

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WIL-SHAR, INC.

and

Cases 26–CA–23869
26–CA–23903

IRONWORKERS, LOCAL 584

Linda M. Mohns, Esq.,
for the General Counsel.
Charles M. Kester, Esq.
of Fayetteville, Arkansas,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Fayetteville, Arkansas, on June 8, 9, and 10, 2011. The charge in Case 26–CA–23869 was filed by Ironworkers, Local 584 (the Union) on October 19, 2010 and amended on December 20, 2010. The charge in Case 26–CA–23903 was filed by the Union on November 18, 2010, and amended on January 19, 2011.¹ Based upon the allegations contained in Cases 26–CA–23969 and 26–CA–23903, the Regional Director for Region 26 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint, and notice of hearing on April 28, 2011.

The complaint alleges that Wil-Shar, Inc. (Respondent) terminated Charles Robbins on July 13, 2010, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act.) The complaint further alleges that Respondent, acting through owner Billy Witcofski, violated Section 8(a)(1) of the Act by interrogating employees about their union activities and impliedly telling employees that it would be futile for them to select the Union as their collective-bargaining representative. The complaint additionally alleges that Respondent, acting through Billy Witcofski threatened employees with a loss of work and a loss of employment if they selected the Union as their collective-bargaining representative, in addition to threatening to cease operations if the employees selected the Union as their collective-bargaining representative. Finally, the complaint alleges that on or about October 15, 2010, Respondent orally promulgated a rule prohibiting employees from discussing their terms and conditions of employment with each other.

¹ All dates are in 2010 unless otherwise indicated.

On the entire record², including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following:

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Findings of Fact

I. Jurisdiction

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Respondent, with an office and place of business in Rogers, Arkansas, has been engaged in the erection of steel building packages. During the previous calendar year, Respondent, in conducting its business operations, purchased goods and materials valued in excess of \$50,000 directly from points located outside the State of Arkansas, which were received at jobsites located within the State of Arkansas. I find that Respondent is an employer within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

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II. Alleged Unfair Labor Practices

A. Issues

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As the Respondent points out, the facts and evidence in this case relate to two specific events; the discharge of Charles Robbins and Respondent’s conduct during an employee meeting on October 15, 2010. The Acting General Counsel alleges that employee Charles Robbins (Robbins) concertedly complained to Respondent regarding the wages, hours, and working conditions of employment of Respondent’s employees by complaining about Respondent’s failure to pay employees the prevailing wage rate, as well as by complaining about Respondent’s employment of illegal immigrants. The complaint alleges that Respondent terminated Robbins on July 13, 2010, because of his having engaged in these concerted protected activities and because Respondent believed that Robbins joined or assisted the Union. Additionally, the Acting General Counsel alleges that during the course of an employee meeting on October 15, 2010, Respondent’s owner and agent made statements to employees that interfered with, restrained, and coerced them in the exercise of rights that are protected by Section 7 of the Act.

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B. Background

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Respondent is a construction sub-contractor engaged in the erection of steel structures and buildings. Although Respondent’s office is in Rogers, Arkansas, Respondent employs approximately 50 to 75 employees who work at various work sites in Arkansas, Missouri,

² On August 4, 2011, counsel for the Acting General Counsel filed an unopposed motion to correct the official transcript. I have reviewed the transcript in light of the nine proposed corrections. Eight of the proposed corrections deal with obvious transcription errors involving references to the attorneys and the judge, as well as misplacement of “Q” and “A” designations. The remaining proposed correction deals with the transcription of the word “coke.” Counsel asserts that the correct word should be “coat.” In reviewing the transcript, however, it appears that the witness could have said “coke” or “coat.” and there would have been no substantive difference in his testimony. Therefore, I grant counsel for the Acting General Counsel’s motion to correct the transcript for all proposed corrections with the exception of the proposed substitution of the word “coat” for “coke.”

Mississippi, Louisiana, and Texas. Respondent is owned by William Witcofski (Witcofski) and his wife. Witcofski is the chief executive officer of the Company and he describes himself as the person who takes care of everything and oversees almost everything. Witcofski's son; Hayden Witcofski serves as the project manager for Respondent's total operation. Carter McLeod is
5 Witcofski's son-in-law and functions as the chief financial officer. During the relevant time period, both John Rusco and Jason Keen were foremen. Keen also worked as a safety, quality, and loss control officer. John Rusco's wife; Denise Rusco works as Respondent's receptionist. During the period of time between August 2009 and the first week of November 2010, Chad Lee worked as Respondent's internal control officer.

10 Respondent stipulates that for all relevant times, William Witcofski, Hayden Witcofski, Carter McLeod, and Jason Keen were supervisors and agents within the meaning of the Act.

15 C. Michael Richards' Organizing Efforts

Michael Richards began his apprenticeship with the Union in Las Vegas, Nevada, in 1998 and later transferred his union membership to the Union in Tulsa, Oklahoma, in approximately 2006. On December 1, 2009, Richards became a union organizer. Richards recalls that he became aware of Respondent's operation through his union business manager.
20 Recognizing that Respondent was working on a high profile job only a few blocks from the Tulsa Building Trades meeting place, he decided to "get his feet wet" and he initiated a "salting" campaign with Respondent shortly after he became an organizer. After making an initial inquiry with a foreman on Respondent's Tulsa, Oklahoma jobsite, Richards went to Respondent's office in Rogers, Arkansas, and submitted his application for employment.
25 Richards began his employment with Respondent in December 2009 and worked on the construction project at the Lorton Performing Arts Center on the campus of the University of Tulsa in Oklahoma.

30 Richards testified that after he began the job, he had some concerns about safety, as well as wages. When Hayden Witcofski did not respond to his inquiries, Richards engaged in an economic strike. In a letter dated January 11, 2010, Richards told Hayden Witcofski that he was going on strike because of several conditions that adversely affected all of "the working men of Wil-Shar Steel Erectors." He identified the conditions as low salaries that were below the prevailing wage rate, lack of vacation pay, lack of health insurance and other fringe benefits,
35 safety concerns, and the necessity for employees to bring their own water to the jobsite. In his letter, Richards suggested that Hayden Witcofski sit down with him and discuss the elimination of these issues on behalf of all the employees. He added that once there had been an agreement to resolve the matter, the agreement could be reduced to writing. Although Witcofski never met with Richards about the concerns in his letter, Witcofski telephoned Richards and briefly
40 inquired as to what Richards meant by "safety concerns." After he initiated the strike, Richards distributed organizing leaflets at Respondent's worksites in both Oklahoma and Arkansas. One of the leaflets dealt with Respondent's failure to pay the prevailing wage rate and suggested that the Union could assist employees in obtaining these rates.

45 In a letter dated February 3, 2010, Richards notified Hayden Witcofski that he was unconditionally offering to return to work. He also assured Witcofski that he intended to assist

his fellow employees in obtaining better wages and working conditions by organizing the employees into the Union and pursuant to their rights under Section 7 of the Act.

5 Following his February 3, 2010 letter to Respondent, Richards continued to have contact with Respondent’s employees. He and two other union organizers visited Respondent’s employees in their homes. Richards also visited Respondent’s jobsites where he documented what he believed to be safety violations and provided notice to the U.S. Department of Occupational Safety and Health Administration (OSHA.) Over the course of the summer months in 2010, Richards continued to visit Respondent’s worksites in Oklahoma and Arkansas.

10 During 2010, Chad Lee (Lee) worked as Respondent’s internal control officer. Lee did not have a private office. He carried out his work from his desk that was located in a large room with other desks; one of which was used by William Witcofski. Each morning, Lee attended a 9 a.m. meeting attended by Witcofski, and various managers including Hayden Witcofski, and Carter McLeod. During the meeting, the managers discussed pertinent information that pertained to the jobsites and future work. Lee recalled seeing Richards’ letters to Hayden Witcofski. Lee also recalled that Richards, the Union, and Richards’ complaints to OSHA were all discussed “a lot” and had been a hot topic in the office. Lee also opined that Hayden Witcofski had not only been upset with Richards about the OSHA complaints, but he had felt
20 betrayed by Richards.

D. The Discharge of Charles Robbins

25 Charles Robbins (Robbins) has been employed as an ironworker since 2006. As a journeyman ironworker, Robbins works as a connector and has certifications to operate equipment such as all-terrain forklifts and aerial lift equipment. Working as a connector, Robbins is the individual who connects the steel from the lifting equipment such as a crane or a forklift and bolts the steel to the structure.

1. Robbins’ complaints concerning pay issues

a. The prevailing wage rate issue

35 During the first half of 2010, Respondent was involved in several prevailing wage projects; two of which were the Garland Bookstore (GBS) project on the University of Arkansas campus in Fayetteville, Arkansas, and the Armed Forces Reserved Center (AFRC) project in Vaughn, Arkansas. Robbins was assigned to these two projects as well as other construction projects during this same period of time. While on the AFRC project, Robbins discussed with other employees the issue of whether they were receiving the prevailing wage rate for their work. Robbins testified that he tried to convey to all the employees on the job that everyone was entitled to the prevailing wage rate based upon the work they were performing and not based upon their title.

45 Employee Kenneth Catron worked for Respondent until July 2010. Although Catron worked on the GBS job, he was not paid the prevailing wage rate. Catron testified that he had not been familiar with his legal rights before his discussing the wage rate issue with Robbins and other employees on the jobsite. Catron recalled that Robbins seemed to be more knowledgeable

about the prevailing wage issue because Robbins, along with others, helped him to understand what needed to be done. On March 15, 2010, Catron filed a prevailing wage claim for his work on the GSB project. By letter dated April 23, 2010, the Arkansas Department of Labor notified Witcofski of Catron's claim. Employee Jarrid Giese testified that he and other employees
5 discussed whether they were being paid the prevailing wage rate on certain jobs. He recalled that Robbins had been involved in the discussions and had voiced his anger because he was "working his butt off and not getting his proper wages."

During May and June 2010, Robbins worked on the Sports Academy job in Rogers,
10 Arkansas. When Foreman John Rusco was not available, Robbins served as acting foreman. Robbins recalled that on one particular morning when he was working as the acting foreman, he met with Witcofski to discuss the tasks that needed to be completed for the day. During the course of the conversation, Witcofski mentioned to Robbins his displeasure with Catron's having damaged some equipment on the GSB project. Witcofski opined that Catron was more of a
15 liability than an asset. He went on to explain, however, that because of Catron's having filed the prevailing wage claim with the U.S. Department of Labor, there might be adverse consequences if he tried to terminate Catron. Witcofski then instructed Robbins to keep an eye on Catron to determine if there was anything such as tardiness or absenteeism that would give him a legitimate reason to get rid of Catron. Although Robbins told Witcofski that he would keep an
20 eye on Catron, Robbins also notified Catron that his job was on the line and told him about the conversation with Witcofski. Catron testified that while there had been damage to some equipment on the GSB project that resulted in his receiving a suspension, this damage had occurred as much as 6 months before Robbins' conversation with Witcofski.

Robbins also testified that in addition to speaking with other employees about their receiving the prevailing wage rate; he also spoke with Witcofski, McLeod, as well as foremen Jason Keen and James Marcotte. Chad Lee testified that during his work in the office, he observed Robbins as very outspoken and very intelligent. Lee explained that when things were not going the way that he thought that they should go, Robbins would make it known through
30 telephone calls to both McLeod and Witcofski, as well as to Lee. Lee was aware of Robbins' calls because he was either present when the calls came in or Robbins' calls were discussed during the 9 a.m. meeting. Lee recalled that the prevailing wage rate issue was a common topic among employees and that Robbins was the most outspoken employee on the subject. Lee recalled that Robbins was very outspoken and would make it known when he was upset. Lee recalled that during an automobile ride to the El Paso worksite, Robbins telephoned a labor
35 agency to ask questions about prevailing wage rates. When Robbins and other employees raised concerns about their pay and questions concerning the prevailing wage rate with Lee, he relayed the questions to McLeod. Lee explained that because of his position, employees seemed to think that he had "some sort of pull" in the office and employees vented their frustrations with him. In
40 response, Lee passed along the concerns to Witcofski, McLeod, Hayden Witcofski, or the foremen.

While he was working on the AFRC job and in approximately May or June of 2010, Robbins contacted the Wage and Hour Division of the U.S. Department of Labor to inquire
45 whether the roofing work performed on one of the structural steel buildings came within the guidelines of prevailing wage work. Based upon the information that he received from the Department of Labor, Robbins concluded that the work was considered to be ironwork and to fall

within the scope of prevailing wage rates. Robbins told Witcofski that based upon the information that he receive from the Department of Labor, this specific roofing work fell within the scope of the prevailing wage rate. Witcofski acknowledged that he had discussions with Robbins about his shortages in prevailing wages and he also had discussions with Robbins about the work on that specific roof. Although Witcofski asserted that his discussion with Robbins concerning the roof work was more of a question of job description rather than prevailing rate, he also acknowledged that he responded to Robbins' questions by his own contact with the U.S. Department of Labor and he addressed questions about prevailing wage rates in crew meetings with Robbins and other employees.

Robbins testified that on two or three occasions he was not paid the prevailing wage rate for work that would have been covered by the prevailing wage rate. On these occasions, he confronted either Witcofski or McLeod about the pay shortage. The record reflects that Robbins received pay adjustments on April 9, May 11, and May 24, 2010. When he received the pay adjustment on May 11, 2010 Robbins spoke with both Witcofski and McLeod at Respondent's office concerning Respondent's failure to pay him the required prevailing wage. When Robbins received the handwritten check for the adjustment, Witcofski told him not to discuss with the other employees that he was receiving the prevailing wage rate. Robbins explained that even though there were some other employees who had received the prevailing wage rate, Witcofski instructed him not to discuss the fact that he had received a handwritten check for the difference in hourly pay. Witcofski told him that if he discussed this with other employees, it might affect his opportunity to work on future prevailing wage rate jobs.

The Acting General Counsel submitted Robbins' telephone records to show that on July 12, 2010, Robbins telephoned both the Arkansas Department of Labor as well as the U.S. Department of Labor. Robbins recalled that he made those calls from his cell phone during his lunch break on July 12. Robbins confirmed that his first written response from the U.S. Department of Labor was included in a letter to him dated July 29, 2010. The letter confirmed that Robbins would be contacted once the case was assigned for investigation.

Although Robbins acknowledged that he did not tell Witcofski about his making the call to the Department of Labor on July 12, he asserted that Foreman Keen had been aware of his doing so.

b. The issue concerning pay for travel time

When employees traveled to the jobsite in El Paso, the trip took approximately 16 to 17 hours. Both Lee and Robbins were the designated insured drivers to transport the employees. Robbins testified that initially he and other employees understood that they would receive \$100 for travel time each way to El Paso. After received their first check, however, they discovered that they were receiving only \$100 for the full round trip. Robbins had been especially concerned because as the insured driver, he spent half his time driving. Robbins recalled that several of the employees were disgruntled because they were only receiving \$100 for almost 40 hours of traveling.

Lee recalled that Robbins and some of the other employees came to his hotel room in El Paso and he described the incident as a "huge meeting." During the meeting, Robbins

telephoned Witcofski to talk about the issue of pay for the employees for their drive time to El Paso. Although Witcofski did not recall that the meeting occurred in Lee's hotel room, he recalled that Robbins telephoned him from the hotel about the pay issue.

5 Robbins recalled that Witcofski acknowledged that he would do whatever it took to satisfy the employees. Robbins spoke with the other employees and the employees collectively agreed that the insured drivers should receive \$10-an- hour while driving and the employees who were passengers would receive minimum wage. A note written by McLeod and included in Robbins' file refers to the travel pay for Robbins based upon this formula for the time period in
10 early May 2010.

2. The issue concerning non-English speaking employees

15 Lee testified that he was aware that employees were concerned that Respondent was employing illegal immigrants. It is apparent that non-English speaking employees on the jobsite posed an issue for Robbins and other employees because of the related safety issues. Respondent does not dispute that it employed two Hispanic employees who changed their names and submitted new identification and employment documentation prior to Robbins' discharge. Lee processed the paperwork for one of the Hispanic employees who had worked for 2 years and
20 then submitted a new drivers' license and social security card with a totally new name in mid-May 2010. Lee recalled that Robbins mentioned his concerns about Respondent's employment of these non-English speaking employees who may have been illegal immigrants. Lee specifically recalled that Robbins spoke with him about these concerns during one of their driving trips to the El Paso project. As with other concerns voiced by Robbins and the other
25 employees, Lee told Hayden Witcofski about Robbins' concerns. Lee testified that he relayed these concerns because he felt that it was his job to let the project manager know if employees were upset on the job.

30 While Robbins was working on the Sports Academy project in Rogers, Arkansas, Robbins' work required that he perform a grinding task while working from the basket of a scissor lift; a piece of equipment similar to a cherry picker. Catron testified that while Robbins was in the basket, the basket "grounded out against the building" causing an electrical shock to Robbins. Although it was never determined what caused the electrical shock, Robbins experienced the electrical shock for approximately 20 to 30 seconds. He lost motor function and
35 fell to the bottom of the basket. Although employee Trevor Larouche was working from a different scissor lift, he observed what was happening to Robbins. Larouche began calling out to one of the Hispanic workers; telling him to call 911 and to shut off the equipment. Both Catron and Robbins testified that despite Larouche's attempts to get help for Robbins, he could not make the nearby Hispanic employees understand what he was saying. Witcofski not only
40 acknowledged that Robbins talked with him about the incident, but he also acknowledged that Robbins and other employees raised the safety issue of employees who did not speak English. Catron also testified that a few weeks before Robbins was terminated, Robbins told him that he intended to file a claim about Respondent's employment of illegal immigrants.

45 Catron testified that after the incident, there was discussion among the employees about the dangers of working on a crew with non-English speaking employees. Jarrid Giese testified that the inability to communicate with fellow crewmembers was an important concern for all the

employees because the language barrier could potentially result in injury or death. Giese recalled that Robbins told him that he had reported the concerns to a foreman, however, Giese did not recall with whom. Giese also recalled that Robbins announced to him his intention to take his concerns to the "Labor Board." Catron recalled that a few weeks before Robbins' termination, Robbins told him that he intended to report Respondent's employment of illegal immigrants to immigration or law enforcement officials.

Robbins testified that in early July 2010, he attempted to call the Immigration Naturalization Service but he had difficulty in getting the right number. He recalled, however, that when he was able to reach an organization identified as the Immigration Reform Law Institute, he shared this information with Keen. Robbins testified that at the time he had considered Keen to be a "good personal friend."

3. Respondent's awareness of Robbins' activities

Lee testified that Michael Richards' union activities was a topic of conversation at Respondent's facility throughout the first part of the 2010 and beyond the time of Robbins' discharge. His name came up in the morning meetings in relation to Richards' filing of the OSHA complaint. Lee also explained that while there were a number of employees who were upset about the non-English speaking employees on the job, Robbins telephoned William and Hayden Witcofski, as well as McLeod and Lee to voice his concerns. Lee explained that because of Robbins doing so, his name also came up during management discussions during the same period when the Union was a hot topic. Lee recalled that after he returned from the El Paso job and after May 2010, Robbins' name was brought up often during the 9 a.m. meetings. Lee also recalled that William and Hayden Witcofski, as well as McLeod, discussed Robbins as someone to watch out for in light of his intelligence and stubbornness.

Lee additionally recalled that there was discussion during the morning management meeting concerning whether Robbins was providing information to Richards. Management knew that Richards was getting employee names and addresses and Robbins had a reputation as being outspoken. During the meetings, Witcofski opined that Robbins might be the person who was providing the information to the union.

Robbins testified that in early July 2010, Foreman Jason Keen telephoned him and told him about a conversation that Keen had with Witcofski. Keen reported to Robbins that Witcofski had asked Keen if he was aware of Robbins having conversations with other employees about the prevailing wage rate or about illegal immigrants on the job. Robbins recalled that Keen told him that Witcofski wanted him (Keen) to keep an eye on Robbins and to report to Witcofski if he heard that Robbins was talking about such things on the jobsite.

4. Robbins actions on July 12, 2010

Robbins recalled that on July 12, 2010, he told Keen that he was going to go to the Rogers Police Department on the morning of July 13 to get additional information about illegal immigrants on the job. When he spoke with Keen by telephone, Robbins explained that he hoped that the police department could direct him to the right agency to handle this matter. Robbins recalled that he told Keen that he was trying to find the appropriate agency with which

he could file a formal charge against Respondent for knowingly hiring illegal immigrants and for what he believed to be I-9 fraud. Robbins testified that in telling Keen, he believed that Keen, as well as the other employees, were “on board” with the idea of contacting a Government agency. Robbins testified that Keen did not tell him that he must report to work at the beginning of the workday on July 13.

Robbins’ telephone records reflect that he made three telephone calls to Jason Keen on July 12, 2010. The first call to Keen at 5:11 p.m. lasted only 2 minutes. A second call to Keen at 5:31 p.m. lasted for 6 minutes and a final call to Keen at 7:03 p.m. lasted for only 1 minute. Robbins testified that although he had discussions with Keen at work about his intent to contact the police department, he recalled that in one of the three telephone calls on July 12, 2010, he additionally told Keen that he was going to contact the police department.

5. The events of July 13, 2010

As he had told Keen that he would do, Robbins went to the Rogers, Arkansas Police Department. He spoke first with an officer of the Criminal Investigation Division and then with an Immigration and Customs Enforcement (ICE) agent. He learned that any formal claim would have to be filed with the Fayetteville, Arkansas Immigration and Customs office and he obtained the number for that office.

While in the police department, Robbins received a message from Witcofski, telling him to contact Witcofski before going to work at the AFRC. When Robbins later spoke with Witcofski, Witcofski asked him why he was not at work. Robbins told him that he was taking care of personal business. Witcofski then told him that he had been selected for layoff. Robbins recalled that Witcofski explained that this decision was based on the fact that the AFRC project would soon be finished and also because of Robbins’ unavailability to work on weekends.

6. The reasons given for Robbins discharge

Witcofski testified that he made the decision to terminate Robbins on the morning of July 13, 2010, and that the decision was based upon Robbins’ attendance for the previous 2-week period. Witcofski explained: “It didn’t seem like he wanted to be there as bad as anybody else.” Witcofski denied, however, that he was aware of any collective or concerted type of activities or complaints that Robbins engaged in when he made the decision to terminate Robbins. He also asserted that he was unaware of any ICE complaint or complaints related to illegal immigrants. Furthermore, he contended that any complaints that Robbins made with respect to the prevailing wage rate dealt only with Robbins’ pay and did not relate to any other employees.

Specifically, Witcofski testified that during the 2-week period of time, Robbins was absent from work on July 6, 2010. Additionally, he was 2 hours late arriving for work on July 7 and 5 hours late in beginning his shift on July 10.

7. Record evidence concerning Robbins’ attendance for the period in question

Robbins does not dispute that he arrived after the scheduled starting time on July 7 or July 10. Robbins asserts, however, that he was never absent or late without informing his

Respondent characterizes Robbins complaints about Respondent’s failure to pay the prevailing wage rate as simply personal complaints about “short pay.” Furthermore, Respondent contends that Robbins engaged in disloyal behavior regarding perceived “illegals” and that “this disloyalty was not concerted activity.” In his brief, counsel for Respondent characterized Robbins actions as merely personal dislikes and “gripes” and asserts that Robbins’ opinions had been known for years.

In cases involving an alleged violation of Section 8(a)(3) and (1) of the Act, an employer’s motivation is frequently in issue. The Board’s causation test for evaluating such cases that turn on the employer’s motivation was first established in the Board’s landmark decision in *Wright Line*, 251 NLRB 1083, 1088 (1980). This test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee’s protected conduct motivated the employer’s adverse action. The essential elements of establishing discrimination include protected activity that is known to the employer and hostility or animus toward the protected activity. *Western Plant Services*, 322 NLRB 183, 194 (1996); *Best Plumbing Supply*, 310 NLRB 143 (1993). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. *Equitable Resources Exploration*, 307 NLRB 730, 731 (1992). Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity or it may be based on circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004).

Although Respondent argues in its brief that the burden of proof never shifts to the Respondent, the Board has held that if the General Counsel establishes a prima facie case, the burden then shifts to the employer to persuade the trier-of-fact that the same adverse action would have occurred even absent the employee’s protected activity. *Best Plumbing Supply* at 143. To meet this burden, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). Furthermore, the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude a finding of discrimination. *J.P. Stevens & Co., v. NLRB*, 638 F. 2d 676, 681 (4th Cir. 1980). When, however, an employer presents a legitimate basis for its actions that is found to be false or not in fact relied upon, the respondent employer fails by definition to show that it would have taken the same actions for those reasons, absent the protected conduct. Accordingly, there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). “For a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

2. Whether Robbins was engaged in protected concerted activity

Section 7 of the Act protects the right of employees to engage in concerted activity for their mutual aid and protection. Respondent depicts Robbins’ complaints about Respondent’s failure to pay the prevailing wage rate as self-serving and aimed at correcting his own short pay. Respondent urges that all discrepancies raised by Robbins were corrected and that such pay discrepancies were fairly common occurrences for employees. With respect to Robbins’ concerns about non-English speaking employees and Respondent’s possible employment of

illegal immigrants, Respondent terms Robbins' complaints as "disloyal" and merely "personal dislikes" and "gripes."

5 Respondent argues that Robbins' complaints related to things other than collective bargaining and also argues that 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. Respondent argues that there is no evidence that Robbins was ever authorized by other employees to raise the complaints about prevailing wage rate or about the employment of the perceived illegal immigrants. Respondent characterizes Robbins' actions as
10 solely for his own benefit as the result affected his own paycheck and his preference to work in an atmosphere without individuals who were perceived as illegal.

15 In his testimony, Witcofski contended that while Robbins raised concerns about prevailing wage and safety issues related to non-English speaking employees, Robbins never "literally" said that he was bringing these concerns on behalf of other employees. Witcofski asserted that because Robbins never came to him and prefaced his comments by identifying himself as a representative of all of the employees, he (Witcofski) did not consider the comments to be made on behalf of other employees.

20 In this case, there is no allegation that Robbins was accompanied by other employees when he attempted to secure the prevailing wage rate on jobs or when he raised concerns about Respondent's possible employment of illegal aliens. Although he testified that he voiced concerns about these issues to management at various times, he did so individually and not as a part of a group effort. Only Robbins signed the letter to the Department of Labor and no one else
25 accompanied him to the Rogers Police Department on July 13, 2010. In essence, Robbins acted alone in the pursuit of his concerns about the prevailing wage rate and about the employment of the non-English speaking employees. The Board has long held, however, that group action is not deemed a prerequisite to concerted activity and the single employee's action may be the preliminary step to acting in concert. *Walls Mfg. Co.*, 128 NLRB 487, 493 (1960). Furthermore,
30 the Board does not require any proof of authorization in order to establish that a solitary individual has engaged in concerted activity. On the contrary, the Board has found that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group. *Alchris Corp.*, 301 NLRB 182 fn. 4 (1991).

35 The record evidence reflects that Respondent's failure to pay the prevailing wage rate was an issue of concern to other employees and not simply a concern of Robbins. Respondent was aware of the employees' concerns from not only Robbins, but from complaints by other employees. In April 2010, Witcofski was notified of the prevailing wage rate claim filed by
40 employee Kenneth Catron. Lee credibly testified that he conveyed these questions and concerns from employees to Respondent's management. The Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment." *Triana Industries*, 245 NLRB 1258, 1258 (1979). The Board has, in fact, termed wages as probably the most critical element in
45 employment, as well as "the grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995).

After Robbins experienced the electrical shock, the issue of the language barrier among employees became a topic of discussion among employees. Although Robbins appears to have been the only employee who actually experienced a specific safety risk as a result of the language barrier, the potential risk to all employees was present. Accordingly, Robbins' safety concerns and complaints about Respondent's possible employment of illegal immigrants constituted concerted activity within the meaning of Section 7 of the Act. *Wabash Alloys*, 282 NLRB 391, 391 (1986).

3. Whether Robbins is otherwise removed from the protection of the Act

Respondent maintains that it did not know of Robbins' contact with either Government agencies or private organizations prior to his termination. Despite the fact that Respondent does not assert that it based its decision to terminate Robbins on Robbins' contact with any outside entities, Respondent nevertheless contends that Robbins' actions were disloyal and thus removed him from the protection of the Act. Citing an Eighth Circuit decision in *St. Luke Episcopal-Presbyterian Hospitals, Inc. v. NLRB*³, Respondent contends that even within the bounds of concerted activity, an employer does not have to tolerate employee misconduct that is flagrant or that renders the employee unfit for employment. In the 2001 case cited by Respondent, a registered nurse appeared on a local news broadcast and accused the hospital of jeopardizing the health of mothers and babies by altering shift assignments and responsibilities of certain registered nurses. The court found that such activity was not concerted activity protected by the Act inasmuch as such activity disparaged the quality of patient care in a way guaranteed to adversely affect the hospital's reputation and the statements were materially false and misleading.

Respondent contends that while Robbins' complaints regarding illegal workers were false, such falsity and "discriminatory animus" are not the most fundamental problem. Respondent asserts that Robbins contacted an anti-immigration advocacy group that shared his views and prejudices. Respondent asserts that Robbins' call to the advocacy group was solely for the purpose of creating discord among Respondent's work force and pitting some employees against others. Respondent maintains that such action is the classic type of disloyalty that forfeits any protection or remedy.

Although Respondent submits that Robbins' conduct was not protected because his complaints were false, the Board has held that an employee's incorrect perceptions of working conditions does not remove protected conduct based on those perceptions from the protections of the Act. *R.J. Liberto, Inc.*, 235 NLRB 1450, 1453 (1978). Additionally, the truth or falsity of a communication is immaterial and is not the test of its protected character. *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 fn. 12 (1982).

Furthermore, there is no evidence that Robbins' contact with the Immigration Reform Law Institute (IRLI) constituted conduct that would lose the protection of the Act. The letter that Robbins received from the IRLI approximately a month prior to his termination indicates that the IRLI is a nonprofit public interest law firm whose mission is to end illegal immigration and to set levels that are consistent with the national interest. In the June 9, 2010 letter to Robbins, the law firm acknowledged receipt of Robbins' request for legal assistance. The letter went on to

³ 268 F. 3d 575 (8th Cir. 2001).

confirm that his inquiry would be treated confidentially and he was asked not to discuss with third parties the information that he discussed with the firm. By the wording of this letter, there is no indication that any of Robbins' concerns about the potentially illegal workers would be disseminated to other entities or to the public. Additionally, the letter indicates that Robbins sought only legal assistance in his pursuit of the issue of illegal workers employed by Respondent. Certainly, Robbins' conduct is not at all similar to that of the registered nurse in the case cited by Respondent. His conduct in this regard does not rise to the level of such flagrant disloyalty and disruption of the workplace that Robbins would lose the protection of the Act.

Accordingly, Robbins' complaints and concerns about the prevailing wage rate and Respondent's employment of non-English speaking employees and potential illegal immigrants, as well as his additional actions in pursuit of those concerns, constitute protected concerted activity.

4. Respondent's knowledge of Robbins' protected concerted activities

Respondent asserts that Witcofski had no knowledge that Robbins filed a complaint with the Department of Labor before his termination or that he spoke with any law enforcement authorities concerning Respondent's potential employment of illegal immigrants.

There is no question that in order for the Acting General Counsel to prove that Respondent terminated Robbins because of his protected concerted activity and/or because of its perception that Robbins was assisting the union, the Acting General Counsel must prove that Respondent had knowledge of such activities or suspected activities. Knowledge of concerted activities may, however, be shown by circumstantial as well as direct evidence. *Famet, Inc.*, 202 NLRB 409, 410 (1973).

Chad Lee credibly testified that Robbins was a very outspoken employee who did not hesitate to voice his concerns to Witcofski or McLeod. Lee recalled that Robbins voiced concerns about Respondent's employees who may have been illegal immigrants, as well as about Respondent's failure to pay the prevailing wage rate. Lee recalled that Robbins was the most outspoken employee about the prevailing wage rate issue and he met with other employees in small groups on the jobsite to talk about the issue. The employees subsequently presented their questions to Lee and wanted him to do something about it. Lee acted as the intermediary and passed along the questions and concerns to McLeod. There is no dispute that Respondent adjusted Robbins' pay in response to his discussions with management.

During one of the trips to El Paso and in Lee's presence, Robbins telephoned a Government agency to get more information concerning the prevailing wage issue. Witcofski admitted that Robbins discussed with him shortages in pay related to the prevailing wage rate. Witcofski also acknowledged that Robbins telephoned him while Robbins was working in El Paso and reported that employees were concerned about Respondent's failure to adequately compensate them for their travel time to El Paso.

Witcofski also admitted that prior to his termination, Robbins raised safety concerns about Respondent's employment of non-English speaking employees and that Robbins raised concerns about the incident when he was electrically shocked on the Academy Sports project.

Employee Catron testified that a couple of weeks prior to Robbins' termination, Robbins told him that he intended to report Respondent's employment of illegal immigrants to immigration or law enforcement officials.

5 As discussed above, Robbins contacted the Immigration Reform Law Institute (IRLI) prior to June 9, 2010. Because he considered Keen to be a personal friend, Robbins told Keen about this contact. He also told Keen that even after this inquiry, he was not seeing any results. Robbins testified that on July 12, 2010, he told Keen that he was going to the Rogers Police Department in hopes that they could direct him to the appropriate agency with which he could
10 speak about this issue. Robbins also testified that in early July, Keen told him that Witcofski had instructed him to "keep an eye" on Robbins and to report back if Keen heard Robbins discussing issues relating to prevailing wages or illegal immigrants on the job.

Counsel for the Acting General Counsel submits that Robbins told Keen about both his
15 letter to the Department of Labor as well as his intention to go to the Rogers Police Department on July 13. Counsel asserts that Robbins did so only days after Witcofski told Keen to keep an eye on Robbins and to report any activities relating to the prevailing wage issue or the illegal employee issue. Counsel for the Acting General Counsel submits that Robbins' discharge within 24 hours of his contact with the Department of Labor and during the time that he was at
20 the Rogers Police Department seeking to report Respondent to immigration authorities, provides a strong nexus to infer animus. In addition to animus, knowledge may also be inferred from such circumstantial evidence as the timing of the alleged discriminatory action. *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *General Iron Corp.*, 218 NLRB 770, 778 (1975).

25 Even when an employer may argue that there is no direct evidence that it had knowledge of the employees' protected activity; the Board has found that such knowledge may be inferred from the record as a whole. *Petroleum Electronics, Inc.*, 250 NLRB 265, 269 (1980), citing *Wiese Plow Welding Co.*, 123 NLRB 616, 618 (1959). When inferring knowledge, the Board has considered not only the timing of the alleged discriminatory actions, but also the employer's
30 general knowledge of the employees' protected activities, as well as the pretextual reasons given for the adverse personnel actions. *Regional Home Care, Inc.*, 329 NLRB 85 (1999).

Robbins testified that he told Keen that he had filed the Department of Labor complaint and of his intentions to go to the Rogers Police Department to report Respondent to the
35 immigration authorities. Although Keen denies that Robbins did so, I do not credit Keen's testimony in this regard. As discussed more fully below, I found Keen's testimony to be contradictory and overall incredible. As a lower level supervisor working for an essentially family-owned and managed entity, it is reasonable that Keen's testimony was influenced by concerns for his own job security and thus it is not surprising that his testimony was consistent
40 with Witcofski's testimony. Based upon Robbins' past interaction with Keen, as well as the apparent personal relationship they shared, it is reasonable that Robbins would have shared with Keen his intentions to pursue both the issue of the prevailing wage rate as well as his concerns about the alleged illegal immigrants. Crediting Robbins' testimony, I also find that Keen's knowledge as a stipulated supervisor is imputed to Respondent. *Dickey John Corp.*, 237 NLRB
45 143 fn. 8 (1978); *Cavender Oldsmobile Co.*, 181 NLRB 148 fn. 6 (1970). As the Board has noted, imputation of a supervisor's knowledge of protected activity is not a novel concept but rather a concept that is recognized under established case law. *State Plaza Inc.*, 347 NLRB 755

(2006); *Dobbs International Services.*, 335 NLRB 972, 973 (2001); *Dr. Phillip Megdal, D.D.S. Inc.*, 267 NLRB 82 (1983).

5 Furthermore, I credit Lee’s testimony concerning Respondent’s suspicions that Robbins was collaborating with Richards. In early 2010 and continuing through the summer, Richards actively sought to organize Respondent’s employees. As a part of his salting activities, Richards reported Respondent to OSHA for any perceived safety violations. As discussed later in this decision, Witcofski told employees in his October meeting about the fines that resulted from Richards’ action. Thus, it appears that based upon Lee’s credible testimony, Respondent 10 suspected that Robbins was collaborating with the Union to target Respondent for governmental scrutiny. The fact that Respondent terminated Robbins within hours of his stated intentions and his contact with the Department of Labor and ICE further reinforces Lee’s testimony.

15 Accordingly, I find that the Acting General Counsel has met its burden of establishing Respondent knowledge of Robbins’ protected concerted activity.

5. Evidence of the motivational link

20 As discussed below, I find that the overall evidence reflects a nexus or motivational link between Robbins’ protected activity and Respondent’s precipitous decision to terminate him on July 13, 2010. Respondent’s contention that it relied upon Robbins’ attendance for the previous as the basis for termination is suspect based upon the total record evidence.

25 Respondent’s employees do not use time clocks or any other automated means of recording their attendance. Foremen are responsible for determining whether employees are present at the beginning of a shift and this information is then communicated to Respondent’s office on a daily basis for purposes of payroll preparation. In his job as internal control officer, Lee received the daily reports from the foremen and then forwarded the information to McLeod. The record reflects that Respondent does not have a standardized attendance policy or a 30 progressive discipline system in place. Lee explained that the attendance policy was not “set-in-stone” and was based on work performance. Lee testified that if an employee had a valid reason for an absence or if the employee contacted a foreman or project manager in advance, the attendance policy was “pretty lenient.” In contrast, if an employee was not a hard worker and didn’t know what he was doing, his failure to report to work would then become a problem.

35 Clerical employee Denise Rusco further corroborated Lee’s testimony concerning leniency. In Respondent’s meeting with employees on October 15, 2010, Rusco spoke with the employees about the attendance policy in place. She reminded employees that they missed work on a regular basis for various reasons other than being ill. She added that while they did so and it 40 was “no problem,” they could not do that if a union represented them.

45 Witcofski concedes that he did not make the decision to terminate Robbins until the morning of July 13. He contends that it was at that time that he looked back to prior dates when Robbins was either absent or when he came in after the scheduled starting time. Witcofski testified that if an employee is going to be late or will be unable to come in to work on a scheduled workday, he is to contact his foreman and/or the office. Robbins does not dispute that

he came to work after the scheduled starting time on July 7 and 10. He maintains however, that he notified his foreman in advance of his doing so.

5 Keen was Robbins' foreman for only about 2 weeks prior to Robbins' termination. When presented by the Respondent as a witness, Keen testified that Robbins did not report to work at the scheduled starting time on July 7, 10, and 13. He maintained that on each occasion Robbins did so without giving any advance notice. He also testified that each time he reported to Witcofski that Robbins was not present at the scheduled starting time; he had also reported to Witcofski that Robbins had not given advance notice that he would be late.

10 The Acting General Counsel introduced Robbins' telephone records for July 6, 2010, to show a call to Keen from Robbins at 6:56 p.m. that lasted 1 minute. The record also reflects an 8-minute call from Keen to Robbins at 8:01 p.m. on that same day. Although he did not explain what had been discussed in those conversations, Keen nevertheless claimed that the calls had not involved Robbins' reporting that he would be late the next morning. Robbins' telephone records also reflect that Robbins had a 4-minute telephone conversation with Keen at 5:46 p.m. on July 9, 2010. Keen admitted that he could not recall what was discussed in this call and that it is possible that Robbins may have told him that he would have to be late coming in on July 10. Upon inquiry by Respondent's counsel, Keen also testified that Robbins was absent from work on July 6, 2010, without notice. He denied that he later checked his records to discover that Robbins had been present. He did not, however, explain or contradict the July 19, 2010 document confirming that Robbins was paid for working 10 hours on July 6, 2010. Despite Keen's assertion that he reported all of the late arrivals, as well as the alleged July 6 absence to Witcofski, neither Keen nor Witcofski presented any evidence that they discussed or considered discipline for Robbins because of these absences.

20 Keen also denied that Robbins told him anything about his intention to go to the Rogers Police Department on July 13 to file an ICE complaint. He confirmed, however, that he received telephone calls from Robbins on both July 12 and 13. He did not dispute that Robbins made a 2-minute call to him at 5:11 p.m. or that Robbins made a 6-minute call to him at 5:31 p.m. on July 12. Additionally, he did not deny that Robbins made a 1-minute call to him at 7:03 p.m. later that same evening. Finally, he did not deny that Robbins also made an 8-minute call to him at 11:38 on July 13. On cross-examination, Keen could not recall what was discussed in any of the telephone conversations with Robbins on either July 12 or 13. He further acknowledged that during the telephone conversations with Robbins on July 12, it is possible that Robbins told him that he would not be in the next morning. When asked if it were possible that Robbins told him on July 13 that he was pursuing the immigration issue, he simply answered that he didn't remember what he had discussed with Robbins on July 13.

30 Keen also denied that Robbins told him anything about his intention to go to the Rogers Police Department on July 13 to file an ICE complaint. He confirmed, however, that he received telephone calls from Robbins on both July 12 and 13. He did not dispute that Robbins made a 2-minute call to him at 5:11 p.m. or that Robbins made a 6-minute call to him at 5:31 p.m. on July 12. Additionally, he did not deny that Robbins made a 1-minute call to him at 7:03 p.m. later that same evening. Finally, he did not deny that Robbins also made an 8-minute call to him at 11:38 on July 13. On cross-examination, Keen could not recall what was discussed in any of the telephone conversations with Robbins on either July 12 or 13. He further acknowledged that during the telephone conversations with Robbins on July 12, it is possible that Robbins told him that he would not be in the next morning. When asked if it were possible that Robbins told him on July 13 that he was pursuing the immigration issue, he simply answered that he didn't remember what he had discussed with Robbins on July 13.

40 In his testimony, Keen consistently denied that he had ever been aware of the United States Department of Labor claim that Robbins filed and he also denied that Robbins had ever discussed any concerns about immigration issues or about prevailing wage issues. Furthermore, Keen claimed to be unaware that any employees had safety concerns about working with non-English speaking employees. Keen also denied knowing that any of the employees had their names changed while working for Respondent. He did, however, acknowledge that he had worked for Respondent for 5 years and had been on previous jobs with Robbins as a fellow crewmember. Although he asserted that he was more acquaintance than friend with Robbins, he

acknowledged that they kept in “pretty regular communication.” He confirmed that he had not only given Robbins a ride to work, but he had also loaned Robbins his car to get to work when Robbins had worked on the Sports Academy project.

5 Although Keen was only asked about his 11:28 a.m. telephone conversation with Robbins
on July 13, 2010, Robbins’ telephone records reflect a total of five telephone contacts with Keen
on July 13, 2010. Robbins’ calls to Keen at 12:41 p.m. and at 3:54 p.m. only lasted 1 minute and
2 minutes respectively. At 8:25 p.m., a call was placed from Robbins to Keen that lasted 2
10 minutes. The more interesting call, however, is the call from Keen to Robbins at 9:35 p.m. that
lasted for 18 minutes. Although Keen appeared to play down his relationship with Robbins in
his testimony, Robbins’ telephone records suggests that they were more than mere
acquaintances. At the time of the last telephone conversation on July 13, 2010, Robbins had
15 already been notified that he was terminated and there was no longer a work relationship
between Robbins and Keen. If there was no longer a working relationship, it is logical that their
discussion at this time of the day for 18 minutes was of a personal nature. Moreover, because
there appears to have been a personal relationship, it is reasonable that Keen was well aware of
Robbins’ concerns about not only the prevailing wage issue, but also the issue involving possible
illegal immigrants and non-English speaking employees. Other employees who testified were
well aware of Robbins’ concerns about both these issues. Lee credibly testified that he had
20 reported to management that Robbins had raised these concerns and that Robbins and his
complaints had been discussed in the morning management meeting. Even Witcofski
acknowledges that Robbins complained to him about not being paid the prevailing wage rate.
For Keen to assert that he had no knowledge of Robbins’ complaints and concerns is simply not
credible. Furthermore, Witcofski acknowledged that two of his Hispanic employees changed
25 their names and identification prior to Robbins’ discharge. Employees and foremen were
notified of the change and foremen were instructed to use the employees’ new names for their
records. It is simply not credible that Keen had no knowledge that these employees changed
their names and identities.

30 As I write this decision, I cannot say with certainty how Witcofski discovered that
Robbins went to the Arkansas Police Department on July 13, 2010, to file an ICE report. The
total record evidence, however, supports an inference that Respondent knew about Robbins’
protected concerted actions on July 13, 2010. Counsel for the Acting General Counsel submits
35 that in early July, Keen told Robbins that Witcofski instructed him to “keep an eye on “ Robbins
and report back to Witcofski if he heard Robbins discussing issues relating to prevailing wages
or illegal immigrants. Counsel for the Acting General Counsel asserts that Keen did as he was
instructed. It is apparent that either Keen or some of the other employees disclosed Robbins’
intentions to Witcofski or other management. Furthermore, Witcofski testified that he had an
affiliation with the local Sheriff’s department and his personal ties with law enforcement may
40 have been a factor in his discovering Robbins’ actions on the morning of July 13, 2010. The
undisputed evidence reflects that something happened on July 13 to trigger Witcofski’s decision
to terminate Robbins. Although Witcofski asserts that it was Robbins’ absence on July 13 that
led to his selection for layoff, the overall record does not support his assertion. Although there is
no evidence that Robbins had received any prior discipline or even any counseling concerning
45 his attendance, Witcofski seized upon attendance as a basis for terminating Robbins. Although
Keen initially testified that Robbins did not give any notice for his alleged absence on July 6 and
his late arrivals on July 7, 10, and 13, he later acknowledged that he had telephone conversations

with Robbins on the evenings of July 6, 9, and 12 and he could not dispute that Robbins may have given notice that he was going to be late on July 7, 10, and 13. Although Keen contended that Robbins did not come to work on July 6, he could not dispute that Robbins was later compensated for hours worked on July 6. Overall, I do not find Keen’s testimony to be
 5 consistent or plausible in light of other record evidence. His denial that he was aware of Robbins’ concerns about the prevailing wage and Respondent’s employment of non-English speaking employees, as well as possible illegal immigrants is simply not credible in light of the testimony of Lee and other employees. Even Witcofski acknowledges that Robbins discussed these issues with him. Therefore, Keen’s adamant denials are all the more suspect and
 10 unsupported by the total record evidence.

Lee credibly testified that Robbins’ complaints and issues were a topic of discussion in the morning management meetings. Lee also credibly testified that there was discussion that Robbins might be involved in giving information to Richards to use in his union campaign.
 15 Witcofski’s statements in his October 15, 2010 employee meeting reflect his concerns about the Union’s organizational efforts.

Based upon the record evidence as a whole, I find that counsel for the Acting General Counsel has met its burden in showing the requisite animus that is required for establishing a
 20 prima facie case that Respondent’s termination of Robbins was discriminatorily motivated.

6. Whether Respondent has demonstrated that it would have terminated Robbins in the absence of his protected concerted activity

25 As I have discussed above, I credit Robbins’ testimony and find that he provided advance notice to Keen for any alleged tardiness or absences during the period of time that Respondent relied upon as a basis for Robbins’ termination. Even if Robbins had not given notice as he alleges, the record reflects that Robbins’ was treated disparately.

30 Respondent contends that during the 2 weeks before his termination, Robbins had repeated tardies and absences that were the legitimate reason and cause for his termination. In its posthearing brief, Respondent asserts that it terminated at least seven other employees for attendance policy violations within weeks or days before and after Robbins’ discharge and cites six exhibits in support of this assertion. The exhibits upon which Respondent relies, however,
 35 indicates that none of the employees referenced by Respondent were terminated under similar circumstances to Robbins. Only three of the referenced employees were terminated before Robbins. Of the six termination notices, only one employee is documented as an involuntary termination; the remaining employees are documented as voluntary terminations.

40 The termination slip for Jorge R. V.⁴ (whose name had been changed from Rudy C) was considered to be a voluntary termination on July 12, 2010 because of “no call, no show.” The underlying paperwork, however, reflects that Jorge R. V. reported a non-work related eye injury. The employee reported that he was going to the clinic to have his eye checked and he was instructed to let the office know when he could return to work. Employee Christopher O. was

⁴ R Exh. No. 28.

documented as a voluntary termination⁵ on June 29, 2010, based upon his walking out on the job on June 25, 2010. Employee Jesse S.’s July 9, 2010 termination⁶ is documented as involuntary. The wording on the separation notice designates the basis for the termination as simply “Replaced/not a good fit.” In further explanation, the notice includes: “We have an uneasy
5 feeling about staying committed and being able to go out of town on a regular basis.”

Employee Nathaniel H. was documented as a voluntary termination⁷ on September 16, 2010, for “no call, no show.” Employee Kenneth C.’s July 26, 2010 separation from
10 employment is documented as a voluntary termination for personal reasons⁸. In the remarks section of the separation notice, Respondent documents that Kenneth C. did not show up reporting an injury to his ankle. When told to report to work anyway to do work that did not require his being on his feet, the employee refused. His file also contains a June 24, 2010 notice of employee nonconformance, confirming that the June notice was his third notice of noncompliance, which includes a removal from assignment. Employee Thomas S. is
15 documented as receiving a voluntary termination for personal reasons⁹ on July 14, 2010. The comments section of the form includes the wording: “Thomas said that he can’t handle the roofing work.”

Counsel for the Acting General Counsel also submits that during the period of time from
20 January 1through December 31, 2010, Respondent did not discharge any other employees for excessive absenteeism/tardiness. Although Respondent asserts that it terminated Robbins because of his attendance during the 2-week period prior to his termination, Robbins received no attendance-related discipline prior to his discharge. The record reflects, however, that Respondent has treated other employees with far more tolerance than Robbins. On November
25 11, 2009, Respondent terminated employee Trevor L. for “no call/no show.” Respondent apparently rehired him as he later received employee nonconformance actions on September 10 and October 18, 2010, for conduct related to attendance. On March 23, 2011, Trevor L. was again given an employee nonconformance action for showing up late to work and on May 4, 2011, his tardiness to work was excused when he contended that he had told his foreman prior to
30 starting time that he would be late. In contrast to Respondent’s abrupt treatment of Robbins, Respondent not only rehired Trevor L., but has also continued to employ him despite his attendance infractions.

The Board has found that under *Wright Line*, an employer cannot carry its burden of
35 persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but it must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 85, 95 (1989).

40 The failure of an employer to show that it has treated employees in the past in a similar manner for engaging in similar misconduct to that of the alleged discriminate has been found to

⁵ R Exh. No. 30.
⁶ R Exh. No. 31.
⁷ R Exh. No. 29.
⁸ R Exh. No.18.
⁹ GC Exh. No. 28.

be a significant defect in the employer's meeting its *Wright Line* burden. 10 Ellicott Square Corp., 320 NLRB 762, 775 (996), enfd. 104 F. 3d 354 (2d Cir. 1996). Respondent's records reflect that Robbins was not treated similarly to other employees and the terminations cited by Respondent have little or no relevance to Respondent's treatment of Robbins. Accordingly, the
5 evidence of disparate treatment does not support the Respondent's position and diminishes its ability to meet its burden under *Wright Line*. *Pope Concrete Products*, 305 NLRB 989, 990 (1991).

The overall evidence supports a finding that Respondent seized upon Robbins' attendance as a pretext to terminate Robbins for his protected concerted activity and because of Respondent's suspicions that Robbins was assisting the Union. Robbins' attendance was never a problem for Respondent until Robbins took his concerns to the Department of Labor and the local law enforcement authorities. There are a number of factors that lead me to conclude that Respondent's asserted reason for Robbins' discharge is pretextual. As I have discussed above,
10 the timing of Robbins' discharge is suspect. Although Witcofski contends that Robbins' absence from work at the scheduled starting time on July 13, 2010, triggered his investigation into Robbins' attendance for the previous 2 weeks, there is no evidence that Robbins was disciplined or even counseled about his attendance prior to that date. Keen testified that each time that Robbins was late during this 2-week period, he reported to Witcofski that Robbins was late or
15 absent without notice. As I have discussed above, I do not credit Keen's testimony in this regard. If I were to find this testimony to be credible, however, it begs the question as to why Witcofski decided to terminate Robbins on July 13 when Respondent had allegedly known that Robbins had been late or absence without notice during the entire 2-week period.

An additional factor in demonstrating pretext is Respondent's shifting reasons for terminating Robbins. Initially, Robbins received a termination notice showing that he was involuntarily terminated for excessive absenteeism/tardiness. Respondent does not dispute that after Robbins applied for unemployment benefits with the Arkansas Department of Workforce Services, Respondent amended Robbins' termination notice to reflect that he was laid off for
25 lack of work. Although Witcofski told Robbins that he amended the notice in order that Robbins could be eligible for unemployment benefits, Witcofski's modification of the termination notice contradicts his assertion that Robbins' attendance was so pronounced that it triggered his termination. Witcofski's modification further raises the obvious question. If Robbins' attendance was so repugnant that it required his immediate termination without any underlying discipline, why did Respondent tell the State agency otherwise?
30

A third factor in demonstrating Respondent's pretext in terminating Robbins is Respondent's attempt to augment its rationale for the termination. Although the initial termination slip for Robbins' indicated that he was involuntarily terminated because of excessive
35 absenteeism/tardiness, Witcofski asserted at trial that Robbins' termination was also based upon other factors. He cited such factors as "unpredictability of his physical actions;" how he got along with other employees on the jobsite; and his job performance on the Academy Sports project. Witcofski admitted that when he gave an affidavit to the Board 4 months prior to his testimony, he never mentioned anything about Robbins' work deficiencies on the Academy
40 Sports job. Witcofski also admitted that Robbins did not receive any nonconformance actions because of his work on the Academy Sports job. Witcofski further asserted that he added a nonconformance action to Robbins' file on July 9, 2010, because of an altercation between

Robbins and another employee. Although the document describes a threat that Robbins allegedly made to a fellow employee, there is no confirmation that any discipline was given to Robbins or that any supervisor discussed this incident with Robbins. Witcofski further acknowledged that although Robbins had been involved in a physical altercation with employee Jarrid Giese in September 2009, he was not terminated for the incident. Although Robbins quit his job with Respondent to take another job on September 29, 2009, Respondent rehired Robbins on October 15, 2009. Thus, the only nonconformance action form in Robbins' file other than the one for September 2009 is the form that Witcofski contends that he added on the morning of July 9, 2010.

The Board has held that, where an employer's asserted reason for termination is found to be a pretext, by definition, the employer has failed to meet its burden under *Wright Line. Metropolitan Transportation Services*, 351 NLRB 657, 660 (2007); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F. 2d 799 (6th Cir. 1982).

Based upon the credited evidence, I conclude that Respondent has failed to demonstrate with a preponderance of the credible evidence that it would have terminated Robbins in the absence of his protected concerted activity.

7. Whether Robbins has forfeited his right to reinstatement and backpay

There can be no dispute that the Board is authorized under Section 10(c) of the Act to remedy unfair labor practices with "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. NLRB* 379 U.S. 203, 215 (1964). Accordingly, reinstatement and backpay are the traditional Board remedies for a discriminatory discharge. *Precoat Metals*, 341 NLRB 1137, 1138 (2004). Respondent contends, however, that Robbins had forfeited his right to reinstatement and backpay because of his criminal convictions.

Respondent acknowledges that during the time that Robbins was employed, Respondent was aware that Robbins had a criminal record. Respondent even confirms in the posthearing brief that such records are not particularly unusual for steel connectors. Respondent contends, however, that after Robbins' termination, it discovered the "severity and nature of this criminal record. Respondent maintains that had Robbins been employed when this information was discovered, he would have been terminated and if the information had been known when a hiring decision was made, Robbins would never have been hired in the first place.

Although Robbins does not dispute that he had felony convictions in 1996, 1997, 2001, and 2005 involving theft, burglary, and robbery, he also testified that Respondent hired him after his serving a prison sentence for the 2005 conviction. Although a portion of Robbins personnel file was introduced into evidence, Robbins original application and date of hire are not included. There is nothing in the file, however, to contradict Robbins assertion that Respondent first hired him after his 2005 conviction. The file reflects that Robbins left Respondent's employment on November 3, 2008, to take another job. Respondent hired him again on January 2, 2009. Robbins personnel file reflects that later in the year, Robbins again resigned his employment on September 29, 2009, to take another job. On October 15, 2009, Robbins was rehired. While it is apparent that Respondent hired Robbins on three separate occasions, there is no evidence that

Respondent ever inquired as to whether Robbins had prior criminal convictions or any criminal background. Although Witcofski asserted that he had not been allowed to have any felons working on the Army Corps of Engineer’s job, he also admitted that he had heard that Robbins had a criminal conviction during Robbins’ employment.

5

As counsel for the Acting General Counsel points out, there is nothing in Respondent’s employee handbook that that sets forth a policy relating to pre or posthire criminal convictions. Furthermore, Respondent presented no evidence that it had ever discharged an employee for having a criminal background.

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Respondent does not contend that Robbins’ prior convictions affected his previous work performance or his ability to get along with other employees and Respondent does not explain with any specificity how Robbins’ convictions would affect his work performance or ability to get along with fellow employees in the future. Respondent has not demonstrated how Robbins’ presence would have a disruptive effect because of his prior convictions. Respondent simply contends that Robbins’ “theft and dishonesty” places Respondent at significant risk, and thus would warrant immediate discharge. In considering the effect of a criminal conviction on the issue of an employee’s reinstatement, the Fourth Circuit pointed out that “It is not the fact that employees have been convicted of crime that renders them ineligible for reinstatement, but the fact that they have been guilty of unlawful conduct which would make their presence undesirable because of the disruptive effect which it would have upon the employer’s business.” *National Labor Relations Board v. Longview Furniture Co.*, 206 F. 2d 274, 276 (4th Cir. 1953).

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In the instant case, Robbins had a number of convictions prior to his working for Respondent. Although Respondent contends that it can not take Robbins back because of these prior convictions, Respondent apparently made no inquiry concerning whether Robbins had a criminal record at any of the three times that Respondent hired Robbins. Even after Witcofski admittedly learned that Robbins had a prior conviction while he was employed, Witcofski apparently made no attempt to get additional information. Robbins also acknowledges that in November 2010 and after his termination, he was charged with, and pled guilty, for the theft of a disposal head for a toothbrush. Robbins testified that at the time he and his wife were experiencing financial problems and he admits that what he did was “foolish.” At the time of this last incident, there had been a period of 5 years’ since his previous conviction. It was during this same 5-year period that he was hired by Respondent on three separate occasions. Respondent has presented no evidence to show that Robbins’ mistake in November 2010 is of such a nature that it would have a disruptive effect on Respondent’s business if Robbins returned to work. Accordingly, I do not find that Respondent has demonstrated that Robbins’ conviction in 2010 or the previous convictions prior to 2005 would result in the forfeiture of Robbins’ right to reinstatement or backpay.

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8. The effect of prior convictions on Robbins’ credibility

I cannot leave the issue of Robbins’ prior convictions without addressing the issue of the their effect on Robbins’ credibility. I am mindful that under Rule 609 (a)(2) of the Federal Rules of Evidence, evidence of prior convictions is admissible to attack credibility when it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonestly or false statement by the witness. In finding that Respondent discriminatorily

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5 terminated Robbins, I have relied in part on the pretextual nature of Respondent's asserted basis for the discharge, as well as the abrupt timing and circumstances of Robbins' discharge. Although I have credited Robbins' testimony that he engaged in protected concerted activity before his termination; Robbins' testimony was also corroborated by other employees as well as
10 management. Both Lee and Witcofski corroborated Robbins' testimony concerning his complaints about Respondent's failure to pay the prevailing wage rate, Respondent's failure to pay travel time, and the safety concerns about Respondent's employment of non-English speaking employees. The responding letters from not only the United States Department of Labor, but also the IRLI further corroborate Robbins' testimony concerning his contacts with government and outside agencies.

15 I have also credited Robbins' testimony that he notified Keen prior to his coming to work late on July 7, 10, and 13. For the reasons described above, I did not find Keen's testimony credible in this regard. Furthermore, Robbins' testimony is further corroborated and bolstered by Robbins' telephone records.

20 Thus, while I have credited Robbins, I have not relied solely upon his testimony for my ultimate finding. It is apparent that prior to his working for Respondent, Robbins' engaged in conduct that could arguably raise the issue of honesty. Unfortunately, he again engaged in similar conduct after his termination when he found himself in financial difficulty. Counsel for the Acting General Counsel submits that the mere presence of criminal convictions in Robbins' background does not automatically render him an incredible witness.

25 In crediting his testimony, I have considered Robbins' testimony as a whole, and particularly his demeanor as a witness. Despite his prior criminal conduct and the November 2010 incident, I am nevertheless persuaded that in this proceeding he was truthful.

F. Respondent's October 15, 2010 Meeting with Employees

1. Background

30 Richards recalled that in or about the last week of September or the first week of October 2010, he sent a letter to Respondent's employees. The letter reiterated the Union's interest in organizing Respondent's employees and discussed a variety of subjects including the range of union benefits, as well as the amount of union dues. Richards followed up the letter by sending a number of text messages to Respondent's employees. On about October 14, 2010, Richards learned from Robbins that Respondent had scheduled a mandatory meeting for employees at Respondent's Rogers, Arkansas office to address Richards' text messages and letter. Richards contacted employee Jarrid Geise and asked him to record the meeting. In exchange for \$100 and
40 a set of bolt bags, Geise agreed to do so. Richards met with Geise in Centerton, Arkansas and gave him a digital recording device to use in recording the meeting.

45 After the meeting on October 15, Geise telephoned Richards and confirmed that he had the recording and that the quality of the recording was good. Richards testified that after an initial attempt to get more money from Richards for the recording, Geise ultimately turned over the digital recording device for the \$100 and Richards' assurance that the bolt bag was forthcoming. Richards then saved the recording to his computer, transcribed the recording, and

provided a copy of the recording and the transcript to the Board’s regional office. The complete transcript and a copy of the digital recording were received into evidence.

5 The Acting General Counsel asserts that during the course of the meeting, Respondent, acting through Witcofski and clerical Denise Rusco, engaged in conduct in violation of Section 7 of the Act. Specifically, the Acting General Counsel alleges that during the course of the meeting, Respondent not only unlawfully interrogated employees about their union activity, but also made various threats to employees. The Acting General Counsel further submits that while acting as an agent of Respondent, clerical Denise Rusco promulgated a rule prohibiting employees from discussing working conditions with each other or with any outside party.

2. Witcofski’s presentation to employees

a. Alleged interrogation and complaint paragraph 7(a)

15 The meeting began with some discussion about work related matters and scheduled future projects. Witcofski discussed the fact that in a non-union setting, ironworkers simply have to show by testimony, affidavits, paychecks, etc. that they have worked for or with iron for three years in order to qualify as journeymen. He contrasted that with the union’s qualifications; requiring an employee to demonstrate that he or she worked under a specific journeyman for six thousand hours in addition to the completion of the apprenticeship program. Witcofski told the employees that he planned to start an apprenticeship program. He explained that Respondent would only select apprentices that “truly have it in their heart to want to be journeymen.” Although experience would be a factor, Respondent would also select employees for the program based upon their work attitude, attendance, and other things. After talking with the employees for about 51 minutes, Witcofski then asked the employees if they had received a letter from the Union. Witcofski inquired:

30 Um, has anybody gotten a letter, from the union? OK well Denise did. Somebody else who else got a letter? Somebody else got a letter, I thought.

Witcofski then explained that Denise Rusco would come into the meeting, read portions of the letter to the employees, and “testify,” as her husband had been around the Union all his life.

Analysis

35 Respondent submits that alleged interrogations are analyzed using the test set out in *Bourne v. NLRB*, 332 F. 2d 47 (2d. Cir.1964). Respondent lists these factors as (a) the history of the employer’s attitude toward its employees; (2) the type of information sought or related; (3) 40 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 has 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 reprisal will be taken if they support the Union. Although Respondent acknowledges that Witcofski is Respondent’s” top dog,” 45 Respondent submits that Witcofski has a history of good employee relations and the information that he sought was not about union sympathies. Respondent also contends that Witcofski had a valid purpose in finding out how broadly the letters were distributed because the letters contained

“patently” false statements about Respondent. Furthermore, Respondent asserts that while Respondent’s legitimate purpose for the question was not expressly stated, it was implied and the questions were tempered when Witcofski occasionally stated in his speech that he didn’t care if employees joined the Union. Finally, Respondent points out that the remarks were not made in one-on-one meetings, but occurred during an open public meeting in a congenial atmosphere.

Contrary to Respondent’s arguments, I find that Witcofski’s questioning constituted unlawful interrogation in violation of Section 7 of the Act. Respondent argues that Witcofski has a history of good employee relations and that the questioning took place in a public setting as opposed to questioning in a more formal setting. The Board has long found, however, that even a personal friendship between the interrogator and the employee cannot legalize conduct that would otherwise be unlawful. *Mayfield Dairy Farms, Inc.*, 225 NLRB 1017, 1019 (1976). In fact, an interrogation by a friendly supervisor may have a far more coercive impact on an employee than an interrogation by a hostile agent of management. *Allied Lettercraft Co.*, 272 NLRB 612, 617 (1984) citing *Mayfield Dairy* at 1019.

Respondent also argues that Witcofski was not seeking information about the employees’ union sympathies and was only inquiring as to whether they received a copy of the Union’s letter. Furthermore, Respondent asserts that since none of the employees responded that they had received a copy of the letter, the truthfulness of the employees’ responses is not a factor in the analysis. Counsel for the Acting General Counsel submits, however, that these questions were directed toward employees who had not revealed whether they were or were not union supporters. Counsel maintains that the fact that there were no audible responses to this interrogation confirms that employees reasonably understood its coercive effect. I agree. Richards engaged in an active campaign to reach Respondent’s employees, including both letters and texts to employee. Based upon the extent of his efforts, it is unlikely that John Rusco was the only employee to receive a copy of this letter. The fact that none of the employees acknowledged receipt of the letters indicates their reluctance to disclose to Witcofski that the union had contacted them. Such reluctance by the employees demonstrates the coercive nature of the questioning. Although Respondent asserts that the mere receipt of the letter would not have indicated the employees’ union views, the employees’ silence indicate that they may have believed otherwise.

Furthermore, although Respondent may not have specifically asked each employee about their own union sympathies, Witcofski’s questioning was clearly an attempt to find out information about the extent and effectiveness of the union’s organizing efforts and the employees’ involvement, and as such were coercive within the meaning of Section 8(a)(1) of the Act. *Crown Cork & Seal Co.*, 308 NLRB 445, 449–450 (1992), decision vacated on other grounds 36 F.3d 1130 (D.C Cir. 1994).

b. Alleged Threats

(1) Complaint paragraph 7(b)

As Witcofski continued, he remarked that in previous flyers, the union told employees that Respondent’s office employees received health insurance benefits. Witcofski asserted that these were lies, as even he did not have health insurance through the company. He opined that

health care coverage would probably run about \$10,000 a month for his employees. He explained that he was “all for” health care if his competitors had to provide it as well. He told the employees that the union admitted in its letter that they were targeting Respondent because it was a big company in North West Arkansas and had had a lot of employees. Witcofski went on to state the following:

OK, I have a legal right to tell you this. If you think I’m lying that’s your prerogative, but if we were union, talking about Wil-Shar, we would go broke. I didn’t say we will. I said we would go broke and we would have to close our business down because my competitors are not union, very similar to the health insurance thing you see? So the point is, is that, that would do nothing for North West Arkansas, it would do nothing for Wil-Shar, ah as much as we are struggling now, and we can’t get everybody health Insurance, why would we want to be union? OK?

(2) Complaint paragraph 7 (c)

Witcofski then talked about how the company lost money on a recent job and the increased costs for worker’s compensation coverage. He hypothesized that if all of the companies became unionized they would all be on the same playing field. He added, however, that Respondent would have to eventually shut down because Respondent would not be able to get any bids. In explaining how the Union operated he opined:

To companies like ours, and they come in and they talk to **you they and say**, Dude, you don’t understand, they’re paying Michael Richards, full time, to follow you around, to bug you, to show up at our house, so that when you open the door, when your little wife opens the door he’s standing, you know it’s called the one foot rule, if the threshold is there, before the door is answered you go one step, one foot back, and that’s how close you’re supposed to be standing when the door opens; it’s a process of intimidation, all the big union bosses in all these Soprano cities, ah, St. Louis, Chicago, Kansas City, I don’t know Kansas City is a little bit more lenient than most to my knowledge.

Witcofski told the employees that the Union would not do anything for them other than to allow them to join their “organization.” He explained that once they joined, they would have to start over because the Union would not allow them to be journeymen unless they went through a 6,000-hour program. He continued:

So maybe in 3 years, if the union even has a job for you to go to, will you work? OK? Plus, I feel like, and I’m gonna be bold here. I feel like the union hasn’t written you a check yet. But, I’ve written, this company, not me, has written you a check every week, Sure it may not be for what you want it to be, but they’ve never missed a paycheck, they’ve always made sure you’ve had work; they’ve never let you be out of work, in fact they’ve overworked your friggen butts. That’s ridiculous. OK? But when you sign up for them you will not have any work to start out with, you immediately go to training, and only if some job from Kansas City says I need three guys that just signed up for the union within the last

3 months, they'll finally call you. Now how many times do you think somebody's gonna say, I need three guys that just signed up for the union, are you kidding me? They're not going to do that there is too many people out of work.

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(3) Complaint paragraph 7(d)

Witcofski told employees that after the union sent an employee's picture to OSHA, Respondent was fined \$6000. He went on to tell employees that if 50 percent of the employees signed union cards, the U.S. Department of Labor would declare Respondent to be unionized. He opined: "So you all now don't work for us anymore, you work for the union. It is as simple as that."

Witcofski added:

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Now let me tell you, I'm going to be the first to admit, remember this day, in fact it's giving me goose bumps even saying it. I'm not saying the union's not bad, it may be for You. OK? But I and I'm serious. I'm not playing you or nothing, but it's not here in Northwest Arkansas because you'll never work. It'll take twenty years for Arkansas, It's a right to work state, it's free. Is, it would take, wouldn't you agree?

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Witcofski followed by telling the employees about someone who was close to him who had been a "union guy" all his life. He explained that the individual sat at home, waited for work, became an alcoholic and drank himself to death. He reminded employees that if they were members of the union they could not work outside the union without being blackballed or thrown out of the union.

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(4) Complaint paragraph 7(e)

After talking about the unions' contributions to United States senators from Arkansas and after explaining the origin of the word "redneck," he talked about former union managers who left the Union. Following a video that was shown to employees, Witcofski added the following:

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I wanted to explain that to you, what he was saying was, they'll settle for a bad contract and what that means, is, if ah, let's just say the unlikely event we wanted to be union, and you guys said OK yeah. So the Labor Department says OK now Wil-Shar you now have to get a contract agreement with the union. With this guy. Or what that guy used to be. So we come in for days, nights, um weeks whatever it takes. Attorneys. And they sit there and they say here's what it's going to be. All your apprentices you gotta change your, you gotta change your apprenticeship share, which by the way has been approved by the Department of Labor out of Dallas, um to X amount percentage of a journeyman's wage. OK? What's your journeyman's wage? Well, we got a set that, well we can't do that, it's too high. My competitor across the street will beat us every time we won't have any work. (unintelligible) in other words a company doesn't have to sign the contract. Now this, sometimes, this takes um, months and you've heard it on the

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news about Auto Workers Union, they're all trying to get a contract going. Well, what happened to Chevrolet.

(5) Additional comments encompassed by complaint paragraphs 7 (a) and (b)

5 After telling employees what they could do if they felt intimidated by the union, Witcofski continued:

10 But anyway, it's uh, bottom line, they want your dues. If it, they're gonna do and say anything. They're gonna write anything. To make sure that you believe what they're telling you, and make it sound really, really good. I just sat here and tried to make you feel really good, didn't I? Before we started talking about the union. So you, you either trust where you're at, where you're going, or you trust them. I don't care if you get up today and say, hey, it's been real, thanks, appreciate it. 15 I'm going to do something else. Fine. Just don't, don't go to the union. Unless you plan on moving to the city and you wanna be in the middle of all those guys, and you know, waiting for your work and you know, whatever. But if you do it here. All it's going to do is ruin companies, you're gonna sit at home waiting, while you're paying your dues to pay Mike Richards to text other people, for the 20 next however many years or more.

Analysis

25 Respondent asserts that 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 are not violative of the Act if they have some reasonable basis in fact and are in fact predictions or opinions and not veiled threats of employer retaliation. In his posthearing brief, counsel for Respondent cites a number of circuit court cases where an employer's statements were found to be predictions or opinion rather threats that were violative of the Act. Respondent 30 maintains that Witcofski's comments did not "go as far" as the comments that were found to be protected and his comments were particularly innocuous because they were infrequent and isolated. Respondent contends that there is no evidence that Witcofski's comments were ever repeated outside the meeting and the comments comprise only a few minutes of a meeting that lasted for 2–1/2 and hours.

35 In determining whether an employer's statement constitutes a threat in violation of Section 8(a)(1) of the Act, the analysis of the Supreme Court in its decision in *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), continues to be the authority. The Court explained:

40 An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction 45 must be carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probable consequences beyond his control.

The burden of proof is on the employer to demonstrate that its prediction is based on objective fact. *Schaumburg Hyundai*, 318 NLRB 449, 450 (1995); *Blaser Tool & Mold Co.*, 196 NLRB 374, 374 (1972). In *Gissel*, the Court explained that more than a mere belief is required to make such a prediction lawful, as “employees who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts.” *Gissel*, 395 U. S. at 619–620. Accordingly, *Gissel* has been found to place a “severe burden” on employers seeking to justify predictions concerning the consequences of unionization. *Zim’s Foodliner, Inc., v. NLRB*, 495 F. 2d 1131, 1137 (7th Cir. 1974).

In the instant case, the overall evidence does not support a finding that Respondent’s predictions met this burden. Witcofski told employees that if the company were unionized, Respondent would have to close because their competitors were not unionized. He further opined that while he was able to provide work for his employees, they would not have work if they joined the Union. He told the employees that because Arkansas was a “right to work” state, it would take 20 years for there to be work for union members. He told employees that if they joined the Union, they would have to relocate to a large city and they would sit home paying their union dues without work.

He opined that if the employees were to select the Union as their bargaining representative, the Union would not only settle for a “bad contract,” but the Union would require a specific journeyman’s wage. Witcofski contends that Respondent’s competitors would then beat Respondent every time and the employees would not have any work.

Although an employer may lawfully predict the consequences of unionization, such predictions must be based upon objective facts. In the present case, Witcofski predicted that if the Company were unionized, Respondent would have to close its operation and would not be able to compete with its competitors. He gives no objective criteria other than his opinion that the Government would force Respondent to sign a contract with the Union. He further asserted that the Union would then settle for a bad contract and would require Respondent to pay a higher wage to the apprentices and journeymen. Although Witcofski appeared to present his prediction as though the consequences would be out of his control, his overall presentation lacks the foundation of objective factors. Even though an employer may be sincere, the Board has also noted, the “conveyance of the employer’s belief,” that unionization will or may result in the closing of its facility “is not a statement of fact, unless, which is most improbable, the eventuality of closing is capable of proof.” *Iplli, Inc.* 321 NLRB 463, 468 (1996). In addition to the fact that Respondent provided erroneous information about its bargaining obligations in negotiating a contract, Respondent failed to provide objective factors to demonstrate why it would not be able to compete in the job market and would have to close because of unionization. He impliedly told employees that it would be futile for them to select the Union as their collective-bargaining representative. Furthermore, Respondent provided no objective factors to show why employees would have to relocate to larger cities or why they would not have any work available to them if they were unionized.

Accordingly, I find merit to complaint allegations 7(a), (b), (c), (d), and (e).

c. Complaint paragraph 8

Complaint paragraph 8 alleges that about October 15, 2010, Respondent, by clerical Denise Rusco, at Respondent’s facility, orally promulgated a rule prohibiting employees from discussing their terms and conditions of employment with each other.

(1) Rusco’s statement

Toward the end of the meeting, Witcofski asked Denise Rusco to speak with the employees about the Union’s letter. Before she began her comments, Witcofski asked her if he had told her what to say. She asserted that he had not.

As discussed above, Rusco initially talked with employees about their flexibility in taking off from work for reasons other than sickness. She told them that they would not be able to do so with the union. She shared her ex-husband’s experience with the Union, as well as her current husband’s feelings toward the Union. She addressed some of the statements in the Union’s letter and also confirmed for Witcofski how much money he had put back into the business.

Rusco then added:

You wanna gripe about the job call me. I’ll listen. Don’t call anybody else. But he does come right out and say that the Witcofski’s and Wil-Shar are reaping your benefits, but if the boys in there weren’t working their butts off. I wouldn’t be stressed out all the time, he wouldn’t be stressed out all the time, and you all wouldn’t have jobs to go to. Oh, I really don’t know about the union if they actually pay your benefits like health and stuff...

Rusco continued by talking about her experience with union retirement, union dues, and her opinion that the union’s letter contained lies. After telling employees that she would leave the union’s letter for them if they wanted to read it, she left the meeting to go back to work.

Analysis

Counsel for the Acting General Counsel asserts that Rusco promulgated a rule prohibiting employees from discussing working conditions with each other or any outside party. Counsel for the Acting General Counsel bases this allegation on Rusco’s statement: “You want to gripe about the job call me. I’ll listen. Don’t call anybody else.” Counsel submits that Rusco spoke at the meeting at the express direction of Witcofski and thus as Rusco acted as an agent, Respondent is accountable for her statements during the meeting.

Citing the Board’s decision in *Waco, Inc.*, 273 NLRB 746, 747–748 (1984), the Acting General Counsel submits that acting through Rusco, Respondent promulgated an unlawful rule prohibiting the employees from discussing their working conditions with each other or any outside party. In *Waco*, the employer told its employees on a number of occasions that they were not to discuss their individual wages with one another. The Board reversed the decision of the judge and found that because the employer’s prohibition against discussing wages interfered with employees’ Section 7 rights and because there was not an overriding business justification

for its promulgation, the rule was unlawful. The Board’s decision in *Waco* was consistent with the Board’s earlier decision in *Heck’s Inc.*, 293 NLRB 1111, 1119 (1989) wherein a rule requesting employees not to discuss wages constituted a restraint of employees’ Section 7 rights. In its 1992 decision in *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), the Board explained that both the *Waco* decision and the *Heck’s* decision make clear that the finding of a violation is not premised on “mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act.”

While there is certainly no question that an employer’s rule prohibiting employees’ discussions about wages and other terms and conditions may be unlawful, I do not find this to be the case in the instant matter. Everything about Rusco’s comments indicates that she spoke against the Union and her comments were fully sanctioned by Respondent. Nevertheless, I find that her comments to employees fell short of unlawfully prohibiting employees from discussing their terms and conditions of employment. At best, her comments were more analogous to a solicitation of their grievances. Although she encouraged them to come to her with their “gripes” and concerns, she did not promise that she or any member of management could rectify their concerns. Thus, while Rusco extended an offer to employees to come to her to discuss their concerns, her comments did not announce a rule prohibiting their discussion of their terms of employment as alleged in complaint paragraph 8. Accordingly, I recommend the dismissal of complaint paragraph 8.

CONCLUSIONS OF LAW

1. By terminating the employment of Charles Robbins, Wil-Shar, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act.

2. By interrogating employees about their union activities, Respondent violated Section 8(a)(1) of the Act.

3. By threatening employees that it would cease operations if employees selected the Union as their collective- bargaining representative, Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with a loss of employment if employees selected the Union as their collective-bargaining representative, Respondent violated section 8(a)(1) of the Act.

5. By threatening employees that there would not be any available work if they selected the Union as their collective-bargaining representative, Respondent violated Section 8(a) (1) of the Act.

6. By impliedly telling employees that it would be futile to select the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act.

REMEDY

5 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

10 The Respondent, having unlawfully terminated the employment of Charles Robbins, I shall order Respondent to offer Robbins immediate and full reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

20 The Respondent, Wil-Shar, Inc., Rogers, Arkansas, its offices, agents, successors, and assigns, shall

1. Cease and desist from

25 (a) Discharging or otherwise discriminating against any employees for engaging in protected concerted activity or for giving assistance or support to the Ironworkers, Local 584 or any other labor organization.

30 (b) Interrogating employees about their union activities.

(c) Threatening to cease operations if employees selected the Union as their collective-bargaining representative.

35 (d) Threatening employees with a loss of employment if they select the Union as their collective- bargaining representative.

(e) Threatening employees that there would not be any available work if employees selected the Union as their collective bargaining representative.

40 (f) Impliedly telling employees that it would be futile to select the Union as their collective bargaining representative.

¹⁰ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

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

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

10 (a) Within 14 days from the date of the Board’s Order, offer Charles Robbins full reinstatement to his former job or, if that job is no longer available, to a substantially equivalent position, without prejudice to his seniority or any other right or privilege previously enjoyed.

15 (b) Make Charles Robbins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

20 (c) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful layoff, and within 3 days notify Charlie Robbins in writing that this has been done and that the layoff will not be used against him in any way.

25 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

30 (e) Within 14 days after service by the Region, post at its facility in Rogers, Arkansas, copies of the attached notice marked “Appendix¹¹.” Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet, or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 13, 2010.

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¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C. November 4, 2011

Margaret G. Brakebusch
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT terminate employees for engaging in protected concerted activity or because of their union membership or support.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT threaten to cease operation if employees select the Union as their collective bargaining representative.

WE WILL NOT threaten our employees with a loss of employment if they select the Union as their collective bargaining representative.

WE WILL NOT threaten employees that there will not be any available work if they select the Union as their collective bargaining representative.

WE WILL NOT impliedly tell employees that it would be futile to select the Union as their collective bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Charles Robbins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other right or privilege previously enjoyed.

WE WILL make Charles Robbins whole for any loss of earnings and other benefits resulting from his termination, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful layoff of Charles Robbins, and **WE WILL** notify him in writing that this has been one and that the termination will not be used against him in any way.

WIL-SHAR, INC.
(Employer)

Dated _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act, and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

The Brinkley Plaza Building, Suite 350, 80 Monroe Avenue, Memphis, Tennessee 38103
(901) 544-0018, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFER, (901) 544-0011.