

**Allegheny Mining Corporation and United Mine Workers of America. Case 5-CA-3659**

August 17, 1967

**DECISION AND ORDER**

**BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND JENKINS**

On June 5, 1967, Trial Examiner George A. Downing issued his Decision in this proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supporting brief.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modification in the order set forth below.<sup>2</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Allegheny Mining Corporation, Mount Storm, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

Substitute the following for paragraph 2(d) of the Trial Examiner's Recommended Order:

"(d) Post at its offices, shops, and mines in Mount Storm, West Virginia, copies of the attached notice marked 'Appendix.' Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that

said notices are not altered, defaced, or covered by any other material."

<sup>1</sup> As the record, exceptions, and brief in our opinion adequately present the issues and the positions of the parties, Respondent's request for oral argument is hereby denied

<sup>2</sup> To comport with our usual practice, we shall direct the Respondent to post the notice, attached to the Trial Examiner's Decision, at the mine operations in Mount Storm, West Virginia, where the unfair labor practices were committed

**TRIAL EXAMINER'S DECISION**

**STATEMENT OF THE CASE**

GEORGE A. DOWNING, Trial Examiner: This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended, was heard at Petersburg, West Virginia, on March 14 and 15, 1967, pursuant to due notice. The complaint, which was issued on January 19, 1967, on a charge dated November 22, 1966, alleged in substance that Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act, by various specified acts of interference, restraint, and coercion in September and October 1966,<sup>1</sup> and by discharging Homer Rush on November 17 because of his union membership and activity. Respondent answered denying the unfair labor practices.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

**FINDINGS OF FACTS**

**I. JURISDICTIONAL FINDINGS**

Respondent, a West Virginia corporation, is engaged in the mining and sale of coal at its mine at Mount Storm, West Virginia. It purchases and receives annually goods of a value in excess of \$50,000 directly from extrastate points and is therefore engaged in commerce within the meaning of Section 2(6) and (7).

**II. THE LABOR ORGANIZATION**

United Mine Workers of America, Union herein, is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE UNFAIR LABOR PRACTICES**

**A. Introduction and Issues**

Respondent operates near Mount Storm two coal mines which it purchased in June 1964 and which it commenced to operate in the fall of that year. One was a deep mine operation and the other (at which the alleged unfair labor practices occurred) was a strip mine. Respondent is owned and managed by its president, Leonard S. Fry, and its secretary-treasurer, Fred Shaulis, Fry's son-in-law, both of whom reside at Mercersburg, Pennsylvania. Those officers spend on the average of a day or day and a half a week at Mount Storm, where the actual mining operations are supervised by Mine Superintendent

<sup>1</sup> All events herein occurred in 1966 unless otherwise specified

Lawrence Streets and by Assistant Superintendent and Master Mechanic Tom Streets, who is Lawrence's uncle.

Organizational activities which began at the strip mine in August were countered by the holding of a meeting with employees on September 7 at which, among other things, President Fry announced the granting of certain benefits and the intention of granting others. Around October 8 Homer Rush, a dragline operator on the day shift since September 1964, became most active in the organizational activities and continued his efforts, to Respondent's knowledge, until his discharge on November 17. Around October 14 Respondent announced that it would install a swing shift and actually began it on November 3. Though Rush at first threatened to quit because of the loss of his day shift, he stayed on and continued his organizational efforts actively and openly until discharged.

The chief issues herein concern alleged coercive statements made by Fry in his speech to the employees on September 7, the promising and granting of benefits at the time, and the discharge of Homer Rush, which was defended on the basis of various "causes." Also in issue were alleged threats by Lawrence Streets on September 7 and by Thomas Streets on September 11.

Because of the findings made and the conclusions reached herein, I deny Respondent's requested findings of fact, conclusions of law, and recommendations.

#### B. *The Organizational Activities; the Section 8(a)(1) Conduct*

An active organizing campaign among the strip mine employees was begun by the Union in August and soon reached Respondent's attention. As early as September 1 Fry informed Virginia Electric & Power Company (VEPCO herein) of the organizing activities and that Respondent's financial condition was such that it needed an increase in the contract price of coal in order to meet anticipated increases in labor costs.<sup>2</sup> Though promising "financial relief," VEPCO made no definite commitment but requested Respondent to develop or to evaluate in its annual statement on August 31 what the anticipated labor increase would cost per ton and to meet with VEPCO about October 1.

Having set up a meeting with the employees for the afternoon of September 7, Fry notified VEPCO of it on the morning of the 7th and talked further about the union activities in the field. Two representatives of VEPCO attended the meeting.

There is little conflict in the evidence concerning what Fry stated in his speech to the employees, for as Respondent summarizes the testimony:

It was testified to at the hearing by witnesses for the General Counsel and the Respondent, and never denied by the Respondent, that during this September 7, 1966, speech Mr. Fry announced to the employees that the Respondent was granting them a general wage increase, increasing paid holidays to five paid holidays, assuming full payment of the Respondent's current hospitalization plan, instituting

a vacation plan and planning to establish a pension plan.

The meeting was the first one Fry had held with the employees in some 2 years and the general wage increase was the only one he had ever given. Furthermore, Fry announced the benefits in the context of direct references to the Union and union activities and to what might happen if the Union were to come in. Thus though Fry stated that the choice of union or no union would be up to the men, he testified further that, "I went on to say that I felt that if the union won the election that the company would have to be sold; that I was getting along in my age in life; I had been in the business 30 or 32 years; and my life was getting too short for negotiations with union people." Fry also acknowledged that he definitely made that statement that his stock would be for sale and that someone else would have to run the Company.

Witnesses for the General Counsel testified that Fry also made the following additional references to the Union: (1) that he could work out a better pension retirement plan than that of the Union; (2) that the employees who had signed cards could get them back by demanding them from the Union, (3) that if an election were held and the Union lost, there could not be another election for a year.

Fry testified that he explained that the Company had realized for some time that the men were entitled to a wage increase; that the one being granted would bring their wages up to the area's prevailing rates; that the wage increase and the fringe benefits had not previously been granted because the Company was losing money; that before giving the increase the Company had to obtain an increase in the price of coal; and that VEPCO had assured him that morning that certain increases could be obtained.

Fry's further testimony showed, however, that there was no commitment by VEPCO, and that no increase has yet been received. Thus Fry testified that by a later contract amendment certain increases were to be paid *provided* Respondent improved the quality of its coal to 11,500 BTU's and reached certain production quotas but Respondent has not met the specified conditions and has therefore not received "one penny more." Despite that failure, and though the pension plan was specifically conditioned on the success of negotiating additional money with VEPCO, the plan was put into effect on January 1 because Fry was "hopeful" that Respondent may yet meet VEPCO's quality and quantity requirements.

Fry also sought by his testimony to justify the granting of benefits by certain representations he made in a meeting of employees 2 years earlier, as follows: that he then offered the men participation on a voluntary basis in a group insurance or hospitalization plan, with Respondent paying one-third of the cost and the employees two-thirds and told the men that the Company hoped to be able to increase wages and other various fringe benefits, such as vacations and holidays, on an annual basis as the economic condition of the Company permitted.<sup>3</sup> He testified that in late 1965 the Company raised its contribution to the insurance and hospitalization plan from one-third to one-half, which increase was handled either by letter or by oral advice through supervision.

<sup>2</sup> VEPCO purchases 95 percent of Respondent's output at a price fixed by a contract which has several years to run. The contract contained what Fry described as a "vaguely worded escalation or escape clause" which Fry relied upon in negotiations with VEPCO as justifying an increase in the price of coal to meet increased living costs and operating costs

<sup>3</sup> Significantly none of the witnesses, including Fry, testified that Fry made any reference to those prior promises in announcing the benefits in his September 7 speech. Furthermore Fry testified that Respondent was losing money at the time

At the end of Fry's speech, Lawrence Streets held up a union card and read it to the employees. Streets made no substantial denial of testimony by Homer Rush and Raymond Cussins that he informed the men that by signing such a card they would sign away all their privileges or their right to any benefits from the Company and that if they wanted such privileges, for example, as time off for hunting or fishing, they would have to go to the Union to do the bargaining. Two later conversations which are also claimed by the General Counsel to be violative of Section 8(a)(1) contained only repetition of some of the statements made at the meeting. Rush testified that on the next day he thanked Fry for the raise and that Fry stated he did not know what was going to happen if the job went union and would just have to shut down and sell out. Though Fry denied making any reference to shutting down or going out of business, the statements which Rush testified to were substantially to the same effect as those which Fry admittedly made at the meeting. I therefore credit Rush's testimony.

In the other conversation between Rush and Thomas Streets on September 11, Streets admitted making a comment (similar to Lawrence Streets' at the meeting) that if the mine went union and if Rush wanted a day or two off to go hunting, he would have to do that through the Union.

### Concluding Findings

The promising and granting of the wage raise and the other benefits in the context of repeated references to the Union and its organizational campaign was plainly a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409-410; *Medo Photo Supply Corporation v. N.L.R.B.*, 321 U.S. 678, 686. Indeed, the present case is stronger on its facts than the cited cases for here the "express purpose" of impinging on the employee's freedom of choice was emphasized by Fry's threats to sell out the Company or his stock and by Lawrence Streets' statement that by signing a union card the employees would sign away company benefits and privileges previously granted. Thus Respondent's "other unlawful conduct" made explicit here the motive found to be "otherwise established" in *Exchange Parts, supra*, where the employer refrained from such "other more obvious violations."

I therefore conclude and find that by promising and granting wage raises and other benefits on September 7 and since, and by threatening employees on September 7, 8, and 11 with loss of existing benefits and privileges and with other reprisals if the Union should come in, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act.

### C. The Discharge of Homer Rush

Homer Rush was employed by Respondent as a dragline operator on September 17, 1964, and was discharged on November 17, 1966. Rush notified Superintendent Lawrence Streets around October 8 that he was in the Union "up to [his] ears," that he proposed to back it fully, and that Streets should so inform Fry.<sup>4</sup>

Thereafter Rush engaged openly, to Respondent's knowledge, in soliciting for the Union both on and off company time. As Respondent's defense is based in part on Rush's violation of an alleged rule against solicitation, we review preliminarily the evidence concerning said rule.

It was plain from all the evidence that Respondent had no rule against solicitation or against employees talking among themselves on the job and that talking in particular was commonly engaged in. Raymond Cussins testified he knew of no rule either against talking or against solicitation of any kind, and he, Thomas Hawk, and Burlin Gillaspie testified that both before and after Rush's discharge employees frequently talked among themselves on company time in the presence of supervision about such matters as hunting or fishing without objection from any member of supervision. Superintendent Lawrence Streets admitted that sometimes, "in a passing way," he stood around on company time and talked with the men about hunting and fishing and that it was his privilege and right to do so.

As for solicitations, there was also no dispute that collections were occasionally made among the employees on the job, with supervision also joining in the contributions. Indeed in two different years the men took up a collection to buy a Christmas present for Fry himself, one of the gifts being a case of whiskey.

Though there was no dispute that Fry made references to talking on the job during his September 7 speech, it was plain that he was laying down no prohibitory rule but was expressing only a hope that the men would not waste too much productive time in talking. Thus Gillaspie testified that Fry stated he did not mind seeing one, two, or even three employees standing around talking but he did not like to see half a dozen doing so. Rush testified that Fry stated that he did not mind a couple of men stopping the machine and "shooting the breeze" for a couple of minutes but that he did not like to see three or four or five or six men get together and hold up production while talking "like a bunch of women." Raymond Cussins testified that Fry commented on the union cards being passed around and stated that he did not want the men "aggravated over the Union, over signing a Union card. . . ."

Vice President Shaulis substantially corroborated the foregoing testimony. Thus Shaulis testified that Fry stated he did not mind if two or three men stood around talking, but he did not want five or six congregating "like a bunch of old ladies," because by standing around talking with each other rather than working, they were in effect taking money from Fry and the Company, and he "would appreciate it" if in the future they would not do such things.

Fry testified that after referring to the union activities, he stated that he certainly "hoped" there would be none conducted on the job and that he would not have to discharge anyone for any activities that would interfere with the normal progress of the work on the job. Lawrence Streets testified that Fry stated that he did not want any union activities on the job.

Since Shaulis substantially corroborated the testimony of Gillaspie, Rush, and Cussins, I credit the latter, and I therefore conclude and find (1) that Respondent had no

<sup>4</sup> The testimony of Rush and Streets is in conflict as to whether Streets replied that Fry did not want the Union on the job or only reminded him

of what Fry said in his speech about the union activities. I find that Streets referred to the latter.

rule against talking or against solicitation on the job; (2) that if Fry's statements on September 7 were to be regarded as establishing a "rule," it was one which was intended to apply discriminatorily against engaging in union activity; and (3) that it was in fact so applied as regarded Rush's activities after October 8.

We turn now to the events which intervened before Rush's discharge. Rush's disclosure of his union allegiance on October 8 was followed on October 14 by Respondent's announcement that it proposed to install a swing shift, which would result in the loss by Rush of the day shift on which he had worked exclusively since first employed.<sup>5</sup> That action was taken following complaints from, and a polling of, employees as to their desires, with only Rush expressing objection. Rush at first announced that he would quit, but later informed the Streets that he would stay on "until hell froze over."

Rush's solicitations for the Union continued apace, with the following specific instances being shown by the record:

Thomas Hawk, Rush's oiler, testified that Rush talked with him "Fairly regular" on the job about the Union but did not interfere with him.

James Bolyard, a witness for Respondent, testified to occasions before mid-October when Rush solicited him to sign a card as they were changing shifts, but those solicitations apparently did not encroach on worktime. On another occasion Bolyard saw Rush engaged in a conversation with Paul Shannon on Shannon's worktime when Rush had a blue card. Jim Head, another witness for Respondent, testified that Rush never solicited him to join the Union but did on one occasion tell him at some length during worktime what the union benefits were. Head reported the matter to Thomas Streets, not as a complaint but because he thought Streets should know.

On November 3 or 4 Rush solicited Harland Smith on the latter's worktime and was observed doing so by Thomas Streets, who said nothing at the time to either man. Around November 13 or 14 Rush solicited Donald Upole, a new employee, while both were on worktime. Upole reported the matter to Lawrence Streets, not as a complaint but to get Streets' advice because, he testified, he did not know what he was getting into.

Finally Fry testified that he himself saw Rush talking with three or four other men in the shop, detaining them from their work, but he admitted he did not know what they were talking about, and there is nothing in the record which indicates that the subject was union activities or that Rush was responsible for initiating or for carrying on the conversation.<sup>6</sup>

The record shows that Respondent objected to Rush's activities among the men and that it warned him to stop. Thus Superintendent Lawrence Streets testified that when he returned from a 2-week vacation around October 28, Thomas Streets reported to him that there was dissatisfaction between Rush and the other employees on the dragline and that they and Jim Head, the mechanic, had reported to Thomas that Rush engaged them in discussions of the Union and that when they did not agree, he would curse them or call them names.

Rush testified that Thomas Streets informed him that the men were complaining about Rush "agitating" them,

and when Rush inquired what he meant, Streets replied he did not know, that he got his orders from higher up, and that if he did not carry them out someone else would.

Thomas Streets confirmed that the name calling, which was the chief ground of employee complaints to him occurred in conversations in which Rush was soliciting employees to sign union cards and that that was what was "irritating" them, along with Rush's lack of cooperation on the machine. Though Streets informed Rush of complaints by the men that Rush was not "getting along" with them, he answered Rush's inquiry concerning the nature of the complaints only by stating, "You know as well as I do what the trouble is."

Rush also sought an explanation from Lawrence Streets of the alleged "agitation," informing Streets he had not held the men up from doing their work. Streets replied that an employee (Upole) had reported the contrary a night or two before. Streets admitted that Rush inquired what it was the men complained of and testified he informed Rush they complained that Rush did not get along with them.

Rush testified that he was discharged at the end of his work shift on the day following the foregoing conversation with Lawrence Streets. Streets handed Rush his pay envelope, stating, "Well, I guess this is it, Homer," and "He said to give this to you when you finished your shift tonight." Rush asked the reason and Streets replied that he just worked there the same as Rush did and that, "He said to give this to you." Streets added that he had nothing to say against Rush's work and that he hated to see Rush go.

Rush testified that he returned on November 23 and asked Fry to reconsider and to give him his job back. When Fry stated that he had not fired Rush in the first place, Rush replied that he had not been able to find out who did so. Fry asserted that Rush had quit, but Rush reminded Fry that he had told Thomas Streets he was going to stay on. Fry then referred to the agitation or the trouble among the men, and Rush stated he had tried to get to the bottom of that claim and that neither of the Streets could tell him what it was or to face him with the alleged accusers. Fry in turn stated that neither would he reveal another man's name who reported something about another employee.

Respondent contends that it discharged Rush for a number of "causes," though the testimony of its chief witnesses (Fry and the Streets) was in conflict not only as to what causes were taken into consideration but also as to what it was which finally triggered the discharge action. Furthermore the testimony of employee witnesses upon which Respondent relies fell far short of establishing Respondent's claim of complaints against Rush, both as to time and in content.

Beginning with supervision, Fry testified that the decision to discharge was one which Respondent had "carefully weighed" since mid-October and that the final "straw that broke the camel's back" was the occasion on which Fry himself saw Rush talking with three or four other men. Thomas Streets testified to the contrary that what brought matters to a head was an incident in which Bolyard got Rush "backed up against the wall" because

<sup>5</sup> Though Rush contended that he accepted employment in 1964 on the promised condition that he work on the day shift, the General Counsel makes no claim of discrimination because of the change to a swing shift

<sup>6</sup> Significantly, Fry characterized that incident as "the straw that broke the camel's back", i.e., as precipitating the decision to discharge

of something Rush said about Bolyard, as a result of which Streets "felt that we had to do something."

Besides being inconsistent both of those claims were subject to stringent discounting on the entire record. As previously observed, Fry was admittedly unaware of the subject under discussion, his testimony did not establish that it was Rush who was responsible for the loss of worktime, and none of his alleged concern was directed at other participants in the conversations. Significantly, too, Fry admitted that nothing happened after that incident which led to Rush's discharge. Thomas Streets' testimony was in turn exploded by the testimony of Thomas Hawk and of Bolyard himself as Respondent's witness, which established that though the name calling and the confrontation between Bolyard and Rush occurred, the incident happened back in August according to Hawk, or in August or September according to Bolyard, and that Bolyard accepted Rush's apology at the time. Furthermore Bolyard testified he had no further arguments with Rush despite the fact that Rush solicited him on a number of occasions to join the Union.

Finally, whatever force remained to the testimony of Fry and Thomas Streets was dissipated by Lawrence Streets, the last of Respondent's officials to testify concerning the discharge. Thus, though Fry denied that Rush's union activities had anything to do with the discharge, Lawrence Streets repeatedly acknowledged that *one of the reasons* for the discharge was the fact that Thomas Streets and some of the employees were reporting that Rush was passing out union cards and engaging in union activities on company time.<sup>7</sup> As that acknowledgement served but to confirm the conclusion which is impelled by the entire evidence, the additional reasons asserted by Respondent need not be reviewed at length.

Briefly summarized those reasons were that Rush did not get along with the other employees, that he failed to cooperate or to communicate with employees on the dragline on matters which were essential to an efficient operation, that he interfered with the work of the other men by talking with them on worktime, and that he cursed and called them names behind their backs. Finally the Streets testified also to reports from employees that they would quit rather than work on the same shift with Rush, which reports as they reached Fry were such as to present "a choice between either Homer Rush going or of the other men quitting."

On cursing and name calling Respondent's evidence highlighted the Bolyard incident, but the significance of that evaporated entirely under the testimony of Bolyard and Hawk as previously observed. Harold Sherwood, also Respondent's witness, testified that though he heard that Rush was cursing him behind his back, he did not speak to Rush and just let the matter go. Sherwood did mention the matter to Lawrence Streets, however, and thereafter Streets spoke to both men, telling them that they had to get along together and to cooperate on the machine. Hawk, who overheard Streets admonish Rush about the name calling, fixed the time of the incident as July.

There was also testimony by Lawrence Streets that Jim

Head was one of the employees who reported to him that Rush cursed and called Head names when Head did not agree to join the Union and that "tempers flared." Head's testimony, however, contained no confirmation of the alleged cursing and name calling; and though Head testified that he reported to Streets that Rush was discussing the Union with him, he did not do so in the guise of making a complaint. Again the report as it reached Fry was further magnified, for Fry referred to it as an incident of "near fisticuffs" between Rush and Head. There was no substantiation of such a report.

Furthermore, it was not disputed that it was common to hear cursing and swearing on the job by persons other than Rush, and Lawrence Streets admitted that he cursed on the job as much as the other men.

Respondent also failed to substantiate alleged reports that other employees threatened to quit rather than to work with Rush.<sup>8</sup> The only employee whom Respondent sought to identify as making such a statement was Burlin Gillaspie (by Lawrence Streets), but Gillaspie's testimony contained no confirmation of his alleged threat. Indeed, Gillaspie worked on a different shift than Rush, as an oiler for Harold Sherwood.

We turn now to Rush's attitude toward other employees on the job and his alleged failure to cooperate with them. The witnesses on both sides were in agreement that Rush did not get along well with the other employees on the dragline, that sometimes he would speak to them and sometimes he would not, and that his attitude worsened after the swing shift was announced (over his dissenting vote). However, Bolyard admitted on cross-examination that Rush's attitude had been the same for the year and a half he had known Rush and that, "Homer was always pretty moody on the machine."

There were also claims that Rush sometimes did not pass on necessary instructions at shift changes and did not make proper entries in the log book. The evidence concerning those matters, however, was in some dispute. Burlin Gillaspie (Sherwood's oiler on the shift which relieved Rush) testified, for example, that on one occasion his crew could not find in the log book any notation as to the time the oil fittings on the dragline had been greased. Gillaspie asked Rush if he knew when the machine was supposed to be greased and got no definite answer from him. Gillaspie admitted that he did not know whether the entry in the book was one which would or should have been made on Rush's shift. Rush testified that he kept the log book in the same manner both before and after the swing shift was started and that on the occasion when Gillaspie asked him about the oil change, he simply told Gillaspie to look in the log book and he would see.

Jim Head testified that in the month of October Thomas Streets called to his attention the fact that the fire extinguishers were empty on the dragline but did not criticize him about it. Head testified that though it was his duty to see that the fire extinguishers were filled, it was the responsibility of the operator (Rush) or the oiler (Hawk) to bring the extinguishers to the shop when they were empty so that Head might have them filled. Head made no attempt to explain the basis for his apparent conclusion that the extinguishers became empty during a

<sup>7</sup> Because of the contradictions and the inconsistencies in the testimony of Fry and the Streets as above set forth, I do not credit their testimony where it is elsewhere in conflict with that of Rush or of the other witnesses.

<sup>8</sup> Since the alleged resentment against Rush grew chiefly out of his organizational activities, such reports, if true, would not avail Respondent as a defense. See *Altamont Shirt Corporation*, 131 NLRB 112, and cases cited therein at 120.

shift on which Rush and Hawk were operating the machine.

Respondent also contended that Rush interfered with the work of other employees by keeping certain company tools and parts in his truck, and although it concedes in its brief that Rush returned tools which he "removed" from the dragline, it argues that his conduct "would still amount to a 'theft' of these tools." There was little substance to the contention and even less to Respondent's exaggerated claim of theft, for the evidence showed only the following:

Bolyard testified to an occasion when his shift needed to replace a nipple on a valve and none could be found in the toolbox. He mentioned the matter to Rush the next morning who said that he had some nipples in his pickup truck, and that is all that was said. Thomas Streets, who learned of the incident, admitted that he did not know whether the nipples belonged to the Company and agreed that they could possibly have been Rush's.

Harold Sherwood was questioned about some incident involving tools which had been removed from the machine but testified that he could not say what happened to them and that some were lost. He testified further that some of the small tools on the machine belong to the operator, who takes them home, but that it is customary for the bigger tools to stay on the machine.

Burlin Gillaspie testified that on one occasion Rush took away from the job a wrench which he had mistaken for his own, but that Rush brought it back, and Gillaspie did not know whether Rush took it intentionally. There was no evidence that the temporary absence of the wrench interfered in any way with the work of other employees.

The foregoing summary, which covers the testimony of all of the employees who testified to alleged "complaints" against Rush shows plainly that Respondent's officials exaggerated their claims of misconduct on Rush's part. Indeed, most of the employees testified that they were not making complaints but were merely reporting on activities in which they assumed Respondent was interested.

Respondent's case was no stronger, of course, than that which it sought to make out by calling the informants to support the alleged complaints. Furthermore, as previously found, the testimony of Respondent's officials was both inconsistent and contradictory in assigning the factors which motivated the discharge. Thus Thomas Streets assigned as the precipitating incident the personal encounter between Bolyard and Rush which occurred months before the discharge and which was settled between the men by Bolyard's acceptance of Rush's apology. Fry assigned instead an incident of a conversation between Rush and other employees. Finally Lawrence Streets acknowledged that Rush's union activities on the job was one of the motivating reasons for the discharge, thereby contradicting Fry's denials that such was the case.

Though that final admission was alone sufficient to establish a violation of Section 8(a)(3),<sup>9</sup> the present decision need not rest solely on that basis. For what the evidence in its entirety showed was that Rush was

discharged because of his union activities alone and that the other miscellany of stale, exaggerated, and unproved complaints were only pretexts by which Respondent sought to build a record of "cause."

Thus the record shows (in addition to facts previously found) that prior to October 8, Rush was not only regarded as a satisfactory employee (despite his moodiness or other personality traits) but had for 2 years been accorded his preference of work shifts. But once Rush announced his intention of backing the Union fully, he suddenly became *persona non grata*. Indeed, Fry admitted that as early as mid-October the matter of discharging Rush was being seriously considered and that he was perfectly willing to let Rush quit at that time. It was then also that Rush began to intensify his organizational efforts, which Respondent countered by warnings to stop "agitating" the men. Significantly Respondent avoided defining what the "agitation" consisted of and refused to divulge the identity of the alleged accusers. A final inconsistency developed concerning the discharge itself, with Lawrence Streets clearly implying that Fry had ordered the discharge, while Fry denied that he had done so.

To summarize my findings, I have previously found that Respondent had no rule against talking or against solicitation on the job, or at best an invalid rule which it applied discriminatorily for the purpose of restraining Rush in his organizational activities. Cf. *Rowe Industries*, 152 NLRB 70, 74, *The Rose Company*, 154 NLRB 228, 270. I conclude and find further that Respondent discharged Rush because of his union activities among the employees and to discourage membership in the Union and that Respondent failed to establish that it discharged Rush for any of the causes which it assigned. Finally, I find alternatively that in any event a substantial and motivating reason for the discharge, as acknowledged by Lawrence Streets, was Rush's organizational activities among the employees. See footnote 9, *supra*, and cases there cited.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

#### CONCLUSIONS OF LAW

1. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1).
2. By discharging Homer Rush on November 17, 1966, to discourage membership in the Union, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action as provided in the Recommended Order below which I

<sup>9</sup> It is well established that even though a discharge is based on other reasons as well, if an employer is partly motivated by union activity, the discharge is violative of the Act *NLRB v. Whittin Machine Works*, 204 F.2d 883, 885 (C.A. 1), and cases there cited, *NLRB v. Great Eastern*

*Color Lithographic Corp.*, 309 F.2d 352, 355 (C.A. 2), cert. denied 373 U.S. 950, *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (C.A. 2), cf. *NLRB v. Town & Country Mfg. Co.*, 316 F.2d 846, 847 (C.A. 5)

find to be necessary to remedy and to remove the effect of the unfair labor practices and to effectuate the policies of the Act. For reasons which are stated in *Consolidated Industries, Inc.*, 108 NLRB 60, 61, and cases there cited, I shall recommend a broad cease-and-desist order.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

### RECOMMENDED ORDER

Allegheny Mining Corporation, its officers, agents, successors, and assigns, shall:

#### 1. Cease and desist from:

(a) Promising and granting to its employees wage raises and other benefits for the purpose of affecting their right freely to choose or to join United Mine Workers of America, or any other labor organization.

(b) Threatening its employees with loss of existing benefits or privileges or with any other reprisals if the Union should come in.

(c) Discouraging membership in the Union, or in any other labor organization of its employees, by discharging them or in any other manner discriminating against them in regard to hire or tenure of employment or any term or condition of employment.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist said United Mine Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement authorized by Section 8(a)(3) of the Act.

#### 2. Take the following affirmative action:

(a) Offer to Homer Rush immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by payment to him of a sum of money equal to that which he would have earned from the date of his discharge to the date of the offer of reinstatement, less his net earnings during said period (*Crossett Lumber Company*, 8 NLRB 440), said backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, together with interest thereon at the rate of 6 percent per annum. *Isis Plumbing & Heating Co.*, 138 NLRB 716.

(b) Notify the said Homer Rush if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(d) Post at its offices, shops, and mines at Petersburg, West Virginia, and at Mercersburg, Pennsylvania, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of said notice, to be furnished by the Regional Director for

Region 5, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.<sup>11</sup>

<sup>10</sup> In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

<sup>11</sup> In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 5, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

## APPENDIX

### NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT promise or grant wage raises or other benefits for the purpose of affecting our employees' right freely to choose and to join United Mine Workers of America, or any other labor organization.

WE WILL NOT threaten our employees with loss of existing benefits or privileges or with any other reprisals if the Union should come in.

WE WILL NOT discourage membership in United Mine Workers of America, or in any other labor organization of our employees, by discharging employees or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist said United Mine Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement authorized by Section 8(a)(3) of the Act.

WE WILL offer to Homer Rush immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of our discrimination against him in the manner provided in the Trial Examiner's Decision.

All our employees are free to become and remain members of United Mine Workers of America, or any other labor organization, except to the extent that such right may be affected by an agreement authorized by Section 8(a)(3) of the Act.

ALLEHGENY MINING  
CORPORATION  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

Note: We will notify the above-named employee if

presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 6th Floor, 707 North Calvert Street, Baltimore, Maryland 21202, Telephone 752-8460, Ext. 2100.