

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WIL-SHAR, INC.,

and

**CASE NOS. 26-CA-23869
26-CA-23903**

IRONWORKERS, LOCAL 584

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS

Respectfully submitted,
WIL-SHAR, Inc.

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BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS

I. Statement of the Case

The Complaint, issued by the Regional Director for Region 26 of the National Labor Relations Board (“NLRB” or “Board”) in these consolidated cases, alleges that Wil-Shar, Inc. (“Wil-Shar”) violated NLRA § 8(a)(1) when it laid off¹ Charles Robbins on June 13, 2010,² because he concertedly complained about Wil-Shar’s alleged failure to pay employees the prevailing wage rate, alleged employment of illegal immigrants, and to discourage employees from concerted activity.³ April 28, 2010 Consolidation Order and Complaint (“Complaint”) ¶¶

¹ Wil-Shar policy provides that absences such as those at issue in this case may be treated either as voluntary resignation or as involuntary termination, R. Exh. 1, p. 13, and this has been Wil-Shar’s practice. *See* Tr. 237-38. Treatment as a voluntary resignation is less advantageous to the employee because it results in disqualification from unemployment benefits. *See* Ark. Code Ann. § 11-10-513. Termination for absenteeism also results in denial of unemployment benefits. Ark. Code Ann. § 11-10-514. Thus, layoff without a stated reason benefits the employee. Wil-Shar’s characterization of the discharge was done at Robbins’ request and for his benefit. Tr. 320-21, 330-31. The ALJ notes this fact, but treats Wil-Shar’s attempt to accommodate Robbins as if it were an action that was adverse to Robbins. Decision, p. 21. To avoid confusion, and follow the practice of the General Counsel, the term “discharge” is used herein to include all types of separations from employment.

² All date references are 2010 unless otherwise noted.

³ The ALJ’s Decision also includes facts related to “salting” efforts by Michael Richards and a “travel pay” issue that were not alleged as unfair labor practices (“ULPs”) and were not the subject of findings of fact or conclusions of law. *See* Decision, II.C. and II.D.1.b, at p. 3-4, 6-7. To the extent that these “background” facts are relevant to the issues raised herein, they are discussed below.

10(a), 10(b). The Complaint alleges that Wil-Shar violated NLRA §§ 8(a)(1) and 8(a)(3) by discharging Robbins because Wil-Shar believed Robbins had joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint ¶¶ 10(a), 10(c), 12.

The Complaint also alleges that Wil-Shar violated NLRA § 8(a)(1) when Billy Witcofski made comments during an October 15th meeting which allegedly interrogated employees about their union activities, threatened to cease operations, threatened the loss of employment, threatened employees that there would be no available work if employees selected the Union, and impliedly told employees that it would be futile to select the Union. Complaint ¶¶ 7(a) - 7(e).

The evidence from the three-day hearing falls into two categories: (1) the layoff of Robbins on July 13th, and (2) statements during the open employee meeting at the Wil-Shar home office on October 15th. Decision, Section II.A, p. 2.

A. The July 13th layoff of Robbins.

Wil-Shar is a steel erector that acts as a sub-contractor for commercial construction projects. *See* Decision, p. 2. Wil-Shar operates a small home office, and employs several types of employees, including “steel connectors,” at various construction sites.⁴ Respondent’s Exhibit (“R. Exh.”) No. 3, p. 5. Robbins worked for Wil-Shar intermittently since 2006 as a steel

⁴ These sites are generally referred to by job nickname, such as: “UTEP,” which was an athletic complex at the University of Texas El Paso; “Performing Arts Center” or “PAC” which was the Lorton Performing Arts Center on the University of Tulsa campus in Oklahoma; “Garland Street” or “Bookstore,” which was a project on the University of Arkansas campus in Fayetteville, Arkansas; “AFRC,” which was an Armed Forces Reserve Center in Northwest Arkansas; and “Fort Chaffee” which was a project located near Fort Smith, Arkansas. In addition, “Academy” or, as the ALJ refers to it, “Academy Sports” or “Sports Academy” was a private commercial building also located in Northwest Arkansas.

connector. Tr. 438; R. Exh. No. 3, p. 4; R. Exh. No. 26,⁵ p. 56, 57. Robbins was most recently hired on October 15, 2009. R. Exh. No. 3, p. 4; R. Exh. No. 26, p. 1. Robbins was laid off on July 13, 2010. R. Exh. No. 26, p. 16. He was supervised during the last two weeks of his employment by Jason Keen. Decision, p. 17. The decision to layoff Robbins was made on July 13th by Billy Witcofski, was communicated to Robbins on that date, and was a layoff based upon work load and Robbins' repeated violations of Wil-Shar policy. Tr. 314-15, 352, 476, 514-16.

Wil-Shar's policies describe factors to be considered in layoffs or reductions of force. These factors include, among other things, conduct, performance, tardiness and attendance of the employee. R. Exh. No. 1, p. 8. Witcofski described the layoff process as essentially laying off the worst employees first based on these considerations. Tr. 431-32, 442. Other employees confirmed that this was the procedure practiced by Wil-Shar, Tr. 157-59, and it was not disputed.

It is undisputed that Wil-Shar was attempting to survive in an adverse economy, and this was the subject of substantial evidence at the hearing. However, these crucial facts are never addressed by the ALJ's Decision. Wil-Shar began trying to adapt to the downturn in the construction industry in late 2008. As a result of worsening economic conditions, Wil-Shar took geographically distant jobs (such as UTEP and the PAC) to try maintain the minimum level of work required to avoid laying off employees. Tr. 441-42. Less profitable and more costly jobs were taken in an attempt to maintain a sufficient workload, costs (including certain employee benefits such as drive time, holiday and vacation pay) were temporarily reduced or eliminated, and employees were given notice of these changes no later than February 2009. R. Exh. No. 26, p. 9. This strategy ultimately proved to be unsustainable because there simply were not enough

⁵ The ALJ has referred to this exhibit as a "portion" of Robbins' personnel file. Decision, p. 22. It was undisputed that Respondent's Exhibit 26 was all available records from Robbins' personnel file. *See* Joint Exhibit 1. There was never any evidence or claim to the contrary.

new projects being lined up to support Wil-Shar's full workforce, and as a result, in 2010 Wil-Shar began to reduce its workforce as the work on existing projects wound down. Tr. 441-42.

Wil-Shar's undisputed business records confirm a significant reduction of force during the second half of 2010 which is unaddressed by the ALJ's Decision. The evidence showed that during the first six months of 2010, Wil-Shar terminated a total of thirteen employees. Tr. 443-44; R. Exh. No. 3, p. 12-13. Over the next six months, Wil-Shar terminated more than four times that number – 55 employees. Tr. 443-44; R. Exh. No. 3, p. 9-11. By early 2011, Wil-Shar's workforce had been reduced by half - from its previous level of 90-100 employees to only 48 employees. Tr. 445; R. Exh. No. 3, p. 8. Lee confirmed that he observed the workforce decrease by approximately 50 percent, from 90-100 employees to 45-50 employees. Tr. 155-56.

This economically driven reduction of force is further confirmed by undisputed records of subsequent hires, which are never mentioned in the ALJ's Decision. During (and after) the time that these seventy-one employees were terminated, only a very limited number of specialized hires occurred. Since the date that Robbins was laid off, not a single employee has been hired to work as a steel connector. Tr. 438-40; R. Exh. No. 3, p. 5. Only six employees have been hired due to specific and specialized skills that Robbins did not have.⁶

1. Wil-Shar policies were applied evenly to all employees and resulted in numerous discharges for similar violations (Exception I.A to I.D).

The ALJ incorrectly stated that “The record reflects that Respondent does not have a standardized attendance policy...in place.” Decision, p. 16. Wil-Shar has printed and published

⁶ The six employees hired since July 13, 2010, were all hired due to other specialized skills and/or certifications. Tr. 439-40; R. Exh. No. 3, p. 5. All six hires have certifications other than “steel connector” (Category D). Only one (Turner) was even a possible steel connector, but Turner, unlike Robbins, held welder certificates, and the undisputed evidence proves that Turner was hired due to his welder certifications (Categories B and C). Tr. 439; R. Exh. No. 3, p. 4, 5.

attendance requirements for its employees.⁷ One of these policies is a prohibition of “Absence without proper notification.” R. Exh. No. 1, p. 11; Tr. 434-35. The procedure for absences or tardies requires advance notice and approval of a valid reason. R. Exh. No. 1, p. 13; Tr. 432-36. Under these policies, “Absenteeism & Tardiness may result in ... in termination. Absence from work without notifying your SQL Officer/Supervisor or the Wil-Shar, Inc., office for one (1) day may be considered a voluntary resignation.” R. Exh. No. 1, p. 13; Tr. 432-36. Another policy addressed excessive absenteeism and/or tardiness. R. Exh. No. 1, p. 11. Under this policy, three absences or tardies (regardless of advance notice) within three months “warrants disciplinary action up to and including termination.” R. Exh. No. 1, p. 11. Chad Lee served as the Internal Control Officer for Wil-Shar from August 2009 until November 2010. Tr. 120. Lee testified that during this time, there was a “pretty good turnover” of some twenty, thirty or forty employees who were discharged for attendance reasons. Tr. 167-68, 434.

Many of these twenty to forty employees were discharged for attendance reasons during the year which preceded Robbins’ layoff. Tr. 167-68, 434. One of these employees was Trevor LaRochelle, who had a work history similar to Robbins, Tr. 222, but was nevertheless terminated in 2009 for a “no call no show.” Tr. 224; GC Exh. No. 31, p. 5. Undisputed evidence of contemporaneous personnel records shows that at least seven other employees were discharged for attendance within weeks or days of Robbins’ layoff. Tr. 501-06; R. Exh. Nos. 18, 23, 28, 29, 30, 31. This undisputed evidence makes clear that at least three Wil-Shar employees were

⁷ Each time that Robbins was hired (or re-hired), he was provided a current copy of Wil-Shar’s *Employee Manual of Procedures and Policies*, as was the normal practice at Wil-Shar. Tr. 427-29. Robbins twice signed receipts for these policies. Tr. 429; R. Exh. No. 26, p. 3-4. Robbins admits that he might have received these policies, Tr. 329, 362, but claimed to be unaware (and hence, not responsible to comply) with these policies. Regardless, he was aware of the requirement of advance notice, as were the other employees. Tr. 117.

discharged for similar attendance related reasons within days before Robbins' layoff, indicating that this policy was not a "pretext" manufactured after Robbins' layoff. These employees were each discharged for attendance violations that were less serious than the violations committed by Robbins:

- Christopher Owens missed part of a day on May 7, 2010, and was discharged on June 25, 2010, for failure to show up at work for a second day in a little less than two months - a much better attendance record than that of Robbins, who was absent for two full and two partial days over a period of one week. R. Exh. No. 30. This fact is wholly unaddressed by the ALJ's brief reference to Owens. Decision, p. 19-20 & n.5.
- On July 9, 2010, Jesse Setzer, who had been an on-and-off employee of Wil-Shar much longer than Robbins (since 2003), was terminated because Wil-Shar had "an uneasy feeling about [him] staying committed being able to get out of town on a regular basis." R. Exh. No. 31, p. 1. Setzer had no other attendance related issues in the immediately preceding month. R. Exh. No. 31. The ALJ's brief reference to Setzer quotes the reason for his termination, but ignores the fact that Setzer had 50% more (3+ more years) work history and experience with Wil-Shar than did Robbins. Decision, p. 20 & n.6.
- On July 12, 2010 (one day before Robbins' layoff), Jorge Vela was discharged for a single absence, for which he provided an excuse. R. Exh. No. 28, p. 1, 2. Vela's only other attendance issue was an unexcused absence on May 17, 2010, some two months previous. R. Exh. No. 28, p. 3. These facts are largely ignored by the ALJ's Decision. Decision, p. 19 & n. 4. The ALJ attempted to distinguish Vela on the basis that the absence leading to his termination was for a reported non-work related injury. However, this attempted distinction does not withstand scrutiny - Vela's excuse for this single absence was offered in advance and was more specific and legitimate than any of the unspecified excuses allegedly offered by Robbins for his multiple absences and tardies.

Four other employees were discharged within days or weeks after Robbins was laid off, again for similar reasons:

- On July 14 (the day after Robbins was laid off), Curtis Lewis was laid off due to lack of work. R. Exh. No. 23. This evidence is wholly unmentioned in the ALJ's Decision.
- On July 14, Thomas Shafer was terminated after he reported in advance that he was going to be absent because he was unable to work his shift. GC Exh. No. 28.
- On July 24, 2010, Ken Catron, who was a steel connector hired well before Robbins, R. Exh. No. 3, p. 3, did not attend a shift and was discharged. Tr. 237-38; R. Exh. No. 18. Catron also provided an excuse and his last month's attendance record (containing this absence and a single tardy) was significantly better than Robbins' record. R. Exh. No. 18.

As noted by the ALJ, Catron (like Vela) offered a non-work related injury as an excuse, but was nevertheless terminated. Decision, p. 20 & n. 8; Tr. 237-38.

- On September 16, 2010, Nathaniel Holmes was discharged after a single absence. R. Exh. No. 29. The ALJ's Decision mentions but essentially ignores the discharge of Holmes without any explanation or analysis. Decision, p. 20 & n. 7.

2. Robbins repeatedly violated Wil-Shar policy during the two weeks before his layoff (Exception I.A to I.D).

Robbins had repeated absences and tardies that were the legitimate cause for his layoff. Robbins was absent on June 30, 2010. R. Exh. No. 16, p. 107. He had no explanation for this absence and did not dispute it. Tr. 361. Robbins was absent a second time on July 6, 2010, although he later disputed this absence. Tr. 479, 489-90, 493, 495, 532; R. Exh. No. 16, p. 108. Robbins was two hours late on July 7, 2010, which he did not dispute. Tr. 490, 492-95, 532; R. Exh. No. 16, p. 108. Robbins was five hours late on July 10, 2010, which he also did not dispute. Tr. 490-96, 532; R. Exh. No. 16, p. 108. Robbins was again absent, for the third full day in two weeks (and the second in a week) on July 13 and was laid off. Tr. 498. The evidence related to each of these dates is as follows:

June 30, 2010: Robbins was absent the entire shift. R. Exh. No. 16, p. 107. Robbins does not dispute that he was absent, and does not (and cannot) claim that he complied with Wil-Shar's attendance policy. Tr. 361. Wil-Shar's contemporaneous records document that Robbins was absent on this date. R. Exh. No. 16, p. 107. It is undisputed this information was conveyed to Witcofski at or before the time that he made the decision to lay off Robbins, in accordance with Wil-Shar's routine business practice. Tr. 452-53. General Counsel's refusal to introduce the available telephone records in its possession, Tr. 363, for this date supports an inference that Robbins violated Wil-Shar's attendance policy on this date. Tr. 591. This absence alone was sufficient cause to discharge Robbins. R. Exh. No. 1, p. 11, 13.

July 6, 2010: Robbins was again absent for the entire day, although he later denied the absence. Tr. 479, 489-90, 493, 495, 532, 550-51; R. Exh. No. 16, p. 108. Robbins claimed to have an unidentified excuse for this absence, but General Counsel's refusal to produce the available phone records which were in its possession, Tr. 363, after fair notice at the hearing supports an inference that Robbins did not comply with Wil-Shar's attendance policy on this date. Tr. 591. All Wil-Shar's contemporaneous records, including but not limited to the initial draft reports, Tr. 493; GC Exh. No. 23, and the final approved reports, Tr. 495; R. Exh. No. 16, p. 108, confirm Robbins' absence on July 6.⁸ The detailed testimony of both Keen and Witcofski confirm that Robbins was absent on July 6. Tr. 479, 489-90, 493, 495, 532, 550-51, 561-63, 565-67. Again, it is undisputed this was the information conveyed to Billy Witcofski at the time that he made the decision to lay off Robbins. Tr. 479, 489-90. This absence also was sufficient cause for Robbins' discharge. R. Exh. No. 1, p. 11, 13. It was undisputed that Witcofski was "scared" of Robbins, Tr. 232, and after his termination, Wil-Shar paid a small settlement to Robbins in an attempt to "buy its peace." Tr. 327-28, 508; GC Exh. No. 12.

July 7, 2010: Robbins was scheduled to be at work at 6:00 am. Tr. 493-94; R. Exh. No. 16, p. 108. He was two hours late to work. Tr. 490, 493-94, 551-52; R. Exh. No. 16, p. 108. Witcofski was on the site and observed the fact that Robbins was tardy. Tr. 490, 493-94. Robbins

⁸ Wil-Shar tracks employee attendance and work hours by means of a "roll call" which is recorded in a "log book" and reported by phone, fax or delivery of the roll call document to the Wil-Shar office, where attendance and payroll reports are then prepared. *See* Tr. 122-25, 131. In addition to these reports and related testimony, Wil-Shar offered the relevant page of the "log book" with contemporaneous notes of Robbins' absence on July 6. R. Exh. No. 40. This exhibit confirms the other documents and testimony which conclusively demonstrate that Robbins' spurious claim that Keen's records supposedly showed that he worked on July 6, Tr. 323-24, 354, was false. *See* Tr. 481. Despite the relevance of this document and Robbins' undisputed history of lying for personal gain, *see, e.g.*, Tr. 345-48, General Counsel's objection was sustained. As a consequence, with the exception of this note, this brief does not cite the rejected exhibit.

does not dispute that he was late to work. Tr. 326, 352. Although Robbins generally asserts that his tardiness was “never” unexcused, Robbins’ purported excuse is never identified. Tr. 322-23. Robbins spoke with Keen on the evening of July 6, as evidenced by a one minute phone call to Keen at 6:55 pm on July 6, followed by a return call lasting twelve minutes at 8:01 pm. GC Exh. No. 32, p. 1. The substance (as opposed to the fact) of this conversation is not clear from the phone records, and Keen testified that he was not informed of Robbins’ tardiness in advance. Tr. 551-52. It is undisputed that that no advance report of an excuse for this absence was reported to Witcofski when he made the decision to lay off Robbins. Tr. 490.

Keen’s testimony is corroborated by the pattern of phone calls reflected on the telephone records. It is clear from the records that not every call between Robbins and Keen was for the purpose of reporting an absence or tardy, since the calls on July 7 at 11:41 am and 12:49 pm could not be for the purpose of reporting an absence. GC Exh. 32, p. 1. Robbins (even at two hours late) was already at work when these phone calls occurred, and had no reason at that time to report his tardiness, which had already occurred. Likewise, calls to Keen during the evening cannot be assumed to be reports of absences or tardies, since there was such a phone call at 5:50 pm on July 7 even though Robbins worked as scheduled the following day, and there was no reason for him to report an absence, since such an absence did not occur. R. Exh. No. 16, p. 108. Robbins’ partial absence on July 7 was his third in roughly one week, and was a violation of Wil-Shar policy that was independently sufficient cause to discharge Robbins. Tr. 492; R. Exh. No. 1, p. 11, 13.

July 9, 2010: On one of the three days that Robbins worked his scheduled shift during the week preceding his layoff, he was involved in a physical altercation/threat with another employee. Tr. 473, 496-97, 552-53; R. Exh. No. 26, p. 11. This was not Robbins’ first physical

altercation at work. Tr. 469-73, 497; R. Exh. No. 26, p. 10. This incident was known to Witcofski the day it happened, and was alone (especially since it was a second recurrence of such a physical threat/altercation) a violation of Wil-Shar policy and sufficient cause to discharge Robbins. Tr. 497; R. Exh. No. 1, p. 10. Robbins' volatility was part of the reason why Witcofski was scared of him, and one reason why Robbins' presence disrupted Wil-Shar's business operations. Tr. 469-72.

July 10, 2010: July 10 was a Saturday. Saturday attendance is particularly important to Wil-Shar due to the difficulties in scheduling Saturday work as compared to weekday work, and the simple fact that employees prefer weekday shifts over Saturday shifts. Tr. 491-92. Absences and tardies on Saturdays are significantly more damaging to productivity and morale than are weekday absences. Tr. 491-92. Robbins was scheduled to be at work at 6:00 am. Tr. 494; R. Exh. No. 16, p. 108. He was five hours late. Tr. 494, 553-54; R. Exh. No. 16, p. 108. Robbins does not dispute that he was late. Tr. 326, 352. There was a phone call with Keen at 5:46 pm on July 9. GC Exh. No. 32, p. 2. Robbins claims that this was a report of some unidentified excuse. Tr. 325. Keen testified that Robbins' account is not true. Tr. 554. The phone records confirm Keen's testimony because if this phone call were a report of an intended tardy as Robbins claims, there is no explanation for the later calls to Keen at 9:38 am and 6:09 pm on July 10. GC Exh. No. 32, p. 2. These later calls confirm that Robbins' call to Keen on July 9 was for some other purpose, and the two calls on July 10 were due to Robbins' concern that he was "in trouble" with his employer precisely because he knew that he had not complied with Wil-Shar attendance policy. This partial absence was Robbins' fourth in roughly one week, was known by Witcofski to be unexcused at the time he made the decision to lay off Robbins, Tr. 490-93, and was independently sufficient cause to discharge Robbins. R. Exh. No. 1, p. 11, 13.

July 13, 2010: Robbins was scheduled to be at work at 6:00 am. *See* R. Exh. No. 16, p. 108-09. He was absent, and he admits that he was absent. Tr. 312, 353, 554-55. There were three phone calls to Jason Keen on July 12. GC Exh. No. 10, p. 1. Robbins claims that these phone calls were to inform Keen of the reason for his absence. However, Robbins admits that he did not know whether any particular call was related to personal business (“our kids swimming together”) or work. Tr. 383.⁹ In short, Robbins could not provide any specifics about the calls, and relied upon his blanket assertion that he “always” reported his absences.

More importantly, Robbins’ available phone records confirm that he violated Wil-Shar’s attendance policies. First, these records show that Robbins first attempted to call to Jason Keen at 11:28 am, more than five hours after Robbins was scheduled to be at work. Tr. 559; GC Exh. No. 10, p. 1. Confronted with these records, Robbins changed his testimony, claiming that he reported the absence the night before. This contradicts his prior testimony, in which he claimed to have reported his expected absence to Keen “that morning” (*i.e.*, July 13). Tr. 307-09, 386-87. In fact, the evidence shows that Robbins did not even attempt to call Keen until after he received a message from Witcofski to inform him of Witcofski’s decision to lay him off due to his absences. GC Exh. No. 10, p. 1.

The records contradict Robbins’ claimed report for a second reason. Robbins claims that he told Keen (either the night before or that morning, depending upon which version of his story is credited) that he was going to Rogers Police Department in the morning of July 13. Tr. 308. Robbins even went so far as to claim that he reported to Keen that he would be absent in the

⁹ As the ALJ notes, the telephone records make clear that there was a personal (non-work related) relationship between Keen and Robbins. Decision, p. 18. However styled, the undisputed evidence was that Robbins regularly contacted Keen to discuss and obtain assistance with Robbins’ personal problems wholly unrelated to Robbins’ employment. Tr. 572, 595-96. The personal nature of these calls is corroborated by the fact that the calls were made to Keen’s personal cell phone rather than his work cell phone. Tr. 577.

morning, but “anticipated actually coming to work later that afternoon.” Tr. 308. The phone records show that at 1:03 pm, Robbins called the Arkansas State Police to figure out what to do before he ever went to the Rogers Police Department. Tr. 384; GC Exh. No. 10, p. 1. Robbins did not actually go to the Rogers Police Department until the afternoon. Tr. 384. Robbins’ claimed report to Keen of his supposed plan to go to the Rogers Police Department in the morning and then go to work in the afternoon contradicts the records of his actual movements on July 13. Tr. 308, 384; GC Exh. No. 10, p. 1.

Third, it is undisputed that Witcofski spoke to Robbins (after a series of attempted calls beginning the minute before Robbins called Keen at 11:28 am) at 2:39 pm, and asked him why he was not at work, and then informed him of his decision to lay him off. Tr. 313-14, 498-501; GC Exh. No. 10, p. 2. Witcofski’s question (“Why are you not at work today?”) that Robbins and Witcofski both agree was one of the first things said during that phone call makes no sense if Witcofski were already aware of Robbins’ alleged advance report of his absence, especially in light of Witcofski’s repeated attempts to contact Robbins. GC Exh. No. 10. In short, Robbins’ claims are not supported by the facts, and are merely the afterthought of a disgruntled former employee who was properly discharged.

3. Robbins’ multiple crimes of dishonesty and theft discovered after his layoff, warrant his layoff and the denial of remedy (Exception I.E and F).

In 1996, Robbins was convicted of Robbery and Commercial Burglary, among other things. Tr. 344; R. Exh. No. 35. Robbins claimed that he “grew out of” this criminal activity after these felony convictions. Tr. 345. Then he was confronted with his 1997 conviction and prison sentence as a habitual offender for the felonies of Residential Burglary, Theft, Forgery and Theft by Receiving. Tr. 345; R. Exh. No. 36. Robbins again claimed to have “learned his lesson” and

to have been on the “straight and narrow” after his release from prison on these additional felony charges. Tr. 345. Then he was confronted by his 2001 conviction for Theft by Deception, R. Exh. No. 37, and a conviction of felony theft in 2005, which involved his lying to various suppliers in an effort to falsely charge purchases to his then-employer. Tr. 345-46, 348; R. Exh. No. 38. Robbins made more claims of rehabilitation, only to be confronted with the fact that he was again convicted of theft in February 2011, after his July 13 layoff. Tr. 351; R. Exh. No. 39.

Robbins’ criminal record consists of ten separate convictions on five separate occasions. These convictions consistently – over a period of some fifteen years – involve theft and dishonesty, with the most recent felony involving his efforts to steal from his employer and with his thefts continuing even after he was laid off by Wil-Shar. Although Wil-Shar was generally aware of a vague “conviction” while Robbins was employed, Wil-Shar had no idea of the true nature and extent of these numerous thefts, including a conviction for theft after Robbins’ layoff. Robbins’ repeated felony convictions of theft and dishonesty places Wil-Shar at significant risk, and is disruptive of Wil-Shar’s scheduling and business because of the risk and job limitations that they create, now that Wil-Shar is fully aware of their nature. Tr. 474-75.

4. Robbins’ complaints about “short pay” were not protected concerted activity known to Witcofski (Exception I.A to I.C).

a. Robbins’ occasional internal complaints regarding “short pay” were purely personal.

Robbins testified that he had “20 or more” internal complaints regarding short pay. Tr. 368. Robbins’ statement is false, and was not credited by the ALJ. Decision, p. 6 (describing “two or three occasions”). The evidence was that Robbins made four complaints regarding short pay - on August 7, 2009; April 9, 2010; May 11, 2010; and May 24, 2010. R. Exh. No. 26, p. 30-31, 61, 67-71. Lee described Robbins’ complaints as “venting” in the first person about his

paycheck. Tr. 229. Carter McLeod, who handled such complaints, described them nothing more than complaints about his (Robbins') personal paycheck. Tr. 617-19. Lee agreed with this description of the complaints as personal to Robbins. Tr. 189-90.

b. Robbins' alleged last-minute external complaint to DOL was unknown to Witcofski.

Robbins also claimed to have filed a claim "for everyone" with DOL in June. Tr. 29. Jarid Giese, a friend of Robbins, Tr. 82, never witnessed any such activity by Robbins. Tr. 85, 116. Catron testified that Wil-Shar Robbins was not involved in his DOL claim and Wil-Shar had no reason to believe that Robbins had any involvement in his claim. Tr. 231, 258-59. Robbins admits that he "can't be certain" that Witcofski knew of his alleged complaint since they did not discuss it. Tr. 398. Lee (like Richards) testified that Robbins falsely told him that he had complained to the "labor" agency or board concerning his not being paid a prevailing wage, but that this information was never passed on to any of Wil-Shar's management (*e.g.*, Billy Witcofski). Tr. 189, 230-31. Lee was never informed that Robbins was taking any complaints "outside the company." Tr. 136. It is undisputed that Witcofski was not aware of any DOL complaint by Robbins. Tr. 372-73, 448-49. 525. Lee confirmed that he never reported to any supervisor or agent of Wil-Shar that Robbins had made any prevailing wage complaint, DOL complaint, ICE complaint or other concerted complaint, and this was confirmed by other Wil-Shar employees. Tr. 136, 567-69, 582-83.

Aside from Robbins' self-serving testimony, the only evidence of any DOL claim was a letter dated July 29, 2010, some two weeks after Robbins was laid off. GC Exh. No. 16. The letter stated the complaint was being handled confidentially, and Robbins admitted that Witcofski was unaware of this complaint. Tr. 372-73. Ultimately, Robbins admitted that his claim to have filed a DOL complaint in June was false. Tr. 403-04. All testimony was consistent

that at the time of Robbins' layoff, Witcofski was not aware of any such complaint even if one had actually been filed after Robbins' attendance had become an issue. Tr. 372-73.

5. Robbins' complaints about perceived "illegals" were not protected concerted activity known to Witcofski (Exception I.A to I.C).

a. Robbins' longstanding complaints regarding perceived "illegals" were merely "gripes" based upon personal prejudice.

Robbins' prejudice against his Hispanic co-workers is wholly undisputed. Robbins testified that he complained about Hispanic workers throughout the entirety of his employment. Tr. 375. Lee testified that Robbins' complaints were "venting, sort of griping" that did not expect or require any response. Tr. 171-72, 203-04, 230. Robbins had a longstanding personal prejudice against Hispanic co-workers. *See, e.g.*, Tr. 30, 85-87, 171, 183. Robbins made no distinction between Hispanic workers, those of brown color, or those with a different nation of origin and language, or legal and "illegal" (undocumented) workers. To Robbins, Hispanics, non-English speakers and "illegals" are all essentially synonymous. *See* Tr. 85-87, 171, 183. Despite Robbins' confusion and prejudice, Wil-Shar undisputedly complied with all federal hiring requirements. Tr. 170-71, 460, 465, 528. Further, all non-English-speaking employees were safety tested for adequate English skills. Tr. 535-36.

b. Robbins' alleged external complaints regarding perceived "illegals" were unknown to Witcofski.

Robbins claimed to have made an anonymous complaint regarding perceived "illegals" in April, or May, or maybe June 2010. Tr. 295-96. Richards testified that Robbins was "upset" about allegedly illegal immigrant workers, and claimed to have called Immigration and Customs Enforcement ("ICE") and "got them fired." Tr. 73-74. Tellingly, Richards described the complaints described by Robbins by using the third person singular ("he"), not the third person plural ("they"). Lee testified that this occurred after Robbins was laid off. Tr. 220. This is

consistent with Robbins' prejudices. Keen was unaware of any such external or formal complaints. Tr. 567-68, 579. Lee was never informed that Robbins was taking any complaints "outside the company" and confirmed that he never reported to any supervisor or agent of Wil-Shar that Robbins had made any ICE complaint or other such complaint. Tr. 136. This was confirmed by other Wil-Shar employees. Tr. 567-69, 582-83.¹⁰ Robbins admitted that Billy Witcofski and Wil-Shar management were unaware of this alleged and anonymous complaint. Tr. 375.

Robbins contacted an anti-immigrant advocacy group, GC Exh. No. 15, but admitted that Wil-Shar and Witcofski were unaware of this confidential complaint until well after his layoff. Tr. 466, 567-68. Lee testified that he was unaware of any complaint that Robbins allegedly filed with any agency regarding Wil-Shar. Tr. 189.

6. Wil-Shar consistently treated persons with protected activity in a non-discriminatory fashion (Exception I.C and I.D).

Discrepancies in paychecks were fairly common. Tr. 455. Robbins' first internal complaint about short pay was in August 2009. R. Exh. No. 26, p. 31. He was not laid off as a result of that complaint. (He quit shortly thereafter in order to take a different job. R. Exh. No. 26, p. 56.) Robbins was rehired within a few weeks. R. Exh. No. 26, p. 2. If such complaints engendered animus against the employee, it makes no sense for Robbins to be rehired just a few weeks after having made the complaint, a fact ignored by the ALJ in her Decision. All witnesses agreed that no adverse action was taken against any employee for reporting short pay. Tr. 369. Numerous other employees experienced similar discrepancies, which never resulted in any

¹⁰ Keen apparently misheard or misunderstood a question using the word "concerted." However, once this became clear, he testified to the same effect once the meaning of the term was explained to him to avoid any misunderstanding. Tr. 592-93. In contrast, Lee admitted that he had repeatedly changed his testimony under oath. Tr. 232-33.

adverse action. Tr. 115, 185, 187-88, 263.

Also ignored by the ALJ is the evidence that Robbins continued to receive favorable treatment after reporting pay discrepancies. He was enrolled in an apprenticeship program on May 13, 2010, just a few days after his next two complaints about short pay. Tr. 396; R. Exh. No. 26, p. 13. In early June 2010, he was given favorable treatment in the form of time off and a loan to enable him to get married and go on a honeymoon, roughly one week after his final complaint. Tr. 395, 467; R. Exh. No. 26, p. 66. Also during this time, Witcofski allowed Robbins to use Wil-Shar's office chairs for Robbins' wedding and reception and twice prayed with him after these internal complaints occurred. Tr. 467.

Robbins admitted that even after Wil-Shar was aware of all the information that he claims was the illicit reason for his layoff, he was treated "more than fair." Tr. 317, 396. One example was the payment that Wil-Shar made for one of Robbins' personal tools that was damaged. Tr. 317, 396, 468-69; R. Exh. No. 26, p. 64-65. He was paid disputed hours on July 19, 2010. R. Exh. No. 26, p. 62. When Robbins informed Witcofski that the termination papers prepared by Witcofski (stating that Robbins was laid off for excessive absenteeism and lack of work) created a problem with Robbins' application for unemployment benefits, Witcofski agreed to delete the reference to absenteeism so that Robbins could receive unemployment benefits. Tr. 320-21, 330-31.

This lack of retaliatory animus is confirmed by Wil-Shar's treatment of other employees. Richards wore a Union shirt and hat when he approached Wil-Shar about employment, listed his prior Union employment, and was nevertheless hired in 2009. Tr. 47-53. Richards continued to openly display Union insignia while working for Wil-Shar, which was sufficiently obvious to occasion discussion with co-workers, but never resulted in any problems with Wil-Shar

management. Tr. 52-53. Jarid Giese, an employee of Wil-Shar who recorded the October 15th meeting, testified that he remained employed by Wil-Shar after Wil-Shar learned that he had recorded the meeting for the Union. Giese did not testify to any mistreatment by Wil-Shar after it learned of his actions, and he ultimately quit his position with Wil-Shar for a “better” position with a different employer. Tr. 80. Even after Wil-Shar became aware that Giese recorded the October 15th meeting, he suffered no adverse employment action, Tr. 115-16, 507, and was on good terms with Wil-Shar. Tr. 116, 118. Catron, an employee who filed a prevailing wage complaint unrelated to Robbins, also stated that he still has a “good relationship” with Witcofski. Tr. 263, *see* Tr. 450.

General Counsel spent significant time presenting the testimony of Michael Richards, a union organizer with Ironworkers, Local 584, who engaged in a “salting” campaign as an employee of Wil-Shar from December 12, 2009, through January 18, 2010. Tr. 16-17, 52. This evidence is of extremely limited value, and is basically a distraction. Assuming *arguendo* that Richards was involved in protected activity during his employment with Wil-Shar, he repeatedly admitted that Robbins was not involved in that activity and had nothing to do with the activity (or Richards) until after Robbins was laid off. Tr. 29, 53-58, 67-68. This was confirmed by Robbins and others. Tr. 199-200, 335-36, 395-96, 446-47. There was no evidence that Wil-Shar was or would be aware of any (non-existent) involvement by Robbins in such activity. Richards admitted that his first contact with Robbins (aside from a brief social contact at a Christmas party) occurred after Robbins was laid off, when Robbins called him for advice regarding “options” as to “how to assert” his alleged “rights” for having been “let go.” Tr. 29.

The evidence is clear that Robbins never engaged in any concerted activity until after his July 13th layoff, and Wil-Shar was not aware of any such activity until after his layoff. Robbins’

complaints about “short pay” were merely individual personal complaints that were handled as a routine manner without any adverse consequence to Robbins, who received favorable treatment after these complaints were known. Other employees also made such complaints without experiencing adverse action. Robbins did engage in disloyal behavior regarding perceived “illegals,” but this disloyalty was not concerted activity, and was not known to Wil-Shar at the time of his termination (although Robbins’ personal prejudice, dislike and “griping” about supposed “illegals” was well-known for years without any adverse consequence). What was known to Billy Witcofski on July 13th was that in the two week period immediately preceding his layoff, Robbins had accumulated three absences, two significant tardies, and made a physical threat on the job. Faced with the need to downsize, Billy chose to layoff Robbins due to his violations of Wil-Shar policy. The only adverse action taken against Robbins occurred after these policy violations between June 30 and July 13. The facts discovered after Robbins’ layoff about his criminal misconduct confirm that he never should have been hired in the first place, and would be discharged if he was employed at the time they were discovered.

B. The October 15, 2010 meeting (Exception II).

General Counsel introduced a recording and a transcript of a meeting held on October 15, 2010 at the Wil-Shar home office. GC Exh. No. 6A, 6B. The recording is more than two and a half hours in length, GC Exh. No. 6A, and the transcript consists of twenty-seven pages of single spaced eight point (or smaller) type. GC Exh. No. 6B. From this lengthy meeting, General Counsel has isolated a few selected portions totaling approximately five minutes in duration.

These “snippets” are as follows:

- GC Exh. No. 6B, p. 11 (51:20 on GC Exh. No. 6A).
- GC Exh. No. 6B, p. 12 (1:01:27 on GC Exh. No. 6A).
- GC Exh. No. 6B, p. 14 (1:10:00 on GC Exh. No. 6A).
- GC Exh. No. 6B, p. 15 (1:15:30 on GC Exh. No. 6A).

- GC Exh. No. 6B, p. 20 (1:41:10 on GC Exh. No. 6A).
- GC Exh. No. 6B, p. 22 (1:58:10 on GC Exh. No. 6A).

II. The Complaint regarding the July 13 layoff of Robbins should be dismissed (Exception I).

General Counsel must prove any alleged ULP by a preponderance of the evidence. 29 C.F.R. § 101.10(b); *NLRB v. Louis A. Weiss Mem'l Hosp.*, 172 F.3d 432, 442 (7th Cir. 1999). The burden of proof on the required elements to establish a ULP never shifts to the Respondent. *Presbyterian/St. Luke's Medical Center, v. NLRB*, 653 F.2d 450, 456 (10th Cir. 1981); *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 165 (8th Cir. 1968). Although the burden of proof on each of the necessary elements of the ULP at all times remains upon General Counsel, it is well-established under the analysis of *Wright Line*, 251 NLRB 1083 (1980), that once General Counsel proves a *prima facie* case, a Respondent may offer a “same decision” affirmative defense by showing that it would have taken the same action regardless of the forbidden motive, that is, would have made the same decision for legitimate reasons. *NLRB v. Louis A. Weiss Mem'l Hosp.*, 172 F.3d 432, 442 (7th Cir. 1999); *Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993); *Ironwood Plastics, Inc.*, 345 NLRB 1244, 1252 (2005). As the Supreme Court explained in *NLRB v. Transp. Mgmt Corp.*, 462 U.S. 393, 401 (1983):

[T]he Board's decisions ... have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on anti-union animus - or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under § 10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c).

“Only if the General Counsel *proves* that anti-union animus was a motivating factor in the employer's decision to discharge does the burden shift to the employer to prove it would have

made the same decision absent the employee's protected activity.” *St. Luke’s Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 581 (8th Cir. 2001) (emphasis in original); accord *NLRB v. Louis A. Weiss Mem’l Hosp.*, 172 F.3d at 442.

The ALJ improperly shifted the burden of proof to the Respondent on the elements of the ULP, which must be proved by General Counsel before the *Wright Line* “same decision” affirmative defense ever comes into play. Put differently, the *Wright Line* analysis applies to “dual motivation” cases, and General Counsel always bears the burden to prove the “forbidden motivation.” *Transportation Management* makes clear that the ultimate burden of proof on the elements of the ULP – including that the employee’s protected conduct was a substantial or motivating factor in the adverse action – never shifts from General Counsel. 462 U.S. at 401; *St. Luke’s Episcopal-Presbyterian Hospitals*, 268 F.3d at 581. This was expressly stated by the Board in *Wright Line*, 251 NLRB at 1088 n. 11, and has been consistently applied by the Board ever since. *See, e.g., Webb-Centric Construction*, 254 NLRB 1181, 1185 (1981).¹¹

This allocation of the burden of proof is no insignificant matter, because General Counsel cannot rely upon gaps in the record or failures to adduce evidence because the absence of evidence does not cut in its favor as the party who bears the burden of proof. *NLRB v. Louis A. Weiss Mem’l Hosp.*, 172 F.3d 432, 446 (7th Cir. 1999). This is particularly important – indeed, dispositive – in this case where the ALJ admitted in her Decision that there was a failure to adduce evidence of one of the crucial elements of General Counsel’s case – Witcofski’s unproven, but erroneously assumed, knowledge of Robbins’ alleged complaints on July 13.

¹¹ The ALJ cites *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (1980). Although decided a few months after *Wright Line*, *J.P. Stevens* does not mention *Wright Line*. The portion of *J.P. Stevens* cited by the ALJ is immediately followed by the recognition, consistent with *Wright Line* and progeny that a ULP may not be sustained unless the employee’s protected activity is proven to be a “but for” cause of the discipline or discharge.

Decision, p. 18.

A. The General Counsel failed to prove concerted activity (Exception I.A).

General Counsel failed to prove that Robbins' complaints about his paycheck or perceived "illegals" were concerted activity. As the facts described in detail in Sections I.A.4 and I.A.5, *supra*, which are hereby incorporated by reference, demonstrate, this is not a situation where Robbins individually sought to enforce collective bargaining rights under the so-called "Interboro doctrine" of *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966). Rather, Robbins' complaints concerned things unrelated to collective bargaining. As such, they are protected concerted activity only if they are "truly group" complaints for mutual aid and protection under the "Meyers test." *International Transp. Serv., Inc., v. NLRB*, 449 F.3d 160, 165-66 (D.C. Cir. 2006). To find an employee's activity to be concerted under *Meyers*, the Board "require[s] that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*); accord *Center Ridge Co.*, 276 NLRB 105, 105 (1986). In order for a single employee's complaint to constitute protected concerted activity, that communication must appear calculated to induce, prepare for, or otherwise relate to some kind of group action. *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*).

Prill v. NLRB, 835 F.2d 1481, 1483-84 (D.C. Cir. 1987), is one of the leading cases addressing the *Meyers* standard. In *Prill*, the Court of Appeals explained the limitations on concerted activities that were imposed by *Meyers*:

In *Meyers II*, the NLRB adheres to its legal position in *Meyers I*, in which it held that an employee's action may be concerted for the purposes of the NLRA only if the action is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization ... to bargain collectively ... and to engage in other *concerted activities* for the purpose of

collective bargaining or other mutual aid or protection.” At the heart of this dispute is whether the safety complaints of a single employee acting on his own can constitute concerted activity protected under the Act. Previously, under *Alleluia Cushion Co.* and its progeny, the efforts of a single worker to invoke state and federal laws regulating occupational safety were held protected activity under section 7. The Board had determined that such complaints were “concerted” on the theory that the action of one individual bringing statutory safety concerns to light is presumed to assert the rights of all employees interested in safety. Put simply, the Board now rejects the theory animating *Alleluia* and its progeny. A worker no longer takes “concerted” action by himself unless he acts on the authority of his fellow workers. Unlike the Board’s reasoning in *Alleluia*, the Board’s new position is that the “concerted activity” prong and the “mutual benefit or protection” prong of section 7 are two distinct factual inquiries that are to be analyzed separately. Concerted action cannot be imputed from the object of the action. In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement. As under the old standard, however, a worker is still deemed to have taken concerted action when he acts with the actual participation or on the authority of his co-workers.

Prill, 835 F.2d at 1482-1483 (internal citations omitted, modifications in original). In order for activity to be concerted, the complaints must be “truly group” issues that are raised on behalf of other employees in addition to the complaining employee. *International Transp. Serv.*, 449 F.3d at 166; *Prill*, 835 F.2d at 1484. The authorization for such representation must be actual rather than implied, and more than a mere temporal connection between employee discussions and the activity or complaint at issue is required in order for concerted activity to be found. *Manimark Corp. v. NLRB*, 7 F.3d 547, 550-51 (6th Cir. 1993).

Under the *Meyers* standard, complaints about issues common to more than one employee do not constitute concerted activity unless a second employee joins in or authorizes the actions of the single employee. *International Transp. Serv.*, 449 F.3d at 166. The level of involvement of other employees for mutual aid and protection is the touchstone. The mere fact that the complaint involves issues common to other employees, or that other employees might incidentally benefit, does not transform an individual “gripe” into concerted activity. *International Transp. Serv.*, 449

F.3d at 166; *cf. Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257, 1259 (8th Cir. 1981); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28-29 (7th Cir. 1980). This is the most that may be said of Robbins' complaints, and it fails to transform his personal gripes into concerted activity.

The cases cited by the ALJ confirm the absence of concerted activity in this case. The ALJ cited *Walls Mfg. Co.*, 128 NLRB 487, 493 (1960), a pre-*Meyers* case, as support for the statement that “group action is not deemed a prerequisite step to concerted activity and the single employee’s action may be the preliminary step to acting in concert.” Decision, p. 12. The activity at issue in *Walls Mfg.* was a letter of complaint by an employee (Akey), which was found, after an extensive, though pre-*Meyers* discussion (part of which is referred to by the ALJ), not to be concerted activity. *Walls Mfg.* explained: “the proof in this case fails to establish that the action of writing the letter was mutually contrived, or adjusted, agreed on, and settled between parties acting together pursuant to some design or scheme. Nor does it bear any resemblance to a labor dispute. Rather the ... letter was a creature born and nursed to maturity in the mind of ... Akey. The fact that after the “birth” some few smiled approvingly of the “child” cannot in my opinion retroactively make the action concerted. Thus it is clear that Akey’s action was not an ‘indispensable preliminary step to employee self-organization.’ The Respondent had no reason to believe that Akey’s letter writing activity was for or on behalf of anyone other than herself.” 128 NLRB at 492-93. While this analysis pre-dates *Meyers*, exactly the same result is required by *Meyers* in this case.

Robbins’ complaints about his “short pay” are merely personal complaints about an allegedly deficient paycheck. *See* Section I.A.4, *supra*. While other employees may have occasionally raised similar complaints about their own paychecks, there is no evidence whatsoever that Robbins was ever authorized by these employees to register complaints on their

behalf, or that such complaints were anything more than individual gripes about a particular paycheck. While wages may be “a vital term and condition of employment,” Decision, p. 12, that does not transform every employee’s individual gripe about his or her paycheck into concerted activity. An individual employee’s complaints about his or her paycheck are not protected activity. *Shamrock Coal Co.*, 271 NLRB 617, 618 (1984) (complaint about wage increase); *NLRB v. Meinholdt Mfg., Inc.*, 451 F.2d 737, 739 (10th Cir. 1971) (same). Robbins’ “short pay” complaints were never the subject of any concerted activity. They were simply the complaint of an individual employee about a particular paycheck. The fact that other employees complained about their own paychecks does not make those complaints concerted activity. Indeed, these complaints did not even address a common issue or series of paychecks, but simply occasional isolated issues on particular paychecks.

Likewise, Robbins’ complaints about perceived “illegals” are not protected activity, *see* Section I.A.5, *supra*, and the ALJ’s reliance upon a single pre-*Meyers* decision for her conclusion to the contrary is incorrect as a matter of law. Such complaints, even if about safety and even if common to more than one employee, are not concerted activity absent actual authority for representation for a “truly group” complaint. *Williams v. Watkins Motor Lines, Inc.*, 310 F.3d 1070, 1072 (8th Cir. 2002); *NLRB v. Portland Airport Limousine Co., Inc.*, 163 F.3d 662, 664-65 (1st Cir. 1998); *Prill v. NLRB*, 835 F.2d 1481, 1483-84 (D.C. Cir. 1987); *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295, 300 (5th Cir. 1984). Indeed, this very type of single employee safety complaint was what *Meyers I* and *Meyers II* found to be unconcerted activity. Again, there is no evidence that Robbins was ever authorized by other employees to raise such complaints. Robbins’ complaints about perceived “illegals” are nothing more than individualized rants over perceived reverse discrimination, and such complaints of discrimination are purely personal

matters. *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 412 (5th Cir. 1981).

The ALJ relied upon *Wabash Alloys*, 282 NLRB 391 (1986), as support for the conclusion that “Robbins’ safety concerns and complaints about Respondent’s possible employment of illegal immigrants constituted concerted activity[.]” Decision, p. 13. This is a misreading of *Wabash Alloys*. The employer in *Wabash Alloys* was subject to a collective-bargaining agreement which provided for an employees’ safety and a safety committee. The committee was authorized to receive safety complaints, to inspect plant equipment, and to report to management its findings or observations concerning employee safety. An employee (Richmond) invoked this process by filing approximately twenty such complaints. The Board found these complaints under the CBA-created process were concerted activity because they were attempts to invoke rights under a CBA, explaining: “Although Richmond acted alone in making the safety-related complaints, his invocation of a right provided by the collective-bargaining agreement qualifies this conduct to be concerted activity protected by Section 7 of the Act.” 282 NLRB at 391. There is not (and cannot be) any similar attempt to invoke a right under a CBA in this case. This case, unlike *Wabash Alloys*, is not a situation where an employee individually sought to enforce collective bargaining rights under the *Interboro* doctrine.

Robbins’ complaints fail to qualify as protected concerted activity for another reason. Concerted activity must “in some fashion involve employees’ relations with their employer and thus constitute a manifestation of a ‘labor dispute.’” *Vemco, Inc., v. NLRB*, 79 F.3d 526, 530 (6th Cir. 1996); *American Golf Corp.*, 330 NLRB 1238, 1240 (2000) (“the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the

Act's protection"). There is simply no evidence of such a labor dispute in this case, or of Robbins' involvement in such a dispute, until one was created after Robbins' layoff, and the ALJ failed to address this independent reason why Robbins' actions were not protected concerted activity.

The evidence is clear that Robbins never engaged in any concerted activity until after his July 13th layoff. Robbins' complaints about "short pay" were merely individual personal complaints that were handled as a routine manner. Robbins' personal dislike and "gripes" about perceived "illegals" were merely the voicing of his own personal prejudices. Robbins was never asked or authorized by other employees to represent them or convey their mutual desires, demands or complaints to Wil-Shar, let alone to present group concerns about any labor dispute. Charlie Robbins was concerned only about Charlie Robbins, and his individual actions were solely for his own benefit – in the form of his paycheck and his preferred work atmosphere, which was free of perceived "illegals" with an accent. After he was laid off, Robbins attempted to transform his personal gripes into a manufactured claim of concerted activity. This is not all that different from what he attempted to do with his previous employer, which resulted in a felony conviction, and fails as a matter of law and as a matter of fact.

B. The General Counsel failed to prove that Billy Witcofski, as decisionmaker for Wil-Shar, was aware of Robbins' allegedly concerted activity (Exception I.B).

General Counsel bears the burden to prove that Billy Witcofski was aware of Robbins' protected activity at the time of the adverse decision. He must not only be aware the activity itself, but also must be aware of its concerted nature or "concertedness." *Center Ridge Co.*, 276 NLRB 105, 105 (1986). In a case cited by the ALJ, the Board affirmed the dismissal of the complaint on the basis that the Respondent was unaware of any concerted activity. *Walls Mfg.*,

128 NLRB at 487-88 & n. 2. In *Alchris Corp.*, 301 NLRB 182 (1991), cited by the ALJ at Decision, p. 12, a complaint was likewise dismissed because General Counsel failed to prove the employer's "knowledge of the concertedness of the activity" so that it was unnecessary to evaluate the concerted nature of that activity. 301 NLRB at 183. The same is true here, as the detailed discussion of the facts at Section I.A.4 and I.A.5, *supra*, which are incorporated by reference, demonstrate.

General Counsel must prove that **the individual decisionmaker** (*i.e.*, Billy Witcofski) was aware of and motivated by the protected activity. *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 412 (5th Cir. 1981); *Delchamps, Inc. v. NLRB*, 585 F.2d 91, 94 (5th Cir. 1978) ("Board must show that the particular supervisor responsible for the [action] knew about [the employees'] union activities"); *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 640 (5th Cir. 1986).

The ALJ may not simply "impute" the knowledge of a lower-level supervisor to the decisionmaking supervisor. *Pioneer Natural Gas*, 662 F.2d at 412; *Delchamps*, 585 F.2d at 94-95; *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 932 (5th Cir. 1993); *Jim Walter Resources, Inc. v. NLRB*, 177 F.3d 961, 963 (11th Cir. 1999); *Guarantee Sav. & Loan v. Gardiner*, 274 NLRB 676, 678-79 (1985) (dismissing complaint because General Counsel failed to prove that decisionmaker knew of protected activity, and noting that it is on specific decisionmaker's "state of mind that analysis must focus"). This imputation is precisely what the ALJ attempted. Decision, p.15-16 ("I also find that Keen's knowledge as a stipulated supervisor is imputed to Respondent."). Courts have consistently rejected such "attempts to simply attribute a foreman or supervisor's knowledge of an employee's union activities to the company. Automatically imputing such knowledge to a company improperly removes the General Counsel's burden of proving knowledge." *Vulcan Basement Waterproofing of Illinois, Inc. v.*

NLRB, 219 F.3d 677, 685-86 (7th Cir. 2000).

While there was evidence of Robbins' assistance of Union organizing efforts after he was laid off, as described in Section I.A.6, *supra*, actions after his layoff are not covered by the NLRA and cannot form the basis for a ULP. *NLRB v. Texas Natural Gasoline Corp.*, 253 F.2d 322, 325 (5th Cir. 1958). Robbins' contacts and cooperation with Richards and Giese, which did not occur until after he was laid off, cannot form the basis of a ULP. The ALJ relies upon a comment made during the October 15th meeting, about fines that resulted from Richards' action as alleged support for a conclusion that Witcofski suspected, two months earlier in July, that Robbins was collaborating with Richards, Decision, p. 16, but these all occurred after Robbins' layoff and are therefore not evidence of Witcofski's knowledge at the time he made the decision at issue on July 13th.

The ALJ also emphasized "The fact that Respondent terminated Robbins within hours of his stated intentions and his contact with [DOL] and ICE[.]" reasoning that this evidence of timing "reinforces" Lee's testimony and is also evidence of knowledge, pretext and animus. Decision, p. 16; *see* Decision, p. 21, 24. There is, quite simply no evidence to support this timing argument, since the evidence was uniform that Witcofski had no knowledge of Robbins' last minute complaints regarding either "short pay" or perceived "illegals," as is explained in Sections 1.A.4.b and 1.A.5.b., *supra*.

Further, the ALJ illogically concluded that Witcofski was aware of Robbins' activities because Robbins told **Catron**, who was indisputably not a supervisor or agent of Wil-Shar, that he intended to report Respondent's alleged employment of perceived illegal immigrants to immigration or law enforcement officials. Decision, p. 15. Catron was unsure whether he reported this to Witcofski ("I may have mentioned it to him and I may not. I don't know."), and

he testified that if Witcofski said that he did not report it, he would not disagree. Tr. 262.

C. The General Counsel failed to prove that Billy Witcofski, as decisionmaker for Wil-Shar, was motivated by Robbins' allegedly concerted activity (Exception I.C).

Mere awareness of concerted activity is not sufficient to satisfy General Counsel's burden of proof. *NLRB v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (2nd Cir. 1965). General Counsel must affirmatively prove that the prohibited animus was a substantial or motivating factor in the employer's decision. *Wright Line*, 251 NLRB 1083, 1086-89 (1980); *Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993); *St. Luke's Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 581 (8th Cir. 2001).

General Counsel failed to meet this burden. The evidence described in detail in Section I.A.6, *supra*, hereby incorporated by reference, demonstrates that Robbins received favorable treatment from Witcofski after all his internal complaints about short pay and perceived illegals were known. Likewise, others who raised complaints about their paychecks did not suffer any adverse consequence. Richards, who made no secret of his Union affiliation was hired and never received any adverse treatment as a result.

In the face of this evidence, the ALJ placed great emphasis upon "The fact that Respondent terminated Robbins within hours of his stated intentions and his contact with [DOL] and ICE[,]" reasoning that this evidence of timing "reinforces" Lee's testimony and is also evidence of pretext and animus. Decision, p. 16. However, the ALJ concedes in her Decision that there was a failure of proof on the issue of Witcofski's assumed knowledge of (and motivation by) Robbins' actions based upon these intentions. Decision, p. 18. The evidence of record discussed in Sections I.A.2, I.A.4 and I.A.5, *supra*, makes this clear, and the Complaint should be dismissed.

D. Assuming *arguendo* that General Counsel proved its *prima facie* case, Robbins would have been discharged for his violations of Wil-Shar policy regardless of any protected activity (Exception I.D).

Based upon this evidence, General Counsel cannot establish its *prima facie* case because it has provided no evidence that Witcofski was aware of the only two potentially concerted complaints by Robbins: the DOL complaint, and the immigration advocacy group complaint. However, even if the General Counsel can satisfy its burden of proof, the evidence described in detail in Sections I.A.1 and I.A.2, *supra*, which are incorporated by reference, demonstrates that Wil-Shar had policies which were repeatedly violated by Robbins, and his layoff was a direct result of these violations.

An employer may properly discharge a worker for violation of a work rule as long as the violation is not a “pretext” for discrimination against protected activity. Participation in protected activity does not insulate an employee from discipline for violations of the employer’s work rules. Numerous cases have held that discharges for rule violations were valid and not ULPs, even in cases where the employer was aware of the discharged employee’s protected activity. *See, e.g., Wellington Mill Div., West Point Mfg. v. NLRB*, 330 F.2d 579 (4th Cir. 1964) (poor work); *NLRB v. Arkansas Grain Corp.*, 392 F.2d 161 (8th Cir. 1968) (poor work); *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050 (7th Cir. 1975) (single absence after call in).

Threats and physical intimidation have also repeatedly been found to justify discharge. *See, e.g., Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969) (verbal threat); *NLRB v. Dale Indus., Inc.*, 355 F.2d 851 (6th Cir. 1966) (threat); *NLRB v. Clearwater Finishing Co.*, 216 F.2d 608 (4th Cir. 1954) (altercation).

Likewise, it is proper and permissible for an employer to make layoffs based upon the relative merit of the affected employees. *NLRB v. Wix Corp.*, 309 F.2d 826, 838 (4th Cir. 1962).

Wil-Shar, like every other employer in the construction business, was in economic difficulty during the time period at issue. Wil-Shar was undisputedly reducing its work force. Over six months in 2010, Wil-Shar terminated 55 employees. R. Exh. No. 3, p. 9-11. Lee described this trend as a decrease from 90 or 100 employees to 45 or 50 employees – a 50% reduction in force. After Robbins' layoff, not a single employee was hired to work as a steel connector. Employee performance was a factor in deciding which employees to layoff, and Lee confirmed that employees were terminated for violating Wil-Shar's attendance policy, some "20, 30 or 40 times." Tr. 167-68, 434.

Robbins violated several Wil-Shar policies, and he knew about them beforehand. R. Exh. No. 1, p. 10, 11, 13. These policies are described in detail in Section I.A.1, *supra*. Robbins' violations are described in Section I.A.2, *supra*. Employees who engaged in similar violations were regularly discharged both before and after July 13, particularly as economic pressures on Wil-Shar increased. What was known to Witcofski on July 13 was that in the two weeks immediately preceding Robbins' layoff, Robbins had accumulated three absences, two significant tardies, and made a second physical threat on the job. Each of these actions was a violation of Wil-Shar policy warranting discharge. Faced with the need to downsize, Witcofski chose to layoff Robbins due to his repeated violations of Wil-Shar policy. Wil-Shar has rebutted General Counsel's *prima facie* case and demonstrated that Robbins would have been discharged regardless of any protected activity, and the Complaint should therefore be dismissed.

E. Robbins engaged in disloyal actions that remove any protection that his complaints otherwise might have enjoyed (Exception I.E).

Section 10(c) of the NLRA makes clear that there is no reinstatement if the employee is discharged for cause. 29 U.S.C. § 160(c); *St. Luke's Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 579-80 (8th Cir. 2001). Even within the bounds of concerted activity

otherwise protected by the NLRA, an employer need not tolerate employee misconduct that is flagrant or that renders the employee unfit for employment. *St. Luke's Episcopal-Presbyterian Hospitals*, 268 F.3d at 581-82. As the Supreme Court has explained, "There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the ... Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise. Congress, while safeguarding, in section 7, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,' did not weaken the underlying contractual bonds and loyalties of employer and employee." *NLRB v. Local Union 1229, IBEW*, 346 U.S. 464, 472-73 (1953). As a result, an employee's attack on the employer's business is the type of disloyalty that is not protected. *Local Union 1229, IBEW*, 346 U.S. at 472-73; accord *American Golf Corp.*, 330 NLRB 1238, 1240 (2000); *American Golf Corp.*, 338 NLRB 581, 582 (2002); *St. Luke's Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 580 (8th Cir. 2001); *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 533 (D.C. Cir. 2006). Misleading or false statements will justify the denial of reinstatement and backpay. *Precoat Metals*, 341 NLRB 1137, 1138-39 (2004). "Cause" is sufficient - malicious falsehood is not required. *St. Luke's Episcopal-Presbyterian Hospitals*, 268 F.3d at 580.

What the Supreme Court said about the fliers at issue in *Local 1229* can be said equally about Robbins' contact with the anti-immigrant advocacy organization described in Section I.A.5, *supra*. "It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would

contribute less to the Act's declared purpose of promoting industrial peace and stability.” 346 U.S. at 476. *American Golf Corp.*, 338 NLRB 581, 582 (2002), collects cases denying backpay and reinstatement due to disloyalty, noting that post-discharge criticism of the employer’s work product or operation of its business warrants a denial of backpay and reinstatement even where the discharge was itself a ULP.

Robbins’ alleged complaint regarding perceived “illegals” was false, but its falsity is not the most fundamental problem.¹² Robbins’ complaint was not to the government, but to an activist group that shared his prejudices about certain of Robbins’ (Hispanic) coworkers. Witnesses testified about Robbins’ claims to have gone to “INS” and “ICE,” but the evidence ultimately shows that Robbins’ statements to this effect were false attempts to take credit for a disruption in Wil-Shar’s workforce. The only complaint Robbins ever made (aside from his undisclosed contacts on July 13) was his June contact with an anti-immigrant advocacy group, which is consistent with his disloyal and disruptive purpose. There is a significant difference between a report to a government agency and a non-governmental advocacy group that advocates a view, bias or prejudice that divides the employer’s workforce and creates discord and conflict in that workforce. Robbins called a group of like-minded persons who shared his prejudices in an attempt to purge Wil-Shar’s workforce of Hispanic and/or Spanish-speaking workers. That created workplace discord, and is disloyal conduct.

¹² The ALJ noted that falsity of the report is “not the test of its protected character.” Decision, p. 13. However, this only partly addresses the issue. *St. Luke’s Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575 (8th Cir. 2001), makes clear that the inquiry under Section 10(c) is broader, and focuses upon both the purpose and effect of the conduct. The ALJ did not address any of these issues in her Decision. *Professional Porter & Window Cleaning Co.*, 263 NLRB 136 (1982), found that a letter asking for the facility administrator to take a “good long look” at the facility “before it is too late,” was not for a malicious or disloyal purpose. 263 NLRB at 139. That letter seeking assistance is qualitatively different from Robbins’ efforts to sow discord among Wil-Shar’s workforce.

Even if a call to an advocacy group might sometimes be legitimate protected activity, it cannot be such where, as here, it is solely (and expressly) for the purpose of creating discord among the employer's workforce, and pitting some employees against others. Perhaps such a contact might be protected if made by an employee against an entity other than his employer, or about a larger issue, but for an employee to explicitly focus his prejudice in a manner that is both calculated to, and can only have the effect of, disrupting his employer's labor force and operations is disloyal and is not protected. Robbins' contact of this anti-immigration advocacy group solely for the purpose of creating discord among Wil-Shar's workforce is the classic type of disloyalty that forfeits any protection or remedy.

F. Robbins has forfeited any right to reinstatement or backpay due to his repeated thefts (Exception I.F).

There are two separate, but related, bases for denying backpay and reinstatement to Robbins based upon his lengthy criminal record, described in detail in Section I.A.3, *supra*, which is hereby incorporated by reference. Both are not addressed by the ALJ. First, Robbins engaged in yet another instance of theft after he was discharged, and this theft would have resulted in his discharge had he been employed. Second, although Robbins was known in general terms to have a "record" when he worked for Wil-Shar, the severity and nature of this criminal record were not discovered until after his discharge. Had Robbins been employed when this information was discovered, he would have been discharged, and had the information been known at the time a hiring decision was made, Robbins never would have been hired.

Misconduct that is known at the time of the discharge decision is analyzed under the *Wright Line* test. Misconduct that occurs, or is discovered, after the decision is handled differently, and the operative question is whether this information, had it been known at the time, would have resulted in discharge. If the answer to that question is affirmative, and the employee

would have been discharged, then remedies terminate at the date of the after-acquired information, and no additional backpay or reinstatement is available. *Berkshire Farm Ctr.*, 333 NLRB 367, 367, 377 (2001); *American Golf Corp.*, 338 NLRB 581, 582 (2002).

Robbins' post-discharge criminal conviction for theft forfeits any right to reinstatement or backpay. An employee may sacrifice his right to reinstatement and backpay by engaging in dishonest or fraudulent activity following his termination. *Precision Window Mfg v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992); *NLRB v. Brake Parts Co.*, 447 F.2d 503, 514-15 (7th Cir 1971). If an employee engages in conduct for which employee would have been discharged had he been employed (or had the conduct been known), backpay and reinstatement are forfeited. *Berkshire Farm Center*, 333 NLRB 367, 367, 377 (2001).

Likewise, discovery of pre-existing thefts after the employee's discharge precludes backpay or reinstatement. A discharge for theft is not a ULP, and "after-acquired" evidence of theft precludes reinstatement or backpay. *NLRB v. Breitling*, 378 F.2d 663, 664 (10th Cir. 1967) (thefts prior to discharge discovered after discharge); *NLRB v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (2nd Cir. 1965) (later discovery of prior convictions).

As described in Section I.A.3, *supra*, Robbins has at least ten separate convictions that have arisen on five separate occasions. They span a period of some fifteen years, and without exception involve theft and dishonesty. The first felony conviction for theft was in 1996, and Robbins' most recent conviction of felony theft arose when he tried to steal from his employer by lying to various suppliers in an effort to falsely charge purchases to his then-employer in 2005. R. Exh. No. 38. Robbins' thefts continued even after he was discharged by Wil-Shar, with his most recent such conviction occurring in February 2011 for actions after his layoff. R. Exh. No. 39. Although Wil-Shar was aware of a vague "record" while Robbins was employed, it had

no idea of the breadth and duration of his thefts, nor of the fact that they involved former employers, nor of the fact that the thefts continued after his layoff. Wil-Shar's employees are placed in positions of trust where they can create significant liability for the employer while using valuable equipment and supplies. As a result, such instances of dishonesty and theft are unacceptable, and warrant immediate discharge. R. Exh. No. 1, p. 11 (referring to "steal[ing]" at #10, "illegal activity" at #14, and containing several other rules applicable to such situations). The evidence is undisputed and uniform that such theft and dishonesty places the employer at significant risk, and would warrant immediate discharge. This evidence was simply ignored by the ALJ. Decision, p. 23. As a result, Robbins' remedies should be limited based upon this after-acquired evidence.

III. The Complaint related to the October 15th statements should be dismissed (Exception II).

A. The comments challenged by General Counsel are protected by the First Amendment and the statutory privilege under Section 8(c) (Exception II).

An employer's free speech right to communicate his views to his employees is protected by the First Amendment and is not (and cannot) be infringed by the Union or by the NLRA. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Section 8(c) makes clear that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." This protection applies to verbal statements as well. Thus, verbal comments such as "I can't tell you not to talk to those guys, but doing so you're really screwing things up around here" and that signing union cards was "stirring up a bee's nest" are lawful, even when obviously hostile to the union. *Solvay Iron Works, Inc.*, 341 NLRB 208, 216 (2004). Likewise,

verbal comments to the effect that “in the event of a strike, [the employer] would probably close the store and, if it continued too long, move out since they had around five hundred stores and one store would not be missed” do not violate the NLRA. *NLRB v. W.T. Grant Co.*, 208 F.2d 710, 711 (4th Cir. 1953). Nor do comments to the effect that an employer could cancel contracts on thirty days notice and would if the employer was no longer competitive violate the NLRA. *Daniel Construction Co.*, 264 NLRB 569, 570 (1982). The comments challenged by General Counsel contain no threats or coercion, and are not violations of the NLRA. Accordingly, the ULP charge should be dismissed as unfounded as a matter of law and of fact.

B. The totality of the circumstances proves that these infrequent and isolated comments were not coercive or threats (Exception II).

The statements challenged by the General Counsel fall into two categories. General Counsel challenges the first statement as unlawful interrogation. It challenges the balance of the statements as unlawful threats. These claims by the General Counsel do not stand up to scrutiny.

1. The alleged “interrogation” was not coercive and cannot be a ULP (Exception II).

Alleged interrogations are analyzed using the so-called *Bourne* factors. These factors, first enunciated in *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964), and refined in subsequent cases, consider the following:

1. the history of the employer's attitude towards its employees;
2. the type of information sought or related;
3. the company rank of the questioner;
4. the place and manner of the conversation;
5. the truthfulness of the employee's responses;
6. whether the employer had a valid purpose in obtaining the information;
7. if so, whether this purpose was communicated to the employee, and

8. whether the employer assures employees that no reprisals will be taken if they support the union.

Pioneer Natural Gas Co. v. NLRB, 662 F.2d 408, 416 (5th Cir. 1981). Questions, or “interrogations” do not violate the NLRA unless they are coercive. *NLRB v. Dale Indus., Inc.*, 355 F.2d 851, 852-53 (6th Cir. 1966). Interrogation does not violate the Act unless there is a threat of retaliation or a promise of a reward. *Federation of Union Representatives v. NLRB*, 339 F.2d 126, 130-31 (2nd Cir. 1964). In this case, consideration of these factors leads inexorably to the conclusion that the brief so-called “interrogation” was not coercive. Each factor is addressed in turn (and numbered to correspond to the list above):

1. Wil-Shar has a history of good employee relations. Billy Witcofski is addressed on a first name basis by the Wil-Shar employees. Witcofski is not the stereotypical uncaring employer – he has taken a personal interest in the well-being of his employees, praying with them, giving them loans, and doing favors for them, helping them in their personal endeavors, and attempting to be “compassionate” toward them. Several of the employees who testified described their relationship with Witcofski as “friendly.” Even Robbins admitted that Witcofski was “more than fair” with him. This friendly relationship is a significant contributing factor to a finding that the questions were not coercive. *See Burke Golf Equip. Corp. v. NLRB*, 284 F.2d 943, 944 (6th Cir. 1960).

2. The information that was sought was not about union sympathies. There was no question about “do you support the union” or “what did you tell them.” Rather, the single question – essentially a rhetorical question - was simply whether any of the employees had received a letter similar to the one that was discussed (and openly displayed) at the October 15 meeting. GC Exh. No. 6B, p. 11 (51:20 on GC Exh. No. 6A). The letter was no secret, and the mere receipt of such a letter would not indicate the employee’s view of the Union, as was

confirmed by the letter that was received by the Ruscos and voluntarily provided by them to Witcofski that gave rise to the meeting in the first place. The Ruscos spoke in opposition to the Union despite their receipt of the letter. GC Exh. No. 6A, 6B The information requested is wholly innocuous and not the type of “surveillance” or inquiry into employee sympathies that might give rise to a ULP.

3. Billy Witcofski, who made all the comments, is without dispute the “top dog” at Wil-Shar.

4. Ordinarily, claims of coercive interrogation involve one-on-one meetings, oftentimes in an abnormally “formal” setting. This meeting was the exact opposite. It was held in the open, and was essentially a public meeting. Employees came and went during the meeting. Employees felt free to speak up and often made jokes. The transcript reflects several such comments by John Rusco. GC Exh. No. 6A, 6B. There was no indication of “abnormal” formality or contrivance, and the congenial atmosphere of the meeting effectively negates any claimed coercion.

5. The Ruscos voluntarily provided the letter that gave rise to the meeting. No other employees responded that they had received such letters, and there was no evidence that other employees had received such letters, so in this case this factor does not bear any significant weight. GC Exh. No. 6A, 6B

6. Wil-Shar had a valid purpose to find out how broadly the letters were distributed. The letters contained patently false statements about Wil-Shar. The letters had the potential to negatively impact worker morale and productivity. Wil-Shar had legitimate reason to try to discover how many (and which) employees had been told these lies, so that it could provide the correct information and avoid disruption in the workplace. Again, it is important to note that the

information sought was not designed to ascertain any employee's view toward the Union. Thus, it significantly differs from cases in which the employer inquires as to union sympathies, meeting attendance or card signings which do reveal the employee's support of the Union. GC Exh. No. 6A, 6B

7. Wil-Shar's legitimate purpose for the question was not expressly stated, but was clearly implied. Equally clear was the fact that no information was sought regarding union sympathies or cooperation. GC Exh. No. 6A, 6B

8. The employer's assurance of no retaliation was made clear in several different sections of the meeting. Witcofski also made statements on more than one occasion to the general effect that "I don't care" if the employees join the union. . GC Exh. No. 6A, 6B

Together, consideration of these factors and the totality of the circumstances makes clear that the brief rhetorical question as to who all received a letter, which did nothing to inquire into employees' views of the Union or to make any type of implied threat or coercion simply is not prohibited under the NLRA. The ULP charge has no basis and should be dismissed.

2. The listed comments which contain no threats of coercion or retaliation cannot be a ULP (Exception II).

The comments that are alleged by General Counsel to be "threats" fare no better than the alleged coercive interrogation. An employer has a right to express his opinions and to predict unfavorable consequences which he believes may result from Union representation, and such predictions or opinions will not violate the National Labor Relations Act if they have some reasonable basis in fact and are in fact predictions or opinions and not veiled threats of employer retaliation. *Laborers Dist. Council of Georgia and South Carolina v. NLRB*, 501 F.2d 868, 874 (D.C. Cir. 1974). A careful examination of the challenged statements confirms that they are without exception such opinions and predictions, and not threats. They describe effects, and do

state or imply that the employer will retaliate. GC Exh. No. 6A, 6B.

An employer may not suggest that if his employees vote in favor of union organization, he will retaliate by making economic decisions adversely affecting their interest. However, an employer does not commit an unfair labor practice by expressing an opinion or even a prediction that dire economic consequences will befall his employees if they choose a union to represent them. Determination whether an employer's statement is a threat of employer reprisal or is instead a prognostication of disastrous consequences is the pivotal question. Sometimes this determination can be made by looking at the questioned statements alone. At other times, the questioned statements do not of themselves clearly indicate whether they are protected or proscribed. In such situations, the statements must be considered in light of the totality of employer communications. If a statement cannot be interpreted as a suggestion that the employer will seek to thwart unionization by visiting economic disadvantage upon his employees, but rather that such consequences may result from unionization itself, the statement is immune from the statutory ban. *P.R. Mallory & Co. v. NLRB*, 389 F.2d 704, 706-07 (7th Cir. 1967). This is precisely what occurred on October 15.

Similar (and more questionable) statements have repeatedly been found not to violate the NLRA. References to the need to remain competitive are not threats, and are therefore not ULPs. *Daniel Construction Co.*, 264 NLRB 569, 570 (1982). Comments about what the law permits (or prohibits) being said by the employer are not threats of reprisal, and are not ULPs. *NLRB v. Sun Co. of San Bernardino*, 215 F.2d 379, 381 (9th Cir. 1954). A supervisor's statements that it might be cheaper to replace warehouse functions with an outside firm if the employees formed a union was a reasonable prediction based on economics necessities and was not a ULP. *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427-28 (2nd Cir. 1996). An employer is entitled to tell its

employees what it believes would be likely consequences of unionization, even if those consequences include possibility of plant closure. *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427-28 (2nd Cir. 1996). *See also Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 780 (D.C. Cir. 1993). The challenged statements are nothing more than the employer's opinions and observations about the anticipated effects of a vote to unionize. There is no reasonable interpretation under which they are threats of employer retaliation. The conduct of the parties confirms that they are not threats. There is nothing in the recording indicating that these comments were interpreted as threats by those who heard them. There is nothing in the conduct of the parties indicating that Wil-Shar took action against employees (such as Jarid Giese) who were sympathetic or cooperative with the Union.

Statements that if the employer signed a union contract, employees would receive less pay than they were receiving was protected by NLRA and did not constitute a ULP. *NLRB v. Sonora Sundry Sales, Inc.*, 399 F.2d 930, 935 (9th Cir. 1968). It was not a "threat of reprisal" to suggest that the employer will, if he signs a union contract, adhere to terms of contract, and if those terms are disadvantageous, it is employer's right to make fair comment on that fact and the employee's right to have him do so. A disadvantageous contractual provision cannot be converted into an employer's "threat of reprisal" because the employer points it out. *NLRB v. Sonora Sundry Sales, Inc.*, 399 F.2d 930, 935 (9th Cir. 1968). As in *Sonora Sundry Sales*, the most that can be reasonably said of the challenged statements is that they are observations of facts that affect both the employer and the employees, and not threats about what the employer would do to retaliate.

Likewise, comments that a proposed union "would work to your serious harm" and that the employer "intended to oppose the Union to the last ditch" were protected and not a ULP,

even when made in private one-on-one meetings. *Wellington Mill Div., West Point Mfg. v. NLRB*, 330 F.2d 579, 583 (4th Cir. 1964); accord *NLRB v. Arkansas Grain Corp.*, 392 F.2d 161 (8th Cir. 1968). Similarly, comments regarding predictions of potential adverse economic effects of a union vote, including a possible plant closure, are not ULPs. *NLRB v. Wix Corp.*, 309 F.2d 826, 839 (4th Cir. 1962). These comments do not go as far as these other comments which were protected, and the comments challenged in this case are particularly innocuous given the fact that they are infrequent and isolated. They comprise a few minutes of a meeting that lasted for more than two and a half hours. There is no evidence that any such comments were ever repeated, or that any threats were ever made outside the meeting. (In fact, all the evidence is to the contrary.) Such infrequent and isolated statements do not rise to the level of a violation of the NLRA. *NLRB v. Armour & Co.*, 213 F.2d 625, 627 (5th Cir. 1954). The comments at issue in this case are merely employer opinions that are protected, and are not the type of threats of retaliation that might give rise to a ULP. GC Exh. No. 6A, 6B. Accordingly, as both a matter of law and of fact, they are protected and the Complaint should be dismissed.

Conclusion

For the foregoing reasons, the General Counsel has failed to carry its burden of proof, and the Complaint fails as a matter of fact and law, and should be dismissed in its entirety. In addition, in the event that General Counsel has proven a *prima facie* case, Respondent has proven its affirmative defenses as a matter of fact and law, so the Complaint should be dismissed, or in the alternative, remedies limited appropriately.

Respectfully submitted,
WIL-SHAR, Inc.

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CERTIFICATE OF SERVICE

I, Charles M. Kester, attorney for Respondent in this action, do hereby certify that on this 15th day of December 2011, I delivered a true and correct copy of the foregoing by electronic filing and/or depositing the same in the U.S. mail with proper first class postage prepaid to:

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