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David Saxe Productions, LLC and V Theater Group, LLC, Joint Employers *and* International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL–CIO. Cases 28–CA–219225, 28–CA–223339, 28–CA–223362, 28–CA–223376, 28–CA–224119, and 28–RC–219130

April 5, 2021

DECISION, ORDER, AND DIRECTION

BY MEMBERS KAPLAN, EMANUEL, AND RING

On August 27, 2019, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union (the Union) filed answering briefs, and the Respondent filed a combined reply brief to the answering briefs. The General Counsel and the Union also filed cross-exceptions and supporting briefs, the Respondent filed answering briefs, and the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by (1) terminating employee Leigh-Ann Hill[4] on March 2, 2018;[5] (2) discharging eight employees from March 17–April 3; (3) discharging employee Scott Leigh; (4) denying light duty to employee Stephen Urbanski; (5) imposing more exacting employment terms and conditions on Urbanski (in two respects); (6) reducing the paid work hours of employees Scott Tupy and Darnell Glen; (7) issuing Tupy written discipline; (8) giving a favorable assignment to employee Courtney Kostew, who opposed unionization; and (9) granting a wage increase during the Union's organizing campaign.

The judge also found that the Respondent violated Section 8(a)(1) of the Act by (1) threatening employee Alanzi Langstaff and giving him the impression that his union activities were under surveillance; (2) interrogating Darnell Glen about a March 13–14 union meeting;[6] (3) interrogating Scott Leigh on April 13 about his circulation of union authorization cards and giving him the impression that his protected activities were under surveillance; (4) giving Scott Tupy and Darnell Glen the impression that their union activities were under surveillance by questioning them after a May 15 mandatory meeting; (5) giving Tupy and Glen the impression that their union activities on the May 17 election day were under surveillance;[7] (6) soliciting grievances and requests for improved terms and conditions of employment from employee Joshua Prieto and giving him the impression of surveillance;[8] (7) maintaining a work rule forbidding employees from blogging in a

[1] Prior to the issuance of the judge's decision, the United States District Court for the District of Nevada granted, in part, the Board's petition for injunctive relief filed pursuant to Sec. 10(j) of the Act. *Overstreet v. David Saxe Productions, LLC*, Case No.: 2:18-cv-02187-APG-NJK, 2019 WL 332406 (D. Nev. Jan. 24, 2019).

[2] The Respondent has excepted to some of the judge's credibility determinations. 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.

In the absence of exceptions, we adopt (1) the judge's dismissal of the allegation that the Respondent's March 13, 2018 "work call" violated Sec. 8(a)(3) of the Act, (2) the judge's finding that employee Stephen Urbanski was not unlawfully subjected to more arduous work assignments when he returned from a work-related injury in June 2018, (3) the judge's overruling of Objections 2, 5, 6, 8, 9, 10, 12, and 13 to the May 17, 2018 election, and (4) the judge's dismissal of the allegation that Supervisor Thomas Estrada's March 2018 remarks to assembled stagehands violated Sec. 8(a)(1).

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found, to our amended remedy, and in accordance with our recent decisions in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), and we have substituted a new notice to conform to the Order as modified.

[4] Member Ring finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(3) by discharging employee Leigh-Ann Hill because of her union activities because any such finding would not materially affect the remedies the Board is ordering based on our finding that the Respondent violated Sec. 8(a)(1) by discharging Hill because of her protected concerted activities in bringing employees' group complaints to management's attention.

[5] Unless otherwise noted, all dates are in 2018.

[6] Member Ring finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(1) by coercively interrogating Glen because any such finding would be cumulative of the Board's finding, which he joins, that the Respondent violated Sec. 8(a)(1) by coercively interrogating employee Scott Leigh.

[7] We find it unnecessary to pass on this impression of surveillance finding because it is cumulative of the May 15 violation and would not affect the remedy.

[8] For the reasons stated by the judge, we affirm her finding that the Respondent unlawfully solicited grievances and requests for improved terms from Prieto, but we find it unnecessary to pass on her impression of surveillance finding because it is cumulative of other like findings and would not affect the remedy.

manner detrimental to the Respondent; and (8) maintaining another work rule requiring employees to refer solicitation or distribution requests from "outside people or organizations" to a human resources representative.

Additionally, the judge found that Stage Managers Dan Mecca and Stephen Sojack were Section 2(11) supervisors and that Courtney Kostew was a Section 2(13) agent of the Respondent. The judge also directed that the Respondent's challenges to seven ballots cast in the May 17 representation election be overruled and that those ballots be opened and counted and a revised tally issued. And the judge further directed that, in the event that the revised tally does not yield a union majority, the election be set aside and a new election scheduled. The Respondent excepts to all the violation findings and directions detailed above.

The judge dismissed the allegations that the Respondent violated Section 8(a)(1) by (1) warning Alanzi Langstaff, through Supervisor Thomas Estrada, in a manner that amounted to a directive not to speak with union supporters;[9] (2) placing the union activities of Tupy and Glen under surveillance on the day before the May 17 election; (3) using its numerous cameras to monitor employees' union activities; and (4) maintaining a rule limiting the content of email signature blocks. The General Counsel and the Union, taken together, except to those dismissals. We affirm, for the reasons stated by the judge, the above-listed findings, dismissals, and directions, with the exception of those findings on which we find it unnecessary to pass and the points discussed in the numbered sections below.

1. Findings related to Stephen Urbanski light-duty denial and imposition of more exacting terms and conditions

As stated above, the judge found that the Respondent violated Section 8(a)(3) and (1) both by denying light-duty work to union supporter Stephen Urbanski from June 4 through 19 and by, in two respects, imposing more exacting employment terms and conditions on him in late June. We affirm the latter violation for the reasons stated by the judge. As to the former, however, we find the evidence insufficient to establish that the Respondent denied light-duty work to Urbanski because of his protected union activity.

In early April, Urbanski injured his left hand while working. Over the opposition of the Respondent's owner, president, and CEO, David Saxe, Urbanski tried to perform light-duty tasks. But due to Saxe's disapproval and his own need for surgery, Urbanski soon decided to halt further light-duty efforts. Human Resources Manager Takeshia Carrington repeatedly offered Urbanski light-duty work during the month of May, but he declined the offers. In doing so, he indicated that he did not want to return to work until he had healed from surgery and was ready for full duty.

Urbanski emailed Carrington on June 1 to request paperwork for returning to work on June 4. Carrington did not reply until June 19, but when she did, she again offered Urbanski light duty, and he again rejected it. After he was medically cleared for unrestricted duty, Urbanski insisted that, despite the length of his time off, Carrington return him to his regular assignment. Once again, he wanted no part of light duty, even temporarily.

Given Urbanski's repeated rejections of her offers of light-duty work in May, Carrington understandably concluded that Urbanski meant just what he said: he was not interested in doing light-duty work while awaiting full medical clearance. Thus, the weight of the evidence suggests that Carrington did not offer Urbanski light-duty work from June 4 through 19 because of his unwillingness to do such work, not because he supported the Union. Accordingly, we reverse the judge and dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) by denying Urbanski light-duty work from June 4 to 19. See, e.g., *Castro Valley Animal Hospital, Inc.*, 370 NLRB No. 80, slip op. at 14–15 (2021) (recognizing that the ultimate burden of proof as to the employer's motivation rests with the General Counsel).

2. Findings related to assignment of Courtney Kostew to more favorable "cue calling" duties

The judge found that the Respondent violated Section 8(a)(3) and (1) by assigning "cue calling" duties to union opponent Courtney Kostew. We disagree. While the evidence shows that Kostew was active in the campaign to resist unionization, the General Counsel failed to demonstrate that this was a motivating factor in assigning her "cue calling" duties.[10]

Linking the assignment to Kostew's opposition to the Union is rendered problematic by the fact that the Respondent also assigned another employee, Joseph Slezak, as a substitute "cue caller," and there is no evidence that he, too, was against union representation. And inferring

[9] We find it unnecessary to pass on the judge's dismissal of the directive allegation because it is subsumed by our finding, infra, that Estrada unlawfully threatened Langstaff with unspecified reprisals by stating, "I'd be careful being seen talking to [prounion employee Zachary Graham] if I were you."

[10] The "cue caller" serves as a liaison between the stagehands and performers and coordinates the stagehand tracks, ensuring that they are performed according to plan. Although "cue calling" was viewed as a favorable assignment, it was not a promotion. Kostew remained an entry-level spotlight operator, with no increase in pay or benefits, and she was only a fill-in or substitute "cue caller." Supervisor Thomas Estrada continued as the regular "cue caller."

such a link is rendered even more questionable by Kostew's romantic relationship with Estrada, the regular "cue caller" and a respected and influential supervisor. Indeed, one of the most prominent union advocates, Nathaniel Franco, testified that he regarded Kostew as "linked to management" because, among other reasons, "she was in a romantic relationship with [Estrada]."

In light of this evidence, we find that the General Counsel failed to meet his burden of showing that the Respondent assigned cue-calling duties to Kostew in order to discourage unionization. On this record, other reasons appear to be more likely, most notably her romantic relationship with a supervisor. See, e.g., *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2–4 (2019) (finding no Section 8(a)(3) violation where pretext evidence, on the record as a whole, was outweighed by other evidence indicating lawful motive). Accordingly, we reverse the judge's finding to the contrary and dismiss this allegation.[11]

3. Findings related to blogging work rule

The Respondent's work rules include a policy entitled "Blogging." In relevant part, it reads as follows:

> Blogging by employees, whether using V Theater Group, LLC's property and systems or personal computer systems, is also subject to the terms and restrictions set forth in this Policy. Limited and occasional use of V Theater Group's systems to engage in blogging is acceptable, provided that it is done in a professional and responsible manner, does not otherwise violate V Theater Group's policy, is not detrimental to V Theater Group's best interests[.]
>
> . . . .
>
> Employees shall not engage in any blogging that may harm or tarnish the image, reputation and/or goodwill of V Theater Group, LLC and/or any of its employees. Employees are also prohibited from making any discriminatory, disparaging, defamatory or harassing comments when blogging[.]

Applying *Boeing Co.*, 365 NLRB No. 154 (2017), the judge found that this ban on certain kinds of negative blog posts violated Section 8(a)(1). In so finding, the judge concluded that employees could reasonably interpret the language of the blogging policy to prohibit Section 7–protected blogs critical of the Respondent, its supervisors, or terms and conditions of employment. And she further found that the blogging rule's impact on Section 7 rights outweighed the legitimate business purposes served by the rule.

Although the judge was correct in applying a *Boeing* Category 1(b)[12] balancing analysis, her application of that test yielded the wrong result. In several recent decisions, we have found that the business justifications underlying "nondisparagement" rules similar to the language at issue here outweighed any adverse impact on Section 7 rights. See, e.g., *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 4–5 (2021); *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132, slip op. at 5–7 (2020).

The same result should prevail here. Although, as the judge found, the rule against "detrimental" messages might adversely affect Section 7 activity, the Respondent's legitimate interests in preserving its reputation and goodwill and the standing of its employees outweigh that potential impact. Thus, consistent with our recent treatment of analogous reputation-preserving rules, we reverse the judge and dismiss the allegation that by maintaining this blogging rule, the Respondent violated Section 8(a)(1).

4. Findings related to outside solicitation and distribution rule

The Respondent also maintained a Non-Solicitation/Distribution rule that regulated, among other things, solicitation and distribution requests from third parties. In relevant part, the rule stated as follows:

> Requests from outside people or organizations to sell merchandise, solicit contributions, distribute literature, arrange displays, or use Company facilities should be referred to the Human Resources Representative.

In finding this rule unlawful, the judge again applied the *Boeing* Category 1(b) balancing test. In this, she erred. The above-quoted language would not reasonably be construed as restricting Section 7 rights. On its face, the rule applies only to solicitation and distribution of literature by "outside people or organizations." Under long-settled precedent, such persons or entities have no Section 7 right to access the Respondent's premises in the first place, except in circumstances inapplicable here where a union otherwise would have no reasonable means of communicating with the employees or the employer has allowed access to other nonemployees for similar activities. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). In fact, the Respondent would have been within its rights to bar such third-party solicitation and distribution altogether. See, e.g., *UPMC*, 368 NLRB No. 2, slip op. at 2–5 (2019). Since Section 7 grants rights to

[11] We do not pass on whether Kostew's favorable assignment could amount to an independent 8(a)(1) violation based on a theory other than the one on which the General Counsel relied.

[12] The Board clarified its *Boeing* categories in *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. 2–3 (2019).

employees, not to nonemployees, a rule requiring requests from third parties for access to solicit or distribute literature to be referred to human resources does not implicate Section 7 rights. This rule, therefore, is properly classified as a *Boeing* Category 1(a) rule. Accordingly, we reverse the judge and dismiss the allegation that this rule violates Section 8(a)(1).[13]

5. Findings related to signature-block rule

Additionally, the Respondent maintained an email policy stating, in relevant part:

> Some casual personal use of the Company's e-mail and Internet connection is acceptable with prior approval provided that personal usage does not become excessive or interfere with the employee's productivity. Further, *an employee's company email address is to be used solely for work related correspondence only*. Personal email may be performed via an employer's third party ISP web mail or other means, so long as it does not interfere with the Company email or computer operations.
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> . . .
>
> The following non-inclusive list contains examples of inappropriate materials that should NOT be sent or received via e-mail or Internet Access:
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> . . .
>
> Customized signature lines containing personalized quotes, personal agendas, solicitations, etc., (only information pertaining to name, job title, and contact information should be included).

(Emphasis added.) The complaint alleged as unlawful the prohibition of customized signature lines.

The judge properly found that the Respondent has not violated Section 8(a)(1) by maintaining this rule, but she did so based on *Purple Communications, Inc.*, 361 NLRB 1050 (2014), which the Board subsequently overruled. Applying *Purple Communications*, the judge found the restriction on signature-block content lawful because the Respondent had not authorized employees to use its email for personal purposes. We agree with the General Counsel that the judge misapplied *Purple Communications*,[14] but this is water under the bridge in light of *Caesar's Entertainment d/b/a Rio All-Suites Hotel & Casino,* 368 NLRB No. 143 (2019), which overruled *Purple Communications*. Moreover, *Rio All-Suites* applies retroactively to all cases pending at the time that decision issued, including this one. Id., slip op. at 9.

In *Rio All-Suites*, we returned to the Board's prior holding, articulated in *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded 571 F.3d 53 (D.C. Cir. 2009), that employees have no statutory right to use an employer's email (or other equipment) for Section 7 purposes. *Rio All-Suites*, supra, slip op. at 1, 8. As a result, there is no longer a precedential basis for finding that employees had the right to include Section 7-related messages in their signature blocks. For that reason, the General Counsel, on cross-exceptions, withdrew his initial position. The General Counsel then argued, however, that the signature-block rule unlawfully discriminates against Section 7-protected messages because the Respondent allowed employees to use its email for limited personal purposes. This argument lacks merit for three reasons.

First, the rule in question does not permit *any* alteration of the signature-block wording, regardless of whether the email is for business or personal purposes. The rule, therefore, effectively precludes discrimination because the signature block must remain the same in all emails.

Second, the General Counsel cannot establish that the Respondent discriminatorily enforced its signature-block rule without showing that it has disparately treated Section 7-protected messages and messages of "a similar character." See *Register Guard*, supra at 1117–1119. The General Counsel has made no such showing.

Third, the General Counsel analogizes the rule against altering email signature blocks to a union insignia ban, but the analogy is inapt. Such insignia are typically pins, buttons, or stickers affixed to employees' work attire. In any event, however, the rule applies solely to emails sent on the Respondent's email system, and absent exceptional circumstances not relevant here, an employer has no obligation to permit employees to use its email system for Section 7 purposes. See *Rio All-Suites*, supra, slip op. at 1, 4–5, 6–8.

For these reasons, we affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by maintaining its signature-block rule.

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[13] Member Kaplan agrees with the judge that employees would reasonably read this rule to require them to refer to human resources any union request that they engage in solicitation or distribution on its behalf, but he agrees with his colleagues' ultimate conclusion that the Respondent did not violate Sec. 8(a)(1) by maintaining this rule. In his view, the rule's incidental interference with Sec. 7 rights is outweighed by the Respondent's legitimate justifications for a rule that generally protects its property from unapproved third-party intrusion. Thus, he believes the rule properly belongs in *Boeing* Category 1(b).

[14] As the General Counsel correctly notes in his cross-exceptions, the now-overruled *Purple Communications* presumption of employee access to the employer's email for Sec. 7 purposes was triggered if the employer had granted its employees access to company email for "any" purpose. See id. at 1054. Access to the employer's email for "personal" purposes was not necessary.

6. Ballot challenges

The judge directed that the seven challenged ballots cast by unlawfully discharged employees be counted. Her decision, however, did not explain why she so directed. To remedy that omission, we note that the Board has consistently found that challenges to ballots of wrongfully terminated employees should be overruled. See, e.g., *F.L. Smithe Machine Co*., 305 NLRB 1082, 1082 (1992), enfd. 995 F.2d 218 (3d Cir. 1993); *Sorenson Lighted Controls*, 286 NLRB 969, 987 (1987); *Crown Distributors*, *Inc.*, 210 NLRB 881, 892 (1974). The judge's direction, therefore, fully comported with Board precedent, and we affirm it.

7. Grounds for setting aside election

The judge also directed that if the revised tally of ballots after the challenged ballots are counted does not yield a union majority, the May 17 election should be set aside and a new election held. She based this decision on her findings that the following constituted objectionable conduct affecting the results of the election: (1) the Respondent's maintenance, during the critical period, of two unlawful work rules (Objection 14), (2) Courtney Kostew's remarks to employees the evening before the election, in which she urged them to vote against the Union (Objection 4),[15] and (3) the Respondent's failure to distribute the Notice of Election by email, as required by the stipulated election agreement (Objection 7). Having found that the work rules were lawfully maintained, we disagree with the judge's findings concerning Objection 14, but we affirm her findings regarding Objections 4 and 7.

In addition to this objectionable conduct, the Respondent committed two unfair labor practices during the critical period. Specifically, the judge found, and we have affirmed, that owner and CEO Saxe, in a conversation with employees Tupy and Glen on May 15, created the impression that he was surveilling the union activity of employee Jasmine Glick. She additionally found, and we have affirmed, that on May 15, Saxe also unlawfully solicited grievances from employee Prieto. These critical-period unfair labor practices, together with the critical-period objectionable conduct found above, clearly warrant setting aside the results of the first election and conducting a new one.[16] On this basis, we adopt the judge's recommendation that a second election be conducted if the revised tally, after the challenged ballots are counted, shows that the Union failed to obtain a majority of votes.

[15] The judge found, and we agree, that in making these remarks, Kostew was speaking as an agent of the Respondent under Sec. 2(13) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discharging employees Leigh-Ann Hill, Jasmine Glick, Taylor Bohannon, Alanzi Langstaff, Nathaniel Franco, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh, we shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay for the 10 above-listed employees 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). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate these individuals for their reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. And we shall order the Respondent to compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 28, 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 for each of them. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In addition, we shall order the Respondent to file with the Regional Director for Region 28 a copy of each employee's corresponding W-2 form(s) reflecting the backpay award.

Further, having found that the Respondent violated Section 8(a)(3) and (1) by reducing the work hours of Scott Tupy and Darnell Glen, we shall order the Respondent to make them whole for losses in pay and benefits sustained as a result of the unlawful reductions in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682

[16] In conditionally directing a new election, the judge declined to rely on events that occurred in the pre-critical period, including the mass discharges. While the Union excepted to this portion of the judge's decision, we find it unnecessary to pass on this issue.

(1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, in accordance with *AdvoServ,* supra, we shall order the Respondent to compensate employees Tupy and Glen for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 28, 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 for each employee. And we shall order the Respondent to file with the Regional Director for Region 28 a copy of each employee's corresponding W-2 form(s) reflecting the backpay award.

We also shall order the Respondent to remove from its files any references to the unlawful discharges of the 10 above-listed employees and the unlawful written discipline imposed on Scott Tupy and to notify them in writing that this has been done and that the unlawful discharges and discipline will not be used against them in any way.

In addition to the standard remedies for the Respondent's unfair labor practices, the judge recommended several enhanced remedies, including requiring the Respondent to post an "explanation of rights." Although this is an extraordinary remedy, in cases (like this one) involving egregious and pervasive unfair labor practices in response to employees' union activity, ordering the posting of an explanation of employee rights under the Act, with examples of unfair labor practices tailored to the violations the respondent has committed, ensures that employees are fully informed of their rights, mitigates the chilling effect of past unlawful conduct, and may help prevent further unlawful conduct. See, e.g., *Purple Communications, Inc.*, 370 NLRB No. 26, slip op. at 1 fn. 5, 57 & fn. 85 (2020); *HTH Corp.*, 361 NLRB 709, 714 (2014), petition for review granted in part on other grounds 823 F.3d 668 (D.C. Cir. 2016). Thus, in agreement with the judge's recommendation, we have attached an "explanation of rights" as Appendix B to the Order below.

The judge also recommended requiring the Notice to Employees to be read aloud to the assembled unit employees by a high-ranking responsible management official in the presence of a Board agent or, alternatively, that a Board agent read the notice aloud to employees in the presence of a high-ranking responsible management official. The Board has found a notice-reading remedy appropriate where the employer's violations are so numerous and serious that a reading of the notice is warranted to dissipate the chilling effect of the violations on employees' willingness to exercise their Section 7 rights. See, e.g., *Postal Service*, 339 NLRB 1162, 1163 (2003). The Respondent's egregious and pervasive unfair labor practices meet this standard. See, e.g., *Wismettac Asian Foods, Inc*., 370 NLRB No. 35, slip op. at 4, 53 (2020) (issuing notice-reading remedy where, among other violations, employer discriminatorily discharged and/or refused to rehire several employees); *Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 1 fn. 5, 8 (2020) (ordering notice reading to help remedy employer's multiple violations in response to union organizing campaign). Accordingly, to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a fair second election can be held, if necessary, we will order the remedial notice read aloud.[17]

Finally, the judge recommended that the Order contain a broad cease-and-desist provision. This remedy is appropriate when a respondent is shown to "have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). Both prongs of this standard are met here. First, the Respondent has demonstrated a proclivity to violate the Act. In *David Saxe Productions, LLC*, 364 NLRB No. 100 (2016),[18] the Board agreed with the judge's findings "that the Respondent[] violated Section 8(a)(1) . . . by prohibiting employees from engaging in protected concerted activity and disparaging employees, impliedly threatening them with discharge, and threatening them with unspecified reprisals because they engaged in protected concerted activity." Id., slip op. at 1. The Board also adopted the judge's conclusion "that the Respondent[] violated Section 8(a)(1) . . . by threatening that failure to cease engaging in protected activity would result in discharge." Id., slip op. at 2. Moreover, the numerous unfair labor practices found in this case and in the 2016 case amply demonstrate a general disregard for employees' fundamental Section 7 rights. Consequently, as the judge recommended, our Order includes a broad cease-and-desist provision.[19]

[17] Member Emanuel would not require the Respondent to publicly read the remedial notice. The violations, although serious, do not warrant such a remedy. See *Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 1 fn. 5 (2020) (Member Emanuel, dissenting); *Valley Health System, LLC, d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. at 6 fn. 19 (2020) (Member Emanuel, dissenting); *Postal Service*, supra, 339 NLRB at 1163.

[18] Enf. denied on other grounds and remanded 888 F.3d 1305 (D.C. Cir. 2018).

[19] For the reasons stated by the judge, we decline to issue a *Gissel* bargaining order mandating, without an election, that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative in a bargaining unit of nine warehouse technicians at its warehouse facility. See *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). In addition to the reasons stated by the judge, we note that the

ORDER

The National Labor Relations Board orders that the Respondent, David Saxe Productions, LLC and V Theater Group, LLC, Joint Employers, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against employees because of their support for the Union or because they have otherwise engaged in protected concerted activities.

(b) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(c) Threatening employees with unspecified reprisals for engaging in union or other protected concerted activities.

(d) Coercively interrogating employees about their own or other employees' union or other protected concerted activities.

(e) Soliciting employees' grievances or requests for improved terms and conditions of employment in order to discourage them from supporting the Union.

(f) Imposing more exacting terms and conditions of employment on employees because they engaged in union or other protected concerted activities.

(g) Giving employees a wage increase to discourage them from engaging in union or other protected concerted activities.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Leigh-Ann Hill, Jasmine Glick, Nathaniel Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Make Leigh-Ann Hill, Jasmine Glick, Nathaniel Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, Scott Leigh, Scott Tupy, and Darnell Glen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

Compensate Leigh-Ann Hill, Jasmine Glick, Nathaniel Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, Scott Leigh, Scott Tupy, and Darnell Glen for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, 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 for each of them.

File with the Regional Director for Region 28 a copy of each affected employee's corresponding W-2 form(s) reflecting his or her backpay award.

Within 14 days from the date of this Order, remove from its files any references to the unlawful terminations of Leigh-Ann Hill, Jasmine Glick, Nathaniel Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh, and the unlawful discipline of Scott Tupy, and within 3 days thereafter notify them in writing that this has been done and that the discharges and discipline will not be used against them in any way.

(f) 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 this Order.

(g) Post at its facilities in Las Vegas, Nevada, copies of the attached notice marked "Appendix A" and the attached explanation of rights marked "Appendix B."[20] Copies of

General Counsel does not except to the judge's refusal to recommend this extraordinary remedy. See *Big Ridge, Inc.*, 358 NLRB 1006, 1006 fn. 4 (2012) (explaining that a decision by the General Counsel not to except to a judge's denial of a *Gissel* order is a "factor[] weighing in favor of finding that traditional remedies are now sufficient to redress the effects of the Respondent's unfair labor practices"), reaffirmed and incorporated by reference in 361 NLRB 1372 (2014), enfd. 808 F.3d 705 (7th Cir. 2015). Additionally, we rely on the fact that we have reversed the judge in part and dismissed the complaint allegations challenging the handbook rules.

Finally, we decline the Union's request that the Board's order include a provision requiring the Respondent to make a video recording of its remedial notice and explanation of rights reading and to post such a video on YouTube.

[20] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices and explanation of rights must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices and explanation of rights must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices and explanation of rights may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices and explanations also applies to the

the notice and explanation of rights, on forms provided by the Regional Director for Region 28, 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, the notice and explanation of rights shall be distributed electronically, such as by email, posting on an intranet or 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 and explanation of rights are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice and explanation of rights to all current employees and former employees employed by the Respondent at its Las Vegas facilities at any time since January 10, 2018.

(h) Hold a meeting or meetings during working hours, scheduled to ensure the widest possible attendance of employees, at which the Notice to Employees attached as Appendix A will be read to the employees by a high-ranking responsible management official in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of a high-ranking responsible management official.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that Case 28–RC–219130 is severed from Cases 28–CA–219225, –223339, –223362, –223376, and –224119 and remanded to the Regional Director for Region 28 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 28 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the challenged ballots of Leigh-Ann Hill, Kevin Michaels, Jasmine Glick, Zachary Graham, Taylor Bohannon, Nathaniel Franco, and Alanzi Langstaff and issue a revised tally. If the revised tally of ballots shows that the Union received a majority of the eligible votes cast, the Regional Director shall issue a certification of representative. Alternatively, if the revised tally shows that the Union has not prevailed in the election, the election shall be set aside and a second election shall be conducted at such time as the Regional Director deems appropriate.

Dated, Washington, D.C. April 5, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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, read, 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 discipline, discharge, or otherwise discriminate against you because of your support for the Union or because you have otherwise engaged in protected concerted activities.

electronic distribution of the notice and explanation of rights if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice and explanation of rights 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."

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals for engaging in union or other protected concerted activities.

WE WILL NOT coercively interrogate you about your own or other employees' union or other protected concerted activities.

WE WILL NOT solicit grievances or requests for improved terms and conditions of employment from you to discourage you from supporting the Union.

WE WILL NOT impose more exacting terms and conditions of employment on you because you have engaged in union or other protected concerted activities.

WE WILL NOT give you a wage increase to discourage you from engaging in union or other protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Leigh-Ann Hill, Jasmine Glick, Nathaniel Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Leigh-Ann Hill, Jasmine Glick, Nathaniel Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest, and WE WILL also make them whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make Scott Tupy and Darnell Glen whole, with interest, for any loss of earnings and other benefits sustained as a result of our unlawful reduction of their work hours.

WE WILL compensate Leigh-Ann Hill, Jasmine Glick, Nathaniel Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, Scott Leigh, Scott Tupy, and Darnell Glen for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, 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 for each of them.

WE WILL file with the Regional Director for Region 28 a copy of each affected employee's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of the employees named above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful actions will not be used against any of them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the June 20, 2018 discipline issued to Scott Tupy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discipline will not be used against him in any way.

DAVID SAXE PRODUCTIONS, LLC AND V THEATER GROUP, LLC, JOINT EMPLOYERS

The Board's decision can be found at https://www.nlrb.gov/case/28-CA-219225 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.

APPENDIX B

EXPLANATION OF RIGHTS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Employees covered by the National Labor Relations Act have the right to join together to improve their wages and working conditions, including by organizing a union and bargaining collectively with their employer, and also the right to choose not to do so. This Explanation of Rights contains important information about your rights under this Federal law.

The National Labor Relations Board has ordered your employer, David Saxe Productions, LLC and V Theater Group, LLC, joint employers, to provide you with this Explanation of Rights to describe your rights and to provide examples of illegal behavior.

Under the National Labor Relations Act, you have the right to

- Organize a union to negotiate with your employer concerning your wages, hours, and working conditions.
- Discuss your wages, benefits, other terms and conditions of employment with your coworkers or Union representatives.
- Take action with one or more coworkers to improve your working conditions.
- Choose not to do any of these activities.

It is illegal for your employer to take any adverse action against you because you formed, joined, assisted, or supported the Union or any other labor organization, expressed support for unions in general, or took action with one or more coworkers to improve your working conditions, or to discourage you from doing so. Prohibited adverse actions include

discharge

discipline

reduction of work hours

imposition of more exacting terms and conditions of employment

It is also illegal for your employer to

- Threaten you with adverse consequences if you form, join, assist, or support a union.
- Coercively interrogate you about your union membership, activities or sympathies, or the union membership, activities or sympathies of other employees.
- Give you the impression that your union activities are under surveillance.
- Solicit grievances or requests for improved terms and conditions of employment from you to discourage you from supporting the Union.
- Implicitly promise you increased benefits for not engaging in union or other protected concerted activities.

Illegal conduct will not be permitted. The National Labor Relations Board enforces the Act by prosecuting violations. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within 6 months of the unlawful activity. You may contact the NLRB about a possible violation without your employer or anyone else being informed that you have done so. The NLRB will conduct an investigation of possible violations if a charge is filed. Charges may be filed by any person and need not be filed by the employee directly affected by the violation.

Sarah S. Demirok and *Rodolfo Martinez, Esqs.,* for the General Counsel.
Gregory J. Kamer and *Nicole Young, Esqs., (Kamer Zuker Abbott),* for the Respondent.
Caren P. Sencer, Lisl R. Soto and *Carolyn N .Cohen, Esqs. (Weinberg Roger & Rosenfeld, LLP),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case over the course of 22 days between September 11 and November 13, 2018, in Las Vegas, Nevada. The case was tried following the issuance of an order further consolidating cases, consolidated complaint, and notice of hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board on August 20, 2018. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by Charging Party International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL–CIO (Charging Party, the Union or Local 720), as well as on postelection objections filed by Charging Party.

The General Counsel alleges that admitted joint employer David Saxe Productions, LLC (Respondent DSP) and V Theater Group, LLC (Respondent V Theater) (collectively, Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act), inter alia, by discharging employees involved in an organizing campaign. The Union filed a petition for an election on April 26, 2018.[1] The Board conducted an election on May 17, pursuant to a Stipulated Election Agreement. The Union lost the election by a vote of 22 to 19. Seven ballots were cast by discriminatees in this matter, each of whom is alleged by the General Counsel to have been unlawfully discharged. On May 24, the Union filed 14 postelection objections, including one based on the discharges.

The General Counsel contends that Respondent alleged unlawful discharge of union adherents warrants the opening and counting of contested ballots cast by those individuals; it is alternately contended that additional objectionable conduct by Respondent warrants setting aside the election. The General Counsel also seeks, in a separate unit of employees, a *Gissel* bargaining order based on Respondent's alleged unlawful conduct. Respondent filed a timely answer to the complaint denying the commission of any wrongdoing.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and

[1] Unless otherwise noted, all dates herein refer to the year 2018.

to file posthearing briefs.[2] Posthearing briefs were filed by each party and have been carefully considered. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following.

Findings of Fact

I. Jurisdiction

Respondent engages in various aspects of providing live shows in Las Vegas, Nevada, and admittedly meets the Board's jurisdictional standards. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I additionally find that Local 720 Union is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. The Allegations

This case involves actions taken in response to organizing campaigns among two distinct groups of employees: theater department employees and warehouse workers employed by Respondent. The majority of allegations concern the former group, a number of whom Respondent discharged following the onset of their union organizing activity.

It is also alleged that Respondent retaliated against union adherents through various means, including issuing discipline, reducing work hours and promoting an antiunion employee, in each case, to discourage employees from engaging in union or other protected activity. Respondent's managers are also alleged to have committed various independent 8(a)(1) violations, including engaging in the surveillance of employees, creating the impression of surveillance, soliciting employee complaints and grievances, threatening employees with discharge and unspecified reprisals, interrogating employees and promulgating and maintaining unlawful rules.

Numerous of Respondent's actions—including the discharges—are alleged to constitute both unfair labor practices, as well as conduct that objectively interfered with the employees' exercise of free choice in the representation election. Accordingly, depending on the violations found, the appropriate remedy in this case may include an order that any wrongfully discharged employees' ballots be opened and counted and/or that a rerun election be conducted.[3]

The General Counsel also alleges that, following the mass discharge of theater department employees, Charging Party achieved majority status among a different group of (Respondent's warehouse technicians) under circumstances (including the discharge of a lead union adherent) rendering appropriate the issuance of a *Gissel* bargaining order.

III. Summary of Findings

As a general matter, I find that Respondent violated the Act as alleged, with certain exceptions discussed throughout this decision. With respect to the General Counsel's adverse action allegations, I find that Respondent unlawfully discharged 10 employees in response to union organizing; eight of these discharges occurred under the guise of a "restructuring." Because seven of the discharged employees subsequently voted subject to challenge at the representation election, I will recommend that the proceedings in Case 28–RC–219130 be severed and remanded to the Regional Director and that he be directed to open and count those ballots in the election held in that case and issue a revised tally of ballots. Should such revised tally of ballots show that a majority of the valid votes cast at the election were cast for the Charging Party, I will, by my order, recommend that Charging Party be certified.

I have also found merit to certain of Charging Party's objections (Objections 4, 7, and 14). In light of these findings, I will further recommend that, should the revised tally of ballots show that Union did not receive a majority of the ballots cast, the Regional Director shall set aside the election and conduct a new election. With respect to the General Counsel's request for a *Gissel* bargaining order with respect to Respondent's warehouse employees, I decline to recommend such an order, but rather determine that a notice reading and explanation of rights are sufficient to remedy Respondent's unfair labor practices.

IV. Sequestration Order

At the outset of trial, on a motion by the General Counsel, I issued a sequestration order pursuant to Rule 615 of the Federal Rules of Evidence. See *Unga Painting Corp.*, 237 NLRB 1306 (1978). This order, based on the Board's model *Greyhound* language,[4] provided that, with certain enumerated exceptions, "no witness may discuss with any other potential witnesses either the testimony that they have given or that they intend to give" and also that "counsel for a party may not in any manner, including the showing of transcripts, inform a witness about the contents of testimony given by a preceding witness without my express permission." (Tr. 7–9.) As the Board has observed, the practice of sequestering witnesses is preventative and intended ". . . to minimize fabrication and combinations to perjure as well as mere inaccuracy." *Unga Painting Corp.*, 237 NLRB at 1307.

The proper remedy for a violation of a sequestration order is a matter within the discretion of the trial court. See *United States v. Ortega-Chaves*, 687 F.2d 1086 (1982). In Board practice, the most common remedy for such a violation is to apply "stricter scrutiny of the tainted testimony," without striking the testimony of that witness. *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1149 (1994), enfd. 72 F.3d 780 (10th Cir. 1995). Nevertheless, violating a sequestration order "may warrant striking the tainted

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[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh. " for Respondent's Exhibit; "U Exh." for the Union's Exhibit; "Jt. Exh." for Joint Exhibit; "ALJ Exh." for administrative law judge exhibits; "GC Br. at for the General Counsel's post-hearing brief; "R. Br. at" for Respondent's post-hearing brief; and "U Br." for the Union's post-hearing brief.

[3] See, e.g., *Franklin Preparatory Academy*, 366 NLRB No. 67 (2018).

[4] See *Greyhound Lines*, 319 NLRB 554, 554 (1995) (adopting model statement to be used at the outset of a hearing where sequestration has been requested).

testimony if it can be demonstrated that a party was prejudiced by the violation of the rule." *Suburban Trails*, 326 NLRB 1250 fn. 1 (1998); see also *Gossen Co.*, 254 NLRB 339, 342–344 (1981).

During the course of the hearing, counsel for the General Counsel and Respondent's counsel each brought to my attention potential violations of this order. My conclusions regarding these allegations are set forth at pertinent sections of this decision. Where appropriate, I have applied stricter scrutiny to testimony I consider tainted by a particular violation; for the reasons stated herein, I decline to strike the testimony of any particular witness.

V. GENERAL FACTUAL BACKGROUND

The events underlying this case largely occurred at Respondent's Las Vegas showrooms (i.e., theaters)—the V Theater and the Saxe Theater—which are situated within a shopping arcade referred to as the "Miracle Mile shops." The V Theater is actually comprised of four separate showrooms, including three working theaters referred to as VI, V2, and V3, as well as a theater used as a dance studio and audition space. The Saxe Theater is located approximately 1,000 feet from the V Theater showrooms, and it is not uncommon for workers to be assigned to more than one showroom. (Tr. 54–56, 3428, 3439–3440.)

A. Respondent's Work Force

Respondent's theater operation employs ushers, box office employees, wardrobe employees, porters, stagehands, lighting technicians, and audio technicians. Lighting technicians (or "lighting techs") are responsible for operating consoles to create lighting effects during performances; they also run spotlights. Audio technicians ("audio techs") repair, maintain and program audio equipment, operate audio decks to play computer recorded tracks, as well as to control the sound levels during the show. They are also responsible for running monitors, which are used by performers to hear the playback from the stage. (Tr. 58–60, 1889, 1984–1985.)

Stagehands (sometimes referred to as "stage techs") are responsible for moving props onstage based on established cues, as well as setting props and equipment for shows, and removing props and equipment after shows. Each stagehand is assigned a designated set of cues or moves, called a "track" for the show to which they are assigned. Outside of performances, certain of Respondent's employees, referred to as "day crew," are responsible for general theater maintenance, including repairing and maintaining props and equipment. Stagehands who are assigned to work a show are sometimes also employed as day-crew employees. (Tr. 61–62, 93–94, 1022, 1143, 1515, 1741, 1974.)

Respondent also employs individuals at a separate headquarters/warehouse facility located approximately 15 minutes away from the theaters (the Oquendo facility). The warehouse portion of the building is the location of Respondent's maintenance and repair operation, where the warehouse technicians work. This building also contains a dance studio, a call center operation and various administrative operations, including employees performing accounting, legal, IT, sales, and marketing functions. (Tr. 78, 3545.)

B. Respondent's Officers, Managers, and Supervisors

1. Respondent's upper management team

Respondent's owner, president and CEO is David Saxe (Saxe). Until February 21, 2018, Saxe's second-in-charge was Production Manager Jason Pendergraft (Pendergraft), who was responsible for overseeing all technical production aspects of shows, including lights, sound, wardrobe, and stage. Around the same time that Respondent's theater employees began their organizing campaign, Respondent discharged Pendergraft for embezzlement and other transgressions. Following his departure, his managerial duties were absorbed by Production Coordinator Tiffany DeStefano (DeStefano), who had previously served as his assistant. Like several individuals working in Respondent's theater operation, DeStefano has a background in theater; since 2014, she has been performing in community theater, regularly auditions for roles, and is occasionally paid for her work. (Tr. 53–54, 137, 2759, 3427–3428, 3441–3442.)

Saxe and DeStefano, as well as other upper management and human resources employees, work a daytime schedule and are officed at the Oquendo facility, where they spend the majority of their time. Also working at the Oquendo facility is Respondent's human resources manager, Takeshia Carrigan (Carrigan). During the relevant time period, Office Manager Jasmine Hunt (Hunt) was in charge of supervising employees at the Oquendo facility, including warehouse employees. It appears that Hunt resigned in sometime between June and August. (Tr. 74–75, 77–79, 319, 708–709, 2174, 2565–2566, 2831–2834, 3646.)

2. Respondent's stage management team

The stagehands at the Saxe Theater are supervised by Stage Manager Thomas Estrada, Sr. (Estrada). Estrada is an admitted supervisor pursuant to Section 2(11) of the Act. Two other stage managers, Stephen Sojack (Sojack) and Dan Mecca (Mecca), are assigned to the V1 and V3 theaters, respectively. The General Counsel alleges, and Respondent denies, that Mecca and Sojack are supervisors under Section 2(11) of the Act.[5]

a. Facts

As a preliminary matter, Respondent's business records indicate that the duties admitted Estrada are essentially the same as those of Mecca and Sojack. They are each in charge of all aspects of a performance and ultimately responsible for the show's quality, as well as ensuring the safety of the performers and the stagehands. They are also responsible for assigning cues tracks to individual stagehands to perform during shows. There is no evidence, however, that these assignments are based on an independent evaluation of their skills and experience. During shows, the stage managers also serve as stagehands (i.e., setting, striking and moving props and set pieces). That said, as discussed infra, their assigned stagehand "track"—cue calling—is more complex and challenging than the other tracks, as it involves ordering stagehands when to perform individual tasks and relaying

[5] See GC Exh. 1(aq). Although both Mecca and Sojack are also alleged to be agents under Sec. 2(13) of the Act, the General Counsel makes no argument in support of these allegations; I therefore consider them abandoned.

information between the stagehands, lighting and sound techs, and the show's cast and band stage crew. (Tr. 781–783, 1648, 3165–3168, 3178–3180, 3195, 3203–3205, 3208–3209; GC Exh. 13.)

The General Counsel adduced no evidence that either Mecca or Sojack have ever hired, fired, transferred, suspended, recalled, promoted, or adjusted the grievances of, any employee. However, as DeStefano explained, when she is off-property during the evenings (when shows are actually performed), the stage managers are responsible for monitoring employee compliance with Respondent's policies and procedures, including attendance, job performance and safety standards, just as she would during the day. As she testified, they each also regularly recommended discipline for employees, and she typically follows those recommendations without conducting any independent investigation of the underlying events. (Tr. 73–76, 84, 627, 3164–3165, 3191.)

Stage managers, who have offices at the theaters, also perform certain non-stagehand duties outside of performances, including maintaining or "up keeping" the stage (i.e., maintaining show pieces, sets and props), making necessary repairs in the theater, keeping inventory, creating employee work schedules, designing cue tracks, interacting with the show's cast and or band and running rehearsals. Unlike stagehands, the stage managers attend "stage managers' meetings," which include the heads of the various departments (i.e., lighting, audio, wardrobe, etc.). (GC Exh. 13 at 5; Tr. 79, 226, 3194–3195, 3211, 3214).

b. Analysis

Section 2(11) of the Act defines "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
An individual need possess only one of the enumerated indicia of authority in order to be a statutory supervisor, so long as the exercise of such authority is carried out in the interest of the employer and requires the use of independent judgment. See *Sheraton Universal Hotel*, 350 NLRB 1114, 1115 (2007) (citations omitted). The burden of proving supervisory status rests with the party asserting it. See id. (citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001)).

The General Counsel argues that Mecca and Sojack are supervisors because they effectively recommend discipline. I agree. The authority to effectively recommend means that "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997). Thus, the Board will find supervisory status where the party asserting it proves, by the preponderance of the evidence, that an individual makes recommendations to discipline employees and that such recommendations are typically accepted by upper management without further investigation. See *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474–1475 (2004); *Progressive Transportation Services*, 340 NLRB 1044 (2003); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003).

This, DeStefano admitted, is precisely what occurs at Respondent's theaters, which are essentially left in the stage managers' hands following her pre-show departure each day. Indeed, she was unequivocal that, in issuing discipline, she regularly relied upon the recommendations of Sojack and Mecca without conducting any independent investigation before doing so. Sojack and Mecca's supervisory status is corroborated by secondary indicia; both managers attend "stage manager meetings" and maintain offices at the theaters. Thus, Respondent treats and holds them out to others as supervisors. As such, I find that Sojack and Mecca are each supervisors within the meaning of Section 2(11) of the Act.[6]

C. Respondent's "Camera Culture"

By Saxe's own admission, approximately 140 cameras are located throughout the theaters, and an additional 60–70 additional cameras operate throughout the Oquendo facility. As Hill testified, other than a few, selected spots such as bathrooms and changing areas, "[t]here wasn't a single spot that you could go to in the theater where you wouldn't be seen on a camera. . . ." The cameras record events and also send live streams to video monitors in Saxe's office, which allows him to observe hundreds of separate feeds at any given time in order to observe show productions, as well as the employee conduct. Both he and DeStefano are also able to monitor the feeds through a smart phone application. Certain of the cameras installed throughout Respondent's facilities have microphones and capture audio, although Respondent's witnesses claimed that the audio they record is very difficult to discern. The cameras have been in place for several years, and there is no allegation that they were installed for the purpose of surveilling employees' union or other protected conduct. (Tr. 80–83, 420, 591–593, 596, 601–602, 606–607, 1035–1038, 1297–1299, 1365, 1784–1787, 2413–2414, 2467, 3498–3501, 3636.)

D. Respondent's Disciplinary Practices

As Carrigan explained, Respondent employs a progressive discipline system, whereby an employee is issued an increasing level of discipline for an infraction of the same sort. In other words, to progress through the steps (verbal warning, written warning, final written warning, suspension and discharge), an employee must commit the same type of offense (i.e., attendance, cell phone use, etc.). Respondent elicited testimony from several employees that they believed, despite this progressive discipline system, that Saxe was in the habit of firing people arbitrarily or on a whim and without warning or progressive discipline. (R. Exh. 64, Tr. 1321–1323, 1554, 1715–1716, 2853–

[6] I do not find, as urged by the General Counsel, that Sojack and Mecca's supervisory status is also established by their assignment of work or direction of stagehands during shows. There is simply no evidence that these functions involve a degree of discretion that rises above the routine or clerical. See *Lynwood Manor*, 350 NLRB 489, 490 (2007); see also *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003) (lack of evidence is construed against the party asserting supervisory status).

2854.) I give only limited weight to this testimony, however, because it appeared largely subjective and without foundation.

E. Pendergraft's departure and DeStefano's ascension in February 2018

Complicating the facts of this case is the management upheaval that occurred close in time to the onset of the union organizing. As production manager, Pendergraft had been responsible for overseeing all the technical production aspects of shows, including supervising the theater employees. Respondent contends that, in addition to embezzling from Respondent and engaging in other misconduct, Pendergraft also shielded underperforming employees from receiving discipline, in some cases, directly in contravention of Saxe's directives. (Tr. 257–258, 295, 302–303, 3441–3443.)

Within a day or two of Pendergraft's discharge, Saxe informed DeStefano that she was to take over his duties. Thus, in mid-February, she became responsible for supervising all of Respondent's stagehands, audio and lighting techs, spotlight operators and wardrobe employees. As Saxe admitted, however, DeStefano had actually, if unofficially, taken over some of Pendergraft's job responsibilities prior to his discharge, and, by early February, was consulting directly with Saxe and Carrigan about how to run the department. The starkest example of this took place on February 6, 2018, when she sent Carrigan a series of three emails in which she ranked Respondent's audio techs, stagehands and day crew employees, respectively, according to their "reliability, attitudes, etc." (R. Exh. 36; Tr. 258, 319, 2775–2776, 3467–3468, 3472.)

DeStefano's rankings (which occurred prior to Respondent's first knowledge of the organizing campaign, are illuminating in their own right. Among the 21 stagehands, she gave relatively high rankings to three of the employees who would be discharged approximately 6 weeks later (second, fifth and seventh). Of the 5 day-crew employees, she ranked two additional future dischargees second and third. (R. Exhs. 30, 31; GC Exh. 84.)

RESPONDENT'S ALLEGED UNLAWFUL HANDBOOK RULES

Respondent maintains certain written handbook policies challenged by the General Counsel as overly broad and discriminatory. See GC Exh. 1(am) at ¶ 5(b). Until approximately September 2017, the handbooks were issued to new hires in hard copy; after that time, they were made available to employees via Respondent's intranet-based payroll system, Paycom. According to Carrigan's unrebutted testimony, no employee has ever been disciplined as a result of any of these policies. Neither Carrigan, nor any other witness, testified as to Respondent's business purpose or other rationale for implementing any of the rules. (GC Exh. 99; Tr. 2254–2255, 2883–2884, 2926–2928.)

A. Restrictions on Employee Blogging [Compl. ¶ 5(b)(2)]

1. Facts

Respondent's handbook policy titled, "Blogging" states in relevant part:

> Blogging by employees, whether using V Theater Group, LLC's property and systems or personal computer systems, is also subject to the terms and restrictions set forth in this Policy. Limited and occasional use of V Theater Group's systems to engage in blogging is acceptable, provided that it is done in a professional and responsible manner, does not otherwise violate V Theater Group's policy, is not detrimental to V Theater Group's best interests[.]
>
> . . . .
>
> Employees shall not engage in any blogging that may harm or tarnish the image, reputation and/or goodwill of V Theater Group, LLC and/or any of its employees. Employees are also prohibited from making any discriminatory, disparaging, defamatory or harassing comments when blogging[.]

(GC Exh. 99 at 27–28, 75.)

2. Analysis

Section 7 provides employees with the right to self-organization and collective bargaining, as well as the right to act together for their mutual aid or protection. These rights have long been interpreted to "necessarily encompass[] the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). This includes employee communications regarding their terms and conditions of employment. *Central Hardware Co. v. NLRB,* 407 U.S. 539, 542–543 (1972)*; Parexel International, LLC,* 356 NLRB 516, 518 (2011) (citing *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996)).

The lawfulness under Section 8(a)(1) of a facially neutral rule, such as Respondent's "blogging" policy, is evaluated based on the balancing test announced in *Boeing Company,* 365 NLRB No. 154 (2017). Under this test, it must first be determined whether the rule is one that the employees would reasonably interpret as "potentially interfer[ing] with the exercise of NLRA rights." If the answer to that question is affirmative, the Board will next evaluate whether the "nature and extent of the potential impact on NLRA rights" outweighs any "legitimate justifications associated with" the rule. Id. at 3–4 and 16.

As a preliminary matter, I find that employees would reasonably interpret the policy restricting communications—via "blog"—that would be detrimental to their employer's "best interest" or that may "harm or tarnish" its "image, reputation and/or goodwill" as forbidding communications that amount to the exercise of core Section 7 rights, such as advocating for their right to collectively bargain with Respondent. Respondent essentially argues that its rule would be reasonably understood by employees merely to require "professional" and "civil" blogging, a form of restriction considered in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), and characterized by the *Boeing* Board as a lawful "Category 1" rule under its new test. I disagree.

While portions of Respondent's prohibition arguably target "uncivil" conduct (i.e., discriminatory or harassing comments), unlike the *William Beaumont* rule, the blogging restriction by its terms captures civil and protected Section 7 conduct, such as blogging criticism of Respondent's labor policies. See *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (unlawful to ban "derogatory attacks" on employer representatives; such prohibition necessarily encompasses protected conduct "such as an assertion that an employer overworks or underpays its

employees"), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990). Thus, violations of the purported "civil blogging" rule would include an employee blogging politely yet publicly, in a manner that discredits and embarrasses Respondent by accusing it of committing unfair labor practices. For example, no matter how politely or civilly an employee blogged an accusation that Respondent was engaging in rampant unfair labor practices, she would reasonably understand herself to be in violation of the rule.

The next inquiry is to evaluate whether the "nature and extent of the potential impact on NLRA rights" outweighs any "legitimate justifications associated with" the rule. In this regard, Respondent—by its posthearing brief—argues that the blogging restrictions were "designed to protect employees from unlawful harassment and discrimination" and "other harmful comments." (R. Br. at 98.) The problem with this defense is obvious: while protecting employees from harassment and discrimination are laudable goals, they are in no way served by a rule banning communications that "detrimental" or "tarnishing" to Respondent's own interests. Because the rule so squarely disallows civil, courteous blogging that the Act protects, I find that it cannot be rationalized on the grounds offered by Respondent.

Accordingly, I conclude that the rule set forth at paragraph 5(b)(2) of the complaint is unlawful under the *Boeing* balancing test.

B. Email and Electronic Communications Policy [Compl. ¶ 5(b)(1)]

The General Counsel also alleges Respondent have violated the Act by barring employees from customizing their signature blocks on their company-provided email accounts. I disagree.

1. Facts

Respondent maintains an "acceptable use" policy regarding employee use of company-provided computer equipment and systems. This policy provides that:

> Some casual personal use of the Company's e-mail and Internet connection is acceptable with prior approval provided that personal usage does not become excessive or interfere with the employee's productivity. Further, *an employee's company email address is to be used solely for work related correspondence only*. Personal email may be performed via an employer's third party ISP web mail or other means, so long as it does not interfere with the Company email or computer operations.

(GC Exh. 99 at 25, 72) (emphasis added).

This policy also states, in relevant part:

> The following non-inclusive list contains examples of inappropriate materials that should NOT be sent or received via e-mail or Internet Access:
>
> . . .
>
> - Customized signature lines containing personalized quotes, personal agendas, solicitations, etc., (only information pertaining to name, job title, and contact information should be included).

2. Analysis

The General Counsel contends that Respondent's ban on customized email signature blocks is unlawful pursuant to the Board's recently announced *Purple Communications* presumption. It is further argued that, separate from this presumption, the ban is discriminatory, because it singles out "the display of messages or insignia, including protected ones . . ." (GC Br. at 96.) I disagree.

By its *Purple Communications* decision, the Board overruled its prior ruling in *Register Guard,*[7] and established a new presumption used to evaluate an employer's restriction of employees' use of its email system. See 361 NLRB 1050, 1063 (2014). The Board's decision was based, in part, on its acknowledgement of the central role email has taken on as workplace communication mechanism. Id. at 1057 ("[i]n many workplaces, email has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations") (citation omitted). Under the *Purple Communications* standard, the Board presumes that employees who have been granted access to their employer's email system in the course of their work have a right to use that system for statutorily protected Section 7 communications during their nonworking time. An employer may rebut this presumption by demonstrating that its email restriction on employees' rights is justified by "special circumstances" necessary to maintain production and discipline. Id. at 1063.

I find that Respondent's restriction on customized email signatures does not violate the Act. It is true that an employee's including a slogan to her work-provided email signature block certainly constitutes "use" of that employer's system for purposes of applying the *Purple Communications* presumption. See *California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB 504, 516 (2014) (customizing company-provided email signature to include commentary on or criticism of employer constitutes conduct protected by Sec. 7 of the Act). However, the threshold for the *Purple Communications* presumption to apply is that the employer has authorized employees to use their company email addresses to send personal messages, which Respondent has not. For the same reason, I reject the General Counsel's contention that Respondent's restriction is discriminatory in nature; Respondent has effectively inoculated itself from such a claim by flatly prohibiting employees' personal use of the company-provided email system.

As such, I recommend that the allegation stated in paragraph 5(b)(1) of the complaint be dismissed.

F. Non-solicitation/Distribution Policy [Compl. ¶ 5(b)(3)]

1. Facts

Respondent also maintains a Non-Solicitation/Distribution policy, which includes various prohibitions on employee conduct and further states that both solicitation and distribution by non-employees on Respondent's premises is prohibited at all

[7] 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB,* 571 F.3d 53 (D.C. Cir. 2009).

times. The policy also contains the following language:

> Requests from outside people or organizations to sell merchandise, solicit contributions, distribute literature, arrange displays, or use Company facilities should be referred to the Human Resources Representative.

(GC Exh. 99 at 31–32, 79–80.)

2. Analysis

It is well established that employees have a right to solicit during non-working time and distribute literature during non-working time in non-working areas. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). The Board's decision in *Boeing* does nothing to disturb this longstanding precedent, "which already strikes a balance between employee rights and employer interests." See *UPMC*, 366 NLRB No. 142, slip op. at 1 fn. 5 (2018). As the General Counsel correctly states, it is also unlawful for an employer to require its employees to report, or obtain permission for, engaging in solicitation or distribution during non-working time. *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1005–1006 (2003); *Teletech Holdings, Inc.*, 333 NLRB 402 (2001); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992); *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

The Board has long recognized that an employer's request that employees report contact with outside union organizers are unlawful, in that it has the potential dual effect of encouraging employees to report the identity of union solicitors and of correspondingly discouraging union solicitors in their protected organizational activities. *W. F. Hall Printing Co.*, 250 NLRB 803 (1980); see also *C.O.W. Industries,* 276 NLRB 960 (1985); *J. H. Block & Co.*, 247 NLRB 262 (1980).

Respondent, which offers no justification for its "referral" requirement, assert that it is merely a lawful restriction on the conduct of outside organizations and therefore has no adverse impact on employees' Section 7 conduct. I find that this too narrow a reading. The requirement is contained within a broader non-solicitation/distribution policy that very clearly governs employee conduct and which also makes clear that Respondent has already banned solicitation and distribution by third parties on its premises. As such, an employee would reasonably understand the reporting requirement to mandate that they disclose any third-party (i.e., union) attempt to enlist them to solicit in order to sidestep Respondent's announced third-party ban. This would effectively dictate that an employee recruited as a union card solicitor inform Respondent's human resources of that fact or face discipline. Based on the Board's above-cited authority, I find this rule—for which Respondent offer no valid business justification—infringes on core employee organizational rights and is therefore abhorrent to the Act.

THE THEATER EMPLOYEES' UNION ORGANIZING CAMPAIGN

The organizing campaign that is the subject of this proceeding was initiated by a former member of Respondent's management team, David Devito (Devito). Devito happened to be close with two theater employees—Steve Urbanski (Urbanski), who was his roommate, and Nathanial Franco (Franco), his personal friend. In mid-February, Devito reached out (both online and offline) to them, as well as another employee, Zach Graham (Graham), and pitched them on the idea of meeting with representatives of the Union. (Tr. 117, 1282, 1284, 2262–2263.)

In mid-February, Urbanski, who is a current lighting tech, spoke with several of his coworkers, including stagehand and day-crew employee Leigh-Ann Hill (Hill). Devito then enlisted Hill to talk to the other stagehands about the Union. Approximately a week later, Hill spoke to approximately 10 stagehands, either in the theater's parking lot/smoke break area or in the theaters themselves. Spotlight operator Jasmine Glick (Glick) became involved; she spoke with at least five of her coworkers at the theaters, to see if they were interested in unionizing. (Tr. 1024–1025, 1368–1369, 1518, 2261.)

A. February 19: the Facebook Group Chat

Devito initiated a Facebook group chat on February 19, to which he electronically "invited" a number of Saxe employees, including Urbanski, Glick, Franco, Zachary Graham (Graham), Taylor Bohannan (Bohannan), to participate in the online discussion. DiVito used the chat format to encourage the employees to meet (in person) with representative of the Union, in order to organize for a contract and job security. On February 21, Devito invited Hill to the chat; she enthusiastically accepted, posting, "I'm pro union always!" Within minutes, Hill, in turn, added five more individuals to the chat. Fatefully, two of her invitees were Stage Manager Mecca and stagehand Courtney Kostew, who happened to be Stage Manager Estrada's girlfriend. This meant that they each gained access to the entire online discussion as of that date. Mecca admitted that, even though he did not accept the invitation, he was able to see the discussion, which piqued his interest.[8] As he explained, he saw a "few familiar names" and "kind of caught on that there was some drama happening . . ." and that the gist of the discussion was that employees were complaining about Respondent and "having issues." Notably, Mecca did not deny telling upper management what he had seen in the Facebook group chat. (Tr. 859–860, 889–890, 1027, 1203, 1284–1285, 1365, 1649, 1935, 3172–3173, 3184–3186; Jt. Exh. 2 at 1–4).

Two days later, one member of the group chat set up an online poll whereby employees could vote on the following question: "Vote to unionize [S]axe?" In response, Bohannan, Urbanski, Hill, Franco, Kostew, Graham, along with six other employees, voted "yes." The employees then discussed setting up a meeting with Local 720 representatives, and, at Bohannan's suggestion, decided that a representative from each sub-department of the theater (i.e., stage, lighting, sound, tech) should attend, as well as anyone else who was interested. Glick was selected to act as the "liason" to the lighting techs, and Urbanski the tech workers. Notably, Kostew hung back and gave another employee her "permission" to represent the stagehands. (Jt. Exh. 2 at 7–9, 15–17, 18; Tr. 1284–1285.)

The employees then planned to meet at 3:30 p.m. on March 1

[8] Mecca claimed that he was invited to the group chat by Devito, not Hill, but he was impeached by the transcript of the chat on this point. (Jt. Exh. 2.)

at “Elara,” a restaurant located near the theaters. The time and venue were chosen so that employees could get to work by 5 p.m. for that evening’s performance. (Id. at 21; Tr. 1204.)[9]

B. Theater management holds “policies and procedures” meetings

Beginning on February 12 and continuing through February 28, Pendergraft and DeStefano held small group meetings with the Saxe Theater stagehands, techs and wardrobe employees. Attendees were provided with a single-page handout entitled, “Policies and Procedures Meeting,” which included bullet points detailing various work requirements, such as abiding by schedules and call-out policies. The handout emphasized that management had an “open door policy” with respect to any issues affecting employees. (R. Exh. 7; Tr. 1344–1345, 2577.)

The bullet point handout closed with a warning that failure to abide by the various bulleted rules could result in disciplinary action, followed by the following message:

> Everything discussed in the meeting today is a good thing! Efficiency, teamwork, ownership, and accountability are a must, so we can all come to work and enjoy it! We have a lot of new projects coming in and we want a fun, positive work environment! Be proud of what you do and take pride in your work! Here’s to a fun and successful future!

(R. Exh. 7.) As one attendee described it, the general theme of the meeting was that management was intending to follow its policies and procedures, even if it had not done so in the past. (Tr. 1244.) Notably, there is no evidence of similar meetings having been held in the past.

DeStefano offered two explanations for these meetings being held: first, she testified that Pendergraft set them up in response to her concerns about employee policy violations; then, she claimed that there had been complaints about a certain employee’s hygiene, and the meeting was held as a pretext to communicate this single point without embarrassing that person. (Tr. 635, 2577.) As to was become a habit, DeStefano simply piled on too many innocent explanations for Respondent’s conduct; I find it significantly more likely that Respondent rolled out the meetings—reiterating work rules, reminding employees of the “open door policy,” and putting a positive spin on workplace morale— as an early preemptive response to a nascent organizing campaign.

C. Management Observes Zack Graham Handing Out Union Authorization Cards

Numerous witnesses, including Saxe and DeStefano, testified about the activity Respondent claims constituted its first notice of the organizing campaign. This was card soliciting activity by one of the original members of the organizing group—Graham—that was reported to Estrada. Specifically, a day-crew employee told told Estrada that he had observed Graham in the Saxe Theater parking garage (which serves as an employee break/smoking area) handing out union cards. After observing Graham himself, Estrada called DeStefano and reported the situation. DeStefano told him to leave Graham along and that she would “take care of it.” DeStefano then relayed Estrada’s report to Saxe, who concluded, “oh, no, maybe they are unionizing.” (Tr. 666, 697–698, 2614, 3473.)

While Respondent’s knowledge of Graham’s card soliciting is undisputed, DeStefano and Saxe insisted that Estrada only observed and reported it in early April (i.e., after Graham and other union adherents had been discharged). Inconveniently, however, both Estrada and the reporting day-crew employee credibly contradicted this, establishing that the event occurred earlier, in late February. I therefore do not credit the testimony of Saxe and DeStefano[10] and instead find that Graham was observed circulating union cards not following his discharge, in April, but rather *prior to* his discharge, in late February. (Tr. 994–995, 3101–3104.)

My conclusion is supported by further evidence that Graham’s card soliciting had come to management’s attention by late February/early March when he indirectly confronted an employee about it. On the occasion in question, Graham pitched future stagehand Alansi Langstaff (Langstaff) on the idea of signing a union card while they were walking out the theater doors to the parking garage/break area (i.e., the same place Estrada had earlier observed him passing out cards). Langstaff indicated he was willing to sign the card, and Graham referred him Glick to obtain one. During this exchange, Langstaff noticed Estrada observing them. When Graham walked away, Estrada and Langstaff reentered the theater; holding the door for Langstaff, Estrada told him, “I’d be careful being seen talking to [Graham] if I were you.” (Tr. 1825–1827, 1872.)[11] This statement is alleged by the General Counsel to constitute a threat, creation of the impression of surveillance and the promulgation and maintenance of an overly broad directive. See Compl. ¶ 5(c).

I agree with the General Counsel as to the first two, but not the third, allegation. There is little doubt that, considering the timing and context of Estrada’s comments, that a reasonable employee in Langstaff’s shoes would understand that his union activities had been observed and think twice about following through with his plan to sign a union card. *Q-1 Motor Express, Inc.*, 308 NLRB 1267, 1276 (1992) (supervisor’s statement that he knew union cards were being circulated and employee should “stay away” from employees involved constituted threat and impression of surveillance). In this regard, I note that Estrada’s warning indicated more than a general awareness of organizing activities, see, e.g., *National Hot Rod Assn.*, 368 NLRB No. 26, slip op. at 2 (2019); based on the sequence of events, what he

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[9] Originally, there was an abandoned effort to schedule the meeting for February 28, which explains why some witnesses testified that it was held that day. The online discussion, however, makes it clear that the meeting was rescheduled to March 1. (See Jt. Exh. 2.)

[10] While generally laid back and genial in his demeanor, Saxe appeared uncharacteristically focused on ‘sticking his landing’ when placing this event in April; DeStefano, for her part, oversold the narrative that Graham had been a former employee when he was observed, mentioning this fact multiple times.

[11] I credit Langstaff’s account. He clearly had a sharp recall of the interaction, and that he initially struggled to recall Estrada’s precise language in my view enhanced, rather than detracted from, his credibility. By contrast, Estrada’s denial was awkward and he appeared uncomfortable discussing conversations he may have had with Langstaff. (Tr. 843.)

imparted to Langstaff was that Graham in particular was a pro-union employee whose card soliciting was being monitored by management. As such, I find that Respondent, by Estrada, violated the Act as set forth in paragraphs 5(i) and (ii) of the complaint.

That said, I do not agree that Estrada promulgated an unlawful rule. As the Board has found, a remark such as Estrada's made to a single employee, does not constitute the promulgation of a rule of general applicability sufficient to violate the Act. *Food Services of America, Inc.*, 360 NLRB 1012, 1016 fn. 11 (2014) (no unlawful rule based on supervisor advising employee to stay away from recently discharged employee). Accordingly, I recommend that complaint paragraph ¶ 5(iii) be dismissed.

D. Organizing employees approach Stage Managers about the Union

During the last week of February, Glick also spoke with stage manager Dan Mecca and asked if he would be interested in attending the upcoming union meeting and "joining the campaign." Mecca responded that he did not want to get involved. In a pattern he was to repeat throughout his testimony, Mecca partially acknowledged such a conversation, claiming instead that he had received a text from Glick, asking him if he was interested in getting paid more at work, to which he responded that he did not want any part "of whatever's going on." (Tr. 1025–1027, 1118, 3175; Jt. Exh. 2 at 3.)

Stage Manager Sojack was approached by an employee about the campaign around the same time. On approximately February 26, stagehand Joshua Prieto (Prieto) approached Sojack backstage at the V Theater and asked what he thought of unions. Sojack responded that he believed that workers had the right to organize, and Prieto informed him that a group of Respondent's employees was going to meet with union representative.[12] Called as Respondent's witness, Sojack did not rebut this testimony, and further admitted that, at some point "during the spring," he became aware of the organizing campaign, when he overheard Prieto discussing the Union with audio tech Bryce Petty and stagehand Darnell Glen backstage discussing the Union and specifically mentioning "people they were talking to about organizing." (Tr. 1938–1941, 3202, 3235–3236.)

E. Events of March 1

As noted, the first, in-person organizing meeting was scheduled for 10:00 p.m. on March 1. Earlier in that day, however, drama ensued—both in the workplace and within the organizing group. The main players were employees Hill and Kostew, as well as DeStefano.

1. Hill complains to DeStefano about pay and working conditions

Hill was hired in mid-August and considered a talented and conscientious employee, as evidenced by DeStefano ranking her second of Respondent's day crew employees on February 5. As discussed, supra, Hill was an early, vocal, and enthusiastic supporter of the employees' organizing effort who reached out to over a dozen employees either in person or online regarding the Union. At the end of her shift on March 1, Hill approached DeStefano to ask for 2 days off so that she could work a 4–day "gig" for another employer (a relatively common occurrence at the theaters). She assured Stefano that she had already worked out coverage with other stagehands, to which to DeStefano stated that there was no problem with her request and instructed her to put it through Paycom (Respondent's online scheduling program). (Tr. 1022–1028, 3201; GC Exh. 84; R. Exh. 32; Jt. Exh. 2 at 1–4.)

Hill then told DeStefano that morale at the theaters was really low and that employees were unhappy with their pay. DeStefano responded by telling Hill to be patient and that improvements were coming. Hill became angry and, in a raised voice, peppered her complaints with salty language; for example, she referred to being underpaid as "bullshit" and "unfair." At this point, Respondent's Director of Operations Michael Moore (Moore) intervened, whereupon Hill apologized and left the office. (Tr. 675, 1027–1029, 1084–1086.)

DeStefano's version of the meeting was quite different. Hill, she claimed, did not merely request 2 days' leave, but rather announced that she was taking on another job that might conflict with her work schedule at the theater. Then, according to DeStefano, the two women had *another* conversation "a few days later" in which Hill, "in a complete rage," screamed at her. DeStefano could not recall if Hill complained about wages during this exchange, but she was careful to note that she "felt very cornered" by Hill and "did not want to be in there alone with her." Notably, Moore was not called by Respondent to corroborate any part of DeStefano's account. (Tr. (Tr. 325–326, 507–508, 675.)

I credit Hill's version of this exchange. She presented as an intense individual, but also very precise in relating events and not prone to embellishment. In response to efforts by Respondent's counsel to get her to admit that she resigned her employment during the meeting, she remained calm, factual and non-combative.[13]

2. Hill falls out with Kostew online

After leaving work, Hill logged on to the Facebook organizing chat, where she got into an online argument with Kostew. Essentially, Kostew accused Hill of being "good friends" with DeStefano and even suggested that Hill may have informed her about the group's organizing efforts. After multiple posts back and forth, Kostew announced to the group, "I'm tapping out to avoid further aggravation and unnecessary bullshit."[14] At hearing, she explained that she decided to part ways with the group because, in her words, "I needed to work . . . and didn't want to be involved anymore, risk losing my job." Kostew's concern

[12] Prieto testified as a current employee and was especially credible. He had a good memory for details, came across as balanced and not prone to exaggeration.

[13] That Hill did not tender her resignation on March 1 is further evidenced by a Facebook message she posted later that very night, in which she refers to resisting the temptation to quit and instead "hanging on" in the hopes of furthering the employees' organizing effort. (Jt. Exh. 2 at 26.)

[14] As Kostew's accusation appeared to be wholly fabricated, it is reasonable to infer that she contrived it as an excuse to bow out of the online discussion while simultaneously deflecting attention from her own connection to Estrada.

about losing her job in fact resulted from a conversation she had had with Estrada, in which he warned her that supporting the Union might result in mass discharges. As she later admitted to Prieto:

> I was all about it but I think I'm gonna tap out. [Estrada] said the other few times there have been union possibilities everyone involved was fired and I really cannot afford to lose this job.

On March 2, Hill removed Kostew from the group chat. (Tr. 859, 872–873, 876–877, 1029–1032; GC Exh. 58; Jt. Exh. 2.)

3. The union meeting and notice to management

On the night of the first, in-person organizing meeting (March 1), Graham dropped by the theater and spoke with Estrada about the campaign and the benefits of unionizing. Estrada's response was blunt: he said he was not interested. I credit Graham's account; Estrada, who described Graham as his personal friend, nonetheless denied ever discussing the union campaign with him. (Tr. 820.) While I found Estrada at times to be a credible (if forgetful) witness, this particular denial was noticeably forced and awkward and I do not credit it.

Approximately 10 employees attended the first organizing meeting, including Urbanski, Graham, Bohannon and Glick, as well as Devito and two Local 720 representatives. The group discussed a plan for the Union to represent various departments (i.e., lighting, sound, stage) at the theatres. Following the meeting, Prieto told Sojack about it, Sojack asked how it had gone, and Prieto relayed what the union representatives had said to the employees. (Tr. 1204, 1367–1368, 1650–1651, 1938–1941, 1979, 2264.) I credit Prieto as to this conversation, whose testimony went undenied by Sojack.[15]

RESPONDENT'S INITIAL RESPONSE TO EMPLOYEE ORGANIZING

The General Counsel alleges that, during March, Respondent undertook certain unlawful actions in response to the organizing activity, including: discharging Hill; soliciting stagehands to work at the Saxe Theater on the same night as a second, in-person organizing meeting was scheduled; granting employees a retroactive, across-the-board wage increase; interrogating employees; and making coercive statements.

A. Hill's March 2 Discharge [Compl. ¶ 5(f)]

1. Factual background

March 2 was to be Hill's last day of employment. According to DeStefano, she called Saxe that day and informed him about her confrontation with Hill, and they decided to discharge her. The decision, she testified, was based on Hill reporting to her that she had chosen to take on outside work and was refusing to commit to scheduling that work around her hours at the theater. Saxe initially testified that he was not involved in the decision to discharge Hill, but he later switched his story to jibe with that of DeStefano. DeStefano also claimed that she consulted with Carrigan about the rationale for discharging Hill. This Carrigan flatly denied, twice testifying that the only person she spoke with about discharging Hill was Saxe himself, who ordered her to inform Hill that she was being "terminated for restructuring and for retaining other employment," which she did. (Tr. 87, 94–98, 322, 675–676, 719, 1032–1033, 2111.)

DeStefano and Saxe offered multiple reasons to justify Hill's discharge—she had been a problem employee "for quite some time," "constantly violated policies," was "not a good worker," and was lazy ("almost never working"). They further claimed to have considered discharging her months earlier, insisting (as was to become a common theme in explaining the timing of Respondent's discharge decisions). This storyline, however, was significantly undercut by Hill's direct supervisor, Stage Manager Sojack, who testified that, far from displaying performance issues, Hill "performed well" and was "conscientious." (Tr. 98–99, 325–327, 3201, 3480–3481.)

Hill's discharge documentation, a form Respondent refer to as a "PAF" (i.e., "personnel action form"), was not completed until 3 days following her discharge and makes no specific mention of her inability to commit to her schedule. Instead, under the form's section entitled, "Termination Reason," it simply states, "Violation of Company policies, poor attitude." On the day Carrigan approved the PAF, she emailed DeStefano that she "needed statements" from her regarding Hill, because she had "nothing on her" except that she had a "bad attitude" and was "rude." In response, DeStefano forwarded a lengthy diatribe recounting Hill's alleged history of misdeeds; she also used this occasion to explain the dearth of prior documentation on Hill, claiming that, under Pendergraft's reign, she had not been allowed to inform Carrigan regarding Hill's performance problems and moreover had "never been able to document" them. The result, she lamented, was that Hill "on paper seemed like the perfect employee." (GC Exhs. 17, 18; Tr. 2064, 2113.)

After receiving a trial subpoena that sought, inter alia, Hill's discharge paperwork, DeStefano made a last-minute effort to shore up the rationale for her discharge. As Carrigan testified, she observed DeStefano, during the process of gathering documents responsive to the subpoena, add a handwritten entry to Hill's discharge PAF in the "termination reason" section, so that, after the "poor attitude" entry, it then stated, "+ secondary employment." (GC Exh. 78; Tr. 2124–2127.)

2. Hill's alleged sequestration order violations

After I issued the sequestration order, several discriminatees then present in the courtroom were excused pursuant to the order, whereupon a number of them, including Hill,[16] set out for a more enjoyable venue—the Fremont Casino and Bar in Downtown Las Vegas (the Fremont). While at the Fremont event, it appears that discriminatee Hill engaged in some "smack talk" about her old nemesis, Kostew, in the presence of several others, recounting the online argument she had with Kostew the night before she was discharged. She and Michaels also reminisced about a prior incident regarding Kostew in January. Respondent urges me to apply stricter scrutiny to the testimony of Hill, and the other employees present, based on this.

I decline to do so. I do not find that the general gossip among

[15] Prieto testified as a current employee and was especially credible. He had a good memory for details, came across as balanced and not prone to exaggeration.

[16] According to the General Counsel, this group consisted of discriminatees S'uapaia, Michaels, Franco, Graham, Glenn, Gasca, Bohannon, Glick, Hill, and Langstaff. (Tr. 771.)

employees regarding the historical animosity between Kostew and Hill, tainted any witness' testimony on a relevant fact in dispute in this matter, such that it could have prejudiced Respondent, nor has Respondent identified any such testimony. There is no dispute that the two women did not get along, and their online argument is set forth in a joint exhibit of the parties. As such, I decline to find that the discussion at the Fremont event regarding Kostew and Hill's falling out violated the protective order in any meaningful way.

3. Analysis

The complaint, at paragraph 5(f), alleges that Respondent discharged Hill based on her protected, concerted activities in violation of Section 8(a)(3) and (1) of the Act. Specifically, it is contended that, around March 1, Hill concertedly complained about employees' working conditions by informing DeStefano that Respondent's employees were unhappy with their pay, and that Respondent was additionally aware that Hill was an open and active participant in the organizing campaign. (See GC Exh. 1(am) ¶ 5(a), (f).) I find, as discussed, infra, that the General Counsel has established, by a preponderance of the evidence, that Respondent did in fact discharge Hill in retaliation for her union and other protected, concerted activities.

a. The statutory framework

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in union activities and "concerted activities for the purpose . . . of mutual aid or protection." The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Concerted activity includes activity that is engaged in with or on the authority of other employees, but also activity where an individual employee brings truly group complaints to the attention of management. See *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

The applicable framework for cases that turn on employer motivation, such as this one, was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that framework, the General Counsel must prove by a preponderance of the evidence that an employee's protected concerted activity was a motivating factor (in whole or in part) for the employer's adverse employment action. This burden is typically met by showing the employee engaged in protected activity, employer knowledge of that activity, and animus on the part of the employer towards protected activity. *Cayuga Medical Center*, 366 NLRB No. 170, slip op. at 1 and 30 fn. 1 (2017); *Dish Network*, 363 NLRB No. 141, slip op. at 1 fn. 1 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014). Proof of such unlawful motivation may be based on direct evidence or may be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed.Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 26–27 (2018), and cases cited therein. In this regard, it is not sufficient for the employer merely to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Instead, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun International,* 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998); see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting employer's claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

That said, under the *Wright Line* framework, as part of his initial showing, the General Counsel may also offer proof that the employer's reasons for the personnel decision were pretextual. *Con-Way Freight, Inc.*, 366 NLRB No. 183, slip op. at 2–3 (2018) (citing *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003)); *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119, fn. 11 (1997)). Indeed, where the employer's proffered reason is shown to be pretextual, "the factfinder may not only properly infer that there is some other motive, but 'that the motive is one that the employer desires to conceal—an unlawful motive. . . .'" Id. (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (citation omitted); see also *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Rood Trucking*, 342 NLRB 895, 898 (2004); *Golden State Foods*, 340 NLRB 382, 385 (2003); *Hays Corp.*, 334 NLRB 48, 49 (2001); *Frank Black Mechanical Services*, 271 NLRB 1302, 1302 fn. 2 (1984); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

b. Hill's discharge violated Section 8(a)(3) *and* (1) *of the Act*

For the following reasons, I find that the General Counsel has met his initial burden of establishing that Hill's union and other concerted conduct were substantial or motivating factors for Respondent's decision to suspend her, and additionally find that the reason proffered by Respondent for Hill's discharge is pretextual and therefore Respondent cannot demonstrate that it would have discharged Hill absent her protected conduct.

The General Counsel has established a prima facie case with respect to Hill. Her protected conduct took two forms: first, on the day prior to her discharge, she sounded off to DeStefano about the theater employees' low morale and dissatisfaction with

their wages; second, she—along with several other future discriminatees—engaged in substantial union organizing activities, both at the theater and online. As Hill's enthusiastic approach to organizing led her to grant Mecca access to the employees' online organizing group chat, Respondent was also on notice that she was one of the group chat's initial members.[17] Circumstantial evidence further supports a finding that Respondent were aware of Hill's pro-union stance; indeed, Respondent's characterization of Hill as a "problem employee," considering her high ranking by DeStefano and praise from Sojack, suggests that this was a veiled reference to her union conduct. See *Hertz Corp.*, 184 NLRB 445, 446 (1970) (manager's characterization of employee as "troublemaker" could only have referred to her suspected union activities given that she was considered one of the best employees), enfd. 449 F.2d 711, 714 (5th Cir. 1971); see also *Smithfield Foods, Inc*., 347 NLRB 1266, 1274 (2006) (supervisor's statement that employee was a "problem person" was a veiled reference to employee's union activity); *Diversified Bank Installations, Inc*., 324 NLRB 457, 471–472 (1997) (president's statement that employee caused "problems" or "trouble" was a euphemism for union activity).

I also find that the General Counsel has proven that Respondent harbored animus toward Hill's protected activity. Her original discharge paperwork (before DeStefano added a reference to "secondary employment") simply stated, "Violation of Company policies, poor attitude." As the Board has recognized, references to an employee's "attitude" may function as euphemism for her union activity. See, e.g., *Blue Star Services*, 328 NLRB 638, 639 (1999) (term "bad attitude" constitutes code for union activities); *Schaumburg Hyundai*, 318 NLRB 449, 458 (1995) (owner's statement that employee did "not work well with his team and had a bad attitude" was a euphemism for union animus); *Boyer Ford Trucks, Inc.*, 254 NLRB 1389, 1395 (1981) (statements by owner and manager that employee was discharged for a "bad attitude" and being a "disruptive influence" were euphemisms or code words for union activity). As the facts of this case make clear, Hill—like the majority of dischargees—was explicitly referred to as having problems with their "attitude," leading me to believe that this term functioned as a reference for holding a prounion stance.

An employer's improper motivation may also be inferred from several factors, including the timing between an employee's protected activities and the discharge. Indeed, "timing alone may suggest antiunion animus as a motivating factor in an employer's action." *Cell Agricultural Mfg. Co.*, 311 NLRB 1228, 1232 (1993); *Trader Horn*, supra; *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984); *Sawyer of Napa*, 300 NLRB 131, 150 (1990). Such is the case here. That Hill, who was considered a good performer and conscientious worker, was summarily discharged 1 day after complaining to DeStefano about employees' morale and wages to is "stunningly obvious" timing, *NLRB v. Long Island Airport Limousine Service*, 468 F.2d 292, 295 (2d Cir. 1972), providing substantial evidence of antiunion motivation. *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995); *Knoxville Distribution Co.*, 298 NLRB 688, 696 (1990).

Animus may also be inferred based on an employer providing pretextual and/or shifting reasons given for a discharge. Here, Respondent's scramble to prop up its decision to discharge Hill with shifting and unsupported explanations strongly indicates an unlawful motive and is also highly suggestive of pretext. Carrigan informed Hill that she was being terminated for "restructuring" and failed to mention her alleged outside employment in her discharge PAF, which DeStefano attempted to cure by doctoring the form before producing it to the government. See *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27–28, and cases cited there (employer's shifting, false, or exaggerated reasons for an adverse action are evidence of unlawful motive); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (finding that "an employer's shifting explanation for a discharge, or . . . its post hoc attempt to rationalize such a decision, are suggestive of a pretext"). Then, at hearing, Respondent's witnesses gratuitously piled on the previously well-regarded (and highly ranked) Hill, labeling her as lazy and claiming that her performance had suffered for some time before her discharge. See *Con-Way Freight, Inc.*, 366 NLRB No. 183, slip op. at 3 (finding pretext based on unsupported claim in termination documents that employee "did not work well with customers and others"); *Harrison Steel Castings Co.*, 262 NLRB 450, 479 (1982) (finding that employer's defense "bore all the trappings of pretext" where it involved "exaggeration, implausibility, and contradiction"), enfd. in relevant part 728 F.2d 831 (7th Cir. 1984).

Having found that the General Counsel has proven that Hill's concerted conduct and union activity were motivating factors for her discharge, the burden shifts to Respondent to offer a legitimate, nondiscriminatory explanation for its conduct. Moreover, given the General Counsel's strong showing of unlawful motivation, Respondent's rebuttal burden is "substantial." *A.S.V. Inc. a/k/a Terex*, 366 NLRB No. 162, slip op. at 1 fn. 4 (2018); *Vemco, Inc.*, 304 NLRB 911, 912 (1991). Respondent missed the mark widely. As indicated earlier, I simply do not credit DeStefano's testimony that Hill declared herself unable to adhere to her work schedule. Rather, I believe that DeStefano and Saxe fictionalized this account based on Hill's request (made the same day as her tirade about low pay and bad morale) to take a few days off. This conclusion is supported by DeStefano and Carrigan's belated effort to paper up their "outside work" rationale and even to add "+ outside work" to Hill's PAF before producing it to the General Counsel. Taken together with Respondent's outsized focus on Hill's "attitude" problem, the timing of the discharge decision, as well as the piling on of additional, unsupported reasons for Hill's discharge urges a finding that Respondent's proffered defense is pretextual; it has thus failed by definition to show that it would have suspended Hill absent her union and other protected conduct.

Accordingly, I find that Respondent discharged Hill based on her union and other protected, concerted conduct, in violation of Section 8(a)(3) and (1) of the Act.

B. Fallout from Hill's Discharge and Estrada's Threat to End

[17] As Mecca did not deny telling upper management about the group chat, I impute his knowledge to Respondent. See *State Plaza, Inc.*, 347 NLRB 755, 757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001).

the Union Campaign

Shortly following her discharge, Hill posted to the Facebook chat, "David [S]axe has restructured my position effective immediately." She encouraged the group to keep up the organizing effort and deleted Stage Manager Mecca from the group (meaning that, from that point on, he could not access any new posts). Hill's discharge appears to have spurred the group into high gear. Less than a minute after Hill removed Mecca, Graham posted, "perhaps we should act sooner rather than later" and the employees began discussing the logistics of gathering authorization cards. (Jt. Exh. 2 at 30–32.)

Approximately 10 days following Hill's discharge, Estrada let at least one employee know that he was onto the group's activities. On March 10 or 11, stagehand Prieto ran across Estrada as they both entered the Saxe Theater parking garage/smoking area; as they exited the stage doors to the break area, Estrada bluntly stated that he was "going to put to an end to this union shit." This testimony by long-term, current employee Prieto was detailed and credible. He had a good memory for dates and details, was cooperative on cross-examination and did not present as prone to exaggeration; Estrada denied making the remark, but appeared extremely agitated whenever questioned on the subject, leading me to believe it struck a nerve. (Tr. 821–824, 843, 845, 1569, 1943–1944, 3114, 3137.)

C. March 13–14: Saxe Solicits Employees to Work the Same Night as the Second Organizing Meeting [Compl. ¶ 6(s)]

1. Factual background

The second, in-person organizing meeting was scheduled to take place on March 13 after the evening's show was over (at approximately 10:30 p.m.) at a local restaurant/bar about 10 minutes away from the theaters. Two days before the meeting, Prieto tried to get Kostew back in the fold, texting her that there was going to be a "vote or ballot thing" about the Union on the night in question. Kostew demurred, claiming that she was still worried about getting fired and about her dispute with Hill. The following day, Prieto invited Sojack to attend the meeting; according to Prieto, Sojack indicated that he might go (he did not). (Tr. 1206, 1370, 1650–1651, 1938–1941, 2406–2407; GC Exh. 58.)

On the 13th, Saxe held a production meeting, which was attended by Saxe, DeStefano, members of Respondent's production team, as well as Stage Managers Sojack, Mecca, and Estrada,[18] which, as noted, was highly unusual. At this meeting, Saxe ordered that there would be a "work call" at the Saxe Theater following that evening's performance to perform repairs on the Saxe Theater stage. (A "work call" is an announcement that workers are needed to perform a specific project outside of a performance, such as cleaning, painting or repairs). Saxe himself is usually not involved in planning work calls, but rather leaves this task to Estrada or DeStefano. (Tr. 78–79, 102, 204–205, 226–227, 361–362, 494–495, 1207, 1371, 3214–3215.)

At 11:25 a.m., Kostew announced the work call via a group text message to eight theater employees, stating, "Hey guys, [Estrada's] in a production meeting and asked me to send out a group text . . ." She then continued, "[T]o anyone who wants to get hours and stay tonight and Bondo[19] the stage, here's your heads up. David Saxe wants us to do that tonight so feel free to volunteer." In addition to her initial group message, she called and texted individual employees about the work call. That night, Estrada encouraged employees to stay after the show for the work call, and Kostew even tried to talk S'uapaia, who was off duty and actually an audience member that night, into remaining for the work call. (He declined and in fact ended up at the union meeting). (GC Exh. 59; Tr. 1459–1462, 1521.)

Repairing the stage had been an ongoing project and the subject of at least 2 prior work calls, the last one held a month earlier. As such, Respondent's witnesses testified that the timing of the March 13 work call was simply a continuation of that project and wholly unrelated to the fact that the employees had planned to meet that night. Once again, Pendergraft was invoked, with Saxe claiming that he had ignored a prior directive to get the repairs completed. Following Pendergraft's departure, Saxe testified, he received reports of dancers suffering injuries due to the stage being uneven and rough. As was usually the case, DeStefano offered an alternate, more dramatic version: during the February 13 production meeting, she testified, Dance Captain Alejandro Domingo (Domingo) unexpectedly appeared to complain that the stage was still uneven. (Tr. 2749–2750, 3242–3543.)

Although not alleged as such, Respondent's scheduling the work call to overlap with the already scheduled union meeting operated as a de facto poll of employees' union sympathies by "outing" union adherents, including future dischargees Graham, Michaels, Glick, S'uapaia, Franco and Bohannon, who each opted for the meeting in lieu of working call. Indeed, events suggest that management was acutely aware of which employees were refusing the call. Notably, Graham visited the Saxe Theater shortly before the second in-person organizing meeting, in an effort to convince workers to attend. When he arrived, the last-minute work call was underway, and two of those he tried to recruit were Estrada[20] and Kostew. Declining, Estrada cited the work call. Later, another employee, Michaels told Estrada he was leaving the work call early because he had "something to do"; Estrada responded by giving him a surprised look and saying "oh." (Tr. 1207, 1286, 1300, 1521–1523, 1655–1656, 1947, 1979.)

2. The March 13 work call did not violate Section 8(a)(3) of the Act

The General Counsel alleges that, by announcing (through Kostew) that a voluntary work call would take place on the same night as the employees' second in-person organizing meeting, Respondent violated Section 8(a)(3) of the Act. I do not agree.

[18] Sojack placed Estrada at the meeting, and I do not credit Estrada's testimony that he did not attend; based on his demeanor, I find that, as was often the case, he simply attempted to edit himself out of significant events underlying this case.

[19] "Bondo" is an automotive body filler and a brand name used by 3M for a line of American-made products for automotive, marine and household repairs. See https://www.3m.com/3M/en_US/bondo-us/. Respondent's plan was apparently to use it to fill in cracks and gaps in the stage's surface. (Tr. 894.)

[20] I again credit Graham, finding Estrada's denial again awkward and forced.

As the Board recently reminded, under *Wright Line*, a finding of discriminatory conduct under Section 8(a)(3) requires a predicate determination that an employer took an adverse action, that is, changed—for the worse—a "'legally cognizable term or condition of employment . . .'" See *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 3, fn. 3 (2018) (citing *Bellagio, LLC*, 362 NLRB 1426, 1427–1428 (2015), and *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006)), enf. denied 854 F.3d 703, 709–710 (D.C. Cir. 2017)). Here, there is ample evidence that Respondent, aware that a union meeting was to be held the night of March 13, deliberately placed employees in a position of having to decide (openly) between attending or responding to the work call. That said, there is no evidence that Respondent actually directed any employee to perform the task of repairing the stage. Thus, there is no predicate for a violation under Section 8(a)(3). Compare *Tufo Wholesale Dairy, Inc.*, 320 NLRB 896, 903 (1996) (finding 8(a)(1) violation where employer purposely scheduled a mandatory meeting to prevent employees from attending a union meeting). I therefore recommend that paragraph 6(s) of the complaint be dismissed.[21]

D. March 14: as Employees Attend the Second Meeting Saxe Grants a Retroactive, Across-the-Board Wage Increase [Compl. ¶ 6(r)]

1. Factual background

Shortly after midnight on March 14, while most of the theater employees were either repairing the Saxe Theater stage or attending the second organizing meeting, Saxe sent an email to his head of payroll, Delois Fonder (Fonder). He listed 19 theater employees (as well as 14 employees from the theaters' wardrobe department), accompanied by an old and new pay rate for each, stating, "please pay the following people on THIS payroll (so their new rate went in last week . . ." Later the same day (at 10:57 a.m., he emailed Fonder another list of employees with a new rate for each; this time, he added names of warehouse and telemarketing employees. Carrigan, as directed, implemented the wage increase retroactively, so that employees received, in their next paycheck, an increase effective March 5. Based on her testimony, it appears that she was so rushed that Respondent actually incurred a monetary penalty in to order to implement Saxe's second request. (Tr. 211–212, 758, 761; GC Exh. 15,16, 97.)

On either the 14th or the 15th, Hardin and DeStefano assembled the Saxe theater stagehands (as well as wardrobe employees) for a meeting before that evening's show and announced that the employees would each receive a $2 per hour wage increase. Notably, Estrada testified that he had been given no notice, prior to the night of the announcement, that a wage increase was in the works. As he testified, "it was crazy" and "happened all at once…" (Tr. 831–832, 833, 1828–1829, 1834.)

At hearing, Saxe struggled to explain the timing of the pay raise, and his testimony on this subject was markedly evasive. Eventually, he settled on a familiar account: Pendergraft was to blame, as he had been paying his employee-friends (whom Saxe identified as Hill, Devito, and a day crew lead named Jordan Rodrigo) at a higher rate than others. According to Saxe, he had "conversations" with Pendergraft about this issue in January "and probably before" and instructed him to "fix" the situation by standardizing employees' wages. As he later admitted, however, Pendergraft had in fact submitted a proposal (in December 2017) that would have standardized wages by compressing the range of hourly rates for theater department employees, but Saxe did not act on it at that time. (Tr. 206–208, 3471, 3494–3497, 3619–3620; R. Exh. 76.) Ultimately, Saxe failed to explain why it took nearly a month after Pendergraft's departure to implement the pay raise, how an across-the-board $2 increase acted to "standardize" employees' wages or why it was necessary to grant a raise to warehouse and box office employees, over whom Pendergraft, during his tenure, had no authority.

Carrigan's testimony further muddied Respondent's storyline; she testified that she, along with former Vice President of Operations Karlo Pizarro (Pizarro), had been charged since October or November 2017 with conducting a review of Respondent's pay standards in various departments, with an eye towards standardizing them. Despite this, there is no indication that Saxe consulted with either her or Pizarro before implementing his wage increase. Further complicating things, it appears that, approximately a week prior to the wage increase, Saxe was also considering switching the theater employees' pay from an hourly to a "per-show" rate. (Tr. 755–756; GC Exh. 13, 98.) Thus, it appears that, prior to March 2019, Saxe may have been vaguely considering different ways of reformulating Respondent's pay structure and had settled on none of them.

2. Saxe's retroactive wage increase violated Section 8(a)(3) of the Act

By its posthearing brief, the General Counsel argues that, by granting employees a wage increase on the night of the second, in-person organizing meeting, Respondent unlawfully granted a benefit to interfere with employees' protected activity, a violation of Section 8(a)(3) of the Act. I agree.

It is well established that an employer may dissuade employees' protected conduct by means more subtle than taking action directly against their immediate interests. As the Supreme Court has explained, "well-timed increases in benefits" serve to remind employees of their employer's economic leverage over them and may therefore be violative of the Act. See *NLRB v. Exchange Parts*, 375 U.S. 405, 460 (1964). Where such conduct is asserted to have violated Section 8(a)(3), the Board employs its *Wright Line* analysis. See, e.g., *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 4 fn. 9 (2016); *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961–962 (2004). Thus, it must be determined whether the record evidence as a whole, including any proffered legitimate reason for the wage increase, supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with such conduct. See, e.g., *Royal Manor Convalescent Hospital, 322 NLRB 354, 361 (1996)*, enfd. mem. 141 F.3d 1178 (9th Cir. 1998). Where an employer grants benefits during an organizing campaign without showing a legitimate business reason, the Board will infer such a motive. *Vista Del Sol*

[21] I note that the work call was not alleged to constitute an independent violation of Sec. 8(a)(1) as either an unlawful poll or a favorable conduct reasonably calculated to impinge upon employees' freedom of choice for or against unionization.

Healthcare, supra; *ManorCare Health Service-Easton*, 356 NLRB 202, 222 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011).

Such an inference is wholly appropriate here. First, there is ample evidence that, when Saxe decided to increase employees' wages, Respondent was aware that theater employees were organizing in support of the Union. A few examples of such knowledge:

- Stage Manager Mecca gained access to the employees' Facebook organizing group chat on February 21, in which employees openly expressed pro-union sentiments, planned their organizing strategy, planned in-person meetings and "voted" in a poll to unionize Respondent's theaters;
- In late February, Estrada observed and reported to upper management that Graham was circulating union cards, causing Saxe to conclude "they're unionizing";
- Shortly afterwards, Estrada attempted to derail Graham's card solicitation efforts by warning Langstaff to stay away from him after the latter had agreed to sign a card;
- In late February, pro-union employees approached Mecca and Sojack and attempted to pitch them on the benefits of unionization;
- Throughout February, Respondent rolled out unprecedented "open door" meetings in which employees were reminded about workplace rules and management encouraged "teamwork" and a "positive work environment"; and
- Two to three days before the wage increase was announced, Estrada was overheard threatening to "put an end to this union shit."

In the face of this evidence, I find the blanket denials of knowledge by Saxe and DeStefano to lack credence and conclude that Respondent granted employees a retroactive, across-the-board pay increase while aware of an actual organizing campaign by the theater employees.

Second, the evidence strongly supports an inference that the organizing campaign was in fact what motivated Respondent's decision to increase wages. As was the case with Hill's discharge, I rely on the relatively "astonishing timing" of Saxe's decision to raise employees' wages. See *Fiber Products*, 314 NLRB 1169, 1186 (1994). Two weeks earlier, Hill had reported to DeStefano that morale was low and, specifically, that employees were unhappy with their wages. While Saxe had previously tinkered with the idea of reformulating Respondent's pay structure, the idea of a retroactive, across-the-board $2 per-hour increase came out of the blue on the very night that a sizable group of employees opted out of Respondent's last-minute work call in order to attend the second, in-person organizing meeting, a meeting to which Estrada had been explicitly invited. As such, the record suggests that, having determined that the organizing campaign had survived Hill's discharge, Saxe trotted out a "carrot" to remind the employees of his economic power over them.

Respondent claims that the wage increase had been in the works for months—as part of an effort to "standardize" wages—but this position does not withstand scrutiny. Indeed, Saxe had failed to act on Pendergraft's December 2017 proposal to do just that, and according to Carrigan, had commissioned her to study the issue. Then, rather than consult with her on her progress, Saxe instead rushed through a retroactive, across-the-board $2 per-hour increase that, by definition, failed to standardize anything.[22] Thus, Respondent failed to offer a credible explanation for the unexpected, unprecedented and, in Estrada's estimation, "crazy" decision to increase employees' wages. See *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 4 fn. 9 (2016) (timing of increase permitted an inference of unlawful motive, and employer failed to establish that the decision to grant wage increases had been made in the absence of union's presence); *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961–962 (2004) (unscheduled pay raise during union organizing campaign violated Sec. 8(a)(3) when employer failed to offer a credible explanation for the timing of pay raise).

Based on the foregoing, I find that the March wage increase, made retroactive to March 5, violated Section 8(a)(3) of the Act as alleged in complaint paragraph 6(r).

E. Mid-March: Mecca Questions Stagehand Darnell Glen About the Second Organizing Meeting and Estrada tells stagehands that he has lined up replacements for them

1. Mecca's questioning of Glen

A few days after the second union organizing meeting, Stage Manager Mecca approached Glen working backstage at the V3 Theater and asked him whether he "knew anything about this union meeting." Glen replied that, yes, he had attended the recent meeting, and was wondering if Mecca was interested in attending one. Mecca responded that he wanted no part of the Union, because he had had a bad experience with it in the past. Mecca denied this conversation or ever discussing the Union with Glen. (Tr. 1892–1893, 3175–3176.)

Mecca's remarks are alleged by the General Counsel as an unlawful interrogation about employees' union activities in violation of Section 8(a)(1).[23] I agree. In *Rossmore House*, the Board eschewed a per se approach and held that "an employer's questioning of open and active union members about their union sentiments, in the absence of threats or promises [did not] necessarily" interfere with, restrain, or coerce employees in violation of Section 8(a)(1) of the Act. Instead, the Board stated, each case would be determined on its facts. Factors to be considered included the background, the nature of the information sought, the identity of the questioner and the place and method of the

[22] Respondent alternately claims that the wage increase was motivated by economic necessity, but the record contains no evidence that this was the case.

[23] On October 3, 2018, counsel for the General Counsel successfully moved to amend the complaint to add this allegation. (See Tr. 1931–1932.)

interrogation. 269 NLRB 1176, 1177–1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).

As a preliminary matter, I credit Glen's account of the conversation over that of Mecca.[24] I further find that Mecca's question went to the heart of Glen's involvement in a core protected activity (attending a union meeting). That said, as the General Counsel concedes, several factors (including Mecca's relatively low-level of supervisory authority, the everyday workplace setting and Glen's unhalting—and honest—reply) argue against a finding of coercion. Moreover, the record indicates that, at the time Mecca questioned him, Glen was an open union supporter.[25] Were Mecca's questioning limited to Glen's own union activities, this circumstances may well dictate a finding of no coercion, but this is not the case.

Instead of merely asking if Glen had attended the meeting, Mecca probed whether he knew "anything" about the meeting, implicitly calling on Glen to disclose what had occurred at that meeting, which would in turn reveal other employees' attendance and participation. This latter aspect of Mecca's inquiry—seeking information about the union activities of other employees—rendered his questioning coercive and unlawful. Thus, even assuming that Glen was an open union supporter at the time of their discussion, Board law does not countenance Mecca's attempt to elicit from Glen information regarding the union activities of his coworkers; I therefore find that, under all the circumstances, Mecca's question would reasonably tend to restrain, coerce or interfere with statutory rights, and therefore constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act. See *Valley Special Needs Program, Inc.*, 314 NLRB 903, 912 (1994) (asking open union supporter about union activities of other employees coercive) (citations omitted); see also *Prineville Stud Co.*, 227 NLRB 1845, 1848 (1977) (unlawful for manager to ask employee if he "knew anything about a union meeting," even where employee responded honestly). I therefore find that Mecca's questioning of Glen constituted an unlawful interrogation as alleged.

2. Estrada's remarks to stagehands [Compl. ¶ 5(d)]

The General Counsel also asserts that, at some point in March, Estrada violated Section 8(a)(1) of the Act by telling an assembled group of stagehands that he was "tired of hearing their complaints" and had "15 people lined up ready to take your jobs." (Tr. 1525–1526, 1560.) By Estrada's first comment, it is alleged, Respondent promulgated and maintained an overly broad directive or rule not to engage in protected concerted activities. His second remark, it is alleged, constituted an unlawful threat.

Only one employee—Michaels—testified in support of these allegations, which were denied by Estrada. I found Estrada's denial as to having made such comments somewhat coached; however, even crediting Michaels, I do not find merit to these allegations. As Michaels himself explained, Estrada's remarks were made in direct response to complaints made by certain stagehands that other stagehands were lazy and slacking off at work; there was no showing, however, that any these complaints were concerted in nature. See *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3 (2019) (concerted activity does not include griping or activities of a purely personal nature that do not envision group action) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). Given the context, I believe that a reasonable employee would take Estrada's remarks as a benign directive to stop in-fighting between employees, as opposed to a directive not to engage in protected conduct, or a threat of discharge for doing so, and therefore find the evidence is insufficient to sustain a violation. See *Alliance Rubber Co.*, 286 NLRB 645, 657 (1987) (no violation where foreman's comments were susceptible of two interpretations, only one of which involving protected conduct, particularly in view of the context in which the statement was made). I will therefore recommend that paragraph 5(d) of the complaint be dismissed.

THE MARCH/APRIL MASS DISCHARGE ALLEGATIONS

While not coercive, Estrada's comment about replacing employees was certainly prescient. By the evening of March 19, Respondent had discharged union adherents Glick, Bohannon, Graham, Gasca, Langstaff, Franco, and S'uapaia, and additionally determined to discharge an additional employee, Michaels (who would be actually terminated weeks later, after a replacement had been trained for his position). As DeStefano reported to Saxe that night, "[a]ll 7 have been completed." (GC Exh. 12.) At the heart of this case is the series of events and circumstances that led to these actions, which are alleged to violate Sections 8(a)(3) and (1) of the Act.

There was no historical precedent for a mass discharge in Respondent's ongoing theater operation.[26] Although Carrigan is usually charged with reviewing employee discipline (including discharge) for fairness and consistency among the work force, her role in the discharge decisions at issue was limited to processing paperwork and informing several of the individual dischargees that they were being fired. (Tr. 130–131, 677, 740, 742–744, 2830–2833, 2835–2836, 2929–2930.)

A. The Mass Discharge Decision

The plan to discharge a group of employees appears to have been formulated between March 14 and 15; as DeStefano testified, she discussed the idea with both Estrada and Saxe at that time. (Tr. 472.) At 4:24 p.m. on March 15, DeStefano texted Saxe as follows:

> I don't wanna bug you anymore tonight I'm almost home and I'll get started on emails if you need anything else please let me know

Minutes later, she added:

> And I hope deciding not to bother you earlier didn't cost me your trust in me. I thought it meant nothing. I promise I have

[24] Glen was a cooperative witness, who presented with the same low-key demeanor both on direct and cross-examination. While Mecca was generally also a cooperative, matter-of-fact witness, he appeared visibly uncomfortable when discussing this conversation.

[25] As discussed, supra, Glen was overheard by Sojack talking with other employees about their collective organizing effort; it is not clear, however, whether this occurred prior to Mecca's questioning.

[26] It does appear that, at some unspecified time, Respondent discharged a group of employees in connection with closing down an entire department. (Tr. 748–749.)

> no clue or involvement.
>
> I love this company and my job and I respect to more than you know and I adore you as a boss. And I hope you can still trust me.

(GC Exh. 3.) Given the events of the prior 2 weeks, DeStefano's denial of any "clue or involvement" (which went without any other credible explanation) suggest the very motive for which the actions on which she was about to "get started."[27]

DeStefano then proceeded to send Saxe a series of emails, each of which concerned an employee who would be discharged. Between 11:26 p.m. and 1:21 a.m., she sent emails about Glick, S'uapaia, Bohannon, Langstaff, Michaels, and Gasca. Notably, the most common theme in these emails was DeStefano's concern with various employees' "attitude" and the concern that it might "spread." Glick, for example, was "badmouthing the Company and people above her…" and was "a bit of a cancer around here with her attitude and mouth," which DeStefano worried would "spread[] to other employees." She voiced nearly identical concerns about Langstaff ("I am concerned with . . . his attitude spreading"); Michaels ("[h]is attitude has been the problem . . . I have a feeling that this is 'just the job' to him and the attitude bleeds into the others down there"); and Gasca ("he has once [sic] of the worst attitudes of anyone I ever worked with. Constantly complaining about his pay and his hours and all the times he has 'busted his ass' for this company with no appreciation . . . I cannot have that kind of behavior and attitude spreading and making other employees uncomfortable." In one of her emails, DeStefano appeared, in coded language, to disclose what had suddenly motivated Respondent to clean house: "[i]n trying to fix moral[e], I can't have people being rude toward management and doing what they want." (GC Exhs. 4–9.)

Saxe, throughout his testimony, conspicuously attempted to distance himself from the mass discharge decision, initially claiming that he had no idea what moved DeStefano to email him complaints about six employees on the same night. He then testified that he simply approved a list presented to him by DeStefano of "people she wanted to fire and why." Finally, he took a more proactive tack; casting himself as the conscientious executive, he claimed that he in fact had discussed the discharge decisions with DeStefano (and perhaps Estrada as well) and instructed DeStefano to document the reasons why she wanted to discharge certain employees. As he explained, he was concerned with having a "good reason" for each discharge—"[y]ou have to have write-ups or things in writing." That said, it does not appear that he actually read DeStefano's emails prior to the employees being discharged. (Tr. 89–93, 107–109, 119–120, 130–131, 136–137, 183–184, 261–268, 278–279, 2578.)

Integral to Respondent's defense is DeStefano's oft-repeated claim that Pendergraft's departure marked the first time she was ever granted the authority to discipline employees, or even to document their performance problems. Quite frankly, DeStefano oversold this storyline. Appearing at times to draw on her skills as a thespian, she recounted the horrors of working under Pendergraft, testifying that "it was a fight every day," that Pendergraft screamed at her "every time" she tried to do "anything" and—most relevant to Respondent's case—that she was effectively forbidden from documenting *any* issues she had with employees' performance. (Tr. 424, 2567, 2576; see also Tr. 2813 "It was [Pendergraft] who never let me do anything. I was a little puppy dog.")

Moreover, Respondent's own business records undercut her claims. For example, effective December 27, 2017, DeStefano issued a written warning to Bohannon over Pendergraft's express objection. Moreover, while DeStefano claimed that she was forced to "sneak around" to address employee issues ("I didn't want to get yelled at any more than I already was"), she also appears, at least by late January, to have engineered a "work around" whereby she was taking orders directly from Saxe and human resources without involving him and was also actively working to undermine him, suggesting to Carrigan that there was no need for both she and he to run the theater operation. (GC Exh. 32.) Based on this, it appears that, while DeStefano and Pendergraft had a somewhat dysfunctional professional relationship, I do not credit her claims that she was forbidden from creating the documentation that would typically precede any of the discharges at issue in this proceeding. Rather, I find that Pendergraft's supposed "gag order" on DeStefano was a mere contrivance designed to excuse the near complete lack of contemporaneous documentation of the dischargees' alleged misdeeds.

B. Individual Dischargees' Background Facts

As discussed in more detail, infra, Respondent claims that the decision to discharge seven employees in March and April was unrelated to their union organizing and instead grew out of a plan to "restructure" Respondent's theater operation. As Respondent's witnesses explained, however, employees were selected for deselection in this process based on their merits. Accordingly, what follows is a discussion of each dischargee's1. work history, as well as a summary of the events surrounding and/or relied on by Respondent for each discharge action.

1. Jasmine Glick

Jasmine Glick had a relatively long history with Respondent. She worked for a year starting in 2015, and then resigned for family reasons. After being rehired in April 2017, she was subsequently discharged in June 18, 2017, for excessive no-call/no-shows. Then, in September 2017, she was rehired once again. Her last position was lighting board operator and spotlight operator in both the Saxe Theater and V3 Theater. As noted, Glick was heavily involved in the organizing effort from its inception, was selected early on to act as the Union's "liason" to the lighting techs and engaged in workplace recruiting of numerous employees to join the effort. She made her support for the Union explicitly known to Stage Manager Mecca during the last week of February when she invited him to join the campaign. (Tr. 1025–1027, 1118, 1362, 1363, 1365, 1368–1369, 1421,1518, 3175; Jt. Exh. 2 at 15–17.)

DeStefano's first emailed discharge recommendation on March 15 pertained to Glick. Blaming Pendergraft for failing to

[27] Abandoning his typically insouciant manner, Saxe insisted that he understood DeStefano to refer to Pendergraft's transgressions, as opposed to the union organizing campaign; based on his demeanor, I discredit this testimony.

discipline Glick in the past, she reported that she was "lazy" and "a problem" and "constantly" on her cell phone. As noted, supra, however, the bulk of her recommendation focused on Glick's poor attitude, her "bad mouthing the company and people above her" and expressed the concern about "her attitude spreading to other employees . . ." (GC Exh. 4.) After returning home from work on March 17, Glick received a call from DeStefano, who told her that Respondent was "going to be going in a different direction with things, doing some restructuring" and hiring through a third party. According to Glick, she also mentioned that someone had been reviewing camera footage and that old policies had not been enforced. Confused, Glick said, "wait, so you're telling me I'm fired right now?" to which DeStefano replied, "yes, I'm sorry." During her testimony, Glick was adamant that DeStefano made no specific mention of her performance, tardiness, or cell phone usage.[28] During the next 2 days, she sent DeStefano three text messages asking why she had been fired, but she received no response. (Tr. 343, 1362, 1371–1372, 1383, 1424, 2699; GC Exh. 63.)

At hearing, Saxe and DeStefano were unsuccessful in settling on a single, coherent explanation as to why they discharged Glick. According to Saxe, there were no problems with Glick's performance in terms of how she ran the lights during shows. DeStefano appeared to agree, at least as of February 6, when she ranked the lighting department employees in order of "reliability, attitudes, etc."—she ranked Glick third of five employees (ahead of two employees who were not discharged in March). At hearing, however, DeStefano changed course, claiming that Glick did have "performance issues," had missed cues "plenty of times" and had even generated complaints from cast members, including a complaint that her missing cues was a safety concern. This safety complaint was not corroborated by any witness or documentary evidence. The record is similarly muddled as to the decisional process that led to Glick's discharge. According to Saxe, DeStefano reported that Glick had attendance problems, and was "just hanging out" at the theater when not on the clock. DeStefano, by contrast, claimed that, approximately a week before Glick's discharge, she told Saxe something quite different: that Glick was late to performances, "extremely disrespectful" and "on her phone constantly."[29] Notably, Estrada, who directly supervised Glick, testified that he had no knowledge as to why she was discharged and that he had never discussed her performance with DeStefano or Saxe. (GC Exh. 83; Jt. Exh. 1; Tr. 104–107, 341, 416–420, 824, 827, 2152–2154, 2693.)

Littered throughout Saxe and DeStefano's attempts to explain discharging Glick were references to her poor attitude. Indeed, despite taking no issue with Glick's technical performance, Saxe nonetheless claimed to have long considered her a "terrible employee" who was "insubordinate" and "immature" and who should not have been rehired after her first (June 2017) discharge. He further claimed that he only learned of her subsequent rehire in January 2018, at which point he and Pendergraft agreed that she would be discharged again, but this never occurred. I find Saxe's claims in this regard thoroughly implausible. Essentially, he would have me conclude that, despite the dozens of cameras throughout the theaters and his habit of monitoring them on a regular basis, he failed to notice Glick was still in his employ, despite the fact he was admittedly familiar with her appearance.[30] DeStefano also took particular issue with Glick's "attitude," describing her as "probably one of the rudest people I ever met in my life." This histrionic spin simply did not square with Glick in person, who came across as an intelligent and inquisitive person who was cooperative both on direct and cross-examination. (Tr. 105, 108–109, 340–342, 416–417, 420–421.)

Two days after Glick was discharged, Carrigan approved a PAF documenting the decision which referred to her "long history of insubordination and attitude" but made no mention of her supposed tardiness or safety complaints. As with several other discharged employees, Respondent engaged in an after-the-fact effort to "boost" the rationale for Glick's discharge. On April 10, DeStefano drafted a typewritten statement accusing Glick of having arrived late to work on "numerous occasions . . . causing the cast and crew to panic," a claim uncorroborated by any other witness. (According to Glick, she had in fact come to work late four times during the last month of her employment. Each time, however, she texted DeStefano and let her know.) DeStefano then listed four times Glick had arrived late in the final month of her employment. The statement also amplified her claims regarding Glick's cell phone usage, noting that, by using her cell phone, she "could" have missed cues and upset performers. The same day, DeStefano sent Carrigan an email in which she further attempted to "pad" the record regarding Glick's tardiness by detailing instances of her reporting late starting in January 2018. (GC Exh. 34 at 2; Tr. 81, 82, 1432–1433.)

2. Taylor Bohannon

Bohannon, an audio technician, was hired on November 1, 2017; along with several others to be discharged in March and April, she was among the group of workers Devito first invited to join his online organizing chat group. She "voted" in an online poll to unionize the theaters and devised the group's strategy of selecting a single "liason" employee from each department to recruit more people to join the campaign. She later attended both in-person organizing meetings, electing to skip the March 13 work call. (GC Exh. 6; Jt. Exh. 2 at 1–4, 7–9; Tr. 1204–1205, 1206–1207.)

Bohannon had received some minor discipline prior to her discharge. Around December 27, 2017, she received a written warning[31] for exceeding her scheduled breaktime and had also

[28] I found Glick to be credible. She appeared to listen carefully to questions, had a good recall of specifics and presented as a matter-of-fact, noncombative witness on cross-examination. Her boyfriend is current employee Darnell Glen, further lending to her credibility.

[29] Glick admitted to using her cell phone while at work and even during shows, as did numerous other employees. This problem was apparently so widespread that, on several occasions, management sent reminders to the theater workers about it. (Tr. 1453; R. Exhs. 8–11.)

[30] Saxe testified that, in 2017, he observed (on his video monitor) Glick and Glen at the theater engaged in intimacy while Glen was working. There is no evidence that Glick was disciplined for this, but it certainly demonstrates that Saxe could easily recognize her on his video feeds. (Tr. 168–170.)

[31] While Bohannan denied receiving any "written discipline" during her tenure with Respondent, I do not believe she understood this to

been verbally warned not to use her cell phone during a show, and not to hang out backstage during a work call. Overall, however, Bohannon was considered a competent, if inexperienced, audio tech. Indeed, DeStefano described her on March 1 as a "great audio tech," and 3 days later, stated, "show wise she is great." On March 17, DeStefano called Bohannon at 11:14 p.m. and left a voice mail. When Bohannon called her back the following day, DeStefano said she was sorry, but her position was going to be "terminated due to restructuring" based on how she had run a show. (Tr. 330–331, 1200, 1208–1209, 1214, 1238–1239, 2609–2610, 3170–3171; GC Exhs. 13, 19; R. Exh. 36.)

According to Saxe, he had received a call in late February or early March from Gerry McCambridge (McCambridge), the star of a show at the V Theater, who complained about Bohannon "ruining his show" by continuously messing up audio cues, and that the problem was so bad that he had been forced to run the audio for the show himself from a PowerPoint on his laptop. Respondent introduced an undated, handwritten note from Saxe to Carrigan purporting to be the notes of his telephone conversation with McCambridge. Following the telephone call, Saxe set about conducting "an investigation," which appears to have involved him speaking with two other performers with whom Bohannon had worked.[32] Neither of these individuals testified. DeStefano attempted to corroborate Saxe's claims, testifying that she was "shocked" to learn of the complaints, herself spoke with all three performers and "confirmed that it was true." (Tr. 110–111, 331, 3474, 3476–3477; R. Exh. 82.) I found this testimony particularly histrionic (even for DeStefano) and do not credit it.

McCambridge—who was called as a witness for Respondent—did not corroborate either Saxe's testimony or his handwritten notes. He did admit to having a short conversation with Saxe about Bohannon, whom he accused of being unqualified, but credibly denied that he had complained that his show had been ruined or that he had been forced to run his cue track by himself. His only complaint about Bohannon, he testified, was that she was inexperienced and would therefore need to consult with another tech if a problem arose. As he explained, Respondent provided him with techs of varying skill levels, and if he lacked confidence in a tech, he would run the cues himself by operating a remote mouse from the stage. Bohannon, he was clear, was *not* such an employee, and he had no recollection of having to run the cues himself when she was his assigned tech. (Tr. 3144–3145, 3153–3157, 3159.) I found McCambridge's testimony highly credible, in particular because he is currently engaged as a performer at one of Respondent's theaters; I have, however, subjected his testimony (as well as that of Bohannon herself) to stricter scrutiny based on an exchange between the two after I issued the sequestration order in this proceeding.

On the first day of hearing, while attending the Fremont event, Bohannon electronically forwarded McCambridge the document Saxe claims to be his notes from the performer's telephonic complaint about her (she had requested a copy of it from the Nevada state unemployment agency). She then proceeded to question him about whether he had, in fact, told Saxe that she had "ruined" his show or that he had been forced to take over her cues. In response, McCambridge essentially previewed for her the testimony he would later give on the subject (i.e., his complaints about other techs and concern that she was not experienced). (See R. Exhs. 81, 82; Tr. 3146–3147.)

I am troubled by Bohannon's conduct. By contacting McCambridge, she gained prior knowledge, before testifying herself, of what he would potentially say under oath about his complaint to Saxe. Under the circumstances, I agree with Respondent that the potential for prejudice to its case was real, but I do not find the violation so extreme as to render Bohannon's testimony incredible as a matter of law. Rather, I have applied strict scrutiny to testimony adduced by the General Counsel regarding the McCambridge complaint, including testimony given by McCambridge himself on cross-examination. See *U.S. v. Fike*, 538 F.2d 750, 757 (7th Cir. 1976), cert. denied 429 U.S. 1064 (1977) (where witnesses discussed certain aspects of their testimony prior to trial, such conduct is a proper subject for impeachment on cross-examination).

3. Alanzi Langstaff

Langstaff worked as a Saxe Theater stagehand for approximately 1 year until his discharge on March 18. Langstaff did not participate in the Facebook chat, nor is there any evidence that he attended any of the in-person organizing meetings. However, as discussed supra, in late February, Langstaff was observed by Estrada agreeing to sign a union authorization card, after which he was immediately warned by Estrada to not be seen consorting with Graham, who had offered him that card. He was also among the employees DeStefano, by her March 15–16 email blitz, recommended be discharged in part, due to their "attitude" problems. (Tr. 1825–1827, 1887; GC Exh. 2; R. Exh. 43.)

Approximately a month before his discharge, Langstaff did have a confrontational exchange with DeStefano, in which he complained that Kostew being assigned cue calling duties constituted favoritism, given her relationship with Estrada. According to Langstaff, DeStefano said the decision had been hers, and the conversation ended with DeStefano suggesting that she would look into getting Langstaff more hours. DeStefano's version of the conversation was markedly different; Langstaff, she claimed, had "cornered her," gotten "in her face" and yelled at her. I credit Langstaff's version.[33] DeStefano was prone to embellishment and exaggeration throughout her testimony

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include written warnings, and therefore do not believe she was intentionally deceptive on this point. (Tr. 1212.)

[32] Saxe was vague as to whether he contacted these two performers as part of his "investigation" or whether they contacted him in the days following his conversation with McCambridge. I find the former scenario far more plausible. (Tr. 112, 3474–3476.)

[33] Respondent claims that Langstaff violated my sequestration order by discussing with fellow dischargee Graham (at the Fremont event) testimony that Saxe had given in a prior Board proceeding. I disagree; by its terms, my order applies only to testimony given by witnesses in the instant proceeding. Nor do I discredit him, as Respondent urges, based on his testimony regarding a conversation between his girlfriend and DeStefano on a matter unrelated to his discharge. There was no true discrepancy between his recollection and DeStefano's account of the conversation in question; rather, it appears that he may have missed hearing part of the conversation. (Tr. 1834–1835; 2672, 2801–2802.)

regarding Langstaff,[34] and appeared intent on presenting a dramatized account of this exchange in particular (i.e., "when somebody that tall and that big is in your face, it's overwhelming"). While Langstaff is somewhat physically imposing (at nearly 6'5" and 290 pounds), I found his overall demeanor extremely low key and pointedly nonconfrontational. (Tr. 375–378, 381–382, 1830–1832, 1851, 1856, 3288.)

The only other instance of Langstaff being accused of aggressive behavior at work took place in August 2017, when he got into a work-related dispute with another stagehand, Ivan Barrera (Barrera). Essentially, Barrera complained that Langstaff had transferred a rolling prop to him too forcefully, hurting his hands. Langstaff countered that he had performed properly and accused Barrera of attempting to micromanage him. The two argued verbally before management broke them up, but no physical contact was involved. (Tr. 1852–1854, 1860–1865, 3289–3290, 3293, 3314–3315.)

Shortly after midnight on March 16, DeStefano sent Saxe her email recommendation that Langstaff be among those discharged. She began by stating that there had been problems with Langstaff "for a while now," including his "timeliness, work ethic, attitude and work performance." She mentioned that stagehands had complained about Langstaff directly to her, referenced his past falling out with Barrera and claimed that he was often late to report to work. She then said (without reference to his supposedly aggressive tone), "[h]e even pulled me aside complaining of favoritism from the stage manager. . . ." DeStefano concluded her email:

> I personally want the most eager people on these shows and the ones that are the best we have and I can rely on. I am concerned with [Langstaff] and his attitude spreading as well as the fact that he doesn't seem to care about what we do here or our audiences.

(GC Exh. 2.) Two days later, Langstaff received a call from Carrigan, who told him that he was being discharged as part of a "revamp" whereby they were "restructuring the stagehands and bringing in an outside source." Approximately an hour later, Langstaff spoke with DeStefano, who echoed this explanation. Carrigan approved Langstaff's PAF the next day, in which DeStefano noted that he had "a very poor attitude." (Tr. 733, 1836–1837; GC Exh. 34 at 5.)

At hearing, Respondent's witnesses offered competing rationales for Langstaff's discharge. According to Carrigan, Saxe told her Langstaff was being discharged for being repeatedly tardy to work. Langstaff, however, denied having a chronic tardiness problem, and there is no credible evidence that he had ever been disciplined for being late (or anything else) prior to his discharge.[35] In fact, he appears to have been historically granted flexibility in his reporting time in order to accommodate his family obligations. DeStefano alternately claimed that, a few months before Langtaff's discharge, Barerra had again accused him of bullying conduct, and that Pendergraft had prevented her from discharging him at that time. Barrera testified, but notably did not corroborate this claim. DeStefano further offered that she had consulted with Estrada about Langstaff, who confirmed that Langstaff was "abusive to everybody, verbally, just yelling, screaming, tossing things." Like Barrera, Estrada failed to corroborate DeStefano's account. (Tr. 370–372, 407–408, 462, 729–730, 797–799, 1838–1839, 1876–1877, 2659, 3306; R. Exh. 85.)

Although Langstaff's PAF contained no reference to his August 2017 altercation with Barrera, approximately a month following his discharge, DeStefano and Carrigan attempted to remedy this, enlisting Kostew to provide an "eyewitness account" of the incident, in which she claimed that the two men had argued outside the theater "for a good 2 hours," and Langstaff had "forcibly thrown" a prop at Barerra. Each of these claims were contradicted by multiple witnesses, including Langstaff and Barerra themselves. DeStefano (who testified that she "could not recall" why Kostew had sent her this email) immediately forwarded it to Carrigan and Saxe. (GC Exhs. 26, 76; Tr. 411, 2078–2080.)

4. Nathanial Franco

Franco was hired as an audio tech in December 2017. Significantly, he was a personal friend of Devito, a fact Saxe himself admitted he "may" have known. As one of the original invitees to Devito's Facebook group chat, Franco was involved in the early stages of the organizing effort and "voted" in support of the Union in an online poll. He also attended the second in-person organizing meeting on March 13, the night of Saxe's last-minute work call. (Tr. 117, 1281, 1283, 1287–1288, 1307; Jt. Exh. 2 at 9.)

Franco was hired despite the fact that he had no prior experience as an audio tech. He was initially mentored by Devito and trained on several shows, which involved him "shadowing" the show's assigned audio tech. After Devito's departure, however, Franco began struggling at his position. As he testified, as soon he began to learn the cues for a particular show, he would be transferred to a different one. Around the winter holidays, Franco's training period ended and he was assigned to run his own shows, including "Vegas! The Show" in the Saxe Theater and a different show in the V2 Theater. Franco readily admitted that he made mistakes during these productions,[36] and it is undisputed that DeStefano coached him about hitting his cues on time. There is no evidence, however, that Franco was ever disciplined for these mishaps. (Tr. 1283–1284, 1292–1293, 1307–1310, 1356–1357.)

On March 9, Franco repeatedly played the wrong music during a performance of "Vegas! The Show," which he admitted was disruptive to the performance and noticeable to the audience. This mistake, according to DeStefano, generated emailed

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[34] For example, she insisted, without any personal knowledge, that Langstaff had "thrown" a prop at Barerra; on another occasion, she claimed to have counseled Langstaff about a particular work-related issue "a thousand times" before reining this in to a more plausible, "multiple times per week." (Tr. 375–376, 407, 2666–2667.)

[35] I do not believe that DeStefano issued Langstaff a January 26 discipline for showing up late at work. Presented with this document (as R. Exh. 26), he appeared sincerely never to have seen it before and appeared to closely examine it during a break in the record. (Tr. 1878; R. Exh. 45.)

[36] It is precisely because Franco was so willing to admit to his performance problems that I found him an extremely credible witness.

complaints from both the dance captain and Company Manager Hardin (who was responsible for producing "Vegas! The Show") that lead directly to Franco's discharge. Asked specifically whether she had received the emails in question prior to discharging Franco, DeStefano responded unequivocally, "yes." These emails were not introduced, nor was DeStefano's claim corroborated by Hardin (who testified) or the dance captain (who did not). Saxe and DeStefano's text messages reveal that they decided to discharge Franco shortly before 8:30 p.m. on March 14, and had even selected a discharge date—Monday the 19. They apparently disagreed over how to characterize the discharge; DeStefano suggested to Saxe that the action would be "just an elimination of position," which Saxe nixed, twice reminding her that Franco was being discharged "because he screwed up the show." (Tr. 87, 114, 344–346, 461, 1292–1293, 1308–1309, 3410–3411; GC Exh. 10.)

Two hours later, DeStefano, in the midst of her blitz of emails seeking Saxe's "advice" about the dischargees, sent him one about Franco. Referencing the March 9 performance, she concluded, "I am concerned with his work performance overall. I have tried every option in this theater to use his talents, so I would like to know where to go from here." The following day, March 15, Saxe responded, noting that he, too, had received complaints about Franco "from multiple show producers and performers;" he then instructed DeStefano, "[p]lease terminate his employment as soon as you have a suitable replacement." Later that evening, DeStefano replied, forwarding another complaint about Franco and adding:

> [a]s of Monday 3/19/2018 I have coverage for this and if we would let him go so our shows do not suffer anymore.
>
> Please let me know your thoughts on this.

(GC Exh. 29.) Neither Saxe nor DeStefano offered any explanation as to why, on March 15, they went through the effort of "recreating" via email the decision to discharge Franco they had reached the day prior. (Tr. 343, 1288–1290, 2658; Jt. Exh. 2 at 32–34.)

Two months following Franco's discharge, DeStefano scrambled together documentation of Franco's conduct, emailing Hardin and the dance captain who had supposedly complained about him. In an urgent tone, she stated:

> Per the text messages I sent you last night, I need those statements on Nathan Franco ASAP please. [Carrigan] and [Saxe] need them right away.
>
> If you can please send them over we would really appreciate it.

(GC Exh. 20.) Within the next half hour, Hardin and the dance captain each provided a brief email appraisal of Franco's performance. Neither one referred to having made a prior complaint about Franco, and the dance captain's email took a decidedly formal tone, including him introducing himself to DeStefano by name and title. Most notably, each of the emails echoed generic complaints about Franco (missed cues, playing the wrong music, etc.), but neither specifically referred to the March 9 performance issues that Respondent claims led to his discharge. Id.

5. Michael Gasca

Gasca was discharged on March 19. He had originally begun working as a part-time stagehand for Respondent in August 2016. Until his discharge, the only discipline Gasca received was a verbal warning for absenteeism in September 2017. Gasca was among the group that DeStefano recommended for discharge on the evening of March 15, but, unlike the other dischargees, he was not involved in the union organizing campaign that is the main focus of this proceeding. (R. Exhs. 53, 54, 83; Tr. 1172–1174.)

Gasca had, however, previously made his pro-union stance known to management. In October 2017, he told Estrada that he had been offered an opportunity to pursue an apprenticeship with another union, Teamsters Local 631, with the lengthy application process set to begin the following January. Estrada instructed him to submit a written request for Pendergraft to review; Gasca complied, providing a letter that mentioned that he had a history of working union jobs through Local 631. Shortly before January, Gasca asked Pendergraft about the status of his request. Demurring, Pendergraft said he was busy; Gasca testified that his tone and demeanor suggested that he was displeased. Ultimately, however, Pendergraft agreed to make Gasca an "on call" employee, which allowed him to pursue the apprenticeship and continue to work for Respondent at the same time. (Tr. 1143–1152.)

As an on-call employee, Gasca was called in to work shows and consistently did so. Between January and February, he successfully completed the Local 631's application process and was accepted into its apprenticeship program. At some point in February, DeStefano called Gasca and asked if he would be willing to go back to part-time status and he declined, stating that the on-call status was working well for him. Shortly thereafter, Gasca informed Sojack, Estrada, and Mecca that he would be starting the Local 631 program on March 9. He then told DeStefano that, because the apprenticeship was unpaid, he wanted to work extra hours at the theater if possible. DeStefano said she would get back to him; she did so later that night, but Gasca was already asleep and missed the call. When he approached her the following day, she demanded to know why he had not returned her call the night before and said she had been calling to discharge him. Gasca asked why, to which she stated that he was a bad worker, had a bad attitude and no backstage experience. She then said that he was not the only one being fired, and there were about 11 others. Gasca asked if he could say goodbye to his coworkers; DeStefano refused his request and showed him the door. As had Glick, Gasca later attempted to get written documentation of the reason he had been let go, but DeStefano never responded to his request. (Tr. 1152, 1155–1161, 1169–1170, 1178, 1191.)

I credit Gasca's version of these events. I found him to be an earnest witness, who worked hard to answer questions, including asking for clarification of complex, longer queries. He presented with a consistent demeanor on both direct and cross-examination. I also reject Respondent's suggestion that I should discredit his testimony because he denied actively participating in the September 1st Freemont Bar conversation with Bohannon alleged to have violated the sequestration order. Gasca did freely disclose what he recalled of the discussion, and his testimony on the topic leads me to believe that, in the bustle of the bar scene, he honestly considered himself a witness, but not a participant, in this discussion and in any event did not understand the discussion to

violate my order. (Tr. 1174–1178.)

Respondent's witnesses appeared to cast around for reasons why Gasca was discharged. As Counsel for the General Counsel's first 611(c) witness, Saxe claimed that he had received reports that Gasca was not dependable and not "available," but the only lack of availability on Gasca's part was his approved on-call status. DeStefano later attempted to portray Gasca as a troubled employee who frequently messed up shows, and whose performance had seriously fallen off once he became an on-call employee; this was contradicted by Mecca, who critiqued Gasca as "spacey," but consistently so.[37] As with the majority of the dischargees, Gasca's alleged performance problems were never documented, and, until the day of his discharge, he had never received any performance-based discipline. Once again, Estrada had apparently been left in the dark; he testified that he had no idea why Gasca was discharged. At hearing, DeStefano offered a final, "Hail Mary" rationale for Gasca's discharge: she had determined to eliminate "on call" positions. Her testimony on this point was muddled beyond the point of being credible ("I mean the position was eliminated, but I didn't want that as the reason because that wasn't the reason I was going to fire him"). (Tr. 132, 433, 826, 3182.)

On the whole, the evidence suggests that, rather than a sudden decline in his performance, Gasca—whose union apprenticeship overlapped with the theater employees' organizing campaign—had developed an "attitude" problem. In recommending to Saxe that he be discharged, De Stefano reported that Gasca "has one of the worst attitudes of anyone I have ever worked with . . ." She further warned, "I cannot have that kind of behavior and attitude spreading and making other employees uncomfortable." At hearing, DeStefano in fact admitted that what she meant by this was that she did not want other employees to start "complaining" like Gasca. Mecca likewise admitted that, while Gasca's performance remained relatively consistent, at a certain point before his discharge, it was his "attitude" that changed. Even Gasca's discharge paperwork focused on this rationale for discharge, stating, "[w]henever he was in the building his attitude was awful and he was always complaining about hours/pay." (Tr. 425–428, 442, 3169, 3195; GC Exhs. 9 & 34 at 6.)

6. Chris S'uapaia

S'uapaia, who had worked as a stagehand since October 2017, was discharged on March 19. He had become involved in the organizing campaign in late February. As noted, above, he overtly rejected Kostew's personal invitation that he participate in the March 13 work call and attended the union meeting instead. Two days later, DeStefano included S'uapaia in the group of employees recommended for discharge, reporting in her late-night email to Saxe that she did not think he was "a good fit" for the theater operation. There is no evidence that, prior to his discharge, S'uapaia had received any discipline. (Tr. 1456–1457; GC Exh. 5; R. Exh. 52.)

At hearing, Respondent's witnesses contradicted each other as to how and why S'uapaia was discharged. DeStefano claimed that she and Saxe made the decision to discharge after consulting with Carrigan, and that "[h]e was discharged for his attendance and his timeliness and his neglect to the schedule." Carrigan, however, denied being involved in the decision. DeStefano also claimed that, 2 weeks before the discharge, Estrada had reported that he had failed to report to work, stating that he "just didn't feel like coming in" and "he had other things to do." DeStefano further testified that she had consulted with Estrada, who had confirmed that they were "on the same page" regarding the problems with S'uapaia's schedule adherence. Estrada flatly contradicted this; indeed it appears that he had a history of tolerating S'uapaia's absences, once even holding his job open for a week while the latter was incarcerated (something he apparently informed DeStefano of).[38] Saxe likewise failed to corroborate DeStefano's testimony regarding S'uapaia. Rather than being part of the decision making, he claimed to have merely been "informed" of the decision to discharge S'uapaia. According to Saxe, DeStefano reported to him that S'uapaia was unreliable, had a bad attitude and had missed shows because he was incarcerated. (Tr. 87, 128–131, 351–352, 355, 801–804, 2104, 2704–2705, 2783–2784.)

On March 19, DeStefano discharged S'uapaia in person, telling him that Stage Manager Sojack had complained about him, specifically because he was unable to move backwards due to a leg injury. It is true that, ever since he began working for Respondent, S'uapaia had been physically limited in his ability to walk backwards at speed while carrying something. It is likewise true that, until March 19, Respondent had consistently accommodated this limitation (either by reassigning him or allowing him to get assistance from coworkers), and he was therefore able to perform his duties without issue.[39] Significantly, although Sojack testified, he did *not* corroborate DeStefano's claim that he had complained about accommodating S'uapaia, testifying instead that he had merely raised the issue of accommodating him. (Tr. 1463–1468, 1492–1493, 3211–3212.)

7. Zack Graham[40]

Graham worked as a stagehand from August 2014 until his discharge on March 21. During the last 3 months of his employment, Graham also called cues. By all accounts, Graham was considered a talented, dependable worker who knew multiple tracks. Estrada, who referred to Graham as his "right hand man," clearly considered him a talented stagehand; as he explained,

[37] Contrary to the claims of Respondent's witnesses, Gasca credibly denied that he ever "threatened to walk out" during shows. These rather incredible accusations were supported by no written evidence. (Tr. 1179.)

[38] Estrada became visibly uncomfortable when questioned about his role in S'uapaia's discharge, and denied having any idea why this decision was made.

[39] I found S'uapaia to be a credible witness. He presented as somewhat nervous, but had a very detailed recollection of events, and in particular of this conversation. I do not credit DeStefano's testimony that she, in fact, informed him that he was being discharged for repeatedly being unavailable for work. As noted, infra, this "reason" was not corroborated by any management witness and, appears to have been crafted after the fact.

[40] As set forth, supra, I have rejected Respondent's claims that Graham's discussion with Langstaff at the Fremont event violated my sequestration order.

Graham was able to perform two tracks at the same time, which is "very rare." At least as of February 6, DeStefano apparently agreed with Estrada's assessment; she ranked Graham fifth of 21 stagehands in her "reliability, attitudes, etc." rankings. There is no evidence that, prior to his discharge, Graham had ever been disciplined. On February 21, Graham broke his arm in an accident unrelated to his work for Respondent; he alerted Estrada that day and said he was going to be off work while recovering. On February 24, DeStefano texted him, "[s]o sorry to hear you're hurt" and requested that he email her a scanned copy of his "doctor's note." Two days later, Graham complied, emailing her a "Work Release Form" indicating that he could return to work but only with restrictions, including no heavy lifting. Graham received no response or followup from DeStefano about his leave, either by text or telephone. (Tr. 397, 653, 847, 1647, 1648, 1654, 1663, 1664, 1706, 1728–1729, 3098–3099; GC Exhs. 23, 34, 66, 84; R. Exhs. 18, 41.)

Despite his medical leave, Graham remained active in seeking to convince his coworkers to join the organizing campaign; he appeared at the Saxe Theater on at least a weekly basis to visit with his coworkers, discuss the Union, and publicize upcoming organizing meetings. As I have found, Estrada, DeStefano, and Saxe became aware in late February that Graham was circulating union authorization cards, and, during the same month, Estrada expressly warned another employee—Langstaff—to steer clear of him. As discussed, on March 1, Graham also solicited Estrada directly (if unsuccessfully) to join the union cause, unperturbed by the latter's negative reaction. Later that same day, he discussed his need for medical leave with DeStefano, who assured him that his job was safe and would be waiting for him. (Tr. 1517–1518, 1651–1653, 1718, 1825–1827, 1872.)

During the next 3 weeks, Graham continued on his leave, and heard nothing from DeStefano. On March 21, however, she texted him with a tone of urgency, asking "[c]an you get on your Paycom??" (referring to Respondent's online payroll system). A few hours later, she texted him, "I've been trying to reach you for weeks unsuccessfully through calls and texts;" Graham responded, via text, that he had logged into Paycom and had received no calls or texts from her. Approximately 15 minutes later, DeStefano sent Saxe an email recounting her purported attempts to contact Graham. Making no mention of the "Work Release Form" Graham had submitted on February 26, she stated that she had decided to discharge him on March 1, but had been unable to reach him to inform him of the fact. She specifically noted that, as of March 1, she had made "multiple attempts to contact him" about his medical documentation, as had human resources, Estrada and other stagehands.[41] DeStefano closed her email with a request that Saxe advise her how to proceed. Saxe and DeStefano then spoke (apparently by phone) and, as Saxe testified, concluded that Graham's conduct constituted job abandonment. Saxe instructed DeStefano to discharge him. (GC Exh. 11; Tr. 85–86, 134, 188–189, 253, 2065, 3478–3479.)

Approximately 1 hour and 20 minutes after her email to Saxe, DeStefano responded to Graham's last text as follows:

> On February 22nd, 2018 you informed me that you broke your arm and would not be able to work. I asked you to provide a doctors [sic] note but you never did and you did not respond to any of my repeated calls or text, until now, a month later! Anyways, you were termed a while ago for job abandonment and failure to comply with the company policies & procedures.

(Tr. 1664, 1710, 1727; GC Exh. 66.) Two days later, DeStefano completed a PAF indicating that Graham had been discharged on March 1 (the day he unsuccessfully solicited Estrada to join the union and DeStefano assured him that his job was safe). Notably, Estrada—Graham's supervisor—was not involved in the discharge decision or even given advance warning that it was going to happen. Testifying that he disagreed with the decision, he said he was shocked to learn that Respondent had discharged his top performing stagehand. (Tr. 397, 807–808; GC Exh. 34 at 8.)

8. Kevin Michaels

Michaels was discharged on April 2, after a relatively long (2-1/2 year) tenure as a stagehand. DeStefano had recommended him for discharge shortly after midnight on March 15, as part of her barrage of emails to Saxe, but, because Michaels performed a particularly challenging track, it took time to train somebody to replace him. Prior to his discharge, Michaels had never received discipline and was a well-regarded employee; the record contains numerous instances of him taking the initiative in improving the quality of theater productions. In her February 6 rankings of the stagehands, Michaels was ranked seventh out of 21. (Tr. 358–360, 466–467, 514–1515, 1528–1529, 1570–1571, 2616, 2774–2775; GC Exh. 84; R. Exh. 38.)

Michaels became involved in the organizing campaign during the week of March 12, when Graham sent him a text about the March 13 union meeting. Michaels did not have a Facebook account, so he was not involved in the group chats, but Glick kept him abreast of the online organizing effort. Michaels also spoke with Graham about the Union during the latter's visits to the theaters during his medical leave and, in turn, relayed Graham's updates to coworkers. Along with Glick, he was instrumental in planning the date and venue for the March 13 meeting and informed a number of employees about the meeting once it was scheduled. As discussed, he conspicuously departed early from the last-minute work call on the 13th (to Estrada's apparent consternation) in order to attend that meeting. (Tr. 397, 1647, 1516–1522, 1549.)

Three days later, when DeStefano emailed Saxe her discharge recommendations, Michaels was the second one she sent. While acknowledging that he was a hard worker, she noted, "[h]is attitude has been the problem as well as following my schedule." Without elaborating, she then mentioned that Michaels had "disregarded" a work call and that Estrada had complained that he had a bad attitude and was only willing to perform his assigned track. Mentioning Michaels' "attitude" a total of four times, she

[41] I do not credit DeStefano's uncorroborated testimony that she, in fact, attempted numerous times to contact Graham; it does appear that, during this period, Estrada and Kostew did attempt to contact Graham "a couple of times" and left messages (i.e., asking "what's going on?" and "how's your arm?"), but there is no evidence that they put Graham on notice that he needed to provide further medical documentation to preserve his position. (Tr. 1653–1654, 3120.)

concluded, "[i]n trying to fix moral [sic], I can't have people being rude toward management and doing what they want." In fact, it appears that management had long permitted Michaels wide latitude as to when he clocked in and out, in relation to his official scheduled hours. Indeed, he readily admitted to diverging from his assigned hours on multiple occasions and frequently clocking in early to set up the stage for the show. This practice appears to have been implicitly condoned by Estrada, and there is no credible evidence[42] that, prior to Michaels' discharge, it ever resulted in him receiving any discipline or counseling. (Tr. 1567, 1580–1582; GC Exh. 8.)

Having secured Saxe's approval of the discharge, DeStefano called Carrigan and arranged for her to deliver the news. As Carrigan testified, DeStefano told her that Michaels was to be discharged for not showing up for work, only being willing to perform his assigned track and refusing to do anything else, and, as she put it, "not really being a team player." On April 2, Michaels received a voice mail message from Carrigan that he was to call her in human resources before he next reported to work. The next day, he reached Carrigan, who informed him that he had been discharged for insubordination, bad work attitude and poor work performance; she also documented these reasons in his PAF. (Tr. 735, 1527–1528, 2161; GC Exh. 34 at 9.)

Respondent's witnesses struggled to present a consistent or credible story that explained Michaels' discharge. DeStefano claimed that both Estrada and Saxe were involved in the decision. Estrada, she testified, agreed with her that Michael's schedule adherence was a problem and that he should be discharged. Estrada, who had supervised Michaels for 2 years, initially testified that he only learned of his discharge on the day it occurred; as with other discriminatees, he appeared eager to distance himself from the decision, stating that he had no idea what had happened. Saxe likewise initially denied being involved in the decision to discharge Michaels, stating that DeStefano simply informed him of the decision. Later, each of them half-heartedly reversed course, claiming that they *had*, in fact been involved in the decision, with Estrada offering that "probably" a couple of months earlier, he had complained to DeStefano about Michaels. Saxe, for his part, claimed that DeStefano had reported that Michaels was "lazy" and shown up late for work, something no other witnesses had mentioned. (Tr. 86–87, 136–137, 358–359, 788–794, 3120–3121.)

C. Alleged Sequestration Order Violations Regarding the Discharge Decisions

Saxe served throughout the hearing as Respondent's Fed. R. Evid. 615(c) designated representative and, as such, was explicitly exempted from the sequestration order. However, during the week of October 15, he provided certain transcripts from this proceeding to DeStefano, delegating to her the task, assigned to him by his in-house attorney, of reviewing these transcripts.[43] Saxe initially testified that the stack of transcripts was an inch high, but then (after DeStefano testified that it was about 6 inches) revised his testimony, claiming that it was approximately 3 inches. (Tr. 2527–2530, 2533, 3071–3072.)

DeStefano testified that the transcripts Saxe assigned her to review contained the testimony of Prieto, Petty and Gasca, as well as her own testimony. Specifically, she recalled reviewing one of these employees' testimony regarding Respondent's posting of election-related notices, as well as Gasca's testimony regarding his request for a leave of absence. According to DeStefano, she spent "maybe a couple of hours" reviewing the transcripts. After reviewing the transcripts, she was called by Respondent to testify in its case.[44] During this testimony, DeStefano appears to have made no substantive reference to the subject of Respondent's notice postings, nor to any subject of Prieto's testimony. She made only a passing reference to Petty (claiming that his show-call schedule changed around the time she changed Tupy and Glenn's hours). Gasca, however, was a different matter; over the objection of counsel for the General Counsel, Respondent's counsel examined DeStefano extensively regarding the circumstances of, and Respondent's various rationales for, discharging him. (Tr. 2540–2827, 2535–2536, 2550–2552, 2577–2578, 2709–2723, 3072, 3080, 3087.)

There is no avoiding the conclusion that Saxe and DeStefano's overtly partisan conduct constituted a violation of the sequestration order, which clearly forbade providing a witness such as DeStefano with transcripts during the course of the hearing. Moreover, her review of Gasca's transcript certainly taints her subsequent testimony on the subject of his discharge. It is less clear, however, what remedy the General Counsel seeks for this conduct, in that no motion to strike was filed with respect to any particular testimony.[45] Under the circumstances, I find it appropriate to apply stricter scrutiny to DeStefano's testimony given following her transcript review on the subject of Gasca's employment and Respondent's proffered rationales for discharging him.

D. Legal Analysis of Theater Department Mass Discharge Allegations

1. The legal standard

Where, as here, an employer is shown to have engaged in a mass discharge for the purpose discouraging employees from engaging in union activity, or retaliating against them for such activity, the General Counsel need not establish each individual employee's union activity and knowledge, or that all union

[42] I do not credit DeStefano's claims that she spoke with Michaels multiple times in January about his schedule adherence. This testimony appeared rehearsed and vague. Instead, I credit Michaels, who testified that the only time he ever spoke with her about schedules was when *he* complained that her scheduling was inefficient, because it did not permit him to get required work calls completed. (Tr. 1567.) He presented as a low-key, genuine witness not prone to exaggeration, listened carefully to questions, and was cooperative on cross-examination.

[43] There is no evidence indicating that any counsel representing Respondent intentionally caused DeStefano to review any witness transcript.

[44] See Tr. 2540–2827.

[45] The General Counsel's post-hearing brief instead appears to argue that, based on Respondent's failure to produce video evidence to the contrary, I should make an adverse inference that DeStefano in fact reviewed *additional* transcripts. I find such an inference unjustified, considering that there is no definitive proof that such video evidence would have actually disclosed which documents she reviewed.

adherents were laid off. *Delchamps, Inc.*, 330 NLRB 1310, 1317 (2000); *Weldun International*, 321 NLRB 733, 734 (1996), enfd. mem. in part 165 F.3d 28 (6th Cir. 1998). As one court of appeals has explained, "[t]he rationale underlying this theory is that general retaliation by an employer against the workforce can discourage the exercise of section 7 rights just as effectively as adverse action taken against only known union supporters." *Birch Run Welding & Fabricating Inc. v. NLRB,* 761 F.2d 1175, 1180 (6th Cir. 1985). Thus, instead of showing a specific correlation between each dischargee's union activity and his or her discharge, instead, the General Counsel's burden is to establish that the mass discharge was implemented to discourage union activity or in retaliation for the protected activity of some of the employees. *Hudson Moving & Storage Co.*, 322 NLRB 1028, 1033 (1997); *We Can, Inc.*, 315 NLRB 170 (1994); *Davis Supermarkets*, 306 NLRB 426 (1992); *ACTIV Industries*, 277 NLRB 356, 356 fn. 3 (1985); *Pyro Mining Co.*, 230 NLRB 782 fn. 2 (1977).

2. The General Counsel established a prima facie case of discriminatory mass discharge

The credible evidence overwhelmingly establishes that Respondent discharged eight employees shortly after learning that a union organizing campaign was underway at the theaters, in retaliation for the protected conduct of at least some—if not all—of them. The Board has consistently held, in a mass discharge case, such timing itself raises a strong inference of both knowledge and animus. See, e.g., *Gunderson Rail Services, LLC*, 364 NLRB No. 30, slip op. at 30 (2016) (citing *Best Plumbing Supply*, 310 NLRB 143, 144 (1993)).

Here, there is ample evidence that Respondent learned of specific evidence of employee organizing shortly before Saxe and DeStefano determined to discharge a group of union adherents. Half of the dischargees (Glick, Bohannon, Graham and Franco) were members of Devito's online organizing group chat, to which Mecca had access.[46] Management learned mere weeks before the discharges that Graham was soliciting cards for the Union, and both Graham and Prieto discussed union meetings with managers. After Graham invited Estrada to the March 13 organizing meeting, it could not have gone unnoticed that Graham, Glick, S'uapaia, Franco, and Bohannon skipped the work call scheduled for the same night, and Estrada appeared visibly upset that Michaels left the work call early. Under these circumstances, the "dramatic timing" of the mass discharge "hard on the heels" of Respondent's learning of the organizing campaign, "strongly supports an inference of animus and discriminatory motivation." *Saigon Gourmet Restaurant, Inc.*, 353 NLRB 1063, 1065 (2009); see also *American Wire Products, Inc.*, 313 NLRB 989, 994 (1994) (citing *Mini Togs, Inc.*, 304 NLRB 644, 648 (1991); *Vemco, Inc.*, 304 NLRB 911, 912 (1991)).

I also find that the General Counsel has proven that Respondent harbored animus toward the dischargees' organizing activity. The most striking evidence of this fact is mathematical: of those discharged, 100 percent were union adherents. The Board, supported by the courts, has long held that, absent a reasonable explanation, the disproportion between the number of union adherents versus other employees may constitute persuasive evidence of discrimination. *Meyers Transport*, 338 NLRB 958, 972 (2003); *Huck Store Fixture Co.*, 334 NLRB 119 (2001); *Glenn's Trucking*, 332 NLRB 880 (2000); *American Wise Products*, 313 NLRB 989, 994 (1994); *Camco, Inc.*, 140 NLRB 361, 365, enfd. in part 349 F.2d 803, 810 (5th Cir. 1965); see also *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994); *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 343 (8th Cir. 1986), *NLRB v. Nabors*, 196 F.2d 272, 375–376 (5th Cir. 1982); *Hedison Mfg. Co.*, 249 NLRB 791, 804 (1980); *NLRB v. Chicago Steel Foundary*, 142 F.2d 306, 308 (7th Cir. 1944).

Here, Respondent would have me find that the 100 percent union adherent composition of the discharged group is simply coincidental. As the Board has noted in rejecting a similar claim, "[w]hile it may be theoretically possible that the Respondent may have fortuitously selected for termination only those employees active in the Union, common sense and the laws of mathematical probability indicate that such fortuity was highly improbable." *Camco, Inc.*, 140 NLRB at 365. I find a similar conclusion is appropriate here and specifically find Respondent's selection of a homogeneously pro-union discharge group to be "very persuasive evidence of discrimination." *NLRB v. Chicago Steel Foundry*, 142 F.2d at 308.

I also note that the record is rife with evidence of animus against the employees' organizing activity, including 8(a)(1) violations by Estrada, Mecca, and Saxe himself. *Dynasteel Corp.*, 346 NLRB 86, 88 (2005) ("Respondent's numerous 8(a)(1) violations provide evidence of its anti-union animus"). Moreover, while unalleged, other conduct strongly suggests an anti-union motive. This includes Estrada's vow to "put an end to this union shit"—made only 5 days before the mass discharge decision. *Stoody Co.*, 312 NLRB 1175, 1182 (1993) (animus can be based on unalleged conduct, and on conduct that does not necessarily violate of the Act); *Gencorp*, 294 NLRB 717 fn. 1 (1989) (conduct not found to be a violation may still be used to show animus). Finally, Respondent's unlawful motivation is further evidenced by its outsized concern over the individual dischargees' poor "attitudes" and potential contagion of the wider workforce—a classic euphemism for union organizing activity. See *Blue Star Services*, 328 NLRB 638, 639 (1999); *Schaumburg Hyundai*, 318 NLRB 449, 458 (1995); *Boyer Ford Trucks, Inc.*, 254 NLRB 1389, 1395 (1981). This is especially so with respect to especially high performing employees, such as Graham and Michaels. See *Hertz Corp.*, 184 NLRB 445, 446 (1970) (manager's characterization of employee as "troublemaker" could only have referred to her suspected union activities given that she was considered one of the best employees), enfd. 449 F.2d 711, 714 (5th Cir. 1971).

Finally, the strong inference that Respondent acted out antiunion motivation is further validated by the abrupt and slap-dash manner in which the discharges were carried out. Respondent offered no plausible explanation for DeStefano's rush to provide Saxe with a series of late-night emails seeking his "advice" on how to deal with an apparent rash of employee shortcomings and

[46] Mecca did not deny reporting to upper management his knowledge of the employees' online discussion; therefore, I find that his knowledge of the Facebook group chat is properly imputed to Respondent. See *State Plaza, Inc.*, 347 NLRB 755, 757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001).

misdeeds, or for leaving both Carrigan (of human resources) and Estrada (who supervised several of the discharges) out of the decisionmaking process. In addition, the record reveals that DeStefano, Saxe, and Carrigan engaged in deliberate, 11th-hour (and, at times, after-the-fact) efforts to "paper up" individual discharge decisions with ex post facto documentation. These post-discharge attempts to "document" employees' alleged poor performance (such as those attributed to Glick, Langstaff and Franco) are additional evidence that Respondent's proffered reasons for discharging the employees are pretext fabricated to disguise an unlawful motive.

Moreover, further evidence of animus is found in the conspicuous lack of a convincing rationale for the discharge actions. Prior to being discharged, Langstaff, Franco, S'uapaia, Graham, and Michaels had never been disciplined. Graham and Michaels were highly ranked in terms of "performance and attitude" by DeStefano in early February. Gasca and Bohannon had received only minor discipline, and Bohannon was considered "great" at her job. While Glick had been previously discharged for absenteeism, she was subsequently rehired. Against this backdrop, many of the proffered explanations for the discharges were revealed at trial to be transparent fabrications. These include Bohannon's supposedly "ruining" a show (a claim denied by the performer, McCambridge) and Langstaff's violent conduct (uncorroborated by his alleged "victim," Barrera). In other cases, Respondent's claimed that the discharge decision was motivated by conduct that it had long condoned. This was the case with both Graham (who was on an approved medical leave of absence) and Michaels (who had historically been granted leeway as to when he reported for work).

Respondent's witnesses also struggled throughout the hearing to agree on a consistent rationale for selecting individual employees for their "restructuring," including Glick (missed cues vs. attendance vs. cell phone use); Langstaff (attendance/timeliness vs. laziness vs. bullying conduct vs. physical violence); Gasca (lack of backstage experience vs. lack of availability vs. elimination of on-call positions); and S'uapais (physical limitations vs. attendance/timeliness issues vs. laziness).

Board law teaches that when an employer shifts defenses for a discharge, it is reasonable and justifiable to conclude that none of its rationales is the real reason but that the termination was in fact the result of an unlawful motive. See *Approved Electric Corp.*, 356 NLRB 238 (2010) ("[t]he Board commonly recognizes such shifting rationales as evidence that an employer's proffered reasons for discharging an employee are pretextual"); *City Stationery, Inc.*, 340 NLRB 523, 524 (2003); *Jacee Electric. Co.*, 335 NLRB 568 (2001) ("the Respondent's varying rationales for its conduct lead to the inference that the real reason for the layoff is not among those asserted by the Respondent"), enfd. 56 Fed.Appx. 102 (3d Cir. 2003); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("[w]here . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive").

Based on the foregoing, I find the General Counsel has established that Respondent's antiunion animus was a motivating factor in the decision to discharge employees Glick, Bohannon, Graham, Gasca, Langstaff, Franco, S'uapaia, and Michaels.[47]

3. Respondent's "restructuring" defense fails

Based on the above, the burden shifts to the Respondent to prove it would have discharged Glick, Bohannon, Graham, Gasca, Langstaff, Franco, S'uapaia, and Michaels even in the absence of union activity. In this regard, Respondent urges me to find that the mass discharge that occurred in the midst of an ongoing organizing campaign in fact grew out of plan to "restructure" its theater operation that was hatched in January (i.e., before the onset of the campaign). As a preliminary matter, Respondent's business records do not support this version of events; indeed, the only documentary evidence of a "restructuring" operation being considered prior to March was a proposal to eliminate unnecessary hours and convert certain full-time positions to part-time that would have eliminated only one position (in Respondent's wardrobe, not theater, department). (Tr. 130–131, 193–194, 464, 479, 480, 677, 2579; R. Exh. 29; GC Exh. 32.)

Notably, Respondent's witnesses could not agree on when—and how—the "restructure" came to be. As Saxe testified, in January, he and DeStefano decided to compile a list[48] of employees to be discharged (or, as he put it, as "shit list of who sucks"). He further testified that a "handful"—but not all—of the discharges were decided that month. Saxe never credibly explained why, having supposedly determined to discharge employees in January, Respondent failed for approximately 3 months to carry through with this plan. Pendergraft was vaguely blamed; Saxe claimed that the former manager had "lied and said he was handling things," but never actually asserted that those "things" included discharging a group of employees. (Tr. 258–260.)

DeStefano contradicted Saxe's version of events. According to her, the "restructure" was a plan *she* devised to eliminate positions after Pendergraft's departure. (Tr. 457–458, "I found a way to restructure . . . I could run it with less people."; "Jason left. I finally put paper to pen and started figuring out how to restructure.") She was adamant that, although she wanted to give Saxe the names of employees she felt should be discharged (who happened to include Hill, Glick, Tupy, Michaels, Gasca, Langstaff, and Franco), Pendergraft had this, and she and Saxe therefore only discussed the fate of individual employees in mid-March after Pendergraft had been fired.

At hearing, DeStefano attempted to "Bondo" the cracks in

[47] I decline to find, as the General Counsel urges, that the presence of numerous cameras throughout Respondent's facilities warrants an inference that it was aware of employees' onsite organizing activities. As discussed in more detail, infra in connection with my analysis of the Union's *Objection 10*, I find insufficient record evidence to make such an inference, such as actual video footage of employees engaging in such activities. As the Supreme Court has cautioned the Board, presumptions of fact "must rest on a sound factual connection between the proved and inferred facts." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–805 (1945)).

[48] According to Saxe and DeStefano, the process involved Estrada and DeStefano making discharge recommendations and there was no actual, physical list; Estrada, to the contrary, claimed to have provided a handwritten list to DeStefano of his recommendations. No list was introduced into evidence. (Tr. 131, 479, 791–793, 834–835.)

Respondent's restructuring story, offering a tempered version of Saxe's "January" story that accommodated her own claims to have had her hands tied by Pendergraft during that period. Saxe, she claimed, "had wanted to restructure for a while" and had been "talking about it" before Pendergraft's departure and in January, after Pendergraft rejected her proposal to discharge employees, she emailed Saxe "behind [Pendergraft's] back," reporting—without naming individual employees—that certain theater employees were poor performers with poor attitudes. No such email was introduced. Later, DeStefano ramped up her effort to synch her story with Saxe's, claiming that he had mentioned restructuring in production meetings as early as November 2017. I found this testimony, which was corroborated only by Saxe, highly coached and unconvincing. (Tr. 457–458, 475–479, 2570–2571, 2770, 3468–3469.)

Saxe and DeStefano's efforts resulted in a thoroughly untenable narrative whereby they, for months, secretly schemed to overhaul Respondent's work force by identifying poor performers (without contemporaneously documenting these individuals' apparently varied and multiple shortcomings and without arranging for any employees to replace them) and then, approximately 2 weeks after learning that these very employees were organizing for representation, summarily discharged them amid a flurry of backdated documentation. Blaming Pendergraft for everything but the weather was necessary but ultimately insufficient to explain Respondent's conduct, including discharging employees DeStefano had only weeks before the organizing campaign ranked highly in terms of reliability and attitude. Ultimately, in the face of the General Counsel's substantial prima facie case, Respondent's claimed storyline—which bore all the hallmarks of being constructed for the courtroom—simply collapsed under its own weight. I find that Respondent therefore failed to meet its burden under *Wright Line*,[49] and that the General Counsel has established that Respondent discharged Glick, Bohannon, Graham, Gasca, Langstaff, Franco, S'uapaia, and Michaels, in each case, based on their union activities, in violation of Section 8(a)(3) of the Act.

As discussed, supra, the Union ultimately lost a Board-conducted election on May 17, in which the ballots of Hill, Michaels, Glick, Graham, Bohannon, Franco, and Langstaff were challenged. As the vote tally indicates that these challenged ballots would have been determinative in the election results, I will recommend that the Regional Director be ordered to open and count them and prepare a revised tally of ballots. Should that revised tally of ballots show that the Union has received a majority of the valid ballots cast, the Regional Director should then issue a certification of representative.

E. Kostew is Assigned Cue Calling Duties [Compl. ¶ 6(u)]

The General Counsel alleges that, in mid-April, Respondent rewarded antiunion employee Kostew, in violation of Section 8(a)(3) of the Act, by assigning her cue calling duties.

1. Facts

As indicated earlier, calling cues amounts to a "track," albeit one more complex and challenging than the other tracks, as it involves acting as a liason between the stage crew and the performers, as well as coordinating the other stagehand tracks and ensuring that they are performed according to plan. Cue calling is typically the responsibility of a stage manager, and there was consensus among the employee-witnesses that, for a stagehand, it is considered a prestigious assignment. In the case of the Saxe Theater, the track was typically performed by Estrada, although stagehand Graham took over the role when Estrada was off. Employees testified that Kostew's assignment was widely interpreted as a sign that she was on track for a promotion to management, and employees even started referring to her as "boss" and "new boss." As Franco testified, he assumed that Kostew "linked to management," because "she was in a romantic relationship with the stage manager and was taking on responsibilities that were above a spotlight operator." (Tr. 781–783, 920, 932, 1351, 1648, 1729–1730, 2327–2328, 3165–3168, 3178–3180, 3203–3205; GC Exh. 61.)

Following Graham's March 21 discharge, Estrada announced to the Saxe theater stagehands that Kostew was going to be the new cue caller. According to Kostew's Facebook posts, it appears that she began training for the track in early April and started running it solo on April 22.[50] Prior to receiving this assignment, Kostew had been a stagehand and occasionally filled in for the spotlight operating track; according to Saxe, the job of operating a spotlight is an "easier," more "entry-level" position at his theaters. DeStefano, who selected Kostew for the assignment, had ranked her harshly in early February: 15th out of 21 stagehands. (R. Exhs. 30, 31; GC Exh. 84.) (GC Exhs. 60, 61; Tr. 61, 914, 920–921, 926, 1830, 3095–3096.)

DeStefano struggled to explain why she selected Kostew for the cue calling track. First, she testified, she selected Kostew because of her "reliability" and ability to run multiple tracks; when confronted with the low ranking she had assigned to Kostew in February, she claimed that, while Kostew's skills had remained level, her "attitude" improved when Pendergraft left, convincing DeStefano that she deserved the assignment. Estrada was evasive when questioned about Kostew's cue calling duties, insinuating that she had been only temporarily assigned to replace Graham as his (Estrada's) backup and was no longer performing the track. He also downplayed the number of times she

[49] I note that, separately and independently, the proven false and pretextual nature of Respondent's proffered rationales for each of the discharges, coupled with the ample additional evidence of Respondent's discriminatory intent, resolves the *Wright Line* with respect to each discharge by rendering impossible Respondent's effort to rebut the General Counsel's case. See *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Frank Black Mechanical Services*, 271 NLRB 1302, 1302 fn. 2 (1984). For this reason, I do not consider or address Respondent's proffered "comparator" evidence in support of certain individual discharges.

[50] DeStefano claimed to have selected Kostew to take over for Graham earlier, in February, when he initially began his medical leave. This testimony is inconsistent with Kostew's Facebook posts, and, given DeStefano's propensity to embellish and even outright fabricate on behalf of Respondent's case, I do not credit it. DeStefano also claimed that she selected an additional stagehand, Joseph Slezak, to fill in for Estrada. (Tr. 2753–2754.) As discussed, infra, even assuming the accuracy of this claim, I do not find it material to my analysis, as the record contains no evidence as to this individual's union sympathies (or lack thereof).

had performed the track, claiming that she only called cues "a couple" of times, later revising this to three or more times over the course of "as couple of weeks." Kostew, however, testified that she was still performing the track, often times when Estrada was himself at the theater. (Tr. 921, 2786–2789, 3096, 3134.)

2. Analysis

While conduct alleged as violative of Section 8(a)(3) typically consists of an adverse action[51] taken against a union adherent, an employer may also be guilty of discriminatory conduct where it takes a positive action with respect to an anti-union employee for the purpose of rewarding and encouraging that individual's anti-union views or conduct. The Board's *Wright Line* case applies, the only difference being that the alleged unlawful motivation to be proven is the encouragement of anti-union activity, as opposed to the discouragement of pro-union activity. See *Miramar Hotel Corp.*, 336 NLRB 1203, 1211 (2001); *General Clay Products Corp.*, 306 NLRB 1046, 1052–1053 (1992).

Accordingly, in the case of Kostew's April assignment, the General Counsel's threshold burden is to establish by a preponderance of the credible evidence that Kostew's anti-union views and/or activities were in fact motivating factors in Respondent's decision. I find that this burden has been met. As a preliminary matter, proof of Respondent's anti-union animus is contained throughout the record, and I will not re-recite it here. The General Counsel has also established that Kostew, who briefly participated in Devito's online organizing chat, withdrew from the employees' effort and began to work actively against it.

Specifically, on March 1, two hours after Graham informed the group that Stage Manager Estrada (Kostew's significant other) was not interested in the organizing effort, Kostew posted her own misgivings about unionizing the theaters. In an online exchange to which stage manager Mecca had access, she then attempted to sow discord among the group's members, warning them that they might be getting set up for discharge and suggesting that Hill was in cahoots with DeStefano, a claim that appears to have been manufactured out of whole cloth. Finally, she dramatically declared that she was "tapping out" of the organizing effort and continued antagonizing Hill until the latter removed her from the group chat. Notably, Stage Manager Mecca had access to this entire exchange. Kostew later overtly signaled her anti-union stance by recruiting employees to forgo the second in-person union meeting and instead respond to Saxe's stage repair "work call."

Both the timing and circumstances of Kostew being assigned the cue calling track are suspect. She was selected for the assignment as a replacement for Graham, who—along with other pro-union employees—had recently been discharged. In DeStefano's estimation, she was not considered an especially talented stagehand, as evidenced by her low performance ranking, and she had previously been assigned the lower-level task of spotlight operator. Under all the circumstances, I find that Kostew's cue calling assignment was intended to demonstrate to the theater employees that those who supported the Union would be punished and those who opposed it would be rewarded. As such, I find that the General Counsel has made out a prima facie case that the assignment to Kostew of cue calling duties was motivated by her anti-union stance.

The burden therefore shifts to Respondent to establish that it would have taken the same action it did, even in the absence of Kostew's position with respect to the organizing campaign. This Respondent has failed to do. Ultimately, even DeStefano was forced to admit that she selected Kostew not because her less-than-steller performance had improved, but rather because she experienced a positive change in her "attitude." As the Board has recognized, references to an employee's "attitude" may in fact serve as euphemisms for that employee's leanings, union-wise. See *Blue Star Services*, 328 NLRB 638, supra; *Schaumburg Hyundai* , 318 NLRB 449, supra; *Boyer Ford Trucks, Inc.*, 254 NLRB 1389, supra. That DeStefano explicitly identified the majority of the discharged employees as having problems with their "attitude," leads me to believe that her use of the same term to describe the basis for Kostew's new assignment was essentially an admission that the decision was made based on her non-union stance. As such, I find that Respondent has failed to demonstrate a legitimate, non-pretextual reason for assigning Kostew cue calling duties.[52]

Accordingly, I find that, by assigning Kostew cue calling duties, Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 6(u) of the complaint.

F. The April 26 Petition for Election and Respondent's Initial Response

On April 26, the Union filed a petition for election, seeking to represent a unit of employees consisting of:

> All full-time and regular part-time Stagehands, Lighting Technicians, Audio Technicians, Spotlight Operators, and Wardrobe Technicians employed by [respondent's] at the Saxe Theater and V Theater facilities in Las Vegas, Nevada.

(GC Exh. 1(o).) Saxe was served with the petition on April 27, after which he texted DeStefano, "Union is official" and told her he would be holding meetings with employees. (Tr. 3473; GC Exh. 35.)

1. Respondent holds captive-audience meetings

On May 15, the employee-voters attended 2–3-hour mandatory meetings on the subject of the upcoming vote. The meeting took place in two segments, with a 15-minute break in between; the first segment was led by a consultant hired by Respondent with only employees (excluding Kostew) in attendance. Vocal during this portion of the meeting were future discriminatees Raymond Tupy (Tupy) and Scott Leigh (Leigh). Each of them openly challenged the consultant's claims, with Tupy stating that

[51] It is undisputed that, by receiving the backup cue caller assignment, Kostew did not receive an increase in wages; however, the Board has held that changing an employee's job duties may itself be actionable under Sec. 8(a)(3) of the Act. See, e.g., *Stafford Ambulance Assn.,* 351 NLRB No. 78 (2007) (not reported in Board volumes).

[52] As noted, I reject Respondent's claim that the apparent assignment of cue calling duties to stagehand Slezak is evidence of its lack of anti-union animus. Slezak failed to testify and therefore I cannot assume that his attitude towards the Union was any different from that of Kostew herself.

he had been a union steward for the Union[53] and that what the consultant was saying was untrue. (Tr. 1006, 1743–1750, 1897–1898, 2052; GC Exh. 39.)

After a 15-minute break, the employees were called to return to the meeting; at this point, various managers and supervisors joined the meeting, including Saxe, DeStefano, and Estrada. Kostew also joined the meeting at this time. Saxe addressed the group; apologizing for not paying attention to the theaters and the employees, he promised to try to be around more often. Growing emotional, he then said he hoped that they would give him another chance to try to make things better. The Union, he said, could make things difficult, and employees might therefore regret voting for representation. Tupy testified that he and two other people asked questions, but he could not recall what. Saxe admitted to delivering remarks during the meeting and failed to deny the statements attributed to him. (Tr. 1750–1751, 1899, 1952–1953, 3534, 3540.)

2. Saxe singles out Tupy and Glen for a private discussion [Compl. ¶ 5(j)]

Following the meeting, Saxe approached Tupy and Glen at the V3 Theater's audio booth, where they were preparing for that evening's show. During the conversation that ensued, according to the General Counsel, Saxe gave the two men the impression that their union activities were under surveillance.

According to Glen, Saxe began the conversation by stating, "you know, I know you guys. . . are both pro-union," and added that he was not going to hold that against them. Tupy's recollection was similar, but not identical; he testified that Saxe said that he knew he had "lost" both of them,[54] and that they should think about how they were going to vote and consider not voting for the Union. Saxe then told Glen, "I know you're pro-union, because of your girlfriend, Jasmine [Glick]." Tupy intervened and engaged Saxe, stating that he "didn't start this whole union thing" but had been a union member for years and was going to vote for the Union. He then told Saxe he expected to get fired once the vote was completed; Saxe responded that he could not fire (or hire) anyone, because of a "union freeze." (Tr. 1745, 1752–1753, 1901–1902.)

While Saxe did not deny that this exchange occurred, his version was different in key aspects. In his iteration, he approached the booth and was immediately "attacked" by Tupy, who accused him of not answering a question during that evening's meeting. Then, he claimed, Glen engaged him, demanding to know why Glick had been discharged. By Saxe's telling, he was conciliatory and measured in his response to the two men, telling Tupy he had "no problem" with him being pro-union and assuring Glen that he had "issues" in the past with Glick, but could not violate her confidentiality. (Tr. 3541, 3623.)

The General Counsel alleges that Saxe's comments amounted to creating the impression of surveillance by (a) telling employees that he knew they supported the Union, and (b) telling employees he knew they were going to vote yes for the Union. I agree. As a preliminary matter, I credit the employees' version of this meeting, as opposed to Saxe's rather obviously sanitized, self-serving version, which appeared tailored to explain why he had chosen to seek out Tupy, who had been vocally prounion in the preceding group meeting.

It is well settled that an employer creates an impression of surveillance by indicating to employees that it is aware of their union activity without disclosing the source of that information, "because the 'employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through employer monitoring.'" *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 4–5 (2018) (quoting *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009), affd. and incorporated by reference in 357 NLRB 633 (2011), enfd. 498 Fed.Appx. 45 (D.C. Cir. 2012)) (emphasis in original). Such is the case where a supervisor tells employees, as Saxe did, that he knows how they will vote in an upcoming election. *Capitol EMI Music*, 311 NLRB 997, 1006 (1993). While Tupy was known to be pro-union and had been vocally so during the group meeting that night, there is no evidence that Glen had done so as well. By stating that he knew Glen, by virtue of his relationship with Glick, was pro-union and would vote "yes," Saxe indicated that he knew that Glick was herself pro-union but did not explain the source of his information. As such, I find that this statement violated the Act as alleged in paragraph ¶ 5(j) of the complaint.

3. Saxe speaks with Prieto one-on-one [Compl. ¶ 5(h)]

Saxe also spoke with Prieto following the meeting backstage at the V Theater, and, according to the General Counsel, created the impression that his union activities were under surveillance and additionally promised him increased benefits and terms of employment by soliciting his complaints and grievances. According Prieto, Saxe approached him as he was working and said that he had heard that he was a "very good worker" and did a "great job" and also that he was "pro-union." He then said he didn't think he would be able to change Prieto's mind "on anything" but hoped that, no matter the outcome of the vote, it did not "cause a rift" between them. Prieto said thanks in response, at which point Saxe asked him if had ever tried to contact him about anything, including "any changes." Prieto responded that he had tried to convince management to give him a raise for his work on a specific aerial act, to which Saxe responded that he had not heard anything like that. (Tr. 1953–1956, 1975.)

Once again, Saxe attempted to portray a rosier version of events; in his version, he told Prieto that he had learned from a performer (whom he identified) that Prieto had been badmouthing Saxe and saying that he was "going to get the Union in here and F me up and stuff like that." Only then, according to Saxe, did he tell Prieto that he knew he was pro-union, that it was "okay" and that he did not want Prieto to feel uncomfortable or at odds with anyone. (Tr. 3536–3538.) This portion of Saxe's testimony stood out as particularly rehearsed, and I do not credit it.

As he had previously with Tupy and Glen, Saxe unlawfully created the impression of surveillance with Prieto by stating he knew he was "pro-union" without explaining the source of this knowledge. See *Greater Omaha Packing Co.*, 360 NLRB 493,

[53] Tupy was open about his pro-union stance, which he made known to management prior to his hire. (Tr. 1743.)

[54] While Tupy's recollection of Saxe's opening remark was different than that of Glen, he understood it to mean essentially the same thing. (Tr. 1756; "I just thought he meant that we were going to vote for the Union and that he lost us").

supra at 496. In addition, by asking Prieto if he had ever tried to contact him about "any changes," Saxe unlawfully solicited grievances. Absent a previous practice of doing so, the solicitation of grievances during an organizational campaign, accompanied by a promise expressed or implied to remedy such grievances, violates the Act. See *Center Service System Division*, 345 NLRB 729, 730 (2005); *Amptech, Inc.,* 342 NLRB 1131, 1136–1138 (2004), enfd. 165 Fed.Appx. 435 (6th Cir. 2006); *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (citing *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994)). "[T]he fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved." *Maple Grove Health Care Center*, 330 NLRB at 775.

In this case, Saxe implicitly solicited grievances from Prieto by asking whether he had ever tried to contact him about "any changes." While subtle, this remark was reasonably understood to signal to Prieto that Saxe was receptive to hearing what Prieto, whom he considered pro-union, wanted to see changed in his work life. Significantly, their exchange came on the heels of Saxe's captive audience speech, in which he had apologized for not being more present at the theater and promised to change his ways and "make things better" if given a chance, essentially indicating that, going forward, he would be more available and receptive to employees' requests and concerns, obviating any credible past-practice argument. As such, I find that Saxe implicitly promised to address Prieto's grievance in violation of Section 8(a)(1) of the Act.[55]

Accordingly, I find that Respondent, by Saxe, violated Section 8(a)(1) of the Act as alleged in paragraph 5(h) of the complaint.

G. DeStefano Arranges for a Shuttle Bus to Transport Employees to the Polls and "Reminds" Tupy and Glen to Show Up [Compl. ¶ 5(k)]

The secret ballot election was scheduled to take place on May 17 at the Board's Las Vegas resident office. Days before the election, DeStefano announced to employees that there would be a shuttle bus available at one of the theaters to transport them to the Board office, even if they were not scheduled for work that day. On May 16–17, DeStefano also texted employees, reminding them when the bus would leave. On the day before the election, DeStefano sent individual text messages to Glen and Tupy (who had been singled out by Saxe following the captive audience meetings). Both men were scheduled off at the time of the work call, and Tupy had already informed DeStefano that he would be *not* be taking the shuttle bus. Nonetheless, she asked each of them to confirm whether or not they wanted to take advantage of Respondent's offer to transport them to the polls. (Tr. 556–557, 712, 1960–1961, 1990, 2754–2755; GC Exh. 40, 41, 71; CP Exh. 3.)

Under established Board law, an employer may provide transportation to and from a polling station, provided that the benefit is offered on a nondiscriminatory basis, and the employees are free to accept or reject the offer. See *Heintz Mfg. Co.*, 103 NLRB 768 (1953). The General Counsel, however, argues that the "reminder" text messages DeStefano sent to Glen and Tupy the day before the election violated the Act, in that they constituted both surveillance of union activities and creation of the impression of surveillance. I agree with the General Counsel that, based on the Board's decision in *B&K Builders, Inc.*, 325 NLRB 693, 694 (1998), DeStefano's texts did, in fact, create the impression of surveillance, in that a reasonable employee, having received such a message, would understand that management was monitoring their voting plans. I disagree, however, that DeStefano's texts constituted "surveillance" as understood by Board law; the General Counsel cites no authority for this proposition, and I have found none.[56] Accordingly, I find that Respondent, by DeStefano, violated Section 8(a)(1) of the Act as alleged in paragraph 5(k)(ii) of the complaint, and further recommend that paragraph 5(k)(i) of the complaint be dismissed.

THE MAY 17 ELECTION AND RESPONDENT'S ALLEGED OBJECTIONABLE CONDUCT

On May 17, the vote took place. Present as the Union's designated observer was Urbanski; Kostew served as Respondent's observer. As of the date of the election, Charging Party had filed unfair labor practice charges alleging that Hill, S'uapaia, Michaels, Glick, Graham, Bohannon, Franco, Gasca, and Langstaff had been unlawfully discharged. Seven of these employees, all but Gasca and S'uapaia, voted subject to challenge at the election. The Union lost by a vote of 22 to 19, rendering those challenged ballots determinative. (Tr. 662–663, 1054–1055, 1210, 1300, 1381, 1532, 1841, 2266–2267, 2327, 2504, GC Exhs. 1(a), 54.)

On May 24, 2018, the Union filed 14 postelection objections, including one based on the discharge of union adherents, arguing that Respondent, by and through their supervisors and agents, engaged in conduct that objectively interfered with the employee-voters' exercise of free choice. As discussed, supra, I have already concluded that, because a determinative number of ballots were cast by employees discharged in violation of the Act, those ballots should be reopened and counted, and a revised tally of ballots should issue. Should, however, this revised tally of ballots demonstrate that the Union has not received a majority of the ballots cast, the Union argues that Respondent's objectionable conduct warrants setting aside the election and directing a re-run election. I agree.

A. The Board's Framework Governing Objections

Under well-established Board doctrine, for conduct to be objectionable, it must normally occur during the critical period, which begins on the date the petition is filed, and runs through the date of the election, during which "laboratory conditions"

[55] I find the Board's decision in *Airport 2000 Concessions*, 346 NLRB 958 (2006), relied on by Respondent, to be distinguishable. In that case, the employer successfully rebutted a supervisor's implied promise to remedy complaints where, following employees' stating their grievances, the supervisor "proceeded to equivocate, temporize, and ultimately outright deny" that these grievances would actually be addressed. Saxe did no such thing; if anything, his response that he had never heard that Prieto wanted a raise, continued to suggest his receptiveness.

[56] It does appear that DeStefano, by her texts, was attempting to gauge whether Tupy and Glen were in fact prounion (as Saxe had surmised), but the complaint fails to allege her conduct as unlawful polling.

must be maintained. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Generally, conduct that occurs prior to the critical period is not considered objectionable. *Ideal Electric*, supra; *Data Technology Corp.*, 281 NLRB 1005, 1007 (1986). Exceptions to this general rule exist, however. For example, prepetition conduct found to be truly egregious or likely to have a "significant impact" on the election may nonetheless be considered objectionable. See, e.g., *Servomation of Columbus*, 219 NLRB 504, 506 (1975) (violence or threats thereof). Similarly, where prepetition conduct "adds meaning and dimension to related postpetition conduct," *Dresser Industries*, 242 NLRB 74 (1979), it may be found objectionable. The critical period for purposes of Charging Party's objections began on April 26, when the petition was filed.

The Board applies a different standard to allegedly objectionable conduct, depending on whether it has also been found to constitute an unfair labor practice. Specifically, unfair labor practice conduct that occurs during the critical period prior to an election is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election." *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016); see also *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 10 (2017); *Super Thrift Market, Inc.*, 233 NLRB 409, 409 (1977); *Dal-Tex Optical Co.*, supra, at 1786. In determining whether the unlawful conduct is de minimis, the Board considers a number of factors, including the number of incidents, their severity, the extent of dissemination, and the size of the unit. *Super Thrift Market*, supra, at 409.

On the other hand, when alleged allegedly objectionable conduct does not also constitute an unfair labor practice, the Board will evaluate whether that conduct, taken as a whole, warrants a new election because it has "the tendency to interfere with employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Metaldyne Corp.*, 339 NLRB 352 (2003). In making this determination the Board examines several factors, including: (1) the number of incidents; (2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists on the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and, (9) the degree to which the misconduct can be attributed to the party. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Taylor Wharton Division*, 336 NLRB 157 (2001).

B. Analysis of Individual Objections

1. Pre-petition conduct [Objections 1, 3, and 11]

Charging Party contends that certain of Respondent's conduct occurring before the Union's representation petition was filed constitute objectionable conduct warranting overturning the election results. Specifically, these actions include the unlawful discharges of Hill, Glick, Franco, Bohannon, Langstaff, Gasca, S'uapaia, Graham, and Michaels, the March 15 wage increase and Kostew's warning Prieto about discharging union adherents. I disagree. Charging Party has failed to establish that this misconduct, while serious, qualifies for an exception to the Board's rule that objectionable conduct take place during the critical period, and I decline to so find. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961); see also *Kokomo Tube Co.*, 280 NLRB 357 (1986). I therefore recommend that they be overruled.[57]

2. Unlawful Handbook Rules [Objection 14]

I have found that two of Respondent's handbook rules, each maintained during the critical period, to be unlawful: the first is a restriction on employee blogging content that is "detrimental" to Respondent's interests or "tarnishing" to its reputation; the second is a requirement that employees refer to management all requests from "outside people or organizations" to solicit or distribute literature on Respondent's premises at any time. There is no evidence that either of these rules, which were disseminated via Respondent's employee handbooks, have ever been enforced against any employee. Nor is there any evidence that either of the rules operated to chill protected conduct.

Such evidence, however, is not required to deem these rules objectionable. As the Board has held, "[i]t is well settled that, absent evidence of a rule's chilling effect, "the maintenance of an unlawful rule is objectionable conduct sufficient to warrant setting aside an election." *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013, fn. 4 (2001); see also *Jurys Boston Hotel*, 356 NLRB 927 (2011) (evidence of a rule's chilling effect not required because "employees could reasonably construe the provision as a directive from their employer that they refrain from engaging in permissible Section 7 activity") (quoting *Pacific Beach Hotel*, 342 NLRB at 373–374).

As I have found each of these rules to violate Section 8(a)(1) during the critical period, they will be deemed objectionable unless they are deemed so de minimis that it is "virtually impossible" to conclude that their maintenance *could* have affected the results of the election. See *Intertape Polymer Corp.*, 363 NLRB No. 187, supra. I would characterize neither of these rules as de minims. They are each aimed at core Section 7 rights: critiquing Respondent's employment practices and requiring employees to report attempts to solicit or distribute literature by "outside organizations" such as unions. Considering this direct impact on protected rights, as well as the rules' wide dissemination throughout Respondent's work force (accompanied by a warning that violating them could result in discharge), I cannot conclude that it is "virtually impossible" that these rules could have affected the results of the election. Indeed, should the Regional Director's retally of results, after counting the ballots of the seven unlawfully discharged employees, evidence another defeat for the Union, it is a distinct possibility (depending on the margin of defeat) that Respondent's maintenance of these unlawful rules

[57] *Objection 11* also included an allegation that, within the critical period, employees were threatened with job loss and closure of theater shows. I found the evidence in support of this exception (a single employee's testimony) to lack credibility and would therefore recommend overturning *Objection 11* on this ground as well. See Tr. 1899–1900.

during the critical period may have directly accounted for such loss.

As such, I find that the Union's Objection 14, insofar as it is based on the allegations in paragraphs 5(b)(2) and (3) to have merit and therefore sustain it.

3. Reduction in Glen's work hours [Objection 13]

In May, Glen worked a part-time schedule of approximately 22 hours per week. According to Charging Party, effective May 6, Respondent reduced his hours to 11 hours per week. The testimony in support of this objection took the form of Glen's somewhat vague testimony that, during this time period, "I stopped doing or stopped getting called in for work calls which were like around 4 p.m., 4 to 5 p.m." DeStefano testified, however, this change to Glen's schedule was part of an across-the-board action that impacted numerous employees. Specifically, she explained, in early May, she and Saxe decided to stop announcing work calls for all part-time employees, such as Glen. (Tr. 1904, 2723–2731.) This testimony went unrebutted, nor was there any evidence that Respondent undertook the schedule change as a means of targeting Glen personally. As such, I recommend that *Objection 13* be overturned.

4. Kostew's conduct as Respondent's alleged agent [Objections 4 and 9]

The General Counsel alleges that Kostew is an agent of Respondent pursuant to Section 2(13) of the Act. While she is not alleged to have committed any unfair labor practice, Kostew's agency status is relevant for purposes of supporting certain of Charging Party's objections to the election. Specifically, Kostew is alleged to have intimidated voters, engaged in surveillance and unlawfully polled an employee on the morning of the election to determine his position on unionization. Charging Party argues that Kostew's agency status arose based on her relationship with Stage Manager Estrada, her promotion to the "cue caller" track and her designation as Respondent's election observer.[58]

a. Facts

Kostew has, for at least 2 years, worked as a stagehand at the Saxe Theater, which is managed by Estrada. Estrada and Kostew began dating in early 2017 and began living together in April or May of the following year. Their relationship is common knowledge among Respondent's work force. As discussed, infra, Kostew was, in April, assigned a prestigious role at work typically performed by a manager (an assignment I have found to constitute an unlawful reward for her anti-union stance). Kostew also joined the May 15 captive audience meeting only at its mid-point (when she arrived with Respondent's managers and supervisors) and served as Respondent's observer at the union election. (Tr. 379, 830–831, 854, 861, 2481, 3106.)

The evidence indicates that Kostew has occasionally acted as a liason between management and her fellow stagehands. As discussed, supra, she did so on at least one occasion as part of Respondent's response to the employees' organizing campaign, when she, on behalf of Estrada and Saxe, solicited employees to a last-minute "work call" scheduled the same night as an organizing meeting. On another occasion, Kostew relayed an employment offer from Estrada to a prospective employee. At hearing, Kostew and Estrada each downplayed Kostew's role as a liason to the theater employees, claiming that Estrada also regularly asked other employees to pass along information. (GC Exh. 59; Tr. 896–897, 1474, 3097–3098.) No such "other employee," however, corroborated this testimony.

Charging Party's *Objection 4* (intimidating voters and engaging in surveillance) is based on Kostew's conduct the night before the vote. Between 9 and 11 p.m., Estrada called a meeting among the Saxe Theater stagehands. Kostew testified that the purpose of the meeting was to get everyone "on the same page" about the next day's vote. Approximately 10 stagehands and 2 audio techs were in attendance. With Estrada present, Kostew told the employees that they should "vote no" in the next day's election; she also delivered a short set of remarks, including the following:

> whether you're for or against the Union, I would like you to keep DSP union free . . . if you want a union gig, go join a union and work the gigs that they give you. This company has been fine without it . . . and if you're that dead set on a union, just go join one. And it's Vegas; they get conventions and stuff all the time, so it's easy to get union work. But keep this not unionized.

After Kostew spoke, two other anti-union employees chimed in, agreeing with her. No one spoke up in favor of the Union. (Tr. 2497–2499, 2502, 2507–2508.)

Kostew also shared her "vote no" message with each of the Saxe Theater stagehands who was not present but was on the payroll as of that day; she testified that these exchanges happened in person and "maybe, probably" via text message and/or Facebook messenger. At 2 a.m. on the day of the vote, she also sent audio tech Petty a Facebook message containing a single word, "Bryyyyyyce!" He did not respond. (CP Exh. 6; Tr. 2409–2411.) This text, according to Charging Party, amounted to unlawful polling by Kostew (*Objection 9*).

b. Analysis

The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Albertson's, Inc.*, 344 NLRB 1172 (2005). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982). The Board's standard is derived from the common law on apparent authority, which results from:

> a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief.

[58] I note that Charging Party does not contend that Respondent unlawfully attempted to interfere with the conduct of the election by appointing Kostew as its observer. See, e.g., *B-P Custom Building Products*, 251 NLRB 1337 (1980).

Mastec North America, Inc., 356 NLRB 809, 809–810 1–2 (2011) (citations omitted).

Over the years, the Board has given consideration, in applying this standard, to whether the alleged agent has regularly been used by the employer as a conduit of information to its workforce and could thus reasonably viewed by employees as speaking on the employer's behalf. See, e.g., *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980) (agent "relayed information from management to employees and had been placed by management in a strategic position where employees could reasonably believe he spoke on its behalf"); *Einhorn Enterprises*, 279 NLRB 576 (1986) (agent "relayed confidential information obtained from management to rank-and-file employees"); *Southern Bag Corp.*, 315 NLRB 725 (1994) (agent was "an authoritative communicator of information on behalf of management"); *Roskin Bros.*, 274 NLRB 413, 421 (1985) (rank-and-file employee who was perceived by other employees as manager's "right-hand man" relaying instructions to employees was employer's agent).

Applying these principles here, I find that Kostew delivered her election-eve speech as Respondent's agent. A month earlier, Respondent had actively enlisted her in its effort to frustrate the organizing effort, and was explicitly charged with publicizing that Saxe personally wanted employees to volunteer for the last-minute work call scheduled at the same time as a union meeting. As discussed, this rather ham-fisted maneuver effectively outed those employees who declined the work call in in lieu of the meeting. Notably, in this instance, Kostew acted with specific, actual authority, see *Acme Bus Corp.*, 320 NLRB 458, 458 (1995), which she announced to employees, stating that Estrada had asked her to relay Saxe's message.

A month later, Respondent rewarded Kostew's loyalty by announcing that she would receive a plum work assignment, which employees viewed as a stepping-stone to a management position. Finally, on the eve of the election, employees were ordered to listen to Kostew—flanked by her significant other, Stage Manager Estrad—deliver a "vote no" speech that echoed the message delivered earlier in Respondent's own meetings. Notably, Respondent themselves were explicitly forbidden, under established Board law, from conducting such a mandatory speech within 24 hours before the scheduled time for an election. See *Peerless Plywood Co.*, 107 NLRB 427, 429 (1954). Thus, by using Kostew to deliver the message they could not, Respondent unmistakably held her out as aligned with their interests and thus a reliable conduit for echoing their anti-union message, which employees had heard from Saxe and his consultant hours earlier. *Beverly California Corp.*, 326 NLRB 232, 234–235 (1998) (statements by anti-union employees during captive audience meeting coercive when manager present expressly called upon them to express their views), enfd. in relevant part 227 F.3d 817 (7th Cir. 2000). I therefore find that the Union's *Objection 4*, insofar as it is based on Kostew intimidating voters, to have merit and sustain it.[59]

Conversely, I find that *Objection 9*, alleging that Kostew unlawfully polled Petty on the morning of the election, is not supported by the record. Here, the record evidence shows that, while she may have ultimately admitted that her brief and failed attempt to contact him was in fact aimed to learn how he planned to vote, her single-word message was not coercive on its face. I therefore recommend that *Objection 9* be overruled.

5. Objections involving compliance with stipulated election agreement

On May 9, the parties entered into a stipulated election agreement that was approved by the Regional Director for Region 28 the same day (the stipulation). Several of Charging Party's objections are based on Respondent's alleged failure to adhere to the terms of the stipulation, including failing to provide an appropriate voter eligibility list and failing to properly post and distribute Board notices.

a. Alleged defects in the voter eligibility list [Objection 2]

The parties' stipulation contains standard language requiring Respondent to provide a voter list (commonly referred to as an "*Excelsior* list") listing contact information for "eligible voters," including home addresses, available personal email addresses,[60] and available home and personal cellular telephone numbers. (See GC Exh. 1(j).) The stipulation does not, however, specifically address whether individuals permitted to vote subject to challenge must be included in the list.

On May 11, Respondent served its list on the Union. The list did not contain the names or contact information for the discharged employees who were entitled to vote subject to challenge and contained personal email addresses for only 29 of the 48 employees listed. (CP Exh. 7; Tr. 2441–2442.) Charging Party asserts that these omissions constitute objectionable conduct. Respondent counters that nothing in the parties' stipulation required it to list subject-to-challenge voters, and that Charging Party failed to demonstrate that it omitted personal email addresses of which it was aware.

In determining whether an incomplete *Excelsior* list warrants setting aside an election, the Board has emphasized that the rule is not to be "mechanically applied." *Telonic Instruments*, 173 NLRB 588, 589 (1969); *General Time Corp.*, 195 NLRB 343, 344 (1972); *Program Aids Co.*, 163 NLRB 145, 146 (1967); *Thrifty Auto Parts*, 295 NLRB 1118 (1989). Typically, "substantial compliance" will suffice; a finding that the employer has acted in bad faith, however, precludes a finding of substantial compliance. See *Woodman's Food Markets*, 332 NLRB 503, 504 fn. 9 (2000) (citing *Bear Truss, Inc.*, 325 NLRB 1162, 1162 fn. 3 (1998)).

With respect to the failure to list employees' personal email addresses, I agree with Respondent that Charging Party has failed to establish that it actually withheld email addresses of which it was aware. Indeed, there is no evidence that Respondent was in possession of, but failed to disclose, any employee's personal email address.

I also agree with Respondent that, pursuant to the parties' stipulation, it was not obligated to list the subject-to-challenge voters. The Board's Rules governing *Excelsior* lists make it clear that, in addition to listing eligible voters:

[59] Charging Party fails to explain how Kostew's conduct constituted "surveillance" as alleged, and I decline to so find.

[60] An employer is not required to provide workplace email addresses. *Trustees of Columbia University*, 350 NLRB 574, 576 (2007).

> [t]he employer shall also include in a separate section of that list the same information for those individuals *whom the parties have agreed should be permitted to vote subject to challenge* . . .

Rules & Regulations Secs. 102.62(d) (emphasis added). Here, Charging Party agreed to, and the Regional Director approved, a stipulation that failed to identify agreed upon, subject-to-challenge voters. I find this omission unambiguous and therefore binding on Charging Party. See *Carl's Jr.*, 285 NLRB 975, 975 fn. 1 (1987) (the Board will accept stipulations of parties unless they are contrary to record evidence, the Act, or Board policy). Accordingly, I find no merit to *Objection 2* and recommend that it be overruled.

b. Alleged failure to properly post the Notice of Petition for Election [Objection 5]

Since 2014, the Board's Rules and Regulations have provided that, following the filing of an representation petition, the Board's regional office will serve on the parties a "Notice of Petition for Election," which must be posted within 2 business days "in conspicuous places, including all places where notices to employees are customarily posted" and remain posted until it is replaced by a Notice of Election. See Rules Sec. 102.63(a)(1) and (2). Charging Party contends that the election should be overturned not because Respondent failed to post the Notice of Petition for Election, but rather because it was not posted "in all applicable break rooms and conspicuous places visible to eligible voters." (See *Objection 5*.) I disagree.

The evidence indicates that this notice was posted in compliance with the stipulation's requirement. Saxe testified that, when he received a packet from the Region including the "Notice of Petition for Election," he immediately ordered his managers to ensure that "they all got posted," and later confirmed that this was the case. He also personally observed numerous postings throughout the facility on bulletin boards alongside other notices to employees during the relevant time period. This was corroborated by Charging Party's own evidence, which includes photographs of the notices posted on bulletin boards. (Tr. 3609, 3511–3513, 3518; CP Exhs. 2, 5.)

In support of its contention that the postings were insufficient, Charging Party offered the testimony of Tupy and Prieto. Tupy photographed a timeclock lacking the posting; Prieto photographed a second timeclock with no posting. Each of these photographs appear to show a timeclock flanked not by notices to employees, such as EEOC and OSHA disclosures, but by instructions on clocking in and out procedures. Prieto further testified that one of the postings was placed behind a locked door not accessible by all employees, and that this door was only unlocked a week later. The same posting, he testified, was placed near management offices, such that an employee reading it would risk being observed. (CP Exh. 1; Tr. 1792, 1947–1951, 2438–2441.)

Nothing in the record in this case indicates that Respondent's posting of the "Notice of Petition for Election" was inadequate. Charging Party alleges no delay in the posting and did not rebut Saxe's testimony that the notice was placed conspicuously throughout the facility at places where notices to employees are typically placed. The stipulation certainly does not mandate that a notice be posted next to every timeclock in Respondent's facility. Nor am I convinced that the posting of a single notice within the vicinity of management offices destroys the laboratory conditions necessary for a fair election.

As such, I find no merit to *Objection 5* and recommend that it be overruled.

c. Alleged interference with posting of Board Notice of Petition for Election [Objection 6]

Respondent also agreed, per the stipulation, to post copies of a Board Notice of Election at least 3 full working days prior to the day of the election. See Section 102.67(k) of the Board's Rules and Regulations. Charging Party alleges that Respondent committed objectionable conduct by "surrounding the Notice of Elections with 'vote no' signs and other anti-union propaganda." (CP Br. at 3.) Charging Party offered into evidence two photographs of Notices of Elections in which anti-union postings also appear. The messages in these non-Board postings, which are presented in different font and color than the Board notices, include "VOTE NO" in large font, informational flyers about dues checkoff and the Board's election process, and contact information for organizations such as the National Right to Work Foundation. (CP Exhs. 2, 5.)

I agree with Respondent that these postings do not provide a basis for overturning the election. As a preliminary matter, Charging Party adduced no evidence that Respondent—as opposed to anti-union employees—were in fact responsible for the non-Board postings. Even assuming this to be the case, however, nothing contained any coercive statements or otherwise strayed from what the Board considers "legitimate propaganda." *Nash-Finch Co.*, 117 NLRB 808, 810–811 (1957). Moreover, based on the documents' placement and appearance, I conclude that employees would not likely have been confused as to whether they contained views endorsed or approved by the Board. See id.

Based on the foregoing, I recommend that *Objection 6* be overruled.

d. Alleged failure to distribute Board Notice of d. Election [Objection 7]

The stipulation further provides that Respondent "distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically." Consistent with the Board's Rules, the stipulation specifically provides that, "[f]ailure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed." Id.; see Section 102.67(k). The Board's Notice of Election "contains important information with respect to employee rights under the Act" which must be conveyed to employees such that they are adequately apprised of their rights in advance of the election. *Smith's Food & Drug, Inc.*, 295 NLRB 983, 983 fn. 1(1989). Notably, the notice in this case served an important additional purpose in this case: alerting employees that there were individuals (i.e., dischargees) who had the right to vote subject to challenge, because their eligibility had not yet been determined. (See Rules Sec. 102.67(b).)

Since at least early 2017, Respondent have maintained an

email system, whereby employees are issued email addresses with the "@davidsaxe.com" domain name. Management uses these email addresses to inform employees of their weekly schedule, as well as to provide other work-related announcements, and maintains a policy requiring employees to check their company email accounts as a condition of employment. Employees Prieto, Glen and Urbanski each testified that, although they regularly receive work-related communications from management via their work (i.e. David Saxe-issued) email addresses, they did not receive a copy of the Notice of Election via this means. (Tr. 698–699, 1300, 1920, 1961, 2334–2335; R. Exh. 62(a).) Respondent presented no evidence to the contrary, nor did any eligible voter testify that they did receive an emailed copy of the notice. Nor did Respondent offer any valid reason for failing to email the Notice of Election to eligible voters. As such, I find *Objection 7* to have merit and therefore sustain it.

6. Changes to employee schedules [Objections 8 and 12]

As an additional basis for overturning the election results, Charging Party claims that, on the April 15 and 17 (respectively), DeStefano manipulated employees' schedules in order to make them available for captive-audience meetings and for Respondent's bus transport to the polls. With respect to the former objection, DeStefano herself admitted that she changed certain employees' schedules (those scheduled to work Mondays) to ensure that every employee attended one of Respondent's meetings; this was corroborated by Tupy and Glen, whose schedules were changed. The testimony regarding scheduling around the election transportation is far more limited, essentially consisting of Prieto's conjecture that DeStefano moved up his start time by 30 minutes on the day of the election to ensure that he would be able to board the bus on time. (Tr. 705, 1959–1960.)

While this conduct occurred undeniably occurred close to the election itself, I find that it fails to rise to the level of conduct that warrants overturning the election. The party challenging an election has the "burden of showing by specific evidence at the hearing that 1) improprieties occurred, and 2) that they interfered with the employees' exercise of free choice to such an extent materially to have affected the election results." *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1343 (9th Cir. 1987) (citing *NLRB v. Krafcor Corp.*, 712 F.2d 1268 (8th Cir. 1983)); see also *NLRB v. Mattison Machine Works*, 365 U.S. 123 (1961) (burden of proof upon objecting party to show prejudice to the fairness of the election).

As Respondent notes, it is well settled that an employer does not engage in objectionable conduct by requiring employees to attend captive-audience meetings. See R. Br. at 194 (citing *Fontaine Converting Works, Inc.*, 77 NLRB 1386, 1387 (1948). Charging Party adduced evidence of only two employees' schedules being affected by DeStefano's attempt to accommodate the meetings, and it appears that was because their regularly schedules would not have permitted them to attend a meeting. Nor is there any evidence that they suffered any economic deprivation as a result of the schedule changes. I find this conduct to be de minimis and no basis for overturning the election results. Absent shutting down its operations, an employer attempting to present its employees with its view on an upcoming election will by necessity be forced to schedule meetings outside of some employees' working hours. Indeed, the alternative would have been for Respondent to disallow certain employees from attending any meeting or single them out for a meeting separate from their coworkers, arguably a more coercive action. Likewise, I find that changing the reporting time of openly pr-union Prieto by 30 minutes thereby making it *easier* for him to vote would simply not have a tendency to interfere with his freedom of choice in a manner that could have affected the election's outcome. *Caron International*, 246 NLRB 1120 (1979) (even if conduct is violative of the Act, under the circumstances it may be of such a de minimis nature as to not affect the results of the election).

Accordingly, I find no merit to Charging Party's *Objections 8* and *12* and therefore recommend that they be overruled.

7. Surveillance of union meetings [Objection 10]

Charging Party alleges that Respondent engaged in objectionable conduct by surveilling union meetings. It is undisputed that Respondent maintain numerous surveillance cameras throughout its facilities, which are used to monitor employee performance and provide supporting documentation for discipline. That said, there is no record evidence of any kind to support a finding that Respondent actually captured video and/or audio footage of any "union meeting" as alleged. Nonetheless, citing no authority, the Union urges me to find that the very extent of Respondent's surveillance constitutes "sufficient evidence that [Respondent were] watching employees who spent time discussing the union while at work." (CP Br. at 25.) This I decline to do.

As the Supreme Court has cautioned the Board, its presumptions of fact "must rest on a sound factual connection between the proved and inferred facts." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–805 (1945)). The Court described this connection in *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775 (1990), as one in which "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact … until the adversary disproves it.'" Id. at 788–789 (quoting E. Cleary, ed., *McCormick on Evidence* § 343, at 969 (3d ed. 1984)). The Union asks me to presume that "union meetings" were surveilled via Respondent's camera system, but there is simply no evidence that any such meetings were held within view of such cameras. The burden was on Charging Party, presumably armed with knowledge of specific instances of such union meetings, to offer such evidence as the basis for any presumption of fact that they were surveilled and/or recorded. Absent such evidence (direct proof of which would appear to have been easy to obtain), I am unwilling to accept the Union's contention that this objection warrants setting aside the election.

Accordingly, I find no merit to Charging Party's *Objection 10* and therefore recommend that it be overruled.

ADVERSE ACTIONS FOLLOWING THE ELECTION

Following the election, Saxe remained hyper-vigilant about employee organizing; according to DeStefano, he believed that "almost anything could be connected to union activity." (Tr. 679–680.) The General Counsel alleges that this animus towards the Union resulted in Respondent's retaliating against pro-union employees Glen and Tupy, as well as election observer Urbanski.

Specifically, it is alleged that Respondent reduced Glen and Tupy's hours, issued Tupy an unwarranted discipline, denied Urbanski requested light duty after he suffered a work-related injury and imposed more onerous and rigorous terms and conditions of employment on him when he returned to full-time status, in each case in violation of Section 8(a)(3) of the Act.

A. Reduction in Glen and Tupy's Hours [Compl. ¶ 6(k), ¶ 6(o)]

1. Facts

Prior to June 1, audio techs Glen and lighting tech Tupy regularly reported for a 7:30 p.m. "show call." Tupy, who also works as a day-crew employee, often arrived even earlier to perform repair and maintenance work unrelated to the evening's production. He was granted wide discretion in setting his own day-crew hours, and for this reason would generally ignore the written schedule.[61] Effective June 1, DeStefano moved up both men's reporting time until 8 p.m. This left less time, before the audience door opened at 8:15 p.m., to run equipment checks, update cues, make repairs, program and synchronize the lighting and audio systems and run an 8 p.m. sound check with the show's live band and performers. (Tr. 1759–1762, 1906–1908)

When Glen questioned the new clock-in time on June 1, DeStefano stated quizzically, "[t]here was a restructure and everyone is coming in at certain times now." DeStefano claims that she informed Tupy of his new show-call time on June 1, but he could not recall any such conversation.[62] Indeed, for a period of time following June 1, Tupy continued to clock-in for performances at 7:30 p.m. (GC Exh. 72; Tr. 1806.)

2. Analysis

Reduction in an employees' hours based on his union or protected concerted activities violates the Act. See, e.g., *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019). Here, I find that the General Counsel has established a prima facie case that the reduction in Tupy and Glen's hours was discriminatory.

Tupy had been an outspoken critic of the positions taken by Respondent's "consultant" at a captive-audience meeting.[63] Interestingly, he had also been recommended for discharge by DeStefano back in March when she emailed Saxe about the other dischargees; it appears that he was only spared because, by the time a replacement was found for him, Saxe had forbidden her from undertaking any more discharges. (Tr. 466–467, 473–475; GC Exh. 31.) Glen, for his part, was known to be romantically involved with union adherent and discriminatee Glick, whom Respondent discharged based on her organizing activity. Moreover, Saxe had exhibited animus against both men on the eve of the election, when he told them that he knew he had "lost" their votes. The timing of the reduction in hours—2 weeks following the election—further suggests a discriminatory motive, as did DeStefano's description of the change as a "restructure," the same lingo she repeatedly used to describe the purge of union adherents that had taken place in March and April.

Based on this evidence of a prima facie violation, the burden shifts to Respondent to demonstrate that it would have reduced Tupy and Glen's hours even in the absence of their status as union supporters. Respondent, relying on the testimony of DeStefano, failed to meet this burden. Without providing any corroborating evidence, she claimed that Tupy and Glen had not been singled out, but that she had "shifted" the show call time for a number of theater employees (including main audio, lighting and spotlight operators) to 7:45 p.m. at the same time. Respondent failed to present either testimonial or documentary evidence to corroborate this claim. In her typical fashion, DeStefano offered a "bonus" rationale for having reducing Glen and Tupy's hours, citing a prior instances when Respondent ceased issuing work calls to theater employees. Logically, however, this fails to explain moving up Glen and Tupy's reporting time for *show* calls. As such, I find that Respondent failed to adduce credible evidence to support its *Wright Line* defense and therefore conclude that, by reducing Glen and Tupy's hours in June, Respondent violated Sections 8(a)(3) of the Act, as alleged.

B. Tupy's Discipline [Compl. ¶ 6(n)]

1. Facts

As noted, Tupy was not notified of the change to his work schedule and, after June 1, continued to clock-in at 7:30 p.m. Approximately 3 weeks later, DeStefano began documenting Tupy's early arrivals. On June 18, DeStefano sent Carrigan an email captioned, "For the record for [Tupy]," stating that she had addressed the issue three times previously with him. (Tupy, however, credibly denied ever having such conversations). DeStefano then noted that she was waiting on Saxe to provide "specific wording" for a "write up" she planned to issue Tupy. On June 19, Carrigan approved a PAF with a June 1 effective date indicating that DeStefano had issued him a written warning on that date for clocking in early. As Carrigan admitted, however, this document was never provided to Tupy. (Tr. 1794–1796, 1799–1800.)

On June 20, DeStefano sent Tupy a text message stating that his start time had been changed to 8 p.m. as of June 1, and that he would be receiving discipline for coming in early. Tupy protested that this would not allow him sufficient time to prepare for the show; after a back-and-forth exchange during which Tupy explained the technical aspects of preparing for the show, DeStefano ultimately agreed to move his start time to 7:45 p.m. Nonetheless, Tupy was issued a "written warning" PAF later that night for failing to adhere to his now-defunct 8 p.m. start time. This warning made no mention of the 7:45 p.m. accord. (GC Exh. 47, 48, 50, 70; R. Exhs. 59, 60; Tr. 608–609, 1764–1765, 1803, 1806, 2738.)

1. Analysis

As discussed, infra, the General Counsel has established that Tupy was vocally pro-union at the meeting held by Respondent's

[61] It appears that Tupy was afforded this flexibility in part to accommodate his need to take intermittent leave for medical treatments. (Tr. 1796–1797, 1975–1797, 1806.)

[62] I credit Tupy on this matter; he was cooperative and non-combative on cross examination and had a very specific recollection of the only conversation he did have with DeStefano concerned his day-crew work, not his reporting time for show calls. (Tr. 1808.)

[63] See *Prescott Industrial Products Co.*, 205 NLRB 51 (1973) (challenging management representative's statements at captive audience meeting constitutes protected conduct).

"consultant" and that Saxe openly accused him of being a union supporter later that day. This evidence, plus the timing of his discipline—approximately a month following the election—suggest animus, establishing the General Counsel's prima facie case.[64] The burden shifts, therefore, to Respondent to demonstrate that Tupy would have been disciplined in the absence of his pro-union stance. This I find Respondent failed to do.

As a basic matter, Respondent's conduct was inconsistent with its claimed concern over Tupy adherence to his new start time. An employer so motivated would not "lay in wait" for three weeks while Tupy—who had followed his posted schedule—continued to show up early, or pad his personnel file with a backdated written warning that was never presented to him. Respondent's conduct on the whole leads me to believe that DeStefano deliberately set up Tupy for discipline in retaliation for his outspoken support for the Union.

C. Allegations Surrounding Urbanski's Return from Medical Leave [Compl. ¶ 6(l), ¶ 6(m)]

1. Facts

Current employee Urbanski, who served as the Union's observer during the election, works as a day-crew employee responsible for repairing and maintaining lighting equipment, as well as performing other cleaning and maintenance work. The General Counsel alleges that, between June 4 and June 21, Respondent refused and failed to offer Urbanski the opportunity to work on light duty. It is further alleged that, between July 8 through July 22, Respondent imposed more onerous and rigorous terms and conditions of employment on Urbanski by subjecting him to closer supervision, requiring him to obtain written consent before performing tasks and assigning him more arduous work assignments.

Hired in late 2016, Urbanski is a relatively long-term employee. He was afforded a significant degree of independence in conducting his work; typically, he would report to work, review the show reports[65] for the lighting section and prioritize what needed to be done first without consulting any supervisor. He also directly responded to repair requests from coworkers and performers and was not required to get permission to do so, unless the repair required an outlay of money for materials. His schedule was Sunday through Thursday, 9:15 a.m. to 5:45 p.m. (Tr. 569, 2288, 2300–2301, 2324, 2338–2339, 2345–2346; R. Exh. 71.)

As noted, supra, Urbanski was the first of Respondent's employees to participate in the Winter/Spring organizing campaign and was known to be close with Devito; in February, DeStefano noticed that Urbanski's "attitude" had "dropped way low" following Devito's departure. That same month, Urbanski recruited a number of his coworkers to join the organizing cause and was active in the Facebook group chat access by Mecca. Most notably, Urbanski served as the Union's election observer on May 17, a fact of which Saxe was admittedly aware. (Tr. 1024, 2261; GC Exh. 84.)

a. Urbanski's medical leave and light duty request

In early April, Urbanski injured his hand at work, and he originally attempted to work light duty. Saxe initially discouraged Urbanski from performing light duty, but then agreed to allow him to perform some inventory work at Respondent's corporate warehouse. His schedule shifted somewhat; during this period, he worked 9 a.m. to 5:30 p.m., Monday through Friday. In the course of training for his light duty, Saxe mentioned that he knew that Urbanski was roommates with former manager Devito, but that he wasn't going to hold it against him.[66] Around April 20, Urbanski's effort at light duty ultimately failed, with Saxe criticizing his work output and Urbanski opting to return to work after having surgery later that month. (Tr. 2270–2271, 2273, 2284, 2289.)

As noted, Urbanski served as the Union's election observer on May 17. Saxe admitted that he learned of this fact shortly after the election (between 1 day and a week). Both before and after the election, Urbanski stayed in communication with Carrigan, who repeatedly offered him light duty, which he consistently declined. On May 24, Urbanski emailed Carrigan stating that he expected to be released to return to work on June 4, at which time he would be able to use his left hand "somewhat." Until then, he said, "I'm going to choose to deny light duty until I can return to work on June 4." On June 1, Urbanski emailed Carrigan:

> Do you have the new modified worksheet I can sign so I can return to the theater on Monday [June 4]?

As Carrigan explained, the "modified worksheet" to which he referred was the paperwork (alternately referred to as a "light duty form" or "modified duty form") that she had previously told him was required for his return to work. Carrigan admittedly did not respond to Urbanski's June 1 email or otherwise provide him with this form; she failed at hearing to explain why this was the case. (GC Exhs. 89 at 1, 6; Tr. 233, 249, 2216, 2325–2326, 2348.)

On June 19, Carrigan emailed Urbanski, claiming that she was unclear as to whether he intended to work light duty or delay his return to work until his restrictions were cleared. She then set forth a lengthy, detailed recitation of his failed prior attempt to return to work and accused him of refusing to accept light duty. She then stated that Respondent had light duty work available to him and that she hoped to see him the following day at 8:30 a.m. (GC Exhs. 90, 91.)

b. Urbanski's return to work

Urbanski did not accept Carrigan's offer to work light duty beginning on June 20; 2 days later, however, Carrigan emailed

[64] Considering the overwhelming evidence of antiunion animus throughout the record, I do not agree with Respondent that Tupy's known ties to the Union at the time of his hire establishes a lack of animus against him, especially considering that he significantly ramped-up his pro-union campaigning shortly before the election. See *Tradesman International, Inc.*, 351 NLRB 579, 581 fn. 14 (2007) (citation omitted).

[65] A "show report" is generated for each show to document problems occurring during the production, as well as to identify equipment (i.e., such as lighting equipment) in need of repair. (Tr. 964–967, 2761.)

[66] I credit Urbanski as to this conversation; a current employee at the time he testified, he listened carefully to questions and testified consistently as to Saxe's remark both on direct and on cross-examination. Saxe, for his part, did not deny making the statement.

him that she had received a note from his doctor releasing him to full duty as of June 21. She instructed him to report to work the following Monday, June 25. (GC Exs. 90, 91.)

For approximately a week following Carrigan's offer of full duty, she and Urbanski debated the terms of his return to work, with Carrigan insisting that he return to the site of his prior light-duty assignment (i.e., the corporate warehouse) and Urbanski protesting that this constituted "retaliation" against him. Around the same time, Saxe and DeStefano discussed Urbanski via email; referring to him (along with Tupy and Petty) as a "trouble maker employee," Saxe told DeStefano that he planned to have an "intervention" with Urbanski upon his return and issue him a "final verbal warning" for his "blatant insubordination." (GC Exhs. 90–92.) At hearing, neither DeStefano nor Saxe explained what this insubordination entailed.

Ultimately, on June 27, Urbanski won the debate with Carrigan and ended up returning to his original schedule and position at the theaters. Urbanski ended up returning to work on July 8, back at the theaters on full duty. It is undisputed that he was no longer reporting to his prior manager, who had stopped working for Respondent during Urbanski's leave and not yet been replaced. DeStefano, who was traveling out of town, sent Urbanski an email the night before his return, detailing the tasks he was to work on, including painting props and sets, cleaning tech booths and installing fans. Notably, these were tasks similar to those he had performed prior to his leave. Throughout the day, Urbanski kept DeStefano apprised of his progress throughout the day. (Tr. 564–565, 2221–2222, 2345, 2881–2882; GC Exhs. 42, 43, 93, 94.)

After completing his shift, Urbanski received an email from Saxe, stating that Urbanski would be reporting directly to him (Saxe). He then stated:

> Remember, do not work on anything other than what [DeStefano] or I assigned to you in writing. If anyone else asks you to handle something, he must get it approved first by either of us in writing.[67]

Urbanski responded that he had not been able to finish his assigned tasks and then questioned why he had been assigned certain tasks.[68] For the next 3 days, he and Saxe exchanged a flurry of emails in which Saxe continuously demanded that Urbanski update him on the progress of each of the tasks he had been assigned. According to Urbanski, this pattern continued for 2 weeks; his account was corroborated by the documentary evidence, which included additional emails from DeStefano during this period, detailing the tasks to which he was assigned. After that period, Urbanski reverted to his pre-medical leave practice of consulting the show notes for the lighting section and prioritizing his own work. (GC Exhs. 42, 44, 45, 100, 101, 570–571; Tr. 2325.)

2. Analysis

According to the General Counsel, by refusing to provide Urbanski his requested "light duty form," Carrigan in effect denied him light duty between June 1 (when he requested it) and June 21. I agree but find that the period of denial was actually June 4 (when he made himself available for light duty) to June 20 (when Carrigan accepted his light-duty offer). The General Counsel also alleges that Respondent discriminated against Urbanski upon his return to work by subjecting him to closer supervision, requiring him to obtain written consent before performing tasks and assigning him more arduous work assignments. I agree with the first two, but not the third, of these allegations.

a. Denial of light duty

Urbanski's extensive union activity, culminating in his appearance as the Union's election observer, is well documented throughout the record. Saxe's remark to about not holding Urbanski's ties to Devito against him, coupled with his characterization of him as a "trouble maker employee" strongly suggests that he was well aware, and took a dim view of, Urbanski's association with the Union. As noted, supra, an employer's reference to "trouble" against the backdrop of union organizing frequently signals animus towards that activity, and "trouble employee" may function as a veiled reference for union supporter. See, e.g., *Mardi Gras Casino*, 359 NLRB 895 (2013) (employee "getting herself into trouble" veiled reference to her union activity), reaffd. 361 NLRB 679 (2014); *Smithfield Foods, Inc*., 347 NLRB 1266, 1274 (2006) ("problem person" euphemism for employee's union activity); *Diversified Bank Installations, Inc*., 324 NLRB 457, 471–472 (1997) (employee causing "trouble" euphemism for union activity). Saxe's animus against Urbanski is also evident from his initial attempt to discourage him from working light duty and plan to subject him to a disciplinary "intervention" upon his eventual return to work.[69]

The General Counsel has established an impressive prima facie case regarding Urbanski. As such, it falls to Respondent to explain why, when he offered to return to work, Carrigan abruptly broke off communication, failing to provide him with the "light duty form" he clearly believed was necessary for his return. At hearing, however, Respondent offered no plausible explanation for Carrigan's inaction, or for her self-serving email 3 weeks later, in which she attempted to portray Urbanski as having refused the very light duty he had plainly requested. The timing of Carrigan's conduct (a mere 2 weeks following Urbanski's serving as the Union's election observer), combined with Respondent's total failure to explain her actions, suggest that, but for his status as a union supporter, Urbanski would not have been denied light duty.

Accordingly, I find that, by denying Urbanski light duty between June 4 and June 20, Respondent violated Section 8(a)(3)

[67] Saxe claimed that he imposed this "written approval" requirement only after warning Urbanski to perform only his assigned tasks. This is belied by Respondent's own records, which demonstrate that Saxe's directive was in fact his first communication with Urbanski upon the latter's return from leave. (See Tr. 244–245; GC Exh. 44 at 3.)

[68] There is no indication that the tasks Urbanski was assigned upon his return from leave were more physically demanding than those he had previously performed. (Tr. 2324, 2339–2340.)

[69] Respondent suggests that Carrigan's ongoing engagement with Urbanski regarding his return to work demonstrates Respondent's lack of animus towards him. I cannot agree. That Carrigan at least initially kept in touch with a workers' compensation-injured employee to determine whether and when he was able to return to work does little to overcome the significant evidence of animus as expressed by Saxe.

and (1) of the Act.

b. Urbanski's working conditions upon return to work

The General Counsel alleges that Respondent discriminated against Urbanski upon his return to work by, inter alia, subjecting him to closer supervision and requiring him to obtain written consent from management before performing any tasks not already in writing. In particular, it is argued, while he had previously been granted wide leeway in determining his own assignments based on show reports, Saxe and DeStefano more closely supervised him by repeatedly checking in with him and demanding updates on his progress throughout the day. I agree.

As the General Counsel notes, the Board will find an adverse action where employees are subject to closer supervision based on their union activity. See *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1085–1086 (2007); *Riley-Beaird, Inc.*, 259 NLRB 1339, 1349 (1982). In this case, as discussed, the General Counsel adduced significant evidence of animus by Saxe against "trouble maker"/known election observer Urbanski, including his plan to have a disciplinary intervention with him upon his return to work based on unspecified "insubordination." While it is understandable that, initially, Saxe and DeStefano may have unintentionally double-teamed Urbanski based on DeStefano being out of town, Saxe continued for days to harangue him with update requests even once this issue had been resolved and, by his tone and intensity, appeared intent on goading him into some actual insubordination. In addition, because Urbanski had previously been permitted to assist his coworkers with their repair requests, curtailing this freedom also served to make an open example of him as the Union's election observer. As such, I find that Respondent's treatment of Urbanski upon his return to work amounted to a substantive, adverse change to his working conditions for which Respondent must provide a non-pretextual rationale.

This Respondent failed to do. There was no credible evidence of a recent downturn in Urbanski's performance that would warrant closer scrutiny of his work; indeed, except for his appearance as the Union's election observer, he had been absent from work for weeks. While a degree of monitoring a recently returned-to-work employee would appear legitimate, Saxe clearly went overboard; indeed, the sheer volume of emails between the two suggests that, if anything, Saxe's incessant demands for updates and explanations actually hindered Urbanski in completing his work. By its post-hearing brief, Respondent suggests that imposing increased monitoring and a "written permission" requirement on Urbanski was the result of changes to Respondent's business structure that had occurred during his absence, such as management turnover and the elimination of other day-crew positions. On its face, however, this fails to explain Respondent's conduct; assuming that Urbanski was expected to perform the entire day-crew operation, requiring him to obtain written permission for specific tasks and constantly haranguing him with requests for updates hardly seems consistent with allowing him to focus on his work. Instead, Saxe, who had determined to conduct a disciplinary "intervention" with Urbanski, appears to have subjected him to a gratuitous hazing aimed to aggravate him enough to either quit or push back hard enough to justify such an action.

For these reasons, I reject Respondent's asserted *Wright Line* defense and find instead that, but for Urbanski's union conduct, he would not have been subjected to increased supervision or required to receive written permission in order to perform tasks.[70]

THE WAREHOUSE UNIT ALLEGATIONS

As discussed, the administrative and supervisory portion of Respondent's operation is housed at a building known as the "Oquendo facility," which is located approximately 15 minutes away from the theaters. In April 2018, Scott Leigh (Leigh), who worked in the warehouse at the Oquendo facility, solicited signatures from several of his coworkers at the facility, in support of the Union. According to the General Counsel, as of April 11, Leigh successfully solicited authorization cards from a majority of an appropriate unit of warehouse workers. It is further alleged that, 2 days later, Saxe unlawfully interrogated Leigh about his union activity and created the impression that his union activity was under surveillance. A week later, Leigh was discharged. (Tr. 2187, 3647.)

No petition for representation of the warehouse employees was filed, but the General Counsel alleges that, based on Respondent's unfair labor practices, the appropriate remedy for Respondent's conduct is the issuance of a *Gissel* bargaining order with respect to those employees. The purpose of a remedial bargaining order is "to remedy past election damage [and] deter future misconduct." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). The Supreme Court has sanctioned the issuance of such a bargaining order "where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined the union's majority. . ." *Gissel*, 395 U.S. at 610.

In the *Gissel* case, the Supreme Court approved the issuance of a bargaining order in two categories of cases: "exceptional cases marked by outrageous and pervasive unfair labor practices" ("Category I") and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" ("Category II"). 395 U.S. 575, 613–614 (1969) (internal quotations omitted). In the instant case, the General Counsel contends that Respondent's violations fell within Category II. In such a case, a bargaining order may issue only if: (1) a majority of employees have shown support for the union; (2) the employer's unfair labor practices undermined the majority strength of the union; and (3) the "possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and [ ] employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Id. at 614–615.

Respondent argues that that the General Counsel has failed to

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[70] Contrary to the General Counsel's contention, I do not find that, upon his return to work, Urbanski was assigned more difficult or physically arduous tasks than he had previously performed, or that he was assigned a higher volume of work. I therefore recommend dismissal of this specific allegation (set forth at par. 6(m)(iii) of the complaint).

establish that Local 720 enjoyed a majority in an appropriate unit. Respondent further argues that, to the extent it committed any unfair labor practices, they have not been shown to have undermined the Union's majority support and in any event were of such a nature that their coercive effects can be eliminated by the application of traditional remedies, rendering a bargaining order inappropriate. Specifically, it is contended that there is insufficient evidence that Respondent's unfair labor practices were aimed at, or disseminated among, a sufficient number of employees to preclude a fair election.

A. The Warehouse Operation and the Alleged Gissel Unit

In support of its claim that the Union had at one time majority support in the warehouse tech unit, the General Counsel relies on evidenced adduced at trial that five warehouse techs in a nine-person unit signed union authorization cards between April 10–11. Respondent asserts that the smallest appropriate unit must include additional positions (runner, electrician, and porter), thereby destroying the Union's card majority. Respondent alternately argues that the only appropriate unit in which a bargaining order may issue is the unit of theater employees stipulated to by the parties in Case 28–RC–219130.

1. Facts

a. The "warehouse technician" position

As noted, employees working in Respondent's warehouse are generally responsible for fabricating, building, repairing, and upkeeping props and set pieces for the theaters' shows. They also perform general facilities maintenance work, including the cleaning and upkeep of the Oquendo facility. In addition, they have also been responsible for remodeling the Oquendo facility, including building out offices and fabricating office furniture. Between late 2017 and early 2018, they also built a stage at the Oquendo facility, which is rented out for rehearsals and auditions. They use various tools and equipment, including saws, power tools, forklifts, and a scissor lift. (Tr. 1597, 1625–1626, 1642–1643, 2177–2178, 2185, 2188–2189, 3798.)

As of April 11 (the date on which the Union is alleged to have achieved majority status among the warehouse employees), there were nine individuals working in this capacity: Leigh, David Montelongo (Montelongo), Marck Capella (Capella), Blake Scott (Scott), Lamar Rayner (Rayner), Brandon Duran (Duran), Dwuane Thomas (Thomas), Kendrick Dotson (Dotson), and Mario Stumpf (Stumpf) (the warehouse technicians). Outside of their general job duties, certain of the warehouse technicians are assigned more specialized tasks. Leigh, for example, spends the majority of his time welding. Scott is chiefly responsible for performing electrical work.[71] Montelongo and Capella work mainly on carpentry projects. (Tr. 1596–1597, 1615, 1617, 2176–2177, 2255, 2258, 3240, 3801, 3907–3908.)

During April 2018, the warehouse technicians were supervised by Hunt, received their daily assignments via a "SmartSheet" (a computer-generated task list) and were expected to attend a daily morning briefing with Hunt to review their assignments and progress. During 2018, the warehouse techs were all paid by the hour (between $13 and $20), were eligible for the same benefits and worked the same schedule. (Tr. 1598, 1627–1628, 1630–1631, 2174, 2184–2185, 2257–2258, 3562–3566, 3830.)

a. Runners

The "runner" position was held by Dominic Antonelli (Antonelli) during April 2018. Unlike the warehouse techs, Antonelli spent approximately 75 percent of his time on the road, picking up and delivering (via a company-provided truck or van) various items to either the theaters and the Oquendo facility. In this capacity, he, like the warehouse techs, reported to Hunt and generally received his assignments via SmartSheets. He spent the bulk of his remaining time on an entirely different task, editing videos in an office on the second floor of the Oquendo facility for Respondent's marketing department, as overseen by an individual in that department. (Tr. 3545, 3589, 3802–3803, 3822, 3860–3863, 3866, 3869–3870, 3876–3877, 3880–3881, 3885–3886.)

Antonelli's main contact with the warehouse techs occurred when he delivered supplies and other items to the warehouse. This contact was very limited; typically, he remained in his vehicle while the warehouse techs unloaded his truck. Antonelli also testified that, on occasion, he would provide an "extra set of hands" to assist the warehouse techs in their work, but, unlike the techs, he did not operate saws, power tools, forklifts or the scissor lift used by the techs. Antonelli earned approximately $13.50 per hour and, like the warehouse techs, was not required to wear a uniform. (Tr. 3876, 3928–3929.)

Rather than being integrated into any particular project or day's work performed by the warehouse techs, Antonelli's assistance was typically ad hoc (for example, handing a tool to a warehouse tech working up on a platform) and not the result of an official assignment. He played no role in the warehouse tech's larger projects, such as building the Oquendo facility stage or the renovating of the facility's office space. He occasionally stocked vending machines (as did at least one of the warehouse techs) but did not assist with cleaning at the warehouse. (Tr. 3821–3823, 3868, 3873, 3883, 3927.)

b. Porters

As of April 11, Respondent employed between six and nine individuals with the job title, "porter." Porters do not work at the Oquendo facility, but rather at Respondent's theaters, where they perform custodial duties, such as cleaning, sweeping, and vacuuming. They may also act as ushers and bar backs, when necessary. Porters are supervised by Saxe and the theater managers and work shifts different from those of the warehouse techs. They earn between $10 and $17 per hour. Unlike the warehouse techs, porters have contact with the public, may work part time and are required to wear uniforms. (Tr. 3554–3555, 3561–3563, 3564, 3566–3567, 3570, 3647–3648, 3798–3799.)

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[71] I give little weight to Leigh's testimony that, during meetings with the warehouse employees, Saxe indicated that Scott was not to perform any warehouse work other than electrical work. This sheds little light on Scott's actual job duties, of which Leigh was admittedly unaware. According to Carrigan, Scott, in addition to his electrical work, performed work similar to that performed by the other warehouse techs. (Tr. 2258–2259, 3828.)

There is no indication that porters and warehouse technicians work together or have regular contact. Porters do not share equipment or cleaning supplies with the warehouse technicians, the only exception being that the two groups of employees do share the use of a large upholstery cleaning machine that is transferred between their work locations, as needed. (Tr. 3649–3650.)

2. Analysis

As noted, the General Counsel must show that, as of April 11, the Union had majority support in an appropriate unit. Respondent contends that the smallest appropriate unit on April 11 must have also included electrician Scott, runner Antonelli and a number of porters, thereby destroying the Union's majority support. For the reasons set forth below, I agree with Respondent that Scott must be included in any appropriate unit that existed as of April 11, but that the runner (Antonelli) and porter positions are properly excluded.[72]

a. The legal standard

In a case such as this, in which an employer argues that the smallest appropriate unit includes individuals not included in the General Counsel's alleged unit, the Board applies a multi-factor test that assesses:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 6 (2017) (citing *United Operations, Inc.*, 338 NLRB 123 (2002)).

b. Evaluation of specific factors

Separate department/separate supervision: The porters are clearly organized into a separate department and reported not to Hunt, but to Saxe and the theater managers, arguing against their inclusion in the unit. Scott, by contrast, clearly worked in the same department as the warehouse employees and, like them, reported to Hunt, which argues for his inclusion. Antonelli chiefly worked in the same department as the warehouse employees but was supervised 25 percent of the time by a member of Respondent's marketing department, rendering this factor neutral as to him.

Skills and training/job functions and work: During the vast majority of the time, the warehouse techs, the runner and porters performed very different types of work, arguing for a warehouse tech-only unit. It is clear that the primary function of the warehouse techs remained at all times the performance of construction and maintenance work in the warehouse. According to Carrigan's unrebutted testimony, these tasks were also regularly performed by Scott, despite his "electrician" moniker. The incidence of job overlap between the warehouse techs and the runner, who spent the majority of his time driving a company-provided vehicle making pickups and deliveries, was negligible. While both warehouse techs and porters appear to have performed cleaning tasks, this appears to be the only type of work they had in common. There is scant record evidence of any specific skills or training required for warehouse techs, runners or porters, rendering this factor largely neutral.

Functional integration: There is no significant functional integration between the warehouse techs and the porters, who work at the theaters on a completely different schedule. Based on Carrigan's testimony, however, there was significant functional integration between the warehouse techs and Scott, who either performed warehouse tech duties or electrical work that was connected to and essential to the building projects undertaken by the warehouse techs. There is some evidence of functional integration of the runner position, in that Antonelli regularly delivered materials and supplies to the warehouse techs. Overall this factor weighs in favor of including Scott and excluding the non-warehouse tech positions.

Other contact: The warehouse techs had regular, work-related contact with each other. They attended morning meetings, which were also attended by Scott, but not the porters or the runner. There is no further evidence of contact between the warehouse techs and the porters. The warehouse techs have occasion to observe the runner when he delivers or picks up items from the warehouse, but there is no evidence that this contact extends beyond pleasantries. Overall, this factor supports a warehouse tech-only unit.

Interchange: There is no evidence of interchange (i.e., either temporary or permanent transfers) between the warehouse techs, the runner position or the porters during the relevant time period, arguing for the exclusion of non-warehouse tech positions.

Terms and conditions of employment: The warehouse techs share personnel policies and employee benefit programs with porters and the runner. Warehouse techs and porters earn a similar range of hourly pay, while the runner position pays significantly less. Furthermore, it is uncontroverted that the warehouse techs (and Scott) attended regular, morning meetings with their supervisor, at which time they received their work assignments. No porter or runner was required to attend similar meetings. Overall, this factor weighs, albeit slightly, in favor of including Scott and excluding the non-warehouse tech positions.

c. Analysis

As described above, the substantial majority of factors supports a finding that the warehouse techs (including Scott) share a community of interest with each other that is distinct from the interests of other employees, including the porters and runner. As such, I find that the appropriate unit on April 11 included Leigh, Montelongo, Capella, Scott, Rayner, Duran, Thomas, Dotson, and Stumpf.

d. Respondent's remaining arguments regarding the appropriate unit lack merit

As noted, Respondent argues that the only appropriate unit in which a bargaining order may issue is the unit of theater

[72] Because, for purposes of a *Gissel* bargaining order remedy, the General Counsel must demonstrate majority status in an appropriate unit as of April 11, I apply these standards to the makeup of Respondent's work force as of that date.

employees stipulated to by the parties in Case 28–RC–219130, and that the General Counsel is effectively estopped from seeking such an order with respect to the warehouse techs. The cases cited by Respondent, however, stand for the proposition that a party will be bound to the terms of an unambiguous unit description contained within a stipulated election agreement insofar as *that unit* is concerned. They do not in any way limit the General Counsel from alleging additional units for the purpose of seeking *Gissel* relief. Put differently, Respondent would have me find that election stipulations are not only generally binding as to unit composition, but rather that they present a one-time opportunity for the parties to agree on a unit (or units) of employees appropriate for representation. This is simply not the case. Accordingly, I reject this as a rationale for refusing to recommend a bargaining order.

Respondent also appears to argue that the General Counsel's request for a *Gissel* remedy for the warehouse techs is somehow procedurally flawed. Citing no authority, Respondent argues that, when the Region amended the complaint 7 days before the hearing to request this remedy, it improperly failed to give "special notice to the parties" or seek my "permission" to do so. It is well established that, prior to the opening of the record, the Region is not required to seek my permission to amend the complaint for any reason and due process entitles Respondent to 14 days' notice to answer. Accordingly, I find this argument by Respondent to lack merit.

B. Leigh's Solicitation of Union Authorization Cards

I have found that, as of April 11, an appropriate unit of nine warehouse techs existed. Accordingly, no bargaining order remedy may issue without a showing that, as of that date, at least five of these individuals had expressed a desire for representation by the Union. As discussed, infra, counsel for the General Counsel presented five signed authorization cards. While Respondent does argue that the cards' language is ambiguous as to the signatory's authorization, but rather contends that two of the five cards should be excluded for purposes of determining the Union's majority status, because they were obtained by misrepresentation. I disagree.

1. Facts

Scott Leigh, who began working in Respondent's warehouse in the spring of 2017, emerged as a supporter of the Union around the very time that management learned about the theater employees' organizing campaign. During a work-related conversation in early March 7, Saxe asked Leigh about his "involvement" with the Union. Leigh responded that he had "worked a few gigs with them," which he had enjoyed. Saxe then asked, "what are the benefits for us going union?" Leigh responded that it would enable Saxe to obtain skilled labor through the Union's hiring hall on an as-needed basis, instead of taking on individual employees full time. (Tr. 1596, 1603–1604.)

Within the next week, prompted by Devito, Leigh spoke to various warehouse employees, including Montelongo, about the Union; he used the same pitch with each of them, first asking what they thought of unions in general and then explaining to them that, if employees working at the warehouse "went union," they would be able to bargain with Respondent and have a say in their working conditions. He also specifically said that there were training classes available if they were interested. According to Leigh, each of the individuals he spoke with expressed their willingness to sign a card for the Union. Between April 9 and 11, he solicited signatures from warehouse employees Montelongo, Rayner, Duran, and Thomas, each of whom signed in his presence. (Tr. 1606–1609; GC Exh. 65.)

Two of the card signers—current employees Montelongo and Thomas—testified, each claiming that Leigh never mentioned that signing the card had anything to do with the Union. According to Montelongo, Leigh initially asked whether he wanted to get some "special training" to be certified to work a side job doing rigging, he said he was interested. Then, he claimed, a couple of days later, Leigh "confronted" him while he was sitting in his car, presented him with a card and said, "here you go. This is where you can sign up for the training." Montelongo then quickly signed the card (without reading it), and Leigh "grabbed it right away." Presented with his original, signed card, Montelongo claimed not to recognize it, while admittedly recognizing the signature and the handwritten date on the card as his own. Montelongo testified that the physical address, email address and telephone number listed on the card were not his. I note, however, that the handwriting on these portions of the card appears similar to the exemplar Montelongo provided at hearing. (Tr. 1598–1601, 3240, 3243–3245, 3247–3248, 3253–3255, 3267; ALJ Exh. 2.)

Leigh did not dispute Montelongo's account for the most part, but as noted, testified that he had previously pitched him on training as part of bringing the Union in to represent the warehouse workers. I credit Leigh, whom I generally found to be a plain-spoken witness not prone to embellishment, on this point.[73]

Thomas testified that he had only a single interaction with Leigh about signing the card; according to him, Leigh simply said that he could get free welding training if he signed a card, to which he immediately agreed, signing the card without reading it. By contrast, Leigh testified that he specifically explained to Thomas that the purpose of the card was to bring the Union into the warehouse operation and that this would result in training being made available. (Tr. 1602, 1607; 3333–3334, 3807–3808.) I credit Leigh, whose recollection was specific and unforced, over Thomas, who recited his version in a hurried and over-rehearsed manner. Nor do I credit Thomas' testimony as to what happened after he signed his card. Essentially, he claimed to have attempted to revoke his card after family members put pressure on him to do so. He was visibly anxious to get to this part of his story, the details of which simply did not add up.[74]

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[73] Montelongo, as a current employee, was clearly uneasy testifying and so eager to distance himself from association with the Union that he reflexively denied recognizing the card he obviously signed. He also embellished his account in a manner to suggest that Leigh somehow "strong armed" him into signing (by "confronting" him and then "grabbing" the signed card).

[74] He claimed, for example, to have done an internet search that led him to a web page showing the Union's office information, including whether it was open, but then testified that he did not call the number

2. Analysis

The Supreme Court in *Gissel* approved the Board's *Cumberland Shoe* doctrine,[75] finding that employees will generally be held responsible for their acts and therefore bound by the clear, unambiguous language of the card they sign. 395 U.S. at 606. An exception exists, however, where that language is "deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above the signature." Id. Demonstration of a qualifying misrepresentation must be established "on the basis of what the employees were told, not on the basis of their subjective state of mind when they signed the cards." *Aero Corp.,* 149 NLRB 1283, 1290 (1964).

An employer's burden to prove such a "cancellation" is a steep one. Indeed, even where it is undisputed that an employee did not read the card's language, he will be bound by it unless the employer offers clear and convincing evidence that the card solicitor expressly indicated that the card "would be used *only* for a different, more limited, purpose than that stated on the card." *Photo Drive Up*, 267 NLRB 329, 364 (1983) (citing *Gissel*) (emphasis added). Thus, a signatory's unambiguous authorization will stand despite it having been solicited by a representation that the employee's signature will result in something different to its stated purpose, as long as that different purpose is not presented as the *sole* purpose. Compare *Warehouse Groceries Mgmt., Inc.*, 254 NLRB 252, 254 (1981) (finding valid card solicited on representation that "if a certain number of people signed the cards, the Union 'would come in and investigate and . . . look around.'") with *Sambo's Restaurant*, 269 NLRB 1187, 1188 (1984) (finding invalid cards solicited on representation that "the only purpose of signing the card was to have an election").

Here, I find that the credible evidence establishes that Leigh told both Montelongo and Thomas that the purpose of the card was to sign up for free vocational training, and that he also mentioned that the card was associated with union representation. Therefore, his statements to the effect that the signing the cards would result in free training were not inconsistent with the stated representative purpose of the card and did not negate the card's written language and did not amount to a directive that they should disregard that language. Consequently, that Montelongo and Thomas signed their cards based on such representations provides no basis for disregarding the expression of intent manifested in the card's clear language.[76]

In conclusion, I agree with the General Counsel that the cards signed by Montelongo and Thomas are valid and should be counted; I therefore find that the General Counsel has established that, as of April 11, the Union enjoyed majority status (five cards in an appropriate, nine-person unit).

C. Saxe Interrogation and Creation of the Impression of Surveillance [Compl. ¶ 5(e)]

The General Counsel alleges that, shortly following Leigh's collection of authorization cards, he was confronted by Saxe. During the conversation that ensued, it is alleged that Saxe unlawfully interrogated Leigh about his union membership, activities and sympathies, as well as that of other employees, and also created the impression that his union activities were under surveillance. I agree.

1. Facts

At the end of his work shift on April 13, as Leigh clocked out and began to exit the warehouse; at that point, warehouse tech Duran alerted him that Saxe was looking for him. Leigh stopped and waited for Saxe, who approached him and asked Leigh to follow him into a conference room. Once they arrived there, Saxe asked Leigh if he was signing people up for free union training. Leigh dodged the question, stating, "nothing in life is free" to which Saxe responded by furling his brow and telling Leigh to go. Saxe did not deny that this conversation occurred, but rather offered a sanitized version of it. According to him, after repeatedly warning Leigh about letting other workers weld at work, he confronted him and asked (without mention of the Union), "why is everybody else welding for you, and why are you offering training, welding?" (Tr. 1609–1611, 3492–3493.)

I credit Leigh's version of this exchange; it was specific, and he related it without embellishment. Saxe, by contrast, appeared rather deliberately to omit the reference to "union" training from his account; as I have noted elsewhere in this decision, Saxe's visibly focused countenance when recounting such editorialized versions of events was notably distinct from his otherwise relaxed, forthcoming manner of testifying.

2. Analysis

a. Unlawful interrogation

The Board recognizes that the lawfulness of particular questioning must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). That said, consideration may be given to the following: whether the employee is an open and active union supporter; whether there is a history of employer antiunion hostility or discrimination; the nature of the information sought (especially if it could result in action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation; and the truthfulness of the reply. The Board also considers the timing of the interrogation and whether other unfair labor practices were occurring or had occurred. See *Rossmore House*, supra; see also *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 1–2 (2017); See *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 17 (2016). Ultimately, the "task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce

immediately because it was evening, and the office "probably" was closed. (Tr. 3335–3340; 3346–3348, 3808.)

[75] *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965).

[76] I note that Respondent does not argue that either Montelongo's or Thomas' card should be deemed invalid pursuant to *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), and therefore do not consider this as an additional basis for discounting them for purposes of establishing the Union's majority status.

the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center*, 330 NLRB 935, 940 (2000).

In this case, these factors strongly support a finding of unlawful interrogation. Saxe, Respondent's president and CEO, literally summoned Leigh back to the warehouse after his shift had ended to grill him about offering his coworkers "union training." This, given the breadth of Respondent's other unfair labor practice violations and the fact that Leigh felt compelled to deflect (rather than answer) Saxe's query, argue in favor of an interrogation violation. Moreover, Saxe's questioning was clearly aimed to determine Leigh's role in soliciting on behalf of the Union, as well as to elicit whether or not Leigh had spoken to other employees about the union. As such, I do not find the fact that Leigh had previously disclosed his pro-union leanings to Saxe to privilege the highly coercive nature of his questioning. See *Far West Fibres, Inc.*, 331 NLRB 950, 951 (2000) (questioning aimed at determining individual employee's role in union conduct constitutes unlawful interrogation); *Valley Special Needs Program, Inc.*, 314 NLRB 903, 912 (1994) (asking open union supporter about union activities of other employees coercive) (citations omitted).

b. Impression of surveillance

As the Board has held, an employer violates the Act when it gives employees the impression that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son, Inc.*, 331 NLRB 914, 914 (2000). The Board has found that the impression of surveillance is created where an employer tells employees that it is aware of their union activities but fails to tell them the source of that information. *North Hills Office Services*, 346 NLRB 1099, 1103 (2006). The coercive quality of such an 'unsourced' statement is based on its tendency to cause employees "to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring." Id.

Saxe's statements to Leigh were more than enough to put the latter on notice that Saxe was wise to his card soliciting activity. By not revealing the source of his information, Saxe left Leigh to speculate as to how it was obtained. Especially considering the sheer volume of cameras placed throughout the warehouse facility where Leigh worked, Saxe's failure to reveal his source would more likely than not cause a reasonable employee in Leigh's shoes to conclude that his activity had been monitored via video.

Accordingly, I find that, by asking Leigh whether he had been offering free union training to his coworkers, Saxe violated the Act as alleged in paragraphs 5(e)(i) and (ii) of the complaint.

D. Leigh's Discharge [Compl. ¶ 6(j)]

Four days after his conference room chat with Saxe about "signing people up," Leigh was discharged. The General Counsel alleges, and I agree that this action was taken in retaliation for his Union activity.

1. Facts

Leigh was not actually at work on April 17, having "called out" to care for an elderly family member. For warehouse employees, "calling out" involves calling an established "callout line," identifying himself and stating his reason for not coming in. It is undisputed that Leigh followed these procedures. (Tr. 1614.) As discussed, infra, Leigh was informed that he was discharged by Carrigan via telephone, and there is no evidence that he ever returned to the workplace or otherwise had contact with any of his former coworkers.

According to Saxe, Leigh was fired for absenteeism, poor performance, "bad attitude" and insubordination. Leigh's insubordination, according to Saxe, involved him training other employees to weld instead of doing welding himself. Curiously, Saxe supposedly learned about this around the very time that Leigh was, in fact, pitching his coworkers on *union provided* welding training.[77] Leigh, for his part, readily admitted to showing employees how to weld but denied that Saxe ever told him to stop doing so. Saxe also claimed that Leigh was frequently AWOL at times when Saxe was looking for him.[78] Finally, at hearing, Saxe added another rationale for discharging Leigh, claiming that, 3 months prior to his discharge, he had been accused of "confrontational" conduct by female office workers at the facility, who had complained to Saxe that Leigh was "abusive," a "bad guy" and "doing bad things." (Tr. 140–141, 1613, 1640.) This testimony went uncorroborated.

Leigh admitted to occasionally reporting to work late, also to calling out from work. He credibly denied, however, that anyone in management had spoken to him about these instances. It does appear that, in January, Carrigan had emailed him about his tardiness and absences. As she testified, typically, two absences in a single week is considered excessive and typically generates disciplinary action. Carrigan's email indicates that, on January 3 and 4, Leigh "called out," presumably triggering her email. The email indicates that it is constituted a "final warning" that Leigh could be terminated for tardiness and/or absenteeism. (R. Exh. 67; Tr. 1638–1639, 2865–2866.)

Shortly after Leigh began talking with his coworkers about the benefits of unionizing and Saxe questioned him about his "involvement" with the Union, Respondent engaged in a flurry of activity, documenting alleged problems with his performance. This consisted of Carrigan approving a series of PAFs generated by Hunt, none of which were presented to Leigh for his signature. These included:

- a March 30 "second verbal warning" for refusing to complete tasks as assigned;
- an April 13 "third verbal warning" for using a personal cell phone during work hours; and

[77] Saxe, who admitted on cross examination that he received such reports in April, later tried to backdate them, claiming that the issue actually arose months earlier. I found this attempt to change the timeline unconvincing. (Tr. 138–140, 3490–3491, 3628–3631.)

[78] I do not credit this (mainly hearsay) testimony, but rather find that Leigh credibly denied ever leaving work while clocked in, except to go to one of Respondent's theaters. (Tr. 139, 1641.)

- an April 16 “fourth verbal warning” for “for “leaving metal outside where it could be ruined.”

Each of the PAFs notes that Leigh had been verbally warned not to repeat the conduct in question; however, Leigh credibly denied this ever happened, and his denials went unrebutted. (R. Exh. 63, 64, 66; Tr. 1639–1640, 2855–2856, 2861.)

Respondent also began documenting Leigh’s absences. On April 12—the day before Saxe confronted Leigh about signing his coworkers up for union training—Carrigan’s human resources department generated a listing of the five times Leigh had called out so far that year. Four days later, on April 16, Saxe sent Carrigan an email with the subject line, “[Leigh] write ups,” in which he stated, “[l]et’s meet this morning to go over [Leigh’s] infractions.” Carrigan recalled no such meeting having actually occurred. However, approximately 45 minutes later, Saxe sent her an additional email, this time purporting to summarize his interaction with Leigh on April 13 (when he accused him of signing his coworkers up for union-provided training). According to Saxe’s email, Leigh during the conversation “admitted” to training Kendrick, Lamar, Dwuane, and Justin (all card signers) to weld, concluding “[l]et’s talk with him one more time today and let him know how important it is for him to simply do his job or he will be termed.” (GC Exhs. 87, 88; Tr. 2198–2202.)

Around noon on April 17, Carrigan called Leigh and said that his employment was being terminated because he was unreliable, had excess absences and had a poor attitude. Leigh asked if he needed to come in and pick up his last check, and she said no, that his last paycheck would be mailed. At hearing, Carrigan was adamant that, despite Saxe’s emails of the day prior regarding Leigh’s “welding training” and contrary to his testimony regarding Leigh’s alleged insubordination, he was in fact discharged for “excessive tardies and absences.” (Tr. 1613, 1645, 2202, 2871; R. Exh. 70.)

After Carrigan’s conversation with Leigh, Respondent, via emails and PAFs, attempted to recreate the series of events leading to his discharge. At 1:52 p.m., Hunt sent Carrigan (with a copy to Saxe) stating that Leigh had called out again “with no good reason,” stated that she had “done several write ups” regarding Leigh and ended with a dramatic flair:

> I, as well as others at the office have asked for this for so long yet [Saxe] keeps on refusing to allow us to term him, even though he agrees Scott is terrible at his job. Please allow me to term him today.

At the time he was discharged, Leigh’s entire disciplinary file consisted of verbal warnings generated during the prior 6 weeks but not presented to him. Less than an hour after receiving Hunt’s email, Carrigan approved an additional discipline for Leigh’s file—this time, a written warning—for refusing to complete his assigned tasks. This warning specifically accused Leigh of not moving certain items in the warehouse as instructed and attached what purports to be photographic documentation of the items in question. (R. Exh. 65, 69.)

2. Analysis

The General Counsel has established a strong prima facie case with respect to Leigh’s discharge. Saxe’s conversations with Leigh make it clear that he had a good grasp on the latter’s card soliciting activities among the warehouse employees and was not pleased that, through Leigh, the Union had opened another front in its attempt to organize Respondent’s operations. Indeed, at first blush, it appears that Saxe’s consternation with Leigh’s providing “welding training,” was a quasi-admission—the credible evidence in fact establishes that Leigh was using the offer of such training to solicit on behalf of the Union. This, combined with the fact that Carrigan, a human resources professional, assiduously “scrubbed” this rationale from her version of the discharge decision, leads me to believe that Leigh’s card solicitation is precisely what motivated his discharge.

That Leigh’s discharge followed on the heels of Respondent’s multiple other unfair labor practices, including the mass discharge of union adherents, is further proof of its discriminatory motivation. See *David Saxe Productions*, 364 NLRB No. 100, slip op. at 5 (citing *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004), enfd. 165 Fed.Appx. 435 (6th Cir. 2006). Further evidence of animus is found in the timing of Respondent’s intensive effort to document Leigh’s supposed performance failings, which coincided squarely with his protected conduct. As noted, supra, “[t]he Board has long held that the timing of an adverse action shortly after an employee has engaged in protected activity will support a finding of unlawful motivation.” See *David Saxe Productions*, 364 NLRB No. 100, slip op. at 5 (citing *Real Foods Co.*, 350 NLRB 309, 312 (2007); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004)). Further evidence of animus against Leigh is found in Respondent’s creation of a secret narrative of his supposed misconduct in the form of never-issued PAFs (both before and after Carrigan had fired him), as well as staging the discharge decision after the fact, complete with an email from Hunt imploring Saxe and Carrigan to “allow” her to discharge Leigh, who had actually been discharged hours earlier. See *Lord Industries, Inc.*, 207 NLRB 419, 422 (1973) (failure to present discharged employees with copies of written disciplines contained in their personnel files supports finding of pretext).

Taking into account all of the foregoing considerations, I find that the General Counsel made a strong showing of discriminatory motivation. Accordingly, under *Wright Line*, the burden then shifts to Respondent to demonstrate that it would have discharged Leigh even absent his protected activity. Faced with the General Counsel’s strong showing of unlawful motivation, Respondent’s rebuttal burden is substantial. See *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1207 (2014) (citing cases). While Leigh did apparently receive a prior discipline for absenteeism in January, Respondent’s clumsy effort to shift the focus from his “insubordination” (i.e., offering welding training) to his schedule adherence, coupled with the absence of testimony by Hunt, on whose credibility the absenteeism rationale ultimately rests, leads me to believe that this, nor any of Respondent’s other proffered rationales were the real reason for his termination. See *Approved Electric Corp.*, 356 NLRB 238 (2010) (“[t]he Board commonly recognizes such shifting rationales as evidence that an employer’s proffered reasons for discharging an employee are pretextual”); *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27–28 (employer’s shifting, false, or exaggerated reasons for an adverse action are evidence of unlawful motive); *Inter-*

Disciplinary Advantage, Inc., 349 NLRB 480, 509 (2007) (finding that "an employer's shifting explanation for a discharge, or . . . its post hoc attempt to rationalize such a decision, are suggestive of a pretext").

Based on the above, I find that Respondent failed to demonstrate that they would have discharged Leigh even absent his protected activity, in that the proffered reasons for his discharge were pretextual. Accordingly, I find that, by discharging Leigh, Respondent violated Section 8(a)(3) and (1) of the Act.

E. Gissel Bargaining Order

As discussed herein, I have determined that the General Counsel has demonstrated that, as of April 11, the Union enjoyed majority support in an appropriate unit. These factors are necessary, but certainly not sufficient, to warrant the issuance of a bargaining order.

Under *Gissel*, a bargaining order is appropriate where an employer's unfair labor practices of have so decreased the chance of a fair election that the already expressed desires of employees for representation (here, the employees' authorization cards) are a more reliable indication of free choice than an election would be. 395 U.S. 599, 603 (1969) ("cards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded. . . ."). Specifically, the question is whether the unfair labor practices are such that they leave only a slight chance that they can be remedied with traditional remedies in a manner that will ensure a fair re-run election, or rather, on balance, would a bargaining order based on the Union's demonstrated card majority provide a better expression of employee sentiment. *Gissel*, 395 U.S. at 614. In making this determination it is appropriate to examine: (1) the seriousness of the violations, (2) the number of employees directly affected by the violations, (3) the size of the unit, (4) the extent of dissemination among the employees, and (5) the identity of the perpetrator of the unfair labor practice. *Milum Textile Services Co.*, 357 NLRB 2047, 2055 (2011); *Holly Farms Corp.,* 311 NLRB 273, 281 (1993) (citing *FJN Mfg.,* 305 NLRB 656, 657 (1991)*).*

In this case, the first, third and fifth factors weigh strongly in favor of a bargaining order. The Board and courts have recognized that the unlawful discharge of a union adherent such as Leigh constitutes flagrant interference with employees' rights under the Act and are have the potential to cause long-lasting damage to election conditions because they have a tendency to reinforce employees' fear that they will lose their employment if union activity persists. *A.P.R.A. Fuel Oil*, 309 NLRB 480, 481 (1992), enfd. 28 F.3d 103 (2d Cir. 1994). Accord: *Michael's Painting*, 337 NLRB 860, 861 (2002), enfd. 85 Fed.Appx. 614 (9th Cir. 2004); *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1304 (10th Cir.1981); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980). The small size of the warehouse tech unit and the fact that Saxe himself was involved in the discharge decision similarly support the issuance of a *Gissel* order. As the Board has held, "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten." *Consec Security*, 325 NLRB 453, 455 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999).

It is the two remaining factors—the number of employees directly affected by the unfair labor practices and the extent of dissemination of them—that present a problem. Where a substantial percentage of employees in the bargaining unit is directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases, supporting the issuance of a bargaining order. *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001). Likewise, even where the unfair labor practices have no widespread effect, unit-wide, their broad dissemination may itself warrant a *Gissel* order, in that the employer's conduct has created a "legacy of coercion" that would likely poison the atmosphere in which any new election would take place. See *Garvey Marine, Inc.*, 245 F.3d 819, 827 (D.C. Cir. 2001), enfg. 328 NLRB 991 (1999). Conversely, where the employer's unfair labor practices neither affect or are disseminated to a significant portion of the bargaining unit, a bargaining order will be deemed unnecessary and therefore inappropriate. *Desert Toyota*, 346 NLRB 118 (2005) (with exception of unlawful no-solicitation rule, none of unfair labor practices occurred on a unit-wide basis, only two employees directly affected by them and no evidence of dissemination); *Cardinal Home Products*, 338 NLRB 1004, 1011 (2003) (no threats of plant closure, and with exception of unlawful no-solicitation rule, virtually all unfair labor practices occurred in one-one-one situations, did not affect significant portion of bargaining unit, and were not disseminated); see also *Stern Produce Co., Inc.*, 368 NLRB No. 31, slip op. at 4–5 (2019) (along with passage of time, lack of widespread dissemination of hallmark violations renders bargaining order inappropriate).

I find that there is insufficient evidence of dissemination of the conduct that would support a *Gissel* order (i.e., the conduct that occurred after a majority of unit employees signed authorization cards)[79] These actions were Leigh's discharge, Saxe's interrogation of him and creation of the impression of surveillance of his union activities, and Respondent's continued maintenance of two unlawful handbook rules. Only the rules had any direct effect on any employee other than Leigh, and there is no evidence of dissemination throughout the unit of either the fact of his discharge or Saxe's coercive statements to Leigh. As such, despite Respondent's unfair labor practices being serious, the record does not establish that they impacted a significant portion of the unit such that traditional remedies would be inadequate to ensure a fair election. Nor is there a factual basis on which to conclude that these actions would likely have been disseminated throughout the unit. Compare *Garvey Marine, Inc.*, 328 NLRB at 1016 (1999) (concluding that news of suspension of union adherent, in dramatic fashion involving police presence, would be disseminated). Under the circumstances, I decline to recommend the imposition of a *Gissel* bargaining order remedy.

[79] While there is ample evidence of Respondent's serious unfair labor practices among the theater unit, this occurred before a majority of warehouse techs signed authorization cards. In the absence of evidence that the warehouse techs only learned of this conduct (the mass discharges, etc.) after expressing their support for representation, there no logical way to attribute an erosion in the union's majority support to these actions. See *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1121–1122 (2004).

As discussed, infra, I do find, however, that certain special remedies are warranted in light of Respondent's extensive and serious unfair labor practices in response to its employees' union organizational efforts. These additional remedies should serve to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices.

CONCLUSIONS OF LAW

1. David Saxe Productions, LLC and V Theater Group, LLC, which collectively comprise Respondent, are joint employers, and are jointly and severally liable for the violations found herein.

2. David Saxe Productions, LLC and V Theater Group, LLC are individually, and as joint employers, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Charging Party International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

4. By maintaining the following rules in their respective employee handbooks, Respondent has engaged in unfair labor practices affecting commerce within the meaning of 8(a)(1) of the Act:

a. A rule that prohibits employees from blogging in a manner that is detrimental to Respondent's best interests or tarnishes Respondent's image, reputation and/or good will; and
b. A rule requiring employees to refer to Respondent's human resources representative requests from "outside people or organizations" to engage in solicitation or distribution.

5. By engaging in the following conduct, Respondent violated Section 8(a)(1) of the Act:

a. Threatening employees with unspecified reprisals for engaging in union activities;
b. Interrogating employees about their union membership, activities and sympathies and the union membership, activities and sympathies of other employees;
c. Creating the impression among employees that their union activities were under surveillance by Respondent; and
d. Promising employees increased benefits and improved terms and conditions of employment if they refrained from union activity by soliciting employee complaints and grievances.

6. By discharging the following employees because of their support for the Union or engaging in other protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act:

a. Leigh-Ann Hill
b. Jasmine Glick
c. Nathanial Franco
d. Taylor Bohannon
e. Alanzi Langstaff
f. Michael Gasca
g. Chris S'uapaia
h. Zachary Graham
i. Kevin Michaels
j. Scott Leigh

7. By engaging in the following conduct, Respondent violated Section 8(a)(3) and (1) of the Act:

a. Granting employees a retroactive wage increase;
Assigning employee Courtney Kostew "cue calling" duties;
b. Reducing the work hours of employees Darnell Glen and Scott Tupy (Tupy);
c. Denying employee Stephen Urbanski (Urbanski) light duty;
d. Imposing more onerous and rigorous terms and conditions of employment on Urbanski; and
e. Issuing Tupy written discipline.

8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Leigh-Ann Hill, Jasmine Glick, Nathanial Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh (the discharged employees), I recommend that it be ordered to offer them, to the extent it has not already done so, immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Having found that Respondent violated Section 8(a)(3) and (1) of the Act by reducing the hours of employees Darnell Glen and Scott Tupy and by denying light duty to Stephen Urbanski, Respondent must make them whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Having found that Respondent violated Section 8(a)(3) and (1) of the Act by assigning Courtney Kostew cue calling duties, Respondent must cease assigning her such duties.

Backpay 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). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Respondent must compensate each of the discharged employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, Respondent must compensate the discharged employees, as well as Darnell Glen, Scott Tupy and Stephen Urbanski, for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report

with the Regional Director for Region 28 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Because Respondent promulgated and maintained certain unlawful workplace rules, I shall recommend that Respondent be ordered to rescind and cease giving effect to their handbook rules regarding email and communications activities, blogging and non-solicitation/distribution, insofar as they prohibit blogging that is detrimental to Respondent's best interests or that may harm or tarnish its image, reputation and/or goodwill, or require employees to refer to Respondent's human resources representative any request from "outside people or organizations" to solicit and/or distribute literature at any of Respondent's facilities.

I will recommend that Respondent be ordered to post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. In addition to traditional notice posting, the General Counsel has requested several special remedies, including: (a) an explanation of rights, (b) a reading of this document, as well as the Board notice and (c) a broad cease-and-desist order. I find each of these remedies appropriate here.[80]

An explanation of rights accompanying the Board notice is warranted considering the nature and pervasiveness of Respondent's unfair labor practice violations. In addition to the language in a standard notice, the explanation of rights sets out the employees' core rights under the Act, coupled with clear general examples that are specifically relevant to the unfair labor practices found in this case. See *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014). This is designed to help undo the likely impact of the violations on employees and help remedy the chilling effect of Respondent's conduct. I therefore recommend that Respondent be ordered to post an explanation of rights as described in the attached appendix to be provided by the Regional Director for Region 28.

Likewise, a public reading of the notice, along with the Explanation of Rights, will serve to reassure employees that that their employer and its managers are bound by the Act's requirements. Respondent, a recidivist violator of the Act,[81] has committed multiple and pervasive violations of the Act, suggesting that employees not be appropriately informed by a notice posting. Reassurance to employees that their rights under the Act will not be violated by Respondent is particularly important because Respondent's owner, Saxe, was directly involved in nearly every instance of unlawful conduct. *Stern Produce Company, Inc.*, 368 NLRB No. 31, slip op. at 5 (citing *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (notice-reading appropriate in part due to participation of high-ranking responsible management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017)); see also *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), review denied 400 F.3d 920, 930 (D.C. Cir. 2005).

Accordingly, I recommend that Respondent be ordered, during the time the required notice and explanation of rights is posted, to convene its employees and have David Saxe (or, if he is no longer the owner, a high-ranking management official), in the presence of Tiffany DeStefano, T.C. Carrigan, Thomas Estrada, Sr., Dan Mecca and Steve Sojack, a Board agent and an agent of the Union, if the Region and/or the Union so desire, read the notice aloud to employees, or, at Respondent's option, permit a Board agent, in the presence Saxe, to read the notice to the employees. I recommend that the Board agent then read the explanation of rights aloud to employees. See *Bozzuto's, Inc.*, 365 NLRB No. 146, slip op. at 5 (2017).

In addition, I find that the egregiousness of Respondent's unfair labor practices and Respondent's status as a recidivist violator of the Act warrants a broad order requiring Respondent to cease and desist "in any other manner" from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. See *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[82]

ORDER

Respondent, a joint employer, which consists, inter alia, of David Saxe Productions, LLC and V Theater Group, LLC of Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad blogging policy that unlawfully interferes with employees' use of computer systems for Section 7 purposes;

(b) Maintaining an overly broad non-solicitation/distribution policy that requires employees to refer to Respondent's human resources department any third-party request to solicit or distribute on Respondent's property;

(c) Creating the impression that employees' union or protected conduct;

(d) Threatening employees with unspecified reprisals for engaging in union or other protected conduct;

(e) Interrogating employees about their union and other protected activities, and the union and other protected activities of other employees;

(f) Promising employees increased benefits and improved terms and conditions of employment if they refrain from union activity by soliciting employee complaints and grievances;

(g) Discharging employees, issuing them discipline or reducing their work hours, because they engaged in union or other protected activities, including supporting International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL–CIO (the Union).

[80] The General Counsel also requests that I order Respondent to reimburse discriminatees for consequential economic harm incurred by them as a result of its unlawful conduct, a remedy not traditionally included in Board orders. See *Operating Engineers Local 513 (Long Construction Co.)*, 145 NLRB 554 (1963). As I am obligated to following existing Board precedent, I decline to recommend this remedy. See *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

[81] See *David Saxe Productions, LLC*, 364 NLRB No. 100 (2016).

[82] 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.

(h) Denying employees light duty, or imposing more onerous and rigorous terms and conditions of employment on them, because they engaged in union or other protected activities, including supporting the Union;

(i) Granting employees a wage increase to discourage them from engaging in Union and other protected activities;

(j) Assigning employees cue calling duties to encourage them to engage in anti-union conduct, or to reward them for engaging in such conduct; and

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Leigh-Ann Hill, Jasmine Glick, Nathanial Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh, to the extent it has not already done so, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, make Leigh-Ann Hill, Jasmine Glick, Nathanial Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, Scott Leigh, Darnell Glen, Scott Tupy and Stephen Urbanski whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful terminations of Leigh-Ann Hill, Jasmine Glick, Nathanial Franco, Taylor Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh, and the unlawful discipline of Scott Tupy, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) 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 this Order.

(e) Within 14 days after service by the Region, post at its facilities in Las Vegas, Nevada, copies of the attached notice marked "Appendix A" and the attached explanation of rights marked "Appendix B." Copies of the notice and explanation of rights, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by 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, the notice and explanation of rights shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices and explanation of rights are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice and explanation of rights to all current employees and former employees employed by Respondent at any time since January 10, 2018.

(f) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the "Notice to Employees" is to be read to the employees by Respondent's owner, David Saxe or at Respondent's option, by a Board agent in the presence of Saxe. If Saxe is no longer an owner or officer of the Respondent, then the Respondent shall designate another owner or officer to conduct or be present for the reading.

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

IT IS FURTHER ORDERED that Case 28–RC–219130 be, and it hereby is, severed from Cases 28–CA–219225, 28–CA–223339, 28–CA–223362, 28–CA–223376, and 28–CA–224119 and that it be, and it hereby is, remanded to the Regional Director; that the challenges to the ballots cast in a representation election conducted in said case on May 17, 2018, be, and they hereby are, overruled; and that the Regional Director be, and he hereby is, directed to open and count said challenged ballots and to prepare and serve upon the parties a revised tally of ballots. If the Petitioner receives a majority of the votes cast, the Regional Director shall issue a certification of representative. In the event that the Petitioner does not receive a majority of the votes cast, according to the revised tally, it is further ordered that the election held on January 12, 1978, among the warehouse employees of the Respondent be set aside and that the Regional Director be directed to conduct a second election at such time as he deems that circumstances permit the free choice of a bargaining representative.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., August 27, 2019

APPENDIX A

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 the National Labor Relations Act and has ordered us to post and abide by 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 benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT maintain a handbook rule that prohibits you from blogging that is detrimental to our best interests or that tarnishes our image, reputation or goodwill.

WE WILL NOT maintain a handbook rule that requires you to refer to our human resources department any request from "outside people or organizations" to engage in solicitation or distribution.

WE WILL NOT threaten you with unspecified reprisals should you engage in union activities and/or protected concerted activities.

WE WILL NOT ask you about your union membership, activities or how you feel about unions.

WE WILL NOT coercively interrogate you about your union activities and sympathies, or the union activities and sympathies.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT solicit employee complaints and grievances and promise you increased benefits and improved terms and conditions of employment to encourage you to refrain from union organizational activities.

WE WILL NOT discharge employees or impose any disciplinary measures on employees because of their activities on behalf of or support for International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL–CIO (IATSI Local 720), or any other union or because they engaged in other protected concerted activity.

WE WILL NOT grant a wage increase in order to discourage you from union membership.

WE WILL NOT assign you a more prestigious job assignment to encourage you to campaign against IATSI Local 720 or any other labor organization, or to reward you for doing so.

WE WILL NOT reduce your work hours because of your activities on behalf of or support for a union or because you engage in other protected concerted activity.

WE WILL NOT deny you light duty or impose more onerous and rigorous terms of conditions of employment on you because of your activities on behalf of or support for a union or because you engage in other protected concerted activity.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL modify our employee handbook by rescinding: (a) the provision that prohibits you from blogging in a manner that is detrimental to our best interests or tarnishes our image, reputation and/or good will; and (b) the provision that requires you to refer to human resources any request from an outside person or organization to engage in solicitation or distribution.

WE WILL, within 14 days of the Board's Order, insofar as we have not already done so, offer our below-named former employees immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed: Leigh-Ann Hill, Jasmine Glick, Nathanial Franco, Taylor Benavente Bohannon, Alanzi Langstaff, Michael Gasca, Chris S'uapaia, Zachary Graham, Kevin Michaels, and Scott Leigh.

WE WILL make the employees named above, as well as Darnell Glen, Scott Tupy and Stephen Urbanski, whole for any earnings and other benefits suffered as a result of our unlawful discrimination against them, with interest.

WE WILL, within 14 days of the Board's Order, remove from our files any references to our unlawful discharge of the employees named above, and WE WILL, within 3 days thereafter, notify them, in writing, that this has been done and that our unlawful actions will not be used against any of them in any way.

WE WILL, within 14 days of the Board's Order, restore the work schedules of Darnell Glen and Scott Tupy to reflect their pre-June 1, 2018 "show call" time.

WE WILL, within 14 days of the Board's Order, remove from our files all references to the June 20, 2018 discipline issued to Scott Tupy and notify him in writing that this has been done and that the discipline will not be used against him in any way.

DAVID SAXE PRODUCTIONS, LLC AND V THEATER GROUP, LLC, JOINT EMPLOYERS,

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-219225 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.

APPENDIX B

EXPLANATION OF RIGHTS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Employees covered by the National Labor Relations Act have the right to join together to improve their wages and working conditions, including by organizing a union and bargaining collectively with their employer, and also the right to choose not to do so. This Explanation of Rights contains important information about your rights under this Federal law.

The National Labor Relations Board has ordered your employer, David Saxe Productions, LLC and its Joint Employer V Theater Group, LLC, to provide you with this Explanation of Rights to describe your rights and to provide examples of illegal behavior.

Under the National Labor Relations Act, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and working conditions.
- Support your union in negotiations.
- Discuss your wages, benefits, other terms and conditions of employment, and collective-bargaining negotiations with your coworkers or your union.
- Take action with one or more coworkers to improve your working conditions.
- Choose not to do any of these activities.

It is illegal for your employer to take any adverse action against you because you formed, joined, assisted or supported International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL–CIO (IATSI Local 720), expressed support for unions in general, or took action with one or more coworkers to improve your working conditions, or to discourage you from doing so. Prohibited adverse actions include:

discharge
discipline
reduction of wages
reduction of work hours
denial of light duty
imposition of more onerous work conditions

It is also illegal for your employer to:

- Threaten you with adverse consequences, if you form, join, assist or support a union.
- Interrogate you about your union membership, activities and sympathies, or the union membership, activities and sympathies of other employees.
- Give you the impression that your union activities are under surveillance.
- Implicitly promise you increased benefits for not engaging in union or other protected concerted activities.
- Reward you with more prestigious job assignments for refraining from supporting the Union.

Illegal conduct will not be permitted. The National Labor Relations Board enforces the Act by prosecuting violations. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within 6 months of the unlawful activity. You may ask about a possible violation without your employer or anyone else being informed that you have done so. The NLRB will conduct an investigation of possible violations if a charge is filed. Charges maybe filed by any person and need not be filed by the employee directly affected by the violation.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-219225 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.