

URS Energy and Construction, Inc. and Timothy Pare. Case 30–CA–018775

April 5, 2012

DECISION AND ORDER

BY MEMBERS HAYES, FLYNN, AND BLOCK

On July 28, 2011, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions, and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, URS Energy and Construction, Inc., Oak Creek, Wisconsin, its officers, agents, successors, and assigns, shall take the

¹ We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that animus against Charging Party Timothy Pare's protected activity was a motivating factor in the Respondent's selection of Pare for layoff. Indeed, the evidence in that regard is compelling. Where, as here, the Acting General Counsel makes out a strong showing of discriminatory motivation under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the Respondent's rebuttal burden is substantial. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010), *enfd.* 646 F.3d 929 (D.C. Cir. 2011). We agree, for the reasons stated by the judge, that the Respondent has failed to meet its burden.

The judge seems implicitly to have discredited the testimony of the Respondent's general foreman, Lewis Yucker, that Yucker at first intended to retain Pare but changed his mind and decided to lay off Pare because it would not be fair to lay off a different employee only because the other employee had a pension. Even if Yucker legitimately could have relied upon this reason for selecting Pare, the record evidence here is not sufficient to show that Yucker actually would have selected Pare in the absence of his animus towards Pare for having filed charges against the Union. See, e.g., *Manorcare Health Services-Easton*, 356 NLRB 202, 225 (2010), *enfd.* 661 F.3d 1139 (D.C. Cir. 2011); *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004).

³ We shall modify the judge's recommended Order to include the Board's standard certification-of-compliance provision.

action set forth in the Order as modified by adding the following as paragraph 2(f).

“(f) Within 21 days after service by the Region, file with the Regional Director for Region 30 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.”

Andrew S. Collin, Esq., for the Acting General Counsel.¹

Robert H. Duffy, Esq. and *Courtney R. Heeren, Esq.*, for the Respondent.²

*Timothy Pare, Pro se.*³

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case I heard on May 9 and 10, 2011, in Milwaukee, Wisconsin. This case originates from a charge filed by Timothy Pare, an individual, on October 5, and amended on November 1, 2010, against URS Energy and Construction, Inc. (Company). On February 28, 2011, the Regional Director for Region 30 of the National Labor Relations Board (Board) issued a complaint and notice of hearing (complaint) against the Company alleging it discriminatorily discharged Pare on October 1, 2010, because of his protected concerted and/or union activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act).

The Company, in a timely filed answer, denied having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I have studied the whole record, the posttrial briefs, and the authorities cited therein. Based on the detailed findings and analysis below, I conclude and find the Company violated the Act as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION AND SUPERVISORY/AGENCY STATUS

The Company is a corporation with an office and place of business in Oak Creek, Wisconsin, where it is, and has been, engaged in the business of providing engineering and construction services at the Elm Road Generating Station, Oak Creek, Wisconsin. During the past calendar year, the Company purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the State of Wisconsin. The evidence establishes, the parties admit, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted that General Foreman Lewis Yucker Jr., Operator/Temporary Foreman Robert McKeag Jr., Superintendent

¹ I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the Acting General Counsel as the Government.

² I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

³ I shall refer to the Charging Party as Pare or Charging Party Pare.

Duane Steinmetz, Project Business Manager Alan Corder, Superintendent Randy Cates, and Construction Manager Randy George are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

WE Energies owns and operates a coal fired power plant on approximately 1450 acres of land in Oak Creek, Wisconsin. Some years ago, WE Energies contracted with the Company to construct environmental controls on the emissions side of its plant. The constructed environmental controls perform functions similar to what a catalytic converter does for emissions on an automobile. Project Manager Corder explained the Company has an agreement with various building trades unions covering work at the Oak Creek site which agreement is known as the general president's project maintenance agreement. Corder further explained that one of the unions at the site, and directly involved with the issues herein, is the International Union of Operating Engineers Local 139 (Local 139 or Union). The president's project maintenance agreement calls for the Company to requisition workers from, in this case, Local 139 to operate and service cranes at the Oak Creek site. General Foreman Yuker stated that for every crane there is an operator and an oiler which together form an operating team. The Company, at applicable times herein, utilized in addition to various cranes other types of equipment such as tile handlers (rough terrain forklifts), hydraulic excavators, rubber tire and front end loaders. Operators, as the name suggests, operates the cranes while oilers ensure the cranes have the proper fluid levels for operation. The Company may request crane operators by name from the Union but for oilers the Company simply requests the number needed with a requested reporting time and Local 139 provides that number of oilers on the dates requested. Project Manager Corder testified that pursuant to the general project maintenance agreement the Company has the right to hire and lay off employees as, and whenever, it chooses. General Foreman Yuker has, since 2009, supervised the crane operators and oilers. General Foreman Yuker has been a member of Local 139 at all applicable times herein. According to Yuker, the Company utilized approximately 30 to 35 crane operators and oilers in 2010. Pare estimated the Company, at various times, employed approximately 750 to 1200 employees from the various building trade crafts.

Pare is, and has been, a member of Local 139 for 13 years and has been employed twice by the Company. Pare first worked for the Company as an oiler on a temporary basis starting October 19, 2009. He was hired initially for 1 week, but actually worked until October 30, 2009, when the oiler he replaced returned from medical leave. Pare again worked for the Company from March 16, to October 1, 2010. Pare worked with crane operator Mark Tomorro from March until the third week in August 2010, and with Jason Klatt from the third week in August until his layoff on October 1, 2010. General Foreman Yuker was Pare's immediate supervisor both times he worked for the Company.

2. Government's evidence

Pare utilizes the referral services of Local 139 for employment opportunities any time he is out of work and specifically deals with Union Central Dispatcher Guy Yuker. Central dispatcher Guy Yuker and Company General Foreman Lewis Yuker are brothers. Pare explained it was normal practice to notify Local 139 as soon as a member was out of work or laid off and the member had to check in regarding his/her status monthly on the first of the month, thereafter, from April through December. Pare said members are not notified of their placement on the referral list unless they specifically ask. Pare testified he experienced some issues obtaining work through the referral service over the past 2 years. Pare did not feel the placement of names on the referral list was correct and that "there was some favoritism going on." On February 22, 2010, Pare requested, in writing, a copy of the referral procedures from Local 139 and a current copy of the out-of-work list and indicated he wanted to be provided weekly copies thereafter of the out-of-work list. Local 139 Business Manager Terrance E. McGowan notified Pare in writing, on February 24, 2010, the requested records were available to all members for inspection at the Union's offices during normal business hours but Local 139 did not distribute hard copies of its out-of-work lists nor would it provide such records on an ongoing basis. Around mid-February 2010, Pare spoke with Union Central dispatcher Yuker about the requested information but none was provided. Pare told dispatcher Yuker that if nothing was going to change regarding the requested information he would contact the Board.

On March 12, 2010, Pare, and two other Local 139 members, namely Fred Higgins and Randy Heule, filed charges (Pare's charge was Case 30-CB-5522) with the Board against Local 139 alleging the Union failed to fairly represent them by failing and refusing to provide them information concerning Local 139's hiring hall procedures and practices.

Pare attended the monthly union meeting at the Pewaukee union hall on May 12, 2010, because Local 139 members had been telling him that the names of those filing charges against the Union were being discussed around the State. Pare said Local 139 Business Manager McGowan spoke to the estimated 130 members and union executives about certain members having filed charges against Local 139. According to Pare, McGowan said the charges had already cost Local 139 \$20,000 in legal fees and that those filing the charges with the Board should be charged because they broke their oath to the Union and broke the Union's bylaws. A retired business agent of the Union (David Harnath) asked for the names of those members who went outside Local 139 with their complaints. The retired agent said it was "un-union of us," "that we should have our pensions and cards removed" and mentioned Pare's vehicle license plate number. Pare said there were comments from the crowd about shooting out his tires and running him off the road. Pare said he and the two others filing charges with the Board were later identified by name. General Foreman Yuker was present at this May 12, 2010 meeting.

Pare testified that at work on May 14, 2010, General Foreman Yuker told him he should not have filed the charges against the Union. Pare did not respond.

On June 2, 2010, Pare filed an additional charge against Local 139 alleging the Union was harassing him and threatening to expel him from the Union because of his earlier charge against the Union.

Local 139 held its June monthly membership meeting on June 9, 2010. Pare said that when he walked by General Foreman Yucker he attempted to speak with Yucker but Yucker looked away ignoring him. During the meeting, General Foreman Yucker asked Local 139 Business Manager McGowan about any disposition of the Board charges. McGowan asked the members to “take a step back” from filing internal union charges against those filing the Board charges until Local 139 could see how the Board disposed of those charges. Following the meeting Pare tried to speak with General Foreman Yucker but Yucker ignored him again.

The next day, June 10, 2010, near the end of the workday, as Pare was securing his crane for the day, General Foreman Yucker drove to the area in a four-wheeler vehicle. Pare asked Yucker about events at the union meeting the night before saying; “You can’t say hi to me, shake my hand or nothing.” Pare said General Foreman Yucker answered; “I’m not going to shake your hand.” “I’m not going to shake it until we know what the outcome of the charges are” adding, “You guys broke your oath to the Union. You broke the bylaws by going outside the Union.” “You were wrong for doing what you did.”

Pare testified that on June 28, 2010, he and his crane operator (Mark Tomorrow) were at an onsite storage area for large duct and iron pieces when General Foreman Yucker arrived in his four-wheeler and handed Pare a copy of a March 3, 2010 decision of the Seventh Circuit Court of Appeals captioned “*Edwards v. Operating Engineers Local 139*, No. 09-3062.” Pare stated that when Yucker handed him the decision he said, “this was evidence that we couldn’t be suing the Union, that it was wrong.” Pare told Yucker it was none of Yucker’s business, walked away, and continued his work.

Pare testified that on July 12, 2010, General Foreman Yucker gave him at work an article from Local 139’s newspaper captioned, “Internal Remedies Save Local 139’s Money.” Yucker told Pare “this might be of particular interest to you.” Yucker turned away “chuckling.” Pare made no response. Pare said General Foreman Yucker explained on July 14, 2010, why he had given him the news article 2 days earlier. Yucker told Pare he should go ahead and read the article because the article said Pare had no right to go outside the Union for help and in doing so he was breaking union bylaws. Yucker urged Pare to show the article to his attorney “so they’d understand that I can’t sue the union and that I was wrong for doing it.” Pare told Yucker this was none of his business, that it was a matter between Pare and the Union. Pare told Yucker he was his (Pare’s) foreman and he did what Yucker asked him without complaining, being late or insubordinate, but his dealings with the Union were between he and the Union and should not be discussed on the jobsite. Pare said Yucker “just kind of clammed up” at that point.

As a result of the content of the newspaper article General Foreman Yucker gave Pare, he amended his charge in Case 30–CB–5569 to allege the Union’s bylaws, as outlined in the article, were unlawful.

On August 3, 2010, Pare’s crane operator, Mark Tomorrow, told Pare the 4100 Manitowoc crane they worked would be going “off rent.” Pare explained that when a piece of equipment went “off rent” it was no longer needed by the Company and shipped out. Typically when a crane went “off rent” the operator and oiler left with the crane. In mid-August operator Tomorrow was reassigned from the 4100 Manitowoc crane to another crane and was replaced by operator Jason Klatt. Pare worked as Klatt’s oiler on the 4100 Manitowoc from mid-August until he was laid off October 1, 2010.

Pare testified that on September 16, 2010, General Foreman Yucker came to where he and Klatt were working and spoke to both of them separately. Pare said that after Yucker spoke with Klatt he came off the crane, patted Pare on the back and told him he was doing a “nice job” and stated:

Hey look. The crane is going off rent. I was told to keep my two best men. You and Jason [Klatt] are them two guys. I don’t want you telling any of the other [Local] 139 guys out here. Keep it to yourself because I’m going to have to lay someone else off to keep you guys on, but that’s my game plan.

Pare was flabbergasted and did not respond to Yucker.

Safety requirements for cranes at the jobsite calls for a swing radius around each crane. Pare explained a swing radius around a crane was the area in which the load being lifted by the crane could be safely set down. The swing radius changes with the weight of the load and/or the angle of the crane boom. Pare said he worked extensively within the swing radius because the Manitowoc crane was an old model that needed many adjustments and repairs with fluid leaks. Pare was never injured working inside the swing radius; however, two onsite oilers did suffer injuries. As a result of the two injuries the Company reexamined its policy of allowing oilers, and others, inside the swing radius. Pare, and others, became concerned about any new rules. Pare asked Union Bull Steward Art Flores about the new rules and if oilers could still work within the swing radius. Flores told Pare oilers could still work within the swing radius providing their operators knew they were there and they had a particular reason for being in the swing radius.

Related to the swing radius, it is undisputed oiler David Streuly was terminated on September 9, 2010, as a result of his being inside the swing radius on his assigned crane on August 31, 2010, where he either “fell asleep” or “was overcome by the heat” resulting in the crane’s counterweight striking him. Streuly’s “near-fatal” accident caused the Company, at its highest levels of management, to review safety issues inside the swing radius and to ensure such did not happen again. As a result, the Company decided no oiler should be inside the swing radius while his/her crane was in operation. The Company terminated another oiler, Frederick Heller, on September 22, 2010, for being inside the swing radius of his crane leaning against a torch tank smoking a cigarette.

It is undisputed the Company, on September 10, requested Local 139 refer an oiler to replace Streuly. The Union referred oiler James Kadlec as the replacement on September 13, 2010. It is likewise undisputed the Company requested an oiler from

Local 139 near the end of September and the Union referred oiler Marcus Bohn, on September 27, 2010, to replace Heller.

Pare testified that on September 24, 2010, General Foreman Yucker came to the cab door of their crane and told operator Jason Klatt that “[w]e couldn’t go inside the swing area at all at any time as long as the crane engine was running.” Pare told Yucker Union Bull Steward Flores had told him and others something different and he wanted Yucker to know so the union steward would not be going around the site telling the oilers something that was incorrect. General Foreman Yucker told Pare he was his foreman, Flores was not, and Pare was to listen to him not Flores.

Pare testified that approximately 15 minutes later that same day he was with oiler Frank McCauley when General Foreman Yucker came to explain the new swing radius safety rules to McCauley. Pare stepped away and when Yucker finished speaking with McCauley, Pare asked for a few minutes of Yucker’s time. Pare asked Yucker why there was so much animosity between them. Pare testified, “I said every time we talked it felt like we wanted to shoot each other in the head. I said, ‘Lew, I’ve got nothing against you. You’re my foreman.’ I said, ‘I treat you like a foreman. I never give you any grief. Why is it like that?’” According to Pare, Yucker responded, “What you’ve done to the Union, you’ve done to me” and “until you change that, this is the way it’s going to be.” Pare walked away ending the conversation.

Pare testified that about midday on October 1, 2010, Bob McKeag, a stand-in-foreman for General Foreman Yucker, came to Pare’s crane and told Pare; “It’s got nothing to do with me, Tim.” “Don’t blame me for it” but, “Lew [Yucker] called me last night, told me to lay off you and Bill Larson. I don’t understand why he’s doing what he’s doing, but that’s what he’s doing.” McKeag then asked for Pare’s timecard and parking pass.

Pare spoke later that day with Company Project Manager Alan Corder about his layoff. Pare told Corder he would like to file a complaint that he believed the fact that the Union’s dispatcher and the Company’s general foreman were brothers had something to do with his layoff. According to Pare, Corder explained the Company did not decide who was selected for layoff just the number to be laid off that it was General Foreman Yucker who decided specifically which individuals were laid off.

After he was laid off, Pare contacted Local 139 and spoke with dispatcher Guy Yucker about being placed on the Union’s out-of-work list. Pare has not been referred for work since October 1, 2010. Pare said that at the time of his layoff one of his two Board charges against Local 139 “was decided” and the other one dismissed. Pare said he never received any discipline nor was given any appraisals while working at the Company but he had received positive commentary from General Foreman Yucker.

3. Employer’s evidence

Lewis Yucker has been general foreman for the Company at its Oak Creek Power Plant Project overseeing all crane operators and oilers since January 2009. In the summer of 2010, Yucker was responsible for approximately 30–35 operators and

oilers, however, that number was down to 22 at trial herein as the project is nearing completion. Yucker meets with the operators and oilers each morning, giving them working instructions, as well as, addressing safety issues. While his employees operate various types of cranes, Yucker has no input regarding the types of equipment brought onto the site. The Company rents and/or owns cranes at this worksite. Yucker said he is given very little notice from higher management when a piece of equipment is going to be added to or taken from the site. Yucker explained that when equipment is added he is simply given enough time to request an operator and oiler from Local 139. Operators are requested by name while oilers are requested by the number needed. Yucker testified that when a piece of equipment goes “off rent,” or leaves the jobsite, the operator team (operator and oiler) leaves with the equipment. Yucker explained that sometimes there were extenuating circumstances where the operator might not leave with the equipment. Yucker said if an operator was highly skilled he might recommend the operator be retained to work on other equipment and his recommendations are followed by higher management.

General Foreman Yucker was Pare’s immediate supervisor on both occasions Pare worked for the Company. On each occasion Pare was referred from Local 139. Yucker is, and has been, a member of the Union for 39 years and served 4 years as its business agent. Yucker’s wife, brother, and nephew are also members of Local 139 with his brother currently serving as general dispatcher for Local 139.

General Foreman Yucker learned in 2010 that certain members of Local 139, including Pare, filed unfair labor practice charges against the Union regarding its referral practices. Yucker also knew Randy Heule and Fred Higgins were the two other members that filed unfair labor practice charges against Local 139. Yucker knew that former member Franklin Edmonds had, in the past, filed “numerous charges” against the Union.

General Foreman Yucker testified he mentioned at one of his early morning operator meetings that the individuals who had filed them, the current unfair labor practice charges against the Union, “should be given a chance to undo what they did and if they didn’t undo it . . . charges should be filed against them . . . [and] their [union] cards [taken] away from them.” Yucker could not recall the exact date of this meeting, but stated Pare was not present.

General Foreman Yucker attended the June union meeting at Pewaukee at which the unfair labor practice charges filed by Pare, Heule, and Higgins were again discussed. Yucker testified, “Lot of the guys weren’t too happy about it,” but the union staff said “there could be no retaliation against these guys.”

The day following this June union meeting Yucker spoke with Pare, among others, about “the million man-hour festivities.” The Company had recorded a million-man hours without an accident and the Company provided food and ice cream for its employees that day. General Foreman Yucker said Pare “confronted” him, wanting to know why Yucker did not say hello to him the night before at the union meeting. Yucker explained he had tried to say hello to Randy Heule but Heule would not speak with him. Yucker told Pare that because Pare was with Heule and others he figured they also would not speak with him so he did not try. Yucker asked Pare why he filed charges

against the Union. Pare said he did not do it for himself but for the membership. Yucker said Pare told him he had tried to get some information from the Union but they would not provide it. Yucker and Pare then talked about the proper procedure for getting such information. Yucker told Pare the information Pare wanted was available for viewing at the union hall. According to Yucker, Pare responded that would not be adequate for him and he would not be satisfied until he was given a physical copy of the Union's out-of-work register. At the end of their conversation Pare asked Yucker to shake his hand. Yucker declined because, "I pick my friends. I disagree with what he is doing. I treated him fairly while he was on the job." General Foreman Yucker acknowledged he gave Pare, and "just about everybody on the job" a copy of the Seventh Circuit Court of Appeals decision dated March 3, 2010, involving Franklin Edmonds and Local 139, in which the court found Edmonds' argument that Local 139 had to make its out-of-work referral list available to him, had been rejected three times and any further like actions by Edmonds would lead to sanctions against Edmonds. Yucker said he had been asked by Local 139 Business Agent Steve Buffalo to distribute the court decision and he told Pare that "these are the findings from the court in regards to Franklin Edmonds." At first Yucker could not recall when he gave the decision to Pare but later stated it was June 28, 2010. Yucker told Pare the decision was relevant because of questions about the Union's referral procedures. According to Yucker, Pare disagreed with what Edmonds was doing but added the costs to the Union were irrelevant because the costs came from retainer fees.

In the summer 2010, General Foreman Yucker gave Pare a copy of an article from Local 139's newsletter written by the Union's legal counsel entitled, "Internal Remedies Save Local 139's Money." When Yucker gave Pare the article he asked him to take a look at it but could not recall the date he gave it to him.

General Foreman Yucker said he spoke twice with Pare on September 24, 2010. On the first occasion, he talked to Pare and operator Jason Klatt about following the rules related to staying out of the swing radius. Yucker testified Pare said a union steward had told him something different. Yucker told Pare he (Yucker) was Pare's supervisor and he was to follow his instructions. Yucker described Pare as being "overbearing" in the conversation and "had to have his say in all of these things."

On the second occasion Yucker said he went back to Pare's area to speak with oiler Frank McCauley about the swing radius safety requirements. Yucker said Pare explained why Pare had been "so forceful in the first conversation." Yucker said Pare was again "overbearing" and added by the end of the conversation, "I was pretty annoyed with it." Yucker told Pare to go find something to do. Yucker specifically denied there was any discussion or mention of Pare's charges against the Union during this conversation.

Although he said he had heard rumors for approximately a month, General Foreman Yucker testified he learned on Monday, September 27, 2010, that the crane on which Pare was an oiler would be going "off rent" October 1, 2010. Yucker said he spoke with Pare and operator Klatt on September 29, 2010, telling them their crane would be going "off rent" and his plan

was to keep them working rather than leaving with the crane. Yucker said he slept on his decision to keep both Pare and Klatt and decided it was not right for him to lay off an oiler (Kadlec), who was assigned to another crane but was a retiree who had a pension, so he could keep Pare on the job thus Pare was laid off on October 1, 2010.

Yucker said he provided Pare numerous opportunities to work on various assignments at higher wages than he made as an oiler during his second tenure with the Company.

Robert McKeag testified he filled in for General Foreman Yucker when Yucker was absent including October 1, 2010. Yucker told McKeag on September 30, 2010, that Pare and oiler Bill Larson would be laid off the next day and asked McKeag to notify them, which McKeag did. McKeag said Yucker did not tell him any reason for the lay offs. McKeag, however, explained that when a machine goes "off rent" the oilers go and sometimes even the operators unless they are retained for specific reasons. McKeag never knew of a crane going off rent without the oiler leaving also. McKeag said when he told Pare he was being laid off Pare responded that General Foreman Yucker had told him "a couple of days prior to that that he may have something for him." Pare did not tell McKeag what Yucker had said. Although Pare was laid off, Operator Klatt was retained because he was a highly skilled operator.

Project Business Manager Alan Corder testified Pare came to his office late in the day October 1, 2010, saying he did not understand why he was being laid off. Corder explained the equipment he was an oiler on was going "off rent." According to Corder, Pare still could not understand why he was chosen. Corder asked Pare what his basis was for someone else being laid off. Pare had no response. Pare told Corder he had a family to support and needed the work and didn't think he should be laid off. According to Corder, Pare talked about complaining to the Union. Corder told Pare he had that right and encouraged him to take that action if he felt it was appropriate.

III. LEGAL PRINCIPLES, CREDIBILITY DETERMINATIONS, ANALYSIS, AND CONCLUSIONS

A. Legal Principles

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board adopted a causation test for use in analyzing 8(a)(1) and (3) discrimination cases. Under *Wright Line*, the Government bears the initial burden of proving by a preponderance of the evidence that animus against an employee's protected conduct was a motivating factor in the adverse employment action. The Government may establish that evidentiary burden by establishing that: (1) the employee against whom an adverse action was taken engaged in protected activity; (2) the employer knew of the protected activity; and (3) the employer exhibited animus against the employee's protected activity and the employee's protected activity was a substantial or motivating factor for the employer's action. If the Government makes a showing of discriminatory motivation, then the burden of persuasion shifts to the employer to demonstrate that the same action would have occurred even in the absence of the protected conduct. *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006).

The Government may meet its *Wright Line*, supra, burden with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances such as union animus, timing, or pretext may sustain the Government's burden. Furthermore, it may be found that where an employer's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Flour Daniel, Inc.*, 304 NLRB 970 (1991). Motivation of union animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially supports such inference. *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490-492 (7th Cir. 1993). Direct evidence of union animus is not required to support such inference. *NLRB v. 50-White Freight Lines, Inc.*, 969 F.2d 401 (7th Cir. 1992). If it is found an employer's actions are pretextual, that is, either false or not relied upon, the employer fails by definition to show it would have taken the same action for those reasons and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982).

B. Credibility Determinations

This case, as in most cases, requires some credibility resolutions. In arriving at my credibility resolutions, I carefully observed the witnesses as they testified and I have utilized such in arriving at the facts herein. I also considered each witnesses' testimony in relation to other witnesses' testimony and in light of the exhibits presented. If there is any evidence, not recited herein, that might seem to impact the credited facts I set forth I have not ignored such evidence but rather have determined it is not essential in deciding the issues or I have rejected or discredited it as not reliable or trustworthy. I have considered the entire record in arriving at the credited facts relied on. I note there are two factual disputes between Pare's and General Foreman Yuker's testimony that are very significant. The first involves when Yuker learned the crane Pare worked on was going "off rent" and notified Pare, while the other concerns what was said between Pare and Yuker during their second exchange on September 24, 2010. Pare impressed me as testifying fully, accurately, and truthfully. I credit his testimony and will expand further on my credibility resolutions as I summarize the facts relied upon. I note Pare recounted with detail the events of both September 16 and 24. He explained precisely what he was doing at the time Yuker approached him, and remembered specifically the conversations that ensued. Yuker, on the other hand, could not recall exactly when he told Pare he intended to keep Klatt and Pare on site. Perhaps Yuker's most telling testimony, however, is his recollection of his conversations with Pare on September 24. Regarding their first conversation, Yuker said Pare was "overbearing . . . as in forcing the conversation on me. I'm not sure how to explain it better than that . . . he had to have his say in all of these things. And that's the best way I can describe it." Yuker then testified about their second conversation that "[Pare] had to tell me why he was going on and being so forceful in the first conversation. And I know by the end of the conversation I was pretty annoyed with

it. Again, he was overbearing." This testimony is disjointed and does not elaborate in detail what Pare said or why it made Yuker so irritated. Yuker provides no substance or specificity to what ensued during their conversations other than his own foggy recollection and perceptions of the encounter. Furthermore, Yuker still harbors animus against Pare for filing charges against Local 139 which may impact his ability or willingness to recall their conversations fully or accurately.

C. Analysis and Conclusions

First, did Pare engage in activity protected by the Act? The evidence is clear he did. Pare's protected activity had its genesis in this case when he attempted, in February 2010, to obtain information from the Union regarding the operation of its job referral system and the policies and procedures governing its out-of-work lists. Pare suspected favoritism had infiltrated the process. When the Union failed to provide the requested information to Pare in the manner requested he advised Union Central dispatcher Yuker he would contact the Board. On March 12, 2010, Pare filed a charge (Case 30-CB-05522) against the Union alleging the Union had failed to fairly represent him by failing to provide him information concerning Local 139's hiring hall practices and procedures. The filing of this charge constituted protected conduct. Pare not only filed the above charge but, on June 2, 2010, he filed a second charge (Case 30-CB-05569) against the Union alleging the Union was harassing and threatening to expel him from membership in the Union because of his first charge. On July 27, 2010, Pare amended his second charge (Case 30-CB-05569) alleging the Union's bylaws, as outlined in a union newspaper article, provided to him by General Foreman Yuker, were unlawful. These filing actions by Pare clearly constitute activity, on his part, that is protected by the Act.

Was the Company aware of Pare's protected activity? It is undisputed the Company, by General Foreman Yuker, was aware of the unfair labor practice charges Pare filed against the Union. General Foreman Yuker was present at the Union's monthly meeting, on May 12, 2010, at which the unfair labor practice charges were discussed and Pare, as well as the other two who had filed Board charges, were identified by name and Pare's vehicle license plate number was even revealed to the membership. A day or so later, General Foreman Yuker told Pare at work that he should not have filed charges against the Union. Yuker even inquired at the June 2010 union meeting about the status of the charges Pare filed against the Union. Simply stated, the Company was undisputedly aware of Pare's protected activities.

Was Pare's protected activity a substantial or motivating factor in the Company's decision to lay him off on October 1, 2010? The totality of the circumstances clearly establishes it was. First, General Foreman Yuker was a long time union member and former business agent for the Union. Yuker was displeased Pare filed unfair labor practice charges with the Board against the Union where his brother, Guy Yuker, was the general dispatcher and other close relatives were members. General Foreman Yuker even announced to the employees at the worksite that those (Pare and the other two) should be given a chance to undo what they had done by filing charges with the

Board, but, if they did not, internal union charges should be brought against them and their union cards taken away. General Foreman Yuker made it clear that Pare and the others were to drop, or withdraw their charges, or they should be removed from union membership and its benefits including job referrals. Following Pare's filing his second unfair labor practice charge on June 2, 2010, against the Union in which he alleged he was being harassed for filing his initial charge, General Foreman Yuker attended the Union's June 9 monthly meeting and specifically asked about any disposition of the unfair labor practice charges against the Union. Pare attempted to speak with General Foreman Yuker at the June meeting but Yuker ignored him. The next day, June 10, 2010, at work, Pare asked General Foreman Yuker why he would not speak with him or shake his hand the day before. Pare credibly testified Yuker told him he was not going to shake his hand until he knew the outcome of the charges Pare had filed against the Union. Yuker told Pare he was wrong in filing the charges and going outside the Union and had broke his oath to the Union. General Foreman Yuker acknowledged he again refused to shake Pare's hand at the end of this meeting because he picked his friends and he disagreed with Pare's actions.

On June 28, 2010, General Foreman Yuker continued to demonstrate his animus against Pare's protected conduct by again indicating to him his charges against the Union were wrong and gave Pare a copy of a Seventh Circuit Court of Appeals decision that was "evidence" Pare and the other two should not be suing the Union. Yuker at work was again expressing his displeasure to Pare regarding Pare's protected actions. On July 12, 2010, at work, General Foreman Yuker gave Pare a union newspaper article written by the Union's attorney on the subject of how internal remedies saved Local 139 money. Yuker suggested to Pare the article might be of interest to him. Two days later Yuker, at work, explained to Pare the newspaper article showed Pare had no right to go outside the Union for help and that Pare should show it to his attorney so they could understand that what Pare was doing was wrong and he could not sue the Union. Pare told General Foreman Yuker all of this was none of Yuker's business that it was a matter between Pare and the Union. General Foreman Yuker again expressed his animus against Pare's protected conduct on September 24, 2010. Yuker admittedly spoke with Pare twice on that date as he was explaining new safety procedures to those working on or around cranes. I credit Pare's account of the two meetings. Pare was much more precise in his recollection of what was said at each meeting. Pare simply stated what was said whereas, Yuker summarized these meetings, saying Pare was "overbearing," "forceful," and Yuker acknowledged he was "annoyed with it." Relying on Pare's credited testimony, I find Pare asked Yuker why every time they met it felt like they wanted to shoot each other. Pare told Yuker he had nothing against him and treated him like his foreman. Yuker responded that what Pare did to the Union he had done to him and added, "Until you change that, this is the way it is going to be." One week later Pare was laid off. It is clear that General Foreman Yuker was the one responsible for selecting Pare for layoff. His selection of operators or oilers for layoff was consistently upheld by higher management. Higher management deter-

mined only the number to be laid off while Yuker selected the specific individuals for layoff.

By all of the above, the Government has established the Company, General Foreman Yuker in particular, had and specifically expressed animus against Pare's protected conduct and acted on that animus in laying off Pare on October 1, 2010.

Did the Company demonstrate that it would have laid Pare off when it did even in the absence of any protected conduct on his part? I find the Company did not meet its burden of persuasion. The Company's contention General Foreman Yuker was simply following company protocol when he selected Pare to be laid off, as Pare was the oiler assigned to the crane going off rent, does not withstand close scrutiny. Two conversations of General Foreman Yuker with Pare establishes Yuker's authority to select those for layoff regardless of any protocol and establishes what his real motivations were in selecting Pare for layoff. In the conversation with Pare, on September 16, 2010, General Foreman Yuker clearly indicated he had the authority not to follow protocol in selecting employees for layoff. Yuker told Pare and operator Klatt that although their crane was going off rent he planned to keep them and asked Pare and Klatt not to mention that fact because he had to "lay someone else off" to keep them employed but that was his "game plan." It is clear General Foreman Yuker had a game plan for selecting employees for layoff that did not follow any protocol. It is just as clear Yuker could select whomever for layoff and his selections or recommendations to higher management were, as a general practice, accepted by higher management. The second of two conversations on September 24, 2010, demonstrates Yuker's real motivation for selecting Pare for layoff. In the first conversation on September 24, Pare attempted to tell Yuker one of the union stewards had said something different about oilers being in the swing radius from what General Foreman Yuker had stated. The exchange between Pare and Yuker became heated. In the second conversation, on September 24, Pare tries to clear up the first conversation between them. In the second conversation Pare asks Yuker why there seems to be so much animosity between them. Yuker responded that what Pare had done to the Union by filing the unfair labor practice charges against the Union he had done to Yuker and, "until [Pare] changes that, this is the way it's going to be." One week later Pare is chosen for layoff. General Foreman Yuker who, days earlier, told Pare he was doing a nice job and he intended to keep him on the job, but then on September 24 had a confrontation with Pare telling Pare that until he cleared up his situation (charges) with the Union relations between the two of them would be filled with animosity. These exchanges in September clearly refute the Company's contention General Foreman Yuker was simply following established protocol when he selected Pare for layoff on October 1, 2010.

I reject the Company's contention that General Foreman Yuker's disagreement with Pare's filing charges against the Union does not constitute unlawful animus but was purely an internal union disagreement between two members that did not spill into or impact their work relationship. It did enter into their working relationship and it demonstrates strong animus against Pare's protected rights. General Foreman Yuker announced, at work, to Pare's coworkers that Pare should not

have filed the charges and he should undo his actions in that regard. Yucker gave Pare, at work, a court decision and a union newsletter trying to persuade Pare against his protected conduct. Even when Pare tried to improve the working relationship with General Foreman Yucker, he was told the animosity would continue on the job until Pare took care of his charges against the Union. General Foreman Yucker's conversations with, and his actions against, Pare demonstrate this was more than just an internal union disagreement between two union members.

I likewise reject the Company's contention that because General Foreman Yucker gave Pare certain opportunities to operate different equipment at higher rates of pay demonstrates Yucker held no unlawful animus against Pare. The Company did not explain or establish reason(s) why Yucker gave Pare the temporary assignments at a higher pay scale. It could have been because no one else was available or Pare was the most highly skilled for the assignment, but such is only speculation and does not demonstrate a lack of any unlawful animus against Pare's protected conduct.

Accordingly, I conclude the Company's layoff of Pare on October 1, 2010, violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By on October 1, 2010, laying off Timothy Pare because he engaged in protected activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy its unlawful conduct toward Pare, the Company must, within 14 days of the Board's Order, offer him reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any lost wages and benefits as a result of his October 1, 2010 layoff, with interest. Backpay will be computed as outlined in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) (backpay computed on quarterly basis). Determining the applicable rate of interest will be as outlined in *New Horizons*, 283 NLRB 1173 (1987) (adopting Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employee shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). I also recommend the Company, within 14 days of the Board's Order, be ordered to remove from its files any reference to its October 1, 2010 layoff of Pare and, within 3 days thereafter, notify Pare in writing it has done so and that his layoff will not be used against him in any manner. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be ap-

prised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, URS Energy and Construction, Inc., Oak Creek, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against employees for engaging in activity protected by the Act.

(b) 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.

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

(a) Within 14 days from the date of the Board's Order, offer Timothy Pare 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 rights or privileges previously enjoyed.

(b) Make Timothy Pare 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 this decision.

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

(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 the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Elm Road Generating Station, Oak Creek, Wisconsin facility, copies of the notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings conclusions and recommended Order shall, as provided in Sec.102.48 of all the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of the 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."

electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expenses, a copy of the notice to all current employees and former employees employed by the Company at any time since October 1, 2010.

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 layoff or otherwise discriminate against any of you for engaging in activity protected by the Act.

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, within 14 days from the date of this Order, offer Timothy Pare 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 rights or privileges previously enjoyed.

WE WILL MAKE Timothy Pare whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful layoff of Timothy Pare, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

URS ENERGY AND CONSTRUCTION, INC.