

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

David Saxe Productions, LLC

V Theater Group, LLC

and

**International Alliance of Theatrical Stage
Employees**

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

**RESPONDENTS DAVID SAXE PRODUCTIONS AND V
THEATER GROUP, LLC'S ANSWERING BRIEF TO THE
UNION'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND RECOMMENDED ORDER**

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I. INTRODUCTION.

The International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL-CIO (“Union”) filed seven (7) Cross-Exceptions to the Administrative Law Judge’s Decision and Recommended Order (“ALJD”). In the matters cross-excepted by the Union, the Administrative Law Judge (“ALJ”) correctly found in favor of David Saxe Productions, LLC and V Theater Group, LLC (“Respondents”) on a handful of issues. Specifically, as discussed in detail below, the ALJ properly determined that Respondents’ Email and Communications Policy was lawful, Respondents did not unlawfully surveille employees through pre-existing surveillance cameras, DeStefano’s reminder texts did not constitute surveillance, and a Gissel Bargaining Order was unwarranted. The ALJ also properly overruled election Objections No. 1, 3, and 13. Finally, the ALJ refused to recommend the outrageous remedies requested by the Union. Specifically, the ALJ did not require that the reading of the Notice Posting be recorded and uploaded to YouTube and did not order pre-existing surveillance cameras to be removed. Respondents’ respectfully request the Board reject the cross-exceptions requested by Union in their Brief (“UCE”) and grant Respondents’ previously-filed exceptions.

II. FACTS AND ARGUMENT.

1. The ALJ Did Not Err in Finding Respondents’ Email and Communications Policy Lawful (Union’s Cross-Exception No. 1).

a. The Custom Email Signature Line Restriction is Lawful Under Purple Communications and Boeing.

The ALJ correctly determined that the part of the Email and Communications section of Respondents’ Acceptable Use of Computers policy prohibiting employees from using “custom signature lines containing personalized quotes, personal agendas, solicitations, etc.” did not constitute an overly-broad or discriminatory rule as alleged in Paragraph 5(b)(1) of the

Consolidated Complaint. **GC 1** at ¶5(b)(1). While the ALJ did both misstate and misapply the presumption in Purple Communications, 361 NLRB 1050, 1054 (2014) that employees who have been given access to their employer’s email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions, the ALJ nonetheless properly concluded that Respondents’ restriction on using custom signature lines in company email did not violate the Act.

The Complaint does not allege and no evidence was presented by the General Counsel or the Union establishing that Respondents’ prohibited employees from using their email systems for statutorily protected communications during nonworking time.¹ The Complaint also does not allege and no evidence was offered by the General Counsel or the Union establishing that the particular prohibition on employees using custom email signature lines containing personalized quotes, personal agendas, solicitations, etc.: (1) expressly restricts activities protected by Section 7 of the Act; (2) was promulgated in response to union activity; or (3) applied to restrict the exercise of Section 7 rights. See GC 1 at ¶5(b)(1). Thus, the only issue is whether or not such a facially neutral workplace rule unlawfully interferes with the exercise of rights protected by the Act using the analysis set forth in The Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017).

In Boeing, the Board overruled Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), which articulated the Board’s previous standard governing whether facially neutral workplace

¹Indeed, Respondents’ Acceptable Use of Computers policy provides for a measure of casual, non-excessive personal use of company email and Internet connection. See GC 99 at 25-27; 72-75.

rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the Act. Under the Lutheran Heritage standard, the Board found that employers violated the Act by maintaining workplace rules that do not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities, if the rules would be “reasonably construed” by an employee to prohibit the exercise of NLRA rights. Id. In place of the Lutheran Heritage’s “reasonably construe” standard, the Board established a new balancing test which applies here. Under Boeing, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate justifications associated with the rule. Under Boeing, ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.

The prohibition on employees using custom email signature lines containing personalized quotes, personal agendas, solicitations, etc. is one of eleven (11) bullet pointed examples of inappropriate materials that should not be sent or received via email or Internet (along with pornography and derogatory or inflammatory remarks about an individual’s race, age, impairment, religion, national origin, physical attributes, sexual preference) in a paragraph discussing discriminatory or harassing materials that are obscene, explicit, or for any other purpose which is illegal or against the best interests of the Company. See GC 99 at 26-27; 74-75. In such context, an employee would not reasonably interpret the limitation on customized email signature lines as potentially interfering with the exercise of Section 7 rights, the justifications associated with the rule are legitimate, and any potential impact on Section 7 rights is infinitesimal. Further, Purple Communications expressly recognizes that employers may apply uniform controls over their email

systems to the extent that such controls are necessary to maintain production and discipline, which is exactly what this portion of the policy is intended to do. Purple Communications, 361 NLRB at 1063.

b. The Custom Email Signature Line Restriction is Lawful Under *Register-Guard*.

The above analysis is largely academic as the Counsel for the General Counsel (“CGC”)² now contends the Board should overrule Purple Communications and return to the standard in Register Guard, 351 NLRB 1110 (2007). Respondents’ wholeheartedly concur. In Register Guard, the Board reaffirmed that employers have a basic property right to regulate and restrict employee use of company property, including its communication and email systems purchased for use in operating its business. Register Guard, 351 NLRB at 1114-16. It recognized that an employer has a legitimate business interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees’ inappropriate e-mails. Id. at 1114. Thus, consistent with numerous prior cases establishing the well-settled principle that employees have no statutory right to use an employer’s equipment, the Board correctly concluded employees also have no statutory right to use their employer’s communication and e-mail systems for Section 7 matters, as long as any employer usage restrictions are nondiscriminatory in nature. Id. As the Board explained, Section 7 of the Act protects organizational rights rather than particular means by which employees may seek to communicate. Id. at 1115.

Had the CGC taken the position at the hearing that Register Guard sets forth the proper analytic framework and given the Board’s acknowledgment in Register Guard that employers who

² Notably, both the CGC and the Union filed respective cross-exceptions on this issue.

have invested in an e-mail system have valid concerns about preserving server space and protecting against computer viruses, Respondents could have provided evidence that the restriction on employees using custom email signature lines is consistent with such concerns. By way of example, at all times relevant to the Complaint, Respondents contracted with Google/Gmail for a basic business email service that only allocates approximately 15GB of email storage space per user, a level of storage that has been exceeded by several of Respondents authorized users in the normal course of business. Allowing employees to add additional text or copy and paste pictures, logos, and icons to their email signature blocks increases the size of each and every email they generate, thereby taking up more of their already limited storage space. In addition, allowing employees to copy quotes, pictures, logos, and icons from the Internet and paste them in email signature blocks presents significant security risks because in doing so, they are also oftentimes copying hidden or embedded hyperlinks and inserting them into each email. Indeed, frequently the cut and pasted picture, logo, or icon is web coding that acts to pull the particular graphic from the originating website when the email is opened by the receiver. These types of hidden links can be used to introduce viruses and/or malware into a user's computer. It is also a common tactic for scammers and hackers. Given the significant security risk associated with embedded graphics, many spam filters and antivirus programs will block emails containing such hidden links.³ Respondents request the Board take judicial notice of the burdens and risk involved in allowing extraneous information to be attached email signature lines. In the alternative, should the Board

³ Other spam filters and antivirus programs treat such graphical items in emails as suspicious and proactively remove them from email signature lines leaving a blank picture placeholder with the red "x", displaying the once hidden web links, or moving the graphical material into one or more attachments to the email resulting in cluttered and unprofessional looking email communications.

decide to apply Register Guard to this case, Respondents are prepared to present evidence on these issue upon remand.

With respect to assessing discriminatory enforcement of an employer usage restrictions, the Board in Register Guard modified its prior method of analysis to require evidence that an employer is drawing distinctions between permitted and prohibited usage along Section 7 lines. Id. at 1117-18 (explaining that unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status). It clarified that nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis, such that an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature and solicitations for the commercial sale of a product, between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use. In each of these examples, explained the Board, the mere fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines. Id. at 1118. In the instant case, the Email and Communications section of Respondents' Acceptable Use of Computers policy prohibits *all* custom email signature lines, not based on content or Section 7-protected status. Further, the only record evidence as to enforcement of the Email and Communications section of Respondents' Acceptable Use of Computers policy is the testimony of Respondents' HR Manager in which she states she is not aware of anyone having been disciplined for violating the policy. See TR 2883:19-2884:2.

2. ***Respondents Did Not Unlawfully Surveille Employees Through Pre-Existing Surveillance Cameras and the Union's Request for Removal of the Cameras Is Unprecedented (Union's Cross-Exception Nos. 2 and 6).***

The Union argues that Respondents gave employees the impression of surveillance of union meetings based on the presence of security cameras throughout the V Theater and Saxe Theater. UCE at 3. The ALJ unequivocally rejected this argument because the record, consisting of over 200 exhibits and 4000 pages of transcript, was completely devoid of any captured video or audio recordings showing any alleged "union meetings." ALJD at 68. Nevertheless, the Union requests that the Board make an inference that Respondents observed union activity via the security cameras because it is "intuitive under the circumstances." UCE at 3. The Union cites no case law in support of its request. Id.

The Union appears to be claiming in its cross-exception that the surveillance cameras constituted unlawful surveillance in violation of Section 8(a)(1) of the Act. UCE at 3. However, the Consolidated Complaint contains no such allegation and at trial, the CGC expressly confirmed that there were no allegations of surveillance or impression of surveillance in the Complaint that were based simply on the presence of security cameras. See TR 1411-1417 (discussion between CGC and ALJ in which CGC states that all impression of surveillance allegations in the Complaint are based on statements by a member of management or specified conduct and represents that there is no separate allegation claiming, "that by running numerous cameras, the Respondent created the impression of surveillance.") Further, adding to the confusion is the fact that the Union initially styled this argument as an election objection, making the appropriate remedy a re-run election, yet the Union now appears to be arguing that the use of security cameras as a separate violation of Section 8(a)(1) that was not at issue in this matter. Regardless, the Union did not present a scintilla of evidence to support such a contention and did not cite to any case law standing for the

proposition that an inference can be drawn based on intuition. Accordingly, this cross-exception must be denied.

Even if this cross-exception was proper, the record evidence established that cameras have been utilized in and around the theater for 8 to 10 years and the warehouse for 4 to 5 years. TR 3499:2-7. These cameras have been in their current locations since at least January 2018. TR 3354:13-17. The cameras are all visible, fixed view and non-rotating. TR 3501:12-23. The cameras' current locations are determined based upon the need for asset protection, theft prevention, quality assurance, litigation defense. TR 3353:11-25; 3354:11-13; 3499:12-19. Importantly, not only are the cameras in plain view, employees, including the alleged discriminatees, are notified of the existence of cameras and all sign releases acknowledging the existence of the cameras when they are hired. See R 74. While the surveillance feed may be available for review, no cameras are being constantly watched. TR 81:16-21. Even assuming *arguendo* that audio is reviewed, not all cameras have audio capabilities and those that do have poor sound quality making conversations difficult, if not impossible, to understand. TR 3500:1-4; 15-25; 3355:9-20; 3357:17-22; 3358:12-3359:2.

The existence and continuing use of pre-existing cameras, especially ones visible or known to employees, that have long been in place and are routinely reviewed and relied upon in relation to employee discipline and other business purposes, are not evidence of animus towards protected concerted activity. Sysco Food Servs. of Cleveland, Inc., 347 NLRB 1024, 1037-38 (2006). Security cameras operated in a customary manner are not *per se* unlawful or objectionable. Snap-on Tools, Inc., 342 NLRB 5, 12 (2004); In Re Orland Park Motor Cars, Inc., 333 NLRB 1017, 1041 (2001). Indeed, the NLRB “recognize[s] that an employer has the right to maintain security measures necessary to the furtherance of legitimate business interests [even] during the course of

union activity.’” Robert Orr-Sysco Food Servs., 334 NLRB 977, 978 (2001) (quoting National Steel & Shipbuilding Co., 324 NLRB 499, 501 (1997)). The continued use of pre-existing cameras is entirely proper and this cross-exception should be denied in its entirety.

Finally, the Union’s request that all security cameras be removed is groundless and unprecedented. Indeed, the Union cites to absolutely no case authority supporting this inflammatory demand and further does not cite to any portion of the ALJ’s Decision to which this cross-exception pertains.⁴ The ALJ never entertained such a pinpointed remedy and the Board should also decline to do so.

3. *DeStefano’s Reminder Texts Do Not Constitute Surveillance or Unlawful Polling (Union’s Cross-Exception No. 3).*

The ALJ determined that Tiffany DeStefano’s text messages to Scott Tupy and Darnell Glenn did not constitute unlawful surveillance. ALJD 58. However, in a footnote, the ALJ implies that DeStefano’s text messages may have been unlawful polling, but declines to find that Respondents, through DeStefano’s messages, engaged in unlawful polling because the Consolidated Complaint contained no such allegation. *Id.* at n. 56. The Union argues that because polling is a form of surveillance, the Board should find Respondents engaged in unlawful surveillance. UCE at 3-4. However, surveillance and polling are separate legal issues that demand different evidence to establish a *prima facie* showing. *See Agricom Oilseeds, Inc.*, 245 NLRB 616 (1979) (disagreeing with the ALJ’s conclusion that polling also created the impression that

⁴ The Union cites to Allied Med. Transp., Inc., 360 NLRB 1264 (2014), however, that case does not involve security cameras. Rather, the allegation of surveillance involved an employer parking 10 feet away from the entrance where a union meeting was being held and watching his employees enter the meeting. *Id.* at 1278. This behavior was “out of the ordinary” unlike the maintenance of cameras in the theaters that had been in place for 10 years. *Id.* This case is inapplicable and perhaps erroneously cited.

Respondent was surveilling its employees' union activities). Indeed, as the Board has determined, "the factors necessary to establish a *prima facie* showing of [impression of surveillance] are not identical with those necessary to establish unlawful polling." *Id.*

DeStefano's text messages do not constitute unlawful polling or surveillance. DeStefano did not ask Tupy or Glenn how they would vote, elicit their union views, inquire into whether they would vote, or insinuate that the employees should vote in favor of Respondents. TR 556:21-562:3; **GC 40; GC 41**. Instead, DeStefano sent text messages to every employee to remind them to bring an ID and Respondents offered to transport all employees to the election site. TR 558:9-14; **GC 41**. The text messages were sent purely for logistical reasons to ensure that all employees were offered transportation to the election site. TR 558:9-14.

4. *The ALJ Properly Overruled Objections No. 1, 3, and 13 (Union's Cross-Exception No. 4).*

The ALJ determined that three (3) of the Union's election objections involved conduct that occurred prior to the critical period ("prepetition conduct") and that the Union failed to establish such conduct qualified for an exception to the Board's general rule that conduct occurring outside of the critical period is typically not objectionable. ALJD at 60. The conduct included the discharges of Hill, Glick, Franco, Bohannon, Langstaff, Gasca, Suapaia, Graham, and Michaels, the March 15 wage increase, and Kostew allegedly warning Prieto about discharging union adherents. *Id.* The ALJ explained that "[u]nder well-established Board doctrine, for conduct to be objectionable, it must normally occur during the critical period, which begins on the date the petition is filed, and runs through the date of the election, during which 'laboratory conditions' must be maintained." ALJD at 59 (citing Ideal Electric Mfg. Co., 134 NLRB 1275 (1961) and Dal-Tex Optical Co., 137 NLRB 1782 (1962)).

The ALJ explained further that prepetition conduct is not considered objectionable unless an exception to the general rule applies, namely where: (1) prepetition conduct is found to be truly egregious or likely to have a “significant impact” on the election and (2) where prepetition conduct “adds meaning and dimension to related post-petition conduct.” ALJD at 59 (citing Servomation of Columbus, 219 NLRB 504, 506 (1975)); Dresser Industries, 242 NLRB 74 (1979). The Union agrees with the general rule cited by the ALJ and does not dispute that all three (3) objections occurred prior to the critical period. UCE at 4. Instead, the Union argues that an exception to the general rule applies to each of the objections at issue. Id.

First, the Union argues the discharge of several employees created an atmosphere of fear and coercion that affected the results of the election. UCE at 4-5. In support of its argument, the Union cites to dicta from Servomation of Columbus, 219 NLRB at 506. However, in Servomation the Board upheld the hearing officer’s determination that *any* atmosphere of fear or coercion was too slight to influence the results of the election. Id. The Board should make a similar determination here. The Union provides no evidence to support its argument that an atmosphere of fear and coercion existed at the time of the election. See Flamingo Las Vegas Operating Co., LLC, 360 NLRB 243, 246 (2014) (overruling union’s objections where “the Union merely argues broadly that the prepetition conduct was part of an ongoing antiunion campaign that continued after the Union's petition . . .”).

Moreover, the Board established the critical period to help remove from “consideration conduct too remote to have prevented . . . free choice.” Ideal Elec. & Mfg. Co., 134 NLRB 1275, 1277 (1961). Here, of the discharges at issue, the last discharge occurred on April 2, 2018, while the critical period commenced on April 26, 2018 (when the Union filed its petition for election), over 3 weeks after the last discharge. Compare GC 99 at 9 with GC 1(c). Further, the wage

increases took effect on March 15, 2018, six (6) weeks before the critical period commenced. **GC 16.** Any atmosphere of fear and coercion created because of the discharges is too remote to be considered. See Nat'l League of Prof'l Baseball Clubs, 330 NLRB 670, 676 (2000) (explaining that “[t]he Board, in setting the date of filing as the commencement of the critical period, was satisfied that this date would be the appropriate cut off point and would not permit consideration of matters that were too remote to the election . . .” except “[i]n very limited circumstances”).

Second, the Union argues because the ALJ determined that both the discharges and the March 15 wage increase were unfair labor practices, the ALJ should have been found an exception to the general rule that conduct must occur during the critical period. UCE at 4-5. However, an unfair labor practice by itself is simply not an exception to the general rule that prepetition conduct is not considered objectionable. See Ideal Elec. & Mfg. Co., 134 NLRB at 1277; R. Dakin & Co., 191 NLRB 343, 344 (1971) (“The Board has consistently adhered to its initial conclusion that the length of the ‘crucial period,’ and hence the cutoff date, should be governed by considerations of equity and orderly administration. . . . In our opinion it would be destructive . . . to consider conduct allegedly engaged in before the operative petition.”); also Evans Bros. Barber & Beauty Salons, 256 NLRB 121 (1981) (“Many of the unfair labor practices found herein occurred prior to the critical period commencing on October 4, 1979, when the petition was filed. As such, they may not be considered as a basis for setting the election aside except as they lend meaning and dimension to postpetition conduct or assist in evaluating it.”).

Given the Union’s failure to show Respondents prepetition conduct was likely to have a “significant impact” on the election or that the prepetition conduct “adds meaning and dimension to related post-petition conduct,” the Board should affirm the ALJ’s finding that Union Objections 1, 3 and 11 be overruled.

5. *A Gissel Bargaining Order Is Unwarranted and Improper (Union's Cross-Exception No. 5).*

In arguing that the ALJ erred by failing to recommend a Gissel bargaining order remedy, the Union misconstrues the ALJ's findings on Gissel, fails to show any error in her assessment of the evidence, and ignores the legal standard properly applied by the ALJ.

The Union asserts 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[, which] . . . 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." UCE at 5-6. While the Union is correct the ALJ constrained her analysis to the allegations of unlawful conduct that related to the warehouse unit (largely pertaining to Leigh and occurring after cards were signed by warehouse employees),⁵ it misconstrues the ALJ's analysis. The ALJ's determination that Respondent's conduct did not impact a significant portion of the warehouse unit was based upon the lack of evidence showing that anyone in the warehouse was impacted by or even knew about the alleged unlawful conduct toward Leigh. ALJD at 90. Indeed, the ALJ explained:

I find that there is insufficient evidence of dissemination of the conduct that would support a *Gissel* order (i.e., the conduct that occurred after a majority of unit employees signed authorization cards). These actions were Leigh's discharge, Saxe's interrogation of him and creation of the impression of surveillance of his union activities, and Respondent's continued maintenance of two unlawful handbook rules. Only the rules had any direct effect on any employee other than Leigh, and there is no evidence of dissemination throughout the unit of either the

⁵ALJD at n.79 (explaining: "While there is ample evidence of Respondent's serious unfair labor practices among the theater unit, this occurred before a majority of warehouse techs signed authorization cards. In the absence of evidence that the warehouse techs only learned of this conduct (the mass discharges, etc.) after expressing their support for representation, there no logical way to attribute an erosion in the union's majority support to these actions.").

fact of his discharge or Saxe's coercive statements to Leigh. As such, despite Respondent's unfair labor practices being serious, the record does not establish that they impacted a significant portion of the unit such that traditional remedies would be inadequate to ensure a fair election. Nor is there a factual basis on which to conclude that these actions would likely have been disseminated throughout the unit.

ALJD at 90.

The Union fails to show any error in the ALJ's assessment of the record on the two factors that weighed against a bargaining order – the number of employees directly affected by the unfair labor practices and the extent of their dissemination. ALJD at 89. Indeed, the Union neither cites to nor discusses any evidence to support its assertion that: “[c]ontrary 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.” UCE at 6. It offers no basis upon which to overturn the ALJ's finding that the General Counsel failed to prove that Respondent's alleged unlawful conduct was disseminated amongst or impacted the warehouse employees. As the ALJ correctly found, the impact and dissemination factors are critical to the Gissel analysis. See Corella Elec., Inc., 317 NLRB 147, 153 (1995) (Board affirming ALJ's rejection of bargaining order where the General Counsel failed to show “that the unlawful terminations of Brown and Heath or their surveillance by the Buehlers were disseminated to other bargaining unit employees, particularly those working at the Ft. Huachuca project”); Walter Jack and Dixie A. Macy (7-Eleven Food Store), 257 NLRB 108 (1981) (Board affirming denial of bargaining order where unlawful threat of plant closure was made to one employee who was not a union supporter and, who did not discuss the threat with any of the other employees).

Further, in arguing that “the employees have surely by now learned of Respondents' various unfair labor practices committed in an attempt to discourage union activity” and that “[r]easonable 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,” UCE at 6, the Union ignores the proper legal standard applied by the ALJ which requires *actual* evidence of impact and dissemination. As the Ninth Circuit Court has explained: “Because a bargaining order is both an extreme and unusual exercise of the Board’s authority, the Board must support the implementation of this remedy with ‘specific findings as to the immediate and residual impact of the unfair labor practices on the election process.’” Scott v. Stephen Dunn & Assocs., 241 F.3d 652, 664 (9th Cir. 2001); see also Peerless of America, Inc., 484 F.2d 1108, 1118 (7th Cir. 1973) (“We have consistently held that Gissel contemplates that the Board must make ‘specific findings’ as to the immediate and residual impact of the unfair labor practices on the election process”). Projections about what a reasonable employee *might* feel or speculation about what employees *may* have now learned are simply not sufficient to support a bargaining order; instead, evidence about the *actual* impact and *actual* dissemination to the employees in question is needed:

But because [the employer’s conduct] might reasonably be thought to induce such fear or expectation hardly means the employees involved were actually coerced or that their voting sentiments would be affected. Were it otherwise the Supreme Court would not have required an inquiry into the effect of second category unfair labor practices on the election process nor posited “a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order.” What may reasonably be thought capable of dampening the exercise of Section 7 rights may be far short of what it takes to change an employee’s mind about the need for a union.

Peerless, 484 F.2d at 1120 (refusing to enforce bargaining order where the evidence indicated that the employees were not daunted by their supervisors’ questions and remarks).

The Union’s exceptions to the ALJ’s finding on Gissel are without merit and should, therefore, be denied.

6. *The Union’s Request that the Reading of the Notice Posting Be Recorded and Uploaded to YouTube Is Outrageous and Unprecedented (Union’s Cross-Exception No. 7).*

In its exceptions, the Union requests two extraordinary remedies that were not recommended by the ALJ or included in the Consolidated Complaint against Respondents. Specifically, the Union requests that the notice reading recommended by the ALJ should be recorded and uploaded to YouTube, and that the Board should order a notice posting period of 120 days.⁶ UCE at 6-7.

Significantly, there is no legal basis for the Union's request to upload the notice reading to YouTube. The Union fails to cite to any cases where the Board has ordered the recording of a live notice reading and its upload to YouTube or any other public site. Requiring an employer to record and post a live notice reading to a publicly accessible site would exceed the broad scope of discretion given to the Board because such a requirement is punitive in nature and is unduly embarrassing, humiliating, and degrading. See Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-12 (1940) (holding that punitive damages have been consistently rejected in unfair labor practice cases under the Act); Local 127, United Shoe Workers of Am., AFL-CIO v. Brooks Shoe Mfg. Co., 298 F.2d 277, 284 (3d Cir. 1962) (explaining that “[i]t is the general policy of the federal labor laws .

⁶ As discussed in detail throughout Respondents' Brief in Support of its Exceptions, Respondents did not engage in the alleged unfair labor practices and had legitimate, non-discriminatory business reasons to discharge the alleged discriminatees. Additionally, the employer's conduct in cases where the Board has ordered a notice posting in excess of 60 days is far more egregious than Respondents conduct in the instant case. See Upmc & Its Subsidiary, 366 NLRB No. 185 (Aug. 27, 2018) (several unfair labor practices at issue occurred during a prior 60-day notice-posting period for allegations of prior unlawful conduct that were informally settled); Ozburn-Hessey Logistics, LLC, 366 NLRB No. 177 (2018) (employer had “extraordinary record of law-breaking”); Pacific Beach Hotel, 361 NLRB 709, 711 (2014) (employers had a “10-year history of . . . egregious and pervasive violations”). Unlike the cases where the Board has ordered a notice posting longer than 60 days, Respondents do not have a long history of violating the Act or failing to adhere to prior Board orders. The Union again cites to Allied Med. Transp., Inc., 360 NLRB 1264 (2014) in support of its argument that the Board should order a notice posting period of 120 days. However, the Board in Allied Med. Transp., Inc. ordered that the notice be posted for only *60 days* - just as the ALJ ordered in this case. Id. at 1270.

. . . to supply remedies rather than punishments”); Elec. Prod. Div. of Midland-Ross Corp. v. NLRB, 617 F.2d 977, 991 (3d Cir. 1980) (holding that the Board's remedies should right the wrong not act as punishment).

In HTH Corp., the D.C. Circuit Court expressed significant caution in utilizing a mandatory notice reading. HTH Corp. v. NLRB, 823 F.3d 668, 677 (D.C. Cir. 2016) (stating that “[i]t’s worth pausing to think briefly why so many of our distinguished predecessors have used the terms ‘humiliating and degrading,’ ‘ignominy,’ and ‘confession of sins’ for a mandatory reading—especially by a named perpetrator”). The D.C. Circuit Court cited to a previous case where it determined that the mandatory notice reading was beyond the broad scope of discretion Congress gave the Board in fashioning remedies. Id. at 675 (citing Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB., 383 F.2d 230, 234 (D.C. Cir. 1967) (reasoning that “[t]he ignominy of a forced public reading and a ‘confession of sins’ by any employer, any employee, or any union representative makes such a remedy incompatible with the democratic principles of the dignity of man.”)). Additionally, the Court compared mandatory notice readings to systems “devised by Stalin and developed by Mao.” Id. The D.C. Circuit Court ultimately upheld the Board’s notice-reading remedy because the company had a long history of unlawful practices, had committed severe violations, and perhaps most importantly, because the remedy was modified to allow the company the option of having a Board employee read the notice.

Here, the Union requests the Board take an extraordinary remedy—the mandatory notice reading—that has been described as “humiliating,” “degrading,” and “incompatible with the democratic principles of the dignity of man,” and intensify it by mandating its broadcast to the world. See HTH Corp., 823 F.3d at 677. The Union’s requested amplification of the mandatory notice reading remedy is clearly punitive and would exceed the broad scope of the Board’s

discretion to remedy violations of the Act. Further, the harm to the Respondents' reputation, business, and the humiliating nature of such a remedy clearly outweighs any benefit cited by the Union, such as allowing listeners the opportunity to pause, re-wind, and re-listen to certain portions of the reading. UCE at 7. Indeed, in the event the Board finds a basis to order the posting of a Notice, it will be posted at the Respondents' facility allowing employees to review it at their convenience as many times as necessary to allow full comprehension.

III. CONCLUSION.

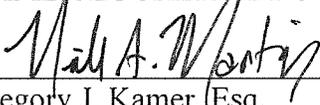
For the above stated reasons, Respondents respectfully request that Union's Cross-Exceptions be denied and the ALJ's Decision be affirmed in part.

DATED this 18th day of November, 2019.

Respectfully submitted,

KAMER ZUCKER ABBOTT

By:



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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2019, I did serve a copy of the foregoing
**RESPONDENTS DAVID SAXE PRODUCTIONS, LLC AND V THEATER GROUP,
LLC'S ANSWER TO UNION'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND RECOMMENDED ORDER** upon:

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