

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

URS ENERGY & CONSTRUCTION, INC.,

Respondent,

And

Case No. 30-CA-18775

TIMOTHY PARE,

Charging Party.

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

For its reply brief in support of its exceptions to the Administrative Law Judge's ("ALJ") decision, URS Energy & Construction, Inc. ("URS"), the Respondent in the above matter, by its attorneys Quarles & Brady LLP, hereby submits the following:

INTRODUCTION

It is undisputed that for all relevant times URS's standard practice has been to lay off its oilers when the machine to which the oiler is assigned is taken "off rent." URS followed this protocol to the letter when it laid off Timothy Pare ("Pare"). Rather than dispute this practice—which necessitates dismissal of the Complaint—the General Counsel cites evidence either not in the record or specifically ignored by the ALJ. Further, the General Counsel offers nothing which could reasonably support the ALJ's erroneous credibility determination, based on Timothy Pare's alleged ability to recite specific details, but instead speculates about documentation that never existed in the first place.

The undisputed evidence establishes that URS did not discriminatorily lay off Pare. As a result, the ALJ's contrary decision was erroneous, URS's exceptions from it should be sustained, the ALJ's decision and suggested remedy and order should be set aside, and the Complaint should be dismissed.

ARGUMENT

I. THE GENERAL COUNSEL HAS CREATED FACTS IN ITS ANSWERING BRIEF THAT ARE COMPLETELY UNSUPPORTED BY THE RECORD AND MUST BE DISREGARDED

The General Counsel's Answering Brief ("GC Answering Brief") includes numerous assertions that are completely unsupported by the record. No witness—including Pare—testified to them and any arguments that the General Counsel has made relying on such "facts" must be disregarded.

The following are material assertions that the General Counsel has made which are completely unsupported by the record:

- **Alleged Material Fact:** *Frank McCauley walked away before Yuker made statements to Pare regarding Pare's Board charges on September 24 (GC Answering Brief, p. 11; no citation to the record.)*

Response: The General Counsel makes this assertion in an attempt to counter URS's argument that if the conversation between Pare and Yuker took place on September 24 in the manner that Pare alleged it did—namely, that they discussed Pare's Board charges, an assertion that Yuker unequivocally denied—the General Counsel should have provided testimony from Frank McCauley, the employee who, according to Pare's own testimony, was present during the conversation. The General Counsel's contention aside, there is simply no record evidence that McCauley walked away before Pare and Yuker allegedly discussed Pare's Board charges.

- **Alleged Material Fact:** *Pare claimed his first layoff from URS in 2009 was discriminatory because he "believed that the Union knew that the assignment was going to be short, and assigned him to the job (without telling him that it was going to be a short assignment), in retaliation for the fact that Pare's brother had run against the current Union administration earlier in the year." (GC Answering Brief, p. 18-19; no citation to record.)*

Response: The General Counsel, in a futile attempt to undermine URS's assertion that Pare had cried wolf once before when he was laid off, creates facts—none of which are found in the record—regarding Pare's first layoff in 2009. Pare, despite the opportunity to do so, testified to none of these facts at the hearing. This new explanation as to why Pare's first layoff was somehow related to his Union activity must be disregarded.

- Alleged Material Fact: *Yuker did not actually mean it when he told Pare that he wanted to keep him despite the fact that Pare's machine was going off rent* (GC Answering Brief, p. 9; no citation to record.)

Response: There is no citation to the record for this totally speculative assertion. No witness testified to this fact and it is contrary to the testimony of Yuker, the only witness who testified on this subject.

- Alleged Material Fact: *Yuker did not believe that Pare deserved to be working on a Union job after what he had done* (GC Answering Brief, p. 5; no citation to the record.)

Response: This may suggest that Yuker was motivated by Pare's Union activity when he selected him for layoff. Once again, however, there is simply no testimony in the record supporting this assertion, no witness testified to this alleged "fact," and there is no citation any such evidence.

- Alleged Material Fact: *Pare amended his Board charge on July 29 and following the amendment, Yuker had little interaction with Pare probably because of his amended charge* (GC Answering Brief, p. 8; no citation to the record.)

Response: The General Counsel attempts to tie the timing of the amended charge to some sort of cold shoulder by Yuker toward Pare. The problem with this assertion, however, is that there is absolutely no record evidence to support it. There is no evidence that Yuker ever learned about the amended charge (or if so, when he did) or that Yuker's interactions with Pare after he learned about the amended charge were any less frequent or otherwise different from what they had been before the amended charge. The wholly unfounded assertion that Yuker shunned Pare must be disregarded.

- Alleged Material Facts: The General Counsel cites to rejected exhibits, discussed further below, in support of its argument regarding when Yuker learned that the machine to which Pare was assigned was going off rent and to claim that another employee—not Pare—should have been selected for layoff on October 1, 2010. (GC Answering Brief, p. 16, 30, n. 8; no citation to the record, only to the Rejected Exhibit File.)

Response: For the reasons discussed in further detail below, it is improper for the

General Counsel to make any argument based on documents which were specifically rejected by the ALJ.

The General Counsel cites to each of the above alleged “material facts” to support its theory that Pare and Yuker discussed Pare’s Board charges shortly before Pare’s layoff, that Pare did not think that Yuker should have remained employed after Pare filed Board charges, and that Yuker was driven by discriminatory pretenses when he selected Pare for layoff. While the General Counsel might wish these were the facts, none of them happened and there is no evidence that they did. As a result, both the alleged facts and the General Counsel’s argument in support of them must be rejected.

II. URS LAID OFF PARE PURSUANT TO ITS STANDARD PRACTICE OF LAYING OFF AN OILER WITH HIS MACHINE; THE GENERAL COUNSEL’S ATTEMPT TO UNDERMINE THIS PRACTICE IS BASED ON SPECULATIVE ARGUMENTS AND MUST FAIL

URS’s standard policy is to lay off an employee when the machine to which the employee is assigned goes off rent. (Tr. 118, Yuker; 225, Bob McKeag; 232, Alan Corder.)¹ Substituting his judgment for that of URS, the General Counsel claims that URS should not have followed its standard protocol in this case because: (1) it requisitioned another oiler shortly before Pare’s layoff (a fact that URS does not dispute but that does not undermine URS’s standard layoff protocol); (2) it retained a highly skilled operator who worked as an oiler due to the Company’s business needs (a fact that URS does not dispute but that does not undermine URS’s layoff protocol for oilers); and (3) it did not lay off another employee the details about which the ALJ specifically excluded from the record (a fact that is not in the record but that nonetheless does not undermine URS’s layoff practice). None of these facts can establish that URS strayed from its standard procedure when it laid off Pare, or that URS otherwise

¹ Citations to the hearing transcript are referred to as “Tr. [page number],” followed by the name of the individual testifying. Citations to URS Exhibits are referred to as “URS Ex. ___” with General Counsel’s exhibits being referred to as “GC Ex. ___.”

discriminated against him because of his protected activities.

A. URS Requisitioned Marcus Bohn Before It Knew That The Machine To Which Pare Was Assigned Was Going Off Rent

Following oiler Frederick Heller's discharge on September 22, 2010 for a serious safety incident, URS requisitioned another oiler from the Union hiring hall to replace Heller. (Tr. 136-137, 139-140, 158, 159 Yuker; GC Ex. 20.) When Yuker requisitioned another oiler to replace Heller he did not know that the 4100 crane was going off rent. In response to Yuker's requisition, the Union hiring hall selected Marcus Bohn who reported to work on September 27. (GC Ex. 11-10.) After Bohn reported to work Yuker learned for the first time that later that week the 4100 crane to which Pare was assigned was going off rent. (Tr. 180, Yuker.)

Given that Yuker did not know the 4100 crane was going off rent until after he had requisitioned for and obtained a replacement for Heller, there can be no argument that Yuker hired Bohn in order to lay off Pare. Indeed, such an argument would require Yuker not only to be clairvoyant, but also to have the authority to waste URS resources, neither of which was true. It is undisputed that Yuker was not the person who decided which cranes were needed on the site at any time and therefore he could not have known the fate of the 4100 until that decision was made and announced to him on September 27. (Tr. 112-113, Yuker.) Further, even if he did know in advance, which he did not, Yuker could not reasonably have allowed the machine to which Heller was assigned sit idle for more than a week with an operator assigned to it but with no ability to run the machine because no oiler was assigned to it.

So too the General Counsel's other efforts to cast suspicion over this requisition are baseless. For example, the General Counsel argues that URS should have refused Bohn and kept Pare working on the jobsite once Yuker learned that the 4100 crane was going off rent. Not only is this speculative, but it would have been unfair to Bohn. On September 22 URS needed to fill a

position due to a vacancy and that's exactly what it did. The General Counsel has offered absolutely no evidence that URS would ever send an oiler back that it had requisitioned and who had reported to the job site simply because it later learned that it was going to have to lay off another oiler a week or more after the new employee reported to work. And if it engaged in such reverse staffing, that would completely undermine the hiring hall process in which operators wait in turn for assignments to a given job site.

Further, the General Counsel's suggestion that—because there was no date listed on Bohn's requisition form as to when the request was made—something unusual was happening with the requisition is farfetched. Again, there is no record evidence regarding what dates are included on a requisition form or even who writes them or when. Further, the General Counsel cannot dispute the fact that Heller was fired and his replacement reported to the job site before Yucker ever learned that the date on which Pare's crane was to go off rent.

B. URS Kept Jason Klatt Because He Was A Highly Skilled Operator

The General Counsel contends that because URS retained Jason Klatt and assigned him to an oiler position this establishes that URS does not uniformly lay off oilers with their machines. The General Counsel is wrong. First, unlike Pare, Klatt was a skilled crane operator who had diverse skills, not an oiler who was not certified to operate any crane. Second, as Yucker unequivocally testified, if a crane operator is highly skilled with certifications to operate equipment other than cranes, or if there are other extenuating circumstances which merit retaining an operator (versus an oiler) with diverse skills, URS has and continues to retain that operator despite the fact that his machine is being taken off rent. (Tr. 118, 155, Yucker.) Of course, this makes perfect sense because like any employer, URS strives to retain its most skilled employees and for this reason will retain a skilled crane operator, even if the operator only works as an oiler. (Tr. 155, Yucker.) For exactly this reason URS retained Klatt, i.e., he was an

experienced crane operator with diverse skills who knew the job site and who URS wanted to retain. It therefore assigned him as an oiler so that he would be available to cover crane operation responsibilities if necessary. Accordingly, that URS retained Klatt does not in any way undermine URS's practice of laying off an oiler with his machine.

C. The General Counsel's Attempt To Cite Evidence That Is Not In The Record Must Be Rejected

The General Counsel also attempts to counter URS's standard policy by again relying on evidence that is not even in the record. Specifically, the General Counsel asserts that James Junk, an employee who was disciplined in 2009, should have been selected for layoff on October 1, 2010 instead of Pare. (GC Answering Brief, p. 30, n. 8.)

As a preliminary matter, even if this evidence were in the record—which it is not—it does not undermine URS's argument that it followed its standard policy. The General Counsel has offered no evidence (because none exists) that the machine to which Junk was assigned was going off rent. The fact that he was not selected for layoff on October 1, 2010 does not contradict URS's standard practice; it supports it. His machine was not going off rent and therefore he was not selected for layoff.

Further, any evidence related to Junk was specifically rejected by the ALJ. The fact that the General Counsel again relies on evidence that is not in the record shows just how weak this case is. There is no evidence that can rebut the fact that URS followed its standard practice when it laid off Pare off because he was the oiler on the machine that went off rent.

III. THE GENERAL COUNSEL FAILS TO DISPUTE THAT THE ALJ ERRED IN DETERMINING THAT PARE WAS MORE CREDIBLE BECAUSE HIS TESTIMONY WAS MORE SPECIFIC THAN YUKER'S

URS established in its initial Brief that the ALJ erred when he based his conclusion that Pare was more credible on the fact that Pare claimed to remember details of certain interactions

between him and Yuker whereas Yuker did not offer a verbatim recollection of every word spoken during their interactions. Specifically, the ALJ's decision completely ignored the fact that Yuker supervised more than 30 operating engineers who were doing critical work on the construction site, that he had daily conversations with each of them, and that he therefore could not possibly have remembered exact words spoken during each conversation with each employee.

The General Counsel cannot to dispute these facts. Instead, it relies on a ridiculous red herring when it contends that because URS did not offer documentary evidence of the date on which Yuker learned that the 4100 crane was going off rent, Yuker's unequivocal testimony that he learned this information on September 27 is not credible. (GC Answering Brief p. 16.) The General Counsel's contention fails for two reasons. First, it has offered no evidence that any such documentation exists and therefore no adverse inference can be drawn based on URS's failure to produce it. Second, the authority it cites for its argument is completely distinguishable from the facts in this case.

A. The General Counsel Has Offered No Evidence Of Existing Documentation Corroborating Yuker's Undisputed Testimony Concerning When He Learned That The Machine To Which Pare Was Assigned Was Going Off Rent

The General Counsel has offered absolutely no evidence that any documentation exists that could either corroborate or dispute Yuker's undisputed testimony that it was not until September 27 that he learned that later that week the machine to which Pare was assigned was going off rent. As noted above, when a crane goes off rent is not a decision in which Yuker is in any way involved and he only learns of the decision when his supervisors communicate it to him.

(Tr. 112-113, Yuker.) As a result, unless Yuker chose to document that conversation,² which he did not do, there is no documentation related to the date or time of that conversation. Since there is no evidence that any such documentation exists, no adverse inference can be drawn against URS for failing to offer it!

B. The General Counsel's Cited Authority Does Not Support Its Contention That Yuker's Testimony Should Be Discounted

The General Counsel contends that an adverse inference should be taken against URS because it did not offer written documentation to support Yuker's undisputed testimony about the date he learned Pare's crane was going off rent. In support of this assertion it cites to two cases, Galesburg Construction Company, Inc., 267 NLRB 551 (1983), and Teddi of California, 338 NLRB 1032 (2003) (see GC Answering Brief, p. 20), in which the Board drew a negative inference from the fact that the respondents had failed to produce existing documentation to support its position in the case. Both cases are entirely distinguishable from the facts here.

In Galesburg, the documentation at issue was pay records: The respondent failed to offer pay records which it would have had to have kept in the regular course of its business to support its argument that certain employees were compensated at a higher rate as laborer foremen. Galesburg, 267 NLRB at 551-552. In Teddi of California, the documentation was related to a planned layoff: The respondent failed to offer the actual layoff list regarding the numerous employees who were laid off. Teddi of California, 338 NLRB at 1040. In both cases, the documentation at issue existed—pay records and a basic plan for a layoff.

Unlike the facts in Galesburg and Teddi of California, there is no reason to believe documentation exists confirming the date Yuker's supervisors told him that the 4100 crane to

² Yuker turned over all of his notes to the General Counsel in this case and none documented the date his bosses announced to him that the crane to which any oiler was assigned was to be taken off rent. Given that Yuker never documented the date for any crane there is no reason why he would or should have done so for the 4100 crane.

which Pare was assigned was going off rent. Nor was there any testimony on this topic at the hearing. The cited authority is therefore inapposite and no negative inference can be drawn related to URS's inability to produce a document that does not exist. As a result, Yucker's undisputed testimony regarding when he learned that the 4100 crane was going off rent (a fact that seriously undermines the General Counsel's theory of this case) must stand.

CONCLUSION

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

Respectfully submitted this 4th day of November, 2011.

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CERTIFICATE OF SERVICE

Copies of Respondent URS Energy & Construction, Inc.'s Reply Brief In Support of Exceptions to the Administrative Law Judge's Decision have been sent on November 4, 2011, electronically to the following parties:

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A copy of Respondent URS Energy & Construction, Inc.'s Reply Brief In Support of Exceptions to the Administrative Law Judge's Decision was also sent on November 4, 2011 via regular mail to the following party:

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Respectfully submitted this 4th day of November, 2011.

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