

Tower Industries d/b/a Allied Mechanical, Inc. and United Steelworkers of America, AFL-CIO, CLC. Cases 31-CA-26120, 31-CA-26135, 31-CA-26184, 31-CA-26194, 31-CA-26276, and 31-RC-8202

July 24, 2008

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On March 13, 2008, Administrative Law Judge William G. Kocol issued the attached supplemental decision.¹ The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended supplemental Order of the administrative law judge and orders that the Respondent, Tower Industries d/b/a Allied Mechanical, Inc., Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the supplemental Order.

Jerry George and Arthur Yuter, Esqs., for the General Counsel.
Patrick W. Jordan, Esq. (Jordan Law Group), of San Rafael, California, for Allied Mechanical.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This compliance case was tried in Los Angeles, California, on December 3 and 4, 2007, and on February 5, 2008. In this case the Board, among other things, ordered Tower Industries d/b/a Allied Mechanical, Inc. (Allied Mechanical) to make Timothy Hays and Walter Reddoch whole for any loss of earnings and benefits

¹ The underlying decision is reported at 343 NLRB 631 (2004).

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

³ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

they suffered as a result of their unlawful discharges.¹ The compliance specification issued on September 25, 2007, and Allied Mechanical filed a timely answer. Concerning Hays, the compliance specification alleges that he is owed \$31,442.51 in backpay and \$3,793.73 in benefits, plus interest. Allied Mechanical agrees that these figures are correct. Concerning Reddoch, the compliance specification, as amended, alleges that he is owed \$76,284.41 in backpay and \$6,002.82 in benefits, plus interest. Allied Mechanical disagrees. The main issue is whether Reddoch adequately searched for interim employment. A secondary issue concerns the appropriate measure of over-time hours.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Allied Mechanical, I make the following

Findings of Fact

Reddoch worked as a machinist for Allied Mechanical until his unlawful discharge on January 23, 2003. His backpay period runs from January 24, 2003,² through August 30, 2004, when he returned to work for Allied Mechanical. The backpay period spans seven calendar quarters. During the last four calendar quarters Reddoch had substantial interim earnings and his search for work during that time is not challenged. Rather, Allied Mechanical challenges the adequacy of Reddoch's search for work during the first 35.7 weeks of his backpay period.

Reddoch worked at Allied Mechanical as a CNC operator. He did not have experience or skills performing other types of specialized machinist work. Reddoch credibly testified that he was unemployed for the first time in his adult life after Allied Mechanical unlawfully discharged him for supporting the effort to unionize its employees. On every other occasion when he changed employers, Reddoch finished at one employer on a Friday and started a new one on the following Monday. As such, I infer he had little experience in finding work quickly under the circumstances following his discharge. Moreover, Reddoch was not highly computer literate and had to learn the process on his own; he became more skilled as the backpay lengthened. As his resume shows, he has been employed his entire adult life and therefore has shown little propensity for willful idleness.

Within a week after his termination and for the first time in his life Reddoch created a resume. He placed that resume on the web sites of monster.com, careerbuilder.com, and Yahoo!.hotjobs. Thereafter he searched these web sites three or four times a week for work and contacted employers listed there either by email, fax, or telephone. He searched a local newspaper, the *Free Enterprise*, and the *Los Angeles Times* in their Sunday editions to find work. He also searched another local newspaper, the *Inland Valley Daily Bulletin*, on a daily basis. During the first week after his termination and continuing thereafter he called the advertisements for machinist positions that he saw in the newspapers. That first week he also

¹ 343 NLRB 631.

² All dates are in 2003, unless otherwise indicated.

called a friend, Andy Cabrera, who works at a machine shop where Reddoch used to work. Cabrera told Reddoch that he did not think the employer was hiring machinists and that four machinists had left that employer and gone elsewhere. Reddoch asked both of his sons-in-law to ask their friends if they knew any business that was hiring machinists. He called friends to see if they knew if any businesses that were looking for machinists. He called a couple of places where he used to work and drove around looking for help wanted signs, all to no avail. He also registered to obtain unemployment benefits. After a few months he began getting the *Los Angeles Times* on a daily basis and searched there for work daily. During the first 3 or 4 weeks Reddoch and Hayes, the other discriminatee involved in this case, on at least three occasions went to look for work together.³ Reddoch looked at the local Yellow Pages for machine shops. He remembered seeing about 15 listings. Some shops performed the type of work for which he had no experience. He called three shops but no one answered the telephone, leading Reddoch to conclude that they were no longer in business.

Reddoch submitted forms to the appropriate state agency to report his search for work. Portions of copies of those forms are illegible. Nonetheless, based upon Reddoch's credible testimony, on January 30, he applied at Contour Aerospace, on February 3, he sought employment at Program Composites, Incorporated, and on February 5, he applied at 4-Flight Aerospace. Although not listed on the form, during that time period Reddoch also called Certified Fabricators, Incorporated; Reddoch had worked there before working for Allied Mechanical. He asked to speak to Donna Self, who was the HR person when he had worked there, but Reddoch was told that she no longer worked there and that they were not hiring.⁴ On February 13, he went to the 4-Flight facility, where he had earlier sent in an application; he was told he was overqualified. On February 20, he was interviewed by Program Composites, whom he had called on February 3. He was interviewed by three persons and was told that they would notify him by the next week. During this same time period he saw an advertisement in the *Inland Valley Daily Bulletin* for a position at MDI and he applied there. On February 27, he applied at Loud Manufacturing but was told that they had no work at the time; on March 3, he applied at Team Losi but was told he was overqualified. On March 11, Reddoch applied via the Internet at Electric Gear but received no answer. The next day he applied at Union Pacific through its web site for a scale inspector position. He applied through the internet on March 18, at Commercial Machining and Engineering but received no reply. During this time period he noticed that Certified Fabricators, Incorporated had an advertisement on either the Monster or Careerbuilders web site;

³ Hayes corroborated Reddoch's testimony that they searched for work together.

⁴ This is an example of why I have decided to credit Reddoch's testimony concerning his search for work. I find this type of detail to be persuasive. Not all of Reddoch's testimony is so detailed; Allied Mechanical argues Reddoch's testimony is therefore not credible. I disagree. After all, these events occurred 5 years ago. It is not surprising that some of the details of his search for work may fade from memory. My observation of Reddoch's demeanor convinced me that he was being accurate as his memory allowed.

he again applied, this time via the web site. On March 27, 28, and April 3, he applied at Saint Gobin, Clayton Industries, and WWP, respectively; he received no replies. On April 7, 9, and 14, he applied at Ultramet, NED Industries, and Excel, respectively, but again received no replies. On April 22, 24, and 27, he applied at Cutting Edge, Roncely Plastics, and Richo Tech, respectively. On May 6, 8, and 9, he applied at Aero (in Gardena), Tri (in Huntington Beach), and New Century, respectively. On May 27, Reddoch went to Roncely Plastics for a second interview. On June 3, Reddoch applied at CCI Valve. Every time he saw an advertisement from 4-Flight Aerospace he applied, doing so again on June 9. On June 19, he applied at Ronco Engineering and on June 19, at Lockheed Martin. On July 7, he applied again at 4-Flight and on July 8, he applied at Capo Industries. On July 14, Reddoch went for an interview at Capo Industries. On July 24, he applied at S&B Filters; on July 28, that company replied that Reddoch was not qualified for the position. On August 3, he applied at Union Pacific for a train service inspector. On August 12, he applied at Flathers Precision and on August 13, he applied at Summit Precision. On September 2, 3, 11, 15, 16, 18, 19, 25, and 29, he applied at Miller Brewing, Caco, Barry Controls, Dart Container, Northrup/Gruman, Mag Instruments, Cummings Aerospace, Harte Enterprise, and Burlingame Industries, respectively. On October 2, Reddoch applied at Waterstone.

Reddoch began working again as a machinist in early November. His interim employer was located in Anaheim, California, this required Reddoch to drive his car 45 miles more per day to get there and back than he would have traveled had he remained employed at Allied Mechanical.

Legal Principles

I apply the following settled legal principles. An unlawfully discharged employee must make a reasonable search to find interim employment. *Arlington Hotel, Co.*, 287 NLRB 851 (1987), *enfd.* in relevant part 876 F.2d 678 (8th Cir. 1989). In assessing the reasonableness of that effort the entire backpay period is examined and not just isolated portions. *Electrical Workers, Local 3 (Fischbach & Moore)*, 315 NLRB 1266 (1995). The Board also may examine the employee's age, education and skills, and employment history. *United Aircraft Corp.*, 204 NLRB 1068 (1973). The General Counsel must establish gross backpay owed an employee. It is then the respondent's burden of establishing a willful loss of interim earnings. *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516 (2004).

Recently, the Board has required unlawfully discharged employees to begin the search for interim employment with the 2-week period following their unlawful discharge. *Grosvenor Resort*, 350 NLRB 1197, 1200-1201 (2007). In that case the Board focused its examination on individual months and calendar quarters in determining whether there has been an adequate search for work despite the fact that the employees found interim employment during other months and calendar quarters. *Id.* at 1202-1203. And while the Board acknowledged that some of the employees were old, had limited skills and education, did not speak English well, lacked access to public transportation, and had been employed by the respondent for years if

not decades prior to their unlawful discharge, these factors did not appear to carry much weight. *Id.*, slip op. at 3. In *St. George Warehouse*, 351 NLRB 961 (2007), the Board stated that the contention that a discriminatee failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant job market, and (2) the discriminatee unreasonably failed to apply for those jobs. The Board in that case altered the existing legal analytical framework by placing the burden of going forward with evidence that the discriminatee made reasonable efforts to apply for jobs, shifting it from the respondent that had unlawfully fired the employee to the unlawfully discharged employee and the General Counsel. The Board made clear, however, that the burden of persuasion remained with the respondent; that is, a respondent still had to establish, based on a preponderance of the evidence that a discriminatee failed to make a reasonable search for work.

Allied Mechanical argues that Reddoch applied in person at only 14 shops during the disputed period. But it does not explain why Reddoch's online applications, in this increasingly computerized environment, should be discounted. Allied Mechanical argues that "there are in excess of 3000 machine shops in the relevant area," but it does not explain why it would require Reddoch to apply if those shops were not hiring machinists nor does it explain why Reddoch's decision to focus his efforts on those machine shops that were hiring was unreasonable. Next, Allied Mechanical points to help wanted ads for machinists that appeared in the *Inland Valley Daily Bulletin*, a newspaper that Reddoch used in his search for work. The Sunday edition of that paper generally had one or two such ads, but sometimes as many as five or six. But I accepted those ads into evidence for the limited purpose of assessing the impact they might have on Reddoch's credibility. I now explain why I affirm that ruling. As indicated above, copies of the forms Reddoch used to document his search for work were often illegible. Although Allied Mechanical was given the forms before the hearing, their use to Allied Mechanical was limited until Reddoch, at the hearing, deciphered them. In fairness to Allied Mechanical, and over the objections of the General Counsel, I granted what became 2-month continuance so that Allied Mechanical could challenge Reddoch's testimony, but limited to his credibility concerning his search for work. At the reconvened hearing Allied Mechanical offered the advertisements from the *Inland Valley Daily Bulletin*. Those documents normally would have been part of Allied Mechanical's case; they were unrelated to the purpose for which I granted the continuance. I therefore received them in evidence solely for credibility purposes. I have considered them for that purpose and I find nothing therein persuades me that Reddoch's testimony was not credible. To the contrary, given the fact that after the 2-month continuance Allied Mechanical did not seriously challenge Reddoch's testimony concerning his search for work, I am all the more persuaded of Reddoch's testimony.

Allied Mechanical relies on the testimony of John David Belzer. Belzer is president and chief operating officer of TCI Precision Metals, a family owned business located in Gardena, California. For many years Belzer has also served as an officer at the Los Angeles chapter and at the national level of the Na-

tional Tooling and Machining Association. The NTMA represents machining job shops employing about 25–35 employees. The NTMA sponsors training centers in Southern California for the purpose of training persons to become machinists. In 2003 it operated four such training centers in the Los Angeles area. About 90 percent of the graduates of the training centers found jobs as machinists. However, these graduates were placed in entry level machinist positions, unlike Reddoch who was an experienced machinist. Belzer identified 43 businesses in the greater Los Angeles area that employed machinists, but Belzer conceded that he did not know whether any of those businesses were hiring machinists in 2003. Belzer also identified eight businesses in the same general location as Allied Mechanical that employed machinists. Finally, Belzer pointed out that there were five companies that he had used as a source for employing machinists on a temporary basis. Belzer is acquainted with Mark Slater, Allied Mechanical's president. Slater too served as Los Angeles chapter president of the NTMA. I have decided not to credit Belzer's testimony beyond the largely undisputed matters cited above. Belzer testified under oath that the market for the machining industry was in recovery in 2003, the time period Reddoch was looking for work. Yet on May 17, 2003, Belzer told a local newspaper that the market for job growth in metal-forming companies was flat. He also said that they had hit the bottom of the trough and were bouncing on the bottom. Belzer's demeanor while trying to reconcile the two contradictory statements was entirely unconvincing. I credit Belzer's 2003 statements over his courtroom testimony. Moreover, Reddoch credibly testified that Belzer's company performs mostly grinding type of machine work and he did not have the skills or experience to do that work. Reddoch had attended classes at the NTMA and after he was fired by Allied Mechanical he contacted that organization to inquire if his apprenticeship classes there could be converted into actual college credits. But he did not use the NTMA as a resource for seeking employment because he concluded, not unreasonably, that given Slater's leadership roles in that organization and because Slater had unlawfully fired him for his union activities, finding a job through that organization would be unlikely. More importantly, Reddoch was unaware that the NTMA assisted anyone other than its recent trainees in finding work and indeed, the record does not indicate that it does.

Allied Mechanical also relies on the testimony of Robert Page. Page and his wife own Nutek Industrial Sales, an industrial supplier for the machining industry. He testified he buys mailing lists for the industry to mail literature to customers "and there's over 3,500 machine shops" in the Southern California area. He defined this area as ranging from Bakersfield on the north to Mexico on the south. Although there were no objections raised to this testimony, I note it is hearsay at several levels, and, because the testimony appeared to be reciting the content of a document, that document is the best evidence of its content. I take this into account in discounting this testimony. He testified that sales in his business increased 14 percent in 2003 compared to 2002. But he did not testify as to when in 2003 that increase in sales occurred, nor whether the increase in sales resulted in Nutek hiring any additional machinists. Page's testimony generally lacked specifics and was at times exagger-

ated; his demeanor was unpersuasive. Accordingly, I find little in his testimony that is useful in resolving the issues in this case.

Robert Santana is a market manager for Benchmark Staffing, a division of Robert Half, International. Benchmark is a specialized staffing company that focuses on placing persons in manufacturing and distribution jobs. In 2003 Santana was the branch manager for Benchmark's Ontario, California branch. He testified that in 2003 if he had 10 orders he would be able to fill only 2 or 3 of them. He did not give any figures concerning the actual number of requests Benchmark had for machinists in 2003. He testified that he searched Benchmark's computer records and found no record that Reddoch ever sought employment through Benchmark. Reddoch admitted that he never searched for staffing companies in telephone books because it never occurred to him to do so. Reddoch credibly testified that he was unaware of the fact that Benchmark was a staffing agency and therefore made no effort to seek employment through it. But the Board does not require that unlawfully discharged employees have comprehensive knowledge of the full range of job opportunities; instead, reasonable efforts to secure interim employment suffice.

Patricia Louise McNeil works as a human resources administrator for Votaw Precision Technologies. Votaw is a precision machine shop for aerospace industry. Votaw keeps a database of machinist applicants. McNeil testified that she searched that database for a record that Reddoch had applied there but found no such record. Reddoch credibly explained that he called Votaw and asked to speak to Dick Berg, whom he knew as Votaw's vice president. Reddoch explained to the receptionist that he was looking for work. The receptionist told him he would have to call back, but he never did so. But in light of the more comprehensive effort to secure interim employment described above, Reddoch's failure to follow up in one instance appears isolated and is insufficient to taint the rest of his search for work. Prince Herzog, the CEO of Tri-Models, Inc., located in Huntington Beach, testified that he had no record that Reddoch submitted an application to his company. But this testimony, viewed in the context of the many contacts that Reddoch made to employers, does not persuade me that Reddoch's testimony was not credible.

Finally, Allied Mechanical points to the testimony of Mark Slater, Allied Mechanical's president, who testified that Allied Mechanical hired machinists in early 2003 but it laid off machinists in October 2003. But it is not surprising that Allied Mechanical hired machinists in early 2003; it had unlawfully fired Hayes and Reddoch at that time.

Although the Board in *Grosvenor* seemed to focus exclusively on the numbers of applications submitted by the unlawfully discharged employees, the General Counsel argues:

To engage in an adequate search for work, a discriminatee may do more than merely submit applications. Creating and maintaining a resume, looking through a phone book, inquiring about jobs from friends and family, documenting job searches, looking for job postings online and in newspapers, and registering with various employment services also constitute reasonable searches for work.

I agree. Viewed in its entirety, Reddoch satisfied his obligation to search for interim employment.

Turning now to the remaining issue, John Travis Williams, the compliance officer, computed the overtime hours Reddoch would have worked by computing a weekly average of the overtime hours Reddoch actually worked in the nearly 6-month period beginning August 1, 2002, to his termination on January 23, 2003, and then projecting that number forward into the backpay period. Allied Mechanical suggests a different method. This method also uses a 6-month period preceding Reddoch's termination, computes a weekly average, and projects the average into the backpay period. However, unlike the General Counsel's pretermination period, Allied Mechanical would eliminate the first 4 weeks preceding Reddoch's termination—a period when Reddoch worked overtime—and add 5 weeks at the other end of the period in June and July—a period when Reddoch worked no overtime. As the General Counsel points out in his brief, the same method was used in computing Hayes' backpay and Allied Mechanical did not object to the use of that method for Hayes. Allied Mechanical does not explain in its brief why its method would result in a more accurate depiction of the overtime Reddoch would have worked than the General Counsel's method. I conclude the General Counsel's method is reasonable. *Performance Friction Corp.*, 335 NLRB 1117 (2001).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Tower Industries d/b/a Allied Mechanical, Inc., its officers, agents, successors, and assigns, shall make whole the individuals listed below, by paying them the amount following their name, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1983), minus tax withholdings required by Federal and State law:

Timothy Hayes—\$35,236.24
Walter Reddoch— 84,286.93

⁵ 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.