Tower Industries Inc. d/b/a Allied Mechanical and United Steelworkers of America, AFL–CIO, CLC *and* Walter Reddoch and Kerry Wolken. Cases 31–CA–27201, 31–CA–27202, and 31–CA–27244

May 14, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On January 31, 2006, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each 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 judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Tower Industries, Inc., d/b/a Allied Mechanical, Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

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 condition the settlement of wage claims upon the requirement that employees not engage in activity protected by the Act.

WE WILL NOT exclude employees from meetings attended by other employees because those employees engaged in activity protected by the Act.

WE WILL NOT coercively interrogate employees concerning their union activity and the union activity of other employees.

WE WILL NOT in any other 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, individually notify each employee who signed a

[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.

The judge found, and we agree, that the Respondent violated Sec. 8(a)(1) by coercively interrogating employees Walter Reddoch and Kerry Wolken during depositions in a wage claim lawsuit filed by Reddoch and Wolken against the Respondent. During the course of the depositions, the Respondent's attorney asked questions about discussions at union meetings, such as, "it's true, is it not, that reasons to support the Union were discussed . . . what were those reasons?," "was there discussion about health and welfare coverage?" and whether the level of benefits "was the problem," and "what were the benefits [of joining the union] as you recall being described during the course of these meetings?" Those questions inquired into confidential, protected conduct and were irrelevant to the civil action, and thus were unlawful under the test of *Guess?, Inc.*, 339 NLRB 432, 434 (2003).

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by conditioning the settlement of wage claims upon the requirement that employees not engage in protected activity, Member Kirsanow observes that where an employer-drafter of a release and/or covenant not to sue makes clear what rights employees are waiving, employees are capable of deciding whether they are willing to do so. In this case, however, the Respondent drafted a release that was ambiguous and self-contradictory. As the judge found, the first part of the release waives the signing employees' Sec. 7 right to assist other employees with their wage claims, and the second part of the release purports to cancel that waiver by excluding conduct "permitted by . . . the National Labor Relations Act." The problem with this release, as the judge observed, is that it assumes employees "are knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion" of the release. Rather than draft a release that clearly informed employees of their right under the Act to assist other employees' pursuit of legal claims and thus permitted them to make a knowing choice whether to waive that right, the Respondent drafted language calculated to restrain its employees from engaging in specific protected activity while simultaneously shielding itself from liability through a generally worded "savings clause" it had to know would not negate the Sec. 7 restraint. On this basis, Member Kirsanow agrees that the Respondent thereby violated Sec. 8(a)(1).

[2] The judge recommended that the Board issue a broad cease-and-desist order requiring the Respondent to cease and desist from violating the Act "in any other manner." For the reasons stated in the judge's decision, we adopt that recommendation.

We shall modify the notice to conform to the violations found and the Board's standard remedial language.

release for claims under United Steelworkers of America, et al., v. Tower Industries, Inc. d/b/a Allied Mechanical, et al., Case RCVRS081220, in writing, that the portion of the release obligating them "not to . . . assist, join, participate in, or actively cooperate in the pursuit of any Wage Claims, including penalties, fees and costs, . . . brought . . . on behalf of any other employee" has been found to be unlawful by the Board, and that WE WILL NOT seek to enforce that portion of the release.

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

Alice J. Garfield, Esq., for the General Counsel.
Patrick W. Jordan, Esq. (Jordan Law Office), of San Rafael, California, for the Respondent.
Robert J. Stock, Esq. (Gilbert & Sackman), of Los Angeles, California, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on November 15, 2005. The charges in Cases 31–CA–27201 and 31–CA–27202 were filed by the United Steelworkers of America, AFL–CIO, CLC (the Union) on February 3, 2005. The charge and first amended charge were filed by Walter Reddoch and Kerry Wolken on March 8 and June 29, 2005, respectively.[1] The first amended consolidated complaint was issued July 25, 2005. The complaint alleges that Tower Industries, Inc. d/b/a Allied Mechanical (Respondent) violated Section 8(a)(1) of the Act by interrogating employees about who attended union meetings and what was said at those meetings, prevailing upon employees to sign a release, and by excluding Reddoch and Wolken from a meeting where terms and conditions of employment were discussed because Reddoch and Wolken had engaged in protected concerted activity. Respondent filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, jurisdiction, the Union's labor organization status, and agency status. It denied the remaining allegations of the complaint pled a number of affirmative defenses.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures machine parts at its facility in Ontario, California, where it annually purchases and receives goods, supplies, and material 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 engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A Background

On January 24, 2003, the Union filed a petition to represent certain of Respondent's employees. An election was held on March 6, 2003, among employees in the following unit:

> 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.

The Union lost the election by a vote of 42 to 37 and it filed objections to the election. On November 19, 2004, the Board issued a decision finding that Respondent violated Section 8(a)(3) and (1) by issuing written disciplinary notices and then discharging employees Timothy Hays and Walter Reddoch and twice disciplining employee Marcelo Pinheiro. The Board also found that Respondent violated Section 8(a)(1) by impliedly and coercively telling an employee that Respondent had retaliated against employees by reducing employees' hours, by threatening an employee with unspecified reprisals, by telling him he would lose, by supporting the Union, and by discriminatorily prohibiting the posting of union literature. The Board also sustained union objections to the election and ordered a new election as it reversed Judge Lana H. Parke's conclusion that a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), was required to remedy the violations. *Allied Mechanical, Inc.,* 343 NLRB 631 (2004). On July 15, 2004, Judge Mary Miller Cracraft issued a decision finding that Respondent violated Section 8(a)(3) and (1) by denying Pinheiro a transfer to the night shift, issuing a written disciplinary notice to Pinheiro, denying him overtime, suspending, and then discharging him. Judge Cracraft also concluded that Respondent violated that same section by issuing a written disciplinary notice to employee Edwin Shook and violated Section 8(a)(1) by telling an employee that its conduct was discriminatorily motivated. *Allied Mechanical,* JD(SF)–55–04 (2004).

Walter Reddoch works as a CNC machinist for Respondent. He was hired in December 1999 and fired in January 2003. As indicated above, Judge Parke concluded that this discharge was unlawful. Respondent thereafter withdrew the exceptions it had filed concerning Reddoch and the Board adopted Judge Parke's conclusions in that regard. He returned to work on August 31, 2004. Respondent admits that Wolken and Reddoch "(C)learly were union supporters. The Company has known about it for a long time, and certainly at all times relevant in these particular proceedings."

B. Interrogations

On June 16, 2004, the Union, Wolken, and Reddoch, each as named plaintiffs, filed a complaint against Respondent for damages, penalties, injunctive relief, and other equitable relief for violations of California labor law and unfair competition laws. On October 7, Respondent took Wolken's deposition. In that proceeding Wolken testified that he began keeping notes of

[1] All dates are in late 2004 and early 2005 unless otherwise indicated.
[2] Certain errors of the transcript are noted and corrected.

the hours that he worked. The following questioning by Respondent's counsel ensued:

Q. Did you talk to anybody from the union about maintaining such notes?

A. Yes.

Q. Who did you talk to?

A. We originally met with a person named Ben Lilien Field.

Q. When was that?

A. Pardon me?

Q. When did you meet with Ben?

A. In December 2002.

Q. When you say "we," who else was present?

A. Walt Reddoch, Tim Hays, and Paul Booth. I believe that's all.

Q. Where did the meeting take place?

A. I'm trying to think of the name. It was a hamburger place. It's not—I can't think of the name of it. I can show you where it is. I don't know the name of it.

Q. At what month—

A. It's near work. It's about a mile or two from work.

Q. Which—which month?

A. December. I'm not sure exactly what date.

Q. That's okay. What was discussed during the course of that meeting?

A. Well, the—we—we signed a card, a petition or something to join the union or try to organize a union, and the reference you made earlier about like keeping notes about what happens at the company in regards to the union/company relationship.

Q. Okay. Anything else that was discussed?

A. We tried—the idea of the union to try to get other people to sign cards to—if they showed interest in joining the union.

Q. Okay. Anything else?

A. Not that I can remember right now.

Then later:

Q. Okay. Take you back to the meeting in December of 2002. What, if anything, was said about the company screwing employees out of pay?

A. I don't believe there was anything said.

Q. Oh, was there any discussion that that the company was not paying people for all hours worked?

A. I don't believe so.

Q. Was there any discussion during that meeting that the company was failing to provide rest breaks of ten minutes.

A. I don't believe so.

Q. Was there any discussion that the company was not providing 30-minute meal periods?

A. No, I don't believe so.

Q. Was there any discussion that the company was not paying people within 72 hours of their termination?

A. I don't believe that was brought up.

Q. Was there any discussion that the information you received on your paychecks and stubs was inaccurate?

A. That was not brought up.

Q. Was there any discussion that the company was not maintaining accurate payrolls records?

A. I don't believe that was brought up.

Q. Was there any discussion that people were allowed to work over eight hours but weren't getting paid overtime?

A. I don't think anybody brought that up either.

Q. Was there any discussion that employees were working over 12 hours but weren't getting double time?

A. I don't recall that being brought up either.

Q. Now, the purpose of this meeting; was it not, was to discuss why the employees were going to support the union, correct?

A. I'm not sure this meeting was related to that. Are you talking about today's meeting?

Q. I'm talking about the December of 2002.

A. Okay. All right. I'm confused. Could you restate the question?

Q. Be happy to. In fact, I'll start over. It's correct, is it not, that Ben was attempting to put together an employee committee who would assist the union in organizing the other employees?

A. That's true.

Q. And you volunteered to be one of those initial organizers?

A. That's right.

Q. And a purpose of—and under score the word "a" not the, "a" purpose was to discuss what issues you would raise with your fellow employees to get them to support the union?

. . . .

A. I believe that's true.

Q. How long did the meeting last?

A. Maybe an hour, maybe an hour-and-half.

Q. And its true, is it not, that reasons to support the Union were discussed in that meeting?

A. That's true.

Q. What were those reasons?

A. We just felt the treatment of employees was unfair and wages were less than possible and health insurance benefits were not very good and maybe a couple of other issues. I don't recall.

Q. Okay. In terms of "unfair," were there any examples given of any unfair treatment?

A. I believe we all had our opinions, but they all seemed to—we may have discussed a couple issues but not—everybody just kind of went along with the general feeling that we were being treated unfairly.

Q. Well, how treated unfairly?

A. In regards to who would get overtime and who would—if they wanted to lay people off and if—just—it's kind of each person's perception I guess. But—

Q. What do you recall were the perceptions by others, if any, during the course of this meeting in December of 2002?

A. I think everybody had the same opinion that management just had no concern about the employees. That's

the general opinion. They just treated people pretty badly I think. You know, that's my opinion. But—

Q. Okay. You're entitled to it.

A. But that the general opinion I got.

Q. People felt that the wages were—too low?

A. That's one of the issues.

. . . .

Q. And the consensus was among the employees that $25 an hour was too low?

. . . .

A. Oh, I'm one of the higher paid people so that's—in my own individual case, it's not unfair. But as far as everybody else there, I think everybody else thought they were being underpaid—underpaid.

. . . .

Q. And was there discussion about health and welfare coverage?

A. Health insurance basically.

Q. Was it the level of benefits that was the problem?

A. It's just basically the copayment that you're paying. If you had a family, you're paying a large, like copay to help subsidize the insurance premium.

Q. Okay. Any other issues that you can recall that were discussed during this initial organizing meeting?

A. Not anybody there was really familiar with the way unions worked, and that was Ben Lillien Feld's input. He had to kind of explain the way the union works and that kind of thing.

Q. And during the course of the meeting, Ben asked each of you or all of you to tell him what you guys felt were issues for you or the employees; is that right?

A. Yes.

Q. And so far as you know—withdraw. With respect to yourself, you offered all the information that you thought was important at that time, didn't you?

A. Yes.

And later:

Q. After the meeting that you described in December of 2002, did you have additional meetings with other employees to discuss the organizing efforts?

A. Yes.

Q. When was the next meeting?

A. We had a series of meetings almost every week once a week for about a month or so, maybe six weeks.

Q. Was there a place where the meetings took place?

A. The—the first two or three meetings were at the hamburger place. I can't remember the name. And then I think about on the fourth or fifth meeting, we started renting a conference room at a hotel near work.

Q. Now you told us the topics that were discussed in the first meeting. Do you have a recollection of the topics that were discussed at the next meeting?

A. The big issue was trying to get more people to sign a card that said that they were interested in organizing a union among other subjects.

Q. What other subjects?

A. If they wanted to have, you know, better benefits from the union, if they thought the union could do—you know, and improve our working conditions.

Q. What kind of working conditions?

A. If anyone had any issued that they wanted to voice, we'd listen. And that was the whole purpose of the meeting.

Q. And did the employees voice issues?

A. Yeah, I believe they did.

Q. And what were the issues that you can recall in the next meeting?

. . . .

A. I don't—I don't remember exactly what the whole meeting was about. I think it was more along the line of just getting people to sign the cards to show they are interested in joining the union.

Q. All right. Okay. We have as Exhibit No. 2 the petition for election that was filed on January 24th, '03. I guess my question is between December—the December meeting you've described in the filing of the petition, did you attend meetings with other employees to discuss working conditions?

A. Between December and January, yeah, we had several meetings.

Q. All right. My questions right now are confined to those meetings.

A. Okay.

Q. Prior to January 24th, 2003.

A. All right.

Q. Did the same individuals attend the meeting that you described in December, or were there more people?

A. The same and more.

Q. Okay. What topics were discussed in these meetings as best you can recall?

A. The major issue was the signing cards to get people to show that they were interested in joining the union. And then the—the—probably some of the benefits of being in the union.

Q. Okay. And what were the benefits as you recall being described during the course of these meetings?

A. Basically, they were—the union representative was trying to explain how the collective bargaining system worked to the people who had no knowledge of a union. I mean, if people don't understand the union, that – that's their main question.

Q. And who was the union representative?

A. Ben Lillien Feld was, I think, the first two or three meetings and then further on there was more members from the union.

Q. Okay. And did you become aware that you needed 30 percent of the employees to sign cards before you could qualify for an election.

A. Yes.

Q. All right. Any other topics you can remember in these prepetition meetings?

A. Just trying to improve our working conditions.

Q. All right. You previously testified that there was no discussion about not being paid properly in the December meeting. Was the subject of being paid for hours worked discussed in the next group of meetings prior to the petition being filed?

A. I think it might have been. I—I can't—

. . . .

Q. Are you guessing?

A. I guess you'd say that.

Q. You guess you're guessing?

A. Well, I—I'm pretty sure the subject was brought up.

Q. Do you have a recollection of who brought it up?

A. Probably Walter Reddoch.

Q. And what do you recall Walt saying?

A. The failure to pay for anything after your shift ended.

Q. Did he raise any other failure to pay issues?

A. I don't think so.

Q. Did anybody in these meetings say that the company was intentionally not paying employees for time worked?

A. No, I don't think so.

Q. Did anyone say that the company was denying you guys rest periods?

A. I don't think so.

Q. Did anybody say that you weren't getting your full 30-minute uninterrupted meal period?

A. I don't think so.

Q. Did anyone say that they weren't getting pay stubs showing hours worked and pay rates?

A. No, I don't think so.

Still later:

Q. But after the union got involved, you then sue the company for wage claims, correct?

. . . .

Q. Is it correct, as a matter of fact, is it not, that after the union got involved, you brought this action against the company?

. . . .

Reddoch's deposition was taken Friday, October 8. During that deposition Respondent's counsel asked Reddoch the following:

Q. Right. You—attended a meeting in December of 2002, did you not, with Mr. Wolken and a representative from the Union?

A. With me—yes, and other people, yes.

Q. And what other people were there?

A. There was Tim Hayes, Paul Booth, Mark Burnett.

Q. What was the name of the union rep?

A. Ben Lillien Feld.

Q. During the course of that meeting—what's his name? Dan? Ben?Didn't Ben tell that you he—he wanted you to keep notes of things that were going on in the plant?

Mr. Stock (the Union's counsel): I'm going to object that it invades the privilege of employees to – and unions to have concerted activities. And it's a violation of the National Labor Relations Act, and I'm going to instruct him not to answer.

Mr. Jordan (Respondent's counsel): You filed this lawsuit. This is fascinating.

Q. What was discussed during the course of that meeting about working conditions?

Mr. Stock: I'm going to make the same objection and instruct him not to answer.

Mr. Jordan: Notwithstanding the fact you made no such objection during the course of Mr. Wolken's testimony?

Mr. Stock: That's correct. That's correct. Well, I think I made the objection but I didn't—I allowed him to answer. But in any event, the record for yesterday stands, you know, reads – it –it stands for what it stands for. And I'm making the objection today, and I'm making the instruction today.

. . . .

Q. During the course of that meeting, was there any discussion about events that led up to the filing of this lawsuit?

Mr. Stock: I'm going to make the same objection and instruct him not to answer.

At this point Respondent's counsel asked a number of questions concerning the meeting but the Union's counsel instructed the witness not to answer. Later the questioning concerning the meeting continued:

Q. You recall testifying that you attended a meeting in December of 2002?

A. I did not receive—I did not attend a meeting in December of 2002.

Q. When did you attend a meeting?

A. January 7, 2003.

Q. All right. Where did the meeting take place?

A. Galaxy Burger in Ontario.

Q. Who was in attendance?

A. There was Kerry Wolken, Tim Hayes, Paul Booth and Ben Lilien Feld. Mark Burnett was not there the first meeting.

. . . .

Q. How long did the meeting last?

A. Approximately an hour.

Q. Did you speak during the meeting?

A. I may have. I don't recall.

Q. Tell me everything you can recall you said during the meeting.

Mr. Stock: Same—same objection as I have before, and I instruct the witness not to answer because the question is too broad.

. . . .

Q. Tell me everything that the union business agent said during the course of the meeting.

Mr. Stock: Same objection.

. . . .

Q. Tell me everything that Kerry Wolken said during the course of that meeting.

Mr. Stock: Same objection; same instruction.

. . . .

Q. Tell me everything the two other employees or three other employees said during the course of that meeting.

Mr. Stock: Same objection: same instruction.

. . . .

Q. Tell me everything you said regarding the subject matters of this litigation in that meeting.

A. The subject matter of this litigation did not come up.

Q. Tell me everything the union person said that in any way relates to this litigation.

A. I don't recall anything that he said that has anything to do with this lawsuit.

Q. At anytime during the course of the meeting, did the union agent and/or the employees discuss complaints that the company was improperly paying employees for time worked?

A. No, they did not.

Q. Were there complaints about the amount of wages being paid by the company?

A. Amount of wages? No. No, sir.

Q. Were there complaints about health and welfare coverage?

Mr. Stock: Objection; same instruction.

Mr. Jordan: Notwithstanding the fact that Mr. Wolken answered the same question?

Mr. Stock: Same instruction; same objection.

. . . .

Q. Okay. Did you attend any other meetings with the union representative after January 7, 2003?

A. Yes, I did.

Q. When was the next meeting?

A. It was January 14th the following Thursday.

Q. Who attended the meeting?

A. That one was Mark Burnett. Someone else didn't show up. It may have been Kerry or Paul. One of those didn't show up. And Tim Hayes and Ben Lilien Feld. Either Kerry or Paul, one of those two, didn't show up.

Q. Tell me everything you can recall that was discussed at that meeting.

Mr. Stock: Same objection; same instruction.

. . . .

Q. Tell me anything that was discussed by anyone regarding allegations that the company was improperly paying employees for the hours worked.

A. The subject was not brought up.

Q. When was the next meeting you attended?

A. Next meeting was—I think it was—there was a Tuesday on there, but I'm not sure of the date. It was in January before my termination on a Tuesday. I'm not sure of the date.

Q. Who attended that meeting?

A. If I recall—if I recall, I believe that was the one we had the—was there one more meeting? I'm not sure if that was a meeting that we had lot of representation or if it was just the five of us again.

It may have been the meeting where—where we were—we brought—there was probably 15 people there. It was either that meeting or the next meeting. I'm not sure. I'm not sure if there was three with just the five of us or if there was two.

Q. Let's go to the one where you know there were other people, where did that meeting take place?

A. Galaxy Burger in Ontario.

Q. And who attended?

A. There was Federico Hernandez. There was Stewart Davies. There was Ed Shook. There was Murad Murad. There was there was Kevin Rogers. There was Kerry Wolken. There was Tim Hayes. There was Oscar Medina, and a couple other people I'm not sure about right now.

Q. Was the union business agent there?

A. Ben Lilien Feld, yes.

Q. How long did that meeting last?

A. That one lasted about the same, about an hour, maybe an hour and 15 minutes.

Q. Tell me everything that you can recall that was discussed during that meeting?

Mr. Stock: Same objection; same instruction.

. . . .

Q. Tell me the topics that were discussed in that meeting.

Mr. Stock: Same objection; same instruction.

. . . .

Q. Was there any discussion about employees not being properly paid for hours worked?

A. No, no discussion at all.

Q. Was there any discussion about meal breaks?

A. No, no discussion at all.

Q. Was there any discussion about rest periods?

A. No.

Analysis

In *Guess?, Inc.,* 339 NLRB 432 (2003), the Board address the test to be applied when employees are interrogated during depositions about their union activity. The facts in that case are succinctly set forth by the dissenting opinion:

> Employee Perez brought a workers' compensation case against the Respondent. She alleged that she sustained injuries while working for the Respondent, and was unable to work for a certain period. The Respondent's defense to

> Perez' claim included two matters. First, the Respondent claimed that Perez engaged in activities, at the union hall, which were inconsistent with her claimed injury. Second, the Respondent claimed that Perez did not sustain her injuries while at work, but rather sustained them while engaging in activities at the union hall.In pursuing these defenses, the Respondent's insurance counsel asked Perez about her activities at the union hall. In addition, counsel asked for the names of other persons who may have worked with Perez at the union hall, and who may have therefore observed Perez at the union hall.

Id. at 436. The Board concluded that this violated Section 8(a)(1) after devising and applying a three-part test that follows:

> First, the questioning must be relevant. Second, if the questioning is relevant it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act.

Before turning to apply this test, I note several factors that serve to make the questioning in this case more coercive than in *Guess*. In *Guess,* there was no evidence of hostility toward the union by that employer. Id. at 437. I have set forth in the opening section of this decision the record of Respondent's hostility toward the Union. In *Guess* there was no ongoing organizing campaign. Id. Here, the question concerning representation remains unresolved and a new election has been ordered. Lastly, the questioning in *Guess* was conducted by the employer's workers' compensation attorney. Id. Here, the questioning was done by the attorney assisting the employer in its dealings with the Union.

Returning now to the three part test, I first examine whether the questioning was relevant to the wage claim lawsuit. At the trial Jordan testified that before he took the depositions of Wolken and Reddoch he caused questionnaires to be distributed to the employees concerning whether or not they had been paid properly by Respondent. He reviewed the questionnaires and concluded that the vast majority had indicated that they had been properly paid. Jordan testified that this conclusion assisted him in formulating the questions he asked in the depositions. In its brief Respondent states:

> Accordingly, Jordan's exploration of wage-related issues discussed was designed to establish that the employees did not complain about the issues, which had been raised in the Civil Complaint. . . . Respondent was entitled to determine if complaints were raised with respect to the wage-related issues.

Later in its brief Respondent states:

> The challenged questioning touched on the Individual Employees keeping written records regarding work, hours worked and claims related to Civil Complaint and their complaints about inappropriate actions by the employer that may have been raised at union meetings. The presence or absence of such complaints relating to wage and hour issues and who raised or discussed their gripes is hotly relevant.

As can be seen from the foregoing, Respondent contends the questioning of Wolken and Reddoch that delved into union activity was relevant to find out which employees complained to the Union or to union supporters about Respondent's failure to pay them in accordance with wage and hour laws. But what Respondent had not explained is why that matter is relevant to the wage claim lawsuit or how that information could lead to information relevant to that suit. Certainly whether or not an employee complained has nothing to do with whether or not the employee was properly paid. Employees may not even know they have been improperly paid and so never complain, or they may complain about being improperly paid when in fact they have been paid in accordance with the law. But in its brief Respondent sets forth another reason why it contends the questioning was relevant and which, I conclude, better explains why Respondent asked these questions.

> Moreover, questions about the motives for initiating discussions about wage and hour issues and bringing the lawsuit, too, are relevant. Indeed, if ever there was a relevant inquiry where the defense will certainly argue the lawsuit was brought to further the Union's organizational objective, this is such a case. Such lawsuits are a standard part of unions' organizational corporate campaigns. A corporate campaign is a coordinated attack by a union using a wide variety of economic, legal, political, and psychological weapons against a corporation that has opposed unionization, refused to agree to the union's bargaining demands, or in some way refused to yield on some issue of importance to the labor organization waging the campaign. The attack is waged in numerous forums, including regulatory agencies and the courts. The attack is intended to tarnish the image, and undermine the reputation, of the targeted company through constant and unyielding pressure and to cause so much disruption that management is forced to surrender to the union's demands. [Footnote omitted].

In sum, Respondent admits that the questioning of Wolken and Reddoch was relevant to show that the motive for filing the lawsuit was organizational in nature and part of the Union's corporate campaign against Respondent. But the motive for filing the wage claim lawsuit has no bearing on the merits of the lawsuit. While it may be useful to Respondent in its campaign concerning the Union, it is not relevant to the lawsuit brought by the Union, Wolken, and Reddoch.

Under these circumstances I need not address the remaining two prongs of the three part test set forth above. By coercively interrogating employees concerning their union activity and the union activity of other employees Respondent violated Section 8(a)(1) of the Act.

C. Releases

Beginning in about November Respondent distributed documents entitled "Acknowledgement and Release"[3] to current and former employees encompassed by the wage claim lawsuit described above; more than 120 persons signed the

[3] Actually there were three different versions of this document, but the differences are not material to the issues in this case.

releases in consideration of payment of a specified amount of money. In pertinent part the releases stated:

> Upon signing this release and receipt of the consideration, I agree not to file or maintain a claim arising out of the subject matter covered under the Complaint described above. I further agree not to initiate, assist, join, participate in, or actively cooperate in the pursuit of any Wage Claims, including penalties, fees and costs, whether the claims are brought on my behalf or on behalf of any other employee, unless required by a court order or valid subpoena or otherwise permitted by federal or state law including but not limited to the National Labor Relations Act.

Analysis

Section 7 of the Act protects the right of employees to concertedly file and assist a lawsuit against an employer concerning the employees working conditions. *Le Madri Restaurant,* 331 NLRB 269 (2000). The release obligates employees "not to . . . assist, join, participate in, or actively cooperate in the pursuit of any Wage Claims, including penalties, fees and costs, . . . brought . . . on behalf of any other employee." To that extent the release conflicts with the Act.

Respondent argues that the specific language quoted in the preceding paragraph is canceled by the language "unless . . . permitted by federal . . . law including but not limited to the National Labor Relations Act." I disagree. Viewed from an employee's perspective, there is an obvious difference between the two conflicting portions of the release. The plain language of the first portion directly prohibits the signatory employee from assisting other employees in pursuing wage claims; the second portion cancels the first but only if the signatory employee is knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion. Respondent argues "It would take a highly paternalistic view of employees to presume they would not get that their NLRA rights are unaffected by the clause." That argument misses the point; employees may understand that their NLRA rights are unaffected, but may not know the fully panoply of those rights. An employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law. *Ingram Book Co.,* 315 NLRB 515, 516 (1994); *McDonnell Douglas Corp.,* 240 NLRB 794, 802 (1979); *Trailmobile,* 221 NLRB 1088, 1089 (1975). Respondent argues that these cases should not apply but instead cites *Lafayette Park Hotel,* 326 NLRB 824 (1998), and *Super K-Mart,* 330 NLRB 263 (1991). But these cases are inapposite for at least two reasons. First, they did not overrule the cases cited above. Second they involved rules that the Board concluded could not reasonably be read by employees to restrict their rights under the Act; here I conclude that that quoted portion of the release directly conflicts with the Act.

By conditioning the settlement of wage claims upon the requirement that employees not engage in activity protected by the Act, Respondent violated Section 8(a)(1) of the Act. *Clark Distribution Systems,* 336 NLRB 747, 748–749 (2001).

D. Exclusion from Employee Meetings

John Guay is a labor consultant for Respondent. Guay has worked with Jordan for about 24 years but he is not a lawyer, not employed in Jordan's law firm, and not paid by Jordan or his law firm. Marisela Rodriguez is Respondent's human resources manager. Guay and Rodriguez held meetings with groups of 6–10 employees during the week of January 31. All employees were required to attend, except Respondent purposefully did not invite Wolken and Reddoch. Slater, Respondent's president, testified that the reason Wolken and Reddoch were excluded was because Respondent would be talking about the lawsuit that Wolken and Reddoch had brought against Respondent and "it would not be appropriate to have them" attend the meetings.[4] Later I asked Slater whether he could be more specific as to why it was not appropriate. He responded that it was "inappropriate in the law."

Guay used talking points when he spoke to the employees. Jordan assisted in the preparation of those talking points. Those talking points read as follow:

Lawsuit Update

- Company may have to turn over payroll information to union's attorney that includes employee's personal data (name, address, SSN)
  - Matter is yet to be resolved
  - Employees have already signed the Releases to settle the lawsuit
  - Company attempting to limit the data it must turn over to the union.
- Lawsuits will take time to resolve, not a quick result

NLRB Update

- Union's appeal of the second election could last until sometime in 2006—no election until appealed is resolved.
- Employees have the right to vote in a second election—union trying to deny employees that right through their appeal to the 9th Circuit Court of Appeals
- Even if the Company settled all the outstanding items the election cannot be held as long as the union's appeal is pending
- The Company notified the NLRB before Thanksgiving it was willing to post the required Notice for sixty (60) days so that a second election could be held.
- Company has the right to contest the amount of back pay due to Hays and Reddock
- Hays and Reddock had the responsibility to look for work, not sit back and wait for a big settlement

[4] Respondent's counsel Patrick W. Jordan testified that he gave Respondent advice concerning whether Wolken and Reddoch should attend the meetings, but he did not disclose what that advice was; rather he testified only as to information he claims "informed" his advice. I conclude this testimony contributes very little concerning the reasons why Respondent decided to exclude Wolken and Reddoch from the meetings.

- Union wants to appeal to your emotions, not the facts—look at rumors flying around the shop at present

Address Rumors

- Company is not being sold—Company needs to become profitable, which it has not been in the last two (2) years
- Poor performance by a few employees brings everyone down
- Company is not disciplining employees just to avoid giving raises at the employee's annual review
- Company is continuing to apply policies, procedures and discipline in a consistent manner as it has always done
- Employee(s) filing NLRB charges who say they are being treated differently than others
- Company must prove through documentation that everyone is treated the same

General Updates

- Company implemented the 401(k) plan to benefit employees—all the monies being spent on the lawsuit and to defend against the NLRB charges are monies not going into the employee's 401(k) plan
- Company reduced the overtime hours worked to benefit employees and give you more time to spend with your families
- Changes mandated by the attorneys/consultant due to lawsuit and NLRB charges

  Must apply all policies and procedures in a consistent manner—e.g. disciplinary actions, write-ups

  Must enforce 10 minute rule on punching in/out

  Meal breaks had to be move (sic) back one (1) hour to comply with State Law—meals must be taken within the first five (5) hours of the employee's start time

  NOTE: State may change Labor Code to allow meal breaks to be taken within the first six (6) hours of the employee's start time—issue is pending and may be resolved in the next several months

Communications

- Company is continuing to look at ways to improve how we communicate and do business
- Communications is a two-way street—Company cannot fix what it doesn't know as a problem
- Management is improving communications among themselves—Mark Slater is having weekly meetings with all the supervisors, managers, schedulers, others to review the week's schedule to avoid problems and late shipments to customers
- Company has a history of getting input from employees on their ideas, suggestions, concerns and areas where improvements can be made—need to continue to communicate these to your immediate supervisor or go to the next step if you feel issue is unresolved
- Company is moving to have all the necessary T-nuts, bolts, straps, etc. that is required at each machine so employees do not have to spend time looking for items to do their jobs
- Company is reviewing time on all jobs and changing some times as required

Debbur Department Only

- Company has addressed communications issue—all direction to debbur employees will come from their supervisor, Tom Bechtol
- Company has addressed the tool issue—tools will be purchased in a timely manner
- Company is reviewing time on all jobs and changing some as required

Guay generally followed his talking points but also added certain information not in the talking points. Guay started at least one meeting by saying that he was there to conduct research for Tom Stull, Respondent's owner, and not for Mark Slater, Respondent's president; he was there to inform Stull about what the issues were in the company. Guay said that as he walked around the shop he noticed frustration with the employees. Concerning the lawsuit, Guay said that the company had not done anything wrong and that it was just Reddoch and Wolken trying to get more money. Guay asked what the issues were and an employee said that the tool crib was disorganized and that made it harder for the machinists to do their work. Someone mentioned that the company ran a lot better when the plant manager's predecessor was in charge, and someone asked how they were going to change the money from profit sharing into the 401(k) plan. Rodriguez also spoke at the meeting during at least one meeting. She mentioned the wage and hour lawsuit and said that the company had done nothing wrong; that the only thing they did was when they changed to a 12-hour shift they did not give a third break.[5]

Analysis

The General Counsel alleges that Respondent violated Section 8(a)(1) by excluding Reddoch and Wolken from the meetings it held with employees during the week of January 31 because they had filed the wage claim lawsuit. As indicated above, the Act protects the right of employees to concertedly file and assist a lawsuit against an employer concerning the employees working conditions. *Le Madri Restaurant,* supra. An employer violates the Act when it excludes employees from employee meetings that it holds because those employees engaged in conduct protected under the Act. *Wire Products Mfg. Corp.,* 326 NLRB 625 (1998), enfd. 210 F.3d 375 (7th Cir.

[5] The foregoing testimony is based on the credible testimony of Arturo Lopez, who has worked for Respondent for about 3-1/2 years as a CNC machinist. John Van Ness, who has worked for Respondent for about 35 years, also presented testimony concerning the meeting that he attended. I agree with Respondent's argument that his recollection of what specifically was said at the meeting was dim. I therefore do not find his testimony contributes much concerning the meeting.

2000).[6] Respondent admits that the reason it excluded Reddoch and Wolken from the meetings was related to the fact that they had filed the lawsuit. Respondent seeks to distinguish *Wire Products* by pointing out in that case at least two of the excluded employees lost overtime as a result of the exclusion whereas neither Wolken nor Reddoch lost pay. But it is clear that the Board found a violation based on the exclusion of all of the members of the union's bargaining committee and not just those who lost overtime as a result of their exclusion.

Respondent makes several arguments to justify its conduct. It implies that the exclusion of Reddoch and Wolken from the meetings did not affect their terms and conditions of employment. This argument fails for a number of reasons. The allegation here is that Respondent's conduct violated Section 8(a)(1); there is no 8(a)(3) allegation. But more importantly the exclusion of Wolken and Reddoch from the meetings affected their working conditions in at least two respects. First, Wolken and Reddoch had to continue to perform their regular work tasks while the other employees were relieved of their duties and instead sat in a conference room listening to Guay and Rodriguez. Second, a wide variety of information on employment issues was provided to the employees who attended the meetings; Respondent withheld this information from Wolken and Reddoch.[7]

Respondent's main argument, as described in its brief is that:

> Reddoch and Wolken were excluded from these meetings to avoid even the specter of an improper and unlawful communication under California law since they were represented by counsel.

The problem with this argument is that the facts in this case do not support it. The most the evidence shows here is that Wolken and Reddoch were excluded because it would not be "appropriate" to allow them to attend or it was "inappropriate in the law." In its brief Respondent states "Attorney Jordan advised exclusion based on California Rule of Profession (sic) Conduct, Rule 2-100 ("Rule 2-100), which is titled 'Communication with a Represented Party." This statement is not supported by a reference to the record in this case. The reason is that there is no such evidence and I see no basis for making any inference to that effect. I note that this was not a reason given at the time to justify the exclusion. Had this been a real concern of Respondent it could have limited the meeting to a discussion of the lawsuit only and then held another meeting to discuss working conditions in general at which Wolken and Reddoch could have attended. Rather, I conclude that this is a justification made after the fact and not genuinely relied upon. Moreover, even had Respondent relied upon the cited rules those rules would not have justified exclusion. The rules forbid a lawyer from directly or indirectly communicating with a party to a lawsuit about the lawsuit. The rules expressly provide that communications between the parties themselves is not forbidden. The meetings here were conducted by Guay, who is not a lawyer, not a member of Jordan's law firm, and not paid by Jordan or his law firm.

By excluding Wolken and Reddoch from meetings attended by other employees Wolken and Reddoch joined in filing a lawsuit over wage claims against Respondent, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

The Respondent has engaged in the following unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by

1. Conditioning the settlement of wage claims upon the requirement that employees not engage in activity protected by the Act.

2. Excluding Wolken and Reddoch from meetings attended by other employees because Wolken and Reddoch join in filing a lawsuit over wage claims against Respondent.

3. Coercively interrogating employees concerning their union activity and the union activity of other employees.

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. I have concluded that by conditioning the settlement of wage claims upon the requirement that employees not engage in activity protected by the Act, Respondent violated Section 8(a)(1) of the Act. The issue becomes what should be done with the releases containing the unlawful language that have been signed by employees. The Union argues that the appropriate remedy is to invalidate the releases in their entirety while allowing the employees to keep the money they received from Respondent as part of the settlement. The Union cites *Metro Networks, Inc.,* supra, in support of its argument. In that case the Board ordered the employer to rescind an unlawful severance agreement offered to an employee. But in that case the employee did not sign the unlawful agreement and received no money from the employer as part of an agreement. Here the employees have signed the release and receive money. The General Counsel argues the appropriate remedy is for Respondent to notify, in writing, the employees who signed the release that they have the option of continuing to accept the settlement with the understanding that the offending language be stricken or the option of nullifying the release and settlement by notifying Respondent within 10 days that they wish to do so and returning the settlement money to Respondent. The General Counsel does not explain the rationale for allowing employees to withdraw from the settlement. I conclude that the

[6] The Board has held that an employer may limit attendance at anti-union meetings held during an organizing campaign to employees who do not support the union. *Daniel Construction Co.,* 266 NLRB 1090 (1983). But Respondent makes no contention that it was privileged to do so at the meetings in question. In this regard the meetings were not limit to providing information to employees as to why they should not select a union as their collective-bargaining representative.

[7] At the hearing I reject evidence that Respondent sought to introduce to attempt to establish that Wolken and Reddoch already had the information that was provided to employees at the meetings. I reaffirm that ruling. *Wire Products,* supra. Respondent is not free to assume that Wolken and Reddoch would not have gained useful information from the meetings that they might not otherwise learned from the written notices Respondent had previously given to all employees on various subjects; Respondent did not merely read the previous notices at the meetings.

General Counsel and Union's approaches are overbroad in that they unnecessarily disrupts the underlying lawsuit by allowing employees to escape from their settlement agreements. The Union's approach is additionally overbroad in that it allows employees to keep the money they received as part of the settlement. But I do agree that notice posting alone is insufficient to remedy this violation. I shall therefore require that Respondent individually notify each employee who signed the release, in writing, that the quoted portion of the release has been found to be unlawful by the Board, or the Court of Appeals as may be appropriate, and that Respondent will not seek to enforce that portion of the release. This avoids the overreaches in the approaches suggested by the General Counsel and Union; Respondent should have no cause to complain because it argues that the releases did not intend to restrict Section 7 rights in the first place.

Inasmuch as the Board has declined to issue a bargaining order against Respondent a free and fair election at some point must be held to determine whether or not Respondent's employees wish to be represented by the Union. In order to get to that point Respondent must stop violating the Act. Because the Respondent has now shown a proclivity for violating the Act and because of the serious nature of the violations demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979); *Postal Service,* 345 NLRB 426 (2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[8]

ORDER

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

1. Cease and desist from

(a) Conditioning the settlement of wage claims upon the requirement that employees not engage in activity protected by the Act.

(b) Excluding employees from meetings attended by other employees because those employees engaged in activity protected by the Act.

(c) Coercively interrogating employees concerning their union activity and the union activity of other employees.

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

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

(a) Within 14 days from the date of this Order, individually notify each employee who signed a release for claims under United Steelworkers of America, et al., v. Tower Industries, Inc. d/b/a Allied Mechanical, et al., Case RCVRS081220, in writing, that the portion of the release obligating them "not to . . . assist, join, participate in, or actively cooperate in the pursuit of any Wage Claims, including penalties, fees and costs, … brought . . . on behalf of any other employee" has been found to be unlawful by the Board, or the Court of Appeals as may be appropriate, and that Respondent will not seek to enforce that portion of the release.

(b) Within 14 days after service by the Region, post at its facility in Ontario, California, copies of the attached notice marked "Appendix."[9] 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 October 7, 2004.

(c) 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.

[8] 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.

[9] 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."