Tower Industries, Inc. d/b/a Allied Mechanical *and* United Steelworkers of America, AFL–CIO–CLC. Cases 31–CA–26605, 31–CA–26644, and 31–CA–26666

May 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On July 15, 2004, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel and the Respondent each filed exceptions, supporting briefs, and answering briefs. The Charging Party filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We specifically affirm the judge's demeanor-based credibility determination concerning the testimony of employee Marcelo Pinheiro. That determination is a sufficient basis for our findings of fact. There is no requirement that there be a subexplanation of the demeanor-based credibility resolution. See *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004), enfd. mem. 156 Fed.Appx. 330 (D.C. Cir. 2005).

Because the judge did not give any reason for crediting employee Marcelo Pinheiro's version of Supervisor Miguel Sedano's statement concerning workplace rules, overtime, and seniority over Sedano's version of his statement, Member Schaumber finds that a blanket footnote statement such as that here ("Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief") is insufficient. Member Schaumber would remand the case to the judge for her to further elaborate on the reasons for her findings. See his dissenting opinion in *Atlantic Veal*, supra at 421–422.

[2] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by implicitly threatening plant relocation and implicitly inducing employees to forgo supporting the Union.

I. INTRODUCTION

This case primarily involves the Respondent's treatment of Marcelo Pinheiro, a machinist at its Ontario, California facility. We adopt without further comment the judge's finding that the Respondent violated Section 8(a)(1) by telling Pinheiro that the Respondent would go by the employee handbook regarding seniority because of the Union's organizing campaign and the Respondent's trouble with the Board, and violated Section 8(a)(1), (3), and (4) by disciplining employee Edwin Shook. For the reasons stated in her decision as well as the reasons stated here, we also agree with the judge that the Respondent violated Section 8(a)(1), (3), and (4) by denying Pinheiro's request to transfer to the night shift. We reverse, however, the judge's findings that the Respondent unlawfully denied Pinheiro overtime, issued him a written disciplinary warning, and suspended and discharged him.[3]

II. BACKGROUND—*ALLIED MECHANICAL I*

The Respondent manufactures prototype parts for the aerospace and defense industries. It hired Pinheiro in April 2002 for a night-shift machinist position. In January 2003,[4] the Union filed a petition seeking to represent a unit of production, maintenance, shipping and receiving employees, and programmers at the Respondent's facility. 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 Supervisor Eddie Rogers that he planned to file charges with the Board over the selective removal of union fliers that Pinheiro had posted in areas where employees customarily displayed nonwork-related notices.[5] Several hours later, the Respondent gave Pinheiro a written disciplinary warning, allegedly for an error machining a part on January 28. On March 25, the Respondent issued Pinheiro a second warning. After charges were filed and a complaint issued, the Board ultimately found that the Respondent violated Section 8(a)(1) by discriminatorily enforcing its posting policy[6] and violated Section 8(a)(3)

[3] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by implicitly threatening plant relocation and implicitly inducing employees to forgo supporting the Union.

[4] Unless stated otherwise, all dates occurred in 2003.

[5] Sedano explained in his testimony in this case (*Allied II*) that he told Pinheiro that the Respondent could do what it wished with the union fliers.

[6] This unlawful action also formed the basis for meritorious objections to the election held March 6. *Allied Mechanical, Inc.*, 343 NLRB 631, 632 (2004) (*Allied Mechanical I*). Member Schaumber dissented

and (1) by issuing Pinheiro the two warnings. *Allied Mechanical, Inc.*, 343 NLRB 631 (2004) (*Allied Mechanical I*).[7]

III. SUMMARY OF THE PRESENT CASE

The Respondent laid off Pinheiro on April 8, and recalled him on July 23 to a day-shift "floater" position, i.e., an employee who is not assigned to a specific machine but instead works on different machines as needed when other employees are out or when "hot jobs" come up. The Respondent told Pinheiro that the reason for the recall was to "keep [Respondent] out of trouble" with the Board.

Following his recall, Pinheiro requested a transfer to the night-shift position he held prior to the layoff, operating the Respondent's 5-Axis machine. The Respondent denied his request, alleging problems in Pinheiro's work quality, and filled the vacancy with a new hire. Then, on September 5, Pinheiro received a disciplinary warning for asserted mistakes in work that he performed on August 21, 27, and 28. During 5 of the 10 full weeks following his recall, the Respondent scheduled Pinheiro for overtime work. During this same period, approximately 20 percent of Pinheiro's coworkers received no scheduled overtime.

On October 3, a day on which he was scheduled to work overtime, Pinheiro left without working the overtime, mistakenly believing his schedule had been changed. On October 6, Pinheiro confronted Sedano in Sedano's office over his belief that he had been denied an overtime opportunity on October 3. Pinheiro asked why another employee was doing work Pinheiro thought he was scheduled to do. Sedano explained that, because of "this union thing and . . . trouble with the Labor Board, that now [Respondent is] going to have to start going by the Employee Handbook" and award overtime in accordance with seniority. In response, Pinheiro said either, "suck d—k" or "suck my d—k." In response, the Respondent suspended Pinheiro on October 8 pending an investigation, and discharged him on October 17 for insubordination.

IV. ANALYSIS

To establish a prima facie case of a violation under the Board's decision in *Wright Line*,[8] the General Counsel must establish that Pinheiro's protected conduct was a substantial or motivating factor in the Respondent's adverse employment actions. *Manno Electric*, 321 NLRB 278, 281 (1996), affd. 127 F.3d 34 (5th Cir. 1997). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an alternative defense, that it would have taken the same action even in the absence of Pinheiro's union activity. Id. at 280 fn. 12, 281.

We agree with the judge that the General Counsel met his initial burden with respect to the Respondent's refusal to transfer Pinheiro to the night shift. We further assume, for the purpose of deciding this case, that the General Counsel met his initial burden with respect to the other challenged employment decisions involving Pinheiro, namely the disciplinary warning, denial of overtime, suspension, and discharge.[9] We turn now to whether the Respondent carried its rebuttal burden regarding these employment actions.

A. Denial of Transfer to Night Shift[10]

The Respondent initially hired Pinheiro in April 2002 to work the evening shift on the 5-Axis and Toshiba machines. Following his lawful layoff in April 2003, Pinheiro was recalled in July 2003 to a "floater" position on the day shift.[11] Mark Slater, Respondent's president, testified that the Respondent recalled Pinheiro from layoff because Pinheiro was an active union supporter and in order to keep Respondent "out of trouble."[12] In late July or early August, Pinheiro asked Day-Shift Supervisor Sedano to reassign Pinheiro to an opening for a 5-Axis operator on the evening shift. Although Sedano said he would "get back to" Pinheiro, he never did. Having received no response from Sedano, Pinheiro repeated his request to Production Manager Bechtol, emphasizing that he was originally hired on the evening shift for the 5-Axis and would like to return to that assignment. There is no evidence that Bechtol ever responded to Pinheiro's request, even though the position had not been filled, or that Bechtol expressed any concern regarding Pinheiro's ability to work on the 5-Axis.

in *Allied Mechanical I* from the majority's finding that the removal of pro- and antiunion fliers from the Respondent's restroom and tool crib walls violated Sec. 8(a)(1) and constituted objectionable conduct.

[7] There were no exceptions to the judge's finding that the March 25 warning was unlawful. *Allied Mechanical I,* supra, 343 NLRB at 632 fn. 2.

[8] 251 NLRB 1083 (1980), enfd. 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).

[9] Member Schaumber finds no permissible inference of animus in Respondent's removal of the fliers that Pinheiro posted or in Sedano's comments that the Respondent could do what it wanted with the fliers. See *Allied Mechanical I*, supra, 343 NLRB at 632 fn. 6.

[10] Member Schaumber does not join this section of the decision.

[11] As we have observed, a "floater" is expected to operate any machine, as needed, presumably including the Toshiba and 5-Axis. It is unclear which machines Pinheiro operated while employed as a "floater."

[12] In its brief in support of exceptions, the Respondent admits that Allied "decided to recall [Pinheiro] to avoid the possibility of a new unfair labor practice charge." Br. at 7.

A week later, Pinheiro learned that someone else had been hired for the 5-Axis evening-shift position. Pinheiro expressed his disappointment to Slater, again emphasizing his relevant experience. Slater responded that Pinheiro was "less trouble on the day shift." When challenged by Pinheiro, Slater explained that by "less trouble," he meant that Pinheiro was more productive on the day shift. Pinheiro replied, "I never had any bad production on nights, I've never had any bad production reports on nights." Slater did not contest Pinheiro's statement. Pinheiro then accused Slater of keeping him on the day shift to keep him "under [Slater's] thumb" because of Pinheiro's union activity. There is no evidence that Slater responded or attempted to disabuse Pinheiro of that opinion. Nor is there is evidence to corroborate Slater's claim that Pinheiro was more productive on the day shift. To the contrary, the record shows that Pinheiro's production was not better on the day shift.[13] Accordingly, a reasonable inference is that Slater's repeated use of the term "trouble" to describe Pinheiro was, indeed, a reference to Pinheiro's union activity, rather than to his productivity.[14]

In light of these circumstances we find, and our dissenting colleague concedes, that the General Counsel met his initial burden under *Wright Line* of establishing that Pinheiro's union activities were a motivating factor in the Respondent's decision to deny his transfer request. Respondent's knowledge of Pinheiro's union activity and its animus toward that activity were initially established in a related case where the Board found that the Respondent unlawfully disciplined Pinheiro on January 31 and March 25 because of his union activities.[15] We note also that the Respondent recalled Pinheiro to the day shift in order to avoid an unfair labor practice charge. However, that surely does not establish that the Respondent approved of or condoned union activity. To the contrary, it shows that Pinheiro's union activity was never far from the Respondent's mind. The fact that the Respondent was prepared to tolerate that union activity for a day-shift job (under the Respondent's thumb) does not establish that it would treat him nondiscriminatorily on the issue of transfer to the night-shift job.

Contrary to our dissenting colleague, and in agreement with the judge, we further find that the Respondent has not satisfied its *Wright Line* rebuttal burden. To establish its *Wright Line* defense, the Respondent cannot simply present a legitimate reason for its actions but must persuade that the same action would have taken place even in the absence of the protected activity.[16] This, we find, the Respondent failed to do.

Our dissenting colleague asserts that the Respondent did not transfer Pinheiro to the night-shift job because of Pinheiro's alleged difficulty in operating the 5-Axis machine. However, it is significant that the Respondent did not give that as the reason for the failure to transfer Pinheiro. Rather, the Respondent told Pinheiro that he was more productive on the day shift. However, we have found no evidence to support that claim. More likely, the Respondent was suggesting Pinheiro would do better during the day because he could be watched more carefully during the day.

Further, even if we take into account the belated explanation of poor performance on that machine, the explanation does not withstand scrutiny. The evidence the Respondent proffered regarding Pinheiro's alleged difficulty operating and performing on the 5-Axis is neither clear nor persuasive. The judge found that the Respondent's managers agreed that Pinheiro could competently operate the 5-Axis. The judge did not credit testimony by Respondent's witnesses Bechtol and Slater, on which our dissenting colleague relies, regarding Pinheiro's allegedly poor ability to operate the 5-Axis.[17] The only documentary evidence regarding Pinheiro's work performance before his layoff is his February 6 performance review by Supervisor Eddie Rogers which, likewise, does not specifically identify deficiencies in Pinheiro's

[13] Respondent says in its reply brief that Pinheiro was having trouble with production after he was recalled to the day-shift "floater" position because of the need to learn to operate new machines. Thus, it appears that the Respondent assigned and maintained Pinheiro in the "floater" position, knowing that there could be a decrease in his productivity, at least while he was learning the new machines.

[14] Our dissenting colleague says that Slater testified "more generally that Pinheiro's work quality was deficient." However, as noted, Slater actually used the term "trouble," and when pressed, referred to Pinheiro's alleged productivity problems. Of course, productivity is not the same thing as quality. Shifting reasons are a further indicium of the fact that Pinheiro's "trouble" was his union activity.

[15] *Allied Mechanical I*, supra. On January 31, Pinheiro asked Day-Shift Supervisor Sedano and Night-Shift Supervisor Rogers not to remove union posters from locations where postings were routinely permitted. Sedano responded that the Respondent could do what it wanted with the fliers. Later that day, the Respondent issued Pinheiro a disciplinary action notice, assertedly because of a machining error. Judge Lana Parke found that this reason was pretextual, particularly in view of Sedano's remark. The Board also affirmed Judge Parke's finding that the Respondent unlawfully disciplined Pinheiro on March 25, assertedly for "excessive discrepancies and quality problems within a 6-month period." The Board agreed that this reason, too, was pretextual, and that the real reason or motive for both of the disciplinary actions was animus to Pinheiro's "vigorous support of the Union."

[16] *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), rev. denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

[17] Night-Shift Supervisor Sedano testified that he told Production Manager Bechtol that Pinheiro "did not perform well" on the 5-Axis before his layoff. Bechtol did not corroborate that testimony. Neither manager, however, offered any specific examples or information about Pinheiro's purported difficulties in operating the 5-Axis.

5-Axis set-up work.[18] Finally, the record is devoid of disciplinary or other records showing a history of such difficulties.

The circumstances surrounding the Respondent's hiring of Steven Butkus to fill the 5-Axis evening-shift position cast further doubt on the Respondent's asserted justification for not transferring Pinheiro to that position. The Respondent contends that an important qualification for the opening was "job-shop" experience doing set-up work on the 5-Axis machine.[19] According to Respondent, it hired Butkus based on his experience working in "job shops" similar to Respondent's, and on Butkus' representation during the interview that he had experience doing set-up work. Despite the importance Respondent claimed to place on applicants' job-shop and set-up experience, there is no evidence that it made any attempt to contact Butkus' previous employers and confirm that he had the necessary experience and qualifications. Rather, Bechtol relied on his "general knowledge" of shops in the area, and his "personal knowledge" of companies listed on Butkus' application.[20] That Respondent did so at some risk of hiring an unqualified employee is borne out by the fact that Butkus proved unable to do set-ups, and his work was slow. Indeed, Respondent fired Butkus within weeks of hiring him. The Respondent's decision to offer employment to Butkus in the absence of any confirmation that he had the necessary, high-priority job-shop and set-up experience stands in stark contrast to its treatment of Pinheiro, who had demonstrated his competence as a 5-Axis operator.

Our dissenting colleague notes that Butkus represented on his application that he had prior experience in setting up the 5-Axis machine. In light of the Respondent's defense herein, one would think that the Respondent would be more interested in confirming the accuracy of Butkus' claim and learning how well or poorly Butkus performed. As noted above, there is no evidence that the Respondent ever inquired or checked into this matter.[21] In fact, the judge found that Butkus had no history of set-up work on that machine, and the Respondent later discharged Butkus because of his inability to perform the work.

For all of these reasons, we disagree with our dissenting colleague's conclusion that the Respondent's selection of Butkus over Pinheiro was a legitimate exercise of its business judgment. In any event, the relevant inquiry is not whether the Respondent might have had a reasonable justification for the decision to hire Butkus. The issue is whether the Respondent established that it would have denied Pinheiro's transfer request in the absence of Pinheiro's union activity. On the evidence before us, we find that it did not. Accordingly, we adopt the judge's unfair labor practice finding.

B. Disciplinary Warning

The Respondent issued a disciplinary warning to Pinheiro on September 5, after he failed to properly machine parts on three dates: August 21, 27, and 28. The judge found that the Respondent failed to show that it would have issued the discipline absent Pinheiro's union activity. According to the judge, the Respondent's reliance on the August 21 and 28 incidents was pretextual because Pinheiro was not solely at fault for those errors. Pinheiro admitted that the August 27 incident was his fault, and the judge recognized that the Respondent could issue disciplinary write ups for only one discrepancy. Nevertheless, the judge found that the warning was unjustified because "there [was] no evidence that [the incident] was of such a nature" as to warrant discipline. We reverse.

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[18] Indeed, it was established in the related case that Rogers considered Pinheiro "a hard worker" and that Rogers "had no problem with Pinheiro." 343 NLRB 631, 637. Pinheiro received "good" ratings in 5 out of 8 performance factors, including "Quality." The review contained the comment, "Overall quality has been good." He earned "fair/good" rankings in 2 factors, including "Productivity." His rating for productivity was accompanied by a comment, "Has shown improvement." He received a "poor" rating for "attitude" for "threatening to fight one of his coworkers" who Pinheiro believed was spreading false rumors about him.

In any case, we do not substitute our business judgment for that of the Respondent, as our colleague contends. The issue before the Board is not Pinheiro's skill as an equipment operator. The issue is whether the Respondent has satisfied its *Wright Line* burden to establish, by a preponderance of the evidence, that it would not have transferred Pinheiro to the night shift even absent his union activity. To the extent that the Respondent relies on Pinheiro's purported lack of ability to work on the 5-Axis, we simply find that the Respondent's evidence on the point is equivocal, at best, and insufficient to satisfy the Respondent's evidentiary burden.

[19] According to the Respondent, job shops manufacture prototype parts on a one-time basis. Thus, job-shop machinists frequently perform set-up work and gain greater experience and skill than production shop machinists, who repeatedly manufacture the same part.

[20] Butkus' application listed three employers: Madden Machine, Calcore Space, and Acromil Corporation. At the hearing, Bechtol testified that he was unfamiliar with Madden. Bechtol testified, further, that Calcore and Acromil were production shops, but noted that Calcore did some small job-shop work. This testimony is contrary to Respondent's admission, in its brief to the Board, that "Allied was not familiar with the employers." See Br. in Support of Exceptions, 9. Shifting explanations of this type support an inference that the real reason for the denial of the transfer is not among those the Respondent asserts. *Hahner, Foreman, & Harness, Inc.*, 343 NLRB 1423, 1425 (2004).

[21] We recognize that there is no evidence in the record regarding whether or not Respondent had a practice of checking the references of employment applicants. However, our point is *not* that the Respondent departed from any past practice when it hired Butkus. Our point is simply that it hired an unknown person (without checking references) over a current employee.

It is undisputed that Pinheiro incorrectly machined the parts cited in the warning. He was solely at fault for the August 27 error and partly responsible for the errors that occurred on August 21 and 28. The Respondent has imposed discipline on other employees with similar error records. For example, the Respondent issued written warnings based on one machining error to Erick Franklin, John Lombardo, Brad Green, Juan Torres, Sergio Barragan, and Vikas Sharma. Indeed, although not mentioned by the judge, the Respondent issued a warning to Pinheiro on November 14, 2002, prior to any union activity on his part, based on one error.

In *Allied I*, the Board found that the Respondent violated Section 8(a)(3) and (1) by issuing a warning to Pinheiro in January for failing to completely machine a part. The part was passed by the Respondent's inspector, who thus was partly responsible for the error. However, that error was easily corrected by placing the part back on the machine, the Respondent failed to show that any other machinist would have been disciplined for "so harmless an error," the inspector received only an oral reprimand, and the discipline was imposed immediately after Pinheiro told supervisors that he planned to file charges with the Board.[22] The September 5 discipline, and the errors on which it was based, differ. The discipline followed Pinheiro's having made three machining errors within a 7-day span. Thus, our finding that this discipline was lawful is consistent with the Board's findings in *Allied I*. See also *Desert Toyota*, 346 NLRB No. 4, slip op. at 4 (2005) (discipline nondiscriminatory where employee Pranske twice engaged in similar misconduct in a short period of time).

C. Denial of Overtime

The Respondent assigned Pinheiro to 40-hour shifts with no overtime for the first 3 weeks following his recall from layoff on July 23, but scheduled him for overtime for 5 of the 7 remaining weeks of his employment. The judge found that the Respondent discriminatorily denied overtime to Pinheiro following his recall.[23] The judge found that the "vast majority of employees were constantly scheduled for overtime." The judge also cited the experience of employee Rusalin Manea, who was scheduled for overtime in the first 4 weeks following his recall.[24]

In reversing, we assume arguendo that the General Counsel has established a prima facie case.[25] However, the Respondent has shown that Pinheiro would have been denied overtime even if he had not engaged in union activity. The Respondent's assignment of overtime to Pinheiro was consistent with its treatment of other employees. During each of the 10 full weeks between Pinheiro's recall and his discharge, more than 20 percent of unit employees received no scheduled overtime. In faulting the Respondent for failing to offer Pinheiro overtime immediately following his recall, the judge was requiring the Respondent to treat him more favorably than his coworkers. In fact, Pinheiro would reasonably be expected to have worked less overtime than other employees, not more. Other employees were assigned overtime when the machine they operated was in high demand. On the other hand, as a floater, Pinheiro's overtime turned on both overall workload and the absence of the person usually assigned to a particular machine.

Contrary to the judge, the fact that the Respondent scheduled Manea to work overtime immediately after his recall does not show disparate treatment. The Respondent recalled Pinheiro weeks before Manea, whose experience in September says nothing about Pinheiro's experience in July. The Respondent offered comparable overtime opportunities to the two employees during the 3 weeks after Manea's recall and before Pinheiro's suspension. Pinheiro worked overtime during 2 of those weeks while Manea worked overtime in all 3. The difference of 1 week does not support an inference of disparate treatment.

D. Suspension and Discharge

When Pinheiro reported on October 3 to work his scheduled overtime, he asked Sedano where he was supposed to work that day and Sedano told him to look at the schedule. After checking a schedule, Pinheiro told Sedano that he was not scheduled to work and would be going home. Later, Sedano checked the document Pinheiro reviewed and saw that it was the schedule for the wrong week; the week of October 6–10. He concluded that Pinheiro had mistakenly gone home.

On October 6, not realizing that he had made a mistake, Pinheiro confronted Sedano in Sedano's office to complain about the lost overtime opportunity on October 3. Sedano explained that, because of "this union thing

[22] The disciplinary warning issued to Pinheiro on March 25 was also found unlawful by the judge in *Allied Mechanical I,* based on evidence that the total cost to the Respondent of the underlying machining errors was $100 and that one of the error reports was later withdrawn. There were no exceptions to the finding that this discipline was unlawful.

[23] Pinheiro testified that he repeatedly requested overtime from Sedano, but Sedano denied receiving such requests. The judge made no specific credibility resolution concerning this conflicting testimony.

[24] The exact date that the Respondent recalled Manea is not evident from the record.

[25] A finding of animus necessary to establish the prima facie case would be based on Sedano's explanation to Pinheiro ("this union thing and . . . trouble with the Labor Board").

and . . . trouble with the Labor Board, that now [Respondent is] going to have to start going by the Employee Handbook" and award overtime in accordance with seniority.[26]

As mentioned above, Pinheiro responded to Sedano's statement by saying either "suck d—k" or "suck my d—k" as he exited Sedano's office. At least three employees were within hearing distance of the exchange. In response, the Respondent suspended Pinheiro on October 8, pending an investigation. After completing its investigation, the Respondent discharged him on October 17. Pinheiro's separation report read in pertinent 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."

Contrary to the judge, we find that the Respondent established that this outburst would have resulted in Pinheiro's discharge even in the absence of his union activity. First, the handbook provisions cited in Pinheiro's separation report provide for disciplinary action up to and including termination for rude treatment of employees and insubordination. Pinheiro's conduct was inarguably rude and insubordinate and his discharge was consistent with the Respondent's disciplinary policy.[27] Second, Pinheiro was lawfully cited for threatening a coworker in his February 6 performance review covering the period September 3–December 2, 2002.[28] His October outburst was thus a second offense. Third, the Respondent discharged employee Martin in June for spitting at and shouting obscenities at his supervisor. Pinheiro's discharge was consistent with the Respondent's treatment of Martin.

In finding that the discharge was unlawful, the judge concluded that the Respondent "has tolerated actions similar to Pinheiro's and worse." We disagree. The Respondent issued a warning to employee Viramontes for shouting obscenities at his supervisor in December 2001, and to employee Scott for altercations with another employee in 2003. In both cases, mitigating circumstances justified the decision not to discharge the employees.[29] No such mitigating circumstances were shown in the case of Pinheiro. To the contrary, Pinheiro had been cited for a similar offense in his February performance review. Consequently, we find a discharge under these circumstances was not discriminatory. See *Desert Toyota,* supra.

In finding that the Respondent failed to meet its *Wright Line* burden, our dissenting colleague maintains that the reasons proffered by the Respondent for discharging Pinheiro were not the real reasons for the discharge. In so finding, the dissent fails to take the record into account. According to the dissent, the Respondent's handbook policy was not a reason for the discharge. But the policy, as discussed above, provided for termination of rude and insubordinate employees.[30] Moreover, the separation report specifically cites to the handbook.

Our dissenting colleague also asserts that the Respondent's defense is undercut because the offenses committed by Martin, Viramontes, and Scott were qualitatively different and considerably more egregious. Our colleague is correct that all four men committed differing offenses. But it is rare to find cases of previous discipline that are "on all fours" with the case in question. Unlike our dissenting colleague, we do not fault the Respondent for being unable to show that it disciplined an employee for saying "suck d—k" to a supervisor. The standard of proof the Respondent must meet under *Wright Line* is that of the preponderance of the evidence. In the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent met that standard by demonstrating that it has a rule regarding insubordinate and rude behavior, that Pin-

[26] For the reasons stated above, Member Schaumber would remand to the judge for further elaboration regarding her finding that this statement violated Sec. 8(a)(1).

[27] See, e.g., *George L. Mee Memorial Hospital*, 348 NLRB No. 15, slip op. at 6–7 (2006) (respondent lawfully refused to rehire employee who walked off of the job in violation of policy requiring all employees to give 2 weeks' notice); *Krystal Enterprises*, 345 NLRB No. 15, slip op. at 2–3 (2005) (discharge for sexual touching lawful where consistent with past practice and sexual harassment policy providing for discipline up to and including discharge).

[28] In *Allied Mechanical I,* the judge found that the performance review was lawful and there were no exceptions to this finding. 343 NLRB 631, 631 fn. 2, 8, 10–11.

[29] The Respondent reasonably believed that Viramontes' supervisor provoked the outburst, and Viramontes was a proficient and productive welder. Pinheiro's situation was different. Pinheiro initiated the conversation with Sedano on the mistaken belief that he had been denied an overtime opportunity. As found above, the Respondent did not treat Pinheiro disparately in the assignment of overtime. And although Sedano and Pinheiro disagreed about the subject of overtime, there was nothing confrontational in Sedano's tone or behavior and he did not use profanity with Pinheiro. Thus, Pinheiro's outburst, in contrast to Viramontes' outburst, was not provoked by any conduct on the part of a supervisor. Scott also was not similarly situated to Pinheiro. His altercations involved another employee, while Pinheiro's misconduct was aimed at a supervisor.

[30] The dissent maintains that the suspension and discharge notices rely solely on insubordination. However, the separation report references pages 14–15 of the employee handbook, which includes disciplinary action up to and including termination for "rude and discourteous treatment of clients, business associates and fellow employees." The separation report also references Pinheiro's poor work record. As discussed above, Pinheiro's poor work history was well documented.

heiro had previously violated that rule,[31] and that the rule had been applied to employees in the past. See *Merillat Industries*, 307 NLRB 1301, 1303 (1992).[32]

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to transfer employee Marcelo Pinheiro to the night-shift vacancy on the 5-Axis machine, 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 make Pinheiro whole for any loss of earnings and other benefits he suffered as a result of the Respondent's unlawful discrimination against him. Backpay shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Interest shall be computed as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

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

1. Cease and desist from

(a) Telling its employees that its conduct was discriminatorily motivated.

(b) Failing and refusing to transfer its employees because they engaged in union or other protected concerted activities, or because they testified before the NLRB.

(c) Issuing written disciplinary notices to its employees because they engaged in union or other protected concerted activities, or because they testified before the NLRB.

(d) 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) Make Marcelo Pinheiro 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 amended remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to Pinheiro's unlawful denial of transfer to the night shift and Edwin Shook's written disciplinary action, and within 3 days thereafter notify the employees in writing that this has been done and that the denial of Pinheiro's transfer to the night shift and Shook's written disciplinary action will not be used against them in any way.

(c) 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.

(d) Within 14 days after service by the Region, post at its facility in Ontario, California, copies of the attached notice marked "Appendix."[33] Copies of the notice, 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. 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 August 15, 2003.

(e) 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. May 31, 2007

Robert J. Battista, Chairman

[31] Contrary to our dissenting colleague's implication, absence of formal discipline for Pinheiro's earlier outburst does not demonstrate that the Respondent disregarded the incident. Pinheiro was cited in his performance review for "threaten[ing] to fight one of his coworkers." The review included a warning to tell management about his problems with coworkers, rather than threaten anyone. And he ultimately received a "poor" attitude rating based on his outburst.

[32] See *George L. Mee Memorial Hospital*, supra, 348 NLRB No. 15, slip op. at 6–7 (differences in circumstances between allegedly unlawful refusal to rehire and past instance of refusal to rehire not fatal to respondent's argument that it consistently refused to rehire employees who quit without notice).

[33] 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."

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I agree with my worthy colleagues on all issues except with their finding that the Respondent violated Section 8(a)(1), (3), and (4) by refusing to transfer employee Marcelo Pinheiro to a night-shift position operating its 5-Axis machine. In my view, the relevant evidence establishes that the Respondent would have reached the same decision even in the absence of Pinheiro's union activity. Accordingly, I respectfully dissent from this finding of a violation.

The Respondent hired Pinheiro in April 2002 as a night-shift 5-Axis machine operator. He testified that "several months" after he was hired he was "taken off" the 5-Axis machine and transferred to a Toshiba machine. In April 2003, he was laid off but recalled to a floater position on the day shift on July 23, 2003.[1] As a floater, Pinheiro operated different machines on an as-needed basis to fill in for vacationing employees and when "hot jobs" came up.[2]

In early August, Pinheiro requested a transfer to a 5-Axis operator position on the night shift. The Respondent considered him for the position, but ultimately selected someone else. Company President Mark Slater met with Pinheiro to explain the decision. Slater told Pinheiro that he was not selected to operate the 5-Axis machine on the night shift because he was "less trouble" on the day shift and that by "less trouble" he meant that Pinheiro's production was better on the day shift.

The Respondent hired a new employee, Steven Butkus, for the position. Butkus was subsequently discharged when the Respondent determined that he too had problems on the 5-Axis.

Insuring that the 5-Axis machine was competently operated was important to the Respondent. It is more expensive to operate than Respondent's other equipment and has the unique capability to machine parts on five rotary axes. The record evidence clearly shows that Pinheiro did not meet the Respondent's standards as a 5-Axis operator.

Machinists on the 5-Axis are responsible for setting up the machine and then watching its operation to prevent the machine's drill from breaking. Slater testified that Pinheiro had "several quality problems" operating the 5-Axis machine. Supervisor Miguel Sedano explained that one of Pinheiro's problems was the manner in which he did his set ups. He testified that Supervisor Eddie Rogers complained that Pinheiro's set-up ability "wasn't as expected." Sedano said he told David Bechtol, the Respondent's production manager, that Pinheiro should not be transferred to the night shift because Pinheiro did not perform well on the 5-Axis prior to his layoff. Bechtol testified that Pinheiro was able to run the 5-Axis, but that he was not able to set it up for proper operation. He further testified that Pinheiro was not qualified to run the 5-Axis machine because of his problems operating that machine prior to his lay off.

My colleagues say that the Respondent's evidence of Pinheiro's problems on the 5-Axis machine is "neither clear nor persuasive" because it did not offer "specific examples or information." I respectfully disagree. Sedano, Pinheiro's immediate supervisor, testified that Pinheiro had a problem setting up the 5-Axis machine for operation, and he testified further that Supervisor Eddie Rogers made a similar complaint. Bechtol corroborated that testimony. Not surprisingly, Company President Slater testified more generally that Pinheiro's work quality was deficient.[3]

The judge found that the "Respondent's managers generally testified" that "Pinheiro could competently operate the 5-Axis."[4] Critically, however, she also acknowledged that the managers "generally testified that" Pinheiro "could not complete set up work for the machine." The judge did not discredit that testimony, and it fully supports the Respondent's *Wright Line* defense. Nonetheless, the judge found the Respondent's reason for not transferring Pinheiro to the night shift was "pretextual." The sole basis for this conclusion is her finding that Butkus, the employee hired instead of Pinheiro, "had

[1] Unless stated otherwise, all dates occurred in 2003.

[2] The Respondent's production records show that Pinheiro did not work on the 5-Axis machine after his recall. While Pinheiro testified that he did, the judge did not credit this testimony. Thus, any implication in the majority decision that Pinheiro may have worked on the 5-Axis machine in the day time upon his return is incorrect.

[3] Pinheiro testified that he was an "A" machinist. He did not testify to his ability to complete set ups on the 5-Axis.

As discussed above, Slater told Pinheiro that he was not selected for the night-shift position because he was more productive on the day shift. That explanation reasonably encompasses the deficiencies in the quality of his work discussed above. Accordingly, I cannot agree with the majority that Slater offered shifting reasons for not transferring Pinheiro. Nor can I agree with the majority's implication that the Respondent's quality concerns were pretextual because Slater did not explicitly cite them during his conversation with Pinheiro.

[4] This may have been an overstatement, since only Bechtol's testimony specifically supports that finding.

no history of set up on" the 5-Axis machine. However, the record does not support this finding. Butkus represented on his application that he had 10-years experience on the 5-Axis machine and Bechtol, who hired Butkus, testified that Butkus told him that his prior experience included setting up the machine. Thus, the record refutes the judge's finding that Butkus had no history of set-up work, and her finding that the Respondent's reason for not transferring Pinheiro was pretextual is without merit.[5]

My colleagues argue that Pinheiro's February 6 performance review undercuts the Respondent's defense because it does not identify deficiencies in Pinheiro's 5-Axis set-up work. But there is also no evidence that Pinheiro was working on the 5-Axis machine during the rating period. The performance review which describes the overall quality of Pinheiro's work as "good," covers a very limited period of time, 3 months out of the 13 months Pinheiro worked for the Respondent before his layoff. In light of Pinheiro's testimony that he was taken off the 5-Axis machine "several months" after he was hired in April 2002, 5 months before the ratings period began, he more likely than not was not working on the machine during the rating period.[6]

Contrary to the majority, the fact that Butkus failed to meet the Respondent's expectations does not establish the Respondent's defense as pretextual. Obviously, the Respondent did not know Butkus' work would fall below expectations when it hired him. As discussed above, the Respondent hired Butkus because he represented that he had 10 years of experience operating a 5-Axis machine. Pinheiro, in contrast, only operated the 5-Axis machine for the Respondent for a few months and, according to the Respondent's witnesses, he was not very successful. Butkus thus appeared to be a successful 5-Axis machine operator, while the Respondent knew that Pinheiro was not.

Similarly, Butkus' subsequent discharge as a result of his performance problems does not detract from the strength of the Respondent's rebuttal case. The Respondent reasonably believed that Butkus was better qualified than Pinheiro to operate the 5-Axis machine. "[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the [decision]." *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993) (quoting *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enfg. in part 137 NLRB 306 (1962)). The most that can be said is that neither Butkus nor Pinheiro turned out to be qualified for the job.

Finally, the Respondent's failure to contact Butkus' prior employers to verify his qualifications does not show that the Respondent's concern about Pinheiro's lack of ability was pretextual. There was no evidence that the Respondent's usual practice was to check references. While checking Butkus' references would have been a wiser course, it is well-settled that the Board will not substitute its business judgment for that of the employer in evaluating whether conduct was unlawfully motivated. *Framan Mechanical, Inc.*, 343 NLRB 408, 413 (2004).

For the foregoing reasons, I find a preponderance of the evidence establishes that the Respondent would not have transferred Pinheiro even in the absence of his union activity.

Dated, Washington, D.C. May 31, 2007

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with the majority in all respects except for their reversal of the judge's finding that the Respondent discriminatorily suspended and discharged Marcelo Pinheiro. In view of the Respondent's labor record, its prior treatment of Pinheiro, and the facts surrounding the suspension and discharge, it is plain to me that the Respondent seized on an unfortunate remark by Pinheiro, one that the Respondent itself provoked, as an excuse to rid itself of a union activist. My colleagues in the majority go astray by confining their attention to the remark itself and deeming it a dischargeable offense. In so doing, they substitute their own judgment for the Respondent's actual motivation. Accordingly, I dissent.

A. Background: The Respondents' Unlawful Antiunion Campaign and its Unlawful Treatment of Pinheiro

The facts of this case played out against the background set forth in *Allied Mechanical I*, 343 NLRB 631 (2004). In the first few months of 2003, the Respondent unlawfully responded to a union organizing campaign by engaging in a variety of unfair labor practices and by committing objectionable conduct prior to the election. The Respondent unlawfully disciplined three employees and unlawfully discharged two of them. In addition, it directed coercive statements to employees and discriminatorily prohibited the posting of prounion literature.

[5] That Butkus was later discharged for poor performance is likewise no basis for the judge's rejection of the Respondent's reason for failing to transfer Pinheiro, as I explain below.

[6] A November 14, 2002 disciplinary action notice citing Pinheiro for a machining error on the Toshiba machine indicates that he worked on that machine for at least some part of the rating period covered by the performance review.

Employee Marcelo Pinheiro was one of those directly affected. An open supporter of the Union's campaign, Pinheiro received a written warning on January 31, 2003, the month the Union filed its election petition, only hours after he informed his supervisor that he would file Board charges over the Respondent's removal of lawfully posted union fliers. The warning purported to address a production error. On March 6, Pinheiro served as the Union's election observer. The Union lost, by a vote of 42–37; on March 13, it filed election objections alleging that the Respondent had engaged in misconduct. On March 25, while the objections were pending, the Respondent issued Pinheiro a second written warning, again addressing "quality problems." The Board found that both warnings were pretextual, and were actually given to Pinheiro on account of his union activity.

After being laid off from early April through late July, Pinheiro returned as a floater on the day shift. Shortly after his return, he told his supervisor, Sedano, that he wished to be considered for the vacant position of 5-Axis machine operator on the night shift. But, as the Board finds today, the Respondent repeatedly frustrated Pinheiro's efforts to land this assignment, in retaliation for his union activities in general and for his service as the Union's election observer. Supervisor Sedano had told Pinheiro in response to Pinheiro's initial request for the transfer that he would look into the matter and get back to him. But Sedano never did get back to Pinheiro. In early August, Pinheiro tried again, this time going up the chain of command to ask Production Manager Dave Bechtol for the transfer. Like Sedano, Bechtol told Pinheiro that he would look into the matter and get back to him. And like Sedano, he never did.

Pinheiro then discovered on his own that the Respondent had hired an outside applicant to fill the night-shift position. (The Respondent, however, had made no effort to determine whether the applicant could satisfactorily perform the job. And as it turned out, he could not, and was soon let go.)

After his discovery, Pinheiro met with Mark Slater, the Respondent's president, to express his disappointment over not getting the night-shift job. Slater told Pinheiro that Pinheiro was "less trouble" on the day shift. Pinheiro said that he thought that what Slater meant was that Slater could keep Pinheiro under close observation on the day shift. Slater did not respond.

B. The Suspension and Discharge

Allied Mechanical I was tried in September. Pinheiro testified as a witness for the General Counsel against the Respondent. The events that led to Pinheiro's suspension and discharge occurred in early October.

On Friday, October 3, because of an error in reading the work schedule, Pinheiro thought that the Respondent had discriminated against him in the allocation of overtime work. On Monday, October 6, Pinheiro approached his supervisor, Sedano, in Sedano's office, and asked why it was that, "every time" that Pinheiro had a job assignment requiring overtime, he was taken off the job and someone else received the overtime. Sedano replied that the particular overtime work in question on October 3 had been reassigned from Pinheiro to another employee on the basis of seniority. Pinheiro challenged that explanation, asking Sedano, "Since when [has] seniority . . . ever played any role in who you give overtime to in this company?" Sedano replied, unlawfully (as the Board finds today), that the Respondent would follow the employee handbook regarding seniority because of the Union's organizing campaign and the Respondent's trouble with the National Labor Relations Board. Pinheiro knew that Sedano's excuse was false, because he knew (and the record establishes) that there was nothing in the employee handbook about assigning overtime by seniority. Pinheiro turned his back on Sedano, began to walk away, and put his face in his hands. While still in Sedano's office, he said, "Suck dick, what does a guy have to do to get a fair shake around here."[1] The judge expressly credited Pinheiro's testimony about the remark:

> [It] was not a word that I told him to do anything. It's just I was disgusted . . . with the answer that he gave me and it was like a frustration. You see, I was frustrated with everything, not getting any respect or . . . being considered for anything. . . . [The remark] was just to myself. It was like in a low tone of voice.

The judge also expressly credited Pinheiro's account of what happened next: Pinheiro returned to his work station. A few minutes later, Sedano approached him and told him that Pinheiro had been very disrespectful in directing that remark to him. Pinheiro told Sedano that he had not done so, but rather had said "suck dick" to

[1] Although Pinheiro and employee Sergio Berragan (who overheard the remark) testified that Pinheiro said "suck dick," Sedano testified that Pinheiro said "suck my dick." The judge found it unnecessary to resolve this dispute; what she deemed important was "whether the remark was made in anger directly to Sedano, or in frustration, as a comment regarding Pinheiro's feelings." In finding the latter, the judge expressly credited the "convincing[]" testimony of Pinheiro and Berragan, and expressly discredited the "vague" testimony of Sedano. Another employee, Milad Murad, testified that he did not hear the remark first-hand, but that he heard Pinheiro tell other employees that he had said "suck dick." My use of the words "suck dick" in this dissent is not intended to resolve the credibility dispute over the words, but for convenience.

himself, in frustration. Pinheiro then told Sedano, "I apologize for saying a bad word."

Two days later, on October 8, the Respondent suspended Pinheiro for his "actions and comments" towards Sedano. On October 16, the Respondent discharged Pinheiro for "cuss[ing] out" Sedano, which it characterized on the employee separation report as "an act of insubordination."[2]

C. The Judge's Decision and Applicable Principles

Applying *Wright Line*,[3] the judge found that a preponderance of the credible evidence supported a finding that the Respondent suspended and discharged Pinheiro because of his union and NLRB activity. The judge also found that Pinheiro's statement did not remove him from the protection of the Act. In making those findings, the judge observed that: the Respondent had knowledge of Pinheiro's union activity; the Respondent repeatedly demonstrated animus, even in Sedano's comments to Pinheiro during their October 6 conversation; that the discussion during that meeting pertained to wages, hours, and working conditions; that Pinheiro uttered his remark in frustration, not in anger; and that such language was "clearly within the ambit of other profanity used on the work floor by and to supervisors."

In view of the credited evidence, I agree with that reasoning. It is important to remember that this case is not about whether Pinheiro's remark justified his discharge. It goes without saying that, under the Act, an employer may discharge an employee for good reason, bad reason, or no reason at all so long as it is not for union or concerted protected activities. *Ryder System, Inc.*, 302 NLRB 608 (1991); see *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). What *is* at issue here is not whether the remark justified the Respondent in discharging Pinheiro, but whether it would have caused the discharge even in the absence of his protected activities. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969) ("the policy and protection provided by the National Labor Relations Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities").[4] I believe the majority loses sight of that essential distinction.

D. The Respondent's Defense

The majority assumes that the General Counsel met its *Wright Line* burden of establishing that Pinheiro's protected activity was a motivating factor in the Respondent's decision to discharge him. But, for a series of reasons, it finds that the Respondent satisfied its burden of showing that it would have suspended and discharged Pinheiro for his conduct even in the absence of his protected activities. I disagree with each of those reasons.

First, my colleagues in the majority assert that Pinheiro's discharge for "rude treatment of employees and insubordination" was permissible under the rules set forth in the Respondent's employee handbook. But that proves nothing. Again, the question is not whether the Respondent had cause to discipline Pinheiro, but why it did so. The language of the handbook does not advance the majority's argument.[5]

Second, my colleagues assert that, because Pinheiro had previously received a warning for a dispute with a coworker, "[h]is October outburst was a second offense." That claim is a make-weight, at best. Although Pinheiro had received an annual review in 2002 that mentioned an incident when he said that he would "kick [a coworker's] ass," he had received no discipline for that statement. And the Respondent made no mention of this alleged prior offense when it suspended or discharged Pinheiro, even though the discharge form specifically provided for the listing of prior misconduct and disciplinary action. Thus, even if the earlier remark might have justified increased punishment, the Respondent did not rely upon it.

Third, my colleagues assert that Pinheiro's discharge was consistent with discipline meted out to other employees. That assertion is simply false. The majority relies on the discipline received, on various occasions, by employees Martin, Viramontes, and Scott. Each of those offenses, however, was qualitatively different and considerably more egregious. In addition, and in spite of the fact that their conduct was worse, two of those employees received lesser punishment.

The Respondent discharged employee Martin for spitting at and shouting obscenities at his supervisor. The Respondent's own account of the incident was that Martin

> [J]ust flew off the handle and started yelling and screaming, in Eddie's face, swearing at him, threaten-

[2] The Respondent's employee handbook defines "insubordination" as "unwillingness to submit to authority of a designated supervisor or other management person."

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

[4] See also *W. F. Bolin*, 311 NLRB 1118, 1119 (1993) ("An employer cannot simply present a legitimate reason for its action but must [show] that the same action would have taken place even in the absence of the protected activity."), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

I find my colleagues' reliance on *George L. Mee Memorial Hospital*, 348 NLRB No. 15 (2006), and *Krystal Enterprises*, 345 NLRB No. 15 (2005), to be unpersuasive for the reasons set forth in my partial dissent in the former case and in Member Liebman's partial dissent in the latter.

[5] In any event, the suspension and discharge notices make no reference to "rude" behavior; they rely solely on "insubordination."

ing him, spitting on him, calling him obscenities and just, basically, went crazy.

Employee Viramontes was disciplined for saying "Fuck you. . . . Fuck it, I'll just go home," to his supervisor when the supervisor was attempting to give Viramontes a work assignment. Viramontes was plainly addressing his remark to the supervisor. The Respondent issued him a warning letter.[6]

Employee Scott was given the choice of attending anger management school or resigning after first getting into a physical altercation with another employee and then, 1 month later, attempting to choke him. The majority's explanation for his receiving more lenient treatment than Pinheiro—that his conduct involved another employee, not his supervisor—simply does not ring true.

Finally, the majority does not dispute the judge's finding, based on the admission of the Respondent's management, that the use of profanity was common among both employees and supervisors.

By focusing their attention exclusively on Pinheiro's remark and ignoring the context, my colleagues conclude that the Respondent established that it would have discharged Pinheiro even in the absence of his protected activity. For the reasons just discussed, I find that conclusion utterly unsupportable. Pinheiro may not have been perfect, but the Respondent did not fire him for that reason. Contrary to my colleagues' assertion, I have in fact considered the entire record, and such consideration compels the conclusion that the Respondent acted in response to Pinheiro's protected activity and thereby violated the Act.[7]

Dated, Washington, D.C. May 31, 2007

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

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 tell you that our conduct was discriminatorily motivated.

WE WILL NOT refuse to transfer you because you engaged in union or other protected concerted activities, or because you testified before the NLRB.

WE WILL NOT issue written disciplinary notices to you because you engaged in union or other protected concerted activities, or because you testified before the NLRB.

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 make Marcelo Pinheiro whole for any loss of earnings and other benefits resulting from his denial of transfer to the night shift, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful denial of transfer to the night shift of Marcelo Pinheiro, and the unlawful disciplinary notice to Edwin Shook, and WE WILL, within 3 days thereafter, notify them in writing that

[6] The majority contends that Viramontes, unlike Pinheiro, avoided discharge because the Respondent reasonably believed that his supervisor had provoked his outburst. By advancing that argument, the majority completely ignores the Respondent's year-long unlawful treatment of Pinheiro and, in particular, Sedano's unlawful statement that triggered Pinheiro's remark.

[7] Although the judge found that Pinheiro's remark was uttered out of frustration, she did not analyze his conduct under the case law protecting otherwise unprotected employee conduct provoked by the employer. See, e.g., *NLRB v. Vought Corp.*, 788 F.2d 1378, 1384 (8th Cir. 1986) (employee's "remarks were unreasonably provoked by repeated Company violations of his rights under the Act") (collecting cases), enfg. 273 NLRB 1290, 1295 fn. 31 (1984); *NLRB v. Mueller Brass Co.*, 501 F.2d 680 (5th Cir. 1974) ("An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment."), enfg. 204 NLRB 617 (1973); *NLRB v. M & B Headwear, Co.*, 349 F.2d 170, 174 (4th Cir. 1965) ("We in no way condone insubordination and in normal situations it would be a justifiable ground for dismissal. But we cannot disregard the fact that the unjust and discriminatory treatment of Vaughan gave rise to the antagonistic environment in which these remarks were made."), enfg. 146 NLRB 1634 (1964); *Caterpillar, Inc.*, 322 NLRB 674, 678–679 (1996). Although I do not find it necessary to rely on that line of authority, it lends strong support to the judge's conclusion that the Respondent's suspension and discharge of Pinheiro were unlawful. As shown above, Pinheiro was subjected to a pattern of unjust and discriminatory treatment, up to and including Sedano's unlawful remark attributing Pinheiro's failure to receive an overtime assignment to the union campaign and the Respondent's trouble with the Board, matters in which Pinheiro played a leading role. The patent falsity of Sedano's claim of applying seniority in accord with the employee handbook would reasonably have led Pinheiro to conclude that this was one more instance of his being singled out for discriminatory treatment.

this has been done and that the unlawful denial of transfer to the night shift will not be used against Pinheiro in any way and that the unlawful disciplinary notice will not be used against Shook in any way.

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

Michelle Youtz Scannell, Esq., for the General Counsel.
Steven D. Atkinson, Esq., of Los Angeles, California, for the Respondent.
Robert J. Stock, Esq., of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Mary Miller Cracraft, Administrative Law Judge: At issue is whether Tower Industries, Inc. d/b/a Allied Mechanical (Respondent)[1] violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act)[2] by denying a transfer to the night shift, issuing a written warning, denying overtime, suspending, and discharging employee Marcello Pinheiro and by issuing written discipline to employee Edwin Shook because Pinheiro and Shook assisted United Steel Workers of America, AFL–CIO–CLC (the Union), and because Pinheiro and Shook took part in a representation hearing and an unfair labor practice hearing before the NLRB. Also at issue are allegations that Respondent violated Section 8(a)(1) of the Act by making an implied threat of relocation and an implied inducement to forego union support, and by telling an employee that its conduct was discriminatorily motivated.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a California corporation engaged in manufacturing machined parts. It maintains its principal place of business in Ontario, California. During calendar year 2003, Respondent purchased and received goods, supplies, and materials valued in excess of $50,000 directly from sources located outside the State of California. Respondent admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. Background

Respondent specializes in medium to large precision machining at its shop in Ontario, California. It also performs assembly and fabrication. Richard Mark Slater (Slater) assumed the position of president of Respondent on January 1, 2003. Prior to that time, he served for seven years as vice president and general manager. Dave Bechtol is production manager. Miguel Sedano is day-shift supervisor. All are admitted to be supervisor and agents within the meaning of Section 2(11) and (13) of the Act.

On January 24, the Union filed a petition in Case 31-RC-8202 seeking to represent a unit of employees as follows:

> All full-time and regular part-time production, maintenance, shipping and receiving employees and programmers employed by Respondent at its facility located at 1720 Bon View, Ontario, California.

On March 6, an election was conducted among these employees. The tally of ballots indicated 37 votes in favor of representation and 42 votes against representation. The Union's timely filed objections were consolidated with unfair labor practice charges. On December 19, Administrative Law Judge Lana H. Parke found that Respondent had committed various unfair labor practices. Additionally, she sustained various of the objections and, finally, she recommended a bargaining order pursuant to *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 610 (1969). JD(SF)-93-03 at p. 15–16. Judge Parke's decision is currently pending review before the NLRB on Respondent's exceptions to that decision.

B. Alleged Unlawful Activity Regarding Pinheiro

1. Pinheiro's employment background and his union activity

Pinheiro began his employment with Respondent in roughly April 2002 as a CNC (computer numeric control) mill machinist. He worked on the night shift, operating a 5-Axis Cincinnati and a Toshiba.

Pinheiro's overall performance review for the period Sep-

[1] Although Respondent claimed at trial and in its brief that its correct legal name was "Allied Mechanical, Inc.," no documentary or testimonial evidence was adduced to support this claim. Thus, Respondent's name will remain as set forth in the consolidated complaint.

[2] Sec. 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1), provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7, "which secures the rights of employees, inter alia, "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . [and] to refrain from any or all such activities. . . ." Sec. 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), provides, inter alia, that discrimination which encourages or discourages membership in a labor organization is an unfair labor practice; and Sec. 8(a)(4) of the Act, 29 U.S.C. § 158(a)(4), prohibits discharge or discrimination against an employee because he files charges or gives testimony under the Act.

[3] Trial was in Los Angeles, California, on April 12, 13, and 14, 2004. All charges were filed by the Union, as follows: The charge and amended charge in Case 31–CA–26605 on December 11, 2003 and January 5, 2004, respectively; the charge in Case 31–CA–26644 on January 9, 2004; the charge in Case 31–CA–26666 on February 3, 2004. The consolidated complaint issued on February 24, 2004. All dates are in 2003 unless otherwise specified.

[4] Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

tember 3, 2002, through December 2, 2002, was good. However, his attitude was rated as "poor." Pinheiro agreed that during this review period, on one occasion, he told another employee that he would "kick his ass" if the employee caused Pinheiro to lose his job by reporting false information to management. This incident was listed as the reason for the "poor" attitude rating. Pinheiro was given this performance review in early February.

Regarding the event leading to the "poor" attitude rating, Respondent's president Mark Slater testified that he had been told that Pinheiro threatened to kill another employee over an unpaid debt. Slater determined to discharge Pinheiro due to this event. However, his production manager and his program manager begged Slater not to discharge Pinheiro because Respondent would be unable to deliver badly needed parts to a customer.

In any event, Pinheiro was not discharged in 2002 and in January 2003, Pinheiro became a supporter of the Union. Pinheiro passed out union flyers from 5 to 6 a.m. in the driveway shortly after the petition for representation was filed on January 24. In the course of this activity, Pinheiro gave a union flyer to Day-Shift Supervisor Miguel Sedano, the man who hired Pinheiro.

In addition, Pinheiro spoke to Eddie Rogers, night shift supervisor, in January. Pinheiro told Rogers that he was engaged in the union campaign but intended to conduct himself in a professional manner. Rogers indicated that he had no problem with Pinheiro and said he was a good worker.

2. Matters presented to Judge Parke

Pinheiro placed union leaflets on the wall by the supervisor's window where other flyers were customarily posted and by the bathroom wall and on the tool crib window. Other flyers were posted in these areas advertising videotapes for sale, computers for sale, hockey tickets for sale, and similar items. Pinheiro noticed that the flyers were always taken down. Pinheiro spoke to both Rogers and Sedano on January 31, and asked them to leave the union flyers posted. Pinheiro threatened that he would have to "put a charge on Sedano" for tearing down the flyers. Sedano opined that the flyers were posted on private property and Respondent could do whatever it wanted to do on private property. Sedano agreed. He testified that his position to Pinheiro was that he believed the company could do what it wished with the union flyers. This evidence warrants a finding that Respondent harbored animus to the employees' union efforts and specifically to Pinheiro's union activity.[5]

All parties agree that a discrepancy report is created for any error made while machining a part. Discrepancy reports do not always reflect machinist error.

Before removing a part from the machine table, each machinist must determine that the piece is completely machined and then must call an inspector to certify that the part has been made as specified. On January 28, before removing a part from the Toshiba table, Pinheiro inspected it and thought it was completed. He then called inspector Jerry Belton to inspect the part. Belton certified that the part was completely machined. Then Pinheiro removed the part from the machine table.

On January 31, a few hours after Pinheiro had spoken with Sedano and Rogers about removal of union flyers, Pinheiro was called back to Sedano's office. Inspector Belton was present. Pinheiro was given a disciplinary action notice for removing the part on January 28 without completing serration on one of the seal faces. Pinheiro agreed that one of the faces was missing the required serrations. Belton admitted to Sedano that he "bought off the part." Belton was given a verbal warning, according to Sedano.

The defective part was returned to Pinheiro, he reloaded it on the table, and machined the missing feature. The part was not scrapped and Respondent did not miss the required time targets for that job. Production Manager Dave Bechtol testified that he recommended that Pinheiro be disciplined for this incident because additional time to load, unload, and clean the machine was involved. This could have been an additional 4 hours to reload and 3 to 4 hours to take the part off and clean the machine at a cost of $75 per hour. However, these figures were not actual but conjectured. The actual time it took to rectify the missing serration is not present in the record.

This evidence supports a finding that Respondent harbored animus to Pinheiro's union activities. Given Pinheiro's open and active union support, Respondent's animus toward Pinheiro's union activity, the timing of issuance of this disciplinary action notice to Pinheiro just after he challenged Respondent's removal of union flyers, and failure to accord the same discipline to the inspector, I find that this disciplinary report was not issued because of the error but because of Pinheiro's support for the Union.[6]

Pinheiro served as an observer for the Union during both sessions of the March 6 election proceeding. On March 25, Pinheiro was called into the office of Production Manager Dave Bechtol and given a disciplinary action notice for excessive discrepancies and quality problems within a 6-month period. Production Manager Dave Bechtol ordered the write up due to the quantity of discrepancy reports and so that Pinheiro would understand that he needed to do a better job. The jobs referenced in the disciplinary action notice were numbers 6864 on February 14, 6907 on March 14, and 6914 on March 19. One of these discrepancies was later withdrawn after Bechtol investigated the matter. However, the disciplinary action notice was not withdrawn. Once again, this evidence supports a finding of animus toward Pinheiro and his union activity.[7]

Pinheiro was laid off on April 8, 2003, and, based on Respondent's records, recalled on July 23, 2003, to work on the day shift as a floater. Respondent's president Mark Slater testified that employees who are laid off are not automatically subject to recall. However, Pinheiro was recalled from this layoff because he was an active union supporter and Slater felt that

[5] Judge Parke found that Respondent's removal of union flyers violated Sec. 8(a)(1) of the Act. JD(SF)-93-03.

[6] Judge Parke found that this disciplinary action notice was given to Pinheiro not because of the error but because of Pinheiro's vigorous support of the Union. JD(SF)-93-03 at p. 13.

[7] Judge Parke found that the March 25 disciplinary action notice was given for pretextual reasons and that, in fact, the discipline was imposed because of Pinheiro's union activity. JD(SF)-93-03 at p. 14.

Pinheiro and other active union supporters should be recalled from layoff "to keep our self out of trouble."[8]

3. Denial of transfer to the night shift

a. Facts

Following his recall, Pinheiro testified that he initially worked on a Cincinnati 5-Axis to replace Cedric Parlow, an operator who was on vacation for 2 weeks. Respondent's records contradict Pinheiro's assertion. These records indicate that Pinheiro worked on other machines when recalled. Pinheiro explained that such record discrepancies exist because sometimes a supervisor instructs the employee to log onto one machine but work on another. In any event, both the records and Pinheiro agree that he was shifted from machine-to-machine on the day shift, as needed. Production Manager Dave Bechtol told Pinheiro that he wanted him in the floater position because he felt Pinheiro was doing well in that position. Bechtol testified that he needed someone he could move around when people were on vacation or when hot jobs came up.

In late July or early August, Pinheiro learned that there was an opening on the evening shift on the Cincinnati 5-Axis. Pinheiro spoke initially to Miguel Sedano, his supervisor, and told Sedano that he wanted to be considered for the evening-shift position on the 5-Axis. Sedano said he would check on the matter and get back to Pinheiro. When Sedano did not report any news to Pinheiro, Pinheiro met with Production Manager Dave Bechtol in early August. Pinheiro told Bechtol that because he was originally hired on the evening shift for the 5-Axis, he would like to be considered for that vacancy. Ed Shook, at that time a maintenance mechanic, accompanied Pinheiro to this meeting with Bechtol. Bechtol said he would look into the matter and get back to Pinheiro.

Bechtol thought he spoke with Pinheiro about the night shift after someone had already been hired on the night shift. Bechtol believed he simply told Pinheiro that there were no openings. I credit Pinheiro and Shook that the conversation occurred prior to Respondent's filling the night-shift position. The new hire first appeared on the payroll during the week of September 2. Moreover, Bechtol was not certain that the conversation was after filling the position or before filling it. Pinheiro and Shook were certain there was still a vacancy pending at the time of the conversation and both recalled the conversation in early August. I credit Pinheiro and Shook because of the certainty of their testimony and because the matter was certainly of more importance to them. Moreover, I note that Shook is currently a member of management but corroborated Pinheiro's version of the conversation.

About a week after his conversation with Bechtol, Pinheiro heard that someone else had been hired for the 5-Axis on evening shift. Pinheiro met with President Mark Slater and told Slater that he was disappointed that he had not been considered for the evening-shift 5-Axis position. Pinheiro emphasized that he had the required experience. Slater responded, according to Pinheiro, that Pinheiro was less trouble on the day shift. Pinheiro asked Slater to define "trouble." Slater responded that Pinheiro was more productive on day shift. Pinheiro argued that he never had any bad production reports on the evening shift. Pinheiro opined that Slater was just keeping him on day shift to keep him "under his thumb" and thought this was due to Pinheiro's union activity.

According to Slater, the meeting proceeded differently. Pinheiro came into Slater's office and stated that he wanted to go onto the night shift and run the 5-Axis. Slater told Pinheiro that Respondent had already hired someone else. Slater discussed Pinheiro staying on the day shift as a floater and Pinheiro agreed that he liked the day shift and "that worked for him." Slater also told Pinheiro that he would keep his desire to return to the night shift in mind if anything else opened up. Slater further recalled telling Pinheiro that he had been recalled to the day shift because he had a poor quality record and could use the extra support from the day shift. Based upon their relative demeanors, where their recollections are in conflict, I credit Pinheiro's version of this conversation.

b. Analysis

In all cases turning on employer motivation, causation is determined pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must prove, by a preponderance of the evidence, that protected conduct was a "motivating factor" in the employer's decision. To establish this, the General Counsel must adduce evidence of protected activity, Respondent's knowledge of the protected activity, Respondent's animus toward the protected activity, and a link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). If the General Counsel makes this initial showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the employee's union activity. *American Gardens Management Co.,* 338 NLRB No. 76, slip opinion at 2 (2002), citing *Taylor & Gaskin, Inc.,* 277 NLRB 563 fn.2 (1985), both incorporating *Wright Line*, supra.

Certainly, the General Counsel has shown that Pinheiro was actively involved in union activity, that Respondent was aware of Pinheiro's union activity, and that Respondent harbored animus toward Pinheiro's union activity.[9] Evidence of animus is established by Sedano telling Pinheiro Respondent could do whatever it wanted with the union flyers, and Respondent's discriminatorily issued written disciplinary reports to Pinheiro. A link or nexus between Pinheiro's union activity and denial of transfer to the night shift also exists. For instance, President Slater testified that Pinheiro was recalled from lay off simply to keep Respondent out of further litigation. Similarly, I have found that Slater told Pinheiro that Pinheiro was less trouble on the day shift. Having found that the General Counsel established that Pinheiro's union activity was a motivating factor in Respondent's refusal to transfer Pinheiro to the night shift, Respondent must demonstrate that the same action would have

[8] Judge Parke found that Pinheiro's selection for layoff was not in retaliation for his union activities. JD(SF)-93-03 at p. 14. It is unnecessary for me to make a determination regarding this event.

[9] Any reference to documents not in the record will be disregarded. General Counsel's motion to strike Respondent's brief is granted. Moreover, no adverse inference may be drawn by Pinheiro's voluntary production of a notebook 1 day later than he had promised.

taken place even in the absence of Pinheiro's union activity, including his testimony before the NLRB.

Initially, I note that Night-Shift Supervisor Sedano testified that he told Production Manager Bechtol that Pinheiro should not be transferred to the night shift because Pinheiro did not perform well on the 5-Axis prior to his lay off. Bechtol did not specifically corroborate this testimony. However, Respondent's managers generally testified that although Pinheiro could competently operate the 5-Axis, he could not complete set up work for the machine. This was the reason he was not transferred to the night shift to run the 5-Axis. Nevertheless, Respondent hired a machinist to run the 5-Axis on night shift who had no history of set up on that machine and he was discharged for inability to perform the set-up work. Accordingly, the reason for denying Pinheiro the night shift is pretextual. Based upon this evidence, I find that Respondent's denial of transfer to the night shift would not have occurred in the absence of Pinheiro's union and NLRB activity. A preponderance of the credible evidence supports a finding that by denying Pinheiro a transfer to the night shift, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

4. Written discipline

a. Facts

On September 5, Pinheiro received a disciplinary write up for three discrepancy reports. The first discrepancy, according to Pinheiro, was for placing an extra "spot" on a part. The report states there was an extra "hole." In any event, Pinheiro explained that on August 21, he programmed the new rotary index table incorrectly. Nevertheless, his supervisor approved his program. While spotting the second hole, Pinheiro realized that the program was incorrect because the machine automatically used decimal points while his program did not. Pinheiro stopped the machine and called this to his supervisor's attention, made the correction, and completed the part. The discrepancy report also contains a notation that Pinheiro has been instructed to spot at a depth of .020 inches. Pinheiro stated that this instruction was not on the discrepancy report when he saw it and his spot was deeper than .020 inches.

The second discrepancy report was for a job run on August 27. Pinheiro agreed that he made a mistake that day. He signed the discrepancy report. The third discrepancy report was for a job on August 28. Pinheiro explained that on that day he took his part, an end cap, to the office and requested that the proper program for that part be routed to his machine. The wrong program was sent and Pinheiro did not discover the problem until the part was completed. According to Pinheiro, it was not possible to know whether the correct program was sent until after the part was completed. Respondent did not dispute this.

Discrepancy reports are completed each time there is a deviation from customer specifications. The fact that a discrepancy report is written does not automatically mean there has been an error by the machinist. Marisela Rodriguez, human resources administrator,[10] explained that there are no hard and fast rules regarding the number of discrepancy reports an employee must get before he receives a write up. Similarly, there are no "rules of thumb" regarding how many write ups an employee may receive before being terminated. In the case of the discrepancy reports supporting the September 5 write up, Pinheiro believed that the first and third reports cited mistakes not attributable to him. At the meeting with Bechtol on September 5, Pinheiro accused Bechtol of trying to build a file to justify his discharge because of his union activity. Bechtol protested that he was simply trying to eliminate mistakes. President Slater testified that he recommended this disciplinary action notice because Pinheiro's quality was atrocious.

b. Analysis

Given Pinheiro's union activity, Respondent's knowledge of the activity, and animus toward the activity, the first three elements of the *Wright Line* analysis are satisfied. I find a link or nexus between the activity, knowledge, and animus, on the one hand, and the issuance of the disciplinary action notice, on the other hand, based upon the pretextual nature of the stated reasons for the discipline. Thus, both Pinheiro and Sedano were at fault in the programming of the rotary index table. Pinheiro had never programmed this machine before and consulted with his supervisor before operating the machine. Similarly, Pinheiro requested the correct program for the end cap but received a different program. Both he and the programmer were at fault. Although Respondent may issue disciplinary action reports for only one discrepancy, there is no evidence that the remaining discrepancy of August 27 was of such a nature as to warrant a disciplinary action report. Given the pretextual nature of the reasons for discipline, it follows that Respondent would not have issued the disciplinary action notice in any event. See *Sodexho Marriott Services,* 335 NLRB 538 fn. 6 (2001). Accordingly, I conclude that a preponderance of the credible evidence supports a finding that Respondent violated Section 8(a)(1), (3), and (4) of the Act by issuing Pinheiro the September 5 disciplinary notice.

5. Denial of overtime

a. Facts

On September 9, Pinheiro testified before Judge Parke. On September 10, a discrepancy report issued for work performed by Pinheiro. Production Manager Bechtol recommended that Pinheiro be disciplined for this discrepancy. However, a disciplinary action notice dated September 17 was never issued to Pinheiro, on the advice of counsel, because the unfair labor practice hearing, held before Judge Parke on September 8–12, was in process.

Pinheiro testified he repeatedly asked supervisor Sedano for more hours. He usually made this request on payday. Sedano did not recall Pinheiro requesting overtime. In any event, for the week September 29 to October 3, Pinheiro was scheduled to work 5 10-hour days. Thus, work on Friday, October 3, was overtime work. However, when Pinheiro reported on Friday, October 3, for overtime work, according to Pinheiro, his supervisor told him that he wasn't scheduled. Pinheiro testified that on Friday, October 3, he saw another employee, Stewart Davies, working on the machine he thought he was supposed to use. Pinheiro clocked out and went home. Respondent's time-

[10] Rodriguez is an admitted supervisor and agent within the meaning of Sec. 2(11) and (13) of the Act.

cards do not indicate that either Pinheiro or Davies clocked in on Friday, October 3.

Sedano explained that when Pinheiro came in on Friday, October 3, Pinheiro asked Sedano whether he was supposed to work that day. Sedano told Pinheiro to look at the schedule. Pinheiro looked at the schedule and came back to Sedano and said he was not scheduled to work and he was going home. Sedano assumed that Pinheiro was correct. However, later, when Sedano looked at the posted schedule, Sedano saw that it was for the week of October 6–10. Apparently, Pinheiro did not notice he was looking at the wrong schedule when he came in on Friday, October 3. Pinheiro looked at the schedule for the week of October 6 and saw that Pinheiro was supposed to work 4 10-hour days. Thus, Pinheiro went home mistakenly, according to Sedano.

Dave Bechtol testified that he moved Davies to the Mitsui Seiki on September 30 because the machine Davies was running, the Union, broke and because Davies was more familiar with the Mitsui Seiki and Pinheiro was a floater. Sedano agreed that Davies had more experience on the Mitsui Seiki and more overall seniority. Sedano testified that Davies did not work on Friday, October 3, because there was insufficient work. I credit Bechtol's testimony and find that Davies was moved to the Mitsui Seiki mid-week and that Davies had more experience on the Mitsui Seiki than Pinheiro. I credit Sedano's testimony that Davies did not work on October 3. His testimony is supported by Respondent's records.

Respondent notes that Pinheiro was scheduled to work overtime for 6 of the 12 weeks following his recall from lay off, for a total of 554 hours. However, Respondent's assertion continues, Pinheiro's time cards show that he worked only 438.70 hours in the 12 weeks. This is somewhat misleading because Pinheiro actually worked only 10 full weeks. He returned from lay off mid-week and he was suspended pending investigation mid-week. Respondent's figures include these weeks when Pinheiro did not work a full week. I will disregard Respondent's figures for that reason.

In the 10 full weeks of his post-recall employment, Pinheiro was scheduled for overtime 5 weeks and not scheduled, 5 weeks. Thus he was scheduled for overtime 50 percent of the time. His total hours scheduled were 450 hours in 10 weeks. During this 10-week period, Pinheiro worked about 415 hours. If he had worked every hour that he was scheduled to work, less 2 days he did not work his scheduled 8 hours because he was present and testified before the NLRB, he could have worked 434 hours. Complete attendance records for each employee were not introduced but Pinheiro, at least, worked about 96 percent of his scheduled hours.

The vast majority of employees were scheduled for overtime 100 percent of the time during the same 10 weeks. Pinheiro was the only employee of the five who were laid off in April who was recalled in July. One other of these five, Rusalin Manea, was recalled in September and scheduled for overtime the first five of the seven weeks following his return.

b. Analysis

The first 3 weeks that Pinheiro worked after his recall from layoff were 40-hour weeks. In contrast, the first 4 weeks that Manea worked after his recall from layoff were overtime weeks. After Pinheiro's first 3 weeks of recall, he was scheduled to work overtime 5 of the 7 remaining weeks. One of his 2 40-hour weeks during his last 7 weeks was the week of the NLRB hearing before Judge Parke.

Pursuant to the *Wright Line* analysis, I find that General Counsel has sustained its initial burden. Penheiro's union and NLRB activity, Respondent's knowledge of this activity, and Respondent's animus to this activity have already been discussed. A link or nexus exists in that the only other recalled employee immediately undertook substantial overtime. Thus, Pinheiro was treated disparately. Moreover, the vast majority of employees were constantly scheduled for overtime. Respondent has failed to show that it would have taken the same action in any event. Thus I find that a preponderance of the credible evidence supports a finding that Respondent violated Section 8(a)(1), (3), and (4) of the Act by denying overtime to Pinheiro.

6. Suspension and discharge

a. Facts

On Monday, October 6, Pinheiro clocked in and saw his supervisor Miguel Sedano going into his office. Pinheiro walked over to the office door and asked Sedano why every time he had a job requiring overtime, he was taken off the job and someone else got the overtime. Sedano responded that Davies got the overtime on that job because Davies was more senior. Pinheiro responded, "Since when [has] seniority . . . ever played any role in who you give overtime to in this company?" Sedano responded, "Since all this union thing and we got into such trouble with the Labor Board, that now they're going to have to start going by the Employee Handbook."[11] Pinheiro started to walk away, putting his face in his hands, and then said, "suck dick, what does a guy have to do to get a fair shake around here?" According to Pinheiro, machinists Israel de La Rosa and Sergio Barragan were present at this time. Pinheiro thought he was around 9 feet from Sedano when he said this.

Sedano recalled that Pinheiro walked into his office and asked why Rusalin Manea had run the Takumi on Friday night. Sedano explained that they had run out of work for Manea on Friday night so he used Manea as back up on the Takumi. Sedano also recalled that Pinheiro asked why Stuart Davies was put on the Mitsui Seiki and Sedano explained that Davies had a year and a half experience on the machine, more than Pinheiro, Sedano knew that Davies was better on the machine than Pinheiro, and Sedano had used seniority as well because "the labor board [was] after us." Sedano testified that Pinheiro then said that was "bull shit" and "suck my dick" and walked out.

Sergio Barragan, another CNC machinist, overheard Pinheiro's remark to Sedano. Barragan was about to walk into Sedano's office when he overheard Pinheiro say something about Respondent never using seniority. Pinheiro may have used the term "bull shit" regarding Sedano's assertion that Davies got the overtime because Davies was more senior. Then Pinheiro turned around, began walking out of Sedano's office, said, "suck dick," and then bumped into Barragan at the door.

[11] The General Counsel alleges that this remark violated Sec. 8(a)(1). This allegation will be discussed infra.

Pinheiro continued walking out and Barragan walked in, laughing at Pinheiro's remark. Barragan was followed by Milad Murad. Sedano said, "There goes your leader." Barragan protested that Pinheiro was not his leader. Barragan heard Pinheiro use the phrase "suck dick" on a daily basis. According to Barragan, normal shoptalk involves profanity.

In any event, Pinheiro began his work. Sedano approached a few minutes later and told Pinheiro that his comment was very disrespectful. Sedano said Pinheiro "had told him to suck his dick." Pinheiro protested that he never said that. Rather, he said, "suck dick" to himself, out of frustration. Pinheiro apologized for his comment. Sedano confirmed that Pinheiro apologized.

According to Pinheiro, language among the machinists and their supervisors is not particularly refined. Maintenance supervisor Edwin Shook confirmed that profanity is frequently used in the shop. He recalled on one occasion that Jose L. Rodriguez spoke to Tom Bechtol, quality control manager,[12] and said, "fuck you, mother fucker." Shook recalled that Rodriguez wore a "Vote No" T-shirt during the union campaign. The profanity that Shook has heard in the shop has always been stated in a joking manner rather than in an angry manner. Production Manager Dave Bechtol also agreed that profanity in the shop is common among employees and management.

Murad Murad, CNC lead man, was warming up an Ikeiga machine about 30 feet from Miguel Sedano's office shortly before 6 a.m. on the morning of October 6. His brother Milad Murad walked through the aisle and the two were discussing their weekend activities when a discussion began between Sedano and Pinheiro in the aisle about 10 to 15 feet from him. Both Sedano and Pinheiro spoke in elevated voices. Pinheiro asked Sedano why he was taken off the Mitsui Seiki and Davies put on it. Pinheiro thought he was denied overtime on the Mitsui Seiki. Sedano replied that Davies had more seniority and experience on that machine. Sedano continued, "That is what seniority is. Don't you want the seniority?" The conversation moved into Sedano's office at that point and Murad Murad was unable to hear anything further until Pinheiro emerged from the office and said, "My lawyer is going to be hearing about this." Then Pinheiro told Murad Murad that he had told Sedano to "suck my dick."

Milad Murad, lead machinist, recalled that Pinheiro said, "I cannot take that shit. I want to call my lawyer." Pinheiro questioned Sedano about why someone else worked on his machine and got overtime on the previous Friday. Sedano explained that he had utilized seniority. Milad Murad did not hear Pinheiro use any profanity. Milad Murad described Pinheiro as screaming and Sedano as calm. Later, in the lunchroom, Milad Murad heard Pinheiro tell other employees that he had told Sedano, "suck dick."

Sedano, Pinheiro, Berragan, Murad Murad, and Milad Murad, by implication, all agree that Pinheiro's comment, either "suck dick" or "suck my dick" was spoken in the confines of Sedano's office. I find that the comment at issue was made in Sedano's office. It is immaterial whether the comment was as Pinheiro and Berragan assert, "suck dick" or whether it was a Murad Murad and Sedano assert, "suck my dick." What is relevant is whether the remark was made in anger directly to Sedano, or in frustration, as a comment regarding Pinheiro's feelings. I find the later to be the case. Pinheiro and Berragan convincingly testified regarding the manner in which the expletive phrase was delivered. Sedano's testimony on this point was vague and is not credited. Moreover, Pinheiro apologized to Sedano after explaining that he had not made a comment directed to Sedano but, rather, a comment of frustration over his belief that he was not receiving as much overtime as he deserved.

Human Resources Manager Marisela Rodriguez was instructed by Slater to conduct an investigation of the Sedano/Pinheiro incident of October 6. Rodriguez interviewed Sedano and received a copy of Sedano's notes about the incident. Rodriguez also spoke with Murad and Milad Murad, Pinheiro, Israel de La Rosa, and Sergio Barragan. Sedano told Rodriguez that Pinheiro told him "suck my dick." Sedano also told Rodriguez that he told Pinheiro he did not get the Mitsui Seiki because he used seniority since the NLRB was "after us."

Rodriguez questioned Barragan about what Pinheiro said to Sedano as part of her investigation of the incident. According to Barragan, he told Rodriguez exactly what happened.

On about Wednesday, October 8, Rodriguez questioned Pinheiro about his comment to Sedano. Pinheiro told Rodriguez "I never told Miguel Sedano to do anything. Basically, what I said was that it was just something that I said to myself out of frustration." Pinheiro did not believe that he actually repeated either the phrase "suck dick" or "suck my dick" to Rodriguez. By telling Rodriguez he never told Sedano to do anything, he was attempting to tell her that he did not say to Sedano, "suck my dick." In any event, Rodriguez told Pinheiro she would speak to employee witnesses as part of her investigation. Rodriguez was not involved in the decision to suspend or terminate Pinheiro.

Later on October 8, Pinheiro was suspended pending investigation. The disciplinary action notice stated, in part,

> On 10/6/03 there was a problem between Miguel Sedano and you. Your actions and comments are considered an act of insubordination. At this time we have taken the determination to suspend your working activities until further notice, pending our investigation. Reference Employee Handbook, page 14–15.

In the meeting with Bechtol and Rodriguez when Pinheiro was given the suspension notice, he protested that the suspension was unfair because he had not been given any warnings. Pinheiro understood that the handbook required two verbal warnings, a written warning, suspension and then discharge.

Dave Bechtol testified that he received Rodriguez' report regarding investigation of the Sedano/Pinheiro incident. After reviewing it, he determined that Pinheiro should be discharged. "There has got to be respect for your supervisors and if you have no respect for supervision, there is—how can you get anything done in a shop? I find it absurd we are even talking about it." Slater testified that in approving Pinheiro's discharge, he relied on the human resources investigation report in

[12] Tom Bechtol is an admitted supervisor and agent of Respondent within the meaning of Sec. 2(11) and (13) of the Act.

which Pinheiro admitted to Rodriguez that he swore at his supervisor.

A separation report was issued on October 16, signed by Dave Bechtol. Pinheiro was advised of his discharge on October 17. The separation report stated that Pinheiro was dismissed due to insubordination and violation of established company rules. The details section stated:

> 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. You have 5 days to pick up your toolbox. After 5 days, Allied Mechanical assumes no liability.

Other employees have been disciplined or discharged for use of profanity. For instance, janitor Willie Martin was discharged in June 2003 for yelling, screaming, swearing, threatening, spitting on, and shouting obscenities to his supervisor. Machinist Jesus A. Viramontes was disciplined in December 2001, for screaming at his Supervisor Eddie Rogers, "fuck you." Viramontes still works for Respondent. Slater testified that Viramontes was not discharged first, because Slater suspected supervisor Rogers had something to do with agitating Viramontes, and second, because Respondent was backed up on welding and Viramontes was a very good, productive welder. Terminating Viramontes would have had a "negative effect on the Company." Additionally, Slater agreed that supervisor Rogers had altercations with people from time to time.

Employee Dennis Scott was involved in a verbal altercation with another employee in March 2003, and received a disciplinary action notice. He had a physical altercation with another employee in April 2003, and attempted to choke him. Scott was given a choice of taking anger management courses or being terminated. He resigned but eventually took the courses and is now reemployed. Indeed, in 2002, Slater thought Pinheiro threatened to kill another employee but did not terminate him because of production pressures. Finally, employees Vikas Sharma and Juan Cortes have been disciplined for drinking on company premises but still work for Respondent.

b. Analysis

Sedano's statement that Pinheiro was denied overtime due to unfair labor practice problems experienced by Respondent reasonably tended to restrain, coerce, and interfere with employees' Section 7 rights. See, e.g., *Webco Industries,* 327 NLRB 172, 173 (1998) (employer violates Sec. 8(a)(1) when it takes adverse action against employees and falsely blames its action on the union).[13]

Pinheiro's union activity, Respondent's knowledge of his union activity, and Respondent's animus regarding the activity have been amply documented. Further evidence of animus is supplied by Sedano's unlawful explanation of the use of seniority to determine job assignment. A link or nexus to the discharge of Pinheiro is provided by Sedano's comment about unfair labor practice proceedings requiring that the company follow the employee manual now and utilize seniority in awarding work. The Union previously filed the very unfair labor practice charges regarding treatment of Pinheiro and others, leading Sedano to state that he had to utilize seniority. Respondent has not shown that it would have discharged Pinheiro in any event. It has tolerated actions similar to Pinheiro's and worse.

Respondent contends that Pinheiro's use of profanity to his supervisor constitutes activity that removes Pinheiro from the protection of the Act. Contrary to Respondent's assertion, I find that Pinheiro's statements did not remove him from the protection of the Act. The offending part of the discussion was held in Sedano's office, away from other employees. Berragan overheard Pinheiro's comment only because he was walking into Sedano's office. The subject matter of the discussion, Pinheiro's assertion that he was denied overtime, pertains to wages, hours, and terms and conditions of employment. In response to Pinheiro's assertion that he had been denied overtime, Sedano unlawfully claimed that because of problems with the NLRB, Respondent had to follow seniority in awarding overtime. Finally, Pinheiro's statement, either "suck dick" or "suck my dick," uttered in frustration, was clearly within the ambit of other profanity used on the work floor by and to supervisors. Under these circumstances, Pinheiro's language did not remove him from the protection of the Act. See, generally, *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979).

Thus, pursuant to *Wright Line's* shifting burden of proof, I find that a preponderance of the credible evidence supports a finding that Pinheiro was suspended and discharged, in part, for his Union and NLRB activity. Moreover, I find that absent such activity, he would not have been suspended and discharged. Additionally, I find that Pinheiro's statements did not remove him from the protection of the Act.

C. Discipline of Edwin Shook

1. Facts

Edwin Shook worked as a maintenance mechanic for about nine years. On February 16, 2004, he became maintenance supervisor. Shook's job as maintenance mechanic was to fix machines, troubleshoot, repair electrical and mechanical problems, and conduct preventive maintenance.

Shook was involved in the union campaign in early January. He handed out flyers on about five occasions in front of the shop, went to union meetings, wore union buttons and a union T-shirt occasionally. Miguel Sedano observed Shook passing out flyers before the day shift, in front of the building. Shook

[13] Respondent claims that the independent 8(a)(1) allegation regarding Sedano's statement to Pinheiro was improperly added during the course of the trial. The charge in Case 31–CA–26605 was filed on December 11, 2003. The first amended charge alleges, inter alia,

> The [Respondent] violated Section 8(a)(3) and 8(a)(4) by indefinitely suspending employee Marcelo Pinheiro without pay on or about October 8, 2003, and by discharging him on or about October 17, 2003, in retaliation for his union-related activities and for the testimony he gave at the trial [before Judge Parke]. By the above and other acts, [Respondent] interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act.

I find that the independent 8(a)(1) allegation is closely related to the allegations in the charge and occurred within 6 months of the filing of that charge.

also posted flyers in the plant. On one occasion, Shook saw Dave Bechtol remove a union flier. Shook spoke to Bechtol and told him that he should not be taking down the union flyers. Bechtol asked why and Shook responded that it was illegal to remove the union literature. Bechtol stated that it was not illegal because the flyers were posted on company property and Respondent could have whatever it wanted posted on its own property.

Joe Garcia, maintenance supervisor prior to Shook, warned Shook that he should not talk to other employees during work time. Shook saw employee John Saenz speak to another employee during work time. Shook spoke to President Slater about the situation. Shook had seen Saenz wearing a "Vote No" T-shirt and speaking with Respondent's labor consultants. Shook told Slater that he did not think Respondent was treating him fairly because of the Union. Slater merely said, "okay" in response. Shook testified at the hearing before Judge Parke.

On December 18, at 4:15 p.m., Shook asked Garcia if he could leave work early because he was not feeling well. Garcia said Shook would have to stay because Garcia had to leave early. Shook went into the office and read a newspaper during the remaining 15 minutes of his shift. While so engaged, Slater entered the office and asked about a machine. Shook answered Slater's question and Slater left. Slater did not say anything to Shook about Shook reading a newspaper on work time. Shook left work at 4:30 p.m. when his shift ended. Judge Parke's decision issued the following day, December 19.

On January 5, 2004, Shook received a disciplinary notice from Joe Garcia stating that Slater had observed Shook reading a newspaper during work time at 4:15 p.m. on December 18. Garcia told Shook he did not personally agree that the disciplinary notice was warranted. The notice stated, in relevant part:

> This is a violation of work rule number seven as stated in the Allied Mechanical Employee Handbook, "The use of Company time, material, or facilities for purposes not directly related to Company business, or the removal of Company property from the Company premises without authorization." Joe Garcia, Maintenance Supervisor, has verbally warned you on several occasions regarding the misuse of Company time.

Shook signed the notice and wrote at the bottom, in part, "This is clearly an attempted first step towards an unfair dismissal due to my union involvement. There are many employees reading papers and magazines here who do not get written up." Shook also testified that other employees read newspapers during work time. Dave Bechtol agreed. "Oh, unfortunately too often [do I catch somebody reading a newspaper]. Probably a couple of times a month." Bechtol has always given verbal warnings by telling the employees to put away the paper and warning them they are not supposed to be reading a newspaper. In agreement, Sedano testified that he sees employees reading a newspaper almost everyday. He tells them to stop reading. Shook is the only employee to receive a written disciplinary action notice for reading a newspaper on work time.

2. Analysis

Shook's open union activity and his testimony before Judge Parke were known by Respondent. Respondent's animus toward employee union activity has been documented supra. No other employee has ever received written discipline for reading a newspaper. This disparate treatment of Shook serves as a link or nexus to Shook's union activity and testimony before the Board. The long delay in issuing the written disciplinary action notice is suspect as well. Respondent has failed to show that Shook would have received written discipline in any event. No other employee has ever received written discipline for this behavior. Respondent's defense is that because the written discipline has been removed from Shook's personnel file and because Shook and Respondent have requested that this charge be withdrawn, it would not effectuate the purposes of the Act to treat discipline of Shook as an unfair labor practice. However, I find to the contrary. Once an unfair labor practice charge is filed, the General Counsel has an independent responsibility to refuse permission to withdraw a charge if withdrawal would not effectuate the purposes of the Act. Although Shook and Respondent may have requested withdrawal of the allegation, the matter was no longer one for vindication of a private right. Moreover, I note that Respondent did not admit any wrongdoing when it removed Shook's written discipline from his personnel file. Accordingly, I find that a preponderance of the credible evidence supports a finding that Respondent issued a written disciplinary warning to Shook on January 5, 2004, because of Shook's union and NLRB activity, in violation of Section 8(a)(1), (3), and (4) of the Act.

D. Implied Threat of Relocation and Implied Inducement to Forego Union Support

1. Facts

About 1 month after Judge Parke's decision issued, Respondent distributed a letter to all employees dated January 12, 2004, signed by Owner Tom Stull. In relevant part, the letter stated:

> We also want to update you on the union situation. We have maintained that we can be more competitive in this industry as a non-union company. The majority of those employees who voted last March agreed with us. However, the National Labor Relations Board has made a decision that we must negotiate with the union, despite the majority of employees against union representation. We support the majority vote and will vigorously appeal the NLRB decision to protect your voices on the issue and our ability to compete. While our appeal is being considered, we will continue to make the best decisions for the company's future. I think that it is important to stress that no matter what side of the union issue you're on, we must work together in this difficult business environment to improve company productivity and profitability.

The letter asserted that Respondent's sales and productivity had decreased while costs had increased. It noted the dramatic 600 percent rise in workers compensation costs, pointing out that California has the highest premiums in the nation and the lowest amounts paid to injured workers, concluding that the entire California workers compensation system needed an overhaul. The letter warned, "Many businesses have given up and are moving out of State to avoid the problem."

The letter outlined Respondent's rising health and dental insurance costs, noting, "we are hearing of cost increases of 10-15% for similar plans. The letter asserted that rising electric rates in California were 2.3 times higher than Arizona and 1.6 times higher than Nevada. The letter stated, "While many business owners say that they would never start a new manufacturing company in the State of California, others are looking for a way out."

2. Analysis

General Counsel contends that the letter, issued shortly after Judge Parke's decision, contains an unlawful implied, not express, inducement of its employees to forego Union support and an unlawful implied, not express, threat of relocation. General Counsel argues that the *Gissel*[14] analysis, "whether the employer's statement constitutes an unlawful threat of retaliation in response to protected activity, or a lawful, fact-based prediction of economic consequences beyond the employer's control" must be applied. Respondent contends there are no threats of reprisal or force or promises of benefits. Thus, *Gissel* does not apply.

The letter does not specifically state that Respondent will leave California if the NLRB upholds Judge Parke's decision and it is ordered to bargain with the Union. There is no express threat to relocate and none is alleged. Respondent states that it believes it would be more competitive as a nonunion company. Respondent also notes that the high cost of doing business in California has deterred companies from locating in the State and forced others to consider leaving. There is no prediction contained in the letter. Nor is there an implication that Respondent "may or may not take action solely on his own initiative for reasons unrelated to economic necessities and know only to him." *Gissel,* supra, 395 U.S. at 618. Accordingly, no implied threat of relocation and implied inducement to forego Union support is contained, even considering Respondent's other unfair labor practices. See, e.g., *Enjo Architectural Millwork,* 340 NLRB No. 162 (2003), slip opinion at 2, relied upon by Respondent.

CONCLUSIONS OF LAW

1. By telling an employee that its conduct was discriminatorily motivated, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By denying Pinheiro a transfer to the night shift, issuing a written disciplinary notice to Pinheiro, denying Pinheiro overtime, suspending and discharging Pinheiro, and by issuing a written disciplinary notice to Shook, Respondent violated Section 8(a)(1), (3), and (4) 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. Having discriminatorily denied a transfer to the night shift, denied overtime, and suspended and discharged Pinheiro, Respondent must offer him reinstatement and make him 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[15]

ORDER

Respondent, Tower Industries, Inc. d/b/a Allied Mechanical, Ontario, California, its officers, agents, successors, and assigns, shall

1. Cease and desist telling an employee that its conduct was discriminatorily motivated, and denying transfer to the night shift, issuing written disciplinary notices, denying overtime, suspending and discharging any employee for assisting the Union and/or engaging in concerted activities, and for testifying before the NLRB, or 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 Marcelo 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 or privileges previously enjoyed.

(b) Make Marcelo Pinheiro 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.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to Pinheiro's unlawful denial of transfer to the night shift, written disciplinary action, denial of overtime, suspension and discharge, and Shook's written disciplinary action, and within 3 days thereafter notify the employees in writing that this has been done and that the denial of transfer to the night shift, written disciplinary action, denial of overtime, suspension and discharge 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 Ontario, California, copies of the attached Notice

[14] *NLRB v. Gissel,* 395 U.S. 575, 618 (1969).

[15] 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.

marked "Appendix."[16] Copies of the notice, 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. 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 mid-August 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.

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

Dated, San Francisco, California July 15, 2004

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 tell any of you that you were denied overtime because we have to use seniority in assigning overtime since we got into trouble with the NLRB.

WE WILL NOT deny transfer to the night shift, discipline, deny overtime, suspend, discharge or otherwise discriminate against any of you for supporting United Steelworkers of America, AFL–CIO–CLC.

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 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 denial of transfer to the night shift, denial of overtime, suspension, and 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 denial of transfer to the night shift, disciplinary notice, denial of overtime, suspension and discharge of Marcelo Pinheiro, and the unlawful disciplinary notice to Edwin Shook, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful denial of transfer to the night shift, disciplinary notices, denial of overtime, suspension and discharge will not be used against them in any way.

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

[16] 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."