

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

RONIN SHIPBUILDING, INC.

and

Case 24-CA-7717

UNION DE TRABAJADORES  
INDUSTRIALES DE PUERTO RICO

*Ismael Rodriguez-Izquierdo, Esq.,*  
for the General Counsel.  
*Jorge P. Sala and Polonio J. Garcia, Esqs.,*  
(*Jorge P. Sala Law Offices*), of Ponce,  
Puerto Rico, for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in San Juan, Puerto Rico on February 2-3, 1998. The charge was filed June 13, 1997, and the complaint was issued on August 29, 1997.

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

Findings of Fact

I. Jurisdiction

Respondent, a corporation, manufactures sport fishing boats at its facility in Ponce, Puerto Rico, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside of the Commonwealth of Puerto Rico. 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, Union de Trabajadores Industriales de Puerto Rico, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) in discharging employee Elias Martinez on June 2, 1997. He also alleges that Ronin violated section 8(a)(1) in making several threats and in interrogating employees just prior to a

representation election conducted at its facility on May 8, 1997<sup>1</sup>.

*The discharge of Elias Martinez*

5 Elias Martinez worked for Respondent as a carpenter from May 1995 until his  
 termination for absenteeism and tardiness on June 2, 1997. During this period he was  
 frequently absent from work and also late for work. On October 5, 1995, he received a "Notice  
 of Error and/or Deficiency" from Respondent regarding his frequent absences from work.  
 Respondent claims that it verbally warned Martinez about his continuing absences and  
 10 tardiness in 1996 and 1997; he denies this. However, no formal disciplinary action was taken  
 against him between October 5, 1995, and his termination on June 2, 1997. Between January  
 11, when Respondent resumed operations after Christmas vacation, and June 2, Martinez was  
 absent from work on about 16 occasions and late 18 times.<sup>2</sup> His record of absences and  
 tardiness in 1996 was worse than his record in 1997.

15 In February 1997, the Union began an organizing drive at Ronin's Ponce facility.  
 Martinez signed an authorization card and attended several Union organizational meetings,  
 some of which were held at a bus stop across the street from Ronin's facility. This appears to  
 be the extent of his union activity. Several of Respondent's supervisors, President Carlos Soto  
 20 and foremen, Amilcar Pagan, Carlos Velazquez and Raul Rodriguez were aware that Martinez  
 was pro-Union. Carlos Soto actively campaigned against the Union. However, as discussed  
 below, I conclude that neither he nor any other supervisors or agents of Respondent violated  
 the Act in doing so.

25 On May 8, the NLRB representation election was conducted at Respondent's plant. The  
 Union lost the election 13-12. On May 15, the Union filed an objection to the conduct of the  
 election. The sole basis for the objection was an allegation that foreman Carlos Velazquez  
 hovered near the polling place while employees were casting their ballots and engaged in  
 electioneering. This objection was overruled by the Board, which certified the results of the  
 30 election on August 5.

35 In order to prove that Respondent violated Section 8(a)(1) and (3) in terminating Elias  
 Martinez, the General Counsel must show that union activity was a motivating factor in the  
 Respondent's decision. Then the burden of persuasion shifts to Respondent to prove its  
 affirmative defense that it would have taken the same action even if Martinez had not engaged  
 in union or other protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F. 2d 899  
 (1st Cir. 1981).

40 To establish discriminatory motivation, the General Counsel generally must show union  
 or other protected activity, employer knowledge of that activity, animus or hostility towards that  
 activity and a causally related adverse personnel action. Inferences of knowledge,<sup>3</sup> animus<sup>4</sup>

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<sup>1</sup> All dates are in 1997 unless otherwise indicated.

<sup>2</sup> Respondent considers departure from work before its 4:00 p.m. quitting time, as an  
 absence and arrival at any time after 7:00 to be a tardy arrival.

<sup>3</sup> *Flowers Baking Company, Inc.*, 240 NLRB 870, 871 (1979).

<sup>4</sup> *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996).

and discriminatory motivation<sup>5</sup> may be drawn from circumstantial evidence rather than from direct evidence.

5 I conclude that the General Counsel has established a prima facie case of discriminatory discharge. Martinez engaged in Union activity and Respondent was aware of it. I infer animus and discriminatory motivation from the close proximity in time between Martinez's union activities and his discharge, and the pretextual nature of Respondent's explanation of the discharge.

10 On June 1, Ronin's president, Carlos Soto, decided to fire Elias Martinez on the next day. Respondent has offered no explanation for the timing of this decision. Martinez's time and attendance offered Respondent a reason for discipline or discharge at any time during his employment at Ronin. Ronin had tolerated his record over two years, with the exception of the October 1995 warning notice. Martinez's absenteeism and tardiness were not getting any  
15 worse. There had been no proximate warning notices or other instances of progressive discipline to which Martinez had been unresponsive.<sup>6</sup> There does not appear to be any reason for the sudden exhaustion of Respondent's patience apart from his union activity. This being so, I find that the reason proffered for the termination is pretextual.

20 The evidence supporting the General Counsel's case is thin. There are no credible statutory violations apart from Martinez's discharge nor other direct evidence of anti-union animus. However, given Ronin's prolonged tolerance for Martinez's absenteeism and tardiness, the absence of any explanation for the termination decision of June 1, and the timing of that decision in relation to Martinez's union activity and the election, I conclude Respondent  
25 bore animus towards him as a result of his support for the Union and that his termination was motivated by this animus. See, *Debber Electric*, 313 NLRB 1094, 1101-1102 (1994), *Active Transportation*, 296 NLRB 431 (1989); *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1962).

30 I reject Respondent's contention that the fact that Martinez was fired after, rather than before the election negates an inference of discriminatory motivation. The Union's objections to the election were pending at the time of Martinez's discharge. This provided Respondent with ample motivation to get rid of Martinez. Moreover, to have discharged Martinez prior to the election would have been very risky. Conceivably it could have resulted in a rerun election or  
35 even a *Gissel* bargaining order.

Further, I conclude that Ronin has not proved that it would have discharged Martinez apart from his union activity. Respondent does not have objective criteria as to how many absences or days tardy are grounds for discharge. It does not have any policy as to the  
40 frequency of absences or tardiness that warrants discharge. Ronin has established that in February 1996, it has discharged one employee, Jose Humberto Perez Garcia, for absenteeism and tardiness. Another employee discharged the same day as Garcia, Geraldo Torres Gonzalez, had recently been suspended for insubordination, in addition to being absent and

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<sup>5</sup> *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

<sup>6</sup> On the other hand, I reject the General Counsel's argument that Martinez was subjected to disparate treatment because all other employees terminated for tardiness and absenteeism had received progressive discipline first. While some other employees did receive progressive discipline, there is no indication of any warnings or suspensions issued to Jose Humberto Perez Garcia prior to his termination in February 1996.

tardy. His case therefore does not advance Respondent's argument that Martinez was discharged in accordance with a consistently applied company policy.<sup>7</sup>

5 The record indicates that sometimes Respondent tolerated absenteeism and tardiness and sometimes it did not. For example, in February 1996, when it discharged Garcia, Martinez's time and attendance record was arguably as bad or worse than Garcia's. Despite the fact that Martinez had received a warning notice several months before, Respondent took no action against him. The record does not disclose a nondiscriminatory factor by which Ronin decided that it was time to discharge an employee who was habitually late and tardy.

10 The General Counsel introduced time cards for a number of employees with significant time and attendance problems in 1997. Although, arguably none of these employee's records is as bad as Martinez's, Ronin has not satisfactorily explained why it fired Martinez and not some of these other employees. Ronin's president, Carlos Soto, testified that the absences of the other employees were excused and Martinez's were not. However, I do not credit Soto's testimony in this regard.

20 Martinez notified his foreman whenever he was late or tardy. Soto claims that foremen had no authority to excuse an absence and that employees had to get permission from him. There is no evidence that Respondent ever told that to Martinez. Indeed, foreman Amilcar Pagan confirmed that Martinez regularly informed him that he would be absent. Pagan would so inform Soto. Pagan did not testify that he told Martinez that he must get prior approval for an absence from Soto. Moreover, Soto's testimony is belied by the fact that Martinez received no disciplinary action for what Soto alleges were frequently occurring unexcused absences.

25 Two of Martinez's 1997 absences, one on February 21, and another on May 7, occurred on days on which he worked a second job unloading ships at port of Ponce, from 7:00 p.m. to 7:00 a.m. Assuming, as Respondent claims, that Martinez lied to Respondent as to the reason for his absences on these dates, the lie is irrelevant to this case. Ronin did not apparently know of these misrepresentations when it fired Martinez and did not rely on them in its discharge letter to him. In summary, the only apparent explanation for the timing of Martinez's June 2, discharge is animus towards him as the result of his support for the Union.

#### *The Section 8(a)(1) allegations*

35 The General Counsel alleges in the Complaint that Ronin violated Section 8(a)(1) from about April 1, through the first week in May, the month or so prior to the election, in the following respects:

40 <sup>7</sup> Respondent also contends that it discharged Welchen Figueroa, Jr. for absenteeism in September 1995. Exhibit R-8, however, indicates that Figueroa worked for Ronin on May 8, 1997. Further, I am unable to conclude on this record that Figueroa was fired for absenteeism and tardiness at any time. Similarly, Ronin's reliance on the discharge of Ricardo Velazquez, a pro-Union employee, on the same day it fired Martinez, does nothing to advance its affirmative defense.

45 At trial I rejected Respondent's attempt's to introduce evidence of discharges for absenteeism and tardiness prior to 1995. I did so because prior to the hearing, on Respondent's motion, I modified the General Counsel's subpoena to relieve Ronin from providing the General Counsel with employee time cards prior to 1996. This I believe deprived the General Counsel of an opportunity to prove that other employees with records similar to that of Martinez had not been fired during this time period.



following recommended<sup>8</sup>

ORDER

5           The Respondent, Ronin Shipbuilding, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

10           (a) Discharging or otherwise discriminating against any employee for supporting Union de Trabajadores Industriales de Puerto Rico, 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.

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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 Elias Martinez 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.

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(b) Make Elias Martinez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify Elias Martinez in writing that this has been done and that the discharge will not be used against him in any way.

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(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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(e) Within 14 days after service by the Region, post at its Ponce, Puerto Rico, facility copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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

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<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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<sup>9</sup> If this Order is enforced by a Judgment of the 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."

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 June 2, 1997.

5 (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.

10 (g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., April 14, 1998.

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Arthur J. Amchan  
Administrative Law Judge

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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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Union de Trabajadores Industriales de Puerto Rico, 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 the Board's Order, offer Elias Martinez 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 Elias Martinez whole for any loss of earnings and other benefits resulting from his 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 discharge of Elias Martinez and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

RONIN SHIPBUILDING, INC.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, La Torre de Plaza, Suite 1002, 525 Franklin D. Roosevelt Ave., San Juan, Puerto Rico 00918-1002, Telephone 787-766-5426.