

November 14, 2007

Anne Poppe  
National Labor Relations Board, Region 9  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

Re: LIFESTYLE COMMUNITIES PAVILION/IATSE LOCAL 12  
Case 9-CA-43944

Dear Ms. Poppe:

The following is the position statement of IATSE Local 12 with respect to the unfair labor practice charges filed against Lifestyle Communities Pavilion (hereinafter, LCP) and arising out of the Union's effort to organize the stage hands employed by Lifestyle. Evidence in support of each of the charges contained in the amended charge is discussed separately.

*1. Lifestyle unlawfully suspended Dale Rowles, Leonard (Leo) DeVrijer, and James Cavanaugh and threatened that they would never work again for the Employer in retaliation for their support for and activities on behalf of the Union.*

James Cavanaugh, Leonard (Leo) DeVrijer, and Dale Rowles, who were active in the Union's attempt to organize the stage hands at LCP, were summarily suspended during the organizing campaign and/or denied work because of their support of the Union. Cavanaugh, DeVrijer, and Rowles were among the top stage hands used with the greatest frequency by LCP. Prior to their suspension, they had never been disciplined or removed from a job.

Dale Rowles began working for Promo West (the former operator of the musical venue currently operated by LCP) as a stage hand in 1992. He was "suspended" by Rick Steenburgh, the stage manager, in late August. During the preceding two years, he had worked over 80% to 85% of the shows staged at LCP. As a stage hand, he has done lighting, audio, and back line work and is qualified to perform carpentry and other general stage work. Rowles was the principal employee/organizer for the Union. He began circulating representation cards in August and obtained 32 signed cards from the 34 employees he talked to.

On August 26 he was told by stage hands who worked for LCP at the Newport (another venue operated by the Employer) that he, DeVrijer, and Cavanaugh had been

unofficially suspended because they had allegedly been critical of the performance of Rick Steenburgh. Rowles was also told that one of the stage hands had gone to management with his name as the party responsible for the Union's organizing efforts as well as the names of Cavanaugh and DeVrijer, the other two active in the organizing campaign. When he didn't receive a call for the Goo Goo Dolls concert on August 27 or subsequent concerts, Rowles called Steenburgh seeking an explanation. Steenburgh told him on September 6 that he didn't know exactly what was being said but that "someone had called into the office" and "until this was straightened out" he, Cavanaugh, and DeVrijer would not be used.

Cavanaugh was also told on August 29 by Steenburgh that he wasn't being used because "the front office heard rumors" that he was "trying to get him fired" and they wanted him "to take control of the situation and make a statement as the stage manager." Steenburgh said that Cavanaugh, DeVrijer, and Rowles "were overheard on stage saying something and it had gotten upstairs." According to Steenburgh, management told him to "keep you three off the call until this was figured out." When Cavanaugh denied making any hostile comments, Steenburgh told him that he would find out what was going on and would get back to him and said, "You'll probably be on the next call." On September 4, Steenburgh told Cavanaugh that he thought management was "making a big mistake" and inferred that the real reason was because of their support of the Union. "Between you and me, he [Scott Steinecker, the owner of Lifestyle Communities] is scared. I've never seen him like this. I think it has to do with the organizing attempt. Everybody in the office is really freaked out."

DeVrijer last worked on August 23. He was offered work opportunities on two to three occasions. On August 29, when DeVrijer asked Steenburgh why he wasn't called to work the GooGoo Dolls show, Steenburgh told him that he "had made disparaging remarks" about him and that management had told him not to work him for a few shows "until this thing clears up." DeVrijer got a call on October 19, an hour before the OSU Medical Center party began. He was already working at the convention center and could not take the call. He was asked if he could take a call on September 21, but he had committed to previously working the Big Free at OSU which Steenburgh would have likely known about.

On September 29, DeVrijer asked Steenburgh if he was going to use him for the calls on October 3 and 5. Steenburgh said, "No, I've already filled those calls." In the course of that conversation, Steenburgh told him that he wasn't being used because of "stuff that you're doing for the union." Steenburgh also said, "People are saying that you're doing union stuff on stage." Steenburgh again told DeVrijer that he had the shows for October 3 and 5 filled.

Steenburgh functioned as a manager for LCP with both actual and apparent authority. He could determine which stage hands worked on which shows and had the power to stop using individuals if he determined their work wasn't adequate, they weren't punctual, or didn't "work well" with other employees. His compensation was paid on a daily rate unlike the stage hands who were paid on an hourly basis. The employees could

reasonably believe that Steenburgh was reflecting company policy and acting on behalf of management. *Waterbed World*, 286 NLRB 425 (1987), *enfd.* 974 F.2d 1329 (1<sup>st</sup> Cir. 1992).

Between August 16 and October 12, 2007, Rowles, DeVrijer, and Cavanaugh were routinely denied work. Cavanaugh was denied the opportunity to work 16 shows in September and October, and Rowles 22 shows. None of the three are currently being offered any significant job opportunities.

The sole explanation provided for their suspensions were alleged “derogatory comments” made against Rick Steenburgh. No details of the alleged derogatory comments, information on who accused them, or what exactly was said was ever provided. There was no investigation and no documents provided to the accused. Steenburgh never elaborated on exactly why they were suspended other than to suggest that he “questioned” the validity of management’s decision. In fact, none of the three had made any adverse comments about Steenburgh. They were however leading an effort to organize the employees. Their suspensions occurred in late September while signatures were still being gathered and before the petition was filed. They were the only three stage hands suspended by the Employer and the only employees to have been suspended during the preceding two years.

There is an abundance of circumstantial and direct evidence that their suspensions were a result of their activities in support of the Union. Steenburgh told Cavanaugh on September 4 that the real reason he was not being used was because the front office was “really freaked out” over the Union’s organizing efforts. DeVrijer was subsequently questioned by Steenburgh and asked if he was involved in “this union stuff” and told that “people are saying that you’re involved with the Union.” DeVrijer was never told that he was suspended for any reason, including insubordination. Before August 23, all three employees were highly valued and constantly used by LCP and could work every concert if they so wished.

The National Labor Relations Act strongly prohibits any retaliatory action against employees for seeking to exercise their rights under Section 7 of the Act. In determining whether an employer’s discharge was in response to an employee’s exercise of his Section 7 rights, the Board has followed the formula set forth in *Wright Line*, 251 NLRB 1083 (1980). There must be evidence that (1) the employees engaged in protected concerted activity, (2) the employer had knowledge of the activity, and (3) that animus or hostility towards the activity was a motivating factor in the employer’s decision to take the adverse action in question. Cavanaugh, Rowles, and DeVrijer have established a *prima facie* case that their suspensions/denial of work was in direct response to their efforts to secure Union representation. All three were engaged in attempting to secure support for the Union, talking to employees, and obtaining signed cards. Their activity on behalf of the Union was known to the Employer as evidenced through conversations with Rick Steenburgh and other managers.

There is no other plausible basis for the sudden, unexplained decision of LCP to suspend these three individuals. Learning their identity was not difficult because Rowles, and to a lesser extent Cavanaugh and DeVrijer, had been meeting with employees, urging them to sign authorization cards, and advocating on behalf of the Union. Management confirmed this knowledge in conversations with Steenburgh and repeated to Rowles, Cavanaugh, and DeVrijer. In addition, Cavanaugh was questioned by Al Shuter and Arron Ardell, two managers who worked under Steenburgh, about his activity in support of the Union on September 12 and 14. Shuter and Ardell had knowledge about the Union's organizing efforts and Cavanaugh's role. They asked Cavanaugh who else was involved in the organizing; was it just Rowles, DeVrijer, and him; and how many cards were signed.

The decision of LCP to suspend and refuse to use the Union's three principal supporters was clearly intended to penalize these employees, discourage support for the Union, and "send a message" to the other employees of the consequences of supporting the Union. *KR Drenth Trucking, Inc.*, 2007 WL 3085574 at page 27.

*2. LCP threatened to close the facility and adversely change the working conditions by implementing a drug testing policy if the employees supported the Union.*

Following the Employer's knowledge that the Union was seeking to organize its employees, several managers/supervisors for LCP threatened employees that they would close the facility if the Union were successful as well as require drug testing of all employees.

On October 1, at a meeting organized by the Union, Rick Steenburgh, the stage manager/supervisor, repeated threats from LCP's owner Scott Steinecker that he would close the facility rather than deal with the Union and demand drug testing of all employees. Steenburgh represented that these were Steinecker's policies and that he spoke with authority. He also indicated that Steinecker would not bargain in good faith, would engage in surface bargaining, and would never reach a contract with the Union "even if they bargained for two years." According to Steenburgh, Steinecker had told him that the wage increases that he knew the Union would demand would put LCP "out of business." The employees had no reason to believe that these were idle threats. The employees knew that Steenburgh had substantial authority and worked closely with Steinecker. They had ample reason to believe that Steenburgh was conveying a message from Steinecker. His comments were not those of simply "another employee."

On at least two other occasions, managers who worked for Steenburgh, Al Shuter and Arron Ardell, threatened Cavanaugh that Steinecker would close the facility rather than allow it to become unionized and would insist upon drug testing all employees.

The Board has found that the threat of job loss because of unionization may violate Section 8(a)(1) because it could improperly influence employees in the exercise of their Section 7 rights. *Clinton Electronics Corp.*, 332 NLRB 479 (2000). The Board has

also found that Section 8(a)(1) may be violated by employers' threats of reprisals. *St. Margaret Mercy Health Care Centers*, 350 NLRB No. 20 (2007); *California Gas Transport, Inc.*, 347 NLRB 118 (2006).

Steinecker's threats as conveyed by Steenburgh were not based on any claimed objective assessment, "carefully phrased on the basis of objective fact," (*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)), but were a calculated effort to predict adverse consequences as a result of the employees' unionization. *Homer Bronson Co.*, 349 NLRB No. 50 (2007). There is no evidence that the Union's bargaining position if it were to succeed in being certified would be unreasonable or extraordinarily costly or jeopardize the Employer's ability to continue to function. Similarly, the Employer's threat to drug test employees had no objective or reasonable basis. Prior to the Union seeking certification, drug testing had never been an issue. The Employer's threats were intended to scare and intimidate the employees in violation of Section 8(a)(1).

3. *The LCP promised wage increases to employees if they rejected the Union as a collective bargaining representative.*

At the same time that Steinecker and his manager were making threats to the employees about the consequences of union representation, LCP told the employees that it would increase their wages from \$11.00 to \$15.00 an hour if they rejected the Union. Steenburgh made those representations at the meeting with the Union and stage hands on October 1 and told them that Steinecker had agreed to these increases in return for the support of the employees and their rejection of the Union. Similarly, Al Shuter on September 12 told Cavanaugh that he had spoken to Steinecker and that he was willing to pay the stage hands \$15.00 an hour if they would "make the Union go away."

It's a fundamental violation of the Act to promise wage increases in return for rejecting the Union. In *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 576 (2000), the Board found that the employer made unlawful promises of benefits in exchange for employee votes against union representation; promise of a wage increase and a four day work week was illegal and objectionable. *Keller Columbus, Inc.*, 215 NLRB 124 (1074). Also see *A.J. Schmidt Co.*, 269 NLRB 104, 269 NLRB 579 (1984); *Medical Center of Ocean County*, 315 NLRB 140 (1994); *Angelica Corp.*, 276 NLRB 617 (1985).

4. *LCP caused Dale Rowles, who was working for another employer on October 5, to be removed from the Lifestyle Communities Pavilion in retaliation for his support and activities on behalf of the Union.*

The Board set the election in response to the Union's petition for October 5, 2007. That morning, Dale Rowles, who had been previously "suspended," was employed by RCS, a lighting subcontractor working for the band that was to perform at the LCP that evening. Shortly after Rowles arrived at LCP that morning, he received a call from Steve Carter, a shop manager for RCS, that Nate Stewart, a supervisor with LCP, had called,

insisting that he be taken off the job. Rowles had arrived at about 8:00 a.m. and had worked for about a half hour when contacted by Steve Carter. The demand that he leave the facility occurred while Rowles was working alongside approximately 20 stage hands hired directly by LCP. These stage hands were scheduled to vote in the election beginning at noon. They were obviously aware of his removal. More importantly, the Employer's authority to force even a subcontractor employed by the band who had no contractual obligation to LCP would have been apparent to the employees, reinforcing the message that dire things happen to supporters of the Union.

Rowles' precipitous and unprovoked removal was an integral part of LCP's campaign to intimidate the employees and ensure that they rejected the Union.

5. *The Employer improperly surveiled the employees at the time of the election.*

The representation election conducted by the Board occurred at the "House of Crave," an adjacent bar owned by LCP. During the balloting on October 5 between 12:00 and 2:00 p.m., several key representatives of the Employer including Kathleen Cleary, Nate Stewart, Rick Steenburgh, Doug Herrmann, the building manager, and Scott Steinecker positioned themselves directly across from the entrance to the House of Crave and were able to observe the employees as they entered the polling area, a distance of about 25 feet. The employees could also see them. These managers are not normally in that area. They were there for the entire two hours that the polls were open. Security was posted on the sidewalk between the House of Crave and the Promo West office. They are not usually posted during this time of day since it was six hours before the show opened.

A camera crew including an individual with a microphone was also allowed by management to position themselves about 10 feet from the entrance to the polling place in order to film those that were voting.

Both the use of the camera crew and the strategic positioning of the top management of the Employer directly across from the entrance to the polling place constitute an unlawful surveillance. Their presence in the context of LCP management's previous activities "could reasonably tend to coerce employees not to take further concerted action." *F.W. Woolworth Co.*, 310 NLRB 1197 (1993). The officials were not merely observing the proceedings but positioned themselves directly across from the entrance to the polling place to remind the employees that they were in control and that the employees were being watched. There was no reason for these management employees to be in this area. Their offices were located elsewhere and they were not functioning as observers in the election. They were 25 feet from the polling place which is clearly prohibited.

Similarly, the presence of a camera crew directly outside the polling place while people were entering is prohibited. There was no justification for the presence of the camera crew. Their presence and their conduct "violates the Act because it has a tendency to intimidate." *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1050 (1994).

6. *Because of the magnitude of the Employer's unfair labor practices and the difficulty in overcoming the effects of their unfair labor practices, the possibility of ensuring a fair second election is slight. Under the circumstances, the Board should order the Employer to bargain with the Union.*

As set forth above, this Employer engaged in a series of coordinated unfair labor practices intended to discourage support for the Union, using a combination of suspensions and coercive promises of wage increases and threats to close the facility and drug testing employees. The Employer was determined not to allow a fair election and any chance that the Union would succeed. They immediately suspended all three of the individuals working on behalf of the Union as soon as their identity and activity on behalf of the Union became known. Their suspensions were transparently without basis and intended to send a message to the employees that Union support would have dire consequences. When the Union's principal organizer Dale Rowles returned to the site as an employee of a different employer, he was forced off the job in full view of approximately 20 stage hands scheduled to vote later that morning.

The Employer's campaign against unionization included its stage manager and his assistants, the owner of the company, and other front office personnel. The owner made it clear that jobs would be lost and the facility closed if the Union succeeded and that employees would be drug tested. The owner also conveyed the message that he would significantly increase their wages by almost 50% if they agreed not to support the Union. Given the number and severity of the violations, it is highly likely that the effects of the Employer's unfair labor practices will continue to affect the employment environment at LCP despite the normal remedies available to the NLRB. The overwhelming majority of stage hands work intermittent schedules and are highly dependent on the "good offices" of management for work opportunities.

Having seen the ability of management to summarily eliminate three of the most experienced and widely used stage hands, and subsequently force the removal of the Union's chief organizer who was at the site on behalf of another employer, it is hard to envision how the necessary laboratory conditions for a fair election could be established. At the time that Rowles, Cavanaugh, and DeVrijer were suspended, they in fact had secured representation cards from the overwhelming majority of stage hands who met the *Davison-Paxon* qualifications. Of the approximately 40 employees who were qualified to vote, the Union had signed cards from over 35. The Employer's campaign of threats, reprisals, and promises drove that majority down to a small minority. Given the magnitude of the unfair labor practices, the involvement of the Employer's chief executive as well as his stage manager and other managers and the pervasive nature of the activities, and the extraordinary difficulty in curing the situation, a bargaining order should be issued as provided in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Sincerely,

Robert K. Handelman