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Rhino Northwest, LLC and Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Artists and Allied Crafts of the United States and Canada AFL-CIO, CLC. Cases 19-CA-165356, 19-CA-168813, 19-CA-169067, and 19-CA-181097.

February 6, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 3, 2017, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions and a supporting brief. The Respondent and General Counsel each filed an answering brief, and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, except as modified in this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.²

We agree with the judge, for the reasons he stated, that in November 2015 the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally instituting a policy of more stringent enforcement of its 90-day deactivation rule,³ that it violated

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified. Specifically, the recommended remedial provisions applicable to the Respondent's discriminatory deactivation of discriminatees will be extended to discriminatee Matthew Klemisch.

³ We reject the Respondent's argument that the community of interests test in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), warrants finding that the riggers' unit is inappropriate, abnegating the Respondent's obligation to bargain. In this instance, the Board has rejected the Respondent's test of certification on the appropriate-unit issue, *Rhino Northwest*, 363 NLRB No. 72 (2015), and the bargaining order for the riggers' unit in that decision was enforced in *Rhino Northwest v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017).

Section 8(a)(4), (3), and (1) of the Act when it "deactivated" prounion employee Heidi Gonzalez, and that it violated Section 8(a)(3) and (1) of the Act when it "deactivated" prounion employee Travis Rzeplinski.

We also agree with the judge that the General Counsel met the initial *Wright Line*⁴ burden of proving unlawful motivation for the "deactivation" of prounion employee Matthew Klemisch.⁵ However, as discussed below, we disagree with the judge's finding that the Respondent established that it would have deactivated Klemisch even in the absence of his protected union activity because Klemisch operated a competing business. Accordingly, we reverse the judge and find that that Klemisch's deactivation also violated Section 8(a)(4), (3), and (1) of the Act.

The Respondent provides riggers and stagehands to perform work at various performance events. To hire riggers and stagehands to service an upcoming show, the Respondent's human resources staff would contact its active employees to offer them work assignments. If an employee declined, which was not uncommon in light of the fact that most employees received work referrals from other companies as well, the Respondent would continue through its active employee list until a sufficient number agreed to staff the job.

In December 2013, well before the Union began its campaign to represent riggers, the Respondent added a provision to its employee handbook stating that employees would "automatically be removed from [the Respondent's] current employee in good standing list" if they did not work a shift for a period of 90 days. This meant that such employees could be "deactivated" from the active list, resulting in their not receiving hiring calls or being able to log into the Respondent's employee portal to check for upcoming shows. As found above, how-

The record fully supports the judge's finding that prior to November 2015, the 90-day deactivation policy was "only enforced sporadically." We therefore reject the Respondent's argument that the past practice analysis set forth in *Raytheon Network Center Systems*, 365 NLRB No. 161 (2017), supports finding that the implementation of a strict enforcement action did not involve a change requiring bargaining.

⁴ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁵ In affirming the judge's finding that the General Counsel met the initial *Wright Line* burden for all three discriminatees, we do not rely as evidence of animus on pre-election statements, not alleged to be unlawful, made by the Respondent's officials about the consequences of unionization. We also do not rely on Facebook statements made by supervisor Scolnik in reply to postings by Rzeplinski and Gonzalez about unsafe working conditions. Other record evidence cited by the judge is more than sufficient to meet the General Counsel's initial burden of proving that animus against the discriminatees' union activity and, in the case of Gonzalez and Klemisch, testimony at the Board hearing, was a motivating factor in their deactivations.

ever, the 90-day deactivation policy was “only enforced sporadically” until November 2015. Further, in nearly all cases when the policy was enforced, the deactivated employee had not worked for the Respondent for many months or even years. In November 2015, soon after Amber Peterson took over the Respondent’s human resource functions, she began to strictly enforce the 90-day rule, resulting in a significant increase in the number of deactivations. We have affirmed the judge’s finding that this action was an unlawful unilateral change. Further, the judge also found that even after Peterson began to strictly enforce the deactivation rule, the Respondent continued to follow a consistent practice of liberally *re-activating* deactivated employees who requested reemployment, but it failed to do so for the three discriminatees in this case.

The Respondent’s officials knew prior to the Union’s July 2015 election victory that all of the discriminatees were union supporters. They also knew that Klemisch and Gonzalez had testified on behalf of the Union at a pre-election Board hearing on June 4 and 5. On the day that hearing began, employee Andy Venegas told President Jeff Giek that Klemisch, Rzeplinski, and two other employees were primarily responsible for organizing activities. Venegas predicted that if the Union won the election, Klemisch would be selected to represent the riggers in contract negotiations and that “[t]his is not good for you.”

During the preelection Board hearing, the Respondent’s counsel asked Klemisch if he owned his own rigging company. Klemisch affirmed that he did. Counsel then asked if the company was called Precision Rigging. Klemisch said that it was. It is undisputed that Klemisch had been the owner-operator of Precision Rigging since 2012, and that at all material times the Respondent’s employee handbook contained a conflict-of-interest provision that could apply to Klemisch’s operation of that company. It is also undisputed that he and employees working for Precision Rigging had worked events alongside the Respondent’s employees, and that some of the Respondent’s managers and supervisors had long been aware of Klemisch’s company. In fact, in February 2015, Karen Biggers, while employed as the Respondent’s director of operations, referred an event company client to Klemisch to discuss the prospect of his company providing rigging equipment services for an event in March 2015.

Giek attended the Board hearing. The judge credited his testimony that he was unaware of Klemisch’s company until Klemisch testified about it. In the week after that hearing, Giek held a series of mandatory meetings with employees in all job classifications. At all of these

meetings Giek read from a script, urging employees to oppose the Union. He singled out Klemisch as “the driving force” behind the organizing drive. At the meeting Klemisch attended, Giek noted that Klemisch owned a rigging business of his own and asked him whether his company was union. Klemisch responded that it was. At another meeting attended by Rzeplinski, Giek falsely claimed that Klemisch’s company did not have a union contract. In addition, one of the Q&A flyers Giek distributed at these meetings asked: “Do you think that one company should be able to represent a competing company’s employees? How could such a company have only the interests of those employees, and not its business interests, at heart?”

At the hearing in this case, Giek was asked what he did after Klemisch “testified [at the pre-election hearing] that he had a competing company.” Giek answered, “I told [Regional Director of Operations] Michelle Smith that he couldn’t work for us anymore.” Giek could not recall when he spoke with Smith and did not indicate that he gave her a reason for denying Klemisch work. Smith was not asked about this conversation during her testimony.

Klemisch was scheduled to work two additional shows in late July, but at some unidentified point earlier that month the Respondent cancelled each assignment. He testified that he was only told “my position was no longer needed, my shift had been withdrawn.” Peterson’s entry for Klemisch’s deactivation in the Respondent’s employment record was dated November 3 and stated “violations of conflict of interest policy” as the reason. However, Klemisch was never told by anyone in the Respondent’s management that he was ineligible for employment due to his operation of a competing business. To the contrary, although not noted by the judge, Klemisch testified that later in November he discovered he had been deactivated when he tried to log into the Respondent’s employee portal. He then called Peterson and she told him he had been deactivated for not having worked in 90 days. Klemisch said he wanted to work, and Peterson said she would “let the [dispatchers] know.”⁶

As noted above, the judge found, and we agree, that the General Counsel demonstrated that Klemisch’s union activity and his testimony at the Board hearing were motivating factors in his deactivation. The question presented here is whether the judge correctly found that the Respondent met its responsive *Wright Line* burden of

⁶ Peterson testified after Klemisch but did not contradict his testimony about this conversation. Although the judge stated that Klemisch was never told “the reason for his deactivation,” it is clear that the judge was referring to the alleged conflict-of-interest “reason” rather than discrediting Klemisch’s uncontroverted testimony about what Peterson told him.

proving by a preponderance of the evidence that it would have deactivated him even in the absence of his protected activities. We find that the judge erred.

We affirm the judge's credibility-based findings that Giek did not know about Klemisch's company until the Board hearing and that "at some point" after the hearing Giek told Smith not to assign Klemisch any more work. We also accept the judge's finding that Precision Rigging's work, though not identical to the Respondent's, overlapped it to a sufficient extent to fall within the terms of the Respondent's no-conflict policy. On this ground, we acknowledge that a lawful basis existed for the Respondent to deactivate Klemisch from employment. But it is well established that, under *Wright Line*, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009) (quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), *enfd. mem.* 99 F.3d 1139 (6th Cir. 1996)). In other words, a respondent must show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so. The Respondent did not make that showing with respect to Klemisch.

As noted above, neither Giek nor any of the Respondent's other officials told Klemisch that he was deactivated because of a conflict of interest. In particular, Giek's testimony about what he said to Smith gives no indication about *why* Giek told her to deactivate Klemisch. The only evidence specifically supporting an inference that the Respondent relied on the no-conflict policy is Peterson's deactivation report, dated November 3, which referred to "violations of conflict of interest policy." However, that evidence is contradicted by Peterson's subsequent failure to tell Klemisch that he was deactivated for this reason, instead telling him that he was deactivated pursuant to the 90-day rule and suggesting that reactivation was a possibility.

There are two additional problems with the judge's reliance on Giek's statement. First, even if Giek was not aware of Klemisch's operation of Precision Rigging, it is undisputed that other members of Respondent's management knew about it and, in spite of the longstanding conflict-of-interest policy, did not raise the matter of a conflict with Giek or Klemisch. On the contrary, Respondent's third-in-command, Karen Biggers, actually referred a customer to Klemisch and his company just a few months prior to the Board hearing. Second, although Giek learned about Precision Rigging in mid-June, nothing

in the record shows the Respondent took action against Klemisch prior to the mid-July tally of ballots confirming the Union's election victory. Giek could not recall when he told Smith not to assign work to Klemisch. Giek's derogatory public comments about Klemisch and his business at the mandatory pre-election employee meetings showed Giek's animus against a leading union proponent but failed to give any indication that Klemisch had already been or would be denied further work based on violation of the no-conflict policy. The first possible indication that such an action had taken place was when Klemisch's two late-July show assignments were cancelled, but the Respondent failed to produce any evidence either that the cancellations took place prior to the Union's election victory or that they were based on the conflict-of-interest policy.

Based on the foregoing, we find that the Respondent has not met its *Wright Line* burden of showing by a preponderance of the evidence that Klemisch would have been denied work after the Board's early June 2015 pre-election hearing if he had not engaged in protected activity. Klemisch's deactivation was consequently unlawful under Sections 8(a)(3), (4), and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 5 of the judge's Conclusions of Law:

"5. By discriminating against Heidi Gonzalez and Matthew Klemisch because they engaged in union activities and testified at a hearing before the National Labor Relations Board, Respondent has violated Sections 8(a)(3), 8(a)(4), and 8(a)(1) of the Act."

ORDER

Respondent Rhino Northwest LLC, Fife, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees because they engaged in protected union activities, or because they gave testimony in a hearing before the National Labor Relations Board.

(b) Refusing to bargain collectively and in good faith with IATSE Local 15 by unilaterally implementing a policy more stringently enforcing its 90-day deactivation rule.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union

as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed out of our Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations Act.

(b) Rescind the more stringent 90-day deactivation policy that was unilaterally implemented in November 2015.

(c) Make Travis Rzeplinski, Heidi Gonzalez, and Matthew Klemisch whole for any loss of earnings or other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(d) Make any Unit employees affected by the more stringent 90-day deactivation policy whole in the manner set forth in the remedy section of the judge's decision.

(e) Compensate Travis Rzeplinski, Heidi Gonzalez, Matthew Klemisch, and any Unit employees due back pay for the adverse tax consequences, if any, of receiving a lump-sum back pay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the back pay award to the appropriate calendar years.

(f) Within 14 days from the date of this Order, reactivate Travis Rzeplinski, Heidi Gonzalez, Matthew Klemisch, and any Unit employee affected by the more stringent 90-day deactivation policy, without prejudice to their seniority or other rights and privileges previously enjoyed, and inform them, in writing, that they have been reactivated.

(g) Within 14 days from the date of this Order, remove from its files any references to the deactivations issued to Rzeplinski, Gonzalez, Klemisch, and any Unit employee who was deactivated pursuant to the more stringent enforcement of the 90-day deactivation policy, and within 3 days thereafter, notify them in writing that this has been done and that their deactivations will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form,

necessary to analyze the amount of back pay due under the terms of the Order.

(i) Within 14 days after service by the Region, post at its Fife, Washington facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities any time since November 3, 2015.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this order.

Dated, Washington, D.C. February 6, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
 NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discriminate against any of you for supporting Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, AFL–CIO, CLC (the Union), or any other labor organization or because you have engaged in protected concerted activity by testifying at a National Labor Relations Board hearing.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally and without giving the Union an opportunity to bargain institute a policy of more strictly enforcing our 90-day deactivation rule for Unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed out of our Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL rescind the more stringent 90-day deactivation policy that we unilaterally implemented, restore the status quo ante, and bargain with the Union as the bargaining representative of Unit employees with respect to any changes to that policy.

WE WILL, within 14 days from the date of the Board's Order, reactivate Travis Rzeplinski, Heidi Gonzalez, Matthew Klemisch, and any bargaining unit employee affected by the more stringent 90-day deactivation policy, without prejudice to their seniority or other rights and privileges previously enjoyed, and inform them, in writing, that they have been reactivated.

WE WILL make Travis Rzeplinski, Heidi Gonzalez, and Matthew Klemisch whole for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest. .

WE WILL make any Unit employee deactivated because of the more stringent 90-day deactivation policy whole for any loss of earnings and other benefits resulting from the deactivation, less any interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Travis Rzeplinski, Heidi Gonzalez, Matthew Klemisch, and any other Unit employee due back pay for the adverse tax consequences, if any, of receiving a lump-sum back pay award, and WE WILL file with the Regional Director of Region 19, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the back pay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the deactivations issued to Travis Rzeplinski, Heidi Gonzalez, Mathew Klemisch, and any Unit employee who was deactivated pursuant to the more stringent 90-day deactivation policy, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the wrongful deactivations will not be used against them in any way.

RHINO NORTHWEST, LLC

The Board's decision can be found at www.nlr.gov/case/19-CA-165356 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Helena A. Fiorianti, Esq., for the General Counsel.
Katelyn M. Sypher, Esq. (Schwerin Campbell Bernard Iglitzin & Lavitt, LLP), for the Charging Party.
Timothy A. Garnett, Esq., and *Heidi K. Durr, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Seattle, Washington, on February 17–19, 2017 based upon charges filed by Local 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada Local, AFL–CIO, CLC (Union, IATSE, or Local 15) and an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing dated October 20, 2016 (Complaint) issued by the Regional Director for Region 19 on behalf of the General Counsel. The Complaint, which was amended at hearing, alleges that Rhino Northwest, LLC, (Respondent or Rhino), violated Sections 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (“Act”). Respondent denies the allegations.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Respondent, I make the following findings of fact and conclusions of law.¹

I. JURISDICTION AND LABOR ORGANIZATION

Respondent admits that it is an Arizona limited liability company, with an office and place of business in Fife, Washington, and is engaged in the business of providing event labor staffing services.² It further admits that it provides services valued in excess of \$50,000 to customers located in states other than the state of Washington. Rhino admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that IATSE Local 15 is a labor organization within the meaning of Section 2(5) of the Act. See also *Rhino Northwest, LLC*, 363 NLRB No. 72 (2015) (Board finds Rhino is an employer engaged in commerce and the Union is a labor organization).

II. FACTS

A. Background

This case arises out of IATSE Local 15’s petition, filed on May 26, 2015,³ to represent a unit of “riggers” employed at

Rhino’s Fife, Washington facility. Rhino was started by Jeff Giek and his brothers. It’s Fife, Washington, office is one of 11 similar facilities scattered throughout the country. Each facility is organized through a separate LLC, and provides riggers, stagehands, and related services to venues for sporting events, concerts, trade shows, and other live performances. While Rhino occasionally provides staging and production equipment, over ninety percent of its revenues come from providing labor services. “Riggers are responsible for using motors to safely suspend objects overhead before events and safely removing them with motors afterwards.” *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 98 (DC. Cir. 2017) (internal quotation omitted) Stagehands perform more general tasks such as pushing boxes, packing–unpacking, and assembling–disassembling items to be used for the show. As is customary in the industry, to staff its events, Rhino relies on a large group of intermittent hourly workers, who also work for other production companies, as needed. This is the established staffing practice in the industry, as production companies such as Rhino generally do not have enough work to keep a large complement of employees working full time.⁴ (Tr. 54–60, 74, 160–61, 460–69, 480; GC 1(s), 1(u); 2.)

Although each facility is its own separate LLC, all are overseen by the Giek brothers through an umbrella company called Rhino Staging; the Giek brothers are members of each of the separate LLCs.⁵ Jeff Giek, who resides in San Diego, is the CEO and president of Rhino Staging and oversees the overall operations. Michelle Smith, the regional director for operations at Rhino Staging, is in charge of the 11 different regional offices, including operations in the Northwest. Smith works from Las Vegas and reports directly to the Giek brothers. In 2015 Respondent’s operations in the Northwest were managed by director of operations Karen Biggers, who worked out of Respondent’s Fife, Washington office. Biggers left Rhino in October 2015, and was replaced by Dan Scolnik, who was a supervisor before taking over for Biggers; as with Biggers, Scolnik reported directly to Smith. Rigging manager Tyler Alexander directly managed the Northwest riggers, until he was fired in March 2106 and replaced by Dion Spires. In November 2015 Respondent hired Travis Medley to oversee the rigging manager. (Tr. 317–18, 351–52, 377–78, 395–98, 458–463; GC 27–28.)

B. The employee Facebook page and the filing of the election petition

It is unclear when Rhino employees first started discussing forming a union, but by August 2014 a private, invitation only, Facebook page had been created to give Rhino’s riggers a forum to discuss relevant issues, ask questions, and get feedback

¹ Unless otherwise noted, witness demeanor was the primary consideration used in making credibility resolutions. Testimony contrary to my findings has been discredited.

² Fife, Washington is a suburb of Seattle. (Tr. 463.)

³ All dates are in 2015 unless otherwise noted.

⁴ Transcript citations are denoted by “Tr.” with the appropriate page number. Citations to the General Counsel, Union, Respondent, and Administrative Law Judge Exhibits, are denoted by “GC” “U.” “R.” and “ALJ.” respectively. Transcript and exhibit citations are only intended as an aid, as factual findings are based upon the entire record as a whole.

⁵ The LLC’s are named according to the areas where they provide services, such as Rhino Tucson, LLC, Rhino Las Vegas LLC, etc. (R. 1.) This proceeding only involves Rhino Northwest LLC.

from a pro-union perspective. The Facebook page was named “Northwest Riggers;” its cover photo was a caricature of a rhinoceros wearing a t-shirt with an IATSE logo, with the words “WORK SAFE, WORK SMART, WORK UNION.” Rhino employee Matthew Klemisch was one of the administrators of the private Facebook page. As an administrator, Klemisch had the ability to invite people to join this private Facebook group. Most of the members of the Facebook group were Rhino employees; a few Rhino supervisors were also members. (Tr. 66–73; GC 5.)

After collecting a sufficient number of authorization cards, the Union filed an election petition on May 26. A few days before the petition was filed, Klemisch told Alexander about the petition. Some of the riggers considered Alexander to be a friend and Klemisch wanted him to know, hoping Alexander would inform his bosses and not get blamed for the workers’ actions. When the petition was filed Respondent challenged the appropriateness of the unit asserting that stagehands, and multiple other classifications, should be included. At the time, Rhino employed between 30 to 60 riggers, and about 500 stagehands. A preelection hearing was held on June 4 and 5 to resolve the issue. (Tr. 74–75, 230–31, 473) (GC 2, 36.)

C. Respondent’s preelection campaign and the NLRB hearing

1. The week leading up to the NLRB hearing

Giek testified that he heard grumblings about “union stuff and unhappy riggers” so he arranged for a meeting of all Rhino riggers in a bowling alley outside of Seattle on May 27. The purpose of the meeting was to listen to the riggers’ concerns and to tell them that the company wanted to stay union free. Rhino provided free food, drinks, and bowling for the event, which attracted between 30–40 riggers. (Tr. 78, 358–59, 463–64, 496; U. 2; GC 26.)

Giek met Klemisch for the first time at the bowling alley event. At the meeting, Giek also met a rigger named Andy Venegas, who turned out to be a source of information for Giek about the Union’s organizing drive. (Tr. 135, 463, 496; U. 2.)

On June 1, Venegas emailed Giek saying that he was unable to get a copy of the Union’s bylaws and “apologize[d] for not being able to come through for you.” In the email, Venegas also told Giek the Union was holding two informational meetings in a Seattle pub on June 2 and June 3, and warned that “this is a time when people who would play the role of loyal, but aren’t, can be most harmful.” Finally, Venegas asked whether Giek was aware of “the ‘secret’ Facebook page where much of this is discussed.” (U. 2.)

Giek replied by email the same day, saying that he was in Seattle for the week and asking if he and Venegas could meet or speak by phone. Venegas proposed they meet the next evening, June 2; Giek responded that they should “touch base” in the afternoon to see how the day was progressing. The pair met on Tuesday, June 2 in Tacoma, Washington.⁶ (U. 2.)

On June 4, Venegas again emailed Giek, stating that the correspondence was “100% confidential.” In the email, Venegas told Giek that, after leaving their Tuesday evening meeting in

Tacoma, he went directly to a Union question and answer session where Local 15 “doted” over “low experience” Rhino riggers; Venegas specifically noted that Rhine employee Travis Rzeplinski was at the union meeting, along with members of the Union’s leadership. Venegas informed Giek that he was shown a list of all Rhino riggers, with IATSE’s estimate of whether they would vote “yes” or “no.” A star was put next to some of the names, including his own, and Union officials asked what it would take to get his vote. Venegas tallied the Union’s vote estimate, and stated in the email that the “yes” votes outnumbered the “no” votes by a slight margin. (U. 2.)

In the email, Venegas further told Giek that Klemisch, Travis Rzeplinski, and two other employees were primarily responsible for “all the footwork” and organizing communications between the Union and Rhino’s employees. He also said that IATSE was planning to waive membership fees, dues, and would offer riggers “journeyman” status. Moreover, the Union was deciding who would represent employees during negotiations; Venegas wrote he was betting it would be Klemisch and if so “[t]his is not good for you.” Venegas ended the email by telling Giek the Union had been working for 18 months on the organizing drive, and that it was part of a national campaign. He assured Giek that he was “planting seeds of doubt” on Facebook and was planning to “reach out” to individuals over the weekend. (U. 2.)

2. The NLRB election hearing and decision

The NLRB preelection hearing to determine the appropriate unit occurred on June 4 and 5. While Respondent and the Union contested the scope of the unit, the parties agreed to Rhino’s position with respect to eligibility. Because of the nature of employment in the industry, Rhino and Local 15 stipulated that employees would be eligible to vote in an election if they had worked on at least two calls within the past 12 months prior to the payroll period ending May 26. (GC 2; GC 36, p. 14, 23.)

At the hearing, Klemisch along with Rhino employees Heidi Gonzalez and Kyle Daley testified on behalf of the Union. Various members of Rhino’s management team were present during the hearing, including Giek, Biggers, Smith, Scolnik, and Eric Drda—who was a general supervisor. Giek, Biggers, and Drda were in the courtroom while Klemisch testified. They were also present for Gonzalez’ testimony, as were with Smith and Scolnik. (Tr. 75, 165–66.)

While cross-examining Klemisch, Respondent’s counsel asked whether he owned his own rigging company. Klemisch testified that he did, in fact, own a rigging company called Precision Rigging, which employed about 30 employees over the past year, including Klemisch. As with Rhino, these workers were intermittent employees – working anywhere from one to multiple shifts for the company during the year. Klemisch also stated that he is typically hired through Precision Rigging to supervise other people, and that the company provided rigging labor about ten times a year. Thus, Klemisch testified, Precision Rigging competes against Rhino for shows on a small scale, but not on a large scale, as Rhino is more specialized, and offers a more complete package – including stagehands. (GC 36 at 293–96.)

On June 18, the Regional Director issued his decision find-

⁶ From the context of Venegas’ June 4 email to Giek, it is clear the pair met on Tuesday, June 2.

ing that the Union’s petitioned-for unit of riggers was appropriate, and directing a mail-ballot election. As stipulated by the parties, Rhino’s proposed formula was adopted, in that all riggers who had worked on at least 2 calls within the 12 months prior to the payroll period ending May 26, 2015 were eligible to vote.⁷ According to the decision, Ballots would be mailed to employees on June 26, and counted in July. (GC 2.)

3. Respondent’s election campaign

a. Mandatory employee meetings the week of June 8

Respondent’s electioneering campaign was in full swing after the NLRB election hearing. During the week of June 8, Giek held a series of meetings in Seattle and Portland for Rhino employees in all job classification.⁸ The meetings were mandatory, and employees were paid for their attendance. Workers received a call from Rhino’s scheduling office, told of the mandatory meeting, and were given a choice of available meeting times. (Tr. 77, 168, 216, 472–73; GC 10.)

Giek, along with various Rhino managers and supervisors were also present at the meetings. Gonzalez and Klemisch attended the same meeting, at the Fife, Washington office, along with about 20–30 other employees. Rzeplinski attended a meeting on June 9, also in Fife, with about 60 workers from various job classifications. Giek and Rzeplinski met for the first time at this meeting. (Tr. 77, 167–68, 215–17, 472; GC 1.7)

Giek spoke at the meetings, relying primarily on an 11 page script on what to say. Giek testified that he stood at a lectern in front of the employees and read from his script. At the meeting, Respondent also passed out a list of questions and answers regarding the Union. Also, copies of the Union’s constitution, bylaws, and LM–2 filings were made available. During at least one of the meetings, Giek also distributed a flier titled “IATSE’s Most Wanted – Where does your dues money go? To a leadership full of criminals.” The document listed the names of ten different individuals and their purported crimes; the same document was also emailed to workers. (Tr. 169, 188–89, 474; GC 9, 17, 31; R. 23.)

Giek started his speech by saying that he wanted to update employees about one of the most critical issues that Respondent has faced, the Union’s petition to unionize the riggers. He told workers about the NLRB preelection hearing and stated the company’s belief that all employees, not just riggers, should have the right to vote; he thought it was wrong for the Union to try to take away the “legal right” to vote from employees who were not riggers. Moreover, he thought it was wrong for the Union to represent any of Rhino’s employees. (R. 23.)

Giek described the significance of the pending NLRB decision on which employees would vote, but noted that regardless of the outcome Local 15 was not going away, and would likely try to contact employees in the future for support. Giek said he

wanted his position to be clear: “Rhino does not want a union here—not IATSE—not any union.” (R. 23.)

Giek then described the election process, telling employees that, from his perspective, Rhino workers had nothing to gain from union representation. Instead, IATSE stood to gain, as it needed dues money from workers; he estimated that the average Local 15 member paid \$1,100 annually in dues. According to Giek, if the Union won the election, it only gained the right to negotiate for employees—nothing more. And, everything employees currently received would be “put on the table for negotiation,” including the current 4-hour call minimum; Giek said he knew of some union contracts that only require a 2-hour call minimum. (R. 23.)

Giek then said that, during negotiations, what employees currently have could go up, down, or stay the same—there are no guarantees. And, he said

[y]ou also need to know that during negotiations, everything is frozen – it is illegal for a company to grant wages [sic] increases without getting an agreement first. So how long would you have to wait for a pay increase – it could be months or it could be years. The first contract after an election takes a long time to negotiate because every word of every sentence of every paragraph has to be negotiated. I’m aware of some negotiations in our industry taking years to negotiate. On the other hand, without a union we are free to make changes at any time and we are free to correct errors when we are made aware of them.

Giek told employees that Rhino would not negotiate a contract that makes the company less competitive in the market, as the company was successful because it provided the highest quality service at reasonable costs. (R. 23.)

Giek next said that only a fraction of riggers in the Northwest are unionized. At this point, Giek mentioned Klemisch and his company Precision Rigging. Giek’s script contains the following notation, “[i]s Matt Klemisch’s company union? If not, make the point of . . . why is he trying to organize Rhino when his company is non-union.” Giek testified that, in the meeting where Klemisch was present – when he asked if his company was union, Klemisch raised his hand, and someone responded that it was a union company. (Tr. 476; R. 23.)

However, in the meeting Rzeplinski attended, at this point in his speech, Giek told employees that Klemisch was the driving force behind the Union’s organizing drive, and that his company, Precision Rigging, did not have a contract with the union.⁹ At Rzeplinski’s meeting, Giek also said “they want to destroy Rhino.” (Tr. 220–22; GC 17.)

Back on script, after discussing Klemisch, Giek told employees the Union gives preference to senior members, and calls-out workers based upon their union seniority. Thus, even if IATSE promised to give Rhino employees preference based upon their work for Rhino or other production companies,

⁷ Employees who had quit or had been discharged for cause were not eligible to vote. (GC 2.)

⁸ Giek testified that he held at least three such meetings in early June. However, in a June 19 email to workers, Giek thanked employees for attending one of the 15 meetings he held in Seattle and Portland. (GC 10.)

⁹ Klemisch testified at trial that Precision Rigging is a union signatory company.

“does it really make sense for you to wait in line for a job that you already have?” After further questioning the Union’s seniority system, Giek said that it “just does not make any sense to me why you would want to stand in line for a job you already have.” Giek went on to tell employees why Rhino does not want a union. He said that,

[h]ere in the Northwest, Rhino has been very successful in winning and keeping contracts with several venues and production companies like Live Nation. And it’s no secret that some of our clients want nothing to do with unions – especially a union like IATSE. They do not want us bringing a union into their venue or their shows. So you have to ask yourself why take the risk of alienating our best clients in the Northwest by bringing IATSE in?

He asked employees why they would abandon a good job with Rhino to work out of the IATSE hiring hall, decreasing their chances of working by being put on the bottom of the Union call out list. (R. 23.)

Giek then said that Rhino treats employees fairly and pays competitive wages. When problems arise occasionally, they resolve the issue amongst themselves and move on. However, IATSE likes “to create problems and even intimidate workers to show them they bring some value to the workplace. They simply don’t.” (R. 23.)

Giek asked employees to get answers signed by IATSE from the list of questions and answers they received at the meeting. Giek then reviewed the document and said it was easy for the Union to make promises because they do not have to make any of them come true. Meanwhile, it was illegal for the company to make promises, because the company can make the promises come true, the union cannot. (R. 23.)

Giek then addressed “tactic[s]” and “tricks” Local 15 may use to get stagehands to sign authorization cards. He described in general the NLRB election process, and encouraged all eligible employees to vote. He apologized for having to give IATSE the email addresses and cell phone numbers of workers, but said it was required under new NLRB election rules. However, he reminded workers they had the right to not speak to union organizers. (R. 23.)

Giek ended the speech by telling employees he is proud of what they have done to make Rhino a great company. He did not want “this outside union” to interfere with what they had built, did not want to lose the privilege of working with employees “as individuals,” and did not want to have to go through “a union just to talk to you.” He asked employees to contact any Rhino supervisor if they had questions, and gave out his cell phone number saying they could call or text him at any time. He promised to get answers to their questions within 24 hours if possible. (R. 23.)

The flier with questions and answers that employees received at the meetings contained a list of 20 questions, with bullet-point answers from Rhino, and room for the Union to write-in its own answers. It also contained a signature block for the signature of a “Union Officer.” Many of the questions and proffered answers involved negative aspects that Rhino

perceived would come from unionization, including fines, assessments, payments to political action committees, strikes, the possibility that wages or benefits could decrease during negotiations, and the likely inability to get promotions based upon skill and ability. (GC 31)

Along with these various topics, three particular questions/answers stand out. In Question 12, Rhino asks:

Can you guarantee me job security?

- Again, the union cannot guarantee you nothing. While I can’t predict the future, many companies have lost jobs or shut down completely after their employees unionized in the past.
- In fact, the Local’s membership has recently decreased by 15%. Nationally, only 6.7% of all employees in the private workforce are union. Why do you think they are so eager to organize a bargaining unit of more than 70 new members.
- If union’s are such a good deal, why are there so few union members in Local 15 and so few in the US.

In question 16 Rhino asks:

Why doesn’t the union want to represent employees other than riggers?

- The union has made it clear that its vision of the job involves rigid classification of employees who do not act as a team. Last week, the union’s supporters testified under oath that they would not even help push boxes because they are riggers. Is that the kind of work environment that you want to this to be?

Finally, question 18 reads as follows:

Does the Union and its supports have business interests that would benefit from making Rhino’s operations less efficient?

- Union supporter Matthew Klemisch testified that he runs his own company, which competes with Rhino. Do you think that one company should be able to represent a competing company’s employees? How could such a company have only the interests of those employees, and not its business interests, at heart?

b. Rzeplinski’s email exchange with Giek

Travis Rzeplinski took notes of the mandatory meeting and, relying upon those notes, sent Giek a strongly worded email the evening of June 9 questioning many of Giek’s statements. Among the various issues addressed in his email, Rzeplinski said that, from his understanding, the Union did not want to destroy the company, but only wanted to represent workers. He also said that he had worked for Precision Rigging on occasion,

and the company does have a union contract. In the email Rzeplinski questioned why Rhino's Las Vegas and Denver riggers are paid, and billed out at, higher rates than the majority of the Seattle riggers. Rzeplinski also noted that, during the mandatory meeting he asked Giek to release Rhino's financial statements, in reply to Giek's reference to the salaries made by Union officials, but that Giek declined to do so. Therefore, Rzeplinski asked whether Giek would disclose his compensation for the year. (Tr. 220–224; GC 17.)

Having not received a reply to his June 9 email, Rzeplinski again emailed Giek on June 15 asking for an update. Giek replied by email on June 18 thanking Rzeplinski for his hard work. The email went on to focus on what Giek believed were the most important issues raised by Rzeplinski. Giek noted that, during negotiations everything employees currently receive can be put on the bargaining table, and could stay the same, get better, or even get worse. Regarding wages, Giek's email stated that

I want you to know that I am aware of the differences in Rhino locations. However, due to the union's petition, federal law requires that wage rates remain frozen while the petition is pending, and the law prevents me from making any promises. If the union wins an election to represent Rhino's employees, federal law also requires that wage rates remain frozen until an agreement is reached. Unfortunately, contract negotiations can take months or even years.

Giek also wrote that, at the NLRB hearing, three riggers testified "under oath" that they do not work as a team with stagehands, and he was "stunned by their denunciation of Rhino's core values. If those three riggers represent the values of IATSE, Rhino's dedicated employees have no need for the Union." Giek further wrote that Rzeplinski had the legal right to support the union, as his coworkers have the legal right to be "union-free" and Giek's goal was to put "all the facts on the table." He ended the email by wishing Rzeplinski safe travels on an upcoming trip to Japan. (Tr. 224; GC 17.)

c. Giek's other correspondence to employees about the election

On June 19 Giek emailed employees updating them on the Regional Director's ruling that only riggers could vote in the upcoming election. He noted his belief that IATSE would still try to organize the stagehands, and therefore said he would also keep stagehands "informed about this union and why I don't think it is in your best interest to support this union." Giek wrote that he hoped employees heard his message that he firmly believes they are better without a union, and that he would be sending employees more information in the coming days. (GC 10.)

On June 23, Giek sent another email to employees, this one with the subject line "IATSE—How Will Your Earnings Change?" The email contained a flier with headings that said "Rumor: You will earn more money with the union," and "Facts: Here's what current IATSE members think of the idea of Rhinos joining their ranks." The flier then allegedly quotes an unnamed union member complaining that, with "a low em-

ployment rate . . . bringing in non-union people to our union will go over like a 'lead balloon' with the Membership," as expanding the membership base will only result in more competition for available union jobs. The flier ends with the statement "Even if wages go up, you can make less money if your hours go down. Why wait in line for a job you already have." (GC 11.)

On June 27, Giek sent employees yet another email with the subject "Voting Guidelines." The email contained election procedures for Rhino employees, noted that 66 riggers were eligible to vote, and that the outcome would be determined by the majority of actual voters. Therefore, all employees were encouraged to vote. The last bullet point of the email states "[o]nce you have reviewed all the facts, we are confident that you'll agree that a 'NO' vote is best for you and your family." (GC 12.)

On June 29, Giek sent one last email to employees, with the subject line "Upcoming Vote: Known vs. Unknown." In the email Giek asks employees to exercise their right to vote, notes that Rhino is one of the safest staging companies in the country, and questions the impact of having a "rigger only" bargaining unit, among other things. Giek asks workers whether they want to put their "trust in the known or take a risk with the unknown." He ends the email by stating that going to "an outside third party, like a union, will not help resolve our issues. Just look at the conflict the union supporters have already created between the riggers and the stagehands. That's not what I want and hope you don't either." (GC 13.)

4. Rhino's monitoring Facebook discussions

The evidence shows that, in the run-up to the election, Michelle Smith emailed various employee Facebook comments to Jeff Giek. She also sent copies to Giek's brothers, Biggers, Drda, and Scolnik. Indeed, some of the Facebook comments were made by Drda and Scolnik themselves replying to comments made by other employees. (Tr. 490–92; GC 33, 34)

a. June 26, 2015 email from Smith (GC 34)

In a June 26, email to Giek, Smith said "[s]ome interesting reading;" she then pasted into the body of the email various comments from employees that were posted on Facebook. Someone named Jeremy Andrews referenced the Rhino "IATSE's Most Wanted" flier that had been emailed to employees, and argued that none of the individuals listed lived, worked, or served anywhere near Seattle or IATSE Local 15. Drda replied by reposting the content of the actual flier, and stating that he saw the relevance as Local 15 is part of the national union. Later in the comments, Andrews said that the motivation to unionize came when the "rigging team" realized their attempts "at equal exchange" were not being met, or even acknowledged. In reply, Drda said "Jeremy your issues were kept at too low of a level" and unionization brought a spotlight "on our situations and because of the organization issues are frozen. Our upper management can't fix any of the problems due to these labor laws." Another employee stated that she had received wage increases, and was never mistreated or exposed to unsafe conditions. In reply, Heidi Gonzalez commented that she had been exposed to unsafe conditions, and that she had to ask and fight for any raises she had received. Gonzalez further

stated that she has been asked to “take one for the team” many times, but questioned when the “team” would benefit her. And, Gonzalez wrote that many good experiences had come from her time with Rhino, but as time has progressed the “cons” outweigh the “pros” and “we need support.” Gonzalez ended her message by asking people to private message her if they want to talk about her experiences.

b. June 27, 2015 email from Smith (GC 34)

On June 27 Smith forwarded another email to Giek, with further Facebook comments, saying “[a]dditional comments on the post I sent.” Again, Smith pasted various comments into the body of the email. In the Facebook comments, Drda replies directly to Gonzalez about her statement that she had been exposed to unsafe conditions, stating “we would love to hear about past unsafe conditions,” as he and Tyler Alexander “take pride in enforcing our safety policies.” Drda further notes that he has been “combating these issues as they arise however input is always welcome,” and offers to discuss them on Facebook or through private message, whichever Gonzalez prefers.

Following-up on Gonzalez’ comment, Rzeplinski remarked that he too has been asked to “take too many for the ‘team’” and has seen his coworkers be overworked, underpaid, and asked to do things he was uncomfortable with. Rzeplinski further complains of not receiving overtime, when it was charged to the client, and not being asked back to calls after speaking about safety issues. Rzeplinski said that there “was a time for cohesive conversation, for cohesive action and it passed without action and a whimper. No one ran to find lawyers . . . [and] no overwhelming push from a ‘higher corrupt manager.’” Instead, a “cohesive group asking for more recognition and more nationally recognized standards of compensation for the dangerous work we do.” Rzeplinski ends his comment by stating his hopes that everyone does their own research, reaches “out to both ‘sides’ of this” and decide what they think will benefit them, their coworkers, friends, and the industry.

Drda responded directly to Rzeplinski, asking for information on “the times you felt uncomfortable where safety was a concern,” because it was unacceptable to be put in a dangerous situation. Drda further said that minimizing risk is his primary focus and that Rhino’s riggers “should never be in immediate danger.” Drda noted that, the previous April, they implemented a “stage hand 101” course, and that in 6 months he and Scolnik had trained more employees than compared to 2014.

c. June 28, 2015 email from Smith (GC 34)

On June 28, Smith again forwarded an email containing Facebook comments to Giek, saying “[a]ttached are a few more comments.” This email starts with a comment from Rzeplinski saying that recently trainings have been more consistent, but that he has been asked “several times to do a load in and out and then drive, paying my own gas, to a venue over 6 h[ours] away.” Rzeplinski then goes on to describe various instances in which he believed safety was put at risk because people lacked equipment, experience, or training. Rzeplinski stated that he has been on shows where shackles “were dropped out of the air,” because people were so exhausted from having traveled to the job from another city, where there were not enough hard

hats for all stagehands, and people “in the air” that “lacked the training or comprehension for the job.” Rzeplinski ended his comment by saying “Yeah dude . . . you guys have done a great job recently working within the system you have been given, [b]ut sometimes the system needs to fundamentally change to become more effective.”

Scolnik replied directly to Rzeplinski’s comments, tagging¹⁰ Rzeplinski and saying “Travis, if you’d like to open this can of worms, I’d truly LOVE to talk about some things I’ve seen you PERSONALLY do on our job sites, on Pyramid gigs as well as other companies, so if you’d like to start calling out Rhino in particular, let’s have it you’ve got a LOT of nerve, you want to go this route, then let’s do this.” In a later post Scolnik states “again, I don’t want to go down these routes,” but “so many of you act like you’re perfectionists on a job site” that it “blows my mind you’d even start going this rout.” Scolnik notes that he has worked with Local 15 riggers when they have had no personal protective equipment “gear on w[ith] boom lifts and riggers in the air.” Furthermore, Scolnik says that he has “seen ALL groups do something of this sort,” but has also been present when Rhino’s “leads point this out and we maneuver people to safer environments.” Scolnik ends his comment by asking “[a]re you so blinded by this crusade that you are willing to keep attacking us for stuff I’ve seen you do or other companies?” An hour later, Scolnik posted another comment saying “maybe it’s time to pull away from your keyboard and start thinking about your process during this. If these are the tactics, I’m pretty ok w[ith] following up w[ith] what I’ve seen you & plenty more folks do.”

Drda replied with a comment that, it was “local practice to ground a rigger for a dropped object,” and that he has worked a “full Rhino schedule last year and had to ground one person.” Drda goes on to state that, if you research Rhino and IATSE you will find injuries and even deaths.” Drda said that he researched “OSHA to see who had paid more in fines,” and that “[w]e are national entities and both adopted/learned from tragedy.” Drda commented that “we are actively on the cutting edge with PPE,” and required employees to wear helmets and harnesses before most in the industry. Drda admitted being on “a few calls” that were short some helmets, but that he would never allow anyone “over height without a harness.” He then said that Rhino “are trend setters,” and that corporate had added several safety specialists in recent years. Drda also noted that Rhino was his only current employer and he could not help but disagree “with the picture of Rhino as an unsafe company.” Drda ended his post saying that he believed himself, Scolnik, and Alexander were part of the solution, and still have room for improvement.

Tyler Alexander then replied, tagging Rzeplinski, saying “if you feel that I have failed in improving safety and training for the riggers in the NW then I apologize. I must have failed in pursuing my passion. My career is over.” Later, Alexander

¹⁰ Facebook allows users to “tag” people in posts. When an individual has been “tagged” the comment will usually appear on the person’s Facebook wall and become associated with the tagged individual’s account. See *Thompson v. Autoliv ASP, Inc.*, 2012 WL 2342928, at *4 (D. Nev. 2012).

posted “this Facebook crap has got to stop! If safety is on the table now, let’s talk like grown-ups and schedule a meeting face to face.” In the comment Alexander further says that he is proud and thankful for being a Rhino rigger and was honored and excited when he accepted his current job “for the team to finally have one of its own be the voice for change.” Alexander stated that he had fought for, and won whenever a concern that was put on his desk, and is making changes for the better. Alexander ended his comment saying that, people should realize “things are better” and they are moving towards a healthier and safer team; change takes time, and he is “in it for the long haul.”

d. June 29, 2015 email from Smith (GC 34)

Smith followed up with an email to Giek on June 29, with additional Facebook comments, saying “[t]he last of the comments.” This email contains a comment from Venegas, in part, telling Gonzalez that the benefit she received “is that you were allowed to and taught how to high rig, which would absolutely not have happened anytime soon if you had started with Local 15.” Venegas then noted an unsafe condition involving two union riggers at a show “last night,” saying that “we are exposed to safety issues by individuals, not by organizations.”

e. June 30, 2015 email from Smith (GC 33)

The final email containing Facebook comments that Smith sent to Giek occurred on June 30. The email contains a long Facebook comment from Drda, reading as follows:

I've been accused of portraying the Rhino management team as hostile. Let's take a step back. Eleven months ago the NW rigger page was created, behind our backs, by a union organizing rep named Radar Bateman. Radar makes 119k a year in the efforts to increase union dues. He doesn't pull ropes, push boxes or grind with the crews. Instead he enjoys the white collar life while selectively convincing disgruntled workers into cutting their direct ties with management.

Let that sink in. One gives away their rights to a larger entity for the greater good of the group. One no longer has the right to negotiate on their behalf. When they ask what you want on the contract it's a ploy on dreams. The reality is a yes outcome keeps pay frozen until a contract is reached. During similar situations years can pass and original crews have turned over so others reap the “rewards.” It allows for the union to add and subtract contract language. Your demands could be overlooked as 51% of fellow riggers pass the contract.

A concerned rigger showed me this page weeks ago and it opened my eyes to who is the brain trust behind the scenes. Matt Klemisch was added after at least 5 union representatives who are not active Rhino employees. Actually they have never been Rhino employees and at least two are paid hefty sums in the attempt to recruit if not an outright military style draft of employees. If their actions fail to correlate as an act of war I implore you to wait for my next post on this topic.

D. The Union's election victory, Rhino's refusal to bargain,

and changes in management

The election was held as scheduled, with ballots mailed to employees on June 26. The ballots were counted on July 17, and a majority of Rhino's riggers voted for union representation. *Rhino Northwest, LLC*, 363 NLRB No. 72 (2015). (Tr. 74; GC 1(u), 36.)

On August 3, the Union was certified as the exclusive collective bargaining representative of the in the following unit of Rhino's employees:

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations Act. (GC 3.)

In August 2015 IATSE requested Rhino meet and bargain. Respondent refused to do so in order to test the validity of the certification. *Rhino Northwest, LLC*, 363 NLRB No. 72 (2015). On December 17, 2015, the Board found that, by refusing to recognize and bargain with the Union, Rhino had violated Section 8(a)(1) and (5) of the Act. *Id.* Respondent petitioned for review of the Board's decision, and the Board filed a cross-application for enforcement. On August 11, 2017, the Board's order was enforced the United States Court of Appeals, District of Columbia Circuit, with the court noting that a “legitimate basis plainly exists for permitting riggers to form their own unit,” as the distinction between riggers and Rhino's other employees “are significant.” *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 103 (DC. Cir. 2007).

After Local 15's certification, Rhino shook up the management and supervisory structure in the Northwest office. On October 5, Rhino hired Amber Peterson to take over the various human resources functions. Also in October 2015 Karen Biggers was replaced as director of operations by Scolnik. In November 2015, Rhino hired Travis Medley to serve as the director of rigging, with direct oversight of the rigging manager – who at the time was Alexander. Before Medley was hired, the rigging manager reported directly to the local director of operations. And finally, in March 2016, Alexander was fired and was replaced by Dion Spires. (Tr. 251, 317–18, 351–52, 411–13; GC 27, 28.)

E. Respondent's computer system and its “deactivation” policy

Rhino's website contains an employee online portal, where-by employees can log into the company's computer system, check their work schedule, and review upcoming shows. The portal also gives employees access to the employee newsletter, various policies and procedures, and the employee handbook. All active employees have access to the computer system. (Tr. 84, 254–55, 270–71, 283, 323–24, 382–83, 407–08.)

To fill jobs on upcoming shows, Rhino's staff telephones ac-

tive employees to inquire if they are available to work.¹¹ If someone is not available, Rhino goes through the employee list until someone is available to fill the job. If the company is unable to fill a call with employees in the computer system, they bring in workers from outside the Northwest. (Tr. 324–26)

In December 2013, Respondent added a section to its employee handbook which stated that employees would “automatically be removed from our current employee in good standing list,” for not having worked a shift in any 90-day period. This would result in employees being “deactivated” and unable to log into the employee portal. If an employee was deactivated, when they tried to log into the employee portal, they would receive a message saying “[employee name,] you are no longer an active employee. Please contact the office for more information.” Deactivated employees would not receive calls for upcoming shows. Michelle Smith testified that the reason the 90-day policy was added to the employee handbook was because having to contact people “who don’t return phone calls, who don’t take shifts . . . [and] that don’t want to work,” slows down the process when Rhino has large calls to fill. (Tr. 391, 402, 415–16, 402, 426; GC 6, 14; R. 1.)

That being said, the evidence shows that before November 2015, the actual policy was only enforced sporadically. At hearing, Respondent introduced into evidence a report showing Rhino employees who had been deactivated from June 4, 2014 through January 24, 2017.¹² (Tr. 417; R. 17.) This report shows that Respondent was consistently deactivating employees for a number of reasons, such as walking off the job, not showing up for work, not returning phone calls, or even being in jail. However, it was not until November 2015 that Respondent started applying the employee handbook policy of automatically deactivating employees for not having worked in 90 days. Instead, the report shows that multiple weeks could pass without anyone being deactivated for not having worked for more than 3 months, and when a deactivation did occur, it was because the employee in question had not worked for multiple months or even years—not just 90 days. (Tr. 411–17; R. 17.)

For example, in mid-June 2014, 6 months after the 90-day deactivation rule was implemented, two employees were deactivated because they had not worked since 2012, and one employee was deactivated for not having worked since 2011. Another employee was deactivated on June 13, 2014, who was hired 9 months earlier—but had never worked at all. On June 27, 2014 one employee was deactivated for not working since March 2013. On October 13, 2014, three employees were deactivated because they had not accepted work in 6 months, and two others for not having worked since their hire date—nearly 5 months earlier; another was deactivated for not having worked in a year. On July 3, 2015, an employee was deactivat-

ed for not having worked since he was hired 5 months earlier. On August 11, 2015, an employee was deactivated for not having accepted work for a year, and on September 16, 2015 an employee was deactivated for not having worked in 2 years. In its posthearing brief Respondent admits that, before November 2015, while deactivations would occur, enforcement of the 90-day deactivation policy “was not done on a regular basis and the reasons for the deactivations were not always consistent.”¹³ (Resp’t Br., at 6) (R. 17).

Also, longstanding employees credibly testified that, before the Union’s certification, they had never known or heard of any Rhino employee being deactivated, or told they could not work, just because they had not accepted an assignment in the preceding 90 days. Indeed, it appears that Rhino employees were never aware of such instances because being “reactivated” into the system was a simple process involving nothing more than clicking a few buttons on a computer screen.¹⁴ Respondent’s report shows that employees were easily reactivated upon request, with little cause for concern about previous deactivations. Thus, employees were reactivated even though they had multiple serious infractions in the past causing their initial deactivation. For example, Rhino reactivated numerous employees despite the fact they had previously been deactivated for having multiple no call/no shows, not returning phone calls, not accepting work, walking off the job, or simply being too busy with their other job. Also, it was a general practice that an employee could go on tour for an extended period, or move away, then come back to town and simply inform Respondent they had returned; Rhino would then reactivate the employee and assign them work. (Tr. 61–62, 186, 314, 402–404; R. 17.)

On October 5, 2015, Rhino hired Amber Peterson to handle the various human resource functions in the Northwest office. As part of her job duties, Peterson was put in charge of deactivating employees from the computer system, including deactivating them for not working in a 90-day period. Peterson started regularly deactivating employees for not working in 90 days starting November 3. Peterson testified that she would run a report showing the employee’s name, hire date, and date last worked. She would then look at the work history to see if the employee was currently scheduled. If the employee had not worked in 90 days and was not scheduled to work an upcoming show, and she would deactivate the employee and make a notation in the system that the employee has not worked in 90 days. After November 3, employees were consistently deactivated for not working in a 90-day period. Notwithstanding, Respondent continued its practice of liberally reactivating employees who had been previously deactivated. For example, a review of Respondent’s deactivation report shows that, of the employees who were deactivated in November and December 2015 for not working in 90 days, 41 were subsequently reactivated (Tr. 411–14, 424) (R. 17).

A review of Rhino’s deactivation report also shows that, for

¹¹ Sometimes employees would also be contacted through text message, email, or in-person discussions; but primarily these contacts are made by telephone. (Tr. 163, 209.)

¹² The report includes all Rhino employees who were deactivated, from any classification, including riggers and stagehands. (Tr. 420–21.)

¹³ Tyler Anderson testified that he knew about the 90-day deactivation policy, but that it was not consistently enforced. (Tr. 329, 335.)

¹⁴ Michelle Smith testified that to reactivate an employee, someone with access to Rhino’s computer system would simply need to click “an active button.” (Tr. 402–403.)

the first 6 months of 2015, a total of 246 employees were deactivated for various reasons. Of these, about 16 (6.5%) were deactivated for generally not working. And half of these 16 deactivations occurred after the petition was filed on May 26. For these 16 individuals, the deactivation report does not specifically say the employee was deactivated for not working in 90 days. Instead, it contains notations like “hasn’t worked in a long time,” “hasn’t worked in over a year [and] only worked one show,” or “doesn’t accept work.” (R. 17.)

From November 1, 2015, through April 30, 2016, the first 6 months after Amber Peterson started enforcing the 90-day deactivation rule, 252 employees were deactivated. Of these, about 142 (56.3%) were deactivated for not having worked in 90 days. And in virtually every one of these instances, the notation in the deactivation report specifically says, “has not worked in 90 days.” Respondent never bargained with the Union about any changes related to its practice of deactivating employees or enforcing its 90-day deactivation policy. (Tr. 23; R. 17.)

F. The alleged discrimination against Rzeplinski, Gonzalez, and Klemisch

1. Travis Rzeplinski

Travis Rzeplinski started working for Rhino in about 2000 and worked for the company until July 2016. As per industry custom, Rzeplinski worked as a rigger for about 20 different employers a year, including Rhino. Rzeplinski is an ETCP certified rigger, and is able to perform most types rigging jobs that do not require welding.¹⁵ As noted above, after attending the mandatory employee meeting on June 9, Rzeplinski sent a series of emails to Giek contesting many of the statements he made in the meeting. After his email exchange with Giek, Rzeplinski testified that work “flowed differently.” He stopped receiving as many offers for longer engagements, and when Rhino did contact him it was for more short-term work with less advance notice. This resulted in Rzeplinski having to turn down Rhino work because he was already booked by other employers. (Tr. 208, 225–226, 234.)

At some point in mid-to late 2015, Rhino held a monthly supervisors meeting where Rzeplinski was discussed. Multiple supervisors and managers were present including Jeff Giek, Tyler Alexander, and Michelle Smith. At the meeting, Smith inquired as to who scheduled Rzeplinski for an upcoming event. Alexander replied that he was responsible, and asked why Smith wanted to know. Smith, asked why Alexander would schedule Rzeplinski when he was only a few days away from being deactivated. Alexander said that Rzeplinski was a great employee, “why would I not schedule him?” Smith said that Rzeplinski was possibly pro-union, and said she was curious why Alexander was scheduling him. At this point Giek abruptly ended the conversation by saying that this did not need to be discussed, and that Alexander was doing what he was supposed to be doing by scheduling workers. (Tr. 330–33.)

¹⁵ ETCP is an acronym for Entertainment Technician Certification Program. An ETCP certification is not generally needed to work as a rigger, but some venues require this certification for certain type of rigging work. (Tr. 57–58.)

Alexander guessed that this conversation happened during the “summer busy season,” but could not recall if it was before or after the Union election. However, Rzeplinski’s work records suggest that it may have occurred sometime in the late summer/early fall, depending upon how early Rhino was scheduling shows at the time. Rzeplinski worked an event for Rhino on November 22, when he was less than a week away from going 90 days without working for Respondent and being subject to the 90-day deactivation rule. (R. 20.)

In January 2016 Rzeplinski was in San Diego so he contacted Giek and asked to meet for lunch; they met at a Japanese restaurant. Rzeplinski asked Giek for an update about the union, and whether they were working on a contract. Giek replied that his hands were tied, as the lawyers were handling things and he was staying out of it. Rzeplinski mentioned that work had slowed for both he and Klemisch, but Giek said that he did not know anything and a lot of changes were occurring in the Northwest office. After this meeting, Rzeplinski worked a Black Sabbath concert for Respondent in February 2016. He then worked a Rhino show at the Washington State convention center on April 13, 2016; Rhino had contacted Rzeplinski to work the same job on April 14, but he turned it down. This was the last job Rzeplinski worked for Respondent. (Tr. 26–27, 226–28, 299–300.)

Rzeplinski received his paycheck for the April 13 job in the mail; included with the check was a copy of Respondent’s employee newsletter. The newsletter noted that that Tyler Alexander had received award “points” for exceptional work. Rzeplinski became upset when he saw this, as he and Alexander were close friends; Rhino fired Alexander a month earlier. Therefore, on April 27, 2016, Rzeplinski wrote a “heated letter” and emailed it to Klemisch, with a copy to the Union. (Tr. 229–232, 249–255, 290–91; GC 18, 19.)

The letter complains about Alexander’s discharge, and includes a picture of the newsletter. It discusses how Alexander rose through the ranks at Rhino, was a 10-year veteran, and “our leader for years.” The letter links Alexander’s discharge with the employee union drive and infers that Rhino associated Alexander as being supportive of employee workplace demands. It says that “we are part of a union because together we are stronger than we are apart.” The letter further lists various job related complaints against Rhino and calls for employees “to get behind an action” against the company. Instead of signing his name, Rzeplinski signed it “In Solidarity, A brother.” (Tr. 231; GC 21–22.)

Klemisch and Rzeplinski then spoke, discussed the letter, and Klemisch asked to post it on the Facebook page. Klemisch made some minor grammatical changes to the letter and posted it on Facebook the same day with a comment “a friend of mine wrote this and I could not agree more.” The post was seen by 43 members of the Facebook group, including Dion Spires, the rigging manager who replaced Alexander. Although the letter was posted as being from an anonymous “brother,” Rzeplinski testified that after it was posted various coworkers congratulated him for a well written letter. (Tr. 256–62; GC 21, 22, 28.)

After his April 2016 job for Rhino at the Washington State convention center, Rzeplinski tried to secure more work assignments from Respondent. He logged into Rhino’s employee

portal, and printed out the calendar of upcoming events which displayed multiple shows for the months of June through September that would require riggers. Previously, Rzeplinski would go directly through Alexander for his work assignments. Because Alexander had been fired, he instead called the office. In May 2016 Rzeplinski twice called the Rhino office to get scheduled for work. He spoke to the scheduler, told her that he was going to be out of town from June 19 to June 3, but that otherwise he was available and wanted to work; Rzeplinski was going on his honeymoon for about two weeks starting June 19. (Tr. 266–79, 303, 312–13; GC 23.)

The scheduler said that she would pass Rzeplinski's name to Travis Medley who was doing the scheduling, and would let Rzeplinski know. However, Rzeplinski never heard back from anyone at Rhino. (Tr. 267–68.)

After he returned from his honeymoon, on about July 6 Rzeplinski again called Rhino to inquire about work. He spoke to an office assistant, said that he knew there were jobs coming up and that he was interested in working. He was again told that his name would be passed on, and again heard nothing. (Tr. 279–80.)

Rzeplinski also asked two Rhino supervisors directly for work during this time frame. He first spoke with supervisor Eric Drda. Rzeplinski was working an event for another company and saw Drda. He told Drda that he was in town, available, and knew Respondent was busy. However, Drda brushed him off. Rzeplinski's second conversation occurred on July 26, 2016, again while he was working an event for another company. He saw Dan Scolnik at the theater and told him that he would like to work, but Scolnik also gave him the brush off. After speaking with Scolnik, Rzeplinski tried logging into the employee portal, but he had been deactivated. Respondent's records show that Rzeplinski was deactivated on July 15, 2016, for not having "worked in 90 days." These records also show that, after the April 14 show at the Washington State convention center, Rhino never contacted Rzeplinski to inquire about his availability or otherwise tried to schedule him for work. (Tr. 282–83; GC 24; R. 17.)

2. Heidi Gonzalez

Heidi Gonzalez started working for Rhino in April 2010 as a stagehand and became a rigger after about a year. She performed rigging work for Rhino until August 2015. As with the other riggers, Rhino was not Gonzalez' only employer during this time period. She generally worked for about 20 different employers each year, including Rhino. Gonzalez testified for the Union on the second day of the NLRB preelection hearing in June 2015. At the hearing, when asked by Respondent's counsel whether it was important for Rhino's stagehands and riggers to work as a team to assemble a show, Gonzalez testified that the stagehands and riggers work independently, as a team amongst themselves—riggers with riggers and stagehands with stagehands – as opposed to working together. (Tr. 159–161, 166; GC 36; R. 17.)

In late September 2015, Tyler Alexander sent Gonzalez a text message about working a Scorpions concert on October 9,

in Kent, Washington.¹⁶ Alexander confirmed Gonzalez for the show, but a few days later another company contacted her to work the same show. It turns out that everyone working the Scorpions concert, including Gonzalez and other Rhino employees, worked for a company named Pyramid, and not for Rhino. (Tr. 178–182, 185; GC 15.)

Gonzalez found out that she had been deactivated when she tried logging into the employee portal sometime in December 2015; the login screen said that she was no longer an active employee and to contact the office for more information. On December 14, 2015 Gonzalez emailed Alexander with her availability for the remainder of the month along with January and February 2016. Alexander replied, with a copy to Amber Peterson and Dan Scolnik, saying that he had passed her information on to the schedulers and that Gonzalez may need to contact Peterson to verify her eligibility. (Tr. 176, 200–02; GC 14, 16.)

Gonzalez called Peterson sometime in December to find out why she had been deactivated. Peterson told her that she was deactivated because she had not worked for Rhino in 90 days. Gonzalez protested, saying that she had been scheduled to work the Scorpions concert for Rhino, but that the call was cancelled. Peterson told Gonzalez that, since she did not actually work the show for Rhino, it did not count. Gonzalez said that she wanted to work, and told Peterson she had emailed Alexander about wanting to work. Peterson replied that she had to speak with someone to see if Gonzalez could be reactivated, and would call Gonzalez back. However, neither Peterson nor anyone from Rhino ever contacted Gonzalez about working. (Tr. 177–78, 183–84, 187, 201–202.)

Peterson admitted having a conversation with Gonzalez in December about her reactivation. Peterson claimed that, Gonzalez asked to come back to work for Rhino, and said she wanted to work on an upcoming job that was assigned to her brother. Peterson told Gonzalez that this was not acceptable, and not part of the process – because Gonzalez was not on the call list, and the schedulers were responsible for scheduling shows. (Tr. 426.)

Peterson further testified that the schedulers were aware that Gonzalez wanted to return to work but that "[t]here are other factors that are taken into consideration." Peterson claimed that there was "poor performance feedback" regarding Gonzalez and that she had a "bad attitude" towards the schedulers and accepting work. Peterson testified that there were other people on her call list that would be more eligible to work than Gonzalez, with better attitudes. (Tr. 427–28.)

In the 5 years Gonzalez worked for Rhino, Respondent never told her that her job performance was poor, or that she had a bad attitude. Furthermore, nobody from Rhino ever told Gonzalez that she would not be assigned work because of performance issues. (Tr. 506–508.)

The Union also tried getting Gonzalez scheduled for a Rhino show in early 2016. On February 9, 2016, Union business agent Mylor Treneer sent Alexander a letter with a list of "Rhino riggers," who were available and interested in working a Rhino show scheduled later that month. The list included Gon-

¹⁶ The Scorpions are a 1980's rock band. (Tr. 178.)

zalez and Klemisch. However, neither was ever contacted to work the show. Respondent's records show that Gonzalez was deactivated on November 3, 2015 for not having worked in 90 days. Gonzalez' last show for Rhino was a concert on August 2, 2015. (GC 4; R. 17, 18.)

3. Matthew Klemisch

Matthew Klemisch's employment with Rhino started in July 2006 and ended in November 2015.¹⁷ Klemisch started as a stagehand, and eventually became an ETCP certified rigger. He only worked for Rhino a few months after starting in the summer of 2006. He returned to Rhino a few years later, after friends suggested to a supervisor that Klemisch was available when they needed an extra person. Klemisch was scheduled to work the show, and continued working for about a year. He then moved to China in 2009, where he worked for a year. When he returned from China, Klemisch called a Rhino supervisor and said he was back in town; Rhino put him back to work. Each time he returned, Rhino simply put Klemisch back to work. He was not required to complete a new W-4 form or any other new employee paperwork. In November 2015 Klemisch tried to log into the employee portal, but he had been deactivated. Rhino's records show Klemisch was deactivated on November 3 for violating the conflict of interest policy. However, Rhino never told Klemisch that he had been deactivated, or the reason for his deactivation. (Tr. 57-63, 81-82, 99, 101-02; GC 6; R. 2, 17.)

a. *Klemisch's union and protected activity*

During the organizing drive Klemisch collected authorization cards, and was put on the Union's organizing committee. As noted earlier, he was also an administrator on the Facebook page; he remained active on the Facebook page even after he stopped working for Rhino. Also, Klemisch was the Union's first witness at the preelection NLRB hearing on June 4, testifying, among other things, about how riggers generally work separately from stagehands. (Tr. 66, 368-372; GC 36.)

b. *Precision Rigging*

In May 2012, Klemisch and his wife formed a limited liability company named Precision Rigging LLC. Both were managers of the LLC, while Klemisch was the registered agent. In September 2015 Precision Entertainment, Inc., was incorporated in the State of Washington, and Klemisch transferred his ownership in the company to his wife. Even though the LLC became inactive, the new corporation continued using the name "Precision Rigging" as a d/b/a. Also, notwithstanding the formal change in the corporate structure, and the "transfer" of ownership, the evidence shows that Klemisch continued running the operations of Precision Rigging while his wife provided support in the areas of accounting, finance, and payroll. (Tr. 105-113, 131; R. 3, ALJ 2.)

Precision Rigging rents rigging equipment, provides production rigging services, production riggers, and general rigging

¹⁷ Throughout his employment with Rhino, Klemisch also worked with other companies as a rigger, and estimated he worked for 10 to 15 different employers during any given year. This was true even as he worked for both Rhino and Precision Rigging. (Tr. 59, 150.)

labor to various shows and venues primarily in the Pacific Northwest.¹⁸ Precision Rigging is a union signatory employer. (Tr. 122.) However, it generally does not use the union's hiring hall. Instead, to staff events Precision Rigging hires workers directly from the pool of riggers in the Puget Sound area, which includes individuals who also work for Rhino.¹⁹ (Tr. 86-88, 116, 120-22.)

At various times while he was working for Precision Rigging, Klemisch has either interacted, or worked directly with, Rhino employees—including supervisors. On some shows Klemisch provided production rigging through Precision Rigging, but oversaw a rigging crew provided by Respondent, with Rhino supervisors. On other occasions Precision Rigging provided the event rigging labor, while the stagehands were provided by Rhino. (Tr. 88-90; Tr. 139-44.)

On one occasion Klemisch even received a referral from Rhino. In early 2015 Karen Biggers referred Andrew Latimer, the production manager for Endless Entertainment, to Klemisch for an event in Seattle. Latimer had reached out to Biggers saying that his staffing manager would contact her to discuss hiring stagehands, but that he wanted to "talk riggers and motors." He emailed Biggers the rigging guidelines and draft site plane, along with a list of equipment needed for the show, including trusses. Biggers replied on January 27, via email, noting that Rhino did not carry much inventory, and that she was unsuccessful in renting some of the needed equipment. She attached a copy of Rhino's labor rates, and then recommended a specific company for lighting equipment, and another company for motors. Finally, she recommended Klemisch as a production rigger and noted he had trusses available. Latimer replied a few days later asking whether Rhino had rigging staff working the show that could determine the specific points and plots that were needed. At some point Biggers texted Klemisch asking what he charged for production rigging; Klemisch replied with the information requested. On February 6, Biggers emailed Latimer saying that Klemisch "is the best production rigger if you are looking for someone to lay out points," and that Rhino's riggers "can help make last minute adjustments if that is all that is needed."²⁰ (Tr. 151-52; GC 25.)

Latimer emailed Klemisch on February 10, saying that Biggers "at Rhino" had referred him for a show in late March. Latimer said that he wanted an ETCP certified head rigger for the show, explained what else he needed, including equipment, and asked whether Klemisch was interested and available. He

¹⁸ Production rigging services and production riggers provide advance planning for events, before they occur, while general rigging labor is provided during the event itself, including the load-in and load-out. (Tr. 87, 118, 460-61.)

¹⁹ At the hearing, both the Union and the General Counsel agreed that Precision Rigging performs similar work as Rhino and that there may be an overlap in the customer base. (Tr. 128-29.)

²⁰ Notwithstanding any testimony to the contrary, the evidence shows that Biggers knew Klemisch was in the business of renting equipment and offering production rigging. The evidence also shows that, when she recommended Klemisch, Biggers was doing so in an attempt to have Rhino provide the general rigging and stagehand labor, with other companies to provide motors and lighting, and Klemisch to provide trusses and production rigging services. (Tr. 356-57; GC 2.5.)

also asked whether Klemisch could provide the equipment, as per Biggers' recommendation. Klemisch replied on February 11, saying that he was "the owner of Precision Rigging," and provided a cost breakdown for the requested labor and equipment. Precision Rigging was hired for the job, and its invoices show that Endless Entertainment was billed \$4,335 for the work. This amount included a charge for equipment rental, and \$1,950 for related rigging labor, including an ETCP rigging supervisor.²¹ (Tr. 504–05; GC 7; R. 4, at 9.)

A review of the Precision Rigging invoices introduced into evidence show that for the 17-month period from June 2014 through October 2015 Precision Rigging billed customers over \$370,000 for its services. Of this amount, over one third (about \$130,000) was for general rigging labor while the remaining amount was for equipment rental, production rigging, and other related services.²² There is no evidence that Klemisch ever received permission from Giek, or any other Rhino executive, to operate a separate company that competes directly against Rhino for business. (Tr. 135–36; R. 4.)

c. *The termination of Klemisch's employment*

When Klemisch testified at the June 4 NLRB preelection hearing, Giek learned that Klemisch operated Precision Rigging, which competed against Rhino. Therefore, at some point after the hearing date, Giek told Michelle Smith that Klemisch could no longer work for Rhino. According to Respondent, as the driving force behind Precision Rigging, Klemisch violated Rhino's conflict of interest policy which is contained in the employee handbook. This policy prohibits employees from putting themselves in a position where their personal interests conflict with Rhino's. As an example of such a conflict, the employee handbook cites "acting as a director, officer, employee, or otherwise for any business . . . with which [Rhino] has a competitive . . . business relationship without written approval of the President." Respondent's records show that Klemisch acknowledged reviewing the employee handbook in August 2012. (R. 1, 2, 16; Tr. 384–384, 392–394, 466, 480–481.)

According to Giek, this policy is designed to prohibit a competitor from potentially stealing Rhino's customers or business. Giek testified that the policy did not prohibit general hourly employees from working for other production companies, as this is the accepted industry model, and there is not enough work for one company to employ all the hourly workers full time. Giek explained that Klemisch was competing directly against Rhino by pursuing the same work for Precision Rigging. Hourly employees, on the other hand, are simply staffing events, and not involved in securing contracts for the companies that employed them. (Tr. 467–471.)

After Klemisch testified at the NLRB hearing, he was scheduled to work two concerts for Rhino, one on July 24 and another on July 31. However, for both shows Klemisch received telephone calls from Rhino saying that he was no longer needed. Klemisch then turned down work offers from Rhino for

²¹ It is unclear whether Rhino was also hired to perform rigging work on this show.

²² The invoices show that, notwithstanding any testimony to the contrary, providing rigging labor is a significant part of Precision Rigging's business.

events scheduled for August 9, and August 10; the last event Klemisch actually worked for Rhino was on May 27. Afterwards, Rhino stopped contacting Klemisch for work, and its employment records list Klemisch being fired on November 3, 2015, for violating the company's conflict of interest policy. (Tr. 59, 78–80, 147; R. 2, 18, 19.)

II. ANALYSIS

A. *Alleged discrimination against Rzeplinski, Gonzalez, and Klemisch*

1. Legal Standard

To show that an adverse employment action was motivated by an employee's protected activities, the Board applies the burden shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).²³ Under this framework, the General Counsel must prove by a preponderance of the evidence that an employee's union or other protected activity was a motivating factor in the employer's actions. The elements required to support such a showing are union or other protected activity, knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. *Id.* at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). And, "where the Employer's proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).

2. Alleged discrimination against Rzeplinski and Gonzalez

a. *Union and protected activity*

The evidence clearly shows that both Rzeplinski and Gonzalez engaged in union activities. Rzeplinski attended union meetings, and in his June 9 email he directly challenged Giek's anti-union statements made at the mandatory employee meeting. The email was clearly supportive of the union drive, and noted that the IATSE only wanted to represent workers, and not destroy Rhino as Giek claimed. Rzeplinski also asked whether

²³ The Board applies *Wright Line* to alleged 8(a)(1), (3), and (4) violations where the employer's motivation is at issue regarding an adverse employment action. *Freightway Corp.*, 299 NLRB 531, 532 *fn.*4 (1990) (noting that *Wright Line* applies to 8(a)(4) as well as 8(a)(3) violations); *Tortillas Don Chavas*, 361 NLRB 101, 114 (2014) (applying *Wright Line* to alleged 8(a)(1) discrimination).

Rhino was working on a contract with the Union during his January 2016 lunch with Giek in San Diego. Finally, Rzeplinski drafted the “anonymous” April 16, 2016 letter, which was posted on the employee Facebook page, and described why employees were part of a union and called on workers to “get behind an action” against the company. Gonzalez engaged in union activities, in that she testified on behalf of Local 15 at the June 2015 preelection hearing. Gonzalez’ testimony is also protected under Section 8(a)(4) of the Act.²⁴

Both Gonzalez and Rzeplinski also engaged in protected concerted activities involving the various comments they made on Facebook. In reply to someone who said they had never been subjected to unsafe working conditions at Rhino, Gonzalez complained that she had, in fact, been exposed to unsafe conditions, had been asked to “take one for the team” many times, and questioned when the “team” would benefit her. In this same comment, Gonzalez said that “we need support,” as the “cons” of working at Rhino outweigh the “pros.”

Following up on Gonzalez’ comment, Rzeplinski posted that he too had been asked to “take too many for the team” and has seen coworkers being overworked, underpaid, and asked to perform “things he was uncomfortable with.” In the same comment Rzeplinski complains of not receiving overtime, and notes that a “cohesive group” is now asking for more recognition and pay for “the dangerous work we do.” On this theme, Rzeplinski then commented about having to pay for his own gas while driving to a work assignment 6 hours away, and described various incidents where he believed safety was put at risk because of a lack of equipment or training. Furthermore, Rzeplinski commented that Rhino supervisors had done a great job recently, working within the system they had been given, but that “sometimes the system needs to fundamentally change to be more effective.” All of these Facebook comments made by Gonzalez and Rzeplinski are protected under the Act. See *World Color (USA) Corp.*, 360 NLRB 227, 228 (2014) (noting that the Board has found Facebook posts among employees about working conditions to be protected concerted activity); *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014) (employees using social media, including Facebook, to discuss their working conditions constitutes concerted activities for the purposes of mutual aid and protection), *enfd.* 629 Fed.Appx. 33 (6th Cir. 2015) (employee’s endorsement of former coworker’s Facebook claim that employer erred in tax withholdings is concerted activity protected by the Act).

b. Knowledge

There is ample evidence showing that Respondent knew about the union and protected activities engaged in by Gonzalez and Rzeplinski. As for Rzeplinski, Venegas reported to Giek that Rzeplinski was present at a union meeting before the election with members of IATSE’s leadership team. Venegas also reported to Giek that Rzeplinski was one of the people primarily responsible for organizing communications between the

²⁴ The Board broadly interprets Section 8(a)(4) to include testimony in all types of Board proceedings, including election/representation proceedings; it even protects employees who appear at a hearing but do not testify. *Virginia–Carolina Freight Lines, Inc.*, 155 NLRB 447, 452 (1965); *Belle Knitting Mills, Inc.*, 331 NLRB 80, 103 (2000).

Local 15 and Rhino’s employees. Moreover, Giek personally exchanged emails and spoke with Rzeplinski about the Union. And Smith stated in a monthly supervisors meeting that Rzeplinski was possibly prouion. Also, Smith forwarded the Facebook comments made by Gonzalez and Rzeplinski directly to Giek. Likewise, Drda and Scolnik were directly commenting on Facebook in reply to posts made by both employees. Finally, multiple members of Rhino’s management and supervisory team were present when Gonzalez testified on behalf of the IATSE at the NLRB preelection hearing. Respondent clearly knew that both Rzeplinski and Gonzalez were engaged in both union and protected concerted activities

c. Animus

The evidence is replete with animus, both general and specific. During the mandatory preelection employee meetings, Giek told workers that Rhino had been successful getting contracts with venues and production companies like Live Nation, that “it’s no secret some of our clients want nothing to do with unions – especially a union like IATSE,” that they “do not want us bringing a union into their venues or their shows;” he then asked employees why they would take a risk of alienating Rhino’s best clients in the Northwest by unionizing. The Board has found that an employer’s assessment of the “risk” of losing its major customer if employees unionized is a violation where there is no objective factual basis for making the claim. *Blaser Tool & Mold Co., Inc.*, 196 NLRB 374, 374 (1972) (statement from company president of concern that major customer might stop doing business with the company if employees voted for the union constituted an implied threat of job loss and plant closure, as there was no objective factual basis for the comment).²⁵ Here, Giek did not present to employees any objective factual basis for his claim that Rhino’s customers, or the venues in which they work, do not want Rhino bringing a “union into their venues or shows.” The same holds true for Giek’s claim that Rhino would risk alienating its best clients if they unionized. The message conveyed to employees was that, if they unionized, Rhino’s would possibly lose their best customers and ultimately workers would be without work. Because Giek provided no objective factual basis when he made these statements, it supports a finding of animus.

Similarly supporting a finding of animus are statements made by Giek and Drda about everything being frozen because of the Union. In his speech to employees, Giek said that during

²⁵ See also, *Crown Cork & Seal Co., Inc.*, 255 NLRB 14, 14 (1981), *enfd.* 691 F.2d 509 (9th Cir. 1982) (table) (Supervisor’s statement that, if employees unionized, the company’s sole customer would switch to a less costly producer, forcing a shutdown in operations, a violation as there was no objective factual basis for this statement nor a showing that these speculative consequences were beyond the employer’s control). *National Propane Partners, L.P.*, 337 NLRB 1006, 1017 (2002) (employer’s “predictions” about the effects of unionization a violation unless they are “carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.”); *Tellepsen Pipeline Services Co. v. NLRB*, 320 F.3d 554, 564 (5th Cir. 2003) (statement that employer’s customer could terminate its contract if the Union won and all employees could possibly lose their jobs constituted implied threats of reprisals in violation of § 8(a)(1)).

negotiations everything is frozen, and that it is illegal for the company to grant a wage increase without an agreement, and asked employees how long they would be willing to wait as it could take months or years for a first contract. On the other hand, he noted that without a union the company could make changes anytime. He made a similar statement in his email to Rzeplinski. Also, in his Facebook comment, Drda said that a “yes” vote “keeps pay frozen until a contract is reached,” and that during “similar situations years can pass.”²⁶ The Board has found that these types of statements, made in similar circumstances, violate Section 8(a)(1) of the Act. *Marathon Metallic Building Co.*, 224 NLRB 121, 122–123 (1976).²⁷ Here, I believe there is sufficient evidence in the record to support a finding that these statements also show animus.

Also, in the list of questions and answers that Rhino disseminated to employees at the mandatory meetings, Rhino states that, while it cannot “predict the future, many companies have lost jobs or shut down completely after their employees unionized in the past.” This statement is also evidence of animus. *S. Bakeries, LLC v. NLRB*, 871 F.3d 811, 821 (8th Cir. 2017) (“In a similar case, we determined that an employer violated § 8(a)(1) when it ‘called employees’ attention to other plants in the community where employees had been laid off following their vote to unionize” quoting *NLRB v. Noll Motors, Inc.*, 433 F.3d 853, 854 (8th Cir. 1970)).

The record also contains various other examples of animus. Giek was clearly mad at the content of the testimony that Rhino riggers gave at the NLRB pre-election hearing. In his email to Rzeplinski he cited this testimony saying that three riggers testified under oath they do not work as a team with stagehands and that he was “stunned by their denunciation of Rhino’s core values.” Giek further wrote that those employees, which included Gonzalez and Klemisch, represent the Union’s values and that “Rhino’s dedicated employees have no need for the Union.” He made a similar reference to this testimony in the questions and answers supplied to employees at the mandatory meetings.

Animus against the concerted activities of Rzeplinski and Gonzalez is also shown in the replies made by Scolnik to the Facebook posts about unsafe working conditions. Scolnik’s comments show that he was particularly angry at the claim of unsafe working conditions at Rhino, saying that Rzeplinski had “a LOT of nerve,” asking whether Rzeplinski was “so blinded by this crusade” that he was willing to attack Rhino for conduct that other companies, and Rzeplinski himself, engaged in. Finally, Smith’s comments to Alexander questioning why he

²⁶ See R. 23, GC 17 and GC 33 for the statements made by Giek and Drda.

²⁷ The Board looks to the following factors to determine whether a violation occurs in these types of circumstances: (1) did the union threaten to protest conferring benefits; (2) is some other basis for the employer to fear such a protest; (3) has the employer made an effort to secure the union’s consent to the institution or increase of benefits; (4) was it made clear that the deferral of benefits is to avoid the appearance of election interference; (5) were the comments made in the context of an antiunion appeal; and (6) did the comments occur while the employer was committing unfair labor practices. *Nissan Motor Corp. in the U.S.A.*, 263 NLRB 635, 640–641 (1980).

would schedule a possible pro-union rigger who was days away from being deactivated also shows animus against union supporters in general, and against Rzeplinski in particular.

d. Respondent has not rebutted the General Counsel’s case

The General Counsel having presented a prima facie case of discrimination against Gonzalez and Rzeplinski, the burden of persuasion now shifts to Respondent to show that it would have taken the same actions against them notwithstanding their protected activity. I find that Respondent has not done so.

Respondent argues that there could be no violation because Peterson deactivated Gonzalez and Rzeplinski, thereby removing their access to the employee portal, as part of her new and more stringent application of the 90-day deactivation rule which applied to everyone. That being said, Rhino cannot explain why it refused to reactivate Gonzalez and Rzeplinski, thereby continuing to deny them access to Respondent’s computer system, and in turn ensuring they would not be called to work future Rhino events.

After learning she was deactivated, Gonzalez spoke with Peterson and specifically asked for work. Peterson admits speaking with Gonzalez about her reactivation, and that the Rhino schedulers were aware that Gonzalez wanted to return to work. Also, based on Gonzalez’ email exchange with Alexander on December 14, it is clear that Alexander, Peterson, and Scolnik all knew Gonzalez wanted to be scheduled for work. Notwithstanding, she was never reactivated, or called to work Rhino events.

The evidence shows that, before the Union’s certification, employees were reactivated upon request with little concern, even if they had multiple infractions in the past which caused their initial deactivation. Moreover, the evidence also shows that, after Peterson was hired, multiple employees who were deactivated pursuant to the 90-day deactivation policy, were subsequently reactivated. However, instead of reactivating Gonzalez and assigning her work, Peterson claimed that she had other people with better attitudes to take a work call. See *Children’s Studio School Pub. Charter School*, 343 NLRB 801, 805 (2004) (“Board has long considered . . . comments, such as accusing an employee of having a ‘bad attitude,’ to be a veiled reference to the employee’s protected activities.”) Respondent has not, and cannot, explain why it would reactivate other employees, but refused to reactivate Gonzalez. As such, I find that Respondent’s explanation is pretext, and that Rhino violated Section 8(a)(1), (3), and (4) of the Act by continuing to keep Gonzalez in deactivated status, thereby denying her access to the computer system and ensuring that she would not be called or scheduled for future events. *Belle Knitting Mills, Inc.*, 331 NLRB 80, 103 (2000) (violation where employees were denied recall because of their union activities, and/or because they gave testimony under the Act).

The same holds true for Rzeplinski. Respondent’s records show that the last time Rhino contacted Rzeplinski for work involved a job scheduled for April 14, 2016, which Rzeplinski turned down—having worked for Rhino the previous day. In May 2016, Rzeplinski actively tried to secure work from Rhino, but was never called. After returning from his honeymoon in July 2016, he again actively tried to get scheduled for work

with Rhino, but again to no avail. Similarly, after he had been deactivated, Rzeplinski asked Scolnik for work, but was given the brush off.

By not contacting Rzeplinski for work after April 14, 2016, Respondent ensured that he would be deactivated under the more stringent application of its 90-deactivation day policy. Indeed, the evidence supports a finding that Respondent was using the 90-deactivation policy to specifically target Rzeplinski. There is no other explanation for Smith's questioning Alexander as to why he would schedule Rzeplinski, who appeared to be prouning, when he was only days away from being deactivated. Rhino knew Rzeplinski wanted to work, but refused to schedule him and would not reactivate him, for no legitimate reason. Accordingly, I find that Respondent has not shown that it would have taken the same actions against Rzeplinski absent his protected activities. Therefore, Respondent violated Section 8(a)(1) and (3) of the Act by deactivating Rzeplinski, and subsequently refusing to reactivate him, because Rzeplinski engaged in protected concerted activities, and because of his union activities.

3. Matthew Klemisch's discharge

The evidence also shows that the General Counsel has presented a prima facie case that Klemisch was discharged because of his protected activities. Klemisch was one of the employees leading the union organizing drive, he was the administrator of the Facebook page, and he testified on behalf of Local 15 at the NLRB preelection hearing. It cannot be questioned that Respondent knew about Klemisch's union activities, as he was highlighted by Giek in his speech during the mandatory employee meetings, and in the questions and answers passed out to employees. Moreover, Venegas specifically warned Giek that it would not be "good for you" if IATSE appointed Klemisch to represent employees at negotiations. And, as described above, Respondent harbored animus against employee union and protected activities.

However, unlike Rzeplinski and Gonzalez, I find Respondent has shown that it would have taken the same action against Klemisch, notwithstanding his protected activities. The evidence shows that Giek made the ultimate decision to terminate Klemisch's employment, and he made this decision after learning Klemisch owned and operated Precision Rigging, which competed directly against Rhino.²⁸ Over one-third of Precision Rigging's revenues came directly from providing rigging labor—the same work provided by Rhino. This is clearly distinguishable from the industry practice of riggers working for multiple companies throughout the year. Here, Precision Rigging was hiring the same riggers used by Rhino, and competing directly against Rhino for the same clients.

By operating a competing rigging company, Klemisch was in clear violation the conflict of interest policy in Rhino's employee handbook, which Klemisch acknowledged receiving.

²⁸ I find that it is of no substance that other Rhino employees or managers may have known about Klemisch's involvement with Precision Rigging before the union organizing drive. The record shows that Giek made the ultimate decision to fire Klemisch, and there is no evidence that, before Klemisch's NLRB testimony, Giek knew anything about Klemisch's involvement with Precision Rigging.

Moreover, the General Counsel has not shown pretext, as there is no evidence that Respondent allowed other employees to remain employed while they operated a competing company. Cf. *Memphis Truck & Trailer*, 284 NLRB 900, 910–911 (1987) (respondent's claim that employee was rejected for employment because he operated a "shade tree" garage at his home was pretext, in part, because the evidence showed other employees who ran "shade tree" garages were hired and later told to cease their "shade tree" operations, while the discriminatee was never given this option). Therefore, I recommend that the unfair labor practice allegations relating to Klemisch's termination be dismissed.

*B. Alleged failure to bargain over deactivating/denying employee access to Respondent's computer system for not working in a 90-day time period.*²⁹

The Board has found that a more stringent enforcement of existing work rules constitutes a change in employee terms and conditions of employment over which an employer has the obligation to bargain. *Hyatt Regency Memphis*, 296 NLRB 259, 264 (1989), enfd. 939 F.2d 361, 371–73 (6th Cir. 1991) (collecting cases and finding a violation where, after the union election, the employer implemented a more stringent enforcement of work rules but failed to bargain with the union, even though the rules in question had been in effect since the company commenced operations); *Celotex Corp.*, 259 NLRB 1186, 1193–1194 (1982) (employer violated Section 8(a)(5) by unilaterally instituting and pursuing a policy of stricter enforcement of its employee work rules.); *San Luis Trucking, Inc.*, 352 NLRB 211, 229 (2008) (employer violated Section 8(a)(5) by more strictly enforcing its rules regarding the issuance of attendance and disciplinary reports to drivers) adopted by Board after remand 356 NLRB 168 (2010), enfd. 479 Fed.Appx. 743 (9th Cir. 2012).

The evidence shows that, even though Respondent's 90-deactivation day policy was added into the employee handbook in December 2013, the enforcement of the rule was lax and sporadic. For example, for the first 6 months of 2015, which is before the election ballots were returned and counted, of the 246 employees who were deactivated—only 6.5% (16 workers) were deactivated for not working. After Peterson started enforcing Respondent's 90-day deactivation rule, for the 6-month period from November 1, 2015 through April 30, 2016, 252 employees were deactivated; of these 56.3% (142 workers) were deactivated for not having worked in 90 days. The number of employees deactivated for not having worked in a 90-day period increased almost 900 percent. Under these circumstances, Respondent had an obligation to bargain with the union before more strictly enforcing its 90-day deactivation policy.³⁰

²⁹ The complaint also alleges that, based upon requests to bargain made by Local 15 in August 2015, Rhino has violated Section 8(a)(5) of the Act by refusing to bargain with the union. However, the Board has already ruled on these exact same allegations, finding a violation. *Rhino Northwest, LLC*, 363 NLRB No. 72 (2015), enfd. 867 F.3d 95 (DC. Cir. 2007).

³⁰ I note that here, as in *Celotex Corp.*, 259 NLRB at 1193, the General Counsel has not attacked the Respondent's motives for more strictly enforcing its preexisting work rule.

Celotex Corp., 259 NLRB 1186, 1193–94 (1982) (violation where, after union election, employer increased the frequency of warnings by 1,000 percent without bargaining with the union).

Respondent's reliance on *Wabash Transformer Corp.*, 215 NLRB 546 (1974), and its progeny, is unavailing. In *Wabash Transformer*, the Board found that the employer's imposition of discharge for failing to meet efficiency standards was not a unilateral change. In so doing, the Board noted that the employer's productivity standards predated the union's certification and the employer "actively enforced its rules by personally interviewing individuals in default, posting notices on bulletin boards, and by delivering speeches to assembled employees." *Id.* at 547. Such is not the case here, as Respondent's 90-day deactivation policy was haphazardly applied and administered before the union was on the scene, and then strictly applied to the detriment of employees after Local 15's certification.

As such, I find that Respondent violated Section 8(a)(1) and (5) of the Act by instituting and pursuing a policy of stricter enforcement of its 90-day deactivation rule without giving the union notice and an opportunity to bargain. *Celotex Corp.*, 259 NLRB 1186 (1982); *Hyatt Regency Memphis*, 296 NLRB 259 (1989); *San Luis Trucking, Inc.*, 356 NLRB 168 (2010), adopting 352 NLRB 211 (2008).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute an appropriate unit (Unit) for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations Act.

4. By discriminating against Travis Rzeplinski because he engaged in protected concerted activities, and because he engaged in union activities, Respondent has independently violated both Section 8(a)(1) and Section 8(a)(3) of the Act.

5. By discriminating against Heidi Gonzalez because she engaged in protected concerted activities, union activities, and testified at a hearing before the National Labor Relations Board, Respondent has independently violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act.

6. By unilaterally and without giving the Union an opportunity to bargain over the decision to institute a policy of more stringent enforcement of its 90-day deactivation rule, Respond-

ent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Sections 8(a)(1) and (3) of the Act by discriminating against Travis Rzeplinski, and violated Sections 8(a)(1), (3), and (4) of the Act by discriminating against Heidi Gonzalez, I shall order Respondent to reactivate them and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Having found that Respondent failed to bargain with the Union about its decision to institute a policy of more stringent enforcement of its 90-day deactivation rule, I shall order that Respondent restore the status quo ante, bargain with the Union about any changes to the enforcement of the 90-day deactivation rule, and make bargaining unit employees whole for any loss of earnings they may have suffered because of Respondent's unilateral implementation of the policy more strictly enforcing the 90-day deactivation rule.

Respondent shall compensate Rzeplinski, Gonzalez, and any other Unit employee due backpay, for any adverse tax consequences of receiving a lump-sum backpay award. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Respondent shall also compensate Rzeplinski, Gonzalez, and any other affected Unit employee, for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

Backpay, search-for-work, and interim employment expenses, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), *enf. denied on other grounds sub. nom., Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Additionally, Respondent shall file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

The Respondent shall also be required to expunge from its files any references to the deactivations issued to Rzeplinski, Gonzalez, and any other affected Unit employee, and notify them and the Regional Director of Region 19, in writing, that this has been done and that the wrongful deactivations will not be used against them in any way. The Respondent shall also post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³¹

³¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent Rhino Northwest LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 (a) Discriminating against employees because they engaged in protected concerted activities, union activities, or because they gave testimony in a hearing before the National Labor Relations Board.

(b) Refusing to bargain collectively and in good faith with IATSE Local 15 by unilaterally implementing a policy more stringently enforcing its 90-day deactivation rule.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the more stringent enforcement of its 90-day deactivation policy, restore the status quo ante, and bargain with the Union, as the bargaining representative of Unit employees with respect to any changes to that policy.

(b) Make Travis Rzeplinski and Heidi Gonzalez whole for any loss of earnings or other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Make any Unit employees affected by the more stringent enforcement of the 90-day deactivation policy whole in the manner set forth in the remedy section of this decision.

(d) Compensate Travis Rzeplinski, Heidi Gonzalez, and any Unit employees due backpay, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of the Board's Order, reactivate Travis Rzeplinski, Heidi Gonzalez, and any Unit employee affected by the more stringent enforcement of the 90-day deactivation policy, without prejudice to their seniority or other rights and privileges previously enjoyed, and inform them, in writing, that they have been reactivated.

(f) Within 14 days from the date of this Order, remove from its files any references to the deactivations issued to Rzeplinski and Gonzalez, and any other Unit employee who was deactivated pursuant to the more stringent enforcement of the 90-day deactivation policy and within 3 days thereafter, notify them in writing that this has been done and that their deactivations will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order.

(h) Within 14 days after service by the Region, post at its

Fife, Washington facility copies of the attached notice marked "Appendix."³² Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities any time since November 3, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this order.

Dated, Washington, D.C. November 3, 2017

APPENDIX

NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, AFL-CIO, CLC (IATSE Local 15), as the collective-bargaining representative of the following employees (Unit):

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers,

³² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed out of our Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT unilaterally and without giving the Union an opportunity to bargain institute a policy of more strictly enforcing our 90-day deactivation rule for Unit employees.

WE WILL NOT discriminate against Travis Rzeplinski because he engaged in protected concerted activities, and because he engaged in activities in support of IATSE Local 15.

WE WILL NOT discriminate against Heidi Gonzalez because she engaged in protected concerted activities, engaged in activities in support of IATSE Local 15, and because she provided testimony at a National Labor Relations Board hearing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL rescind the more stringent enforcement of our 90-day deactivation policy, restore the status quo ante, and bargain with IATSE Local 15, as the bargaining representative of Unit employees, with respect to any changes to that policy.

WE WILL, within 14 days from the date of the Board's Order, reactivate Travis Rzeplinski, Heidi Gonzalez, and any Unit employee affected by the more stringent enforcement of our 90-day deactivation policy, without prejudice to their seniority or other rights and privileges previously enjoyed, and inform them, in writing, that they have been reactivated.

WE WILL make Travis Rzeplinski and Heidi Gonzalez whole for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest.

WE WILL make any Unit employee deactivated because of the more stringent enforcement of our 90-day deactivation policy whole for any loss of earnings and other benefits resulting from the deactivation, less any interim earnings, plus interest.

WE WILL compensate Travis Rzeplinski, Heidi Gonzalez, and any other Unit employee due backpay, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director of Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the deactivations issued to Travis Rzeplinski, Heidi Gonzalez, and any other Unit employee who was deactivated pursuant to the more stringent enforcement of our 90-day deactivation policy, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the wrongful deactivations will not be used against them in any way.

RHINO NORTHWEST, LLC

below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



The Administrative Law Judge's decision can be found at www.nlr.gov/case/19-CA-165356 or by using the QR code