No. 07-72381

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

TOWER INDUSTRIES, INC. d/b/a ALLIED MECHANICAL

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board ("the Board") had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations

Act, as amended ("the Act") (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order issued on May 31, 2007 and is reported at 349 NLRB No. 117. (ER 17.)[1] The Board's Decision and Order is final under Section 10(f) of the Act (29 U.S.C. § 160(f)).

This case is before the Court on the petition of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("the Union"), who was the Charging Party before the Board, to review the Board's Order dismissing three of the underlying complaint allegations. The petition was timely, as the Act imposes no time limitation on filing for review. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), because the alleged unfair labor practices took place in Ontario, California. Tower Industries, Inc. d/b/a Allied Mechanical ("the Company") was the Respondent before the Board and has intervened on the side of the Board.

[1] "ER" refers to the Excerpts of Record filed by the Union. "SER" refers to Supplemental Excerpts of Record filed by the Board with this Brief. References preceding a semicolon are to the Board's findings; those following are to the

STATEMENT OF THE ISSUE PRESENTED

Whether the Board had a rational basis for dismissing the complaint allegations that the Company unlawfully disciplined, suspended, and discharged employee Marcelo Pinheiro.

STATEMENT OF THE CASE

Based on charges filed by the Union, the Board's General Counsel issued a consolidated unfair labor practice complaint against the Company on February 24, 2004. (ER 5-9.) The complaint alleged that the Company violated Section 8(a)(1), (3), and (4) of the Act (29 U.S.C. § 158(a)(1), (3), and (4)) by denying employee Marcelo Pinheiro a transfer to the night shift, denying him overtime, and disciplining, suspending, and discharging him because of protected activity. (ER 5-8.) It also alleged that the Company violated the above provisions of the Act by disciplining employee Edwin Shook because of his protected activity, and violated Section 8(a)(1) (29 U.S.C. § 158(a)(1)) by telling Pinheiro that the Company would follow its handbook regarding overtime because of the Union's organizing campaign and trouble with "the Labor Board." Finally, the complaint alleged that the Company violated Section 8(a)(1) of the Act by impliedly threatening relocation and inducing employees to forego union support. (ER 5-8.)

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supporting evidence.

Following a 3-day hearing, the administrative law judge issued a decision finding that the Company violated the Act in almost all alleged respects, except for the allegations regarding the implied threat to relocate and inducement of employees to forego union support, which the judge dismissed. (ER 29-38.) The Company filed exceptions and the General Counsel filed cross-exceptions. (ER 17.) The Union filed an answering brief to the Company's exceptions, and the Company filed a reply brief. (ER 17.)

On May 31, 2007, the Board issued its decision reversing, in part, the judge's findings and recommended order. (ER 17-23.) Although the Board upheld the judge's findings that the Company violated the Act by denying Pinheiro a transfer to the night shift, telling Pinheiro that the Company would follow the handbook because of employees' protected activity, and unlawfully disciplining Shook, it reversed the judge's remaining findings. Specifically, the Board reversed the judge's findings that the Company violated the Act by disciplining, denying overtime to, suspending, and discharging Pinheiro. (ER 17-23.) In so finding, the Board held that, even assuming that the General Counsel demonstrated that union animus was a motivating factor in those decisions, the Company proved its affirmative defenses that it would have taken the same actions absent Pinheiro's protected activities. (ER 17, 18-23.) Accordingly, the Board dismissed the relevant complaint allegations. (ER 17.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Structure; Relevant Disciplinary Practices

The Company manufactures machine parts, operating a large facility in Ontario, California. (ER 17; ER 6.) The Company employs approximately 110 employees, including production, maintenance, shipping and receiving employees and programmers. *See Allied Mech. Inc*., 343 NLRB 631 (2004) (*Allied I*), *affirmed*, *USW v. NLRB*, 482 F.3d 1112 (9th Cir. 2007).[2]

Mark Slater is the Company's president. (ER 18; ER 6, 12.) Dave Bechtol is the Production Manager. (ER 18; ER 6, 12.) Foremen, including Night Shift Foreman Eddie Rogers and Day Shift Foreman Miguel Sedano, directly supervise employees and report to Bechtol. (ER 17, 18; ER 6, 12, SER 64.)

The Company prepares a "discrepancy report" whenever a part is not completed exactly to specification. (ER 32; SER 59.) It then provides the discrepancy report to the purchaser. *Allied I*, 343 NLRB at 637. Machinist error,

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[2] The Board took judicial notice (ER 17) of its earlier decision in *Allied I*, a case in which it found that the Company committed unfair labor practices against Pinheiro and others. At the time of the administrative hearing in the instant case, the judge took judicial notice of the *Allied I* judge's decision, which at that time was pending review by the Board. As discussed later herein, the Board in *Allied I* ultimately upheld the judge's findings on the relevant unfair labor practices, but reversed the judge's finding that they warranted the issuance of a *Gissel* bargaining order. This Court recently affirmed the denial of the bargaining order in *USW v. NLRB*, 482 F.3d 1112 (9th Cir. 2007) (summarily enforcing uncontested unfair labor practices

which can cause problems with a part, can form a basis for a discrepancy report. (ER 30; SER 60.) Although a discrepancy report itself is not discipline, such a report can provide the basis for the Company to give an employee a Disciplinary Action Notice ("DAN"). (ER 32; SER 59, 91.) There are no hard and fast rules regarding the number of discrepancy reports the Company must have issued to an employee before that employee receives a DAN. (ER 32; SER 83, 91.) Over the years, the Company has issued DANs to numerous employees based on only one machining error. Employees receiving such DANs include Erick Franklin, John Lombardo, Brad Green, Juan Torres, Sergio Barragan, Vikas Sharma, and Pinheiro. (ER 21; SER 172-180.)

The Company's handbook contains a code of conduct that provides, in pertinent part, that employees can be disciplined up to and including termination for "rude and discourteous treatment of clients, business associates and fellow employees." (ER 22; ER 93, 109.) The code of conduct also provides that employees may receive discipline up to and including termination for "insubordination," defined as "the unwillingness to submit to authority of a designated supervisor or other management person." (ER 22; ER 110.)

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and affirming denial of bargaining order), as noted above in the text.

B. The Company Hires Employee Pinheiro and Disciplines Him for Machine Error Seven Months Later; Pinheiro Shortly Thereafter Threatens a Coworker That He Will "Kick [His] Ass"

In mid-2002, the Company hired Pinheiro as a night-shift machinist. (ER 18; SER 122.) On November 14, 2002, the Company gave Pinheiro a DAN for improperly setting up a machine, leading to a defective part. (ER 20-21; SER 124.) Later that year, Pinherio had an altercation with coworker Sharma, in which Pinheiro threatened to "kick [his] ass." (ER 22; *Allied I*, 343 NLRB at 637, SER 61.) Foreman Rogers sent both employees home. 343 NLRB at 637. Although Company President Slater prepared a termination letter for Pinheiro based on this incident, he ultimately did not give it to him because Pinheiro was running a machine that was severely behind schedule with work for the Company's number one customer. (ER 19; SER 65.)

C. Union Conducts Organizing Campaign and Board Holds Election; The Company Disciplines, Evaluates, and Lays Off Pinheiro

In December 2002, an employee contacted the Union to discuss the possibility of union representation. *Allied I*, 343 NLRB at 636. Shortly thereafter, employees formed an organization committee and, in January 2003,[3] began to hold meetings. (*Id*.) Pinheiro soon became an active union supporter. (*Id*.)

[3] All dates noted hereafter are in 2003.

On January 24, the Union filed a petition for a Board-conducted representation election. (*Id*.) On January 31, Pinheiro told Sedano and Rogers that he planned to file charges with the Board over the removal of union fliers that Pinheiro had posted in certain areas of the plant. (*Id*.) Later that day, the Company gave Pinheiro a DAN, stating that he had erred in machining a part on January 28. (*Id*.)

On February 6, Foreman Rogers gave Pinheiro his performance evaluation, covering the period from September to December 2002. (*Id.*) Rogers rated Pinheiro as poor in "attitude," noting in the comment section that Pinheiro "threatened to fight one of his coworkers," referring to the incident with Sharma. (*Id*.)

On March 6, Pinheiro served as a union observer at the election. *Allied I*, 343 NLRB at 636. The Union lost the election by 5 votes, with 37 votes cast for and 42 votes cast against the Union. (*Id*.)

On March 25, the Company issued Pinheiro another DAN. (*Id*.) On April 8, the Company laid off six employees, including Pinheiro, because work had decreased and Pinheiro was among the least senior employees. (*Id*.)

D. The Union Files Charges Against the Company and Complaint Issues in *Allied I*

Shortly thereafter, the Union filed unfair labor practice charges against the Company, alleging, among other things, that the Company unlawfully

discriminated against Pinheiro by issuing him the January and March DANs, issuing him the performance review with the poor attitude rating in February, and laying him off in April. (*Id.*) In June and August, the Board's Regional Office issued complaints in what eventually became the consolidated cases in *Allied I*. (*Id*.)

E. The Company Discharges Employee Martin for Insubordination

Also in June, the Company discharged employee Willie Martin for insubordination. His conduct consisted of swearing at and spitting on his supervisor. (ER 22; SER 67-68, 71-72, 119.)

F. The Company Recalls Pinheiro to the Day-Shift and Assigns Him Overtime, and Hires Another Employee for the Night-Shift

On July 23, the Company recalled Pinheiro to a day-shift "floater" position, that is, 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, under Sedano's supervision. (ER 18; SER 54, 90.) During 5 of the 10 full weeks following Pinheiro's recall in July, the Company scheduled him for overtime work. During this period, approximately 20 percent of his coworkers received no scheduled overtime. (ER 21; SER 125-171.)

Soon after his recall, in late July or early August, Pinheiro requested a transfer to the night-shift position he held prior to the layoff. (ER 21; SER 96.)

The Company denied his request and instead filled the vacancy with a new hire. (ER 21; SER 90.)

G. Pinheiro Makes Three Mistakes in a Seven-Day Period and the Company Issues Him a DAN

In August, Pinheiro made three mistakes in machining parts. (ER 20-21, 32, SER 102-105.) On August 21, he incorrectly programmed the new rotary table index. (ER 20, 32; SER 103.) Although his supervisor approved the program, Pinherio later recognized that the program was incorrect and called it to his attention, then corrected it and completed the part. (SER 55.) The Company issued a discrepancy report to him. (ER 32; SER 103.) On August 27, Pinheiro erred in setting up a machine, which led to a defective part. (ER 28, 32; SER 104.) Pinheiro agreed that the mistake was solely his fault. (SER 57-58, 104.) Pinheiro received another discrepancy report. (*Id*.) Then, on August 28, a programmer sent the wrong program to Pinheiro's machine and he did not discover the problem until the part was completed. (ER 28, 32; SER 105.) The Company also issued him a discrepancy report for this error. (SER 105.) On September 5, after these three discrepancy reports, the Company gave Pinheiro a DAN. (ER 28; SER 102.)

H. Pinheiro Tells His Supervisor to "Suck D—k" or "Suck my D—k"

On Friday, October 3, a day on which he was scheduled to work overtime, Pinheiro left the plant without working the overtime, mistakenly believing his schedule had been changed. (ER 21; SER 97.) The following Monday, October 6,

Pinheiro confronted Day-Shift Foreman Sedano in Sedano's office because he believed that he had been denied an overtime opportunity on October 3. (ER 21; SER 98-99.) Pinheiro thought that another employee had done the work that he should have been given. (*Id*.)

Sedano calmly explained that, because of "this union thing and . . . trouble with the Labor Board . . . now [the Company is] going to have to start going by the Employee Handbook" and award overtime in accordance with seniority. (ER 22 n. 29, SER 99.) In response, Pinheiro said either, "suck d—k" or "suck my d—k." (ER 22, 33; SER 100, 181.) Sedano immediately reported this incident, and Company President Slater initiated an investigation. (ER 34; SER 84, 101.)

I. The Company Investigates Pinheiro's Conduct Towards Sedano and Eventually Suspends and Later Discharges Him

At Slater's behest, Human Resources Manager Marisela Rodriguez conducted an investigation into the offensive incident. (ER 34; SER 84.) On October 7, the day after the incident, she interviewed Sedano, Pinheiro, and two witnesses to the incident, brothers Milad and Murad Murad. (ER 34; SER 84-86, 107-118.)

Sedano told Rodriguez about Pinheiro's conduct, including that Pinheiro yelled at him, told him that his overtime explanation was "bullshit," and told him to "suck my d—k." (SER 108.) Sedano also gave Rodriguez his notes about the

incident, which reflected the same.[4] (SER 113-114.) He also told Rodriguez that the brothers Milad and Murad Murad witnessed the incident. (SER 108.)

Rodriguez also interviewed Pinheiro that day. (SER 108.) Pinheiro would not repeat to Rodriguez the exact comment he made to Sedano, but admitted to "profanity" that he characterized as "a comment I use all the time to say, 'I don't care.'" (SER 109.) Pinheiro did not name any witnesses to the incident, but told Rodriguez to ask Sergio Barragan or Israel De La Rosa regarding his use of the offensive comment to indicate "I don't care." (SER 109.)

That same day, Rodriguez interviewed Milad Murad. (SER 109.) He told her that Pinheiro had been screaming, Sedano was calm, and that his brother, Murad, was the only other witness. (SER 109.) Milad also told Rodriguez that Pinherio's screaming made him stay in the area so he could intervene if the situation worsened. (ER 34; SER 109.)

Rodriguez also interviewed Murad Murad that day, and he told her that he heard two elevated voices during the incident, but that he did not hear any profanity. (ER 34; SER 109.) The next day, October 8, however, Murad told

[4] In his notes, however, Sedano did not write out "suck my d—k," but, rather, characterized it with a question mark because he did not want to write the phrase down on paper to present to "a lady." (SER 114, 182-183.) As discussed above, however, when Rodriguez asked him, Sedano eventually told her exactly what Pinheiro said.

Rodriguez that Pinheiro later admitted to him that he had told Sedano to "suck my d—k." (SER 76-77, 110.)[5]

On October 8, Rodriguez put the information she had gathered into a preliminary report that she gave to Slater and Bechtol. (ER 34; SER 92-93, 108.) After reading the report, Slater and Bechtol decided to suspend Pinheiro based on Pinheiro's admission that he had uttered the offensive comment to his supervisor. (ER 22, 34; SER 66, 69-70, 92-93, 106.)

On October 9, Rodriguez called Sedano, Pinheiro, and the Murad brothers on the phone to ask follow-up questions. (SER 108-110.) Pinheiro now told Rodriguez that Sergio Barragan had also witnessed the incident. (*Id*.) Sedano and the Murad brothers told Rodriguez, however, that Barragan was not there. (*Id*., SER 89.)

On October 14, Rodriguez interviewed Barragan and De La Rosa. (ER 34; SER 110.) They both told her that Pinheiro had said "suck d—k" before. (SER 110.) Barragan also claimed that he witnessed the event and although Pinheiro did not appear to be angry, he heard Pinheiro say "suck d—k" to Sedano. (*Id*.) Rodriguez then wrote her final report, noting what was said in the interviews, and gave it to Slater and Bechtol. (ER 34; SER 67, 87, 94.)

[5] A few days after the incident, Pinherio told employees in the cafeteria, including Milad, that he had said "suck d—k" during the incident. (SER 78, 81.)

Based on Rodriguez's report, Slater and Bechtol decided to terminate Pinheiro. (ER 22, 34-35; SER 67-68, 94.) Bechtol signed the October 16 separation report, which stated, in pertinent part:

> 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. (ER 22; SER 121.)

On October 16, the Company informed Pinheiro that he was terminated. (ER 18; SER 121.)

J. Pending *Allied I* Allegations Decided: the Company's January and March Discipline of Pinheiro Found Unlawful; The Board Dismisses Allegations That His Performance Evaluation and Lay-Off Were Unlawful

In December, the judge in *Allied I* found, among other things, that although the Company violated Section 8(a)(3) and (1) by issuing Pinheiro the January and March 2003 DANs, it did not violate the Act by issuing its February performance evaluation to Pinheiro or by its deciding to lay him off in July. Accordingly, the judge dismissed the unfounded allegations. The Company took exception to the finding about the January DAN, but did not except to the finding that the March DAN was unlawful. None of the parties took exception to the judge's dismissal of the charges involving the performance evaluation and layoff. The Board in *Allied I* ultimately denied the Company's exception to the January 25 DAN finding. *Allied*

Mechanical, Inc., 343 NLRB 631 (2004), affirmed in *USW v. NLRB*, 482 F.3d 1112 (9th Cir. 2007).

II. THE BOARD'S CONCLUSIONS AND ORDER

In the instant case, the Board (Chairman Battista and Members Schaumber and Walsh) adopted (ER 17-23) the judge's finding that the Company violated the Act by denying Pinheiro's request to transfer to the night shift[6] and telling him that seniority was being altered "because of this thing at the Labor Board." However, the Board reversed the judge's findings (ER 17-23) that the Company violated the Act by issuing another DAN to Pinheiro, denying him overtime, and suspending and discharging him.[7] Specifically, the Board found (ER 17, 18-23) that even assuming that the General Counsel demonstrated that union animus was a motivating factor in these decisions, the Company nevertheless proved its affirmative defense that it would have taken the same actions absent Pinheiro's protected activity. Accordingly, the Board dismissed the complaint allegations as to these issues. (ER 23.)

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[6] Member Schaumber dissented (ER 24) from this finding.
[7] Member Walsh dissented (ER 25-28) from the suspension and discharge findings.

SUMMARY OF ARGUMENT

The Board reasonably dismissed the underlying allegations that the Company unlawfully disciplined, suspended, and discharged Pinheiro. The Board's findings—that the Company showed that it would have taken the same actions absent Pinheiro's union activity—are amply supported by the record evidence. Specifically, the record demonstrates that the Company acted in a manner consistent with its past practice notwithstanding Pinheiro's protected activity. It not only gave disciplinary warnings for machining errors similar to those it warned Pinheiro about, but it also followed its employee handbook, properly considered Pinheiro's past work record, and acted consistently with how it treated other employees, when it suspended and then discharged Pinheiro because he told his supervisor to "suck my d—k" or "suck d—k."

The Union failed to meet its heavy burden of establishing that the Board's findings were irrational or unsupported by substantial evidence. To the contrary, the Board carefully considered the entire record, thoroughly explained its reasoning, and made balanced findings supported by substantial evidence that, although the Company committed some unfair labor practices, it did not commit the ones at issue here. Accordingly, the Board's reasonable decision should be affirmed.

Finally, the Union's assertion—that Pinheiro's outburst was protected, concerted activity constituting a separate basis to find the Company's actions unlawful—was not raised to the Board. Therefore, it is not properly before the Court. In any event, contrary to the Union's claim, the judge made no finding that Pinheiro's conduct was concerted.

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR DISMISSING THE COMPLAINT ALLEGATIONS THAT THE COMPANY UNLAWFULLY DISCIPLINED, SUSPENDED, AND DISCHARGED PINHEIRO[8]

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . ." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging or taking other adverse action against an employee for engaging in union activity.[9]

Whether adverse action taken against an employee by an employer violates the Act typically depends upon the employer's motive. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB

[8] As noted above, the Board also dismissed (ER 22) the allegation that the Company unlawfully denied overtime to Pinheiro. The Union (Br 2, n.2) does not challenge this finding.

[9] Section 8(a)(1) establishes that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7 of the Act. A violation of Section 8(a)(3) results in a "derivative violation" of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). The Board's *Wright Line* test gives effect to Section 10(c) of the Act (29 U.S.C. §160(c)), which provides that the General Counsel carries the burden of establishing an unfair labor practice by a preponderance of the evidence.

To prevail under the *Wright Line* test, the Board's General Counsel must demonstrate that antiunion considerations were a "motivating factor" in the employer's adverse action. The employer may then demonstrate, as an affirmative defense, that it would have taken the same action even in the absence of union activity. If the employer establishes that defense by a preponderance of the evidence, the Board must dismiss the case, notwithstanding any union animus. *Transportation Management Corp*., 462 U.S. at 395; *see also Merillat Industries*, 307 NLRB 1301, 1303 (1992).

Where, as here, the Board finds that the conduct does not violate the Act, the Board's determination must be upheld unless it has no rational basis. *Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978) (citing *International Ladies' Garment Workers v. NLRB*, 463 F.2d 907, 919 (1972)). *Accord American Postal Workers Union, AFL-CIO v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004); *Kankakee-Iroquois County Employers' Ass'n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987). The Board's underlying findings of fact are conclusive so long as they are supported by substantial evidence on the record as a whole. Section 10(e) of

the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). As this Court has stated, "[i]f there is evidence to support two conflicting views, the Board's findings must be allowed to stand even though we might have reached a different conclusion on our own." *NLRB v. Champ Corp.*, 933 F.2d 688, 691 (9th Cir. 1990); *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-88 (D.C. Cir. 1991) (in dismissal cases, the "rational basis" standard essentially "particularizes the general rule that the court will defer to Board findings of facts supported by 'substantial evidence on the record considered as a whole.'") As the D.C. Circuit recently emphasized, in these circumstances, the Court "will reverse the Board's factual determinations only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *United Food & Commercial Workers Union Local 204 v. NLRB*, __ F.3d __, 2007 WL 3254359 at * 2 (Nov. 6, 2007) ("*UFCW*").[10]

[10] To the extent that this Court's panel decision in *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 918 n.12 (9th Cir. 2006), a case cited by the Union (Br 19-21, 24), can be read to categorically reject rational basis as a standard for reviewing Board dismissals, that decision is not precedential because that panel lacked authority to overrule the prior decision in *Chamber of Commerce*, absent intervening Supreme Court or en banc authority. *See Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006); *See also Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760, 765 (3d Cir. 1997) (reiterating Third Circuit practice that to the extent that later panel decision is contradictory to earlier one, the earlier holding is the precedential one). Since *Healthcare*, another panel of this Court used the "rational basis" standard and cited *Chamber of Commerce* to uphold the Board's decision not to make particular findings. *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 632-33 (9th Cir. 2007).

The deference given the Board is not modified in any way where, as here, the Board and a judge disagree. *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1076, 1079 (9th Cir. 1977). To be sure, the Union is correct in noting (Br 20) that in these circumstances, the judge's findings are to be considered and weighed with other opposing evidence. However, it is the Board, not the judge, to which this Court gives "special deference" where, as here, the Board and judge do not make different credibility determinations, but rather simply draw different derivative inferences from the evidence. *SKS Die Casting & Machining Inc. v. NLRB*, 941 F.2d 984, 989 (9th Cir. 1991) ("the significance of the ALJ's report depends largely on the importance of credibility in the particular case . . . ." and where the Board did not overrule credibility determinations but rather made "inferences from facts," this court "defers to the Board, without giving special weight to the ALJ"). *See also NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980) (Board accorded special deference in drawing derivative inferences from the evidence).

In the instant case, the Board assumed (ER 18) that the General Counsel met its initial burden under *Wright Line* but found (ER 18, 18-23) that the Company demonstrated that it would have taken the same actions against Pinheiro even absent any union activity. Accordingly, the Board dismissed the complaint. To prevail, the Union carries the heavy burden of establishing that the Board had no rational basis for its finding. As shown below, the Union has failed to meet that

burden, particularly in light of the Board's meticulous consideration of the entire record, including all arguments to the contrary. Indeed, the Board weighed the evidence for each allegation and found that the Company committed some violations and not others, further demonstrating that the Board engaged in the type of balanced, reasoned decision-making to which this Court should defer.

B. The Board Rationally Found That the Company Would Have Disciplined Pinheiro by Giving Him a DAN on September 5 Regardless of his Union Activity

The Board found (ER 18-23) that, even assuming that the General Counsel demonstrated unlawful motive, the Company sufficiently established it would have given Pinheiro the September 5 DAN regardless of his union activity.[11] As shown below, ample evidence supports this finding.

In examining an employer's defense that it would have taken its action for reasons independent of any union activity, the Board considers the action in the context of the employer's past practice. *Redwood Empire*, 296 NLRB 369, 393 (1989). Moreover, the Board does not substitute its own business judgment for that of the employer, but instead recognizes that "'the 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 [action].'" *Ryder*

[11] The Union incorrectly characterizes (Br 17) this part of the Board decision as "split." To the contrary, all Board members agreed on this portion of the decision. (ER 18.)

Distribution Resources, Inc., 311 NLRB 814, 816 (1993). *Accord Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981).

The Board rationally found (ER 20-21) that the Company's decision to give Pinheiro the September 5 DAN for making machining errors on August 21, 27, and 28 was consistent with its past practice and based on its business judgment, not on Pinheiro's earlier union activity. As the Board explained (ER 21, 32; SER 102-105), Pinheiro incorrectly machined the parts on all three dates cited, which constituted three errors in a week's time. Even acknowledging the Union's protest (Br 23) that Pinheiro was *solely* responsible for only one of the errors, the Board reasonably found (ER 21) that the Company showed, as shown on p. 6 above, it "has imposed discipline on [six] other employees with similar error records." *See Redwood*, 296 NLRB at 393 (employer action considered in context of its past practice). Indeed, as the Board noted (ER 21), the Company gave Pinheiro a DAN for one machining error before he even engaged in any union activity. (SER 124.) That he was later disciplined the same way for the same type of mistake after engaging in union activity further undermines the Union's claim that the later discipline was pretextual.

The Union's related argument (Br 23-24)—that the Board's finding is inconsistent with the Board's finding in *Allied I* that Pinheiro was unlawfully disciplined for an error that was not solely his fault—misses the mark. As the

Board reasoned (ER 21), "[t]he September 5 discipline, and the errors on which it was based, differ [from the discipline in *Allied I*]." The Board noted (ER 21) that, unlike here, the discipline in *Allied I* "was imposed immediately after Pinheiro told supervisors he was going to file charges with the Board." Further, unlike here, where "the discipline followed Pinheiro's having made three machining errors within a 7-day span" (ER 21), the discipline in *Allied I* was not based on numerous errors in only one week's time. Thus, the Board concluded (ER 21) that the September 5 DAN was "consistent with the Board's findings in *Allied I*" (citing *Desert Toyota*, 346 NLRB No. 4, slip op. at 4 (2005), 2005 WL 3555529 (discipline nondiscriminatory where employee twice engaged in similar misconduct in a short period of time)). Accordingly, the Board rationally found that the Company would have issued the DAN to Pinheiro notwithstanding his union activity.

C. The Board Rationally Found That the Company Would Have Suspended and Discharged Pinheiro Regardless of His Union Activity

Similarly, the Board's findings that the Company would have suspended and discharged Pinheiro regardless of his union activity for telling his supervisor to "suck d—k" or "suck my d—k," are properly based on reasonable inferences from, and a thorough analysis of, the record as a whole. As shown below, the Company followed its handbook policy, properly considered Pinheiro's poor work record,

and disciplined him in a fashion consistent with other employees who engaged in similar conduct. Moreover, the Union fails to meet its high burden of demonstrating that the Board's findings are irrational or otherwise unsupported by substantial evidence.

To begin, as the Board observed (ER 22), Pinheiro's suspension and discharge comported with longstanding company policy as reflected in its handbook. Indeed, the handbook provisions cited in Pinheiro's separation report provide for disciplinary action up to and including termination for rude conduct and insubordination. (ER 93, 109-110.) As the Board found (ER 22), and the Union in effect concedes,[12] Pinheiro's "suck d—k" comment in response to his supervisor "was inarguably rude and insubordinate, and his discharge was consistent with the Company's disciplinary policy. *See George L. Mee Memorial Hospital*, 348 NLRB No. 15, slip op. at 6–7 (2006), 2006 WL 2826438 (employer lawfully refused to rehire employee who walked off of the job in violation of policy); *Krystal Enterprises*, 345 NLRB No. 15, slip op. at 2–3 (2005), 2005 WL 2094918 (discharge for sexual touching lawful where consistent with past practice and sexual harassment policy providing for discipline up to and including

[12] The Union has waived any such challenge by failing to contest this portion of the Board's finding in its opening brief. Fed. R. App. Proc. 28(a)(9).

discharge); *Redwood*, 296 NLRB at 393 (employer action considered in context of its past practice).

Second, the Board reasonably considered (ER 22) Pinheiro's poor work record and found that it further indicated that the Company would have suspended and discharged Pinheiro for his comment regardless of his protected activity. Consistent with the judge's finding in *Allied I*, the Board recognized here (ER 22, 23 n.31) that Pinheiro's vulgar comment was not an unprecedented display of his negative attitude. To the contrary, in his February 6 performance review, the Company lawfully cited Pinheiro for threatening a coworker during the period prior to any union activity at the Company. (ER 23 n.31, 343 NLRB 631, 631 n.2, 8, 10–11). Moreover, and contrary to the Union's claims (Br 26), the Board noted (ER 22, 22 n.30) that the Company specifically relied on Pinheiro's "poor work record" in the separation report it ultimately issued to him.[13] Therefore, the Board reasonably found (ER 22) that the Company considered Pinheiro's "suck d—k" comment to be a second offense worthy of the suspension and discharge regardless of Pinheiro's protected activity. *See Brandeis Machinery & Supply Co.*, 342

[13] This poor work record indisputably included Pinheiro's recent performance review, which cited him for a poor attitude for "threaten[ing] to fight one of his coworkers." That this earlier offense was memorialized in a performance review rather than in a DAN, as the Union further contends (Br 26), does not undermine the Board's rational conclusion (ER 23, n.31) that "the absence of formal discipline does not demonstrate that the [Company] disregarded the incident," in light of the reference in the performance review.

NLRB 530, 530 n.3, 541 (2004), *enforced* 412 F.3d 822 (7th Cir. 2005) (discharge nondiscriminatory where employee had made multiple errors).

Third, the Board reasonably determined (ER 22) that the Company discharged employee Martin in June for misconduct similar to Pinheiro's, which further supports the Board's finding that the Company did not treat Pinheiro differently because of his union activity. Martin, like Pinheiro, treated his supervisor with great disrespect—he spit at and shouted obscenities at him—and the Company discharged Martin. After comparing the two situations, while recognizing that they were not identical, the Board rationally concluded (ER 22, 23, 23 n. 32) that Pinheiro's discharge was nevertheless "consistent with the Company's treatment of Martin" (citing *George L. Mee Memorial Hosp.*, 348 NLRB No. 15, slip op. at 6-7, 2006 WL 2826438 (differences in circumstances between allegedly unlawful refusal to rehire and past instance of refusal to rehire not fatal to employer's argument that it consistently refused to rehire employees who quit without notice)). Accordingly, the Board rationally found (ER 22-23) that the Company would have taken the same action regardless of Pinheiro's union activity.

The Union's claim (Br 28-32) that Martin's discharge is not a proper comparator is without merit. The Board reasonably concluded (ER 22) that Martin's treatment was sufficiently similar to Pinheiro's to support, along with the

other ample evidence set forth above, its finding that the Company would have taken the same actions regardless of Pinherio's union activity. The fact that Martin unlike Pinheiro also spit at his supervisor does not render this conclusion irrational under the totality of the circumstances; notably, the Board recognized that "[i]t is rare to find cases of previous discipline that are 'on all fours' with the case in question." This is particularly true in a unique case such as this one, in which a rigid adherence to precision would unfairly penalize the Company, as the Board noted (ER 22), "for being unable to show that it disciplined an[other] employee for saying 'suck d—k' to a supervisor." *See George L. Mee Memorial Hosp., supra*, 348 NLRB No. 15, slip op. at 6–7, 2006 WL 2826438.

The Union's additional attempts (Br 24-33) to undermine these findings do not rise to the requisite level of establishing that "the record is so compelling that no reasonable factfinder could fail to find to the contrary." *United Food & Commercial Workers Union Local 204 v. NLRB*, __ F.3d __, 2007 WL 3254359 at * 2 (Nov. 6, 2007). Thus, as we now show, the Union's remaining arguments (Br 24-33) should be rejected.

Relying on *Dash v. NLRB*, 793 F.2d 1062, 1065-69 (9th Cir. 1986), the Union argues (Br 27-28) that the Company's suspension and discharge of Pinheiro were pretextual because the Company tolerated Pinheiro's earlier misconduct prior to his union activity, but suspended and discharged him for similar misconduct

only after his union activity. This argument is unfounded. As a threshold matter, in *Dash*, there was significant evidence of pretext not present here. Indeed, there the employer utterly failed to investigate the event giving rise to the employee's discharge. Significantly, as the Court in *Dash* recognized, the employer refused to even listen to the employee's side of the story. *Dash*, 793 F.2d at 1069. In marked contrast, here, as shown above, the Company conducted an extensive investigation, interviewing Pinheiro and other witnesses—including witnesses identified by Pinherio to specifically support his version of events—multiple times. *See Sociedad Espanola de Auxilio Mutuo v. NLRB*, 414 F.3d 158, 163 (1st Cir. 2005) ("[t]he conducting of an inadequate investigation of (or a complete failure to investigate) the incident upon which the employer relied as grounds for discharge can support a finding of discriminatory motive").[14]

Moreover, the Union's *Dash*-based argument (Br 26-28)—that it must have been Pinheiro's union activity that caused the Company to discharge Pinheiro because it did not discharge him prior to such activity when he earlier threatened

[14] Indeed, the Union does not dispute that the results of the Company's investigation supported its honest belief that Pinheiro had made an extremely offensive comment directly to his supervisor. Accordingly, the Union's implication (Br 14, 29-30) that the Company acted too severely because, as the judge later found (ER 34), Pinherio's comment was made in frustration rather than in anger directed to Sedano, is without merit. *See Ryder Distribution*, 311 NLRB at 816 (Board does not substitute its own business judgment for that of the employer; crucial factor is not whether business reasons cited were good or bad but whether they were honestly invoked and caused the discharge).

his coworker—fails on its own terms. Such an argument ignores the Board's reasonable inference (ER 22) that the Company simply considered Pinheiro's outburst to be a second offense, and acted accordingly. Moreover, as Slater testified, Pinheiro would have been fired after his first offense but for a business emergency that required him to complete a crucial customer's order. (SER 65.) No such non-discriminatory exigency could explain the employer's different treatment of employee Dash before and after his protected activity. *Dash*, 793 F.2d at 1067.[15]

Finally, the Union's argument (Br 28-30) that the Company "tolerated the much more egregious conduct" of employees Dennis Scott and Jesus Viramontes fails to overcome the Board's rational findings. Although the Union is correct (Br 28-29) that Scott was not fired after altercations with another employee and Viramontes was not fired after swearing at his supervisor, the Board did not ignore this evidence but instead made rational distinctions (ER 22) between those incidents and Pinheiro's situation. Specifically, the Board reasonably found (ER 22) that Scott's situation was different because it involved a coworker rather than a supervisor and Viramontes' situation was different because Viramontes, unlike

[15] Moreover, the Court in *Dash* found it significant that Dash had been an extremely successful salesman but was fired anyway. *Dash*, 793 F.2d at 1067. In contrast, as the Board noted here (ER 22 n.30), Pinheiro did not have such a stellar record. Indeed, his poor work record was reflected in his earlier performance review and referenced in his separation report.

Pinherio, was "a proficient and productive welder" who, also unlike Pinheiro, had been provoked by his supervisor.

The Union further argues (Br 29-30, 32) that Pinheiro, like Viramontes, was, indeed, provoked because the Company had engaged in earlier unfair labor practices against him and Sedano made the statement about the Union and "Labor Board" prior to Pinheiro's outburst. However, in light of the Board's consideration (ER 22, n.29, 35) of the circumstances surrounding both incidents and its balanced approach to the other allegations in the case, its conclusion that Pinheiro was not sufficiently provoked to justify his actions is not irrational. Indeed, while recognizing (ER 18) that Sedano's "Labor Board" comment preceded Pinheiro's outburst, the Board made a reasonable distinction (ER 22, n.29). Thus, it explained, "there was nothing confrontational about Sedano's tone or behavior," whereas the Company believed that Viramontes had been exposed to a qualitatively different experience given his supervisor's penchant to engage in altercations with employees (Tr 73-74).[16]

[16] The Union's companion pretext argument (Br 32), that the Company "tolerated" profanity in general, other than that of union activist Pinheiro, is also unfounded. The record, including the pages cited by the Union (Br 15), demonstrates that although some profanity was tolerated, it was not used in the way that the Company believed Pinheiro had used it: directed at a member of management in disrespect. Instead, it was either profanity used in a joking manner (SER 62), uttered among coworkers and management (ER 75-77, SER 184-85), or used in a situation like that of Viramontes, where a good employee had been provoked by a supervisor. (SER 73-74.)

Accordingly, ample evidence supports the Board's rational conclusion (ER 22-23) that the Company fulfilled its *Wright Line* burden by a preponderance of the evidence. As the Board summarized (ER 22-23), "[i]n the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the [Company] . . . demonstrated that it has a rule regarding insubordinate and rude behavior, that Pinheiro had previously violated that rule and that the rule had been applied to employees in the past." Therefore, this Court should uphold the Board's findings.

D. The Union's Assertion that Pinheiro's Conduct Was Protected, Concerted Activity Providing a Separate Basis for Overturning the Board's Decision is Not Properly Before this Court and, in Any Event, Is Without Merit

At the outset, the Union's argument, that Pinheiro's offensive comment to Sedano was protected activity providing "a separate basis for overturning the Board's decision" (Br 33-34), is barred by Section 10(e) of the Act.[17] That section deprives an appellate court of jurisdiction to review any issue not presented by a party to the Board, even if the only means of raising the matter was by filing a motion for reconsideration. *See Woelke & Romero Framing, Inc. v. NLRB*, 456

[17] *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

U.S. 645, 665-66 (1982); *NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 795-96 (9th Cir. 1981).

In the instant matter, neither the General Counsel—who has exclusive prosecutorial authority over unfair labor practices and thus controls the litigation strategy, *see International Ass'n of Machinists v. Lubbers*, 681 F.2d 598, 600 (9th Cir. 1982), citing 29 U.S.C. § 153(d))—nor the Union argued in exceptions before the Board that the judge made or should have made an unfair labor practice finding independent of the *Wright Line* analysis. Neither did the Company preserve this issue for the Union, as it, too, failed to make a valid exception regarding a framework independent of *Wright Line*. *See Gardner Mechanical Services, Inc. v. NLRB*, 115 F.3d 636, 641 (9th Cir. 1997) (where another party preserved issue, petitioner could still raise issue where it had not previously raised it before the Board).

To be sure, although the Company's exceptions (SER 6) stated that it objected to what it characterized as the judge's "finding that Pinherio's [conversation with Sedano] constituted protected activity," it did not cite any authority, include any legal argument in support of its assertion in its accompanying exceptions brief,[18] or frame the issue as providing an independent grounds to analyze the case. Such cursory treatment falls short of preserving the

[18] The Board has filed a motion to lodge the Company's exceptions brief with this

issue, for it is in such circumstances that the exceptions brief must set forth "argument or citation of authority in support of the exceptions." 29 C.F.R. § 102.46 (b). Any exception which fails to comply with the foregoing requirements may be disregarded. *Id*; *see also* 29 C.F.R. § 102.46 (c) ("[a]ny brief in support of exceptions shall contain . . . . [t]he argument, presenting clearly the points of fact and law relied on . . . with specific page reference to the record and the legal or other material relied on").

Moreover, the Union's answering brief to the Company's exceptions also failed to raise the issue of an independent mode of analysis for the suspension and discharge findings. Instead, the Union (SER 41) made only a boilerplate response to the Company's above characterization of the issue, stating cryptically that, "the invalidity of [the Company's] only exceptions to the operative facts on which the ALJ based her conclusion of this protection necessarily means that [the Company] has offered no basis on which to sustain its exception." Such an unfocused response to a similarly passing reference by the Company is insufficient to preserve the issue before the Court. *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 265 (4th Cir. 2000) ("passing reference" not sufficient to preserve objection; allegation of error must be grounded in an appropriately specific objection).

Court.

Additionally, once the Board decision applying only *Wright Line* issued, no party filed a motion for reconsideration before the Board. That being so, the Union is jurisdictionally foreclosed from arguing before this Court that Pinheiro's conversation with Sedano was concerted, protected activity entitling him to reinstatement independent of *Wright Line*. *See Woelke & Romero Framing*, 456 U.S. at 665-66; *Sambo's Restaurant*, 641 F.2d at 795-96.

In any event, the Union misstates the judge's finding (Br 34) when it claims that she found that Pinheiro was engaged in protected, "concerted" activity when he made the offensive statement. Although the judge found (ER 35) that Pinherio was discussing "terms and conditions" of employment with Sedano, and that Pinheiro's outburst did not otherwise remove him from the Act's protection, nowhere did the judge make the required accompanying finding—needed to establish protected activity and thus a separate unfair labor practice—that Pinheiro's actions in that conversation were concerted. Such a finding requires a distinct factual inquiry that must be analyzed separately from whether or not the activity concerns "mutual benefit or protection." *See Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir. 1987).[19] Accordingly, the Union's claim is without merit.

[19] No party excepted to the judge's failure to make a concertedness finding. Thus, any such argument is also waived pursuant to Section 10(e) of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter denying the Union's petition for review.

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STATEMENT OF RELATED CASES

This case relates to *USW v. NLRB*, 482 F.3d 1112 (9th Cir. 2007), *enforcing Allied Mechanical I*, 343 NLRB 631 (2004).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	)	
Petitioner	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	No. 07-72381
Respondent	)	
and	)	Board Case No. 31-CA-26605
TOWER INDUSTRIES, INC. d/b/a/ ALLIED MECHANICAL	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,108 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

_____

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Dated at Washington, D.C.
this 12th day of December, 2007

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Intervenor	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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