

**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

REPLY BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS

General Counsel's Answering Brief ("Ans. Br.") is revealing for two reasons: what it says and what it does not say. General Counsel discusses irrelevant matters, and makes assertions that are unsupported evidence and contradicted by the law. The Brief is even more revealing for what it does not say - the issues raised and cases cited by Respondent go almost entirely unaddressed.

I. The significant omissions from the Answering Brief confirm that the ALJ's decision was reversible error.

A. General Counsel fails to address or explain the clear errors by the ALJ.

The ALJ's decision is replete with errors of fact and law which led the ALJ to her erroneous conclusions. The Answering Brief fails to address any of these errors, and provides no explanation or justification for the ALJ's mistaken reasoning.

1. The ALJ erred regarding Wil-Shar's policies.

The ALJ incorrectly stated that "Respondent does not have a standardized attendance policy[.]" Decision, p. 16. This is inaccurate. Wil-Shar has a published policy prohibiting "Absence without proper notification." R. Exh. No. 1, p. 11; Tr. 434-35. "Absenteeism & Tardiness may result in ... in termination. Absence from work without not[ice] . . . for one (1) day may be considered a voluntary resignation." R. Exh. No. 1, p. 13; Tr. 432-36. Wil-Shar also has an excessive absenteeism/tardiness policy, under which three absences or tardies (regardless of notice) within three months "warrants disciplinary action up to and including termination." R.

Exh. No. 1, p. 11. General Counsel admits that Robbins violated this policy when he was absent for parts of three shifts on July 6, 10 and 13, 2010. Ans. Br., p. 34 (mistakenly stating dates as “July 7, 10 and 13”). This policy violation occurred true whether he gave notice or not.

Wil-Shar’s policies also describe factors considered in layoffs or reductions of force. These include conduct, performance, tardiness and attendance. R. Exh. No. 1, p. 8. It was undisputed that Wil-Shar’s layoffs were based on these considerations. Tr. 157-59, 431-32, 442.

2. The ALJ erred regarding concerted activity.

The ALJ incorrectly cited *Walls Mfg. Co.*, 128 NLRB 487, 493 (1960), a pre-*Myers* case, on the issue of concerted activity. Decision, p. 12. Even under the analysis of *Walls Mfg.*, a single employee’s complaints were not concerted activity. This is ignored by General Counsel, who never mentions *Walls Mfg.*, and never attempts to explain the ALJ’s mistaken reliance upon this pre-*Myers* case which contradicts her finding of concerted activity.

The ALJ also mistakenly relied upon *Wabash Alloys*, 282 NLRB 391 (1986). Decision, p. 13. *Wabash Alloys* involved an “invocation of a right provided by the collective-bargaining agreement” and found that because the employee sought to enforce collective bargaining rights under the *Interboro* doctrine, this was concerted activity. 282 NLRB at 391. As there is no CBA in this case, there is not (and cannot be) any similar attempt to invoke a right under a CBA. General Counsel does not address this issue.

3. The ALJ erred regarding Witcofski’s knowledge and motivation.

The ALJ erroneously based her decision upon imputed knowledge. Decision, p.15-16. The ALJ concedes in her Decision that there was a failure of proof on the issue of Witcofski’s knowledge of (and motivation by) Robbins’ actions based upon these intentions. Decision, p. 18. The ALJ may not simply impute the knowledge of a lower-level supervisor to the

decisionmaking supervisor. General Counsel must prove that the individual decisionmaker (*i.e.*, Billy Witcofski) was aware of and motivated by the protected activity. General Counsel makes no attempt to justify or explain this clear error, and does not address any of the cases that were cited in the Respondent's Brief on this issue.

The ALJ also relied upon unsupportable inferences. For example, a comment made during the October 15th meeting was alleged as support for a conclusion that Witcofski suspected, months earlier, that Robbins was collaborating with Richards. Decision, p. 16. Both the events referred to in that comment and the comment itself occurred after Robbins was already laid off, and cannot be evidence of Witcofski's knowledge months earlier when he made the decision at issue. Likewise, the ALJ 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 evidence of knowledge, pretext and animus. Decision, p. 16, 21, 24. There is no evidence to support this argument, since the evidence uniformly demonstrated that Witcofski had no knowledge of Robbins' last minute DOL and ICE complaints. The ALJ also illogically concluded that Witcofski was aware of Robbins' activities because Robbins told Catron that he intended to report Respondent's alleged employment of perceived illegal immigrants. Decision, p. 15. Catron was unsure whether he reported this to Witcofski and admitted that he would not disagree if Witcofski said that Catron did not report it to him. Tr. 262. Witcofski testified that he received no such report.

General Counsel cannot rely upon gaps in the record 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 dispositive in this case where the ALJ admitted that there was a failure to adduce evidence of one of the essential elements of General

Counsel's case – Witcofski's unproven, but erroneously assumed, knowledge of Robbins' alleged complaints on July 13.¹ Decision, p. 18.

4. The ALJ erred regarding unemployment benefits.

Both the ALJ and General Counsel misconstrue Wil-Shar's accommodation of Robbins in connection with his unemployment benefits. Decision, p. 21; Ans. Br., p. 15, 32. Under Arkansas law, a voluntary resignation and termination for absenteeism both result in disqualification from benefits. *See* Ark. Code Ann. § 11-10-513 & 11-10-514. Layoff without a stated reason benefits the employee, and this was done at Robbins' request and for his benefit. Tr. 320-21, 330-31. General Counsel admits (and it was undisputed) that Witcofski simply did not contest Robbins' claim for unemployment benefits. Ans. Br., p. 18.

B. General Counsel fails to address the material facts ignored by the ALJ.

Just as the Answering Brief fails to address the affirmative mistakes made by the ALJ, it also fails to address the material omissions by the ALJ. The decision is based upon an improperly distorted view of the evidence. The Answering Brief perpetuates this error.

1. The ALJ improperly ignored Wil-Shar's reduction in force.

The ALJ and General Counsel ignore the undisputed fact that those employees, including Robbins, were given notice of Wil-Shar's economic difficulties in a memo no later than February 2009. R. Exh. No. 26, p. 9. It is undisputed that in 2010, Wil-Shar began to reduce its workforce. Tr. 441-42. Wil-Shar's undisputed business records confirm that during the last half of 2010, Wil-Shar terminated 55 employees, a significant reduction in force. Tr. 443-44; R. Exh. No. 3, p. 9-11. By early 2011, Wil-Shar had reduced its workforce by half, from the previous level of 90-

¹ General Counsel attempts to style its failure of proof as a credibility issue by casting unjustified aspersions at Witcofski. General Counsel asserts without any explanation or argument that Witcofski testified "evasively," and was "equivocal and inconsistent." Ans. Br., p. 18. The transcript reveals nothing of the sort, and the ALJ made no such finding.

100 employees to only 48 employees. Tr. 445; R. Exh. No. 3, p. 8. Lee confirmed that the workforce decreased by approximately 50%, from 90-100 employees to 45-50 employees. Tr. 155-56. Undisputed records of subsequent hires show that since 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.

2. The ALJ improperly ignored numerous discharges for attendance.

General Counsel falsely asserts that “during the period from January 2010 through February 2011, Robbins was the only one discharged by Respondent for ‘excessive absenteeism/tardiness [.]’” Ans. Br., p. 18.² Lee testified that during his employment, there was “pretty good turnover” of between 20 and 40 employees who were discharged for attendance. Tr. 167-68, 434. Undisputed records show that at least seven other employees were discharged for attendance within weeks of Robbins’ layoff. Tr. 501-06; R. Exh. Nos. 18, 23, 28, 29, 30, 31.

- On June 25, 2010, Christopher Owens was discharged for failure to show up at work for a second day in a little less than two months. R. Exh. No. 30.
- On July 9, 2010, Jesse Setzer was terminated because of “an uneasy feeling about [him] staying committed being able to get out of town on a regular basis.” R. Exh. No. 31.
- On July 12, 2010, Jorge Vela was discharged for a single absence. R. Exh. No. 28.
- On July 14, 2010, Curtis Lewis was laid off due to lack of work. R. Exh. No. 23.
- On July 14, 2010, Thomas Shafer was terminated after he reported that he was going to be absent for his shift. GC Exh. No. 28.
- On July 24, 2010, Ken Catron was discharged for missing a single shift. Tr. 237-38; R. Exh. No. 18.
- On Sept. 16, 2010, Nathan Holmes was discharged after one absence. R. Exh. No. 29.

3. The ALJ improperly ignored non-discriminatory treatment of persons with similar complaints.

² General Counsel also claims that discharge for absenteeism and reduction in force are inconsistent. Ans. Br., p. 34. The simple answer to this spurious argument is that failure of an employee to work a scheduled shift affects the entire crew on which that employee is scheduled to work, regardless of the number of projects that the company has going at the time.

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 adverse action. Tr. 115, 185, 187-88, 263. Robbins also received favorable treatment after reporting pay discrepancies. He was enrolled in an apprenticeship program. Tr. 396; R. Exh. No. 26, p. 13. He was given time off and a loan to enable him to get married and go on a honeymoon. Tr. 395, 467; R. Exh. No. 26, p. 66. He was allowed to use Wil-Shar's office chairs at his wedding. Tr. 467. Robbins admitted that even after his complaints, Wil-Shar treated him "more than fair." Tr. 317, 396. None of this is addressed by the ALJ or General Counsel.

4. The ALJ improperly ignored Robbins' disloyal actions.

General Counsel does not address this issue. Robbins' complaint about "illegals" was not to the government, but to an activist group that shared his prejudices. Witnesses testified about Robbins' claims to have gone to "INS" and "ICE," but Robbins' statements to this effect were false attempts to take credit for disruption of 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. Such a call cannot be protected activity where, as here, it is for the purpose of creating discord among the employer's workforce, and pitting some employees against others. This is the classic type of disloyalty that forfeits protection or remedy under the NLRA.

II. Affirmative statements in the Answering Brief confirm that the ALJ's decision was reversible error.

A. The Answering Brief focuses upon immaterial facts in an effort to deflect attention from the ALJ's erroneous decision.

1. Robbins had only after-the-fact involvement with Michael Richards.

General Counsel spends significant time discussing Richards. This evidence is merely a

distraction, as the ALJ recognized. Tr. 19-20. Richards admitted that Robbins had nothing to do with him (or his activities) 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. In the discussion of Richards, General Counsel attempts to characterize Witcofski as “angry.” Ans. Br., p. 5 (citing GCX 20). The cited exhibit is nothing more than a chronological recitation of events, and the evidence contradicts the inference urged by General Counsel. Richards wore a Union shirt and hat, listed his prior Union employment, and was hired by Wil-Shar. Tr. 47-53. Richards displayed Union insignia while working at Wil-Shar, but never had any problems. Tr. 52-53.

B. The errors in the Answering Brief confirm that the ALJ erred.

1. Robbins’ multiple convictions are for dishonesty and theft.

The facts of Robbins’ convictions are undisputed. General Counsel’s treatment of Robbins’ convictions contains two fatal flaws. First, General Counsel argues that these convictions do not “automatically render him an incredible witness” but carefully avoids mentioning the crimes of which Robbins was convicted – crimes of theft and dishonesty.³ Ans. Br., p. 35-36. Second, General Counsel (as did Robbins) attempts to argue that these crimes are “old news,” and ignores that Robbins was again convicted of theft after his lay off.

General Counsel argues that “convictions” are not addressed by Wil-Shar policy. This is not true, particularly as it relates to theft convictions. The policies make clear that a “core value” at Wil-Shar is integrity. R. Exh. 1, p. 3. Among the “standards of excellence” are “highest ethical and moral guidelines” and “being trustworthy.” R. Exh. 1, p. 4. “Engaging in illegal activity” is a standard of conduct that can lead to termination. R. Exh. 1, p. 11. There is a large section of the policies dealing with theft. R. Exh. 1, p. 25-26. The policies also state that “Criminal Activity ...

³ General Counsel references a “brush with the law” involving Geise. Ans. Br., p. 22, 36. However, Geise was never convicted, and it is undisputed that Geise was disciplined for suspected possession of marijuana, even though he was never convicted.

will not be tolerated and [is] grounds for immediate termination.” R. Exh. 1, p. 31.

Robbins’ criminal record consists of ten convictions on five occasions. All these convictions are for theft and dishonesty, with the most recent two convictions involving efforts to steal from his employer and a theft after he was laid off. Although Wil-Shar was aware of a vague “conviction,” it had no idea of the nature and extent of these numerous thefts. Robbins’ repeated convictions of theft and dishonesty places Wil-Shar at significant risk, and is disruptive of Wil-Shar’s scheduling and business. Tr. 474-75.

2. General Counsel distorts the facts relating to Robbins’ discharge.

It is ultimately undisputed that Robbins had repeated absences and tardies that violated Wil-Shar policy and were the legitimate cause for his layoff:

- Robbins did not dispute that he was absent on June 30, 2010. R. Exh. No. 16, p. 107, 361.
- Robbins was absent on July 6, 2010, although he later disputed this. Tr. 479, 489-90, 493, 495, 532; R. Exh. No. 16, p. 108. All records, including the initial draft reports, Tr. 493; GC Exh. No. 23, the final approved reports, Tr. 495; R. Exh. No. 16, p. 108, and detailed testimony confirms that Robbins was absent. Tr. 479, 489-90, 493, 495, 532, 550-51, 561-63, 565-67. It was undisputed that Witcofski was “scared” of Robbins,⁴ Tr. 232, and for this reason paid a small settlement to Robbins. Tr. 327-28, 508; GC Exh. No. 12.
- 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. General Counsel admits this. Ans. Br., p. 16, 17.
- Robbins was five hours late on July 10, 2010, which he did not dispute. Tr. 326, 352, 490-96, 532; R. Exh. No. 16, p. 108. General Counsel admits this, although mistakenly referring to this date as July 6. Ans. Br., p. 16, 17. General Counsel mentions an agreement that permitted Robbins to “be off every other weekend” in an attempt to imply that the July 10 tardy was due to this agreement. Ans. Br., p. 16. Robbins clearly knew that he was scheduled to work since he actually came to work. The agreement does not explain why he was tardy for work on a scheduled Saturday, and both Robbins and General Counsel are evasive and less than candid on this point.

⁴ During his last week, Robbins was involved in a physical altercation/threat with coworker. Tr. 473, 496-97, 552-53; R. Exh. No. 26, p. 11. This was Robbins’ second altercation at work. Tr. 469-73, 497; R. Exh. No. 26, p. 10. Robbins’ volatility was one reason why Witcofski was scared of him, and why Robbins’ presence disrupted Wil-Shar operations. Tr. 469-72.

- Robbins was again absent on July 13, 2010. Tr. 498. Robbins gave conflicting testimony on this subject and his story suffers from numerous other inconsistencies which are explained in Respondent's brief, but are simply ignored by the Answering Brief.

3. General Counsel distorts the nature of Robbins' complaints.

a. Robbins' only known "short pay" complaints were purely personal gripes.

General Counsel claims that Robbins' pay adjustments were for prevailing wage. Ans. Br., p. 9. General Counsel also claims these adjustments were for attendance. Ans. Br., p. 17. It cannot have it both ways. 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. Lee described Robbins' complaints as "venting" in the first person about his paycheck. Tr. 229, 189-90.

General Counsel references a supposed July 12 claim filed by Robbins with the Department of Labor. Ans. Br., p. 10-11. 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 had previously (and 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. The only evidence of any DOL claim was a letter dated July 29, 2010. 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.

b. Robbins' only known complaints regarding "illegals" were purely personal prejudices.

Robbins had a longstanding personal prejudice against Hispanic co-workers and complained about them throughout his employment. Tr. 375. Lee testified that this was "venting, sort of griping" that did not expect or require any response. Tr. 171-72, 203-04, 230.

Robbins claimed to have made an anonymous complaint regarding perceived "illegals" in April, or May, or maybe June 2010. Tr. 295-96. 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. Lee testified that he was unaware of any complaint that Robbins allegedly filed with any agency regarding Wil-Shar. Tr. 189. This was confirmed by other Wil-Shar employees. Tr. 567-69, 582-83. Robbins admitted that Billy Witcofski and Wil-Shar management were unaware of this alleged and anonymous complaint. Tr. 375. Robbins admitted that Wil-Shar and Witcofski were unaware of this complaint until after his layoff. Tr. 466, 567-68.

III. The October 15th meeting

The recording and transcript speak for themselves. Evaluation of the *Bourne* factors confirms that there was nothing coercive about the meeting.

Conclusion

The Answering Brief fails to address the issues raised in Respondent's Exceptions, and provides no support for the ALJ's erroneous Decision, which should be reversed.

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 3rd day of February 2012, I delivered a true and correct copy of the foregoing by electronic filing, email and/or depositing the same in the U.S. mail with proper first class postage prepaid to:

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