

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
THIRTIETH REGION

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URS ENERGY & CONSTRUCTION, INC.,

Respondent,

And

Case No. 30-CA-18775

TIMOTHY PARE,

Charging Party.

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**BRIEF IN SUPPORT OF RESPONDENT URS ENERGY & CONSTRUCTION, INC.'S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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ROBERT H. DUFFY  
State Bar No. 1010996  
COURTNEY R. HEEREN  
State Bar No. 1066153

QUARLES & BRADY LLP  
411 East Wisconsin Avenue  
Milwaukee WI 53202  
414.277.5000  
Attorneys for Defendant  
URS Energy & Construction, Inc.

Direct Inquiries To:  
Courtney R. Heeren  
Ph: 414.277.3071  
Fax: 414.978.8896  
Email: [courtney.heeren@quarles.com](mailto:courtney.heeren@quarles.com)

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For its brief to the National Labor Relations Board (“the Board”) in support of its exceptions to the Administrative Law Judge’s (“ALJ”) decision, URS Energy & Construction, Inc. (“URS”), the Respondent in the above matter, by its attorneys Quarles & Brady LLP, hereby submits the following:

## **INTRODUCTION**

URS is constructing environmental control systems for WE Energies’ new coal power plants in Oak Creek. As with any construction site, the demand for construction equipment changes based on the progression of the project. In the fall of 2010, URS began downsizing the number of cranes on site, which had a direct impact on the number of operating engineers on site. When URS construction managers—who were not in any way involved in the decision as to which operators would be laid off—decided that URS no longer needed a particular crane, foreman Lewis Yuker, Jr. (“Yuker”) followed URS standard protocol and laid off the Charging Party, Timothy Pare (“Pare”), because he was the oiler assigned to the crane which was no longer needed. In doing so, Yuker relied on only legitimate reasons wholly unrelated to any alleged protected activity by Pare, specifically, the fact that Pare had filed Board charges against the Union.

The ALJ not only ignored the undisputed evidence regarding URS’s standard procedure for laying off oilers with their machines, but he then compounded his error by crediting Pare’s various uncorroborated and self-serving statements and finding a causal connection between Pare’s layoff and such alleged protected activity. The basis for the ALJ’s credibility determination—Pare’s ability to recite specific details—was erroneous in light of the surrounding circumstances and certain disregarded testimony from disinterested witnesses that seriously undermined Pare’s credibility.

There is no dispute that Pare and Yuker discussed Pare's Board charges. As a fellow Union member, Yuker believed that Pare should have utilized internal grievance procedures before resorting to external remedies, the legal defense of which would be far more costly to the Union. Yuker did not in any way act on his opinion, which had no bearing whatsoever on Pare's subsequent layoff. In finding otherwise, and specifically in finding that such statements constituted discrimination under the National Labor Relations Act ("Act"), the ALJ has effectively ruled that Yuker is not entitled to his own opinion, as a Union member, regarding an internal Union matter. That is not a reasonable or legally justifiable conclusion.

Finally, neither Pare nor the General Counsel offered any evidence as to which oiler other than Pare should have been laid off on October 1, 2010 at the time the crane to which Pare was assigned was no longer needed at the construction site. Nor have either offered a reason as to why URS should have violated its established policy of laying off the oiler assigned to the crane at the time that oiler's crane left the site. So, too, the ALJ's decision fails to address these critical facts which establish that regardless of any alleged protected activity or anti-union animus, URS would have laid off Pare. This is also reversible error.

Because the ALJ's decision erroneously found that URS discriminatorily laid Pare off, URS's exceptions therefrom should be sustained, the ALJ's decision and suggested remedy and order should be set aside, and the Complaint should be dismissed.

#### **ALJ CATES' DECISION**

Following a two day hearing, Administrative Law Judge William N. Cates ("ALJ Cates") issued a decision on July 28, 2011 ("Decision") in which he found that URS violated the Act by laying off Pare. ALJ Cates then ordered URS to reinstate Pare and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, remove any reference to Pare's layoff in his file and notify Pare of the removal, cease and desist from

engaging in the above mentioned unfair labor practices, and post a notice at the job site stating the outcome of the case and an employee's rights under the Act. (Administrative Law Judge Decision ("ALJD"), 14:41-16:2.)

### STATEMENT OF THE CASE

Many of the facts in this case are undisputed, including important facts which ALJ Cates ignored in his decision. Certain significant facts related to conversations between Pare and his supervisor, Lewis Yuker, Jr. ("Yuker"), are disputed and are discussed at Sections F through H and J through L below. (See also ALJD, p. 10, lines 32-33.)

#### A. URS, The Oak Creek Power Plant Project, And Pare's Employment

URS, an engineering and construction company, contracted with WE Energies to construct environmental controls for new or refurbished coal fired electrical generation plants in Oak Creek, Wisconsin. (Tr. 50-51, Pare.)<sup>1</sup>

Pare worked for URS at the Oak Creek site as an oiler. (Tr. 50-52, Pare.) He was initially hired on October 19, 2009 to temporarily replace an employee who was on medical leave. (Tr. 90, Pare.) When the employee that Pare was temporarily replacing returned from medical leave, Pare was laid off on October 30, 2009. (Tr. 172, Yuker, URS Ex. 15.) URS rehired Pare on March 16, 2010 at which time he was assigned to a crane known as the Manitowoc 4100, the crane that URS rented from a third party. (Tr. 52-90, Pare, Tr. 175, Yuker, GC Ex. 11.) Pare continued on that crane until it went off rent on October 1, 2010. (Tr. 52, Pare.) Going "off rent" is the phrase used to describe the process of taking down a piece of rented equipment from the job site. (Tr. 72, Pare.)

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<sup>1</sup> Citations to the hearing transcript are referred to as "Tr. [page number]," followed by the name of the individual testifying. Citations to URS Exhibits are referred to as "URS Ex. \_\_\_" with General Counsel's exhibits being referred to as "GC Ex. \_\_\_."

Lewis Yuker, Jr. (“Yuker”), who has been a foreman at the site since January, 2009, supervises the various operators and oilers at the Oak Creek site. (Tr. 107-108, Yuker.) Yuker supervised Pare throughout his employment. (Tr. 55, Pare.) Yuker was involved each time that Pare was hired and laid off, including in 2009 and then again in 2010. (Tr. 90, Pare, Tr. 171, 183-184, Yuker.) For all relevant times, both Yuker and Pare have remained members of the International Union of Operating Engineers, Local 139 (“Union” or “Local 139”), one of the trade unions on site. (Tr. 29, Pare, Tr. 122, Yuker, Tr. 230, Corder.)

URS utilized several types of material handling equipment including cranes, rough terrain forklifts, hydraulic excavators, and rubber tire loaders in this construction project. (Tr. 111, Yuker.) A team comprised of one oiler and one operator is assigned to each crane. (Tr. 53, Pare.) While the operator controls the crane, an oiler is responsible for ensuring that the crane has the appropriate fluid levels to function correctly. (Tr. 53, Pare.) The oiler also maintains a safety barrier around the crane while it is operating. (Tr. 53, Pare.)

The number of machines on site depends, among other things, on the stage of the construction process. (Tr. 232-233, Corder.) Yuker has no input on what kind of machines will be on site and has little advance notice of when any given machine will arrive or be removed from the site. (Tr. 112, 170, Yuker.) URS generally waits as long as possible to communicate equipment changes to its foremen in order to prevent the dissemination of inaccurate information. (Tr. 233, Corder.) By not prematurely releasing such information, URS also aims to prevent improper worker’s compensation claims and any potential slow down of productivity that may result when employees learn that they may be laid off in the near future. (Tr. 233-234, Corder.)

## **B. URS's General Hiring And Layoff Procedures**

Under the Agreement between URS and various trade unions at the Oak Creek site, known as the General President's Project Maintenance Agreement, URS has the explicit right to hire and layoff employees as and when the Company sees fit. (Tr. 231, Corder, GC Ex. 10, Article 2.)

Generally, when a piece of equipment leaves the Oak Creek site, the oiler and operator who are assigned to work on that piece of equipment are laid off. (Tr. 118, Yuker, Tr. 225, McKeag, Tr. 232, Corder.) URS has, however, made exceptions for crane operators. Specifically, if a crane operator is highly skilled with certifications to operate equipment other than cranes or if there are other extenuating circumstances which merit retaining a crane operator with diverse skills, URS may choose to retain the operator despite the fact that his or her machine is being taken off rent. (Tr. 118, 155, Yuker.)

In contrast to crane operators, on no occasion has URS *not* laid off an oiler when his machine went off rent. (Tr. 225, McKeag.) This is because, unlike crane operators, oilers do not have the skills to operate various cranes on the job site. (Tr. 53, Pare.) Consistent with URS's standard and undisputed practice of laying off oilers along with their assigned cranes, on December 31, 2009, Yuker laid off oiler Frank McCauley ("McCauley") because the machine to which he was assigned, a 250 crane, was taken off rent. (Tr. 186-187, Yuker, Tr. 241-242, Corder, URS Exs. 21, 33.) Similarly, on April 16, 2010, Yuker laid off oiler Fred Higgins because URS returned the 100 ton grove rough terrain crane to which Higgins was assigned to the third party that owned it. (Tr. 188, Yuker, Tr. 241-242, Corder, URS Exs. 22-33.)

## **C. Pare Complained That His 2009 Layoff Was Related To His Union Activity**

Following his layoff in 2009, Pare filed a complaint with URS's Human Resources Department alleging that his layoff was caused by his involvement in his brother's campaign to

run as Business Manager for the Union. (Tr. 94, 96, Pare.) Pare also complained that Guy Yucker, Yucker's brother and the Union's Central Dispatcher, had held it against him that Pare was involved in his brother's campaign to run for office in the Union. (Tr. 30, 96-97, Pare.) Although Yucker was aware that Pare had challenged the decision to lay him off, and although URS had the right to accept or reject any oiler assigned by the hiring hall, Yucker did not take any action to prevent Pare from being rehired at URS in March of 2010. (Tr. 173, Yucker; GC Ex. 10, Art. 2.)

**D. Pare Is Given Numerous Opportunities To Work On Other Machines Resulting In Significant Increases In His Pay**

After Pare was rehired in 2010, Yucker repeatedly selected him from the group of oilers that he supervised to work on additional pieces of equipment. (Tr. 54, 91, Pare.) When Pare worked on other machines he received both new training opportunities and an increase in pay of approximately \$10 per hour in addition to his regular rate. (Tr. 92, Pare.) Pare admits that it was within Yucker's discretion to decide which of the oilers that he supervised would receive these opportunities. (Tr. 92, Pare.)

Between March 16 and October 1, 2010, Yucker gave Pare 15 opportunities to work on machines other than the crane on which he worked as an oiler. (Tr. 176, Yucker; Tr. 248, Corder; URS Ex. 20.) In doing so, Yucker provided Pare with such coveted assignments more often than any other oiler except for Bill Zynda, the first oiler on site who had been promised the next forklift seat. (Tr. 176, Yucker.)

**E. Pare Files Unfair Labor Practice Charges Against The Union**

Pare filed Board charges against the Union on March 12, 2010 and June 2, 2010. (Tr. 39, 57, Pare; GC Exs. 4, 5.) In his charges, he alleged that the Union had discriminated against him by refusing to provide information concerning the Union's hiring hall and had harassed and/or

threatened him with expulsion and/or other internal actions and/or violence because he had filed a charge. (GC Exs. 4, 5.) Pare filed an amended charge on July 27, 2010 alleging similar violations. (Tr. 70, Pare; GC Ex. 8.) Pare filed charges externally without exhausting the Union's internal remedies.

**F. Pare And Yuker Discuss His Board charges On June 10, 2010**

On June 9, 2010, an offsite union meeting occurred during which Union membership was told about the Board charges that Pare and two other union members—Fred Higgins and Randy Heule—had filed against the Union. Yuker was present at the meeting and the next day at the job site Yuker expressed his opinion as a fellow union member relating to these charges. (Tr. 149-150, Yuker.) Specifically, during a morning crew meeting Yuker stated his opinion that the individuals who filed charges against the union should be given a chance to withdraw their charges and if they chose not to withdraw them, they should have their union cards taken away. (Tr. 122, 126, Yuker; 149-150, McKeag.) In his comments at the crew meeting, Yuker did not identify Pare as one of those who had filed charges nor was Pare present when Yuker expressed his opinion. (Tr. 126, Yuker.)

On June 10, the Oak Creek site was celebrating its “million man hour” festivities, a milestone related to the fact that URS employees at the site had worked one million man hours without any lost time injuries. (Tr. 192, Yuker.) To congratulate the employees for such an accomplishment URS provided its employees with gifts, such as free lunch, ice cream and apparel. (Tr. 192, Yuker.) Yuker personally approached all of his subordinates to tell them about the celebration. (Tr. 192, Yuker.)

When Yuker went to the 4100 crane to which Pare was assigned to discuss the million man hours celebration Pare descended from the crane and confronted Yuker about the June 9 union meeting. (Tr. 193, Yuker.) Specifically, Pare claimed that Yuker would not say hello to

him at the meeting. (Tr. 193, Yucker.) Yucker responded that he was not aware that Pare had said anything to him, that he had tried to talk to Randy Heule (an employee that Pare was standing with at the time who was the foreman before Yucker and one of the people who had filed charges against the Union), that Heule would not talk to him, and that as a result Yucker assumed all the employees with whom Heule was standing would do the same so he did not say hello to Pare. (Tr. 193, Yucker.)

Because Pare had raised the topic with Yucker, Yucker also asked Pare why he had brought the charges. (Tr. 193-194, Yucker.) Pare stated that he had not done it for himself, but for the membership. (Tr. 193-195, Yucker.) Yucker disagreed with what his fellow Union member was doing. (Tr. 194-195, Yucker.) As a result, when at the end of the conversation Pare attempted to shake Yucker's hand Yucker declined to do so. (Tr. 195, Yucker.)

**G. Yucker Gives URS Employees A Copy Of A Federal Court Decision Dismissing A Complaint Against The Union**

On June 28, 2010, Yucker gave a copy of a federal court decision (*Franklin Edmonds v. Operating Engineers Local 139*) to the URS employees that he supervised at the Oak Creek site. (Tr. 128, 197, Yucker; GC Ex. 6.) Steve Buffalo, a Business Agent for the Union, had given Yucker a copy of the decision. (Tr. 128, Yucker.) When Yucker gave Pare a copy of the decision, Yucker stated it supported his belief that Pare should not sue the Union without first exhausting internal remedies. (Tr. 65, Pare.) In response, Pare told Yucker he did not agree with what Edmonds (the plaintiff) was doing. (Tr. 145, Yucker.)

**H. Yucker Gives Pare A Copy Of A Union Article Encouraging Union Members To Utilize Internal Complaint Procedures**

On July 12, 2010, Yucker gave Pare a copy of an article published in the Union's newsletter regarding utilizing internal complaint procedures. (Tr. 66, Pare; 129-130, Yucker; GC Ex. 7.) Yucker thought the article was relevant to Pare's unfair labor practice charge because

it discussed the good reasons for union members to exhaust all reasonable internal remedies before filing a complaint with an external agency. (Tr. 129-130, Yuker; GC Ex. 7.)

**I. URS Discharges Two Oilers And Disciplines Another Due to Safety Incidents**

Employees are prohibited from entering a crane's swing radius while the crane is operating. (Tr. 75, Pare; 201, Yuker.) The swing radius is the area surrounding a crane in which the operator can set down the load that the crane is holding. (Tr. 75, Pare.) In late summer of 2010 three separate incidents occurred involving a crane's swing radius. As a result URS instituted strict safety rules and disciplined three oilers for their involvement in these events.

The first incident occurred on August 31, 2010. (Tr. 156, Yuker.) On that day, oiler David Streuly was injured after falling asleep within the swing barrier of the crane. (Tr. 156, Yuker; GC Ex. 19.) At the time Streuly was inside the swing radius and not paying attention to his surroundings the crane's counterweight swung around and hit Streuly and nearly killed him. (Tr. 156, Yuker.) URS discharged Streuly on September 8, 2010 as the result of his negligence and failure to follow URS's safety regulations which were the cause of his accident. (Tr. 156, 158-159, Yuker; GC Ex. 19.) Streuly was replaced by Jim Kadlec, another oiler that URS requisitioned and Union's hiring hall designated for that assignment. (Tr. 136, Yuker.)

Due to the serious nature of Streuly's accident, URS's senior management team immediately instituted safety procedures to ensure that a similar incident did not reoccur. Specifically, URS prohibited all employees from being inside the swing radius of a crane when the crane was operational. (Tr. 156-157, Yuker.) At this time, Steve Gebhart, the most senior URS management employee at the Oak Creek site, also counseled Yuker (who was the person most directly responsible for supervising all crane operators and oilers on the construction site) that he needed to ensure that the oilers were following the safety precaution of not being inside

the swing radius. (Tr. 160-161, Yucker.) Gebhart made it very clear to Yucker what would happen if he did not do so: he would lose his job. (Tr. 160-161, Yucker.)

The second incident occurred on September 1, 2010. Despite URS's clear directive that employees were not to be within the swing radius while a crane was operating, on that day Brad Smith ("Smith"), a WE Energies senior management employee, reported to Yucker that he saw oiler William Larson ("Larson") inside the swing radius, not paying attention to his surroundings and writing in his checkbook. (Tr. 161, 163, Yucker.) Yucker immediately investigated the matter and although Larson initially denied that he was writing checks within the swing radius, when further confronted, he stated that that might have been what he was doing. (Tr. 162-163, Yucker.) As a result, URS gave Larson a written disciplinary warning for his misconduct. (Tr. 163, Yucker; URS Ex. 28.)

The third incident occurred in late September, 2010. On that occasion, Smith observed oiler Frederick Heller within the swing radius, smoking a cigarette while leaning on a torch tank that is filled with acetylene and oxygen, an explosive gas. (Tr. 137, 158, Yucker.) Upon receiving this report, Yucker investigated it, including speaking to Heller who admitted the behavior. (Tr. 158, 160, Yucker.) URS then discharged Heller on September 22, 2010 for violating its safety rules. (Tr. 136-137, 159, Yucker; GC Ex. 20.) Heller was then replaced by another oiler that URS requisitioned from the Union hiring hall, Marcus Bohn. (Tr. 139-140, Yucker.)

**J. Yucker Discusses Swing Radius Safety Precautions With All Of His Subordinates, Including Pare**

Consistent with his instruction to vigilantly enforce URS's swing radius rules, in late September Yucker individually met with each of his subordinates to discuss URS's expectations regarding this important safety rule. (Tr. 201, Yucker.) As a part of these meetings, on

September 24, 2010, Yuker told Pare and Jason Klatt, the operator assigned to the 4100 Manitowoc crane at the time, about the rule that all employees were to stay out of the swing radius while a crane was operational. (Tr. 54, 78-79, Pare.) In response, Pare challenged Yuker, stating that Art Flores, the Union steward, had told him something different. (Tr. 76, 78-79, Pare.) Yuker, who felt that Pare was questioning his authority as Pare's supervisor, reminded Pare that Yuker, not Flores, was his foreman so Pare needed to listen to Yuker. (Tr. 79, Pare; 202, Yuker.) It is undisputed that they did not discuss Pare's Board charges or any internal complaints during this conversation. (Tr. 203, Yuker.)

Yuker returned to the Manitowoc crane a second time on September 24, 2010 to tell McCauley, another oiler who was present there at the time, about the swing radius safety rule. (Tr. 203, Yuker.) At that time, Pare approached Yuker and explained why he was "going on and being so forceful in the first conversation." (Tr. 203, Yuker.) Yuker testified that due to Pare's failure to recognize his authority or the importance of the safety rule, he (Yuker) was "pretty annoyed" by the whole conversation. (Tr. 203, Yuker.) Yuker unequivocally denied mentioning Pare's Board charges or any internal complaints during this conversation. (Tr. 203, Yuker.) While Pare contends that Yuker referenced Pare's Board charges at this time, Pare did not provide any testimony from the other alleged witness to the conversation, McCauley. (Tr. 79-81, Pare.)

**K. The 4100 Manitowoc Crane To Which Pare Was Assigned Is Taken Off Rent And As A Result Yuker Selects Pare And Larson For Layoff**

On Monday, September 27, 2010, Yuker learned that the 4100 Manitowoc crane to which Pare was assigned, a piece of equipment rented by URS from a third party, was likely going to be going off rent later that week. (Tr. 72, Pare; Tr. 180, Yuker; URS Ex. 25.) Yuker therefore needed to reduce the number of operating engineers by two since two of them (an oiler and a

crane operator) were assigned to the 4100 Manitowoc crane at the time. (Tr. 180, Yuker; Tr. 106, Pare.)

On Wednesday, September 29, 2010, Yuker spoke with Pare and Klatt (the crane operator on the machine) and told them that their crane would soon be going off rent but that he was thinking of keeping both of them on the job. (Tr. 100, Pare; 138-139, 180-181, Yuker.) At the time, Yuker was considering laying off Jim Kadlec ("Kadlec"), an oiler assigned to a different crane at the Oak Creek job site. (Tr. 182, Yuker.) Yuker's rationale for considering Kadlec for layoff was that while Kadlec had a pension Yuker thought that Pare's only source of income was his job at the Oak Creek site. (Tr. 182-183; Yuker.) After further considering the issue, however, Yuker realized that it was not his place to make decisions based on an employee's source of income. (Tr. 183, Yuker.)

Yuker ultimately decided that the two employees who he would lay off as the result of the 4100 going off rent were Pare, the oiler assigned to the machine, and Larson, the oiler who Yuker had recently disciplined as the result of his violation of URS's swing radius rules. (Tr. 139, Yuker.) Consistent with URS's protocol, Yuker chose Pare because he was the oiler assigned to the crane going off rent. (Tr. 138, 183, 184, Yuker.) Yuker decided to retain Klatt instead of Larson because Klatt was a skilled crane operator and he wanted to preserve his diverse skills on the job site. (Tr. 140, Yuker.) Conversely, Larson was an oiler who did not have any special skills and who Yuker had just disciplined for a serious safety violation. (Tr. 139, 169, Yuker.)

On Thursday, September 30, 2010, Yuker told Dwayne Steinmentz, URS's Superintendent at the Oak Creek site, that he wanted to keep Klatt because Klatt was a highly skilled operator and that he had planned to lay off an oiler, Larson, in order to keep Klatt, since

Larson had previously received written discipline for a safety violation. (Tr. 139, 163, 183-184, Yucker; GC Ex. 21.) Yucker did not say anything to Steinmentz concerning Pare, the other oiler he had selected for layoff, because he was following standard protocol in laying off the oiler assigned to the machine going off rent. (Tr. 139, 183, 184, Yucker.)

**L. Pare Receives Layoff Notice; States That He Was Unaware He Was Going To Be Laid Off Because Yucker Had Told Him A Couple Days Earlier That He May Have Something For Him**

Bob McKeag (“McKeag”), a URS operating engineer who filled in as foreman when Yucker was absent, notified Pare of his layoff on October 1, 2010. (Tr. 81, Pare; 224, McKeag; GC Ex. 9.) Yucker had spoken with McKeag the night before because he (Yucker) was going to be absent from work on October 1 due to previously scheduled training. (Tr. 185, Yucker.) Yucker told McKeag that he would need to give both Pare and Larson their layoff notices. (Tr. 185, Yucker.) Yucker did not tell McKeag why URS was laying off Pare or Larson since it was a reduction-in-force involving two oilers and McKeag knew that the 4100 Manitowoc crane was going off rent and as a result a head count reduction of two was necessary. (Tr. 185, Yucker.)

When McKeag gave Pare his layoff notice on October 1, he asked Pare whether he knew he was going to be laid off. (Tr. 226, McKeag.) Pare responded that he did not know that because Yucker had told him “a couple days” prior that he may have something else for him. (Tr. 226, McKeag.) McKeag testified that he was certain that on October 1 Pare said it was “a couple days” earlier that Yucker had told him that he might not be laid off. (Tr. 226, McKeag.) In contradiction of both Yucker and McKeag’s testimony and without any corroborating evidence, Pare claims that a couple of weeks before October 1—on September 16—Yucker told Pare that his crane would likely be going off rent and that he (Yucker) was going to try to keep him on the job site. (Tr. 73, Pare.)

**M. Pare Complains To Alan Corder About His Layoff And Does Not Challenge Corder's Explanation That Pare Was Laid Off Because His Machine Went Off Rent**

On the afternoon that he was laid off, Pare approached Alan Corder, URS's Project Business Manager for the Oak Creek site, and told him that he did not understand why he was being laid off. (Tr. 246, 229, Corder.) Corder told him that he understood Pare's machine was going off rent and that was the basis for his layoff. (Tr. 246, Corder.) When Pare responded that he still did not understand why he was selected, Corder asked him what would be the basis for URS to select anyone other than him for layoff. (Tr. 246-247, Corder.) Pare did not offer any response or explanation as to who other than he—the oiler assigned to the machine going off rent—should be laid off. (*Id.*) Nor did Pare dispute Corder's explanation for his layoff. (Tr. 247, Corder.)

During the meeting with Corder on October 1 Pare said that he wanted to challenge his layoff because he needed to support his family and just needed to be employed. (Tr. 247, Corder.) In response, Corder encouraged him to talk to the Union. (Tr. 247, Corder.) Corder also told Pare that he felt there was no basis to change the layoff decision. (Tr. 247, Corder.) During the conversation Pare said nothing about the fact that he thought he was laid off for engaging in any kind of Union activity. (Tr. 247, Corder.) While Pare claimed he told Corder “the fact that the dispatcher's brother was the foreman there, ... I implied that had something to do with it,” Corder unequivocally denied that Pare made such a statement or said anything regarding his belief that he was laid off for his alleged union activities. (Tr. 83, Pare; 247-248, Corder.)

## QUESTIONS PRESENTED

- I. **WHETHER THE ALJ ERRED IN CREDITING PARE'S TESTIMONY OVER YUKER'S REGARDING THEIR CONVERSATIONS ON SEPTEMBER 16 AND 24, 2010. (Relates to Exceptions 1-8, 12.)**
- II. **WHETHER THE ALJ ERRED IN DETERMINING THAT THERE WAS A CAUSAL CONNECTION BETWEEN PARE'S UNION ACTIVITY AND HIS LAYOFF. (Relates to Exceptions 1-8, 12-15, 16.)**
- III. **WHETHER THE ALJ ERRED IN REJECTING THE UNDISPUTED EVIDENCE THAT PARE WOULD HAVE BEEN LAID OFF REGARDLESS OF HIS UNION ACTIVITY. (Relates to Exceptions 1, 9, 10, 11, 15, 16.)**

## ARGUMENT

- I. **THE ALJ ERRED IN CREDITING PARE'S TESTIMONY OVER YUKER'S REGARDING THEIR CONVERSATIONS ON SEPTEMBER 16 AND 24, 2010**

The ALJ erred in crediting Pare's testimony over Yuker's regarding their conversations on September 16 and 24, 2010 and specifically, in crediting Pare's testimony that Yuker told him his crane was going off rent on September 16, 2010 and that they discussed Pare's Board charges on September 24, 2010, assertions which Yuker unequivocally denied. (See Exceptions 1-8, 12.) The ALJ based his conclusion that Pare was more credible than Yuker on the fact that Pare was more specific and precise in his testimony and was able to provide more detail regarding alleged statements made during these interactions. Pare's specificity, in light of the circumstances surrounding his interactions with Yuker, is an insufficient basis on which to make such a major credibility determination. Further, such a conclusion is not supported by applicable law and ignores key evidence from disinterested witnesses that undermine Pare's credibility.

- A. **The ALJ Erred In Determining That Pare Was More Credible Based On The Fact That His Testimony Was More Specific Than Yuker's**

In assessing a witness's credibility, a fact finder should assess the following: the demeanor and conduct of the witness; his candor and lack thereof; his apparent fairness, bias, or prejudice; his ability to know, comprehend, and understand the matters about which he testified;

whether he had been contradicted or otherwise impeached; the interrelationship of the testimony of the witnesses and the written and/or documentary evidence presented; and the inherent probability and plausibility of the testimony. See Young Broadcasting of Los Angeles, Inc. d/b/a KCAL-TV and Local 45, International Brotherhood of Electrical Workers, AFL-CIO, NLRB Case 31-RC-7773 (2000).

The fact finder should also pay special attention to what each witness has to gain from his testimony, especially when the only evidence of discrimination is that witness's own self-serving statements. Courts have held that self-serving statements from a charging party who stands to gain reinstatement and backpay—like Pare—as a result of his testimony, without additional evidence, is insufficient to establish a violation of the Act.

For example, in Delco Air Conditioning Div., Gen. Motors Corp. v. N.L.R.B., 649 F.2d 390, 390 (6th Cir. 1981), the court refused to uphold the Board's opinion that the respondent had violated the Act, finding that the decision was not supported by substantial evidence. The main evidence of anti-union animus was based on the charging party's own testimony: The charging party alleged that, following his discharge, the company's labor relations supervisor had offered him reinstatement if he would resign as union committeeman, an allegation that, if true, would have violated the Act. *Id.* at 391. The only evidence the charging party had of this conversation was his own testimony which was uncorroborated and which the labor relations supervisor specifically denied. *Id.* at 393. The court found that although credibility determinations were ordinarily the prerogative of the Board, it was unwilling to enforce the Board's order since it had been based upon the uncorroborated testimony of the charging party who stood to gain reinstatement and backpay and was testimony that the other party to the alleged conversation specifically denied. *Id.* at 393 (internal citations omitted). See also N.L.R.B. v. Cook Family

Foods, Ltd., 47 F.3d 809, 818 (6th Cir. 1995) (refusing to uphold a finding of discrimination when the ALJ had ignored evidence of the charging parties' poor performance and instead credited the charging parties' self-serving, uncorroborated testimony regarding their interactions with the respondent when they stood to gain backpay and reinstatement from their testimony).

Like the ALJ and NLRB in Delco Air Conditioning Div., Gen. Motors Corp., 649 F.2d 390, ALJ Cates case based his finding of discrimination on Pare's testimony regarding his discussions with Yuker, especially their alleged discussion on September 24, 2010 of Pare's Board charges. This testimony was completely uncorroborated. Like the labor relations supervisor in Delco Air Conditioning Division, Yuker specifically denied that they discussed the Board charges on that date. The ALJ should not have credited Pare—a self-interested witness who stood to gain backpay and reinstatement from the outcome of this proceeding—over Yuker, a disinterested witness who has no reason to lie and whose testimony, unlike Pare's, was corroborated by additional witnesses.

Contrary to the ALJ's conclusion simply because Pare claimed to remember details of certain interactions between him and Yuker did not make him a more credible witness. The fact that Yuker did not offer a verbatim recollection of every word spoken during his interactions with Pare is hardly surprising. Yuker supervised more than 30 operating engineers who were doing critical work on the construction site. He had daily conversations with each of them. He therefore could not possibly have remembered exact words spoken during each conversation with each employee. But he credibly remembered important details, including that he never said anything to Pare on September 16 or 24 about Board charges, and that on September 24 he was surprised and annoyed that Pare would challenge his authority as a supervisor to enforce an important safety rule.

Pare, on the other hand, has a significant interest in “recalling” that he and Yucker discussed his Board charges on September 24, 2010. But that does not make such a detailed “recollection” true. Further, Pare’s contention is incredible in light of the overall circumstances, including that Pare admits he was challenging Yucker’s efforts to articulate and enforce a safety rule involving staying out of the swing radius when a crane is operational. And as noted below, Pare’s claim is further undermined by the statements he made to another employee (McKeag) less than a week later and by his failure to call the only other person who he claims was present when Yucker supposedly said something about Pare’s Board charges (McCauley). Accordingly, the ALJ erred when he found Pare more credible simply because he had a more “detailed” recollection of the highly disputed conversation.

**B. The ALJ Erred In Ignoring Evidence That Undermines Pare’s Credibility**

The ALJ also ignored critical and undisputed testimony that seriously undermines Pare’s credibility.

First, it is undisputed that Pare cried wolf once before when he claimed that his first layoff was related to his Union activity. In fact, this was not true as it is undisputed that Pare was initially hired in 2009 as a temporary fill-in for an employee on medical leave and he was laid off once that employee returned to the job. Pare therefore sees, and is more than willing to claim, unlawful retaliation where none has occurred. Nonetheless, the ALJ completely ignored this fact.

Second, the ALJ erred when he ignored the fact that Pare failed to call the witness who he claimed was present on September 24, 2010 when Yucker supposedly made a reference to Pare’s Board charges. While Pare claimed that Frank McCauley was present during this interaction, he offered no testimony from McCauley to corroborate his self-serving (and completely

unsupported) contention in this regard. The ALJ completely ignored this fact which seriously undermined Pare's disputed testimony on this issue.

Third, as discussed in greater detail below, the ALJ ignored the testimony from a completely disinterested witness which contradicted Pare's claim that on September 24 Yuker told him he was considering keeping him (Pare) on the job. Specifically, contrary to Pare's claim, McKeag testified that on October 1 Pare told him that it was "a couple of days prior"—not September 16, as Pare testified—that Yuker told Pare about his crane likely going off rent and that Yuker would try to keep both operators assigned to that crane employed at the Oak Creek site. This corroborates Yuker's undisputed testimony that he did not learn that Pare's crane was going off rent until September 27, 2010 and therefore could not have discussed this with Pare on September 16, 2010, nearly two weeks earlier. The ALJ should have considered all of this evidence when making a credibility determination regarding Pare. Instead, he mistakenly relied on Pare's alleged specificity in his testimony as trumping all other circumstances impacting his credibility. In doing so he committed reversible error.

## **II. THE ALJ ERRED IN DETERMINING THAT THERE WAS A CAUSAL CONNECTION BETWEEN PARE'S UNION ACTIVITY AND HIS LAYOFF**

Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason as long as the employer's purpose is not to encourage or discourage union membership. Associated Press v. NLRB, 301 U.S. 103, 1 LRRM 732 (1937); Midwest Reg'l Joint Bd., Amalgamated Clothing Workers of Am., AFL-CIO v. N. L. R. B., 564 F.2d 434, 440 (D.C. Cir. 1977). To prove that Pare's layoff violated Sections 8(a)(1) and 8(a)(3) of the Act, the General Counsel needed to prove that URS knew of Pare's union activity and that it laid him off because of it. Wheeling-Pittsburgh Steel Corp. v. N.L.R.B., 618 F.2d

1009 (3d Cir. 1980). The General Counsel did not meet this burden and the ALJ erred in determining otherwise. (See Exceptions 1-8, 12-15, 16.)

In crediting Pare's testimony over Yuker's, the ALJ found that on September 24, 2010 Pare and Yuker had spoken about Pare's Board charges. Yuker specifically denied this interaction and unequivocally maintained that he and Pare had not discussed Pare's Board charges since June, 2010, more than three months earlier. For the reasons stated above, the ALJ's credibility determination was seriously flawed and cannot be sustained. Without Pare's testimony that he and Yuker discussed his Board charges on September 24, 2010, the causal connection between Pare's protected activity and his layoff all but evaporates. Further, the ALJ ignored other critical evidence that refutes any causal connection between Pare's Board charges and his discharge.

**A. The ALJ Erred When He Failed To Address Pare's Own Statements To Robert McKeag That Undermine Pare's Testimony Regarding His Alleged Interactions With Yuker On September 24, 2010**

The ALJ completely ignored the disinterested testimony of Bob McKeag, the operating engineer who filled in as foreman on October 1, 2010 and informed Pare of his layoff. Specifically, McKeag unequivocally testified that when he gave Pare his layoff notice, he asked Pare whether he knew he was going to be laid off. (Tr. 226, McKeag.) McKeag testified that Pare responded that he did not know that because Yuker had told him "a couple days" prior that he may have something else for him. (Tr. 226, McKeag.) McKeag testified that he was certain that on October 1 Pare said it was a couple days earlier that Yuker had told him that he might not be laid off. (Tr. 226, McKeag.)

While Pare claimed (and the ALJ credited) that it was on September 16, 2010 that Yuker said he was considering keeping Pare on the job (Tr. 73-74, Pare), Pare told McKeag that the statement occurred "a couple of days" before October 1, not two weeks. (Tr. 226, McKeag.) In

fact, Yucker could not have made that statement on September 16 because he did not even learn until September 27 that the crane on which Pare worked was likely going off rent later that week. (Tr. 180, Yucker.) Pare therefore lied about the date and did so in order to try to place Yucker's friendly statements toward him as far away from the layoff decision as possible. The ALJ's failure to even address this critical timing discrepancy further undermines his finding that URS laid off Pare because of his protected activity.

**B. The ALJ Erred In Dismissing Evidence Of Yucker Giving Pare Extra Machine Operation Assignments Resulting In Significant Pay Increases**

The ALJ inexplicably dismissed URS's undisputed evidence that Yucker chose Pare to work on machines that resulted in both training opportunities and a significant hourly pay increase for Pare. Pare himself acknowledged that it was within Yucker's discretion to select Pare over other employees for these assignments. (Tr. 92, Pare.) Dismissal of this evidence—which demonstrated Yucker's efforts to provide employment opportunities and pay to Pare above and beyond anything that he was entitled to—was unfounded. It simply is not plausible or credible to believe that the same supervisor who would layoff Pare for bringing Board charges would at the same time go out of his way to provide extra pay and training to that employee.

**C. The ALJ Erred When He Ignored Yucker's Desire To Keep Pare As An Employee**

The ALJ also erred when he disregarded Yucker's desire to keep Pare as an employee, an undisputed fact that further undermines any causal connection between Pare's Board charges and his layoff. If Yucker had intended to discriminate against Pare and lay him off because of his Union activity, why would he have told Pare just days before the layoff that he was thinking of how to keep him and Jason Klatt, the operator on the 4100 Manitowoc crane, employed at the Oak Creek site? In fact, if Yucker really had such ill intentions, he certainly would not have made such a contrary statement days before the layoff itself. In fact, he made the statement because he

meant it, but after reflecting further on URS's layoff protocol and his responsibilities as a supervisor, he realized that it would have been improper for him to do anything except layoff Pare.

While there is no dispute that Yuker learned on September 27 that he would need to lay off two employees as the result of the 4100 Manitowoc crane going off rent later that week the ALJ completely disregarded this fact. Yuker's original plan to accomplish this involved laying off an oiler on another machine, who unlike Pare, was receiving a pension. After reflecting further, however, Yuker realized that it was not fair or appropriate to make a layoff decision based on whether an employee had sufficient income; indeed, doing so would have arguably constituted illegal age discrimination. Yuker therefore correctly decided to follow URS's standard and uniformly followed protocol; i.e., lay off the oiler who is assigned to the unneeded machine. In this case, that was Pare.

Had Yuker truly wanted to retaliate against Pare for his Board charges, he would have taken action against him months before Pare's crane went off rent, he would not have arranged for Pare to get plumb machine assignments which allowed him more pay and training opportunities, and he would never have both pondered and articulated to Pare his desire to keep an oiler on the job who was assigned to a crane which URS no longer needed. Fortunately, Yuker made the proper and logical decision to lay off Pare. In doing so he fully complied with URS policy and did not in any way consider Pare's earlier charges against the Union. The ALJ's contrary holding, which ignored this undisputed and compelling evidence, must be reversed.

### **III. THE ALJ ERRED IN REJECTING THE OVERWHELMING EVIDENCE THAT PARE WOULD HAVE BEEN LAID OFF REGARDLESS OF HIS UNION ACTIVITY**

Even if the General Counsel had established an improper motive for Pare's layoff, which it did not, URS still must prevail because it established that it would have taken the same action

regardless of any alleged improper motive. See Wright Line, a Div. of Wright Line, Inc., 251 NLRB 1083 (1980) enforcement granted sub nom. N.L.R.B. v. Wright Line, a Div. of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981) and disapproved of by Boich v. Fed. Mine Safety & Health Review Comm'n, 704 F.2d 275 (6th Cir. 1983) and disapproved of by Champion Parts Rebuilders, Inc. v. N.L.R.B., 82-3145, 1983 WL 207889 (3d Cir. May 9, 1983), enf'd N.L.R.B. v. Wright Line, a Div. of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981), approved in N.L.R.B. v. Transp. Mgmt. Corp., 462 U.S. 393, 401, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983) abrogated by Dir., Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994); N.L.R.B. v. Clinton Electronics Corp., 284 F.3d 731, 738 (7th Cir. 2002). Applied here, if the General Counsel had established both URS's knowledge of Pare's protected activity and its anti-union animus, URS was still entitled to rebut any inference of unlawful activity by establishing that it would have taken the same employment action regardless of Pare's protected activity. (*Id.* ) See also Hyatt Regency Memphis, 296 NLRB 259 (1989) enforcement granted sub nom. Hyatt Hotel Corp. v. N.L.R.B., 944 F.2d 904 (6th Cir. 1991) and aff'd sub nom. Hyatt Corp. v. N.L.R.B., 939 F.2d 361 (6th Cir. 1991). Through compelling and undisputed evidence URS established that pursuant to its standard and uniformly applied layoff procedure, Pare would have been laid off regardless of his Board charges. In ignoring this compelling evidence and reaching a contrary conclusion the ALJ committed reversible error. (See Exceptions 1, 9, 10, 11, 15, 16.)

**A. The ALJ Erred In Finding That Yuker's Contemplation Of Keeping Pare Despite His Machine Going Off Rent Somehow Undermined URS's Standard And Uniformly Applied Practice Of Laying Off The Oiler With His Machine**

URS's general practice is that when a machine goes off rent, the operator and oiler assigned to that machine are laid off. Further, it is undisputed that there are no exceptions to this rule as it relates to oilers. (Tr. 118, Yuker; 225, McKeag; 232, Corder.) Rather, the only

exception to the rule is for crane operators (Pare was not one) who URS may retain if it determines that an operator's diverse skills were needed on the site. And it is more than ironic that the only time that URS made such an exception it was to bump an oiler in order to retain a crane operator who had the ability to run multiple cranes which were needed for the project. Here, Pare was not the victim of the exception as he was not bumped but instead went with his machine.

The ALJ not only failed to credit this undisputed layoff procedure and its limited exception, but he perverted it into something that was neither logically nor practically true. The exception to the rule never worked in favor of oilers, it worked against them! In finding otherwise the ALJ contradicted the undisputed evidence and erred as a matter of law.

**B. The ALJ Erred In Disregarding The Undisputed Comparable Evidence Of Employees Laid Off With Their Machines**

URS not only established its standard protocol of laying off the oiler with his machine but it also proved its uniform application of the rule at the Oak Creek job site. Specifically, it is undisputed that URS laid off two other oilers—McCauley and Higgins—when their respective machines were taken out of service at the Oak Creek job site. (Tr. 186-187, 188, Yuker; 241-242, Corder; URS Exs. 21, 22, 33.) Further, it is undisputed that at no time did URS ever retain an oiler whose machine went off rent. (Tr. 225, McKeag.)

The ALJ both ignored and then contradicted this compelling and undisputed evidence in concluding that URS had not established its Wright Line defense. In doing so he committed reversible error.

**C. Neither the General Counsel Nor Pare Ever Answered The Question Of Who Other Than Pare Should Have Been Laid Off**

There is no dispute that on October 1, 2010 URS needed to layoff two operating engineers. In finding that URS improperly laid off Pare ALJ Cates implicitly held that URS

should have laid off someone other than Pare. But neither at the time of the layoff, nor during the investigation of Pare's charge, nor even at the hearing did Pare or the General Counsel establish or otherwise identify who that person should have been. Pare had no answer when Corder asked him that very question on the day he was laid off, the General Counsel had no answer at the hearing, and the ALJ had no answer in his decision. The reason for this is obvious: no answer was given because there is no such person.

In fact, even Yuker contemplated the question. Though he identified a possibility, he properly concluded that laying off an oiler other than Pare because he was pension eligible was both wrong (and likely illegal) and a violation of URS's uniform policy of always laying off the oiler along with the oiler's assigned machine.

There is no evidence that would support laying off any oiler other than Pare on October 1, 2010. Pare was the oiler on the 4100 crane that went off rent at that time and he had been assigned to that machine ever since he returned to the Oak Creek site in March of 2010. Because Pare was both the logical and appropriate person to layoff, and would have been laid off regardless of his Board charges or any alleged anti-union animus, the ALJ's contrary conclusion must be reversed and his recommended remedy and order must be vacated.

### **CONCLUSION**

As established above, ALJ Cates' finding that URS violated the Act when it laid off Pare is contrary to the compelling evidence, much of which is undisputed, as well as the law. As a result, URS respectfully requests that ALJ Cates' decision be reversed, that his recommended remedy and order must be vacated, and that the General Counsel's complaint be dismissed in its entirety.

Respectfully submitted this 7<sup>th</sup> day of October, 2011.

ROBERT H. DUFFY  
State Bar No. 1010996  
COURTNEY R. HEEREN  
State Bar No. 1066153



QUARLES & BRADY LLP  
411 East Wisconsin Avenue  
Milwaukee WI 53202  
414.277.5000  
Attorneys for Defendant  
URS Energy & Construction, Inc.

Direct Inquiries To:  
Courtney R. Heeren  
Ph: 414.277.3071  
Fax: 414.978.8896  
Email: [courtney.heeren@quarles.com](mailto:courtney.heeren@quarles.com)