UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 13

TOWER AUTOMOTIVE OPERATIONS USA I, LLC,

Case Nos. 13-CA-44668
13-CA-44894

Respondent

and

JUAN RUVALCABA,
An Individual

and

STEVEN RAMOS,
An Individual

RESPONDENT'S EXCEPTIONS TO THE MARCH 31, 2009 DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS

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Tower Automotive Operations USA I, LLC ("Tower") hereby takes the following Exceptions to the March 31, 2009 Decision issued by Administrative Law Judge Michael A. Rosas ("ALJ"):

1. Tower excepts to the ALJ's conclusion that the termination of Steven Ramos violated Sections 8(a)(3) and 8(a)(1) of the Act because the ALJ's conclusion that Tower disparately treated Ramos following his undisputed violation of safety rules both lacks support in the record and directly contradicts the record evidence on which the ALJ purportedly relied in making his erroneous factual findings. [ALJ 12-13, 15-16; 687:10-12, 712:9-23.]

2. Tower excepts to the ALJ's conclusion that Tower bore animus toward Juan Ruvalcaba because of his union activity sufficient to state a prima facie violation of the Act under *Wright Line* because the ALJ both: (a) expressly relied upon record evidence showing that the only credible evidence of animus presented during the entire hearing both predated and was not a product of Ruvalcaba's union activity; and (b) completely ignored the extensive and uncontradicted evidence that Tower welcomed, and even encouraged, Ruvalcaba's union activity. [ALJ 2-3, 2 n.5, 4, 4 n.13, 14; 99:16-100:20, 205:15-24, 241:13-242:4, 242:10-12, 242:20-243:9, 281:10-18, 308:1-309:13, 402:6-21, 403:1-10, 403:18-20, 405:2-11, 427:7-10, 428:3-18, 429:14-430:13.]

3. Tower excepts to the ALJ's conclusion that Tower's termination of Ruvalcaba was motivated by union activity based on Tower's purported scheme to rid itself of Ruvalcaba and its departure from past standards in disciplining Ruvalcaba because, to reach these conclusions, the ALJ expressly relied upon facts nowhere found in the record and made factual findings contradicted by and otherwise unsupported by the record. [ALJ 3, 3

n.10, 5-6, 7 n.26, 8 n.31, 15-16; Respondent's Exhibit 11-12; 71:15-72:1, 232:6-18, 254:3-10, 406:14-408:4, 418:9-21, 452:4-10, 453:2-454:2, 479:1-13, 483:11-18, 499:16-500:3509:19-510:21, 517:23-519:22, 525:11-19, 526:2-22, 592:4-593:1, 596:2-10, 635:9-636:5, 667:25-668:15.]

4. Tower excepts to the ALJ's legal conclusions both that the General Counsel carried its burden under *Wright Line* with respect to Ramos and Ruvalcaba and that Tower's reasons for terminating Ruvalcaba and Ramos was not legitimate because the ALJ's conclusions rest upon erroneous factual determinations that show the General Counsel did not establish a prima facie violation of the Act under *Wright Line*. [ALJ 14-16, all record citations identified in Exceptions 1-3.]

In support of its Exceptions, Tower relies upon the record of the hearing held on January 26-29, 2009 and upon its supporting brief filed concurrently with these Exceptions.

* * *

WHEREFORE, Respondent Tower Automotive Operations USA I, LLC respectfully requests that the National Labor Relations Board reject the proposed Decision of the ALJ and the erroneous findings of fact and conclusions of law contained therein, and dismiss Ruvalcaba's and Ramos' unfair labor practice charges in their entirety.

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Respondent

and

JUAN RUVALCABA,
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STEVEN RAMOS,
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RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE MARCH 31, 2009 DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS

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I. STATEMENT OF THE CASE

These consolidated cases come before the National Labor Relations Board (the "Board") following an erroneous decision by an administrative law judge finding that Tower Automotive Operations USA I, LLC ("Tower") violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act (the "Act") by terminating the employment of Juan Ruvalcaba and Steven Ramos. Both Ruvalcaba and Ramos contend that the terminations of their employment with Tower were motivated by their discussions with Tower management regarding the method of selecting employees to participate in training programs. Both claims are meritless.

A. EVIDENCE ADDUCED AT THE HEARING

On January 26 through January 29, 2009, the consolidated cases were tried in Chicago, Illinois before Administrative Law Judge Michael A. Rosas ("ALJ"). Over the course of the four-day hearing, Tower and the General Counsel adduced the following evidence:

1. Tower Automotive And United Auto Workers Local 3212, AFL-CIO

Tower is a first-tier supplier of parts to automobile manufacturers. The United Auto Workers, Local 3212, AFL-CIO ("Union') represents the hourly employees at Tower's Chicago Facility, including Tower's maintenance technicians. [306:18-23[1].] The last collective bargaining agreement between Tower and the Union expired – along with its arbitration and training obligations – on October 10, 2006. [306:7-17, 424:14-22.]

2. Tower's Employment Policies

Tower employees must review and certify that they will comply with the Company's Acceptable Usage Policy applicable to information technology resources and reiterate their understanding that Tower's Internet resources are for business purposes each time the individual

[1] These citations refer to the pages and lines of transcript of the January 26-29, 2009 hearing. In this case, page 306, lines 18-23.

logs into a Tower computer. [Respondent's Exhibit ("R.") 2, R. 7.] Tower also maintains a written disciplinary policy under which employees receive points based on the type of misconduct at issue. [R. 6.] Under this policy, an employee receives three points both for "Failure to meet established performance expectations" and "Misuse or abuse of Company provided technology," and ten points for "Falsifying employment records, including … maintenance records" and "Intentional disregard or bypass of safety rules, requirements and equipment." [*Id*.] Because the policy calls for termination of employment for any individual who accumulates ten points in a rolling 12-month period, willful safety violations and falsification of records are infractions that result in immediate termination. [*Id*.]

3. Ruvalcaba's And Ramos' Employment With Tower And Ruvalcaba's Disciplinary History

Ruvalcaba joined Tower in May 2004 and Ramos was hired in January 2005, both as maintenance technicians. [21:1-20, 196:3-16, 197:12-14.] Each held this position until their respective terminations in April and June 2008. [General Counsel Exhibit ("GC") 4-5, 21:1-20, 196:3-16, 197:12-14.] In June 2007, Ruvalcaba left the facility during his shift without permission and without punching out, and upon returning, refused to take a drug and alcohol test as requested. [281:10-18, 402:6-21.] While these infractions called for ten points, Tower reduced Ruvalcaba's points for the incident to six. [R. 6; 403:1-10.] Only three months later, Ruvalcaba became involved in a physical confrontation with other employees. [403:18-20, 404:3-13.] While Tower's policy again called for the maximum ten points for this infraction, and thus would have again effected Ruvalcaba's automatic termination, Tower reduced Ruvalcaba's points, this time to three. [R. 6; 405:2-11.]

4. Tower Had No Animus Toward Ruvalcaba And Ramos Due To Their Activities Regarding Employee Training

a. Following The Expiration Of The Collective Bargaining Agreement, Pollick Continued Attempting To Address Training Issues

Shortly after taking over management of the Chicago Facility, Plant Manager Matt Pollick found that the skilled trades apprenticeship program called for by the expired collective bargaining agreement had never gotten off the ground and thus took it upon himself to meet with various skilled trades groups six to seven times prior to March 2008. [306:7-17, 424:14-22, 423:23-425:2, 445:5-15, 494:3-495:1.] Following these efforts, in February 2008, Pollick met with Union Chairman Edward Kendall to discuss the appointment of employees to the Union skilled trades committee. Pollick suggested that Kendall appoint Ron Spencer to the committee because Spencer was well respected by both Tower and the Union membership, particularly because Spencer had no disciplinary history at Tower. [428:3-18, 447:9-22.] For his part, Kendall contended that during this conversation, Pollick told Kendall he "did not like" Ruvalcaba, which Pollick denied. [308:1-309:13, 429:14-430:13.]

b. Pollick's Discussions With Ruvalcaba And Ramos Regarding Apprenticeship And Training Were Extremely Positive

On March 18, 2008, Pollick met with Ruvalcaba, Ramos, and Spencer to discuss apprenticeship and training issues. [28:4-20.] Both Ruvalcaba and Ramos described this meeting in extremely positive terms, and conceded that Pollick was very receptive to their ideas about developing a formalized training program, including their wish to roll out training based on seniority. [99:16-23, 205:15-24, 241:13-242:4, 242:23-243:9.] It was Pollick who suggested that Ramos and Ruvalcaba seek the involvement of an International UAW representative at a future meeting who could more effectively explore apprenticeship issues on behalf of the Union [100:13-20, 242:10-12.]

The only area of difference was that the Union members wanted to provide training first to the most senior workers who had been with Tower for years, whereas Pollick, because of safety concerns, wanted to first train the most inexperienced technicians. [425:21-426:11, 450:23-451:2.] At no time did Pollick, or anyone else from Tower, express any hostility or even dissatisfaction with Ruvalcaba or Ramos or with their wish to have the more experienced individuals receive training first. [99:16-100:12, 242:20-243:9, 427:7-10.]

5. Tower Discovered Several Problems With Ruvalcaba's And Ramos' Performance During A Production Shutdown In March 2008

a. Tower Experienced Production Problems With Machinery On Which Ruvalcaba And Ramos Had Recently Worked

After resuming production following a shutdown period in February 2008, Tower immediately began having problems with a cell known as the front body pillar which resulted in a production shutdown at Ford Automotive, Tower's principal customer. [513:24-514:16, 541:22-547:3.] Maintenance Supervisor Don Plomann and his supervisor Maintenance Superintendent Bill Noojin both knew that Ruvalcaba and Ramos were the only technicians who had performed maintenance work on the front body pillar during the February shutdown. [96:25-97:11, 514:24-515:8 .]

b. Plomann Observed Several Irregularities In Ruvalcaba's And Ramos' Work During The March 2008 Shutdown

On March 21, 2008, Tower initiated another shutdown that continued to April 3, 2008. [13:7-10.] Ruvalcaba and Ramos were the only technicians during their shift assigned to perform preventive maintenance during the shutdown. [509:6-18.] Between March 25 and March 28, 2008, Plomann repeatedly observed Ruvalcaba and Ramos at one of the computer kiosks located in the North End where they had no work-related reason to be. [509:19-510:3.3]

Each time he approached the area with the kiosk, Ruvalcaba and Ramos would walk away from the computer. [*Id*.]

During this same time period, Plomann found irregularities in the preventive maintenance paperwork turned in by Ruvalcaba and Ramos during the shutdown. [517:23-518:7.] While maintenance technicians typically turned in their preventive maintenance checklists at the conclusion of each shift, Plomann was receiving Ruvalcaba's and Ramos' checklists several days after the work had reportedly been completed. [518:8-519:12.]

c. Plomann Requested An Audit Of Maintenance Work Ruvalcaba And Ramos Reported They Had Completed

During this same time period, Noojin heard that Ruvalcaba and Ramos were again working in the front body pillar. [R. 11; 546:19-547:6.] Recalling the problems Tower had experienced after Ruvalcaba and Ramos last worked in that cell, Noojin emailed Plomann on March 27, 2008 as follows:

> Don –
>
> I have a meeting tomorrow to review the accomplishments during this week of the shutdown. Please leave me some information on what the afternoon shift techs are or have been working on this week. What is done and what is left to be done.
>
> I heard that Steve Ramos and Juana Ruvalcaba are back in the Front Body Pillar again. Please say it ain't so. The last time they went in there we didn't run very well for a week. What are these 2 guys doing? [R. 11.]

Primarily concerned by the discrepancies in their paperwork, but also because of his observations of the technicians at the computer kiosk, Plomann responded to Noojin's message as follows:

> Yes front body pillar is completed again by JR and Steve. They said they have also completed Wo#s 26943 / 26942 / 26778 / 25266 / 25612…

> Al is on vacation next week, Elias tomorrow night and Juan, Monday and Tuesday. *I would like to have an audit done on JR and Steve work order completion. I do not believe them.*. [R. 12, emphasis supplied.]

At the time he made this audit request, Plomann had no knowledge that either Ruvalcaba or Ramos had met with Pollick on March 18, 2008. [124:6-13, 529:7-9, 529:20-22.]

d. Tower's Audit Of Ruvalcaba's And Ramos' Work Established That The Technicians Had Not Touched The Machinery They Claimed To Have Maintained

In response to Plomann's request, Noojin directed day shift Maintenance Supervisors Peter Buddell and David Salgado to audit the areas covered by the work orders identified in Plomann's request. [547:19-548:10, 625:19-626:18.] The supervisors found the machinery reported worked on by Ruvalcaba and Ramos covered in dust, dirt, welding slag, and other types of grime, all of which indicated that the machinery had not been touched by a maintenance technician in weeks. [R. 1(a)-1(n); 596:19-597:20, 600:2-10, 601:6-20, 639:7-22.] Buddell and Salgado also found at certain machines that critical fluids were below the appropriate level and, in one case, they found a broken air hose regulator emitting an audible whistling noise. [597:21-598:12, 601:22-602:5.] Their most striking discovery was two mechanical valves, which Ruvalcaba and Ramos reported to have replaced, caked in grease such that it was clear the valves had not been replaced as claimed. [R. 1(a)-1(n); 601:6-21.]

Buddell summarized these findings, which Noojin then relied on in notifying both Plomann and Human Resources Director Greg Watts of Buddell's and Salgado's findings. [R. 13; R.15; 549:9-12, 593:20-594:10.] In response, Watts interviewed Noojin and Plomann regarding the findings, and thereafter asked Noojin to obtain photographs of the audited areas. [R. 1(a)-1(n), R. 14; 660:13-661:3, 661:9-662:18.]

e. Ruvalcaba's And Ramos' Internet Usage Showed Significant Non-Business Use Of The Internet

Around the same day he requested the audit, Plomann had a casual conversation with Pollick, during which Plomann commented that he had seen his maintenance technicians in the North End frequently at the computer terminals, but that they would walk away when Plomann approached. [407:3-13, 418:22-419:2, 522:7-24.] In response to this comment, Pollick asked Watts to pull the Internet usage records of those employees – who Pollick only later learned to be Ruvalcaba and Ramos – to review their usage. [407:14-20, 452:4-10, 499:16-500:3.]

Ruvalcaba's and Ramos' usage reports showed that they had accessed numerous non-business related sites, including significant access of a personal America Online email account, Internet auction sites, and online gaming and gambling sites. [R. 17-18.] Ruvalcaba's usage report also showed that he had attempted to access adult and mature content on the Internet using Tower's computers. [*Id.*]

6. Tower Issued Ruvalcaba And Ramos Each Six Points Because Of The Issues Discovered During The Shutdown, Resulting In Ruvalcaba's Termination

a. Watts Suspended Ruvalcaba And Ramos Pending An Investigation And Opportunity To Meet With The Union

After receiving the results and photographs from the audit, and after viewing Ruvalcaba's and Ramos' Internet usage during the same time period, Watts unilaterally decided to suspend both employees pending an investigation. [667:6-15, 667:18-21, 672:6-13.] On the afternoon of April 4, 2008, Watts, Noojin and Plomann met first with Ruvalcaba and then with Ramos to notify both of their suspensions pending further discussion when union representatives were available. [668:15-670:1, 671:2-672:1, 669:9-20, 671:16-672:1.]

b. Pollick Reduced Ruvalcaba's And Ramos' Discipline From Terminable Offenses To Minor Infractions

On April 8, 2008, Pollick, Noojin and Watts met with Ruvalcaba, Ramos, Union Chairman Kendall and a Union steward to discuss Tower's findings with respect to the technicians' actions. [407:25-408:25, 674:18-24.] Neither technician substantively reviewed the photographs taken by Tower because Kendall tossed them aside saying such objective evidence "don't mean nothing." [258:7-259:17.] Ruvalcaba then denied the "J.R." initials on the preventive maintenance checklists were his, but later conceded he had filled out the checklists. [122:7-123:1, 412:18-413:2.] Pollick then asked him to explain the condition of the machinery and the valves which had clearly not been replaced, and Ruvalcaba responded that he had been in a hurry but had changed different valves and simply wrote the wrong thing down. [413:3-13.]

Pollick then gave both Ruvalcaba and Ramos the benefit of the doubt, and took away the falsification of records charge and reduced it to poor workmanship. [412:11-413:20.] Ruvalcaba, Ramos and Kendall began alleging that other employees had been blocked from using the Internet and claiming that Ruvalcaba and Ramos should simply be blocked without further discipline. [71:6-72:1, 72:13-73:2, 232:19-233:12.]

c. Tower Returned Ramos To Work With Full Back Pay, And Ramos Thereafter Expressed No Concerns About Tower's Disciplinary Decision

On April 10, 2008, Tower called Ramos back to the facility to meet with Watts and then be returned to work. [73:8-74:1.] At the meeting, Watts informed Ramos that Tower would be assigning him three disciplinary points due to his paperwork errors and three points for improper Internet use. [74:2-11.] However, Tower paid Ramos full back pay for the period of his suspension. [677:25-678:1.]

d. After Again Meeting With The Union, Tower Terminated Ruvalcaba's Employment Because It Could Not Excuse His Third Commission Of A Terminable Infraction

On April 16, 2008, at the request of the Union, Pollick, Watts and Noojin again met with Ruvalcaba, Kendall, the Union steward, and Frank Angel, an International UAW representative. [419:13-420:8.] At one point during the meeting, Angel asked to speak privately with Pollick to request that he "just let this one go." [420:12-24.] However, Pollick and Tower could not simply "let this one go" because it represented the third time in a ten-month period that Tower's disciplinary policy called for Ruvalcaba's termination. [423:9-18.] Though Tower again reduced Ruvalcaba's points to six, it could not completely ignore Ruvalcaba's actions and allow him to escape with no points, and thus terminated his services. [405:17-19, 423:9-18.]

7. Tower Terminated Ramos For Willfully Violating Its Government-Mandated Safety Requirements

a. Despite Knowing He Had Not Complied With Lock Out/Tag Out, Ramos Intentionally Entered The Production Area

On May 28, 2008, a maintenance technician requested Ramos assist him at the lower back production cell. [77:6-16.] When he arrived at the location, Ramos attempted to Lock Out/Tag Out ("LO/TO") as required by federal law, *see* 29 C.F.R. § 1910.147(a) *et seq.*, and though he could not remove the key from his lock, he entered the cell anyway in violation of LO/TO. [79:17-80:2, 82:10-22, 157:17-158:8]

b. Tower Suspended Ramos Because Of His Willful Disregard Of Safety Protocols

As Ramos emerged from the cell, Production Manager David Roe and Engineering Manager Eric Tuley arrived at the location, and Tuley noticed the key inside Ramos' lock. [644:22-645:4.] Ramos acknowledged that he knew the key was in the lock and claimed he

could not remove the key. [646:6-13.] At that point, Tuley directed Roe to write Ramos up for a disciplinary violation. [83:14-84:9, 646:6-20, 648:2-11.]

Immediately thereafter, Tuley and Roe met with Watts to inform him of what they observed, and then Watts spoke with Ramos, who confirmed his understanding that he was not supposed to enter the cell without properly complying with LO/TO. [R. 16, 21; 647:5-16, 678:15-679:7, 680:25-681:16.] Watts then notified Ramos he would be suspended pending an investigation. [681:3-22.]

c. Finding No Previous Incidents Of LO/TO Violations, Watts Terminated Ramos' Employment

After suspending Ramos, Watts spoke with other Tower managers and looked through employee files to see if there had been any past disciplinary incident regarding failure to LO/TO. [681:23-682:3.] Learning of no prior violation of LO/TO, Watts issued Ramos ten points for intentional disregard of safety rules in accordance with the disciplinary policy and thus terminated Ramos' employment. [687:10-688:6.]

B. THE ALJ'S DECISION

On March 31, 2009, the ALJ issued a written Decision in which he specifically found that Ruvalcaba's and Ramos' work in performing preventive maintenance work during the production shutdown was unsatisfactory. [ALJ 15.] He further expressly rejected Ruvalcaba's and Ramos' attempts to explain away their presence at the computer kiosks during the shutdown when they should have been performing preventive maintenance work, finding that neither individual had any business reason to be at the computer during the shutdown. [ALJ 5-6, n.19 and n.20.] Additionally, the ALJ recognized that Ramos knew about the importance of complying with LO/TO and unambiguously rejected Ramos' attempts to explain away his transgressions. [ALJ 11 n.46, 15.] The ALJ further concluded that Ramos could not challenge

the discipline he received in April 2008 because Ramos failed to file an appropriate charge within the Act's six-month limitations period. [ALJ 14.]

Despite thus finding that the Charging Parties engaged in the very same misconduct Tower relied upon in terminating their employment, the ALJ nonetheless found that both of their terminations violated the Act. To justify these conclusions, the ALJ found facts for which no evidence was presented, made numerous factual conclusions that are not supported by the record, and reached other factual determinations that directly counter the uncontradicted evidence in the record. These erroneous findings, and the ALJ's reliance upon them in finding that Tower violated the Act for terminating Ruvalcaba and Ramos despite finding they had engaged in misconduct, requires the ALJ's decision be set aside.

For example, with respect to Ramos, by finding that Ramos was time barred from asserting that his April 2008 discipline relating to poor workmanship and computer abuse violated the Act, the ALJ made clear that his decision as applied to Ramos is based exclusively upon Tower's purported discovery of a previous LO/TO violation by a different employee and its adoption of a different punishment for Ramos. Yet in making such a finding, the ALJ cited to unambiguous evidence showing that Greg Watts, the decision maker, knew of no previous alleged LO/TO violation at the time he terminated Ramos' employment, and thus Tower could not have discriminated against Ramos as the ALJ concluded.

Similarly with respect to Ruvalcaba, in finding that the General Counsel met its prima facie burden under *Wright Line* to show Ruvalcaba's union activity was a motivating factor in his termination, the ALJ concluded that Tower bore anti-union animus toward Ruvalcaba as required under *Wright Line*. However, the ALJ expressly found that Tower's purported animus toward Ruvalcaba both pre-dated any union activity by him and was caused by reasons unrelated

to any union activity such that even if Tower bore animus toward Ruvalcaba, it was not of the type necessary to state a prima facie case under *Wright Line*. To exacerbate this erroneous finding, the ALJ completely ignored and disregarded the extensive evidence that Tower in fact welcomed Ruvalcaba's and Ramos' union activity and even specifically requested to continue meeting with the Union to mutually work toward a training program. Such evidence is not only hardly the type of conduct by an employer unhappy with its employees' union activity, but further eliminates the possibility that Tower developed animus for Ruvalcaba *after* February 2008 – a factual conclusion not reached by the ALJ.

Not only did the ALJ's Decision thus incorrectly find that the General Counsel met its burden under *Wright Line* based on non-existent union animus, the ALJ additionally concluded that Ruvalcaba's union activity motivated his termination based on a series of factual findings purportedly showing that Tower orchestrated a scheme to terminate Ruvalcaba immediately following his union activity and treated him disparately in comparison to other employees. To reach such conclusions, the ALJ incredibly invented facts that are nowhere found in the record, made other factual findings that directly contradict the evidence in the record, and made still other findings that the record evidence simply does not support.

In thus relying on a series of faulty factual assertions to find the General Counsel satisfied its prima facie burden to show a violation of the Act under *Wright Line*, the ALJ both effectively dispensed with the requirement that the General Counsel meet is burden to show a violation of the Act and ignored the fact that Tower affirmatively proved that it had legitimate and good faith reasons for terminating the employment of Ruvalcaba and Ramos. The actual evidence thus demonstrates that the General Counsel did not meet its *Wright Line* burden, and thus the ALJ's Decision must be set aside and the unfair labor practice charges dismissed.

II. QUESTIONS FOR DETERMINATION BY THE BOARD

1. Whether the ALJ's conclusion that the termination of Ramos violated Sections 8(a)(3) and 8(a)(1) of the Act is supported by substantial evidence when the factual predicate underlying that conclusion – that Tower treated Ramos following his undisputed violation of LO/TO differently than another employee who allegedly also violated LO/TO – not only lacks any support in the record, but further flatly contradicts the record evidence on which the ALJ purportedly relied in making his erroneous factual findings? [Exception 1.]

2. Whether the ALJ's conclusion that Tower bore animus toward Ruvalcaba because of his union activity is supported by substantial evidence when the ALJ's Decision itself recognizes that the only record evidence of purported animus by Tower for Ruvalcaba predated any union activity by Ruvalcaba and further was concededly provoked by reasons other than Ruvalcaba's union activity? [Exception 2.]

3. Whether the ALJ's conclusion that Ruvalcaba's termination was motivated by union activity due to a purported scheme to effect Ruvalcaba's termination and Tower's purported departures from past practice is supported by substantial evidence when the ALJ invented facts to support such a conclusion, when the ALJ's factual findings contradict the undisputed record evidence, and when the record evidence does not support the ALJ's factual findings on which the ALJ relied? [Exception 3.]

4. Whether the ALJ properly applied *Wright Line* in finding that the General Counsel satisfied its prima facie burden to show a violation of the Act when the factual predicates for such decision are contrary to the undisputed record evidence and when the

contradicted record evidence shows that Tower proved it had legitimate and good faith reasons for terminating Ruvalcaba's and Ramos' employment? [Exceptions 1-4.]

III. ARGUMENT

A. THE ALJ'S FACTUAL FINDINGS RELIED ON FOR HIS CONCLUSION THAT RAMOS' TERMINATION VIOLATED THE ACT UNAMBIGUOUSLY CONTRADICT THE RECORD EVIDENCE THAT THE ALJ PURPORTED TO RELY UPON

In his written Decision, the ALJ observed that "Ramos knew, and was trained to the effect, that he was not permitted to enter the production cell unless and until he could lock the cell door behind him." [ALJ 11.] The ALJ further acknowledged that "it is not disputed that Ramos violated the Respondent's OSHA-mandated safety policy by entering the production cell in contravention of the OSHA notice posted on the door" and thus, the ALJ appropriately "reject[ed] Ramos' assertion that his conduct was excusable because he had a mean supervisor that was stressing him out." [ALJ 15.]

Nevertheless, despite clearly agreeing that Ramos had engaged in terminable conduct, the ALJ found that Tower violated Sections 8(a)(3) and derivatively 8(a)(1) for the exclusive reason that Greg Watts purportedly knew of a previous LO/TO violation by Plomann but chose to discipline Ramos differently than his supervisor,[2] as made clear by the following excerpt from the Decision:

> During his investigation of the Ramos lock-out/tag-out violation, Watts attempted to ascertain whether the Respondent had ever disciplined an employee for a lock-out/tag-out violation. After speaking with supervisors and reviewing employee personnel files,

[2] The only evidence of any purported LO/TO violation by anyone other than Ramos was Pollick's speculative statement that Plomann might have once violated LO/TO before becoming a Tower employee. Pollick's speculation was not supported by any reliable evidence, causing the ALJ to reject the factual possibility that Plomann had even violated LO/TO. [ALJ 13, n.50.] With the ALJ thus clearly rejecting the fact that Plomann had been subject to any type of reprisal for LO/TO, it makes no sense that the ALJ would conclude Watts learned of such an occurrence, which Watts clearly showed to be false.

> he uncovered only one similar violation – by Plomann. In that instance, however, Plomann was verbally counseled and issued no disciplinary points. Here, rather than take the same route and have Ramos receive a verbal counseling, Watts issued Ramos 10 disciplinary points for intentionally disregarding safety rules. [ALJ pp. 12-13 (emphasis supplied).]

To reach this factual assertion, the ALJ unambiguously declared that he relied *exclusively* upon the testimony of Tower Human Resources Manager Greg Watts. [ALJ p. 13, n.50.]

It is simply unfathomable how the ALJ could have concluded that Watts uncovered a similar LO/TO violation before terminating Ramos because such a finding unquestionably contradicts the record evidence showing that Watts found nothing remotely suggesting any previous LO/TO instances prior to Ramos. [687:10-15, 712:9-23.] Incredibly, the ALJ cited the following testimony by Watts in making his finding that Watts (who had been recently hired in October 2007 [657:16-20]) learned of Plomann's purported LO/TO violation when he investigated the LO/TO incident:

> Q. Are you aware of any similar lock out, tag out violations prior to Mr., Mr. Ramos' suspension?
> A. No.
> Q. You mentioned you looked through folders, did you discover any other lock out, tag out violations?
> A. I did not. [687:10-15.]
>
> * * *
>
> Q. You testified that you reviewed records of other lockout tagout violations. Is it your testimony that you found none.
> A. I found none.
> Q. So one of your supervisors, Don Plowman [sic], never had any discipline for lockout tagout?
> A. There was nothing in his record.
> Q. So if one of your managers said that Mr. Plowman [sic] had, in fact, received some sort of discipline for lockout tagout, that manager would be incorrect?
> A. No.
> Q. He wouldn't be incorrect?
> A. He might have gotten a verbal discussion.
> Q. Do you know if Mr. Plowman [sic] got a verbal discussion regarding lockout tagout violation?

A. *Yesterday was the first I heard of it*.[3]
Q. So that did take place?
A. That allegation was made. *I couldn't find anything in his file. I had never heard anything before*. [712:9-23 (emphasis supplied).]

With Watts thus unambiguously stating that he found no previous instance of LO/TO violation before terminating Ramos' employment, and with the ALJ making clear he relied entirely upon the above testimony, it defies explanation how the ALJ could reach the factual determination that "Watts uncovered only one similar violation – by Plomann." [ALJ 12.] Because the evidence clearly rebuts such a finding, it is factually impossible that Watts could have knowingly treated Ramos differently for his undisputed LO/TO violation than another employee.

The unambiguous record evidence thus demonstrates that the ALJ's conclusion that Tower violated Section 8(a)(3) and derivatively 8(a)(1) in terminating Ramos' employment thus cannot stand because it is predicated on a demonstrably incorrect factual finding. Consequently, the ALJ's ruling that Tower violated the Act by terminating Ramos – poisoned by an erroneous factual finding – must be overturned by the Board, and Ramos' meritless unfair labor practice charge should be dismissed.

B. THE ALJ'S CONCLUSION THAT TOWER BORE ANTI-UNION ANIMUS TOWARD RUVALCABA CANNOT STAND BECAUSE THE ALJ BOTH FOUND TOWER'S PURPORTED ANIMUS WAS NOT CAUSED BY UNION ACTIVITY AND IGNORED UNCONTRADICTED EVIDENCE THAT TOWER BORE NO SUCH ANIMUS

Under the Board's *Wright Line* test, the General Counsel cannot prove a prima facie violation of the Act without showing a link exists between the employee's union activity and his

[3] By "yesterday," Watts refers to the testimony adduced on the previous day of the hearing. In other words, Watts had never heard anything about any previous LO/TO violation until January 28, 2009 – more than six months after deciding to terminate Ramos' employment.

termination. *Ironwood Plastics*, 345 NLRB 1244, 1252 (2005); *Robert Orr/Sysco Food Servs., LLC*, 343 NLRB 1183, 1183 n.6 (2004). To establish such a connection, the evidence must show that the employer's anti-union animus motivated its treatment of the employee. Absent such a showing of union-related animus, even clearly unjustified or unfair conduct does not violate the Act. *Cardiovascular Consultants of Nev., MI*, 323 NLRB 67, 71 (1997).

The ALJ recognized the necessity of finding Tower bore animus toward Ruvalcaba in order to find a violation. Yet in making a finding of such animus, the ALJ effectively acknowledged that Ruvalcaba's union activity did not play, and could not have played, a factor in creating such animus. Compounding this error was the ALJ's decision to ignore completely Ruvalcaba's and Ramos' own admissions that Tower was actually pleased by and supported their union activity. By nevertheless finding a violation of the Act on the basis of non-union animus and in the face of clear evidence showing no such animus existed, the ALJ improperly found a prima facie violation of the Act under *Wright Line*. This error requires reversal of the ALJ's conclusion that Ruvalcaba's termination for misconduct violated the Act.

1. The ALJ's Finding Of Animus By Tower Toward Ruvalcaba Cannot Stand Because The ALJ's Own Factual Findings Make Clear That Any Such Animus Was Not Motivated By Union Activity And That Tower's Reasons For Disciplining Ruvalcaba Were Legitimate

In his written Decision, the ALJ repeatedly observed that prior to March 2008, Ruvalcaba had no interaction with Tower on behalf of the Union nor played any active role in the Union. [ALJ 2 ("neither Ruvalcaba nor Ramos had any interaction with the Respondent on behalf of the Union prior to March"), ALJ 2 n.5 ("It is undisputed that neither Ramos nor Ruvalcaba played an active role on behalf of the Union prior to March"), ALJ 4 (Ruvalcaba's March appointment to the Union skilled trades committee "was the first instance in which … Ruvalcaba became actively involved in union activity").] These factual findings showed it was impossible for

Tower to have held any union-related animus toward Ruvalcaba prior to March 2008 for the simple fact that Ruvalcaba engaged in no union activity before then. In the absence of such union animus, there is no evidence that Tower's decision to discipline Ruvalcaba for what the ALJ acknowledged was unsatisfactory work performance was pretextual, and Tower's termination of Ruvalcaba was therefore credible and legitimate.

The ALJ further found that before Ruvalcaba ever engaged in any union activity, he had already raised the ire of Tower's management, first when he left Tower's facility without authorization and upon return refused a requested drug and alcohol test, and second when he became involved in a physical altercation with other employees. [ALJ 2-3.] The ALJ also found that Ruvalcaba caused Tower additional consternation following an incident where Ruvalcaba's car was vandalized in Tower's parking lot. [ALJ 3.] The ALJ thus concluded that Pollick communicated to Kendall in February 2008 that he considered Ruvalcaba to be an employee of questionable character. [ALJ 4, n.13.]

By making such findings, the ALJ illustrated that Tower's purported animus for Ruvalcaba predated any union activity and was borne out of character concerns – not union activity. Nevertheless, in undertaking a *Wright Line* analysis, the ALJ found the anti-union animus element satisfied on the basis of Pollick's expressed of dislike for Ruvalcaba <u>in February 2008</u> for <u>serious character flaws</u> [ALJ 14 ("Pollick's animosity toward Ruvalcaba was previously expressed in February when suggesting that Ruvalcaba had serious character flaws, he urged Kendall not to appoint him as a union representative on the skilled trades committee")]; in other words the ALJ found the required element of anti-union animus met based on evidence showing any such animus could not have been and was not caused by Ruvalcaba's union activity. By thus effectively dispensing with the fundamental *Wright Line* requirement that animus be union-

related, *Cardiovascular Consultants*, 323 NLRB at 71, the ALJ improperly found a violation of the Act with respect to Tower's termination of Ruvalcaba for misconduct.

2. The ALJ's Erroneous Finding Of Union Animus By Tower Is Made All The More Clear By His Disregard Of Ruvalcaba's Admissions That Tower Welcomed, And Even Encouraged, His Union Activity

As illustrated previously, Ruvalcaba and Ramos described their March 18, 2008 meeting – their only union activity at Tower – in extremely positive terms, and conceded that Pollick was both very receptive to their ideas about developing a formalized training program and expressed zero displeasure regarding Ruvalcaba's wish to roll out training based on seniority. [99:16-23, 205:15-24, 241:13-242:4, 242:23-243:9.] In fact, the undisputed evidence revealed that at this meeting, it was Pollick who wanted to push forward the process of getting a skilled trades training program off the ground by directing Ruvalcaba to involve an International UAW representative who could more effectively explore apprenticeship issues on behalf of the Union.[4] [100:13-20, 242:10-12.] These undisputed facts, confirmed by all present at the March 18 meeting, are conspicuously absent from the ALJ's Decision. [ALJ 4-5.]

Instead of following the testimony of those actually present at the meeting, the ALJ instead found that "an undercurrent of discord as the result of several grievances filed between January and March by maintenance technicians" pervaded the March 18 meeting. [ALJ 4.] The only evidence of such "discord" or of "several grievances" came from the testimony of Kendall, who was not present at the meeting and conceded he did not know what was going on with respect to the skilled trades committee meetings. [356:1-8.] Furthermore, the purported grievances relied on by the ALJ filed by "maintenance technicians" were in fact filed only by

[4] From a logical standpoint, had Pollick truly been hostile toward Ruvalcaba's activities on behalf of the Union, one would have to wonder why Pollick would encourage Ruvalcaba to further pursue his union activity, let alone suggest that Ruvalcaba engage experts from the UAW's Detroit Headquarters.

Kendall, a witness the ALJ specifically discredited due to his poor recollection of facts and because his testimony was inconsistent with Ruvalcaba's. [ALJ 4, n.15; 343:3-17[5].] Neither Kendall nor the General Counsel produced the purported grievances, nor did they adduce any evidence regarding the substance or circumstances of the grievances or their resolution.

The ALJ's Decision, compared against the record evidence, thus shows that the ALJ disregarded the consistent testimony of those present at the March 18 meeting to invent an air of hostility – which Ruvalcaba himself disclaimed – based on the contradicting testimony of a discredited witness not present at the meeting. The ALJ thus ignored the manifest weight of the evidence showing that Pollick wanted to work with Ruvalcaba and the Union to improve training for unit members, and even directed Ruvalcaba to take steps to strengthen the Union's position.

Having thus found *Wright Line* satisfied based on evidence showing any animus was not related to union activity, and having further swept aside Ruvalcaba's own concessions that Tower bore him no ill will for his union activity, the ALJ's conclusion that the General Counsel established a prima facie violation of the Act under *Wright Line* cannot stand.

[5] In fact, when testifying about the purported grievances, Kendall expressed the same inability to recall specific facts that led the ALJ to reject his assertions. It defies logic why the ALJ would specifically discredit Kendall's testimony for such reasons yet rely on his testimony to contradict Ruvalcaba's positive description of the March 18 meeting, particularly when Kendall was not even present. [ALJ 4, n.15.] Kendall's decision to disobey Tower's subpoena to appear and produce the purported grievances creating an "undercurrent of discord" was also ignored completely by the ALJ. [725:3-12.]

C. IN ATTEMPTING TO EXPLAIN AWAY THE ACKNOWLEDGED MISCONDUCT BY RUVALCABA, THE ALJ INVENTED FACTS, MADE FACTUAL FINDINGS CONTRADICTED BY THE RECORD EVIDENCE, AND MISCONSTRUED THE EVIDENCE ADDUCED AT THE HEARING

1. To Suggest The Appearance Of A Pollick-Led Scheme To Terminate Ruvalcaba, The ALJ Relied On Facts Clearly Outside The Record And Contradicted Documentary Evidence

At various points throughout the written Decision, the ALJ suggests that Ruvalcaba's termination was the result of a scheme to rid Tower of Ruvalcaba developed by Pollick immediately after the March 18 skilled trades committee meeting. To suggest the existence of such a scheme, the ALJ made numerous findings of fact that are clearly erroneous, as demonstrated below:

- "At some point between March 18 and March 20, Pollick and Noojin discussed the union involvement of Ramos and Ruvalcaba. As a result, Noojin directed Plomann to inform Ramos and Ruvalcaba that their work would be audited. Plomann informed them of the audit on March 21." [ALJ 6.]

It is inexplicable how the ALJ found that Pollick and Noojin discussed the union involvement of Ramos and Ruvalcaba between March 18 and March 20 because there is no evidence in the record of <u>any</u> conversation ever occurring between Pollick and Noojin, let alone one about union activity. Indeed, the record shows that Noojin did not even refer to Pollick during his testimony, and similarly, Pollick referenced Noojin only five times, none in connection with any purported conversation regarding union activity.[6] Furthermore, no other

[6] Between pages 542 and 590 (Noojin's testimony), the words "Matt," "Matthew" and "Pollick" do not appear anywhere. As for Pollick's testimony, on pages 408 and 410 of the hearing transcript, Pollick identifies Noojin as one of the individuals who attended the various grievance meetings relating to the discipline issued to the Charging Parties. On page 468, Pollick notes that he assumes either Noojin or another supervisor ordered the audit of Ruvalcaba's work, but acknowledges he does not know this for fact. On page 473, Pollick notes that Noojin, accompanied by two maintenance supervisors, took the photographs included in the record as Respondent's Exhibit 1(a) through 1(o). On page 489, Pollick comments that he thinks Noojin might have records of audits conducted by Tower.

witness even suggested that Noojin and Pollick had a conversation pertaining to any union activity between March 18 and March 20. The Decision simply pulls this "fact" out of thin air.

The ALJ also invented the fact that "Noojin directed Plomann to inform Ramos and Ruvalcaba that their work would be audited." Once again, there is no evidence in the record that remotely suggests such a conversation took place. However, the record does show – in the form of documentary evidence – the nature of the communications occurring between Noojin and Plomann which dispels the myth that Noojin directed Plomann to tell Ruvalcaba he would be audited. [R. 11-12.] Plomann's March 28 e-mail response to Noojin's March 27 e-mail shows that Plomann, of his own volition, requested the audit of Ruvalcaba's finding: "Al is on vacation next week, Elias tomorrow night and Juan, Monday and Tuesday. *I would like to have an audit done on JR and Steve work order completion. I do not believe them.."* [R. 12, emphasis supplied.] The e-mail between Noojin and Plomann comes nowhere close to suggesting any direction by Noojin to inform Ruvalcaba of an audit. [*Id*.]

The ALJ's contrary finding that "Noojin directed Plomann to inform Ramos and Ruvalcaba that their work would be audited" is simply at odds with the record evidence.

Given the foregoing, the ALJ's further finding that Plomann notified Ruvalcaba and Ramos that they would be audited on March 21 is also erroneous. As an initial matter, to support such a finding, the ALJ cites to the March 27 and March 28 emails transmitted *after* Plomann's purported announcement of the audit. [*Id*.] Furthermore, Plomann unambiguously denied ever speaking to Ruvalcaba or Ramos about an audit, yet in connection with relying upon facts found nowhere in the record, the ALJ nevertheless accepted Ruvalcaba's claim that Plomann

announced the audit, and further found this announcement took place on March 21.[7] Notwithstanding the Board's general practice of declining to disturb the credibility findings of an administrative law judge, because the Decision invents numerous facts proceeding the ALJ's finding that Tower announced the audit on March 21, the ALJ's determination that Tower announced the audit at all simply cannot stand in the face of Plomann's unambiguous denial to have done so, bolstered by the unambiguous documentary evidence contained in the record. [526:2-22.]

- "It is reasonable to assume that, had Pollick and Noojin been serious about conducting a meaningful audit, they would have taken steps throughout the period of March 21 to March 28 to monitor the work performance of Ramos and Ruvalcaba." [ALJ 8, n.31.]

Not only is this factual finding inherently incorrect because it relies upon the erroneous findings above, but it further disregards the documentary evidence in this matter. As Plomann made clear, he did not begin to grow concerned about Ruvalcaba's work performance during the shutdown until he found paperwork discrepancies and found them regularly stationed at the computer kiosk. [509:19-510:21, 517:23-519:22.] He raised these concerns to Noojin at 2:04 a.m. on March 28, 2008, and the audit was performed that same day. [596:2-10.] The ALJ's factual assumption that Pollick and Noojin were somehow lying in wait, based on a series of factual inventions and a disregard for the record evidence, is thus untenable.

[7] The finding that Plomann announced the audit on March 21 is also a factual fabrication, as neither Ramos nor Ruvalcaba ascribed any particular date to the purported announcement. The closest evidence was Ruvalcaba's claim that this purported conversation took place on either a Monday or Tuesday. [254:3-10.] March 21, 2008 was a Friday.

- "On or around the same day he requested the audit, Pollick asked Plomann about the activities of Ramos and Ruvalcaba." [ALJ 6.]

Again seeking to suggest Pollick was driving forward a scheme to terminate Ruvalcaba, the ALJ makes this finding to suggest Pollick was attempting to have Plomann rat out Ruvalcaba for improper Internet use. The record evidence tells a much different story.

As an initial matter, Pollick played no role in the audit of Ruvalcaba and Ramos as the ALJ asserts. Pollick never spoke to Noojin about the Charging Parties' union activity, and was not a participant in the written communications between Noojin and Plomann. Furthermore, the ALJ's description of Pollick coming to Plomann to check into the activities of Ruvalcaba and Ramos is clearly erroneous. Rather, the uncontradicted evidence on this point shows that Pollick casually and generically asked Plomann how things were going, and that Plomann voluntarily mentioned that he had concerns about some of his maintenance technicians' use of the Internet. [406:14-408:4, 525:11-19.] Both witnesses consistently testified that Pollick certainly was not coming to Plomann to specifically discuss Ruvalcaba and Ramos – in fact, at the time of the conversation, Pollick did not even know Ramos and Ruvalcaba were the technicians to whom Plomann referred. [452:4-10, 499:16-500:3.] The ALJ's attempt to characterize the evidence to suggest Pollick was taking purposeful steps to persecute Ruvalcaba is thus clearly unfounded.

- "Subsequently, on April 4, 1 day after Ruvalcaba and Ramos called Pollick to complain about the latter's decision to roll out safety training for the newer technicians and without regard to seniority, Pollick had Watts suspend Ruvalcaba and Ramos based upon poor work performance and excessive internet use." [ALJ 15.]

Once again, the ALJ's attempt to suggest Pollick was directing the actions of other Tower supervisors is erroneous, as the finding that Pollick directed Watts to suspend Ruvalcaba is simply false. Rather, as Watts testified, he alone made this decision without speaking to anyone else at Tower. [667:25-668:15.]

In light of the foregoing, the ALJ's conclusion that Tower's termination of Ruvalcaba was pretextual and the product of an orchestrated scheme by Pollick following Ruvalcaba's union activity cannot stand because it relies upon a series of clearly erroneous factual conclusions. The ALJ's legal conclusion that Tower violated the Act by terminating Ruvalcaba's employment on the basis of such erroneous findings should therefore be rejected.

2. The ALJ's Findings That Tower Treated Ruvalcaba Disparately Because It Had Never Before Audited A Maintenance Technician and Had Earlier Blocked Maintenance Technician Internet Access Are Also Erroneous

To attempt to further support the conclusion that Ruvalcaba's termination violated the Act, the ALJ concluded that Tower treated Ruvalcaba disparately because it had never before audited a maintenance technician's work and had previously blocked the access to the Internet for employees who misused it. As before, both of these conclusions rest upon factual determinations that contradict and find no support in the record.

a. The ALJ's Finding That Tower Has Never Before Audited A Maintenance Technician Prior To Ruvalcaba Ignores The Record Evidence

Throughout his written decision, the ALJ repeatedly stated that Tower had neither a policy nor a practice of auditing the work of its employees, such that Tower's decision to look into the work of Ruvalcaba and Ramos was unprecedented. Presuming that such purportedly unparalleled action by Tower could only have been caused by Ruvalcaba's union activity, the ALJ thus determined that Tower's departure from its past practices was further proof that Ruvalcaba should not be held accountable for his poor work performance. This determination once again ignores uncontradicted record evidence.

Logically, it is a certainty that Tower regularly audits and looks over the work of its employees to ensure the work is performed according to requirements. This is of course one of

the primary jobs of any supervisor. Indeed, several Tower witnesses testified – without contradiction – to this fact. For example, Maintenance Supervisor Peter Buddell stated that as part of his supervisory duties, he constantly looks over the work of the maintenance technicians he supervises for safety reasons; in fact, Buddell indicated that he is specifically directed to perform this kind of work as part of his job responsibilities. [592:4-593:1, 635:9-636:5.] Pollick confirmed this testimony by stating that Tower audits its employees' work "all the time" and agreed with Buddell that supervisors are responsible for monitoring the work of their subordinates. [479:1-13.] Astonishingly, the ALJ even recognized Pollick's testimony by stating on the record that "there were audits, work performance was audited all the time," thus acknowledging during the hearing that the evidence showed Tower did in fact routinely audit the work of its employees. [483:11-18.] Having thus understood the evidence as it developed, it is simply amazing that the ALJ would then find in his Decision that Tower had no practice of auditing maintenance technicians. The ALJ thereafter completely disregarded this evidence in finding that Tower had no previous practice of reviewing the work of maintenance technicians.[8]

b. The ALJ's Finding That Tower Departed From Past Practice By Declining To Simply Block Ruvalcaba's Internet Use Also Relies On Facts Unsupported By The Record

In addition to erroneously finding Tower treated Ruvalcaba disparately because it had never before audited a maintenance technician, the ALJ also concluded that Tower disparately treated Ruvalcaba because it issued him disciplinary points for Internet misuse instead of blocking his access. To support the ALJ's asserted impropriety of such an action, the Decision makes the following factual findings:

[8] In reaching such a conclusion, the ALJ may have erroneously relied upon the fact that Tower rolled out a formalized "LPA Audit" procedure in approximately April 2008. However, Tower's adoption of a different quality control standard in April 2008 does not support the ALJ's conclusion that

- Tower blocked internet access for maintenance technicians in the past, but no employee was ever warned or told to refrain from such activity. [ALJ 3.] Prior to April 4, Tower would occasionally block certain employees from Internet access due to excessive use. [ALJ 5.]

- Tower knew or had reason to know that internet abuse was rampant in the maintenance department. In fact, several employees in that department were previously blocked from internet access due to excessive or inappropriate use. [ALJ 15.]

As with numerous other factual findings in the Decision, the assertion that Tower previously blocked the Internet access of maintenance technicians is not supported by the record. The General Counsel presented no evidence to support such a fact. Instead, the only mention of such a contention is in Ruvalcaba's and Ramos' descriptions of their meetings with Tower to discuss their discipline. During those meetings, Ruvalcaba and Ramos claimed that Tower had blocked the access of employees in the past. [71:15-72:1, 232:6-18.] These statements were made in response to questions about what Pollick said during those meetings, and the Charging Parties then went on to talk about what they said themselves during the meeting. [*Id*.] In light of the clear lack of foundation for such assertions and their hearsay nature, Ruvalcaba's and Ramos' speculative contentions are not substantive evidence to support a conclusion that Tower did in fact block the access of maintenance technicians in the past. [*Id*.] The ALJ's finding of such fact without any legitimate evidentiary support[9] is thus improper. The ALJ's further conclusion that Tower was aware of purported "rampant " Internet abuse is also incorrect. Rather, as Tower's witnesses confirmed, they had no reason to discipline – or even look into

(..continued)
Tower never monitored or otherwise reviewed the work of maintenance technicians before inspecting Ruvalcaba's work in March 2008.

[9] The record does contain substantive evidence showing Tower blocked Internet access for maintenance technicians *after* Ruvalcaba's termination because, in response to an NLRB request for information, Tower for the first time looked at the Internet usage of other technicians and discovered that numerous technicians – who were nonetheless performing their work satisfactorily – were using the Internet for personal reasons. After consulting with the Union to address the potential issue of

another employee's Internet use – because while other employees have used the Internet, such use had never interfered with an employee's work activities such that Tower had concerns work was not being performed properly.[10] [418:9-21, 453:2-454:2.]

With the record evidence thus debunking all the factual assertions in which the ALJ predicated his determination that Tower treated Ruvalcaba disparately, his determination that Ruvalcaba should be excused from his poor work performance is erroneous, and cannot stand.

D. BY FINDING THE GENERAL COUNSEL SHOWED A PRIMA FACIE VIOLATION OF THE ACT UNDER *WRIGHT LINE* BASED ON FACTUAL FINDINGS UNSUPPORTED BY AND AT ODDS WITH THE RECORD, THE ALJ BOTH IMPROPERLY EXCUSED THE GENERAL COUNSEL FROM MEETING THE BURDEN TO SHOW A VIOLATION OF THE ACT AND IMPROPERLY FOUND TOWER'S REASONS FOR TERMINATING RUVALCABA AND RAMOS WERE NOT LEGITIMATE

Under the Board's *Wright Line* test, the General Counsel has the burden to establish a prima facie violation of the Act by a preponderance of evidence. *NLRB v. Louis A. Weiss Mem'l Hosp.*, 172 F.3d 432, 442 (7th Cir. 1999); *Ironwood Plastics*, 345 NLRB at 1252; *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999). Failure to meet this prima facie burden mandates dismissal of the underlying unfair labor practice charge. *Majestic Towers*, 353 NLRB No. 29, slip op. at 20, 55 (2008).

As demonstrated, the ALJ's concluded that the General Counsel satisfied its prima facie burden to show a violation of the Act with respect to both Ruvalcaba and Ramos by fabricating a series of facts nowhere supported by the record and by making numerous factual findings that flatly contradict and otherwise lack support in the record. By thus finding a prima facie violation

(..continued)
disciplining numerous technicians, Tower then blocked the maintenance technicians' access to the Internet *after* Ruvalcaba's termination. [718:5-25, 724:6-19.]

[10] The ALJ also asserted that Plomann conceded during the hearing that he knew other technicians used the Internet substantially more than Ruvalcaba and Ramos. [ALJ 7, n.26.] Once again, this fact is an absolute invention – Plomann was not even asked any questions about his knowledge of other employee Internet use.

of the Act on clearly erroneous factual predicates, the ALJ effectively excused the General Counsel from meeting its burden to show a prima facie violation of the Act – which the above facts demonstrate the General Counsel did not do. Having thus relied on false evidence of union animus and erroneous indicia of pretext, the ALJ also ignored the fact that Tower affirmatively and credibly proved it had good faith and legitimate reasons to discipline and terminate Ruvalcaba and Ramos, and would have done so regardless of their Tower-welcomed union activity. Because it thus misapplied *Wright Line* through the finding on numerous incorrect facts, the ALJ's Decision must be rejected by the Board, and Ruvalcaba's and Ramos' unfair labor practice charges should be dismissed.

IV. CONCLUSION

The ALJ's March 31, 2009 Decision is riddled with factual findings that both lack any support in and unambiguously contradict the record. Because the ALJ's findings that Tower violated the Act relies upon such improper factual findings, his Decision is clearly improper and must be overruled.

Tower thus respectfully requests the Board set aside the Decision and dismiss Ruvalcaba's and Ramos unfair labor practice charges.

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STATEMENT OF SERVICE

I hereby affirm that on April 28, 2009, I served this "**RESPONDENT'S POST-HEARING BRIEF**" on Lisa Friedheim-Weis, Esq., Counsel for the General Counsel, by attachment to an electronic mail message sent to the following address:

Lisa.Friedheim-Weis@nlrb.gov

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

By: /s Christopher G. Ward
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