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Registry of Interpreters for the Deaf, Inc. and Pacific Media Workers Guild, Local 39521. Case 20–CA–164088

September 11, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On December 29, 2016, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief to the General Counsel’s answering brief. In addition, the General Counsel and Charging Party each filed cross-exceptions, the Respondent filed an answering brief to the Charging Party’s cross-exceptions, and the Charging Party filed a reply brief.

The complaint in this case alleges that the Respondent, a national professional association of interpreters for deaf individuals, violated Section 8(a)(1) of the Act by maintaining and applying policies that restrict the Respondent’s members from sharing or communicating information about their wages, terms and conditions of employment, and views regarding unionization. On November 2, 2018, the National Labor Relations Board issued a Notice to Show Cause why the complaint allegations regarding the Respondent’s maintenance of its civility and antitrust policies should not be severed and remanded to the judge for further proceedings in light of the Board’s decision in *Boeing Co.*, 365 NLRB No. 154 (2017), including reopening the record if necessary. In response, the General Counsel and the Charging Party moved to withdraw certain cross-exceptions each had filed, thereby expressly relinquishing their contentions that the Respondent’s maintenance of its civility policy was unlawful. The Board issued orders on November 23 and 30, 2018, granting the motions of the Charging Party and the General Counsel, respectively. All parties opposed remand, contending that the stipulated record before the Board would permit it to resolve the remaining issues, i.e., whether the Respondent violated Section 8(a)(1) of the Act by maintaining its antitrust policy and by applying its civility policy and its antitrust policy to remove from its Facebook page a series of posts by some of its members, who are not its employees. Because there is no dispute as to any material fact, and the allegations may be decided based on the existing stipulated

record, we agree with the parties that remand is not necessary.

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

The Board has considered the decision and the record in light of the exceptions, briefs, and responses to the Notice to Show Cause and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order. For the reasons explained below, we conclude that, on the stipulated facts presented in this particular case, the Respondent did not violate Section 8(a)(1) of the Act as alleged, and we dismiss the complaint.

Facts and Procedural History

The Respondent’s members consist of more than 16,000 professional interpreters and transliterators, interpreting students and educators, deaf or hard-of-hearing individuals, and organizations that support the Respondent’s mission of advocating for excellence in the delivery of interpretation and transliteration services. None of the Respondent’s members are its own employees, but some are employees of other employers (“employee members”). The Respondent employs fewer than 20 employees, none of whom is among its members. That is, the Respondent’s members are an entirely distinct group of individuals from its employees.

At issue are the Respondent’s civility and antitrust policies. The civility policy is posted on the Respondent’s members-only Facebook page and applies exclusively to communications on that site; the antitrust policy is posted on the Respondent’s website and applies exclusively to communications in all Respondent-sponsored and Respondent-sanctioned forums.¹ These policies, moreover,

¹ The lengthy policies are set forth in full in the Stipulation of Facts and its attachments. Substantial excerpts of the policies appear in the administrative law judge’s decision. Brief excerpts of each policy follow.

In relevant part, the civility policy states: “We . . . expect that posts on the RID Facebook page will be polite and respectful and fall within our operating guidelines” and “[w]e also expect a basic level of civility in user posts; disagreements are fine, but mutual respect is a must, and profanity or abusive language are out-of-bounds.” The policy reserves the Respondent’s right to delete “inappropriate” comments and submissions, including those “that threaten or harm the reputation of any person or organization,” “advertisements or solicitations of any kind,” and “posts that are in violation of RID’s antitrust and civility policies.” Stipulation of Facts, par. 18 & Jt. Exh. H.

The antitrust policy states the Respondent’s commitment to compliance with antitrust laws and provides, in part, that “[i]n connection with membership or participation in RID, there shall be no discussion, communication, or agreement between or among members who are actual or potential competitors regarding their prices, fees, wages, salaries, profit margins, contract terms, business strategy, business negotiations, or any limitations on the timing, cost, or volume of their services,” including via “any RID-related listserv, online discussion groups, spon-

apply only to the Respondent's members, not to its employees.

The Judge's Decision

In a decision based on the parties' stipulated record, the judge essentially found the violations alleged. In concluding that the Respondent's policies implicated the Section 7 rights of its members, even though the members are not the Respondent's own employees, the judge relied on, and implicitly extended, *New York New York Hotel & Casino*, 356 NLRB 907 (2011), *enfd.* 676 F.3d 193 (D.C. Cir. 2012), *cert. denied* 568 U.S. 1244 (2013), overruled by *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019). That is, the judge analogized the status of the Respondent's members when accessing its Facebook page to the status of the employees of a New York New York contractor who worked on the hotel's property.

Assessing whether the Respondent lawfully maintained the civility and antitrust policies, the judge found it unnecessary to apply the "reasonably construe" prong of the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), because he found that the antitrust policy explicitly restricted Section 7 activities. He did not separately analyze the civility policy, finding simply that the "Respondent's civility and/or antitrust policies . . . unlawfully restricts its members in the exercise of their Section 7 rights, in violation of Section 8(a)(1)."

The judge also found that the Respondent violated Section 8(a)(1) by removing from its members-only Facebook page a series of posts, dated October 21–27, 2015, by members of the Respondent's Video Interpreter Member Section (VIMS). The Respondent removed those posts because portions of them violated its antitrust and civility policies. The Respondent explained that the

sored RID social media, RID publications, or other RID-sanctioned event, program, or activity." The policy adds that

members may not be aware that discussions about fees, rates, and other economic terms can create such an appearance [i.e., that members had agreed "to something that could have an effect on prices, fees, or competition"] and raise concerns about possible violations of antitrust law. These concerns come to the forefront when members ask [RID components and affiliates] to take action about fees/rates, bargaining positions regarding terms of employment/engagement, etc.

Stipulation of Facts, par. 18 & Jt. Exh. G.

The stipulation also provides that "Respondent does not and cannot control the content of non-Respondent-provided forums. As such, Respondent's Antitrust Policy and Civility Policy do not apply to member discussion or communications on non-Respondent-provided forums, including members' personal social media, forums provided by members' employers, and other public forums." Stipulation of Facts, par. 21. (The Stipulation of Facts inadvertently numbered two consecutive paragraphs as 21; the cited language is found in the first of them.)

portions that violated its policies "include the references to the union, referral to its website, photos of the union leaders, and specifically naming companies and their practices." The Respondent further stated, "While these forums are available to discuss the VRS [video relay service] industry in general, including your experiences, thoughts and insights, they cannot promote unionization or ways to restrict competition." According to the judge, however, the member posts that the Respondent removed focused on the "desire to improve the members' terms of employment, rather than on setting standard prices for their services." In those circumstances, the judge concluded, the members' posts could not violate antitrust laws, and the Respondent's concern about antitrust violations did not provide a defense for its removal of the posts from its Facebook page.

The Parties' Initial Exceptions, the Board's Post-*Boeing* Notice to Show Cause, and the Parties' Responses

The Respondent excepted to the judge's findings, raising various contentions but primarily arguing that, in the absence of an employment relationship between it and its members, or something akin to an employment relationship, its maintenance and application of the policies at issue cannot violate the Act. The General Counsel, in his initial cross-exceptions, argued that the judge should have considered the lawfulness of each policy separately, applying *Lutheran Heritage's* then-applicable "reasonably construe" prong. The Charging Party's cross-exceptions track those of the General Counsel and also seek minor corrections to the judge's conclusions of law and additional remedies.² In light of the Board's subsequent issuance of *Boeing*,³ however, the Board, on November 2, 2018, issued a Notice to Show Cause why the complaint allegations regarding maintenance of the civility and antitrust policies should not be severed and remanded to the judge for further proceedings consistent with *Boeing*, including reopening the record if necessary.

The General Counsel, Charging Party, and Respondent responded to the Notice to Show Cause, unanimously opposing remand. As stated above, the Board granted the Charging Party's and General Counsel's motions relinquishing their contentions that the Respondent unlawfully maintained the civility policy. We agree with the parties that remand is not necessary, and we will resolve the remaining allegations that the Respondent vio-

² Because we reverse the judge and dismiss the complaint, we need not address either the precise language of the judge's conclusions of law or any remedial issues.

³ *Boeing Co.*, 365 NLRB No. 154, slip op. at 14–17 (2017) (overruling and replacing *Lutheran Heritage's* test for employer rules alleged to violate the Act because employees would "reasonably construe" the rules as restricting Sec. 7 rights).

lated Section 8(a)(1) by maintaining its antitrust policy and by applying the antitrust and civility policies in removing members' posts because of their allegedly protected content.

The General Counsel now argues that those remaining allegations do not turn on *Lutheran Heritage's* "reasonably construe" test and that finding the alleged violations is consistent with *Boeing*. Regarding the Respondent's maintenance of its antitrust policy, the General Counsel contends that the policy is within *Boeing's* category 3, as a rule that prohibits employees from discussing wages or benefits with one another. Regarding the application of both policies, the General Counsel contends that the Respondent's removal of employee members' posts purportedly protected by Section 7 may, and should, be found to violate Section 8(a)(1) as an unlawful application of a lawful civility rule. The Union joins in full the General Counsel's response to the Notice to Show Cause. The Respondent references its initial exceptions, reiterating that its policies apply only to its members, not to its employees, and therefore cannot violate the Act. Thus, the Respondent contends, the Board need not decide whether the policies are lawful under *Boeing*.

Discussion

We agree with the Respondent that, based on the stipulated record, its relationship with its members is not akin to an employment relationship. This is true even of the "employee members," who are employees under the Act, albeit of employers other than the Respondent.⁴ As a result, the Respondent's maintenance and application of policies covering its members and specifying the contours of their rights *as members* do not affect the Section 7 rights they have *as employees*. And, as the Act's text makes explicit, Section 8(a)(1) cannot be violated if Section 7 rights are not affected.⁵

We begin by highlighting several material facts about the relationship between the Respondent and its members. As noted above, it is undisputed that none of the employee members is the Respondent's employee, and none performs work for the Respondent or for a contractor of the Respondent on the Respondent's physical property or, for that matter, in the Respondent's electronic forums.⁶ The employee members also do not perform

work integral to the Respondent's business. Their work as interpreters is, in a general sense, connected to the Respondent's business as a professional association for interpreters, but the Respondent's business is not dependent on their work in the way it is dependent on the work of its own employees or others performing work similar to that which its employees might otherwise perform.⁷ Nor does the Respondent compensate the employee members.⁸ On these particular facts, we are persuaded that the relationship between the Respondent and its members neither resembles employment nor functions as an employment relationship typically would.

Further, the stipulated record suggests that only a fraction of the Respondent's members are employees of any employer, and no employee member was shown to be employed by an employer whose relationship with the Respondent gives the Respondent control over the employee members' terms and conditions of employment. As alluded to in the stipulation, none of three major employers in the industry was itself a member or contractor of the Respondent during material times, and none of the identified employee members was described as having been employed by any other employer. Those facts are particularly significant: if the Respondent does not, even indirectly, control the employee members' wages, hours, or working conditions, it cannot be found to restrict or interfere with the employee members' rights as employees.⁹

tract. The parties have stipulated that, in those circumstances, the contracted interpreter members are not employees of the Respondent within the meaning of the Act and are not on a long-term or continuous contracted status with the Respondent.

⁷ We are not persuaded by the General Counsel's argument that members who post in the Respondent's online forums are carrying out the Respondent's business purpose by disseminating industry-related information. Members who post about their work in the industry simply are not acting as (or in lieu of) employees of the Respondent when they access a members-only site, to which they would not have access if they were the Respondent's employees rather than its members, in order to comment to other members of the Respondent.

⁸ Cf. *WBAI Pacifica Foundation*, 328 NLRB 1273, 1274 (1999) (holding, in representation case, that employee status requires "at least a rudimentary economic relationship, actual or anticipated, between employee and employer"). Indeed, the compensation structure of a typical employment relationship is arguably reversed here: rather than the Respondent paying members in order to obtain their services, as would normally be true if the Respondent were their employer, members pay the Respondent (in the form of annual dues) and, in exchange, the Respondent provides services to them.

⁹ Again, as noted above, the stipulated record establishes that the Respondent's antitrust and civility policies do not apply to member discussions or communications on forums that the Respondent does not provide, such as members' personal social media or forums provided by members' employers. The Respondent's policies simply have no bearing on its members' activities as *employees*. In these circumstances, we find it unnecessary to reach the judge's discussion of *Fabric Services*, 190 NLRB 540 (1971), *Lucky Stores, Inc.*, 243 NLRB 642

⁴ We focus our analysis on the employee members. Unlike the employee members, the Respondent's members who are not employees of any employer have no Sec. 7 rights that could even arguably be affected by the Respondent's maintenance and application of its policies.

⁵ Sec. 8(a)(1), in its entirety, provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

⁶ If the Respondent occasionally wishes to obtain interpreting services from one or more members (e.g., for a Respondent-sponsored meeting or conference), it does so through a short-term, freelance con-

As for *New York New York Hotel & Casino*, supra, which the judge applied, and *Bexar County*, supra, which overruled *New York New York*, neither case is on point here. We are not assessing the rights of employees of an onsite contractor or licensee of the Respondent, and we do not adopt the judge's apparent conclusion that the materially different facts at issue here should be analyzed as if they were analogous. Accordingly, *Bexar County* is inapplicable.

In short, on the stipulated facts presented here, we are persuaded that the association/member relationship between the Respondent and its employee members is neither an employment relationship nor akin to an employment relationship, and the Respondent's policies applicable to its members do not affect the rights of employee members *as employees*.¹⁰ And, of course, Section 7 simply does not address their rights as members of the Respondent.

Although not necessary to our conclusion, we further observe that our analysis tracks that of the Regional Director, who initially dismissed the charge.¹¹ The Region-

(1979), *Jimmy Kilgore Trucking Co.*, 254 NLRB 935 (1981), and *International Shipping Assn.*, 297 NLRB 1059 (1990).

¹⁰ The General Counsel, in his answering brief to the Respondent's exceptions, suggests that the facts here are comparable to those in cases in which the Board had found that nonemployee union organizers' Sec. 7 rights were interfered with when a respondent created a quasi-public space on its property, like a cafeteria, and then barred access or activity by the nonemployee organizers. But the line of cases on which the General Counsel relies for this argument was overruled by *UPMC*, 368 NLRB No. 2 (2019) (holding that an employer that opens its property to access by the public need not permit nonemployees to use the property for promotional or organizational activity). Thus, even if we were persuaded that the Respondent's members-only Facebook pages and other forums are analogous to quasi-public spaces like cafeterias, and that the Respondent's members can properly be treated similarly to nonemployee union organizers exercising derivative Sec. 7 rights on behalf of employees with their own Sec. 7 rights—and, to be clear, we are not so persuaded—we would still reject the General Counsel's argument as unsupported by current Board law.

¹¹ The Regional Director's dismissal was partially reversed by the Office of Appeals, resulting in issuance of the instant complaint.

Notwithstanding the General Counsel's opposition to our consideration of the Regional Director's initial dismissal of the charges at issue, we may take administrative notice of the procedural history of this case. See, e.g., *Advertisers Mfg. Co.*, 275 NLRB 100, 102 (1985) ("It has long been established that the Board will take official notice of its own proceedings and decisions [and] that it may rely thereon."); *Teamsters Local 901 (Hotel La Concha)*, 193 NLRB 591, 591 fn. 1, 598 (1971) (taking administrative notice of other Board cases involving the same respondent); cf. *Midwest Division – MMC, LLC d/b/a Menorah Medical Center*, 362 NLRB 1746, 1759 fn. 9, 1764 fn. 24 and accompanying text (2015) (administrative law judge's decision) (stating that Fed. R. Evid. 201 allows judges to take administrative notice "of adjudicative facts that are not subject to reasonable dispute" and that "[t]he Board also supports the taking of judicial notice," citing *Mimbres Memorial Hospital & Nursing Home*, 342 NLRB 398, 403 fn. 14 (2004), enf'd. 483 F.3d 683 (2007)).

al Director explained: "The investigation . . . revealed that the Charged Party is a professional association and that the complained of policies, the denial of access, and the Facebook deletion all occurred in the context of the Charged Party regulating the relationship between it and its paying members. Thus, none of the complained of rules or conduct applied to or impacted an employer-employee relationship and did not, therefore, interfere with employees' Section 7 rights." RD dismissal letter, December 22, 2015. In our view, the Regional Director's initial conclusion and rationale were correct.

Conclusion

Based on the stipulated record presented here, we conclude that the Respondent has neither an employment relationship nor an employment-like relationship with its employee members, and that, accordingly, the Respondent's policies that apply to the employee members *as members* do not affect their Section 7 rights *as employees*. Thus, contrary to the judge, we conclude that the Respondent did not violate Section 8(a)(1) by maintaining its antitrust policy or by applying its civility and antitrust policies.

The General Counsel's sole argument against our consideration of the Regional Director's dismissal letter is that the document is not part of the stipulated record in this case. The General Counsel does not contend that the dismissal letter fails to accurately represent the underlying facts or that any Board precedent or practice precludes us from considering the procedural history of a case before us. It is true that the dismissal letter is not found in the parties' stipulated record; however, a minimally redacted version of the letter is publicly accessible on the Board's website in the case file for this case. And, in any event, the parties stipulated that "the stipulation of facts does not prevent any of the Parties from requesting that the ALJ take judicial notice of matters of public record or of public court or Board proceedings." *Jt. Motion to submit stipulated record to the administrative law judge at 1–2*. The Respondent has requested that the Board (rather than the judge) take judicial notice of Board proceedings in this case, which are a matter of public record, and we see no reasonable obstacle to granting the request. Thus, we take administrative notice (the term we use in place of "judicial notice") of the Regional Director's initial dismissal letter and the official explanation it contains for his decision to dismiss.

In light of our conclusion that the absence of an employment-like relationship between the Respondent and its members prevents us from finding the alleged violations, we need not address the parties' additional arguments regarding the Respondent's reliance on asserted facts outside the stipulated record.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 11, 2020

John F. Ring, Chairman

Marvin E. Kaplan Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Richard McPalmer, Esq., for the General Counsel.
Christopher Michalik, Esq. (McGuire Woods LLP), for the Respondent.
Michael Melick, Esq. (Barr & Camens), for the Charging Party.

DECISION

STATEMENT OF THE CASE

Joel P. Biblowitz, Administrative Law Judge. On November 8, 2016, the parties submitted a joint motion to transfer proceedings to the Division of Judges together with a stipulation of facts and supporting exhibits. The joint motion waives a hearing before an administrative law judge and seeks findings of fact, conclusions of law, and an appropriate order based upon the stipulation of facts and briefs submitted by the parties. On November 10, 2016, Associate Chief Administrative Law Judge Gerald Etchingham issued an Order approving the joint motion and stipulation of facts, assigned the case to me and set a date for the filing of briefs in this matter. The parties stipulated that the issues presented for determination are as follows:

1. Whether the language of Respondent’s civility and/or anti-trust policies, specified in the August 31, 2016 complaint and notice of hearing (Joint Exh. C) and promulgated on its website and its video interpreter member section Facebook page (Joint Exhs. G, H), explicitly restrict its members¹ from participating in activities protected by Section 7 of the National Labor Relations Act.

¹ The accompanying stipulated factual record will demonstrate that, at any given time, some portion of Respondent’s members are employees within the meaning of Sec. 2(3) of the National Labor Relations Act, employed by entities other than Respondent. The record will further show that some portion of those members who participated in the video interpreter member section Facebook page exchange at issue here were employees within the meaning of Sec. 2(3) of the National Labor Relations Act, employed by entities other than Respondent. So as not to suggest that Respondent’s members are its own employees, the term “member” is used here.

tions Act. See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646–647 (2004).

2. Whether Respondent’s members would reasonably construe the language of Respondent’s civility and/or antitrust policies, specified in the August 31, 2016 complaint and notice of hearing and promulgated on its website and its video interpreter member section Facebook page, to restrict or prohibit Section 7 activity.

3. Whether the Respondent’s maintenance of its civility and/or antitrust policies, specified in the August 31, 2016 complaint and notice of hearing and promulgated on its website and its video interpreter member section Facebook page, constitutes violations of Section 8(a)(1) of the National Labor Relations Act, as amended.

4. Whether the Respondent restricted its members’ exercise of their Section 7 rights by applying its civility and/or antitrust policies, specified in the August 31, 2016 complaint and notice of hearing and promulgated on its website and its video interpreter member section Facebook page, to remove member exchanges on its video interpreter member section Facebook page, thus constituting a violation of Section 8(a)(1) of the Act.

5. Assuming a violation (or violations) of the Act are found as alleged, whether it is appropriate to include a nationwide electronic notice posting as part of the remedy.

The parties also agreed to the following

Joint Exhibits:

- A. The Charge in Case 20-CA-164088;
- B. The Affidavit of Service of the Charge in Case 20-CA-164088;
- C. The Complaint and Notice of Hearing in Case 20-CA-164088;
- D. The Affidavit of Service of Complaint and Notice of Hearing in Case 20-CA-164088;
- E. Respondent’s Answer to Complaint and Notice in Case 20-CA-164088;
- F. A discussion engaged in amongst members of Respondent and its Video Interpreter Member Section (“VIMS”) on Respondent’s VIMS Facebook page, dated October 21, 2015, through about October 27, 2015, including Respondent’s own post in reaction, dated October 27, 2015;
- G. Respondent’s Antitrust Policy as it appeared via the link included in Respondent’s October 27, 2015, post to its VIMS Facebook page and as it appears on Respondent’s website today.
- H. Respondent’s Civility Policy as it appeared on Respondent’s primary Facebook page as of October 27, 2015 and as it appears on Respondent’s primary Facebook page today.
- I. Respondent’s current organizational Mission Statement.
- J. Respondent’s current organizational chart.
- K. E-mail communications dated June 18, 2015 through July

29, 2015 between Respondent and Charging Party.

L. A letter dated August 3, 2015 from Respondent to the Charging Party.

The Stipulation of Facts:

The parties agree that the following facts are true. The parties do not concede the relevance of each fact recited, and this stipulation is made without prejudice to any objection that any party may have as to the relevance of any facts stated herein or related argument.

1. The charge in Case 20–CA–164088 was filed by the Charging Party on November 10, 2015, and a copy was served on Respondent by U.S. mail on November 13, 2015.

2. (a) Since at least October 15, 1974, Respondent has been a California corporation with its principle office located at 333 Commerce Street, Alexandria, Virginia (Respondent’s office), and has been engaged in the operation of a trade and professional association of interpreters for deaf individuals.

(b) During the 12-month period ending August 31, 2016, Respondent, in conducting its operations described above in subparagraph 2(a), collected and received dues and fees in excess of \$50,000 from entities and individuals located outside the Commonwealth of Virginia, and remitted said dues and fees to its principal office located in the Commonwealth of Virginia.

3. Since at least June 15, 1964, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

4. Since at least November 2012, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

5. Respondent is a national professional association for interpreters of deaf individuals.

Respondent plays a leading role in advocating for excellence in the delivery of interpretation and transliteration services between people who use sign language and people who use spoken language. Consistent with its Mission Statement (Jt. Exh. I) and in collaboration with the deaf community, Respondent certifies interpreters and advocates for best practices in interpreting, for professional development for interpreting professionals, and for the highest standards in the provision of interpreting services.

6. Currently, Respondent has a large, growing, and diverse membership of more than 16,000 professional interpreters, transliterators, interpreting students, and educators. Respondent’s membership also includes individuals who are deaf, deaf-blind, hard-of-hearing, and organizations that promote and support the mission and philosophy of Respondent. The number of Respondent’s individual members was similar as of October 2015.

7. Individual and organizational members pay annual dues to maintain membership with Respondent.

8. Respondent employs fewer than twenty individuals. (See Jt. Exh. J.) Respondent’s employees are not members of Respondent. Interim Executive Director Anna Witter-Merithew is

a member of Respondent but is not, in her current capacity, an employee within the meaning of Section 2(3) of the National Labor Relations Act.

9. At any given time, some portion of Respondent’s individual members are employees (as defined by Section 2(3) of the National Labor Relations Act) of other entities, while others are freelance or independent interpreters or interpreting students who do not have an employment relationship with any entity. This is true currently and since at least October 2015.

10. Respondent’s individual members are not employees of Respondent and do not work on Respondent’s premises. Respondent does not provide any fringe employment benefits to its individual members and does not provide compensation to its individual members for being members. Respondent occasionally contracts individual interpreter-members on a freelance basis to perform interpretation services at meetings of its committees and at its regional and national conferences. In these circumstances, the individual interpreter-members are not employees of Respondent within the meaning of Section 2(3) of the Act and are not on a long-term or continuous contracted status with Respondent.

11. At any given time, Respondent may have individual members who are employed by competitors in the interpreting market. For example, one member may be employed by Purple Communications, Inc., which is a private sector entity engaged in video relay interpreting services, while another member may simultaneously be employed by Sorenson Communications, Inc. (Sorenson VRS), which is also a private sector entity engaged in video relay interpreting services, while yet another member may be employed by CSDVRS, LLC d/b/a ZVRS, which is also a private sector entity engaged in video relay interpreting services.

12. Respondent maintains “member sections” organized by industry or interpretation focus. One example is Respondent’s Video Interpreter Member Section (“VIMS”). Respondent has sponsored and maintained VIMS since at least June 27, 2009. The VIMS currently totals 2437 individual members. The number of Respondent’s VIMS members was similar as of October 2015.

13. At any given time, some portion of Respondent’s VIMS individual members are employed in the video relay interpreting industry and meet the definition of employee as defined by Section 2(3) of the National Labor Relations Act. This is true currently and since at least October 2015.

14. Respondent also directs, maintains, and operates certain social media forums for its members, including Facebook pages. One example is Respondent’s VIMS Facebook page, which has been operated by Respondent and been available to Respondent’s members since late-2011.

15. Respondent’s VIMS Facebook page is closed inasmuch as Respondent members interested in gaining access must request permission from the page’s administrator(s). So long as an individual requesting access is a Respondent member, they are granted access to participate in the VIMS Facebook page. At any given time, some portion of Respondent’s individual mem-

bers accessing the VIMS Facebook page are employed in the video relay interpreting industry and meet the definition of employee as defined by Section 2(3) of the National Labor Relations Act. This is true currently and since at least October 2015.

16. Respondent operates the VIMS Facebook page as a professional association for its members—not for its employees—in order to provide information for its members, to promote its mission to encourage the growth of the interpreting profession, and to allow for a forum for its members to share and discuss industry-related information.

17. Respondent has ultimate control of the VIMS Facebook page's content.

18. Respondent maintains an antitrust policy (the "Antitrust Policy," Jt. Exh. G) that is applicable to its members and their discussions or communications on any Respondent provided forums, events, programs, or activities, including Respondent-provided social media and including the VIMS Facebook page. Respondent has maintained the antitrust policy and posted it on its website since at least October 2015. Respondent also maintains a civility policy (the "Civility Policy," Jt. Exh. H) that is applicable to its members and their discussions or communications on Respondent-operated Facebook pages, including the VIMS Facebook page. Respondent has maintained the civility policy and has posted it on its primary Facebook page since at least October 2015.

19. The antitrust policy and the rationale for its adoption are prominently displayed on Respondent's website. (See Jt. Exh. G.) This is true currently and since at least October 2015. As a professional association, certain federal and/or state antitrust laws apply to Respondent. Accordingly, and in order to avoid potential civil or criminal action directed at it or at certain of its employees and/or board members, Respondent is particularly careful to avoid explicit or implicit understandings among its competitor-members that they will act in concert to control prices, fees, or other economic terms. Whether and to what extent federal and/or state antitrust laws may apply to the VIMS Facebook page exchanges captured by Joint Exhibit F, and whether such questions are even relevant to the alleged unfair labor practices at issue, are legal questions left to the Parties' briefing.

20. The antitrust policy applies only to Respondent members and only to Respondent-provided forums. The civility policy applies only to Respondent members and only to Respondent provided and operated Facebook pages.

21. Respondent does not and cannot control the content of non-Respondent-provided forums. As such, Respondent's antitrust policy and civility policy do not apply to member discussion or communications on non-Respondent-provided forums, including members' personal social media, forums proved by members' employers, and other public forums.

21[sic]. The antitrust policy and civility policy do not apply to Respondent's own employees.

22. Among other things, Respondent ensures that its Facebook page complies with its antitrust policy and its civility policy.

23. The Charging Party has embarked on an effort to organize interpreters, some of whom may be members of Respondent. The Charging Party's efforts have focused on the video relay interpretation service industry. This is true currently and since at least late 2012.

24. The Charging Party has not engaged in efforts to organize Respondent's employees.

25. Respondent has publicized no official position on the unionization of its members, and Respondent does not condition membership on its members' or prospective members' views on unionization.

26. The Charging Party has previously sought to use Respondent forums as a means of spreading its message to Respondent's members who may be employees of some other employer.

27. Respondent holds a national conference every other year, which it organizes for its members. Prior to Respondent's 2015 national conference in New Orleans, the Charging Party sought to become an organizational member of Respondent and to serve as an exhibitor at the conference. (See Jt. Exh. K.)

28. Respondent rejected the Charging Party's membership and exhibitor request, citing the antitrust policy. (See Jt. Exhs. K, L.)

29. On October 21, 2015, a Respondent member named Julie Balassa posted a message on the Respondent's VIMS Facebook page. The message generated responsive posts from numerous Respondent members. The exchanges went on for several days. (See Jt. Exh. F.)

30. In accordance with the antitrust policy and the civility policy, on October 27, 2015, Respondent removed the posts captured by Joint Exhibit F (page ranges 000001—000056) posted a reminder to its members of the rules for posting on Respondent's Facebook pages, and provided a link to the antitrust policy. (See Jt. Exh. F, p. 000057-000062.)

31. Purple Communications, Inc., is not and never has been a contractor of Respondent. Purple Communications, Inc., also was not a member of Respondent in fiscal year 2016 (July 1, 2015, through June 30, 2016). Sorenson Communications, Inc. (Sorenson VRS) is not and never has been a contractor of Respondent. Sorenson Communications, Inc. (Sorenson VRS) also was not a member of Respondent in fiscal year 2016 (July 1, 2015, through June 30, 2016). CSDVRS, LLC d/b/a ZVRS is not and never has been a contractor of Respondent. CSDVRS, LLC d/b/a ZVRS also was not a member of Respondent in fiscal year 2016 (July 1, 2015, through June 30, 2016).

32. At the time of the VIMS Facebook posts captured by Joint Exhibit F, the following list of Respondent individual members who participated in the posts captured by Joint Exhibit F

worked in either a full-time or flex capacity at the Purple Communications, Inc., facilities appearing across from their names and were employees as defined by Section 2(3) of the Act:

Judith Kroeger—Corona, California
 Martin Yost—San Diego, California
 Sarah Spencer—Denver, Colorado
 Paula DiMuro—Oakland, California
 Norma Villegas—San Diego, California (“Norma BrownSuspect Villegas”)
 Desere Phoenix-Patterson—Corona, California
 Renee Souleret—Long Beach, California
 Lindsey Antle—Denver, Colorado

33. The list of persons at stipulation no. 32, above, is not necessarily an exhaustive list of Section 2(3) employees appearing on Joint Exhibit F.

34. The Charging Party is a not a Respondent member and, as such, would not be entitled as an organization to utilize or post on Respondent’s members-only social media sites.

35. All documents attached as Joint Exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the Joint Exhibits.

36. The Parties additionally and jointly request that the Administrative Law Judge take judicial notice of the two NLRB Decisions appended here as Notice Exhibits A and B and of the four Certifications of Representative appended here as Notice Exhibits C through F.

The antitrust policy, as set forth above in paragraphs 18 and 19, and appearing in Exhibits G and H are set forth below: Exhibit G states, inter alia:

RID is committed to compliance with the antitrust laws of this country, which laws prohibit anticompetitive behavior, regulate unfair business practices, and encourage competition in the marketplace.

Neither RID, nor any of its affiliate chapters, member sections, councils, committees, or task forces shall be used for the purpose of bringing about or attempting to bring about any understanding or agreement, written or oral, formal or informal, express or implied, between or among competitors that may restrain competition or harm consumers. In connection with membership or participation in RID, there shall be no discussion, communication, or agreement between or among members who are actual or potential competitors regarding their prices, fees, wages, salaries, profit margins, contract terms, business strategy, business negotiations, or any limitations on the timing, cost, or volume of their services. This includes any RID-related listserv, online discussion groups, sponsored RID social media, RID publications, or other RID sanctioned event, program, or activity.

Frequently Asked Questions About Professional Associations and Antitrust Risks

Introduction: Most association activities are procompetitive or

competitively neutral; but antitrust enforcers have always been concerned about the potential for harm arising from the activities of groups made up of competitors. This document was designed for RID members, committees, task forces, work groups, member sections and state affiliate chapters to help them better understand what they and their groups can do and discuss in light of such antitrust concerns.

Antitrust law applies to all organizations, no matter how small or how localized, and the penalties for violating federal or state antitrust laws are severe. Professional association members, as well as professional associations themselves, need to avoid any activity that might lead to the appearance that the association members had agreed, even informally, to something that could have an effect on prices, fees, or competition. Many members may not be aware that discussions about fees, rates, and other economic terms can create such an appearance and raise concerns about possible violations of antitrust law. These concerns come to the forefront when members ask their committees, task forces, work groups member sections and state affiliate chapters to take action about fees/rates, bargaining positions regarding terms of employment / engagement, etc. This document is designed to answer some commonly asked questions.

Exhibit H, Respondent’s Civility Policy, states, inter alia:

We welcome you to the RID Facebook page and encourage your participation. It is our hope that you will use this page to join in on discussions, network with other professionals in the field, receive helpful information about RID initiatives and news updates, share links to useful information about the interpreting profession and community, see deadline reminders, event details and more. We welcome your comments and expect that posts on the RID Facebook page will be polite and respectful and fall within our operating guidelines.

We review Facebook comments routinely and those that are off-topic or include solicitation will not be allowed. We also expect a basic level of civility in user posts; disagreements are fine, but mutual respect is a must, and profanity or abusive language are out-of-bounds. Users are responsible for the content of their comments. RID reserves the right to delete comments/ submissions that are inappropriate, including comments/submissions that contain:

- vulgar language;
- comments that threaten or harm the reputation of any person or organization;
- advertisements or solicitations of any kind;
- comments that suggest or encourage illegal activity;
- posts that are in violation of RID’s antitrust and civility policies [Exhibit G above];
- multiple off-topic posts or repetitive posts;
- infringements on copyright or trademark laws.

The Stipulation also includes posts on the Respondent’s Facebook page. The most prominent and responded to was a October 21, 2015 post from Balassa, a former employee of Sorenson, an employer in the industry that was highly critical of that employer, including statements such as:

The pressure, the endless rules, the punitive measures taken when SOA was even a few seconds over the goal, when a break was even just one minute over the allowable time...the daily unethical, dishonest and even illegal trampling on the rights of interpreters, on best practices that we have worked tirelessly to establish, is simply astounding...In my center there were interpreters in tears just about every day...There were times when I wet my pants, was close to vomiting or passing out, was beyond emotionally spent by vicarious trauma.

There were numerous responses to this post from, at least, eight statutory employees, some from Respondent's members who were employed by Sorenson and other employers, some supportive and some in disagreement with the posting. Further, a number of these responses were supportive of unionization as the best way to improve working conditions. The Respondent removed the October 21, 2015 Balassa post, as well as those that were responsive, on October 27, 2015. On October 27, the Respondent posted the following on its Facebook page:

This page is an official RID forum for the RID Video Interpreter Member Section, an official entity of the Registry of Interpreters for the Deaf, Inc. As such, the dialogue and conversations that take place on this official forum of the organization must follow all policies and procedures, including the Civility Policy and Antitrust Policy.

Recently, RID had to delete a post due to violation of both of these policies in some parts of the discussion and dialogue.

Portions violating antitrust and civility include the references to the union, referral to its website, photos of the union leaders, and specifically naming companies and their practices.

While these forums are available to discuss the VRS Industry in general, including your experiences, thoughts and insights, they cannot promote unionization or ways to restrict competition. For RID to remain in compliance, we cannot allow those types of discussions within our official forums.

Analysis

The Respondent is a trade and professional association of interpreters for the deaf. It advocates for excellence in this area and certifies interpreters for professional development in the profession. Of the approximately 16,000 members who pay annual dues to the Respondent, some are employees as defined by Section 2(3) of the Act of other employers in the industry (such as Purple Communications and Sorenson), while others are freelance or independent interpreters or interpreting students who have no employment relationship with any employer in the industry. Respondent's individual members are not employees of the Respondent and while the Respondent employs approximately twenty individuals, they are not members of the Respondent.

The Respondent maintains "member sections" organized by industry. The relevant one herein is its video interpreter member section ("VIMS") for members employed in the video relay interpreting industry, and these members are employees within the meaning of Section 2(3) of the Act. Respondent maintains social media forums for its members, but not for its employees,

including its VIMS Facebook page, which has been in operation since late 2011 and its members are granted access to participate in this Facebook page. The Respondent has also maintained an antitrust policy and civility policy since at least October 2015 and in order to avoid any potential civil or criminal action, it "... is particularly careful to avoid explicit or implicit understandings among its competitor-members that they will act in concert to control prices, fees or other economic terms." [Stipulation of Facts, No. 19] The Charging Party has attempted to organize interpreters in the video relay interpretation service industry, as shown by Notice Exhibits A and B attached to the stipulation. Some of the employees of these targeted employers may be members of the Respondent, but the Charging Party has not attempted to organize the Respondent's employees and the Respondent has not publicized an official position on the unionization of its members. Neither Purple Communications, Inc. nor Sorenson Communications, Inc. was a contractor for, or a member of, the Respondent between July 1, 2015, and June 30, 2016.

The Respondent's antitrust policy, after stating the reason for the policy, states: "there shall be no discussion, communication or agreement between or among members who are actual or potential competitors regarding their prices, fees, wages, salaries, profit margins, contract terms, business strategy, business negotiations, or any limitations on the timing, cost or volume of their services."

It requires little discussion to state that, in a normal employer-employee situation, a restriction on the discussion or communication of wages and salaries would violate Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and numerous cases that followed. Because the antitrust policy explicitly prohibits activities protected by Section 7 of the Act, there is no need to determine if employees would reasonably construe it to prohibit this activity. There could be no better example of an unlawful restriction under Section 8(a)(1) of the Act than a prohibition against discussing wages and salaries. Employees could hardly miss the inference that it would curtail their right to engage in protected concerted activities by discussing wages and salaries with their fellow employees. In fact, when Respondent removed the posts on October 27, it informed its members that while the forums were available to discuss the industry, "they cannot promote unionization or ways to restrict competition." Counsel for the Respondent, in his brief, argues that the Section 7 right involved herein applies only when there is a direct employer-employee relationship, stating: "The Act does not envisage a universal right untethered to the employment relationship, and neither the courts nor the Board have issued such a decision." I disagree. While the restriction herein relates to the Respondent's members, not its employees, the Act and the case law are clear that even when this restriction does not apply to its employees, this limitation on nonemployee member's postings still violates the Act.

In *Fabric Services, Inc.*, 190 NLRB 540, 541 (1971), the employer instructed an individual who was employed by another employer, but was performing work on its premises, to remove his union pocket protector as a condition of performing

work at his plant. The respondent defended that the complaint should be dismissed because it was not the employee's employer. Trial Examiner Arthur Leff stated, *inter alia*:

I reject that defense as without merit. I find no basis, either in the declared policy of the Act or in any delineating provision of it for construing Section 8(a)(1) as safeguarding employees in the exercise of Section 7 rights only from infringement at the hands of their own employer. To the contrary, the specific language of the Act clearly manifests a legislative purpose to extend statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship. Thus, Section 8(a)(1) makes it "an unfair labor practice for *an* employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7." And Section 2(3) declares, "The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." Moreover, Section 2(9), which defines "labor dispute" as including "any controversy...regardless of whether the disputants stand in the proximate relationship of employer and employee" further discloses a statutory aim to give the Act's various prohibitions a broad rather than narrow meaning, except, of course, where the prohibition is limited in its internal context or is specifically restricted by other express language of the Act.

Further, in *Lucky Stores, Inc.*, 243 NLRB 642, 643 (1979), the Board stated: "In implanting the statutory protections provided for employees who exercise their rights guaranteed in Section 7 of the Act, this Board has consistently held that an employer may violate Section 8(a) of the Act not only with respect to actions taken affecting its own employees, but also by actions affecting employees who do not stand in such an immediate employer-employee relationship." See also *Jimmy Kilgore Trucking Co.*, 254 NLRB 935 (1981), and *International Shipping Association, Inc.*, 297 NLRB 1059 (1990). More recently, in *New York, New York LLC*, 356 NLRB 907 (2011), the respondent (NYNY), a hotel operator, prohibited the employees of the food service contractor at the hotel (Ark) from handbilling on its property. In finding a violation, the Board stated:

As a preliminary point, it is clear that the undisputed lack of an employment relationship between the Ark employees and NYNY is not dispositive here. The Act clearly regulates the relationship between an employer (such as NYNY) and employees of other employees (such as the employees of Ark). The Act contains not only a broad definition of the term "employee," but one whose breadth is aimed directly at the question at issue. The Act provides that "the term 'employee' shall include any employee and *shall not be limited to the employees of a particular employer*, unless the Act explicitly states otherwise." Section 2(3), 29 U.S.C. Sec. 152(3) [Emphasis supplied]. The precise terms of the Act's prohibitions also make clear that an employer's action toward the employees of other employers can constitute an unfair labor practice. The prohibition at issue in this case, contained in Section 8(a)(1), provides that 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." The prohibition is not limited to interference with the rights of *his* employees.

It is important to note that the Facebook posts responding to Ms. Balassa's post referred to the desire to improve the members' terms of employment, rather than on setting standard prices for their services. Therefore, by removing Ms. Balassa's post on October 27, the Respondent violated Section 8(a)(1) of the Act.

The Respondent defends these restrictions on the basis of its fear that unchecked Facebook postings could place it in jeopardy of antitrust laws. I find that while this could be a valid defense in some circumstances, this is not one of those circumstances. The Respondent's members who participated in the Facebook postings were employees within the meaning of the Act and their postings were meant to publicize and improve their working conditions at other employers in the industry rather than to regulate the prices charged and therefore could not violate antitrust laws. Neither Purple Communications nor Sorenson were members of the Respondent with access to the Facebook postings. If they were, and the Respondent's Antitrust Policy restricted discussions of their pricing and charges, those rules would be proper to protect against antitrust violations, but that is not the issue herein. While the Respondent was not legally obligated to maintain Facebook pages for the use of its members, by maintaining these Facebook pages and unlawfully restricting the content of the posts and removing the post that it deemed to violate its antitrust rules, it violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent's civility and/or antitrust policies that is specified and maintained on its website and its video interpreter member section Facebook page unlawfully restricts its members in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.
4. By removing the posting of member Julie Balassa as well as other member posts on its Facebook page, on about October 27, 2015, the Respondent further violated Section 8(a)(1) of the Act.
5. Because Respondent's civility and/or antitrust policies found to be unlawful apply to all of its employees, I recommend that the Respondent post the Notice required herein at all of its facilities, nationwide.

REMEDY

Having found that its civility and/or antitrust policy unlawfully restricts its employees in the exercise of their Section 7 rights, I recommend that the Respondent be ordered to rescind these rules and to notify its members nationwide that these rules have been rescinded and will no longer be enforced, and that they are free to post messages on the Facebook page about their terms and conditions of employment without fear that these postings will be removed.

Upon the joint motion and stipulations of facts and the entire

record, I hereby issue the following recommended²

ORDER

The Respondent, Registry of Interpreters for the Deaf, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing its civility and/or antitrust policy contained on its website and its video interpreter member section Facebook page.

(b) Removing messages from its Facebook page because they violate the civility and antitrust policy promulgated and maintained by the Respondent.

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

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

(a) Notify all of its members, nationwide, that the civility and/or antitrust policy has been rescinded, and will no longer be enforced, and that they are free to post messages on the Facebook page without fear that these messages will be removed.

(b) Within 14 days after service by the Region, post at all of its offices, nationwide, and on its Facebook page, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 20, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2015.

(c) 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 the Respondent has taken to comply.

Dated, Washington, D.C. December 29, 2016

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

² 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.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the civility and/or antitrust policy restricting postings on our video interpreter member section Facebook page and WE WILL NOT remove postings that we consider have violated that policy.

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

WE WILL notify all of our members nationwide that our civility and/or antitrust policy has been rescinded and will no longer be enforced and that they may post message on our video interpreter member section Facebook page about their terms and conditions of employment without fear that the posting will be removed.

REGISTRY OF INTERPRETERS FOR THE DEAF, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-164088 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.

