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**Tower Industries, Inc. d/b/a Allied Mechanical and United Steelworkers of America, AFL–CIO–CLC.** Case 31–CA–26605–R

November 22, 2010

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On May 31, 2007, the National Labor Relations Board issued a Decision and Order in this proceeding, in which it dismissed complaint allegations that the Respondent unlawfully suspended and discharged Marcelo Pinheiro.<sup>1</sup> Subsequently, the Union petitioned the United States Court of Appeals for the Ninth Circuit for review, inter alia, of this aspect of the Board’s decision. On April 1, 2009, the Ninth Circuit by majority vote granted the petition on this issue and remanded the case to the Board.<sup>2</sup> On September 1, 2009, the Board notified the parties that it had decided to accept the court’s remand and that all parties could submit statements of position with respect to the issues raised by the remand. The General Counsel filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We accept the court’s remand as the law of the case. For the following reasons, we now find that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by suspending and discharging Pinheiro for his protected activities.

Background—*Allied Mechanical I*

The Respondent manufactures prototype parts for the aerospace and defense industries. It hired Marcelo Pinheiro in April 2002 for a night-shift machinist position. The Union filed a petition in January 2003<sup>3</sup> seeking to represent certain of the Respondent’s employees. Pinheiro soon became an active union supporter. He posted union literature, attended union meetings, and distributed union fliers to employees and to his supervisor, Miguel Sedano. Pinheiro also served as the Union’s observer at the March 6 representation election.

On January 31, Pinheiro told Sedano and another supervisor that he planned to file charges with the

Board over the selective removal of union fliers that he had posted. Several hours later, the Respondent gave Pinheiro a written disciplinary warning, allegedly for an error in machining a part on January 28. On March 25, the Respondent issued him a second warning. The Board found that the Respondent violated Section 8(a)(3) and (1) by issuing the two warnings to Pinheiro. *Allied Mechanical, Inc.*, 343 NLRB 631 (2004) (*Allied Mechanical I*).

Facts of the Present Case

On April 8, the Respondent laid off Pinheiro. It then recalled him on July 23 to a different position. Following his recall, Pinheiro requested a transfer to his prior night-shift position. The Respondent denied his request, alleging problems in Pinheiro’s work quality.<sup>4</sup> Then, on September 5, Pinheiro received a disciplinary warning for mistakes in work he performed on August 21, 27, and 28.<sup>5</sup> On September 9, Pinheiro testified at the Board hearing in *Allied Mechanical I*.

The Respondent assigned Pinheiro no overtime for the first 3 weeks following his recall from the July 23 layoff, and then scheduled him for overtime for 5 of the next 7 weeks.<sup>6</sup> Pinheiro was scheduled to work overtime on October 3, but he left without performing it because he mistakenly believed that his schedule had been changed. On October 6, he confronted Supervisor Sedano because he believed he had been denied overtime on October 3. Pinheiro asked why another employee was doing work Pinheiro thought he was scheduled to do. Sedano said that because of “this union thing and . . . trouble with the Labor Board, that now [the Respondent is] going to have to start going by the Employee Handbook” and award overtime in accordance with seniority.<sup>7</sup> In response, Pinheiro said either “suck d—k” or “suck my d—k” as he exited the office. The judge, crediting Pinheiro’s testimony, found that his outburst was uttered in frustration regarding his own feelings and not directed in anger at his supervisor.

The Respondent suspended Pinheiro on October 8 pending an investigation, and it discharged him on October 17. His separation report read in pertinent

<sup>4</sup> The Board found that this denial of his transfer request was unlawful. *Allied Mechanical (II)*, supra at 1328–1330. The Respondent did not appeal this conclusion to the court.

<sup>5</sup> The Board found that the discipline was lawful. *Id.* at 1330–1331. The court affirmed that conclusion.

<sup>6</sup> The Board found that the Respondent’s 3-week denial of overtime to Pinheiro was lawful. *Id.* at 1331. The Union did not seek judicial review of that conclusion.

<sup>7</sup> The Board found that this statement violated Sec. 8(a)(1). The Respondent did not seek judicial review of that conclusion.

<sup>1</sup> 349 NLRB 1327 (*Allied Mechanical II*).

<sup>2</sup> 321 Fed. Appx. 581 (9th Cir. 2009).

<sup>3</sup> Unless stated otherwise, all dates are in 2003.

part: “Termination—On 10/6/03 you cussed out your supervisor, Miguel Sedano. This is considered an act of insubordination. Reference Employee Handbook pages 14–15. You have a poor work record and this misconduct cannot be tolerated.”

#### Board and Court Decisions

In its prior *Wright Line*<sup>8</sup> analysis of Pinheiro’s suspension and discharge, the Board assumed “for the purpose of deciding this case” that the General Counsel met his initial burden to show that the Respondent’s actions were unlawful. The Board also affirmed the judge’s credibility-based determination that Pinheiro’s outburst was made in frustration regarding his own feelings, but it nevertheless found that the Respondent proved it would have suspended and discharged him for this conduct even in the absence of his protected activities.

The Ninth Circuit held that “the Board disregarded the [judge’s] credibility and factual findings . . . and recharacterized the facts” in its analysis of whether Pinheiro’s suspension and discharge were justified under the Respondent’s disciplinary policy. It then remanded this issue to the Board. 321 Fed. Appx. at 582–583.

#### Analysis

Having accepted the court’s remand as the law of the case, we now reexamine our *Wright Line* analysis of Pinheiro’s suspension and discharge consistent with the court’s holding.

Under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee’s protected conduct was a motivating factor in the employer’s adverse action. The General Counsel makes a showing of discriminatory motivation by proving the employee’s protected activity, employer knowledge of that activity, and animus against the protected activity. See *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961 (2004) (for analysis of an allegation of an 8(a)(3) violation); *Newcor Bay City Division*, 351 NLRB 1034, 1034 fn. 4 (2007) (for analysis of an allegation of an 8(a)(4) violation). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Allied Mechanical II*, 349 NLRB at 1328. The court’s decision, rejecting the Board’s finding that the Respondent met its rebuttal burden, mandates that

we now find the Respondent did not carry that burden. The only open issue then is whether the General Counsel met his initial burden. The Board previously assumed, without deciding, that the burden was met. We now find that the General Counsel met this initial burden of proving that the Respondent was motivated to suspend and discharge Pinheiro by his protected activities.

Pinheiro’s protected activities included posting union literature, distributing union fliers, serving as the Union’s election observer, and participating in the Board hearing in *Allied Mechanical I*. The Respondent was aware of all these activities. Furthermore, its unlawful discipline of Pinheiro on January 31 and March 25 and unlawful denial of his request to transfer to the night shift in late July or early August are sufficient proof of the Respondent’s specific animus towards Pinheiro’s participation in such activities. We therefore conclude that the General Counsel met his initial burden of proving the Respondent’s unlawful discriminatory motivation for Pinheiro’s suspension and discharge. Having found that the Respondent did not carry its rebuttal burden, we find that Pinheiro’s suspension and discharge violated the Act as alleged.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(4), (3), and (1) of the Act by suspending and discharging Marcelo Pinheiro for engaging in union or other protected activities, or because he testified before the NLRB.
3. The unfair labor practice found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by suspending and discharging Marcelo Pinheiro, we shall order that the Respondent cease and desist and take certain affirmative actions designed to effectuate the policies of the Act. We shall order the Respondent to offer Pinheiro full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356

<sup>8</sup> 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

NLRB No. 8 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful suspension and discharge of Pinheiro and to notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

#### ORDER

The National Labor Relations Board orders that the Respondent, Tower Industries, Inc. d/b/a Allied Mechanical, Ontario, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employees for engaging in union or other protected concerted activities, or because they testified before the NLRB.

(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 this Order, offer Marcelo Pinheiro immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Marcelo Pinheiro whole for any loss of earnings and other benefits suffered as a result of the unlawful actions against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Pinheiro's unlawful suspension and discharge, and within 3 days thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him 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 Ontario, California, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the no-

<sup>9</sup> 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

tice, on forms provided by the Regional Director for Region 31, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>10</sup> 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 October 8, 2003.

(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. November 22, 2010

Craig Becker,	Member
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

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

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."

<sup>10</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

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 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 the Board's Order, offer Marcelo Pinheiro immediate and

full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Marcelo Pinheiro whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Marcelo Pinheiro, and within 3 days thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

TOWER INDUSTRIES, INC. D/B/A  
ALLIED MECHANICAL