UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

X FACTOR S2 LLC

and **Case 31-CA-323348**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES (IATSE) LOCAL 728

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for the General Counsel.
Amanda Lively, Esq.
for the Charging Party
Daniel Castro, Pro Se
for the Respondent.

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This hearing was held on January 14, 2026, in Los Angeles, California, over allegations that X Factor S2 LLC (the Respondent) violated the National Labor Relations Act (the Act) when it discharged employees Noah Kelly, Andrew Choe, Sean Hunt, and Steven Miller. The four made up the grip and electrical crew working on a television film project. Prior to the start of filming, Kelly spoke with IATSE Local 728 (the Union) about a plan to organize the project. He also spoke to Choe and Hunt, and Hunt later spoke to Miller. On the first day of filming, the Respondent's executive producer, Daniel Castro, learned about the plan. After the second day of filming, he gave the four the following day off and then replaced them with a new crew.

On August 4, 2023, the Union filed the unfair labor practice charge in this case. (GC Exh. 1(a)). On July 24, 2025, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued the complaint. (GC Exh. 1(d)-(e)). The complaint alleges the Respondent discharged Kelly, Choe, Hunt, and Miller because they engaged in, or were believed to have engaged in, protected concerted and union activities, in violation of Section 8(a)(1) and (3) of the Act. On August 21, 2025, the Respondent, through Castro, filed its answer denying the alleged violations and raising affirmative defenses, including that it "did not discharge any employees at any relevant time, for any purpose." (GC Exh. 1(f)). The Respondent, however, failed to appear at the

[1] Abbreviations in this decision are as follows: "Tr. __" for transcript; "ALJ Exh. _" for Administrative Law Judge Exhibits; and "GC Exh. __" for the General Counsel Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on the entire record.

hearing,[2] and thus failed to present any evidence in support of its answer.[3]

[2] The Regional Director originally scheduled this hearing to be conducted by videoconference. Sec. 102.35(a)(6) of the Board's Rules and Regulations gives the Administrative Law Judge the discretion to conduct and regulate the course of an unfair labor practice hearing. Further, Section 102.35(c) provides the judge with discretion to permit remote (video) testimony by contemporaneous transmission "[u]pon a showing of good cause based on compelling circumstances, and under appropriate safeguards." *William Beaumont Hospital*, 370 NLRB No. 9 (2020). Section 102.35(c) mirrors Rule 43(a) of the Federal Rules of Civil Procedure, which considers remote testimony to be a limited exception to the rule favoring in-person testimony. Courts have been admonished to proceed with caution to ensure that the exception does not swallow the rule: "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it inconvenient for the witness to attend the trial." Fed. R. Civ. P. 43 Advisory Committee's Note (1996). While good cause and compelling circumstances may be established if all parties agree upon video testimony, the court is not bound by that agreement and can insist on live testimony. Id. "Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial." Id.

During my pre-hearing conference call with the parties, I inquired into why the hearing had been scheduled to be conducted by videoconference. The only reason given, aside from convenience, was that the General Counsel intended to call a third-party witness who had moved out of California and would either be working on a project in Ohio or Illinois, or traveling back to stay with family in Tennessee, during the week of the hearing. I advised that if the General Counsel believed there was good cause based on compelling circumstances for that witness to testify remotely, the appropriate course would be to file a motion requesting that under Sec. 102.35(c) of the Board's Rules. But absent good cause for conducting the entire hearing by videoconference, the Board's Rules required that it be conducted in person. Thereafter, the Regional Director issued an order setting an in-person hearing at the Regional office in Los Angeles. (GC Exh. 1(i)). The General Counsel later filed an unopposed motion under Sec. 102.35(c) to have the third-party witness testify remotely, which I granted because there was no objection. (GC Exhs. 1(k)-(m)).

About a week after the conference call, Castro sent an email claiming that, due to "financial hardship," he lacked the funds necessary to travel from his home near San Diego to Los Angeles (approximately 95 miles) to attend the hearing in person, and he requested permission to participate remotely by videoconference. (ALJ Exh. 1). The General Counsel opposed the request. (ALJ Exh. 1). Two weeks later, Castro reiterated his request and included the Respondent's bank statements from June to December 2023, which showed a steady decline in funds from a single checking account that was later closed. He stated the materials showed the Respondent has had no funds, assets, or operating activity since early 2024, and that production funds were fully expended.

I advised the parties that absent compelling circumstances (i.e., beyond cost and convenience), they would need to appear at the hearing in person. I further advised that because the General Counsel had subpoenaed Castro (as Respondent's custodian of records) to appear and produce documents at the start of the hearing, the General Counsel was responsible for reimbursing his mileage and covered travel expenses in accordance with 28 CFR Sec. 1821. (ALJ Exh. 2). A week later, Castro stated that due to his "current financial circumstances, traveling from San Diego to Los Angeles for a 9 a.m. appearance without overnight lodging the evening before, and fronting those costs with reimbursement later, is not feasible." (ALJ Exh. 2). Later that day, I informed Castro that if the start time presented an issue, we could discuss starting at 11 a.m., to obviate the need for him to incur additional lodging expenses. On the day before the hearing was scheduled to begin, Castro responded that due to his financial circumstances and the lack of advance funding for travel, he would not be able to attend the hearing in person, regardless of when it started. (ALJ Exh. 2). Castro did not provide any information to support that he lacked the funds necessary to travel and appear at the hearing in person.

Based on the foregoing, I reaffirm my earlier rulings that there was no good cause for conducting this entire hearing via videoconference, or for allowing Castro to participate in that manner as the Respondent's representative and sole witness.

[3] The Respondent also failed to produce any documents in response to the General Counsel's subpoenas duces tecum. (Tr. 9-10) (GC Exhs. 29-32).

For the reasons stated below, I find the General Counsel has established the Respondent committed the alleged violations. I, therefore, recommend issuing an appropriate remedial order.

FINDINGS OF FACT[4]

A. Jurisdiction

The Respondent is a limited liability company with an office and place of business in Escondido, California, where it engaged in the business of producing television shows. In conducting its operations during the calendar year ending December 31, 2023, Respondent performed services valued in excess of $50,000 to Wiedemann and Berg, an enterprise located outside the State of California. Wiedemann and Berg has been a film production company with a headquarters in Munich, Germany. The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce, and that the Board has jurisdiction pursuant to Section 10(a) of the Act.

B. Alleged Unfair Labor Practices

1. *Background*

In 2023,[5] the Respondent produced the second season of the television series "X Factor (Beyond Belief)" starring Jonathan Frakes. (GC Exh. 6). Daniel Castro was the executive producer for the project.[6] In late March, Castro hired Edward Salerno to be the director of photography. He informed Salerno that the project would last about 13 weeks (four weeks of preparation and nine weeks of filming), and it would be non-union. (GC Exh. 17).

As the director of photography, Salerno was involved in recommending employees for hire into his departments, which included cameras, grips, and electrical. (Tr. 95-96). Grips are responsible for the setup, adjustment, and maintenance of production equipment on set, including dollies, tracks, and cranes; and the gaffers manage the electrical aspects, such as lighting fixtures and power supply and distribution. (Tr. 14; 18-19).

In June 2023, Salerno recommended Noah Kelly to be the chief lighting technician/gaffer and Sean Hunt to be the key grip. Each had about 10 years of experience and were members of IATSE. Salerno informed them that filming would begin after the July 4th weekend, and it would last eight or

[4] My findings of fact are based upon consideration of the entire record. Any testimony in conflict with my findings has been discredited. In assessing witness credibility, I relied upon several factors including demeanor, the context of the testimony, the quality of the recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. sub nom. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB at 622. Specific credibility determinations are set forth below.

[5] All dates refer 2023, unless otherwise stated.

[6] Castro is an admitted supervisor and agent of the Respondent within the meaning of Section 2(11) and (13) of the Act. (GC Exhs 30-33).

nine weeks (until mid-September). (GC Exhs. 3, 4, and 20). When he told them what their weekly pay rate would be, he apologized because it was less than what they would earn on a union project.

The Respondent followed Salerno's recommendation and hired Kelly and Hunt for the project. (GC Exhs. 6 and 23). It also hired Andrew Choe as the assistant lighting technician/best boy gaffer and Steven Miller as the best boy grip. (Tr. 23-26; 96). The four made up the project's grip and electrical crew.[7]

2. *Plan to "Flip" the Project*

Filming was set to begin on July 10.[8] On July 5, Kelly emailed Union business agent Greg Reeves about the project and that it should be organized. Kelly and Reeves exchanged emails with information about the project. (GC Exh. 7). On about July 6, Kelly separately texted Choe and Hunt about trying to "flip" the project and make it unionized. Choe and Hunt each expressed interest in doing so. (GC Exhs. 12 and 24). Like Kelly, Choe was a member of the Union. Hunt was a member of IATSE Local 80. After communicating with Kelly, Hunt contacted Local 80 to report that they were going to try to organize the project. (Tr. 128-129). Part of the reason for flipping the project was that they would receive union health and welfare benefits for their hours worked. (Tr. 127).

On the morning of July 10, Reeves emailed Kelly to let him know the Union had been authorized to move forward with trying to organize the project. Reeves provided Kelly with a link to a digital authorization card to complete and sign and to share with the others on the project who were interested in organizing. (Tr. 58-60) (GC Exh. 7). Kelly signed a card and sent the link to five to ten others on the project. (Tr. 35). Hunt and Miller also signed cards. (Tr. 132). The record does not reflect whether Choe signed a card. (Tr. 60-62).

3. *Respondent Learns of Efforts to Flip*

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[7] The Respondent required each sign a Crew Deal Memo (the Memo), a Rider, and a Short-Form Non-Disclosure Agreement. (GC Exhs. 6, 12 and 23). The Memo refers to the signatory crew member as an "Employee" and refers to the Respondent as the "Company" or the "Employer." The Memo contains 23 provisions. The provision entitled "General Employment Conditions" states, in relevant part, that, "Employee's services shall be exclusive for Company at all relevant times hereunder… This is an 'at will' agreement and no other work is guaranteed, meaning that Employee may be terminated with or without cause or notice, subject to Employer's obligation to pay through the end of the day on which Employee is terminated…" The provision entitled "Equipment" states, in relevant part, that "[w]hen necessary, Employee shall supply all the necessary kit, box, tools, equipment and supplies commonly used in the industry to perform such services … Company is not liable for loss or damage of such tools, equipment and supplies Employee provides." The provision entitled "Purchases/Rentals" states, in relevant part, that, "All items purchased or rented for the Picture, whether directly or indirectly, by the Company or Employee, shall remain the Company's property, and must be immediately delivered to Company upon completion of Employee's services or upon request by Company, whichever is earlier." The Memo also contains the Employee's (hourly) rate of pay. The provision entitled "Overtime" states, in relevant part, that the Employee will receive 1.5x their regular hourly rate for time worked in excess of eight hours a day, and that performing such work required the Company's prior approval. The provision entitled "Right to Withhold" states, in relevant part, that: "Company shall have the right to deduct and withhold from any sums payable to Employee hereinunder (i) any amounts required to be deducted and withheld by Company pursuant to any present or future law, ordinance or regulation of the United States or any state thereof, or of any other country, having jurisdiction …; and (ii) any expenses paid by Company on Employee's behalf."

[8] Each night before filming, the Respondent provided a call sheet. It identified each person scheduled to work, their title and department, and when and where they were expected to report for work. (GC Exhs. 8-10).

On July 10, at 11:04 p.m., Castro sent Salerno an email with the heading "Union Stuff, XF2." (GC Exh. 18). In the email, Castro wrote: "Just a heads up that Noah is talking about flipping the show. Not sure what that is about. Let me know if you think anything to worry about." Salerno did not respond to Castro. (Tr. 111-112).

4. *Events of July 11*

The following day, while on set, Salerno approached Kelly during the lunch break. He told Kelly that management was "snooping around" about him trying to organize the project, and he told Kelly about Castro's email. (Tr. 100). Hunt was nearby when Salerno spoke to Kelly.[9]

After filming ended for the day, Castro called Salerno into a meeting with another producer. (Tr. 100-102). Castro asked Salerno how he felt about replacing some of his crew. Salerno stated he did not want to replace any of his crew, and he asked Castro why. Castro then showed Salerno a link to a digital authorization card. Castro told Salerno he "could not have a [Union] rep coming down and having a vote happen." (Tr. 101).

Later that evening, beginning at around 8 p.m., Castro sent Salerno a series of texts. (GC Exh. 19). He began by informing Salerno that he was bringing in a different grip and best boy grip to work the following day. He stated he was not sure whether they would call Hunt and Choe back at another time.[10] Later he texted Salerno that he was going to give the entire grip and electrical crew the following day off.[11] He asked Salerno if he wanted to be the one to tell them. When Salerno did not respond, Castro texted that he would notify them before it got too late. He also texted Salerno, "I hope this doesn't offend you or make you not wanna go to set :(" (GC Exh. 19).

Salerno later called Castro to ask that he not fire his guys. (Tr. 103-105). Castro responded that he was not firing anyone; he was giving them the day off "for production's breathing room." Salerno testified Castro did not explain what he meant, and that he (Salerno) assumed it was just an excuse. (Tr. 103).

Later that evening, Castro texted and emailed Choe, Kelly, Hunt, and Miller that they each had the following day off from work. He did not provide a reason. (GC Exhs. 11, 14, 15, and 24-27). Choe replied to Castro asking whether there was a reason he was being called off. Castro responded that it was not a permanent decision and that he would have meetings tomorrow with his heads of department. (GC Exh. 15) (Tr. 81-82). Castro never contacted Choe again after this. (Tr. 89).

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[9] Kelly and Hunt testified that during this exchange Salerno mentioned management suspected them both of trying to flip the project. (Tr. 42-43, 131-132, 136-137, 144-145). Salerno, in his testimony, only mentioned Kelly. (Tr. 112-113). I credit Salerno. In general, he had a clearer and more detailed recollection, and his testimony was consistent with the other evidence, namely Castro's email to Salerno which only mentioned Kelly.

[10] Salerno testified he was not certain why Castro wrote Hunt and Choe, rather than Hunt and Miller, who were the grip and best boy grip. Salerno confirmed the crew worked closely with one another, and the Respondent tended to lump them together. (Tr. 103).

[11] In this text, Castro also asked Salerno whether he had heard that "Pete [Abrahams, the locations manager] was verbally abused by that [grip and electrical] dept." (GC Exh. 19). Salerno did not respond to the text. He testified he had not heard anything about anyone being verbally abused on the project. He added that if any kind of abuse would have happened, it would have been brought up on set, and it was not. (Tr. 103; 114).

5. *Events of July 12*

Kelly first saw Castro's text and email the following morning. He called Castro and asked what was going on. Castro told him that because there was an upcoming strike involving the Screen Actors Guild (SAG) Union, the producers were having issues reserving actors for the day. He stated they were trying to figure things out, and that, in the interim, they were scaling down to a skeleton crew. He added that there was a chance they would not be working the rest of the week if things were not resolved. (Tr. 45).

That morning, Choe received a text from an employee in the prop department (Jesse Martinez) asking why Choe and his crew were not working. (GC Exh. 16). Choe later spoke with Martinez and learned the Respondent had replacement employees performing the grip and electrical crew's work on the project, and that they were using the crew's gear and equipment. (Tr. 83-84).[12] Choe reported this to Kelly and Hunt, and Hunt communicated with Miller. (Tr. 135-137) (GC Exh. 27).

Kelly called and spoke to Castro. He asked Castro if the Respondent had hired another crew to replace them, and Castro stated they had. Kelly told Castro he was going to come to the set to retrieve his personal gear and equipment. About an hour later, after Kelly arrived on set, he approached Castro. Castro apologized that this was happening the way it was. He added that other crew members suspected the Respondent had done this because the Union "had reached out," but Castro stated that was not the case. He said that producers just felt there were some crew members who did not want to be a part of the production anymore, and they decided "to kind of cut loose the fat, if you will." (Tr. 51). That was the end of the conversation. Kelly gathered his personal items and left the set.[13]

Hunt and Miller also went to the set to retrieve their gear and equipment because they believed they had been discharged. (Tr. 139-140). While he was on set, Hunt spoke to Castro. Castro told Hunt he was sorry that the grip and electrical crew did not "vibe well" with the rest of the individuals working on the set. Castro also stated that he wished all his shows could be union. (Tr. 141). Hunt did not say anything in response. He and Miller gathered their belongings and then left the set.

Although the record does not contain the details, there were issues with the work the replacements performed on July 12, because later that evening, at 7:49 p.m., Castro texted Salerno to apologize for what happened. (GC Exh. 19). Castro also informed Salerno that he had found another gaffer (Nathaniel Elegino) to work the following day. He provided Salerno with the gaffer's biography. Salerno texted Castro back, asking if there was any way he could have his original crew come back, adding that "I feel like this is just such a sideways insane thing." Castro responded, "Can you give me the weekend to think about it? I promise this guy [Elegino] and his [best boy] are really good tomorrow and Friday." (GC Exh. 19).

The Respondent never brought Choe, Kelly, Hunt, or Miller back to work. (Tr. 106-107). According to Salerno, filming continued as planned, and it was completed in mid-September. He testified Respondent had a "relatively revolving door of different individuals" performing the work of the grip and electrical crew during the remainder of the project. (Tr. 107).

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[12] Salerno, in his testimony, confirmed the Respondent hired replacements to perform the crew's work on July 12. He characterized them as "inexperienced students." (Tr. 104; 114). And, as discussed below, there were issues with the performance of the replacements.

[13] On July 14, Kelly texted Castro asking about his paychecks. (GC Exh. 11). Castro responded that payroll had one check ready and the other would be available on Monday, and they would work to get the check to him.

LEGAL ANALYSIS

The General Counsel alleges the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Choe, Kelly, Hunt, and Miller because they engaged in, or were believed to have engaged in, protected concerted and union activities.

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act. Section 7 affords employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

When assessing the lawfulness of an adverse action that turns on employer motivation, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). Under this framework, the General Counsel has the burden of establishing by a preponderance of the evidence that the employee's protected concerted and/or union activity was a motivating factor in the employer's decision to take the adverse action, i.e., that a causal relationship existed between that activity and the adverse action. This inquiry includes establishing that the employee engaged in protected concerted and/or union activity, that the employer knew of or suspected the activity,[14] and that the employer had animus against such activity. Id. See also *Intertape Polymer Corp*., 372 NLRB No. 133 (2023), enfd. 2024 WL 2764160 (6th Cir. 2024). A discriminatory motive may be established by direct or circumstantial evidence, which may include, among other factors: the timing of the action in relation to the protected activity; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the adverse action; failure to conduct a meaningful investigation; departures from past practices; and/or disparate treatment of the employee. *Intertape Polymer Corp*., supra slip op. at 6.

If the General Counsel establishes these factors, the burden shifts to the employer to show it would have taken the same adverse action in the absence of the statutorily protected activity. *Wright Line*, 251 NLRB at 1089. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the adverse action would have taken place absent the actual or suspected activity. The General Counsel may offer proof that the employer's reasons for the adverse action were false or pretextual. When the employer's stated reasons for the action are found to be pretextual -- that is, either false or not in fact relied upon -- discriminatory motive may be inferred, but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).

[14] The Board has held an employer violates the Act when it takes an adverse action against an employee suspected or believed to have engaged in statutorily protected activity, regardless of whether the employee actually did so. See *Hyundai Motor Mfg. Alabama, LLC*, 366 NLRB No. 166, slip op. at 2 (2018); *U.S. Service Industries, Inc.*, 314 NLRB 30, 30-31 (1994) (quoting *Monarch Water Systems, Inc*., 271 NLRB 558, 558 fn. 3 (1984)), enfd. 80 F.3d 558 (D.C. Cir. 1996)); *Hamilton Avnet Electronics*, 240 NLRB 781, 791 (1979); *Metropolitan Orthopedic Assn*., 237 NLRB 427, 427 fn. 3 (1978).

In applying the *Wright Line* framework, I conclude the General Counsel has met her burden of establishing that the grip and electrical crew's statutorily protected activities were a motivating factor in the Respondent's decision to remove and replace them. The evidence establishes that each was involved in the plan to try to organize the project. Kelly originated the plan by discussing it with the Union, Choe, and Hunt. Hunt later spoke with Miller. All four crew members supported the plan. Kelly, Hunt, and Miller later signed authorization cards, and Kelly distributed cards for others to sign.

The evidence also establishes the Respondent, through Castro, knew about or suspected the crew's plan to unionize the job and exhibited animus toward that plan. Direct evidence of knowledge is in Castro's July 10 "heads up" email to Salerno. He stated Kelly was trying to flip the project and he asked Salerno whether it was anything he needed to worry about. Direct evidence of animus is in Castro's comments to Salerno during their July 11 conversation. Castro first brought up replacing the crew members. When Salerno asked why, Castro stated he "could not have a [Union] rep coming down and having a vote happen." These statements, along with the timing of the Respondent's decision to remove and replace the entire crew, establish a causal connection and an intent to effectively nip the organizing effort in the bud. The record suggests the Respondent was so eager to quickly replace the entire crew that it was willing to hire replacements who lacked the skill or experience necessary to perform the work correctly.

Although Castro's "heads up" email only mentioned Kelly's involvement, his subsequent action of removing the entire crew suggests he believed or suspected that Choe, Hunt, and Miller also were involved. The Board has held that it is not necessary for the General Counsel to prove the employer had specific knowledge of an employee's protected activity, where other circumstances support an inference that the employer had suspicions or probable information about those involved. See *Martech MDI*, 331 NLRB 487, 488 (2000), enfd. 6 Fed. Appx. 14 (D.C. Cir. 2001). The circumstances include proof of knowledge of general union activity, the employer's demonstrated animus, the timing of the discharge, and the pretextual reasons for the discharge asserted by the employer. Id. See also *General Iron Corp*., 218 NLRB 770, 778 (1975), affd. mem. 538 F.2d 312 (2nd Cir. 1976); *Hunter Douglas, Inc*., 277 NLRB 1179 (1985), enfd. 804 F.2d 808 (3d Cir. 1986). In addition, the discharge of an employee who is not known to have engaged in union activity, but who has a close relationship with a known union supporter, including working together, may give rise to an inference of discrimination. See e.g., *Permanent Label Corp*., 248 NLRB 118, 136 (1980), enfd. 657 F.2d 512 (3rd Cir. 1981), cert. denied 455 U.S. 940 (1982). See also *Amptech, Inc*, 342 NLRB 1131, 1133 (2004); *Invista,* 346 NLRB 1269, 1273 (2006); and *L.C. Cassidy & Son*, 272 NLRB 123, 129 (1984).

All the circumstances necessary to infer knowledge or belief are present. As outlined, Castro had general knowledge of and expressed animus toward Kelly's plan to try to flip the project. Additionally, he told Salerno he was looking at replacing member*s* (plural) of the crew to avoid "having a vote happen." The discharges effectively happened later that night when Castro gave the crew the following day off and then brought in replacements. When the employees asked Castro why he took these actions, he gave shifting, pretextual explanations. He initially told Salerno it was to allow production to have some "breathing room." He told Kelly it was due to the pending SAG strike and the need to get down to a skeleton crew. He told Hunt it was because they did not "vibe well" with the others on the set.[15] He later told Kelly it was because the Respondent needed to trim the fat. There

[15] I also find Castro's other comment to Hunt during this exchange to be evidence of animus and a causal connection. Castro told Hunt that he wished all his jobs could be union. This reasonably would inferred to mean

was no evidence substantiating these claims, and most were proven to be false. There was no evidence of any issue between the members of the grip and electrical crew and any other employees on the project, and the record does not reflect the Respondent reduced the number of employees on the project.

Finally, according to Salerno, Kelly worked closely with the other three on the crew, and management tended to lump the four of them together as one.

For these reasons, I conclude the General Counsel has established the Respondent knew or suspected all four of engaging in union activities, and the Respondent's demonstrated animus toward those activities is what motivated its decision to remove and replace them and not bring them back to work. As such, the General Counsel has satisfied the initial *Wright Line* burden.[16]

The burden then shifts to the Respondent to establish it would have taken the same action in the absence of the statutorily protected activity. As stated, the Respondent failed to appear and present evidence in its defense,[17] and, for the reasons stated above, the explanations Castro gave for the crew's

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that, from Castro's perspective, the project could not be unionized, and that indicates the crew's efforts to organize were why they did not "vibe well" with the others, and why they were eventually removed and replaced.

[16] Even if the General Counsel had failed to establish the Respondent knew or suspected Choe, Hunt, and Miller of engaging in union activities, and that it viewed them as neutrals, I would still conclude that each was discriminatorily discharged. The Board has held an employer violates Sec. 8(a)(1) and (3) of the Act when it takes an adverse action against a seemingly neutral employee when the circumstances indicate it was done to facilitate or cover-up discriminatory conduct against a known or suspected union supporter. See *Embassy Vacation Resorts*, 340 NLRB 846, 848 fn. 13 (2003); *Bay Corrugated Container*, 310 NLRB 450, 451 (1993), enfd. 12 F. 3d 213 (6th Cir. 1993). In these situations, the General Counsel need not prove the employer's knowledge of the union activity by the neutral employees because they are deemed to have been treated adversely as part of the employer's plan to discriminate against the known union supporter(s). Here, I would conclude based on the circumstances surrounding the removal and replacement of Choe, Hunt, and Miller -- which were allegedly for the same pretextual reasons as Kelly – that the Respondent did so to facilitate or cover-up its discriminatory conduct against Kelly.

[17] About a month prior to the hearing, Castro suggested in an email to the General Counsel that he intended to raise two defenses to the complaint allegations. The first was the four were "independent contractors rather than employees." The second was that they "voluntarily ceased performing services by walking off the production." (GC Exh. 29, pg. 3).

Whether an individual is an independent contractor is evaluated "in light of the pertinent common-law agency principles." *The Atlanta Opera, Inc*. 372 NLRB No. 95, slip op. at 3 (2023). The principles include the following, with no one factor weighing more than others: (1) extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether or not the worker is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) skill required in the occupation, (5) whether the employer or the worker supplies instrumentalities, tools, and place of work for the person doing the work; (6) the length of time for which the person is employed; (7) method of payment, whether by the time or by the job; (8) whether or not work is part of the regular business of the employer; (9) whether or not the parties believe they are creating an employer-employee relationship; and (10) whether the employer is or is not in business. Notably, the Board emphasized that it would consider whether a worker is in fact "rendering services as part of an independent business." *Id.* at 12. It will look at the facts on the ground—rather than any theoretical opportunity the worker may have to operate independently—and consider whether the employer has effectively limited the worker's ability to run an independent business. *Id.* The party asserting independent contractor status has the burden of proof. *BKN, Inc*., 333 NLRB 143, 144 (2001).

The Respondent failed to appear and present any evidence or argument on this issue, and the evidence that was presented does not establish they were independent contractors. As discussed, the Memo they signed

removal at the time were all pretextual. As a result, I recommend finding the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Kelly, Choe, Hunt, and Miller.

CONCLUSION OF LAW

1. The Respondent, X Factor S2 LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, IATSE Local 728, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Noah Kelly, Andrew Choe, Sean Hunt, and Steven Miller because they engaged in actual or perceived protected concerted and union activities.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having unlawfully discharged Noah Kelly, Andrew Choe, Sean Hunt, and Steven Miller, must offer them reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges they would have enjoyed absent the discrimination against them. The Respondent shall also make each of the four whole for any loss of earnings and other benefits. 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). Consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022), Respondent shall also compensate each of the four for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for

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at the beginning of the project referred to them as employees, and it stated their services were exclusive to the Respondent for the period of the project. It described their relationship as "at will," which means they may be terminated by the Respondent with or without cause or notice. The Memo also set forth their hourly rate of pay, stated they were eligible for overtime, and stated their pay was subject to withholding in accordance with applicable laws. In addition to the Memo, there were the daily call sheets which set forth when and where the crew members are required to be on set and ready to begin work. As noted, the Respondent had the unilateral right to change assignments, as reflected by Castro's decision to call them off from work and replace them with a new crew. Finally, based on Castro's correspondence with Kelly regarding paychecks, the Respondent compensated the crew members not based on the project but on the number of hours they worked.

The record also does not support the four voluntarily ceased performing services. As noted, on July 11, they each received their call sheet telling them to report for work the following day at 8 a.m. They were later notified by Castro that they had been given the day off. When Kelly and Hunt separately spoke with Castro on July 12, he confirmed the entire crew had been replaced. They were never called back to work, despite Salerno asking to have them back after he began having issues with the work of their replacements. Castro instead brought in a "relatively revolving door of different individuals" to perform the crew's work.

those harms 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, the Respondent shall compensate Kelly, Choe, Hunt, and Miller for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 31, 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, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016). In accordance with *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent shall also be required to file with the Regional Director for Region 31 a copy of each backpay recipient's corresponding W–2 form reflecting the backpay award.

The Respondent shall also be required to remove from its files any references to the unlawful discharges of Kelly, Choe, Hunt, and Miller and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice, on a form provided by the Regional Director for Region 31, 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 Respondent shall distribute the notice electronically, such as by email, posting on an intranet or an internet site, 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 notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed its facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the facility at any time since July 11, 2023.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, in Escondido, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for their actual or perceived protected concerted and/or union activities.

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

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

[18] 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 due under the terms of this Order.

(a) Within 14 days from the date of this Order, offer full reinstatement to Noah Kelly, Andrew Choe, Sean Hunt and Steven Miller 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) Make Kelly, Choe, Hunt, and Miller whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the Remedy section herein.

(c) Compensate Kelly, Choe, Hunt, and Miller for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for Kelly, Choe, Hunt, and Miller.

(d) File with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of corresponding W-2 forms for Kelly, Choe, Hunt, and Miller reflecting the backpay awards.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Kelly, Choe, Hunt, and Miller, and within 3 days thereafter, notify each in writing that this has been done and that the discharge 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) Within 14 days after service by the Region, post at its Escondido, California facility copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its

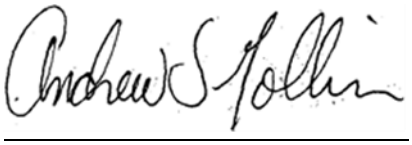
[19] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

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."

employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed 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 July 11, 2023.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 31 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. February 19, 2026



Andrew S. Gollin
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose a representative 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 in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in actual or perceived protected concerted and union activities

WE WILL make Noah Kelly, Andrew Choe, Sean Hunt and Steven Miller whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful discharges, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Kelly, Choe, Hunt and Miller for the adverse tax consequences, if any, of receiving a lump-sum backpay award(s), and WE WILL file with the Regional Director for Region 31 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Kelly, Choe, Hunt and Miller, and WE WILL, within 3 days thereafter, notify them each in writing that this has been done and that the discharge(s) will not be used against them in any way.

X FACTOR S2 LLC
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want

union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website:

11500 W Olympic Blvd., Suite 600
Los Angeles, CA 90064-1753
Tel: (310) 235-7351
Fax: (310) 235-7420
8:30am - 5:00pm PT

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-323348 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (310) 307-7342.