Tower Automotive Operations USA I, LLC *and* Juan Ruvalcaba *and* Steve Ramos. Cases 13–CA–44668 and 13–CA–44894

January 15, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The issue in this case is whether Tower Automotive Operations USA I, LLC (Tower) terminated employees Juan Ruvalcaba and Steve Ramos in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. We find that the General Counsel has failed to prove that Tower violated the Act.[1]

Facts

Tower manufactures parts for automobile companies. Its maintenance technicians are represented by United Auto Workers, Local 3212. The parties' last collective-bargaining agreement expired in October 2006.

Tower has not maintained a comprehensive employee training policy. In the absence of a policy, Tower preferred to train less senior technicians before more senior technicians. The Union favored seniority-based training, and filed several grievances on this point between January and May 2008.[2]

In February and March, Plant Manager Matthew Pollick and Union Chairman Edward Kendall agreed to charge the skilled trades committee (a joint labor-management committee) with developing a comprehensive training policy. There were several labor vacancies on the committee that needed to be filled. Plant Manager Pollick asked Union Chairman Kendall not to appoint maintenance technician Juan Ruvalcaba, who had an extensive disciplinary history.[3] Despite Pollick's request, Kendall appointed Ruvalcaba and designated him as committee chairman; Kendall also appointed maintenance technician Steve Ramos. Prior to their appointments, neither Ruvalcaba nor Ramos had played an active role on behalf of the Union.

The committee met on March 18, and the members discussed, among other issues, the issue of whether training assignments would be based on seniority. Ruvalcaba, Ramos, and Pollick all testified that the meeting was constructive and amicable.[4] Pollick even suggested that the local union invite a representative from the International Union to aid the committee. Contrary to the judge's finding, there is no evidence of discord at this meeting.[5]

On March 28, Tower formally audited Ruvalcaba's and Ramos' work.[6] The audit confirmed discrepancies in their work reports and unsatisfactory work product.

At approximately the same time, Tower also reviewed their internet records, which detailed their use of company computers to access the internet. Ramos and Ruvalcaba had visited various internet sites, most of which were not work related. Tower has a policy of restricting computer use to business-related purposes, but had not

[1] On March 31, 2009, Administrative Law Judge Michael A. Rosas issued the attached decision. Tower filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Tower filed a reply brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

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 Liebman and Member Schaumber 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. See *Teamsters Local 523 v. NLRB*, ___F.3d___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] Unless otherwise stated, all dates refer to 2008.

[3] Pollick testified, without contradiction, that Ruvalcaba's prior transgressions were serious enough to warrant discharge.

[4] At trial, Ruvalcaba testified that the March 18 meeting ended "real well . . . everybody was happy." Ramos similarly testified that the March 18 meeting "ended on a . . . positive note." When asked if he would describe the committee meeting as adversarial, Pollick testified, "No. No, I think, as a matter of fact . . . the only disagreement we had, and at least at that point, was over the sequence of training. And that was, I'd say, relatively minor."

[5] Based on the union grievances, the judge found that there was an "undercurrent of discord" at the committee meeting. Because of the consistent testimony quoted above and because the record fails to illuminate fully the circumstances surrounding those grievances, we do not adopt the judge's finding.

[6] The record does not support the judge's finding that Maintenance Superintendent William Noojin "directed [Maintenance Supervisor Don] Plomann to inform Ramos and Ruvalcaba that their work would be audited." While the judge credited Ruvalcaba's and Ramos' testimony that Plomann informed them of the audit, there is no evidence that Noojin directed Plomann to do so.

previously disciplined an employee for accessing non-work-related websites.[7]

Several days later, on April 3, Ruvalcaba learned that Tower had again selected less senior technicians for training. Ruvalcaba telephoned Pollick to object to the selection, and they agreed to meet the next day to discuss the issue.

On April 4, based upon the results of the work audit and review of internet records, Tower charged Ruvalcaba and Ramos with falsification of work reports and internet abuse and suspended them without pay. Together, these 2 infractions would have resulted in 13 disciplinary points. Under Tower's disciplinary policy, the accumulation of 10 points over a 12-month period subjects an employee to termination.

The Union grieved the discipline. At a grievance meeting on April 8, Pollick accepted Ruvalcaba's and Ramos' explanation that the discrepancies in the work reports were due to poor communication, rather than an attempt to mislead. He therefore agreed to reduce the falsification charge to one of poor work performance, worth three disciplinary points. Pollick refused to dismiss or reduce the internet abuse charge, however, and imposed three points for that infraction.[8] Thus, Tower imposed only six disciplinary points on each employee. After this discipline, Ruvalcaba had a total of 15 points, and Tower terminated him. Because Ramos did not have any prior disciplinary points, Tower reinstated him with backpay.

On May 28, two supervisors observed Ramos working on a machine without following a required safety procedure known as "lock-out/tag-out." Under Tower's disciplinary policy, the intentional disregard of plant safety rules warrants 10 disciplinary points and, as a result, termination. To determine whether Tower's past disciplinary practices deviated from this policy, Human Resource Manager Greg Watts, who had been with Tower since October 2007, reviewed employees' personnel files and talked with line supervisors. Watts testified, without contradiction, that he failed to uncover any prior violation of the "lock-out/tag-out" procedure, and, thus, found no past practice with respect to the discipline for this particular safety infraction.[9] Watts therefore terminated Ramos in accordance with Tower's disciplinary policy. At trial, Pollick testified that Supervisor Plomann and another employee had violated this safety procedure in either 2004 or 2005, but he could not recall the specific level of discipline. In addressing this testimony, Watts speculated that those infractions must have resulted in undocumented verbal counseling given that he had found no documentation of the infractions in their personnel files.

Judge's Decision

The judge concluded that Tower unlawfully terminated both Ramos and Ruvalcaba.[10] In making this finding, the judge relied on several factors. First, he found that Pollick harbored personal animosity toward Ruvalcaba based on the events that led to Ruvalcaba's prior discipline. Second, he found that the formal work audit and review of internet records were unprecedented. Third, the judge found the timing of the discipline suspicious. He observed that the work audit and review of internet records occurred within days of Ruvalcaba's and Ramos' union activity. Fourth, he found that Tower engaged in disparate treatment by disciplining Ruvalcaba and Ramos for internet abuse and by discharging Ramos for violating the "lock-out/tag-out" procedure. Finally, the judge concluded that the justifications offered for the discipline were pretexts.

Discussion

The proper analytical framework for reviewing the General Counsel's allegations in this case is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that framework, the General Counsel must prove by a preponderance of the evidence that animus toward an employee's protected activity was a substantial or motivating factor in the adverse employment action. If the

[7] It was apparently common practice for both employees and supervisors to use the Company's computers to access the internet for non-work-related purposes. Instead of imposing discipline for this misconduct, Tower blocked further internet access for offending employees.

[8] We do not rely on the judge's finding that Pollick stated at the grievance meeting that Tower had a list of the top 10 internet users and that neither Ruvalcaba nor Ramos was on it. The judge did not address the inconsistency between this finding and Tower's admission that, during its investigation of Ruvalcaba and Ramos, it did not pull the internet records of any other employee. The judge's finding would not affect our decision in any event.

[9] The judge did not discredit Watts' testimony that he found no previous examples of "lock-out/tag-out" violations. Thus, the judge's finding that Watts' investigation "uncovered one similar violation – by Plomann" is not supported by the record.

[10] There are no exceptions to the judge's finding that the allegation concerning Ramos' April discipline was time-barred under Sec. 10(b). Of course, the April discipline may "shed light on the true character" of Ramos' later termination. See *Machinist Local 1424 v. NLRB*, 362 U.S. 411, 416 (1960). There are also no exceptions to the judge's dismissal of the allegation that Tower unlawfully failed to consider Ramos for a promotion.

At trial, Tower failed to call Maintenance Supervisors David Salgado and Frank Pena. The General Counsel asked the judge to draw an adverse inference against Tower. The judge refused to do so, stating, "Such an inference should be drawn only where the requesting party provides a sufficient notice at trial to the party against whom it requests such action." We need not pass on the judge's statement as no party excepted to it.

General Counsel makes the required initial showing, the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the employee's protected activity. See, e.g., *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1224 (2004).

Contrary to the judge, we conclude that the General Counsel failed to prove that animus toward Ramos' and Ruvalcaba's union activity was a substantial or motivating factor in Tower's decision to terminate either employee. When determining whether antiunion animus motivated an adverse employment action, all the relevant circumstances must be considered. Here, there are a number of facts, which the judge did not take into account, that substantially undermine the case for finding unlawful motive.

As noted above, neither Ruvalcaba nor Ramos played an active role on behalf of the Union other than their participation on the committee that addressed the training policy issue, the skilled trades committee. There is no direct evidence that Tower harbored animus against the Union or union activity generally. Nor is there evidence that Tower harbored animus against the Union's advocacy of seniority-based training, the issue in which Ruvalcaba and Ramos were involved. For instance, there is no evidence of discord during the skilled trades committee meeting at which seniority-based training was discussed. Despite Tower's and the Union's disagreement on the subject, all agree, including Pollick, Ruvalcaba, and Ramos, that the meeting was constructive and amicable. Indeed, Pollick encouraged greater union involvement in the matter when he suggested that the local union invite the International Union to participate.

Ramos: Tower's conduct at the April grievance meeting further undermines any suggestion of antiunion animus directed against Ramos. Based on the work audit and review of internet records, Tower originally charged Ruvalcaba and Ramos with falsification of work reports and internet abuse, which together would have resulted in 13 disciplinary points and termination of both employees. During the grievance meeting, however, Pollick accepted Ruvalcaba's and Ramos' explanation that the discrepancies in their work reports were due to poor communication, and he agreed to reduce the falsification charge to one of poor workmanship. As a result, instead of terminating Ramos in April, Tower reinstated him with backpay. Had Tower actually been motivated to terminate Ramos because of his union activity, it could have done so simply by rejecting the employees' proffered explanation for the discrepancies. The fact that Tower retained Ramos in April, when it could have discharged him, strongly suggests that it was motivated by something other than animus when it terminated him in June.

While Tower's discipline of Ramos differed from its prior discipline of the other individuals who had violated the "lock-out/tag-out" procedure, the General Counsel failed to prove that Tower's decision evidenced antiunion animus. Human Resource Manager Watts was hired approximately 2 years after the previous infractions, so he would not necessarily have had personal knowledge of Tower's past disciplinary actions. Watts also testified, without contradiction, that his investigation failed to uncover those past actions. As a result, Watts terminated Ramos in accordance with Tower's established disciplinary policy. Under the circumstances, we are not persuaded that Tower's termination of Ramos was unlawful.

Ruvalcaba: Tower's termination of Ruvalcaba presents a closer question because of the circumstances surrounding his termination. However, we again find, contrary to the judge, that the General Counsel failed to prove that animus toward Ruvalcaba's union activity was a substantial or motivating factor in Tower's decision to terminate him. Ruvalcaba's only union activity consisted of supporting seniority-based training in the skilled trades committee and of objecting to Tower's selection of less senior employees for training.[11] But, as explained, there is simply no direct evidence that Tower harbored animus against the Union's advocacy of seniority-based training. Thus, we cannot agree with the judge that Tower disciplined Ruvalcaba "all because" he advocated seniority-based training. While it does appear that Pollick held a poor view of Ruvalcaba, given his request that Ruvalcaba not be placed on the skilled trades committee, Pollick's view appears to be based not on hostility toward Ruvalcaba's union activity, but instead on Ruvalcaba's disciplinary record, which was the basis on which Pollick urged Kendall not to appoint Ruvalcaba to the committee.[12]

Admittedly, there is some evidence suggestive of an unlawful motive. Tower conducted an unprecedented work audit and review of internet records. Tower disciplined Ruvalcaba shortly after he engaged in union activity. And Tower departed from its practice of simply blocking internet access for those who engaged in internet abuse. Depending on the circumstances, one could

[11] The record does not support the judge's finding that Noojin had a conversation with Pollick or anyone else regarding Ruvalcaba's and Ramos' union activities prior to the work audit and review of internet records.

[12] The General Counsel did not argue, and the judge did not find, that Tower's discharge of Ruvalcaba was intended to effectively punish the Union for having appointed Ruvalcaba to the skilled trades committee, over Pollick's objection.

infer animus from such conduct. See, e.g., *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), petition for review dismissed 2004 WL 210675 (D.C. Cir 2004). However, the totality of the facts fails to support such an inference in this case, where the theory is retaliation against Ruvalcaba for his union activities and not, as noted above, because the Union appointed him to the skilled trades committee in the first place over Pollick's objection, based on his disciplinary record.

Based on all of the facts before us, therefore, we conclude that the General Counsel failed to prove by a preponderance of the evidence that Tower acted unlawfully when it terminated Ramos and Ruvalcaba.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 15, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lisa Friedheim-Weiss, Esq., for the General Counsel.
Bennett L. Epstein and *Christopher G. Ward, Esqs.,* of Chicago, Illinois, for the Respondent.

DECISION*

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois, on January 26–29, 2009. The charge in Case 13–CA–44668 was filed by Juan Ruvalcaba on April 23, 2008,[1] and amended on April 30. The charge in Case 13–CA–44894 was filed by Steven Ramos on August 26, and amended on October 17. The complaint issued October 30, alleging that the Respondent, Tower Automotive Operations USA I, LLC, violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by suspending Ramos and Ruvalcaba on or about April 4, discharging Ruvalcaba on or about April 8, and discharging Ramos on or about June 1, because they assisted and supported the United Auto Workers Local 3212, AFL–CIO (the Union) and engaged in union activities. The Respondent admits the jurisdictional allegations, but denies the material allegations and asserts that Ramos' charge that he was unlawfully suspended on April 4 is time barred pursuant to Section 10(b) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation, is engaged in the business of manufacturing automobile parts at its facility in Chicago, Illinois, where it annually purchases and receives goods, products, and materials valued in excess of $50,000 directly from points outside the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The Respondent's Chicago facility (the facility) produces automobile parts for sale to automobile manufacturers. The Ford Motor Company is the Respondent's largest customer. Prior to March, the facility, which is approximately the size of a football field, operated two production shifts. The first shift begins in the morning; the second shift begins in the afternoon. Production personnel are supported by maintenance technicians, who are responsible for ensuring that assembly lines are running, repairing broken machinery and equipment, and performing routine maintenance work.[2]

From March 21 to April 3, 2008, there was a production shutdown. During the shutdown, the facility did not produce parts and production employees were furloughed. Approximately 32 maintenance technicians and utility technicians, however, performed maintenance and preventive maintenance work during the shutdown on two shifts—a day shift from 6 a.m. to approximately 2:30 p.m., and an afternoon shift from approximately 3:30 p.m. to 1 a.m. Maintenance employees were assigned to perform either preventive maintenance or repair work on the production machinery and equipment. Their work was recorded on preventive maintenance worksheets, commonly referred to as PM sheets. Each PM sheet contained a checkoff list of categories of work specific to a piece of equipment or machinery.[3]

B. The Parties

The Respondent's supervisors involved in this controversy include: Matt Pollick, the plant manager; Greg Watts, the facility's human resources manager; Eric Tuley, an engineering/maintenance manager; William Noojin, a maintenance su-

* Corrections have been made according to an erratum issued on April 15, 2009.

[1] All dates are in 2008, unless otherwise indicated.

[2] Tr. 21, 196–197, 305.

[3] As witness estimates varied widely as to the number of maintenance technicians employed by the Respondent, I relied on the Respondent's internet usage report for the period of March 17 to April 2. It lists 31 names, but omitted any mention of Ruvalcaba, so I determined there was a total of at least 32 maintenance technicians and utility technicians. (GC Exh. 11.)

perintendent; and Don Plomann, a maintenance supervisor.[4] The discriminatees, Ruvalcaba and Ramos, were employed by the Respondent as maintenance technicians on the 3:30 p.m. to 1:30 a.m. shift at the north end of the facility. Plomann was their immediate supervisor. Ruvalcaba was hired in May 2004; Ramos was hired in January 2005. Ramos and Ruvalcaba were also members of United Auto Workers Local 3212, AFL–CIO (the Union) which represented the hourly employees, including the maintenance technicians, at the Respondent's facility. Prior to March, Ruvalcaba was an alternate member to the skilled trades and bargaining committees. However, neither Ruvalcaba nor Ramos had any interaction with the Respondent on behalf of the Union prior to March.[5]

Prior to March, neither Ruvalcaba nor Ramos was ever disciplined, audited, or given a negative evaluation regarding their work performance. Nor was any supervisor concerned about their work performance.[6] Ruvalcaba was, however, previously disciplined on two occasions. The first occurred in June 2007, when he left the facility during a shift without punching out and, upon returning, refused a requested drug and alcohol test. The second occurred in September 2007, when Ruvalcaba engaged in a physical altercation with several other employees. As a result of union intervention, Ruvalcaba avoided the maximum number of disciplinary points, but still ended up with nine points—one short of mandatory termination—as of March 1. These disciplinary events were preceded, however, by incidents involving Ruvalcaba that caused Pollick additional consternation. Sometime in 2006, Ruvalcaba's car was vandalized in the parking lot. Upon seeing police arrive in the parking lot, Pollick said, "[T]here goes Ruvalcaba again." Subsequently, Ruvalcaba filed a claim with the Respondent for compensation.[7]

C. The Respondent's Policies and Practices

The Respondent's policies and procedures at issue involve those relating to discipline, internet usage, evaluating or auditing employees, and training. The Respondent's written disciplinary policy, effective February 10, 2006, lists 37 types of infractions that will result in the issuance of disciplinary points, including 3 for infractions involving the "[f]ailure to meet established performance expectations" or "[m]isuse or abuse of Company provided technology." The policy further accords 10 points both for "[f]alsifying employment records, including timecards, training sheets, maintenance records, quality documents, etc." and "[i]ntentional disregard or bypass of safety rules, requirements or equipment." An accumulation of 10 disciplinary points over a 12-month period subjects an employee to termination.[8]

All employees, upon their hire, including maintenance technicians, acknowledge in writing that they will comply with the Respondent's internet usage policy by using company computers only for business-related purposes.[9] Prior to March, maintenance technicians were logged on to the internet on a regular basis. While internet access for some maintenance technicians was blocked because of excessive use in accessing nonwork-related websites, none was ever told by a supervisor to refrain from such activity. Nor did the Respondent ever discipline any employee for excessive or nonbusiness-related use of company computers while working.[10]

Beyond its disciplinary and internet usage policies, the Respondent's operations were not governed by written policies and procedures. Prior to March, the Respondent had a practice of writing up employees, including maintenance technicians, for poor work performance. It did not, however, have a policy or practice, written or otherwise, of auditing the work of employees.[11] Nor did the Respondent have any written training policies and procedures.[12]

D. The Skilled Trades Committee

The Respondent and the Union have been without a collective-bargaining agreement since the expiration of the last one on October 10, 2006. As a result, the provisions for grievances, arbitration procedures, and training programs also expired at that time. Notwithstanding the absence of an agreement, after arriving at the facility in or around April 2007, Pollick periodically discussed with employees and union representatives the need to establish a training program for employees in the skilled trades, including the maintenance technicians. The most recent series of discussions began in February when Pollick and Tuley spoke with Edward Kendall, an assembler and the Union's bargaining unit chairman, about filling labor vacancies on the skilled trades committee. At that time, Pollick asked Kendall if he was going to appoint Ruvalcaba to the committee. Kendall responded that he did not know yet who he would appoint. Pollick urged Kendall to appoint Ron Spencer, a maintenance technician with no disciplinary history, to be the Union's designee on the committee.[13]

Kendall did not take Pollick's advice and appointed Spencer to the committee. Instead, in a letter faxed to Watts on March

[4] The Respondent, in its answer, concedes that these individuals were statutory supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act, respectively. (GC Exh. 1(p).)

[5] It is undisputed that neither Ramos nor Ruvalcaba played an active role on behalf of the Union prior to March. (Tr. 23–24, 198–201.)

[6] Pollick, Plomann, Noojin, and Watts conceded that, prior to March, none had concerns with the previous work performance of either Ramos or Ruvalcaba. (Tr. 467–470, 534–535, 572, 706–708.)

[7] The accuracy of Ruvalcaba's disciplinary history prior to March is not disputed. (Tr. 281, 394–396, 402–405.)

[8] R. Exh. 6.

[9] There is no question that Ramos and Ruvalcaba agreed to, and were aware of, this policy. (R. Exhs. 2, 7.)

[10] Pollick and Watts acknowledged that there was no practice of disciplining employees for excessive or nonbusiness-related use of the internet until action was taken against Ramos and Ruvalcaba in March and April. (Tr. 453–455, 463–464, 699, 706.)

[11] Watts conceded the absence of such a policy or practice prior to March. (Tr. 707–708.)

[12] It was not disputed by Pollick, Ramos, and Ruvalcaba that the Respondent lacked a written training policy or schedule and that any training was provided on an ad hoc basis without regard to seniority. The culprit for this void appeared to be the lack of a collective-bargaining agreement and the inability of the Respondent and the Union to engage in any meaningful discussions on training since the agreement expired. (Tr. 25–27, 202, 423–425, 444–447, 494–495.)

[13] There is no dispute that Pollick preferred Spencer, a person he deemed of higher character than Ruvalcaba, for the committee. (Tr. 308–309, 401–405, 427–428, 446–447, 493.)

5, he appointed Ruvalcaba to the committee and designated him chairman of the skilled trades safety subcommittee. Kendall also took the opportunity to name Ruvalcaba to the Union's bargaining team. Kendall also faxed another letter to Watts on March 20 appointing Ruvalcaba and Ramos as union representatives to the skilled trades committee.[14] This was the first instance in which Ramos and Ruvalcaba became actively involved in union activity.[15]

Ruvalcaba convened the first meeting of the newly-constituted skilled trades committee on March 18. The others in attendance included Pollick, Ramos, Spencer, O. Jamison, Frank Angel, Leo Williams, Tuley, and Noojin. During the meeting, Ramos raised the issues of training, apprenticeship programs, and electrical safety for maintenance technicians. Ruvalcaba raised the issue of seniority with respect to training opportunities for maintenance technicians. Pollick was receptive to the suggestions raised, including training development. However, while the meeting was mostly civil, there was an undercurrent of discord as the result of several grievances filed between January and March by maintenance technicians who were upset that newly hired technicians were being selected for training first. Consistent with the Respondent's position at those earlier grievance meetings, Pollick disagreed with the notion that training should be offered on the basis of seniority. He felt that the newer and, thus, more inexperienced technicians should be afforded training.[16]

E. Employee use of the Internet

Since 2004, when the facility began operating, until May 2008, maintenance technicians, including Ramos and Ruvalcaba, regularly used the computer terminals near their work areas to access and search the internet—a process commonly referred to as "surfing" the internet. Since January 1, 2007, at the earliest, and continuing regularly through May 2008, several other of the Respondent's maintenance technicians regularly used the internet during worktime as much or more—even much more—that Ramos or Ruvalcaba, and throughout this time period other technicians regularly accessed websites that were not business related, such as sites providing information on the weather forecast, automobiles for sale, news developments, retail specials, and real estate offerings.

Prior to April 4, the Respondent would occasionally block certain employees from internet access due to excessive use. No maintenance technicians, however, including Ramos and Ruvalcaba, were ever informed by a supervisor of their excessive use of the internet for nonwork reasons. Nor were they ever disciplined or warned to refrain from surfing the internet on the Respondent's computers for nonwork-related reasons.[17]

On a few occasions during the March shutdown, Ramos, accompanied by Ruvalcaba, accessed the Respondent's computers for the purpose of obtaining information from the Respondent's intranet website regarding the Respondent's Programmable Logistics Control (PLC) software.[18] However, most of the time, Ramos was surfing the worldwide website for nonwork-related reasons.[19] They also did this with Plomann during their lunch or break periods on two or three occasions. Plomann's interests included a custom-manufactured Corvette automobile and real estate listings.[20] In any event, the Respondent's internet usage reports for the maintenance department during March and April indicated that several other maintenance technicians viewed significantly more nonwork-related internet sites than Ramos and Ruvalcaba.[21]

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[14] The Respondent sought to show at trial that Kendall did not notify the Respondent of his decision appointing Ruvalcaba and Ramos until May 27, the date indicated on the fax transmission stamp of a copy of the letter. However, that fax transmission was sent to the office of the Board's General Counsel, not the Respondent. As such, Kendall's testimony that he faxed both letters to Watts on those dates was credible and corroborated by the printout generated by his office's fax machine confirming those fax transmissions. (GC Exhs. 6–8; Tr. 24–26, 200–201, 309–319.)

[15] I did not credit Kendall's testimony that Ruvalcaba and Ramos attended grievance or negotiating meetings prior to being appointed by Kendall in March and that harsh words were exchanged at some of those meetings. First, it was inconsistent with Ruvalcaba's account of his union involvement. Second, he had a poor recollection of dates and qualified his answer by saying that the meetings occurred "approximately" during that time. (Tr. 343–351.)

[16] Pollick conceded that he disagreed at this meeting with Ruvalcaba and Ramos regarding the order of training opportunities for maintenance and utility technicians. Pollick wanted the newer employees to receive the training first. Ramos and Ruvalcaba wanted training offered on the basis of seniority. Given the nature of the meeting, the conversations that ensued, and Kendall's notifications on March 5 and 20, that he was appointing Ruvalcaba and Ramos to the committee, Pollick's initial testimony that he was unaware that Ruvalcaba and Ramos were members of the skilled trades committee until later in April was not credible. (Tr. 27–30, 37, 99–100, 202–205, 241–243, 344, 425–427, 447–451, 494, 502.)

[17] This finding incorporates sec. 2 of the stipulation entered into between the parties at trial regarding internet usage by Ramos, Ruvalcaba, and all other technicians and the unrefuted testimony of Ramos and Ruvalcaba as to the extent of their internet usage. (Tr. 52–59, 217–220, 454; GC Exh. 14.)

[18] Although the Respondent produced an internet usage report for the particular period in March and April, it is suspicious that there is no data regarding Ruvalcaba's internet usage during that time. This corroborates Ruvalcaba's testimony that he did not, after being informed he was going to be audited, actually access the internet himself. (GC Exh. 11; Tr. 262.)

[19] I concur with the Respondent's witnesses that Ramos and Ruvalcaba would have had little reason to spend much time on the *repair* of the PLC software, since they were assigned mainly to perform *preventive maintenance* work during the shutdown period. (Tr. 299–300, 510, 532–533.)

[20] I did not credit testimony by Ramos and Ruvalcaba that they needed to access the internet as often as on a daily basis in order to search for technical information's testimony relating to the PLC machinery. In fact, of the 3 days that later became issue, only the PM sheet for March 27 reflects work on the PLC issue. (Tr. 164, 170–171, 263, 299–300; GC Exh. 2(a).) The plant was on shutdown and I credited testimony by Plomann and Noojin that PLC-related issues would not have arisen as often during a production shutdown. (Tr. 532–534, 562–563.) However, Plomann confirmed their testimony regarding their collaborative surfing of the worldwide web and that he never warned them about their internet usage or told them to refrain from such activity. (Tr. 537–538.)

[21] GC Exh. 11.

F. Ramos and Ruvalcaba are Audited

During the February production shutdown, Plomann assigned Ramos and Ruvalcaba to work on the front-body pillar in section 18 of the facility. After production resumed, the Respondent experienced several problems with the front-body pillar.[22] Those problems resulted in a production shutdown at Ford, the Respondent's most important customer. Plomann and Noojin knew that Ruvalcaba and Ramos had performed maintenance work on the front-body pillar during the first shutdown in February. They encountered some problems with that task, but Plomann did not evaluate their work or discuss it with them at or around that period of time.[23] Nor was there an issue with the work performance of Ruvalcaba and Ramos in March prior to the March 21 shutdown, as they completed all of their assignments, in comparison to most technicians, who completed far less of their assigned tasks that month.[24] Nevertheless, at some point between March 18 and 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.[25]

On or around the same day he requested the audit, Pollick asked Plomann about the activities of Ramos and Ruvalcaba. Plomann informed Pollick that he believed Ramos and Ruvalcaba to be spending some of their worktime surfing the internet, although he knew that other technicians used the internet more, and some substantially more, than Ramos and Ruvalcaba.[26] Venturing into an area that he had never been concerned about before, or later, for that matter, Pollick then asked Watts to obtain copies of the internet usage records of Ruvalcaba and Ramos.[27] The records produced indicated that Ruvalcaba and Ramos used the Respondent's computers to access personal e-mail accounts and surf several nonwork-related worldwide websites. The records contained data indicating the websites visited, but none as to the amount of time spent on them. Nor was there data produced regarding the internet usage of other employees and against which the produced information could be compared.[28] Nevertheless, a review of the Respondent's internet usage records going back to at least January 1, 2007, and continuing regularly through mid-March 2008, would have indicated that Ramos and Ruvalcaba regularly used the internet during worktime as much or more than they did during the period of March 17 to April 2, including regularly accessing worksites that were not business related.[29]

Ramos and Ruvalcaba performed their preventive maintenance work during that period of time without incident. There was a minor problem with paperwork—several of the PM sheets for particular machines were not available. As a result, they improvised and marked up the forms used for other machinery in order to use them for the machines in question. As a result, the PM documentation on March 26 for one machine that they serviced and later became an issue—the weld gun—was reflected on the PM sheet for the smart electrode.[30]

Knowing that their work would be audited, Ruvalcaba and Ramos attempted to contact Plomann every night to come and review their work. He never responded, so Ruvalcaba and Ramos contacted Salgado, another shift manager who was not their supervisor, to review their work at the end of each shift. Salgado responded when requested, reviewed their work, and provided them with a verbal approval. At no point did Salgado, Plomann, or any other supervisor inform Ramos or Ruvalcaba during the second shutdown that there was a problem with their work. In fact, Buddell and Salgado did not actually inspect any of the machinery serviced by Ramos and Ruvalcaba until they were asked to do so on March 28.[31] By that time, machinery

[22] Noojin conceded that the front-body pillar machinery frequently encountered problems and malfunctioned. (Tr. 560.)

[23] Plomann's testimony regarding his concern about their performance on the front-body pillar in February was not credible. He could not articulate exactly what, if anything, they did wrong during the February shutdown and confirmed their testimony that he never had discussions with them about their work or took disciplinary or evaluative action as a result. (Tr. 96–97, 513–515, 534, 547; R. Exh. 12.)

[24] Noojin conceded that the Respondent's records showed their March completion rate at 100 percent, which was higher than nearly two-thirds of the other maintenance technicians. (Tr. 575–576; GC Exh. 12.)

[25] Noojin's explanation as to why he asked Plomann about work by Ramos and Ruvalcaba on the front-body pillar, as well as what Plomann told him, was not credible. Plomann, who was their supervisor, took no issue with their work at or around the time it was completed and did not believe in writing up his employees. In other words, Noojin put pressure on Plomann to come up with any negative information as to their work performance. While there is insufficient credible evidence establishing that Plomann was aware of the March 18 union activity by Ramos and Ruvalcaba, it is clear that the audit was not his idea. (Tr. 47–48, 124, 212–213, 517–518, 529, 546–547; R. Exh. 11–12.)

[26] I credited Plomann's testimony that Ramos and Ruvalcaba would walk away from the computer terminal if he was approaching, as they did not credibly deny such activity. However, he did not know what they were doing on the computer and how long they had been there on any occasion. (Tr. 263, 510, 534.) In any event, given the nature and extent of Plomann's internet collaboration with Ramos and Ruvalcaba, and his testimony conceding that others used the internet substantially more than they did, I find it incredible that he would have, in the ordinary course of his activities, expressed concern to Pollick about their furtive movements around the computer station and its impact on their productivity. (Tr. 453–455, 522, 525.)

[27] Significantly, even in July, about 4 months after this incident, Pollick was still unaware that employees' internet access was being blocked, much less the entire maintenance department. (Tr. 462.)

[28] Unlike the internet usage reports produced at trial, these reports did not show the amount of time spent by Ramos and Ruvalcaba on each site or a total amount of time spent on all of them. (R. Exh. 17–18; Tr. 407, 418–419, 451–454, 509–510, 699–701.)

[29] This finding is based on sec. 3 of the stipulation entered into between the parties at trial. (GC 14.)

[30] The Respondent failed to provide any credible testimony or evidence to refute the assertion of Ramos and Ruvalcaba that the PM sheets for the weld gun and other machinery were unavailable. (Tr. 41–46, 210–211; GC Exh. 2(c).)

[31] The General Counsel, citing *Torbitt & Castleman, Inc*., 320 NLRB 907 (1996), and *International Automated Machines*, 285 NLRB 1122 (1987), requests that I draw an adverse inference from the Respondent's failure to call Salgado as a witness. Such an inference should be drawn only where the requesting party provides a sufficient notice at trial to the party against whom it requests such action. How-

previously serviced by Ramos and Ruvalcaba would have been operated prior to the end of the second shutdown period and resumption of production. As such, it would not have been unusual to find grease, dirt, and slag on machinery that had already been serviced during a production shutdown. Nevertheless, there was a significant amount of buildup on some of the machinery assigned to Ramos and Ruvalcaba for service, indicating that the substance had been on the machinery for weeks.[32]

Buddell's written report was hurriedly incorporated the same day into an e-mail by Noojin to Plomann, which was forwarded the next business day, March 31, to Watts.[33] Noojin, responding to an e-mail request by Watts on April 2, accompanied Buddell and Salgado on April 3, the last day of the shutdown, to photograph the various pieces of machinery referenced in Buddell's report. The 15 photographs depicted a broken air regulator, pneumatic valves that were not replaced, and grease, dirt, and slag on or around some of the machines serviced by Ramos and Ruvalcaba during the second shutdown.[34]

G. Ramos and Ruvalcaba are Suspended

On April 3, Ruvalcaba and Ramos learned from other maintenance technicians that the Respondent scheduled utility technicians, not the more senior maintenance technicians, for robotic training. This training development became a cause of concern among many of the maintenance technicians. As a result, Ruvalcaba called Pollick later that day. He told Pollick that maintenance technicians were upset at being bypassed for the training and asked to meet the next day at around 3:30 p.m. to discuss how training opportunities were being implemented.[35]

On April 4, instead of planning to meet with Ruvalcaba and other union representatives later that day, Pollick, Noojin, and Watts decided to take disciplinary action against Ruvalcaba and Ramos based upon the information contained in the audit. At the time of their conversation or conversations, Pollick, Noojin, and Watts were all aware of the involvement of Ruvalcaba and Ramos with the Union and the skilled trades committee, and the Union's concerns about the availability of training opportunities for maintenance technicians.[36] As a result, the meeting between representatives of the Respondent and the Union never occurred.

At or around 3:30 p.m., as Ruvalcaba and Ramos arrived for their shift, they encountered Noojin standing at the entrance. He stopped them, directed Ramos to wait outside, and took Ruvalcaba inside the facility. They proceeded to the conference room, where Watts told Ruvalcaba that he was suspended for falsifying documents and excessive internet usage. Ruvalcaba asked what documents he supposedly falsified. Watts then showed him three PM sheets for March 26, 27, and 28, and asked if Ruvalcaba's signature was on the May 28 sheet. Ruvalcaba denied that it was his signature and demanded to have his shop steward present. He later retracted that statement. Noojin added that Salgado and Buddell, the night-shift supervisors, checked the work. The meeting concluded.

Noojin then called Ramos into the facility. Ramos proclaimed at the outset that, if the meeting was disciplinary in nature, he wanted union representation present. Noojin insisted, however, that the meeting go forward and then Watts informed Ramos that he was suspended for falsifying documents and excessive internet use. He also explained that Ramos and Ruvalcaba filled out PM sheets for 3 days showing work completed which, in fact, was incomplete or not performed at all. Ramos asserted that other maintenance technicians also use the internet, including some whose access has been blocked due to excessive internet use. This meeting also concluded with Watts explaining that Ramos was suspended pending further investigation.[37]

H. The April 8 Grievance Meeting[38]

Ruvalcaba and Ramos grieved their suspensions and a grievance meeting was held on April 8. Pollick, Watts, and Noojin

ever, since Salgado was not called and Plomann did not deny the contentions of Ramos and Ruvalcaba that they had difficulty trying to reach him, I rely on their credible testimony that Salgado approved their work during each shift. In another twist that casts doubt as to the integrity of the purported audit, the Respondent did not ask Salgado and Buddell to actually perform the audit until March 28. 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 28, to monitor the work performance of Ramos and Ruvalcaba. Such scrutiny would have revealed that Salgado was checking their work each night and that Noojin would have directed him to check their PM sheets as well. As a result, Salgado was not aware of the audit and did not check the PM sheets. (Tr. 48–52, 214–217, 604.)

[32] Buddell conceded that the machines that Ramos and Ruvalcaba worked would have gone through startup procedures before production workers returned and that they would have accumulated grease, dirt, and slag. (Tr. 628, 632.) He later clarified, however, that the buildup depicted on one of the machines at issue would have accumulated over the period of 2 to 3 weeks. His opinion in that regard was corroborated by the amount of buildup shown in the photograph and was not rebutted by either Ramos or Ruvalcaba. (Tr. 639; R. Exh. 1N.)

[33] It appears from Noojin's e-mail to Plomann that he asked Buddell and Salgado to do the audit on March 28, and incorporated their report the same day. (R. Exh. 13; Tr. 549, 595.)

[34] Yet another factor detracting from the integrity of the alleged audit was that the photographs relied on as evidence were not taken by Buddell and Salgado during their alleged audit, but rather by Noojin at Watts' direction as part of his process for further action. (R. Exhs. 14 and 1A–1O; GC Exhs. 2(a)–(c); Tr. 596–611, 613, 615, 617, 622, 660–662.)

[35] Pollick, Ramos, and Ruvalcaba provided consistent testimony regarding this conversation. (Tr. 59–61, 220–223, 470–471.)

[36] I did not find credible testimony by either Pollick or Watts that the latter decided, based solely on the results of the audit and independent of any other considerations, to suspend both employees pending an investigation. In addition to the suspicious timing of the disciplinary action taken, I was particularly taken aback by Pollick's conduct in frequently looking at Watts at counsel's table while he testified. On several occasions that I observed, he held up exhibits facing Watts as if to be looking for subtle messages from the latter. (Tr. 667–672.)

[37] There is not much dispute as to what transpired at their suspension meetings on April 4. (Tr. 61–65, 223–229, 553, 556–557, 669–672; GC Exhs. 2(a)–(c).)

[38] I relied on the testimony of Watts, who seemed sure of the date, that the meeting occurred on April 8. Ramos and Ruvalcaba, on the other hand, testified that it occurred around April 7.

attended on behalf of the Respondent. Ramos and Ruvalcaba were accompanied by bargaining unit chairman, Kendall, a shop steward, Leo Williams, and two other union officials, Frank Angel and O. Jamison.

Pollick presented the Respondent's position, explaining that the suspensions were premised on their excessive use of the internet for personal reasons and their work performance on March 26, 27, and 28. He produced the PM sheets for those days and the 15 photographs and gave Ruvalcaba and Ramos the opportunity to explain. While Kendall precluded them from addressing the photographs, Ruvalcaba and Ramos addressed each of the allegations in Buddell's report. Ramos insisted there had been miscommunication. Ruvalcaba initially insisted that he signed only one of the PM sheets, but relented after consulting with his union representative and conceded he signed two of them, while Ramos signed one of the sheets. Ruvalcaba also conceded that he had been in a hurry, forgot to replace certain pneumatic valves, and incorrectly listed them as completed work. Ruvalcaba also explained that he needed to improvise by adapting the form for a weld gun in order to service the smart electrode. As a result of their response, Pollick agreed to reduce the charge of intentionally falsifying documents to poor workmanship.[39]

Pollick then raised the issue of excessive internet usage by Ruvalcaba and Ramos. Ruvalcaba and Ramos insisted they had been provided with access to the internet and asserted, further, that most employees, including Plomann and other supervisors, used the Respondent's computers to access personal websites and accounts. Curiously, Pollick then acknowledged that the Respondent possessed a list of the top 10 internet users, but conceded that neither Ramos nor Ruvalcaba was on it. Kendall then inquired if other employees had been blocked from internet access, an action that would be appropriate in this instance. The meeting ended without resolution, and Ruvalcaba and Ramos remained on unpaid suspension. Angel suggested that the Respondent compromise and Pollick agreed to consider it.[40]

I. Ramos is Reinstated and the Disciplinary Points are Reduced

Watts reinstated Ramos with backpay on April 10. Upon returning, he was told that his discipline would be reduced to a total of six points—three for excessive internet use and three for work performance and paperwork issues. Although he filed a charge regarding the initial discipline of April 4, Ramos returned to work and did not take issue with this determination until he filed an amended charge with the Board on October 16.[41]

J. Ruvalcaba is Terminated

On or about April 16, Pollick, Watts, and Noojin met again with Ruvalcaba, Kendall, and Angel. Ruvalcaba reiterated his position that he completed his assigned tasks and did not abuse his internet access any more than anyone else at the facility. Angel asked that the Respondent mitigate the charges in such a manner as to reinstate Ruvalcaba, but Pollick insisted that the Respondent could not completely overlook Ruvalcaba's third serious transgression within 10 months. As of April 1, Ruvalcaba already had nine disciplinary points in his personnel record from earlier incidents. Although Pollick agreed to reduce Ruvalcaba's discipline to 6 points—the same amount assessed against Ramos—the sanction resulted in a new total of 15 disciplinary points in Ruvalcaba's personnel file. Accordingly, on or about April 22, Ruvalcaba received a letter of termination, effective April 4.[42]

K. Ramos is Never Considered for a Promotion

On April 23, Ramos applied for a promotion to the position of maintenance team leader. However, he was never interviewed for it. The promotion would have resulted in increased pay. The Respondent neither considered nor interviewed him for the position.[43] Instead, he inherited a new supervisor, Frank Pena. There were no problems initially, but Pena started yelling at him in May because he was working slowly. Ramos was not used to such treatment from his previous supervisors.[44] On May 30, while he was still out on suspension for a safety violation committed 2 days earlier, the Respondent rejected Ramos' April promotion application due to that "disciplinary issue."[45]

L. Ramos is Terminated for a Lock-Out/Tag-Out Violation

On May 28, Ramos had been working on his shift for about 3 hours when another maintenance technician requested assistance in another location known as the lower-back area. As he approached the lower-back area, Ramos encountered Pena. Pena began cursing about the fact that the lower-back area was

[39] Noojin and Pollick could not readily distinguish many of the machines depicted in the photographs from similar or identical machines elsewhere throughout the facility. Accordingly, I relied on the explanations of Ramos of Ruvalcaba, coupled with their offer to go and show Pollick what they worked on, that many of the 15 photographs did not accurately depict machinery that they were assigned to service. (Tr. 42, 46, 63–64, 66–73, 122–123, 209–211, 227–233, 258–259, 407–413, 475–476, 565–566; R. Exh. 1A.)

[40] There is no disagreement about this part of the meeting. (Tr. 71–73, 232–233.)

[41] The Respondent correctly notes that Ramos did not take issue with that determination at that time. (GC Exh. 1(l); R. Exh. 6; Tr. 73–74, 674–678.)

[42] The Respondent's witnesses did not shed much light on this discussion, but there is no disagreement as to what transpired at this meeting and the termination letter that issued. (Tr. 235–237, 273–274, 405, 419–420, 423; GC Exh. 5; R. Exh. 20.)

[43] The Respondent does not dispute that Ramos applied for the position, but was neither interviewed nor considered for the position. (Tr. 75–76; GC Exh. 3.)

[44] Again, I refuse to draw the requested adverse inference against Pena, who was not called by the Respondent as a witness. The General Counsel did not provide notice at trial of its intent to request such an inference. Moreover, there is simply insufficient connection between Pena's alleged tirades and Ramos' previous activities with the Union and at the facility. (Tr. 73–75.)

[45] Although there is an issue as to the nature and extent of the Respondent's disciplinary action resulting from the May 28 "tag-out/lock-out" safety violation, discussed infra, there is no question that Ramos committed a safety violation on May 28, and that his promotional application was rejected on May 30. (GC Exh. 3.)

not running, and insisted that Ramos resolve the problem and "get the cell going." After a brief discussion as to how long the repair might take, Pena left the area. Before entering the cell, Ramos attempted to "lock-out/tag-out"—a procedure required whenever a maintenance technician enters a production cell—by attempting to remove the key before entering the cell. Although the key was given to Ramos by Plomann for use on that lock, Ramos could not remove the key from the lock. Pursuant to Occupational Safety and Health Administration (OSHA) safety requirements, a notice was posted on the cell door stating, "STOP! LOCK CELL DOOR WHEN ENTERING." Thus, 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. Nevertheless, after attempting unsuccessfully for several minutes to remove the key from the lock, Ramos entered the production cell in an attempt to quickly resolve the problem, leaving the door open in the process.[46]

Ramos remained in the production cell, which contained a robotic arm and weld parts, for approximately 90 seconds in order to diagnose the problem. While he was in the cell, Ramos received a radio call from David Roe, the production superintendent, requesting his location. Ramos told Roe that he was in the lower-back area, but did not mention his problem with the key and violation of the lock-out/tag-out procedure. Roe and Tuley arrived at the cell a short while later and observed Ramos inside the cell with the door open and the key in the lock. Tuley noticed the key inside the lock and asked Ramos what happened. Ramos explained that he was unable to remove the key from the lock. Tuley responded that there was no excuse for violating the lock-out/tag-out requirement and directed Roe to issue Ramos a disciplinary violation. Ramos simply replied to Tuley that it had been a pleasure working with him.[47]

Shortly thereafter, Tuley and Roe informed Watts about Ramos' safety violation. Watts then contacted Israel Pierson, a materials handler who also served as a union shop steward, to inform him that the Respondent was suspending Ramos. Shortly thereafter, Pierson spoke with Ramos. Ramos provided an explanation and asked Pierson to try to remove the key from the lock. Pierson was unable to do so. Pierson then went to meet with Watts, Tuley, and Roe, taking the lock and key with him. Tuley responded that Ramos could have suffered a fatal injury. During their conversation, Pierson asked Watts to try to remove the key from the lock. Watts complied and attempted to remove the key from the lock several times. He, too, was unsuccessful.[48]

Ramos was then called to a meeting with Watts, Roe, and Pierson. Tuley had already left. Watts informed Ramos that he was suspended for a lock-out/tag-out violation, pending a further investigation. Watts informed Ramos that he was suspended pending a further investigation for a lock-out/tag-out violation. Ramos conceded that he was in the production cell while the key was still in the lock and the door open, but asserted that he could not remove the key from the lock. Watts simply responded that Ramos needed to leave the premises.[49]

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, 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. As those 10 points alone mandated termination, he did not even consider Ramos' disciplinary history, which consisted of 6 points for excessive internet use. Accordingly, on June 4, the Respondent issued Ramos' termination letter.[50]

M. The Respondent Issues a New Internet Policy

On May 1, the Respondent issued a new internet use policy, entitled, "Information Systems Acceptable Use." The new policy stated, in pertinent part, at item 2:

> Colleagues will use Tower information resources for valid business purposes, except that very limited or incidental use for personal nonbusiness purposes is acceptable. Such use must be infrequent, not incur charges against Tower Automo-

[46] It was not disputed that the lock given to Ramos, designated as lock 258, was the correct one for the gate to that cell. (Tr. 80–81.) Nor is it disputed that the OSHA notice was posted on the cell door. (R. Exh. 3; Tr. 649–650.) Furthermore, in evaluating the propriety of the Respondent's response to this incident, it is irrelevant as to whether Ramos' conduct was attributable to pressure by Pena or simple disregard for the applicable OSHA requirement. See 29 C.F.R. § 1910.147(a), et seq.

[47] Tuley testified that, when Ramos saw him approaching, Ramos "immediately grabbed it, opened it up, took the key in and out three or four times in front of Mr. Roe and myself." He also allegedly reported his observations immediately to Watts. (Tr. 644–648.) His version, however, contrasted with Watts' recollection that Tuley told him that he, not Ramos, was able to remove the key from the lock two or three times and insert it again each time. Moreover, Watts' corroborated Ramos' contention by conceding that, he too, was unable to remove the key from the lock. (Tr. 710–711.) Lastly, I find it ludicrous that Ramos, having left the door open, would have gone to the lock and removed the key several times. Accordingly, I found Ramos' version of this incident more credible than the testimony and e-mail report provided by Tuley, as well as the identical version contained in the e-mail provided by Roe, who was not called as witness. (Tr. 77–84, 149–151, 157–158, 163, 678–681; R. Exh. 16, 21.)

[48] As previously noted, Watts, Pierson, and Ramos provided consistent testimony confirming there was a problem removing the key from the lock. (Tr. 84–85, 379–381, 710.)

[49] It is evident that Watts moved quickly to issue the suspension based on verbal reports from Tuley and Roe, as they e-mailed their reports later that day. (R. Exh. 2127; Tr. 85–86, 383, 710–712.)

[50] I based the finding as to how the Respondent treated others for a similar violation on Watts' testimony and, thus, reject Pollick's suggestion that Plomann might have been disciplined for a lock-out/tag-out violation. (Tr. 86–87, 492–493, 681–682, 687–688, 712–713; GC Exh. 4.) In fact, given the fact the Respondent failed to produce any records in response to the General Counsel's subpoena requesting such disciplinary records, the only inference that can be drawn is that Plomann's verbal counseling was not even recorded in his personnel file. (ALJ Exh. 1.)

> tive, not affect job performance, and not deplete system resources needed for business purposes. Personal non-business use by any colleague may be terminated at any time at the discretion of Tower Automotive. These activities include but are not limited to chat rooms, email, telephones, and Internet surfing. Tower IT will monitor colleague Internet usage, and provide usage reports to Human Resources.[51]

Sometime in July, after unfair labor practice charges were filed, a Board investigator requested, in pertinent part, internet usage records for the employees in the maintenance department. In response, on July 21, Watts sent an e-mail to the information technology department directing him to remove internet access for the remaining 33 maintenance and utility technicians because "[n]ot only has there been abuse but none need Internet use for business use."[52]

III. DISCUSSION AND ANALYSIS

A. The Respondent's 10(b) Defense of Untimeliness

Section 10(b) of the Act precludes the filing of a complaint if the alleged unfair labor practice occurred more than 6 months prior to the filing of a charge. There is an exception, however, where the otherwise time-barred allegations are both legally and factually related to the allegations of a prior timely-filed charge. *Redd-I, Inc.*, 290 NLRB 1115, 116–118 (1988). To meet that threshold, the untimely allegations must be found to have arisen from the same factual situation or sequence of events as those found in the timely-filed charge. *Carney Hospital*, 350 NLRB 627, 629 (2007).

Ramos was informed of his suspension on April 4 for falsification of documents and internet abuse. On April 10, he was notified of the Respondent's final determination, which reduced the violations to poor workmanship and internet abuse. He was suspended again on May 28, and terminated for the lockout/tag-out violation on June 4. On August 26, he timely filed a charge alleging illegal termination due to his union-related activities. On October 16, Ramos amended the original charge to incorporate the April 10 discipline. As the October 16 charge was filed more than 6 months after it occurred and, in the absence of an exception, it is time barred.

The Respondent contends that the "closely-related" exception does not apply, as there is no factual overlap between Ramos' April discipline and June termination, and that any alleged overall antiunion animus is insufficient to connect the two incidents. The General Counsel disagrees and asserts that there is a common inquiry for both the April suspension and the June 4 discharge—the Respondent's motivation to treat Ramos adversely due to his activities on the skilled trades committee in March and April. I disagree. The Board, in *Carney Hospital*, supra, rejected such an approach, holding that it would not find the "closely-related" test satisfied merely because the untimely events occurred during or in response to the same union activities. Id., 350 NLRB at 630. Accordingly, Ramos' charge arising from his April 4 suspension, or April 10 discipline for that matter, is time barred.

B. The 8(a)(3) and (1) Allegations

The surviving portion of the complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Ruvalcaba on or about April 4, discharging Ruvalcaba on or about April 8, and discharging Ramos on or about June 1, because they assisted and supported the Union and engaged in union activities. The Respondent denied the material allegations and asserts that Ruvalcaba and Ramos were dismissed for safety violations that warranted points exceeding its threshold for termination.

Section 8(a)(3) provides, in pertinent part, that it is "an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish that an employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. See also *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the General Counsel establishes its prima facie case, the burden of persuasion shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.*, 346 NLRB 494 (2006). Simply presenting a legitimate reason for its actions is not enough. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 966 (2004); *T&J Trucking Co.*, 316 NLRB 771, 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

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. Kendall, the Union's chairman, disregarded Pollick's request and, on March 5, notified Watts in writing that he was appointing Ruvalcaba to two union committees. On March 18, Ruvalcaba and Ramos met with Pollick, Tuley, and Noojin as new members of the Union's skilled trades committee and advocated for safety training on behalf of maintenance technicians. Pollick disagreed that safety training be offered on the basis of seniority. On March 20, Kendall notified Watts in writing that he was appointing Ruvalcaba and Ramos to the Union's skilled trades committee.

The Respondent did not take long to react. On March 21, 3 days after Ruvalcaba and Ramos met with Pollick to insist on seniority-based safety training, the Respondent notified them that their work would be audited. Almost simultaneously, the Respondent allegedly looked into their internet usage at the worksite's computer kiosks. Both actions were unprecedented and unrelated to any periodic evaluation or legitimate complaints by supervisors. In any event, there was no record of Ruvalcaba's internet usage during the audit period. Subsequently, on April 4, 1 day after Ruvalcaba and Ramos called Pollick to complain about the latter's decision to roll out safety

[51] GC Exh. 9.

[52] Watts conceded that he directed that maintenance and utility technicians be precluded from internet access after the Board investigator requested that department's internet usage records. (Tr. 702–705; GC Exh. 10.)

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. In Ruvalcaba's instance, it was tantamount to termination.

The Respondent's reasons for disciplining Ruvalcaba and Ramos[53] were all pretextual. With respect to the audit, it is clear that their work on some of the machinery was unsatisfactory. The Respondent, however, did not ask Buddell and Salgado to perform the audit until 1 of the 2 weeks of the audit period had elapsed. By that time, Plomann had abdicated his supervisory role by failing to respond to daily radio calls by Ramos and Ruvalcaba to check their work. This caused Ramos and Ruvalcaba to call Salgado, one of their eventual auditors, to review their work each night. Salgado approved their work on each occasion. The Respondent's failure to call Salgado as a witness to counter such testimony strongly suggests that Plomann's disappearance was part of a scheme to "set up" Ruvalcaba and Ramos for adverse action.

With respect to the charge that Ramos and Ruvalcaba abused their internet access, there is no doubt that they were treated in a disparate manner. The Respondent 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. However, instead of examining the internet access of all employees in the maintenance department, the Respondent pulled only those internet use records pertaining to Ramos and Ruvalcaba. Upon receipt of that information, the Respondent took the unprecedented action of strictly construing its internet usage policy and disciplined them for using the Respondent's computer to access nonbusiness websites.

Lastly, the Respondent's response to Ramos' violation of the lock-out/tag-out policy was also unprecedented. While I doubt the Respondent's assertion that Ramos and Tuley were able to remove the key from the lock, 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. As such, I reject Ramos' assertion that his conduct was excusable because he had a mean supervisor that was stressing him out. However, it was not the first time that an employee had violated that policy. In fact, Ramos' supervisor, Plomann, also violated the policy. In that instance, Plomann received a verbal counseling that did not result in disciplinary points in his personnel file.

While Ramos' treatment for violating the lock-out/tag-out safety policy was attributable to discriminatory motivation, the same cannot be said about the Respondent's decision to deny his promotion. In the absence of any information as to the Respondent's promotional policies and practices, it cannot be reasonably concluded that the Respondent was unreasonable in rejecting his application and refusing to consider him for promotion to team leader.

The suspicious timing of the Respondent's actions, coupled with its assertion of pretextual reasons for terminating Ruvalcaba and Ramos, strongly supports an inference of discriminatory motivation. *State Plaza, Inc.*, supra at 757. Accord *Campbell Electric Co.,* 340 NLRB 825, 841–842 (2003).

Since the General Counsel established a prima facie case, the burden of persuasion shifted to the Respondent to prove, by a preponderance of the evidence, that it would have suspended and then terminated Ramos and Ruvalcaba even in the absence of their union activity. *Monroe Mfg.*, 323 NLRB 24 (1997). To meet its burden of persuasion, the Respondent was required to do more than show that it had a legitimate reason for its actions. *Hicks Oils & Hicksgas,* 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). It did not do so. The evidence demonstrated that the Respondent had never performed a scheduled audit of any employee, much less one that resulted in discipline. Internet use by maintenance employees was rampant and, prior to April 4, no employee was ever disciplined on that basis. Lastly, the Respondent's only precedent for disciplining an employee for violating the lock-out/tag-out safety policy was to verbally counsel the employee who, in that instance, was Plomann, the Charging Parties' supervisor.

Based on the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) by suspending Ruvalcaba on April 4, terminating Ruvalcaba effective that date, and suspending Ramos on May 28 and terminating him on June 4, all because they advocated for seniority-based training for maintenance technicians.

CONCLUSIONS OF LAW

1. The Respondent, Tower Automotive Operations USA I, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Auto Workers Local 3212, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending Ruvalcaba on April 4, terminating Ruvalcaba on April 4, suspending Ramos on May 28 and terminating him on June 4, all because they advocated for seniority-based training for maintenance technicians, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[54]

[53] Although Ramos' charge of discipline on April 4 is time barred, such facts are relevant background to show bias leading to subsequent discipline on May 28.

[54] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondent, Tower Automotive Operations USA I, LLC, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Auto Workers Local 3212, AFL–CIO, or any other union.

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

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

(a) Within 14 days from the date of the Board's Order, offer Juan Ruvalcaba and Steven Ramos full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Juan Ruvalcaba and Steven Ramos whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[55] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 4, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Auto Workers Local 3212, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Juan Ruvalcaba and Steven Ramos full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Ruvalcaba and Steven Ramos whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Juan Ruvalcaba and Steven Ramos, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TOWER AUTOMOTIVE OPERATIONS USA I, LLC

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mended 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.

[55] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."