

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 TOWER AUTOMOTIVE OPERATIONS, USA I, LLC'S REPLY TO
COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF ON TOWER'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”) respectfully submits the following Reply to Counsel for the General Counsel’s Answering Brief to Tower’s Exceptions to the March 31, 2009 Decision issued by Administrative Law Judge Michael A. Rosas (“ALJ”).

I. TOWER’S EXCEPTIONS TAKE ISSUE NOT WITH THE ALJ’S CREDIBILITY DETERMINATIONS, BUT RATHER WITH THE FACT THAT HIS FACTUAL DETERMINATIONS, CRUCIAL TO THE HIS LEGAL FINDINGS, DO NOT SQUARE WITH AND EXIST ENTIRELY OUTSIDE THE RECORD EVIDENCE

A. THE BOARD SHOULD OVERTURN THE DECISION BELOW BECAUSE THE ALJ’S FACTUAL FINDINGS FLY IN THE FACE OF THE EVIDENCE, NOT BECAUSE OF ANY CREDIBILITY CONCLUSIONS

Pointing to the National Labor Relations Board’s long-standing and established general policy not to overturn an administrative law judge’s credibility resolutions unless such resolutions are manifestly contrary to the record evidence, the General Counsel’s Answering Brief simply restates the arguments presented in her brief to the ALJ and repeatedly contends that Tower’s exceptions are little more than an expression of dissatisfaction with the ALJ’s decision to credit the General Counsel’s witnesses over its own. On the basis of such credibility arguments, the Answering Brief claims that there is absolutely no basis to overturn the ALJ’s decision that Tower’s disciplinary actions toward Juan Ruvalcaba and Steven Ramos violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act (the “Act”). These assertions ignore the fundamental basis for Tower’s exceptions to the ALJ’s Decision.

Tower acknowledges the Board’s historic reluctance to overturn an administrative law judge’s ruling on the basis of disagreements over credibility findings. However, it would be quite another thing for the Board to uphold a finding that the Act has been violated when that conclusion rests not upon a weighing of diverging versions of the evidence, but rather upon factual findings that lack any basis in the record evidence and that unmistakably contradict the uncontroverted evidence. *See ITT Automotive. v. NLRB*, 188 F.3d 375, 384 (6th Cir. 1999)

(noting that upholding factual determinations made by the Board requires more than a “mere scintilla” of evidence in support of a fact), *citing Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Servomation, Inc.*, 237 NLRB 48, 48 n.1 (1978) (refusing to validate an administrative law judge’s factual inference that was without factual support in the record).

Such is the situation in the present matter – Tower is not excepting to the ALJ’s Decision on the basis of credibility determinations. Instead, Tower objects to Decision because it rests upon factual findings that not only lack substantial evidence in the record, but that further rely upon purported factual findings reached without any foundation in the record evidence and that directly contradict the record evidence – illustrations for which the General Counsel has virtually no argument and no answer. Indeed, rather than confront the numerous examples of the erroneous “facts” found by the ALJ identified by Tower, the Answering Brief, in all but one example, fails to even address the Decision’s erroneous facts made without evidentiary foundation and that contradict the record. Even in the one example the Answering Brief confronts, the General Counsel concedes the falsity of the ALJ’s determination that Plant Manager Matt Pollick and Maintenance Superintendent Bill Noojin purportedly talked about Ramos’ and Ruvalcaba’s union activity before their terminations, and seeks to simply write off this erroneous factual finding as an inadvertent use of Pollick’s name in place of another Tower employee.¹ With respect to all the other facts found outside the record evidence or in

¹ The General Counsel’s attempt to pass off this admittedly erroneous factual conclusion (Pollick’s and Noojin’s phantom conversation about Ramos’ and Ruvalcaba’s union activity) as a simple case of mistaken identity would perhaps be believable had the Answering Brief identified any evidence that any two Tower supervisors ever talked about Ruvalcaba’s and Ramos’ union activity. Instead, the record lacks any evidence that any such conversation ever occurred between any Tower management employees. Furthermore, in light of the fact that the Decision invents numerous other “facts” about Pollick in an attempt to suggest he masterminded some scheme to terminate Ruvalcaba (for example, that Pollick purportedly directed Human Resources Manager Greg Watts to suspend Ramos and Ruvalcaba, or that Pollick supposedly asked specifically about Ruvalcaba’s and Ramos’ work activities to look for ways

contradiction to such evidence, the Answering Brief cites to no portion of the record that could somehow explain the ALJ's disregard for the evidence, nor does it identify any evidence that could support any of the "facts" identified by the ALJ for which there is no record support. With no substantive answer for Tower's arguments, the Answering Brief's attempt to disguise the Decision's errors as the simple product of credibility determinations is thus entirely unavailing.

B. BECAUSE THE ALJ'S ERRONEOUS FACTUAL CONCLUSIONS PROVIDE THE CENTRAL BASIS FOR HIS FINDING OF VIOLATIONS OF THE ACT, THE DECISION MUST BE OVERTURNED

Not only would it be error to simply write off the ALJ's erroneous factual findings as innocent and meaningless errors or simple cases of mistaken identity, it would further be error to uphold the ALJ's Decision on the theory that the erroneous factual findings are simply harmless error. Rather, because the Decision's factual conclusions provide the critical bases for the assertion that both Ramos' and Ruvalcaba's terminations violated the Act, the ALJ's improper findings of the commission of unfair labor practices must be rejected.

With respect to Ramos, the ALJ unambiguously stated that Watts' purported decision to treat Ramos' lockout/tagout ("LO/TO") violation differently than the previous LO/TO violation of which Watts supposedly learned was the exclusive reason why the ALJ found Tower violated the Act with respect to Ramos. This was no minor error – rather, because the conclusion that Watts knew of a previous LO/TO violation and chose to depart from that precedent is clearly contradicted by the evidence [see Tower's Brief at pp. 14-16], the ALJ's finding of a violation of the Act relative to Ramos cannot stand. Similarly, the ALJ's conclusion that Ruvalcaba's termination violated the Act rests upon two fundamental precepts – that Pollick bore Ruvalcaba animus because of his union activity and that Tower, through Pollick, constructed a scheme to set

(..continued)

to pretextually discipline them [see pp. 24-25 of Tower's Brief in Support of its Exceptions]), the Answering Brief's "mistaken identity" explanation is simply impossible to accept.

up Ruvalcaba for pretextual termination. Both of these factual predicates contradict the record and lack any support in that evidence, particularly where the record shows that Tower's purported dislike of Ruvalcaba was fully formed before his involvement in union business and for reasons indisputably unrelated to his union involvement. The record evidence further shows that Pollick's purported scheme to terminate Ruvalcaba was built upon conversations found by the ALJ that in fact never occurred, on statements attributed to Pollick by the ALJ that no witness testified to, and on a complete disregard of the extensive – and uncontroverted – evidence that Pollick actually encouraged Ruvalcaba's union activity.

As a result, and identically to the Decision's findings vis-à-vis Ramos, the foundation of the Decision's conclusion that Ruvalcaba's terminated violated the Act is built upon false facts such that the conclusions constructed thereon cannot survive. When the Decision is properly stripped of the ALJ's unsupported factual findings, it becomes inexorably clear that no violation of the Act occurred neither with respect to Ramos nor to Ruvalcaba. The Board thus cannot simply write off the ALJ's making of such evidentiary unsustainable factual findings as harmless error, and instead should reject the ALJ's Decision in its entirety.

II. CONCLUSION

With it clear that the ALJ found violations of the Act not upon credibility determinations, but rather upon crucial factual assertions that both contradict and have no basis in the record evidence, the conclusions reached in the written Decision are clearly erroneous and cannot stand. Respondent Tower Automotive Operations USA I, LLC therefore respectfully requests that the Board reject the proposed Decision and the erroneous findings of fact and conclusions of law therein, and dismiss Ruvalcaba's and Ramos' unfair labor practice charges in their entirety.

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STATEMENT OF SERVICE

I hereby affirm that on May 22, 2009, I served this “**RESPONDENT TOWER AUTOMOTIVE OPERATIONS, USA I, LLC’S REPLY TO COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING BRIEF ON TOWER’S EXCEPTIONS TO THE MARCH 31, 2009 DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS**” 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 further hereby affirm that on May 22, 2009, I served this “**RESPONDENT’S POST-HEARING BRIEF**” upon Juan Ruvalcaba and Steven Ramos, Parties, by attachment to an electronic mail message sent to the following addresses:

Juan G. Ruvalcaba
jruvrv12@aol.com

Steve Ramos
stevebbq@wowway.com

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

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