

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

**DAVID SAXE PRODUCTIONS, LLC and
V THEATER GROUP, LLC, Joint Employers**

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**

**Cases 28-CA-219225
28-CA-223339
28-CA-223362
28-CA-223376
28-CA-224119**

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CANADA, LOCAL 720, AFL-CIO**

Case 28-RC-219130

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY TO RESPONDENTS
ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER**

Respectfully submitted,

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I. INTRODUCTION

In its Answering Brief to the General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision and Recommended Order,¹ Respondents seek the Board to affirm the few findings within the Administrative Law Judge's decision that fell in its favor. In doing so, Respondents, in part, set forth extra-record evidence and highlight discredited testimony which is addressed by this reply. Regarding the substantive issues addressed by Respondents in response to Counsel for the General Counsel's (CGC) Cross-Exceptions, the Board should, respectfully, find merit to CGC's limited cross-exceptions for the reasons advanced within its Brief in Support of the Cross-Exceptions.

II. THE BOARD SHOULD STRIKE AND DISREGARD RESPONDENTS' ATTEMPT TO RELY ON EXTRA-RECORD EVIDENCE

Respondents agree that the Board should return to the standard set forth under *Register Guard*, 351 NLRB 1110 (2007), in determining whether its prohibition on custom email signature lines is unlawful but contend that under this standard its rule is lawful. (R. Br. 4-6). In doing so, Respondents assert that had "the General Counsel taken the position at the hearing that *Register Guard* sets forth the proper analytic framework . . . Respondents could have provided evidence that the restriction on employees using custom email signature lines is consistent with such concerns." (R. Br. 4-5). Further, Respondents describe the evidence they purportedly would have adduced to establish their defense that Respondents' prohibition is aligned with a concern for "preserving server space and protecting against computer viruses." (R. Br. 4-5).

Specifically, Respondents set forth the following extra-record facts: (1) Respondents contract with Google/Gmail for basic business email services; (2) that contract allocates a

¹ Hereinafter cited to as "R. Br."

certain amount of email storage space per user; (3) several users exceeded the allocated storage space during the regular course of business; (4) allowing employees to use logos or additional text would otherwise use more storage space; and (5) copying quotes or logos into emails “presents significant security risks” due to hidden hyperlinks that can be used to introduce viruses or malware which is a “common tactic for scammers and hackers.” (R. Br. 5). Respondents seek judicial notice of these facts, or alternatively, an opportunity to present evidence on remand. (R. Br. 5). As discussed below, neither is warranted here.

First, CGC’s cross-exception on this issue is premised on the ALJ’s erroneous finding that Respondents’ restriction on customized email signatures is not discriminatory because Respondents prohibit all personal use of their email system. As set forth in CGC’s Brief in Support of Cross-Exceptions, Respondents’ restriction, by the provisions within its handbook, is discriminatory, and thus, unlawful under *Register Guard*. Accordingly, Respondents’ attempt to show “the burdens and risk involved in allowing extraneous information to be attached to email signature lines” has no bearing on whether its restrictions are nondiscriminatory as required under *Register-Guard*, 351 NLRB at 1114. Thus, the extra-record facts set forth by Respondents are immaterial to the issue raised by CGC’s cross-exception and remanding the case to the ALJ to present additional evidence would only serve to delay this proceeding.²

Moreover, the Board should reject Respondents’ request to take judicial notice of their extra-record facts. Rather, the Board should strike those portions of Respondents’ Answering Brief that describe or rely on the non-record evidence it sets forth. First, Respondents offer

² Unnecessary delay is especially important in this matter given the standing injunctive order under Section 10(j) of the Act issued by the Honorable Andrew P. Gordon, presiding in the United States District Court of Nevada in Case 2:18-cv-02187-APG-NJK. Additionally, this matter involves pending questions concerning representation that have long been recognized by the Board as warranting expeditious resolution.

no authority showing that judicial notice of the facts which could be disputed through documentary evidence is appropriate under the Federal Rules of Evidence. (See FRE 201(b)(2)). Second, and significantly, Respondents failed to show that they were otherwise precluded from adducing such evidence during the 23-day hearing already held. In fact, such evidence would have been relevant under *The Boeing Co.*, 365 NLRB No. 154 (2018), to show Respondents' legitimate business justifications associated with the rule, which Respondents argue would be the appropriate standard if the Board does not return to the *Register-Guard* standard. (R. Br. 2-3). Respondents never attempted elicit any evidence at the hearing regarding the reasons for the alleged unlawful rules, and thus, its post-hoc attempt to assert a legitimate business justification by introducing extra-record evidence under the guise of addressing a different legal theory is inappropriate and should be stricken. *The Fund for the Public Interest*, 360 NLRB 877, n.2 (2014); *United Steel, Paper & Forestry Local Union 193-G (PPG Industries)*, 356 NLRB 996, n.2 (2011); *Kimtruss Corp.*, 305 NLRB 710, n.2 (1991). This reason also shows that remanding the case for further evidentiary proceedings would only serve to provide an unwarranted second bite at the apple.

Accordingly, the Board should disregard the extra-record facts asserted by Respondents, strike those portions of their brief in which those facts are incorporated, and deny its request for judicial notice, or alternatively, further evidentiary proceedings. Regarding the substantive issues raised by CGC's cross-exception, the Board should find that Respondents' prohibition on custom email signature lines is unlawful for the reasons stated in CGC's Brief in Support of Cross-Exceptions.

III. RESPONDENTS RELY ON DISCREDITED RECORD EVIDENCE TO SHOW THAT ESTRADA DID NOT UNLAWFULLY DIRECT EMPLOYEES NOT TO TALK WITH UNION SUPPORTERS

Respondents support the ALJ's finding that Stage Manager Estrada did not unlawfully direct employee Langstaff not to talk with union supporters by setting forth discredited record evidence. Specifically, Respondents contend that Estrada denied ever making the statement or knew of employees' union support at the time of the incident. (R. Br. 8). Respondents also attack the credibility of Langstaff despite the ALJ's well-supported finding (R. Br. 8), based on Langstaff's credited testimony that Estrada told him not to be seen with a certain employee who had just solicited him to sign a union card. For the reasons discussed at length in CGC Answering Brief to Respondents' Exceptions related to the same incident (GC Answering Br. 23-26, 42), the Board should reject Respondents' attempt to color the record by relying on discredited testimony.

Further, Respondents argue that the allegation is unsupportable because Estrada's statement to one employee does not constitute the promulgation of a rule, similar to the ALJ's reasoning. (R. Br. 8-9). However, as noted in CGC's Brief in Support of Cross-Exceptions, the allegation was alleged as a directive, not a rule. Thus, cases in which rules allegations are dismissed based on a supervisor only making a remark to a single employee are inapplicable here. Accordingly, and for the reasons fully set forth in CGC's Brief in Support of Cross-Exceptions, the Board should find that Stage Manager Estrada's statement was an unlawful directive not to talk with union supporters in violation of Section 8(a)(1) of the Act.

IV. CONCLUSION

Based on the foregoing, and for the reasons advanced within CGC's Brief in Support of its limited cross-exceptions, the Board should, respectfully, reverse the portions of the

ALJ's decision to which the General Counsel has excepted, and provide a full and appropriate remedy for all of Respondents' unfair labor practices.

Dated at Phoenix, Arizona, this 25th day of November 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Reply Brief to Respondents' Answering Brief to CGC's Cross-Exceptions in David Saxe Productions, LLC and V Theater Group, LLC, Cases 28-CA-219225, et al., was served via E-Filing and E-Mail, on this 25th day of November 2019, on the following:

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