

CAREN P. SENCER, Bar No. 233488
CAROLINE N. COHEN, Bar No. 278154
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: csencer@unioncounsel.net
ccohen@unioncounsel.net
nlrbnotices@unioncounsel.net

LISL R. SOTO, Bar No. 261875
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
800 Wilshire Boulevard, Suite 1020
Los Angeles, California 90017
Telephone (213) 380-2344
Fax (213) 443-5098
E-Mail: lsoto@unioncounsel.net
nlrbnotices@unioncounsel.net

Attorneys for Charging Party/Petitioner
IATSE, Local 720, et al.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DAVID SAXE PRODUCTIONS, LLC

V THEATER GROUP, LLC,

Respondents,

and

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES AND
MOVING PICTURE TECHNICIANS,
ARTISTS, AND ALLIED CRAFTS OF THE
UNITED STATES AND CANADA, LOCAL
720, AFL-CIO,

Charging Party/Petitioner.

No. 28-CA-219225
28-CA-223339
28-CA-223362
28-CA-223376
28-CA-224119
28-RC-219130

**BRIEF IN SUPPORT OF CROSS-
EXCEPTIONS**

While the Respondents took 75 pages to file a Brief in support of their 173 Exceptions, the Union's Cross-Exceptions are limited and can be specifically and directly addressed. The Charging Party's exceptions are made only to the extent the Administrative Law Judge's findings as to the unfair labor practices, order of reinstatement and order to open selected challenged ballots are overturned.

1. The Administrative Law Judge ("ALJ") found that the Respondents' policy prohibiting employees from customizing signature lines in their company emails to contain "personalized quotes, personal agendas, solicitations, etc.," did not violate Section 8(a)(1) of the Act. Decision of the ALJ ("ALJD"), 12:18-26. While use of a company email's signature to express criticism of the employer or support of union activity is protected activity under Section 7 of the Act, the ALJ found that she was unable to assess whether Respondents' email policy violated the Act by prohibiting this conduct. She reasoned that under *Purple Communications*, such a policy can only violate the Act if the employer has authorized the personal use of company email, and the ALJ found that Respondents did not. ALJD 12:18-20; *Purple Communs., Inc.*, 361 NLRB 1050, 1050 (2014). However, the "acceptable use" policy at issue clearly states that "some casual personal use of the Company's e-mail and Internet connection is acceptable."

In *Purple Communications*, the Board did not hold that the access an employer grants its employees to company e-mail must be unfettered in order for the employees to have Section 7 rights to use that e-mail for union activity. In fact, the Board stated that an employer is still free to have complete bans on personal use of company e-mail that would otherwise prohibit Section 7 rights only if it has a legitimate business justification for doing so. *Purple Communications*, at 1050. This finding strongly suggests that the Board did not contemplate that *any* restrictions of

company e-mail should preclude employees from using company email to exercise Section 7 rights under *Purple Communications*. The Respondents had the burden to show that the above e-mail policy was “uniformly and consistently enforced... to the extent necessary to maintain production and discipline.” *Id.* However, the ALJ did not reach this point of analysis. In this respect, the ALJ erred.

2. Although the ALJ made various findings that Respondents had given employees the impression of surveillance by conveying knowledge of Union activity – reasoning that Respondents had little reason to be aware of the employees’ union activity absent surveillance – she simultaneously declined to find that Respondents’ ubiquitous cameras on their premises constituted such surveillance of union activity in violation of the Act. ALJD 68:15-23, 40-41. The ALJ explained that General Counsel did not present video evidence from one of the ubiquitous surveillance cameras demonstrating union activity. ALJD 68:34-36. However, the Union did not have access to the footage and the Respondents did not provide surveillance footage obtained from the cameras. An inference that Respondents observed union activity via their numerous surveillance cameras, and David Saxe’s regular, live-streaming access to security camera footage, is not only permissible, it is intuitive under the circumstances.

3. While the ALJ found that text messages from DeStefano to employees Darnell Glen and Scott Tupy reminding them that there would be a shuttle bus available to transport them to the polls for the Union election violated 8(a)(1) of the Act by creating the impression of surveillance, she alternatively held that the reminder texts did not themselves constitute surveillance. See ALJD 58:21-29. The ALJ goes on to imply, however, that the same conduct would constitute unlawful polling if the Union had so alleged. ALJD 58:25-26, n. 56. The Board should find the distinction in the present case immaterial. By definition, polling is a form

of surveillance, thus if this example would be appropriate as a charge of unlawful polling, it should likewise be appropriate to find unlawful surveillance of union activity.

4. The Union filed 14 post-election objections. Among them, the ALJ overruled two concerning pre-petition conduct, finding that the conduct in these objections did not warrant overturning election results. The conduct included:

- a. The unlawful mass discharge of employees Hill, Glick, Franco, Bohannon, Langstaff, Gasca, S'uapaia, Graham, and Michaels;
- b. Respondents' March 15, 2018 wage increases.

In overruling each of these items (Union's objections 1 and 3 respectively), the ALJ reasoned that the Charging Party did not establish that the conduct, while serious, qualified for an exception from the general rule that conduct occurring before a petition's filing, and thus outside the critical period, is not considered objectionable conduct warranting overturning election results. ALJD 60:8-16. As she explains, exceptions to this rule exist where prepetition conduct is found to be truly egregious or likely to have a "significant impact" on the election. ALJD 59:15-17. We address how each of the above items qualifies for an exception from the general rule under these standards.

First, the unlawful mass discharge was obvious retaliation against union activities as the Respondents terminated multiple employees in rapid succession after becoming aware of organizing activity, which occurred in the weeks leading up to the petition's filing. The ALJ agreed in finding that this action was an unfair labor practice violating Section 8(a)(3). ALJD 51:36-39, 52:1-3. It is the type of conduct that in and of itself, is likely to create an atmosphere of fear and coercion through the date of the election as it sent a message to employees that they could be fired for supporting the union. *See, Servomation of Columbus, Inc.*, 219 N.L.R.B. 504,

506 (N.L.R.B. July 25, 1975)(stating “[o]f course, if threats or violence *generates an atmosphere of fear and coercion which persists to the date of the election and taints the conditions under which it is conducted*, the election will be set aside regardless of the time when the misconduct occurred, the end to which it was directed, or the persons responsible for its perpetration.”).

Second, as the ALJ determined, the March 15 wage increase was a transparent attempt to dissuade employees from organizing in violation of 8(a)(3) as it occurred so close in time to the election. ALJD 29:23-24. Both of these actions constituted unfair labor practices. If they *had* occurred in the “critical period,” these actions would be “a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is ‘virtually impossible to conclude that [the violation] could have affected the results of the election.’” ALJD 59:24-30, citing *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016); *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 10 (2017); *Super Thrift Market, Inc.*, 233 NLRB 409, 409 (1977); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). Thus, this conduct should have been found to warrant an exception to the general rule that conduct must occur during the critical period to be found objectionable.

5. The ALJ declined to issue a bargaining order despite finding that the warehouse unit had an apparent majority who had signed union authorization cards. Under *Gissel*, as the ALJ explained, the question is “whether the unfair labor practices are such that they leave only a slight chance that they can be remedied with traditional remedies in a manner that will ensure a fair re-run election, or rather, on balance, would a bargaining order based on the Union’s demonstrated card majority provide a better expression of employee sentiment.” ALJD 89:13-16, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 599, 614 (1969). In answering this question, the ALJ found that much of Respondents’ unlawful conduct (excluding the maintenance of

unlawful handbook rules) “occurred after a majority of unit employees signed authorization cards.” ALJD 90:14-15. This led the ALJ to conclude that Respondents’ conduct did not impact a significant portion of the unit such that traditional remedies would be inadequate to ensure a fair election. This, however, ignores that there is a lingering effect of Respondents’ misconduct. The fact that its employees signed authorization cards *before* learning of Respondents’ anti-union animus is precisely why the cards will be a better expression of employee sentiment than an election. After all, the employees have surely by now learned of Respondents’ various unfair labor practices committed in an attempt to discourage union activity. Reasonable employees could very well change their position upon learning of the unfair labor practices based on a fear of losing benefits or facing similar adverse actions for supporting the union. In consideration of this strong possibility, the Board should hold that a *Gissel* order is appropriate. Contrary to the ALJ’s finding, the number of employees affected by Respondents’ unlawful conduct and the extent of dissemination among the employees weigh in favor of granting a bargaining order at this stage.

6. The ALJ declined to recommend that Respondents be ordered to remove all security cameras from work areas. This remedy would eliminate the impression of surveillance through workplace surveillance cameras. To that end, the Employer should be ordered to cease and desist from creating the impression amongst employees that it was engaging in surveillance of their union or other protected concerted activities. *See, Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *86 (2014).

7. The ALJ declined to recommend that Respondents be ordered to record David Saxe’s live Notice reading to his employees and subsequently upload the video to YouTube. *See, e.g., Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *20 (2014)(finding a “public reading of

the notice is appropriate in light of the Respondent’s numerous serious unfair labor practices, which were committed by a high-ranking management official...Reading the notice serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future.”)(citing *Homer D. Bronson Co.*, 349 NLRB 512, 515-516 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008)); *see also*, *Consec Security*, 325 NLRB 453, 454-455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) (participation of high-ranking management in ULPs magnifies the coercive effect); *Mcallister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) (“[T]he public reading of the notice is an ‘effective but moderate way to let in a warming wind of information and . . . reassurance. [citations omitted].”); *Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *85 (2014). Given the current state of technology, it is widely-known that social media is an effective means of disseminating information, as evidenced by the discriminatees’ use of Facebook chat to plan union meetings and discuss unionization. A posting of the Notice reading on YouTube will assure that all members of the production crew are able to view the reading. The format will also facilitate understanding as it provides listeners the opportunity to pause, re-wind and re-listen to certain portions of the reading. Similarly, for these same reasons, a longer notice posting period of 120 days should be ordered. *See, e.g., Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *20 (2014).

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 800 Wilshire Boulevard, Suite 1020, Los Angeles, California 90017. On October 29, 2019, I served the document(s) described as **BRIEF IN SUPPORT OF CROSS-EXCEPTIONS** on the interested parties by causing copies thereof to be sent electronically to each person listed herein below, as indicated.

<p>Cornele A. Overstreet Regional Director, Resident Office National Labor Relations Board, Region 28 600 South Las Vegas Boulevard, #400 Las Vegas, Nevada 89101-6637 Email: cornele.overstreet@nlrb.gov</p>	<p>Sara Demirok National Labor Relations Board, Region 28 2600 N. Central Avenue, Suite 1400 Phoenix, AZ 85004 Email: sara.demirok@nlrb.gov</p>
<p>Elise F. Oviedo National Labor Relations Board, Region 28 Las Vegas Resident Office 300 Las Vegas Blvd. South, Ste. 2-901 Las Vegas, NV 89101-5833 Email: elise.oviedo@nlrb.gov</p>	<p>Rodolfo “Rudy” Martinez National Labor Relations Board, Region 28 Albuquerque Resident Office 421 Gold Avenue SW, Suite 310 Albuquerque, NM 87103-2181 Email: Rodolfo.Martinez@nlrb.gov</p>
<p>Scott A. Wilson Law Offices of Scott A. Wilson 433 G Street, Suite 203 San Diego, California 92101 Email: scott@pepperwilson.com</p>	<p>Gregory J. Kamer; Nicole A. Young Jen Serafina; Jody Florence Kamer Zucker Abbott 3000 West Charleston Boulevard, Suite 3 Las Vegas, NV 89102 Email: gkamer@kzalaw.com; nyoung@kzalaw.com; jserafina@kzalaw.com; jflorence@kzalaw.com</p> <p>Counsel for David Saxe Productions & V Theatre Group</p>

I certify under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California on October 29, 2019.



 Melanie Garion