Atlas Minerals, Division of Atlas Corporation *and* Richard Ross. Case 27-CA-6521

May 20, 1981

DECISION AND ORDER

On December 2, 1980, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in reply.

The Board has considered th record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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 Administrative Law Judge and hereby orders that the Respondent, Atlas Minerals, Division of Atlas Corporation, Moab, Utah, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except the attached notice is substituted for that of the Administrative Law Judge.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and State their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

The Federal Mine Safety and Health Act of 1977 is administered by the Mine Safety and Health Administration, a subdivision of the U.S. Department of Labor. That Act gives employees the right to file complaints concerning mine safety and health.

WE WILL NOT threaten to learn who has filed safety complaints with the Mine Safety and Health Administration.

WE WILL NOT threaten to discharge or otherwise discriminate against employees who file safety complaints against us with the Mine Safety and Health Administration.

WE WILL NOT suggeest that we have "off the record" rules which differ from the above promises and assurances or the provisions of the Federal Mine Safety and Health Act of 1977.

WE WILL NOT suspend the official miners' representative of our employees designated by the Mine Safety and Health Administration because of his activities under the Federal Mine Safety and Health Act of 1977.

WE WILL NOT in any like or related manner violated the provisions of the National Labor Relations Act.

WE WILL NOT make employee Richard Ross whole for any loss of wages and benefits he may have suffered by reason of our discrimination against him, with appropriate interest.

WE WILL expunge any personnel record we have of our 3-day suspension of Richard Ross on January 31, 1980.

WE WILL distribute a copy of this notice to our new and returned employees who attend our training programs approved by the Mine Safety and Health Administration during the next year.

ATLAS MINERALS, DIVISION OF ATLAS CORPORATION

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This matter was heard before me on September 9, 1980, at Moab, Utah, pursuant to a complaint and notice of hearing issued on June 20, 1980, by the Regional Director for Region 27 of the National Labor Relations Board, alleging that Atlas Minerals, Division of Atlas Corporation (hereinafter Respondent), violated Section 8(a)(1) of the National Labor Relations Act, as amended (hereinafter the Act). The complaint is based on charges filed by Richard Ross, an individual, on January 17, 1980.

The complaint, as orally amended at the hearing to correct a myriad of technical deficiencies, alleges that Respondent threatened employees with discharge and with more onerous enforcement of rules, and suspended employee Ross for 3 days, all because employees considered filing or had filed safety complaints against Respondent with the Mine Safety and Health Administration. Respondent, through its answer as orally amended at the hearing, denied the occurrence of threats and denied responsibility for the conduct of certain individuals alleged to have made threats. Respondent admitted it had suspended employee Ross for 3 days but denied that the suspension was in any way based on Ross' protected concerted activities or other impermissible criteria.

All parties were given full opportunity to participate at the hearing, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file post-hearing briefs. Briefs have been received from the General Counsel and Respondent.

Upon the entire record herein, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and at all times material herein has been, a corporation with its corporate offices in Princeton, New Jersey, a division office in Denver, Colorado, and a place of business in Moab, Utah (hereinafter the mine), where it is engaged in the business of mining uranium. Respondent, in the course and conduct of business operations, annually sells and ships material valued in excess of $50,000 directly to points and places outside the State of Utah and, during the same period, purchases and receives goods and materials valued in excess of $50,000 directly from points and places outside the State of Utah. Respondent is, therefore, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Events and Circumstances*

1. Background

Respondent's mine employs approximately 250 employees. The identity, authority, and supervisory status of the mine supervisory hierarchy is not in dispute. The supervisory and agency status of Larry Jacobs, the environmental coordinator, and James Phillips, the safety engineer, is in dispute. The General Counsel alleges and Respondent denies the supervisory and agency status of both individuals.

The mine is subject to the provisions of the Federal Mine Safety and Health Act of 1977[1] (hereinafter referred to as the Mine Act), which is administered by the Mine Safety and Health Administration, a Federal agency within the United States Department of Labor (hereinafter referred to as MSHA). The Mine Act gives employees, *inter alia*, the right to appropriate health and safety training, the right to obtain mine inspections, the right to have a representative of the miners accompany Federal inspectors on mine inspections, and the right to be protected from discrimination based upon the exercise of their rights under the Mine Act.

Respondent presents a 24-hour training program to new and returning employees. MSHA's requirements for such programs include, *inter alia*, that the course instructors be certified and that the course cover certain subjects. Respondent had obtained both course approval and instructor certification for its training program. James Phillips, the safety engineer, was the regular instructor. Larry Jacobs, the environmental coordinator, was the alternate instructor. Each had been certified by MSHA.

2. The new employee training session of July 30, 1979

On July 30, 1979, an apparently regular employee training session was held at the mine for some 15 new or returning employees. The session that day was being conducted by Phillips in the training or orientation room at the mine. During the session Phillips was called away so that he might be present during an MSHA inspection of the mine. Phillips excused himself for that reason. Larry Jacobs was introduced to the new employees as Respondent's environmental coordinator and he continued the training session in Phillips' absence.

Jacobs presented a film and slide discussion of mine safety and employee rights under the Mine Act to the employees. Jacobs specifically mentioned the fact that the Mine Act protects miners from discrimination because of any action they might take in filing safety claims against Respondent. After this material had been presented, an unidentified employee from the back of the room asked Jacobs what would happen if an employee were to file charges against the mine with MSHA. Jacobs' response to the employee's question was in dispute at the hearing and was closely litigated. Six witnesses testified to what Jacobs said.

Richard Ross had previously been employed at the mine until January 1979. He returned to Respondent's employ on July 30, 1979, and was present at the training session as a returning employee. Ross recalled that Jacobs was asked the question noted above and answered as follows:

> Off the record, that it wouldn't be advisable, that in one way or another they'd find out who you were and be looking for a reason to lay you off. . . . Let's keep it between us in this room.

Ross' version was substantially corroborated by maintenance mechanics Tommy Roberts and Merrill Brady, who attended the session as new employees. Each recalled that in answering the employee's question, Jacobs said that legally employees were protected, but then proceeded to warn employees that Respondent would learn

[1] 30 U.S.C.S. 801, *et. seq.* See also Rules and Regulations, 30 C.F.R. §§40-44.

the identity of the complainant and terminate him. Tommy Roberts could not recall whether in stating his answer Jacobs used the phrase "off the record" or rather "in my opinion." Brady did not recall any "off the record" reference by Jacobs. Both specifically recalled being struck by the unusual nature of the question and answer, given the content of the training course until that time.

Jacobs testified that in answering the question he told employees that, if they discovered a safety problem, it would be better to take it to the Company before going to MSHA. He testified that he further admonished them:

> Don't kid yourself. This in fact, whether you turn Atlas in to MSHA or not, if you were a grave safety violation—involved in a grave safety violation or infraction or violation of a company policy, that you could, in fact, be fired whether or not you turned Atlas in to MSHA or not.

Current employees William Mitchell and Charles Coshway, who attended the training session as new employees, essentially corroborated Jacobs. Each was impeached, however, by the introduction of an inconsistent statement[2] prepared by Ross and signed by Mitchell and Coshway.[3]

I credit the version of the events testified to by Ross, Tommy Roberts, and Brady over that of Jacobs, Mitchell, and Coshway. I do so in part because of the superior demeanor of each of the former over each of the latter. Ross struck me, as did Tommy Roberts and Brady, as a direct, straightforward witness. Jacobs seemed to me to testify with increased recollection on behalf of Respondent after having difficulty recalling events as the General Counsel's witness.[4] Mitchell and Coshway were impeached not only by the inconsistent statement but by their less than forthright responses when asked to acknowledge the existence of the statement during the hearing. This was particularly true in Coshway's case.

The probabilities also favor Ross' version of Jacobs' answer. First, it was not denied that Jacobs' remarks during the training session were sprinkled with the comment "off the record." Mitchell noted this in particular. Thus, with respect to unspecified portions of the training session, Jacobs clearly communicated to employees that he was offering secret or sub-rosa information that was not for attribution. When Jacobs was asked the question by the employee concerning the consequences of filing a charge with MSHA, it is thus likely that he would have given first an "official" statement of legal immunities and then given an "off the record," confidential warning of potential retaliation. Jacobs testified that he told employees to take safety claims to the Company and that he added further that a safety claim is not protection against an otherwise justifiable discharge. This version is not responsive to the question posed: What would happen to an employee? I also find significant the testimony of Brady and Tommy Roberts that each found the question and answer so unusual that they specially recalled it. Indeed, Brady testified, and I find, that he was sufficiently startled that he sought the attention of his neighbor to share his incredulity at Jacobs' answer. Jacobs' version of his answer would not have caused such a reaction by Brady.

3. Events occurring immediately after the January 9, 1979, MSHA inspection

The Mine Act provides for inspection of mines by MSHA agents based upon requests of miners or their representatives and under other circumstances. The statute provides that a representative of the miners shall accompany the inspector. An official of a labor organization representing employees may perform this function. Respondent's mine employees are not represented by a labor organization. The Mine Act further provides, however, that miners may select a miner as their representative and that individual will then receive certain special rights under the Mine Act, including the right to participate in inspections.

Sometime before January 9, 1980, Ross was selected by Respondent's employees as their miner representative and he was officially designated as such by MSHA. Respondent was notified of this designation. Employees and others were also notified of Ross' status by postings on public bulletin boards in the facility. Ross was the first individual to serve in such a role at the mine. As the miners' representative he openly participated in an MSHA inspection at the mine on January 9, 1980.[5]

a. *Ross' conversations with Kenny Roberts*

On or about January 11, 1980, Ross was transferred from the supervision of Russ King to the supervision of Kenny Roberts.[6] Ross testified that on that day, his first under Roberts' supervision, he had two conversations alone with Roberts. In the first conversation Roberts told Ross that he had been told by Doug White, the maintenance superintendent and Kenny Roberts' immediate superior, not to show any favoritism to Ross if a job came open in certain areas of the plant.[7] In the second

[2] The document states:

> This is a written statement that on July 30, 1979, Larry Jacobs said during our safety orientation, that if we went to [MSHA] with safety violations, that in one way [or] another they would find out who we were, and for one reason or another find a reason to fire us or force us to quit.

[3] Coshway could not recall having signed the statement but did admit it bore a signature that appeared identical to his own. Ross and Brady testified without contradiction that they saw Coshway sign the statement. Mitchell testified that he signed it at the insistence of Brady and Ross. I find that each signed the statement.

[4] Jacobs testified that he had not understood the initial questions of the General Counsel. In any case, his credibility was impaired by his failure either to understand or to respond fully.

[5] Counsel for the General Counsel on several occasions sought to adduce testimony from Respondent's agents to the effect that they believed that Ross was responsible for causing the January 9, 1980, inspection. She failed. There is no evidence in the record to support a finding that Ross was suspected of being responsible or indeed that anyone employed by Respondent was responsible for initiating the inspection. MSHA periodically inspects mines even if no complaints are received.

[6] No allegation was made that this transfer was in any way improper. Kenny Roberts credibly testified that Russ King had quit as of January 11.

[7] Apparently, work in certain areas requires the use of a respirator. This equipment may not be effective for a worker with a beard, thus re-

Continued

conversation Roberts told Ross that White had told him to "keep an eye on" Ross. Kenny Roberts denied that he made the statements attributed to him by Ross.

White denied that he had ever told Kenny Roberts not to show any favoritism to Ross. White testified, however, that on one occasion, on a date he could not recall, he told Kenny Roberts that he had seen Ross using the telephone apparently in or near the guardhouse at the mine. White testified that he regularly instructed his foremen to try and be aware of the location of employees on the job during working time.

Ross testified that he had used the telephone on the morning of January 11 and that White had observed him on that occasion. Ross also testified that during his call he was holding some "papers" supplied him by MSHA, but he admitted that White could not have known of the contents of the documents.

I have previously credited Ross and I do so here. I also found Kenny Roberts to be a sincere and straightforward witness. I believe that Roberts has merely forgotten the conversations in question. First, they would be of greater import to Ross and therefore Ross would be more likely to recall them. As Roberts noted, he has many conversations with his employees each day. Second, the fact that White testified that it was likely that he told Kenny Roberts to keep an eye on Ross makes it probable that Roberts reported this admonition to Ross. Since I find that Ross' recollection of the one conversation is superior to that of Kenny Roberts and is corroborated, indirectly, by the testimony of White, it is also likely that Ross' recollection of the other conversation with Roberts on that day is more likely than Roberts' failure to recall it.

b. *Kenny Roberts' luncheon remarks*

On or about January 12, 1980, White held a meeting of foremen, including Kenny Roberts. The foremen were instructed by White to enforce the existing safety rules more strictly. He told the foremen that the employees were not responding to verbal warnings concerning safety and that the foremen should issue written warnings to employees for safety violations.

Kenny Roberts left that meeting and went to the maintenance luncheon room where two crews were having lunch. He spoke to his own crew of about a dozen men. He told them that he had just come from a supervisors' meeting where he had been told to write up employees for safety infractions no matter how small. Employee Tommy Roberts testified that Kenny Roberts added that he did not think it was fair to write up employees for "just anything," and that he would weigh the significance of any violation before deciding to write up an employee for a safety violation.

There was no real dispute concerning either the foremen meeting or Roberts' remarks immediately thereafter at the luncheon gathering. I credit the version of Tommy Roberts as the more complete. His recollection of Kenny Roberts' comments on fairness and his recollection of Roberts' further comment that he would not write up every infraction is consistent with the fact that Kenny Roberts did not issue written warnings to his employees during that period.

4. Ross' 3-day suspension on January 31, 1980

a. *Respondent's system of discipline*

Respondent maintains a system of progressive discipline which includes, first, a written warning; second, a 3-day suspension without pay; and, finally, termination. Warnings can be verbal or written, but only written warnings initiate the progression system. Thus, verbal warnings do not advance an employee to the suspension stage of the progessive discipline system. Respondent also has a hybrid called a "written verbal warning," which is a written warning labeled verbal, thus exempting it from serving as a written warning that would trigger an advance in the progressive discipline system. Discipline is caused by violation of Respondent's rules, which include safety rules.

On January 31, 1980, James Phillips, the safety engineer, and James Jackson, an electrical supervisor, were passing through the machine shop and came upon Ross operating a grinding machine without wearing the required face shield or goggles. The grinding machine bore a sign indicating safety equipment was required. Phillips approached Ross and asked him to shut the machine off and Ross did so. Phillips then raised Ross' lack of proper eye protection. Ross acknowledged both the sign on the machine and the rule requiring the eye cover, but asserted inconvenience in procuring the necessary equipment.

Following his conversation with Ross, Phillips went to his office and filled out a standard safety violation form addressing Ross' conduct. Phillips then sought Ross' supervisor, Kenny Roberts, but was unable to locate him. Phillips went to the next higher supervisor, Doug White. Phillips told White that he wanted Ross to be given a 3-day suspension because of his conduct. White and Phillips then had a meeting with Bill Flynn, the maintenance manager, Sid Shatley, personnel manager, and Ken Olsen, vice president of human resources. A discussion ensued. Phillips argued that Ross had committed a "direct, flagrant violation." He noted Ross' admission that he had seen the cautionary sign and Phillips suggested that the safety violation was serious. Flynn told Phillips to memorialize the events, to have Phillips' secretary type up the statement, and to present it to Ross for signature in order to determine if Ross agreed with Phillips' version of the events.

Phillips prepared a statement and presented it to Ross. In his conversation with Ross, Phillips did not tell Ross of the potential consequences of his conduct or of his recommended suspension. Phillips merely tendered a copy of the statement and his previously prepared safety violation form to Ross. Ross signed the statement. Phillips then returned to Flynn and told him of Ross' action in signing the statement. He recommended again that Ross receive a 3-day suspension. Flynn acquiesced in the recommendation. An afternoon meeting at 3:15 that day was planned to inform Ross of his suspension.

---

quiring assignees in these areas to shave regularly, and thereby preventing the wearing of beards. Ross apparently had an interest in avoiding such assignments.

That afternoon, before the scheduled meeting with Ross, a meeting was held with Phillips and Supervisor Syl Dominick concerning a safety complaint made by Ross against Dominick earlier that day. Ross complained about Dominick after he had been advised of his own safety violation by Phillips.[8] Later that afternoon Kenny Roberts, Phillips, and Ross met. Ross was told that he was to be given a 3-day suspension without pay. Ross was suspended for 3 working days thereafter. Ross returned to work upon completion of the suspension and continued in Respondent's employment without apparent incident until a later unrelated employment severance.

On January 27, 1980, Ross received a substantial merit wage increase. The increase had been recommended by his previous supervisor, King, but had been approved by White and Flynn. The increase was neither automatic nor usual, but reflected Ross' superior experience and skills.

b. *History of the application of the progressive discipline system*

Normally, Respondent's progressive discipline system operates with a 3-day suspension following only after a written warning had been received. Oral or "written verbal" warnings may precede a written warning. Respondent has terminated employees without utilizing the progressive discipline system when their transgressions were perceived as so serious as to require immediate severance of employment. On one occasion an employee was discovered smoking in an area of extreme fire hazard—a solvent extraction area—and was terminated without regard to his previous record.

The General Counsel introduced a disciplinary document concerning employee Johnston, who was suspended for 3 days without pay in August 1979 after receiving two safety citations, the first being for working at a grinding machine without the required safety eye covering. The document, signed by White, noted: "Two citations call for three days [off] without pay." Thus, no suspension had been issued for the first violation involving the grinding wheel. Phillips testified that he had issued a verbal written warning to a production operator who had ventured into a safety glass area but had forgotten to bring his glasses with him. He also testified that he had discovered an electrician operating a grinding machine without appropriate eye cover in February 1980. Phillips did not "write up" the electrician but only verbally warned him. Phillips testified that the electrician claimed ignorance of the safety goggles requirement. Further, the grinding machine in the electrical department did not bear instructional signs regarding eye protection. The electrician was also wearing safety glasses at the time.[9]

Phillips also testified that on three occasions he had gone to employee's supervisors and recommended 3-day suspensions for employees who had committed safety violations. In each case the immediate supervisor had disagreed with Phillips' recommendation and the matters had gone no further. Phillips had not reccommended 3-day suspensions for safety violations on other than these three occasions and the incident involving Ross. Only the August 1979 Johnston incident has ever resulted in a 3-day suspension at Respondent's facility for safety violations prior to Ross' suspension.

B. *Analysis and Conclusions*

1. Respondent's motion to dismiss

At the commencement of the hearing Respondent moved to dismiss the complaint on the ground that the allegations were within the exclusive jurisdiction of the Mine Safety and Health Administration. Respondent sought not deferral of the matters to that forum but rather dismissal of the complaint, arguing that MSHA's exclusive jurisdiction rendered the issues "not a proper subject" for the Board.

Counsel for the General Counsel opposed the motion, alleging that (1) an agreement exists between the Board and MSHA, (2) Ross had filed charges with MSHA, and (3) MSHA was "deferring to the Board for the purpose of investigation and litigation into this issue" and that Ross had been so informed by MSHA. I instructed counsel for the General Counsel to prove these factual assertions and deferred ruling on Respondent's motion.

The General Counsel adduced no evidence concerning either an MSHA deferral or the fact that Ross had been informed of such. Since counsel for the General Counsel was instructed to prove her assertions through appropriate evidence and chose not to do so, I reject her unsupported contentions made orally at the hearing and reasserted on brief. Thus, no finding that a charge had been filed with MSHA can be made. Consistent with my agreement to judicially notice the relevant Mine Act statutes and regulations, however, I take judicial notice of the agreement between the General Counsel and MSHA.[10]

On brief Respondent did not argue in support of its motion and neither party cited authority in support of its respective position.

At the threshold it must be noted that Respondent does not seek deferral to another forum but rather asserts a lack of Board jurisdiction over the subject matter of the complaint. Section 10(a) of the Act states in part:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

Respondent has not asserted nor do I find any portion of the Mine Act which deprives the Board of this general power.[11] The terms of the agreement between MSHA

[8] It is clear that the decision to suspend Ross came before management learned of Ross' complaint about Supervisor Dominick.

[9] Safety glasses do not provide the complete protection to the eye that safety goggles or a face shield do and are therefore insufficient under Respondent's grinding machine safety rules.

[10] Set forth in 45 F.R. 6189 (1980).

[11] Indeed, the agreement between MSHA and the General Counsel notes in part:

Continued

and the General Counsel may be relevant to the General Counsel's initial determination to issue a complaint pursuant to his statutory power under Section 3(d) of the Act. The General Counsel, however, determined to issue the complaint in the instant matter alleging certain violations of Section 8 of the Act. Having done so, it is appropriate for me to hear and decide the issues on their merits. I am not empowered to determine if a complaint should have issued, but only to determine if the allegations have merit. Accordingly, I deny Respondent's motion to dismiss the complaint as beyond the jurisdiction of the Board.

2. The July 31, 1979, address of Jacobs

I have credited the testimony of witnesses that Jacobs was asked a question by an employee at a training meeting regarding the consequences to an employee of filing a complaint with MSHA. I also have found that, while Jacobs answered that employees had legal protection, he then stated "off the record" that Respondent would uncover the identity of the complainant and cause his discharge. Two questions remain. First, is Respondent responsible for the actions of Jacobs? Second, does Jacobs' conduct rise to the level of a violation if attributable to Respondent?

Jacobs is not a supervisor. He bears none of the traditional indicia of supervision set forth in Section 2(11) of the Act. In addition to his other duties, however, Jacobs functioned as an alternate or substitute instructor for new employees. Thus, when he was utilized as an instructor, Respondent held him out as one authorized to present the training course required by MSHA to its employees. He had both actual and apparent authority to act as instructor. I find that he is an agent of Respondent as an instructor and that Respondent is accountable for his statements made during the training course as an instructor. Jacobs sprinkled his instructions to employees with the comment "off the record," followed by statements not part of the formal presentation. Such an admonition does not shelter Respondent from accountability for the "off the record" remarks. Jacobs was still speaking as an instructor to a captive audience listening to the appointed, albeit alternate, company spokesman. His caution only served to underscore the significance and importance to employees of the comments which followed the "off the record" admonition. Such confidential instructions also create the impression that two levels of rules exist for employees: (1) the formal publicly acknowledged rules and (2) the actual, unwritten, "off the record," deniable rules which in reality control employee conduct.

Respondent's agent has thus threatened employees with adverse consequences if they utilize MSHA, a Federal agency involved in the regulation of employee working conditions. Employees have statutory protection in utilizing such agencies and threats which discourage free access to them violate the Act. *Apollo Tire Company, Inc.*, 236 NLRB 1627 (1978). Acoordingly, I find that by engaging in the threats described above Respondent violated Section 8(a)(1) of the Act.

Respondent makes scholarly argument on brief which discusses the current state of various circuit courts of appeals' disapproval of the Board's "constructive concert" doctrine reflected in *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), and its progeny. Respondent argues that a single employee, when he or she utilizes an agency such as MSHA, is not engaged in concerted activity under the analysis of various courts. Therefore, under Respondent's view, threats of retaliation against such an employee are not directed against concerted activity and hence do not violate the Act.

I find Respondent's argument ingenious but not persuasive for two reasons. First, it is Board law which is binding upon me. The Board has retained its view that, in going to a Federal agency to complain concerning working conditions, a single employee is engaged in concerted activity. Thus, at the Board level, the predicate for Respondent's argument fails because its threats were directed against protected concerted activity even if access to MSHA was to be undertaken by a single employee.

Second, and more fundamentally, Respondent's threat was made to all the employees at the training session and hence applied with equal force to chill collective and individual recourse to MSHA. Respondent cannot exalt form over substance and convincingly suggest that its threat to fire an employee for going to MSHA was not also a threat to terminate employees for collective action in going to MSHA. Even under the most restrictive court analysis such collective action constitutes protected concerted activity.

3. Kenny Roberts' luncheon remarks[12]

On January 11, 1980, Kenny Roberts was told by his superior, White, to tighten up on employees' safety discipline and Roberts so informed his crew at a luncheon meeting that same day. The employees were told that Roberts had received instructions that written warnings were to be issued for safety infractions however small. Roberts added, however, that he did not think that this instruction was fair and that he did not intend to issue written violations in all cases.

Written safety violations are a step in Respondent's progressive discipline system and therefore Roberts' announcement carried the threat of a significant adverse change in employee working conditions. Further, the announced change occurred hard after the safety inspection

3. Although there may be some safety and health activities which may be protected solely under the Mine Act, it appears that many employee safety and health activities may be protected under both Acts [the Mine Act and the NLRA].

[12] Kenny Roberts told Ross that he had been told by his superior, White, (1) not to show favoritism towards Ross and (2) to keep an eye on him. Under the circumstances of those conversations, I find—assuming the General Counsel would argue that these events fall within the complaint—no violation of the Act.

Counsel for the General Counsel does not argue on brief that such statements violate the Act. Were she to have done so, I would reject such argument because the evidence does not relate these remarks to protected activity. Rather, each was explainable as either related to normal practice by White or is not explainable at all; i.e., the remark concerning favoritism. Such evidence does not meet the General Counsel's burden of showing that the Act has been violated by a threat sounding in protected activity.

on January 9, 1980, and was itself related to safety. Kenny Roberts noted that the tightening was based in part on the MSHA inspection and its finding of employee safety violations. From these relationships and the July 30, 1979, threat, the General Counsel urges that I find that Respondent threatened employees because employees had invoked the processes of the Mine Act.

The timing, severity, and type of threat directed at the employees would carry the General Counsel's burden here but for the existence of a plausible and not improper reason for imposing stern conditions on employees at that time. The inspection by MSHA, while possibly resulting from an exercise of employees' protected activity, also raised safety questions. Employees were not following Respondent's safety rules. Thus, Respondent had a reason to impose stern safety rule enforcement; i.e., to stimulate employees to obey rules for a safe workplace. Given this proper motive and without an admission of wrongful motive by an agent of Respondent, it is impossible to find that Respondent took the action it did for the improper reason of retaliation for the inspection rather than for the proper reason of stimulating better safety habits among employees. The counsel for the General Counsel notes on brief:

> The fact that Respondent did not specifically state the reason for stricter enforcement was because of MSHA complaints does not eradicate the coercive nature of Respondent's conduct.

This argument of the General Counsel does not address, however, the fact that Respondent has regularly threatened its employees with safety violation writeups in order to induce safer conduct. Here the response of Respondent through White to Roberts to employees was directly related to unsafe employee conduct. The suspicions of employee concert in causing the MSHA inspection by Respondent were unproven and remote in any case. They are not sufficient to support a finding that they caused the conduct involved herein.

Accordingly, I find that the General Counsel has not met his burden of proof in showing that the actions of Roberts on January 1, 1980, were because of employee complaints to MSHA or that employee Section 7 rights were chilled thereby. Therefore, I shall dismiss this allegation of the complaint.

4. The January 31, 1980, suspension of Ross

a. *The adequacy of the complaint*

The General Counsel argues that Ross received a 3-day suspension because of his protected concerted activities in dealing with MSHA. Respondent correctly points out that the record is not replete with references to Ross' contacts with MSHA other than in being appointed a miners' representative and in accompanying the MSHA inspectors and Respondent's safety engineer on the January 9, 1980, inspection of the mine. Respondent notes that the sole concerted activity alleged in the complaint as the basis for Respondent's alleged discrimination is Ross' filing of a complaint with MSHA. The General Counsel failed to show that Ross filed the MSHA complaint, that any complaint was filed at all, or indeed even that there was a suspicion by Respondent's agents that Ross filed a complaint. Thus, Respondent urges that it receive a "directed verdict" based upon the General Counsel's failure of proof with regard to the protected concerted activity underpinning his suspension theory.

I believe Respondent reads the complaint too narrowly. The record will not sustain a finding that Ross filed a complaint with MSHA. Strictly construing the complaint, it is true therefore that the General Counsel has failed to prove this element of his case. However, the complaint in my view may be taken to have sufficient breadth to include the theory that Ross was suspended, not for filing a complaint with MSHA, but rather for being the official MSHA miners' representative and for participating in the January 9, 1980, inspection. See, for example, *The Anaconda Company*, 224 NLRB 1041 (1976).

b. *Wright Line analysis*

Given the adequacy of the complaint to bring the issues to decision, what remains is essentially a factual question. Ross' activities in attending the January 9, 1980, inspection and as miners' representative generally clearly constitute protected concerted activity. Respondent could not properly discriminate against Ross because of these activities. Respondent asserts that it merely applied its safety rules free from other forbidden considerations in suspending Ross. The General Counsel argues dual motive or pretext; i.e., that Respondent seized upon the incident as an excuse to punish excessively the miners' representative, a symbol of employee access to MSHA.

The Board has recently set forth a formal causation test to be applied in cases turning on employer motivation in dual-motive situations. In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board stated at 1089:

> First we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

This standard will be applied herein.

(1) The *prima facie* case

In the instant case, in support of his *prima facia* case of wrongful motive, the General Counsel has shown that Ross was publicly acknowledged as the miners' representative and that he participated in the MSHA mine inspection on January 9, 1980, which inspection resulted in at least some safety citations being issued against Respondent. The status of Ross as the miners' representative was all the more significant because he was the first employee to be so designated at the mine and because he had apparently been designated largely through his own efforts.

Evidence of Respondent's animus against Ross as the MSHA miners' representative is not strong. The General Counsel relies on the July 30, 1979, threats by Jacobs, found violative, *supra*, to show Respondent's hostility to MSHA and derivatively to its miners' representative.[13] While Jacobs' conduct is serious, there is no evidence that management generally shared the animus reflected in Jacobs' threats.

Further, the record is clear that no employee had ever been suspended for a safety violation of the type involving Ross without having received a previous written warning. One employee received a written warning without immediate suspension for an eye cover safety violation while using a grinding wheel and a second did not even receive a written warning. Thus, at least from this perspective, Ross' suspension was without precedent.

From all of the foregoing, I conclude that the General Counsel has made a *prima facie* showing that Ross' protected concerted activity was a motivating factor in Respondent's decision to suspend him. My conclusion is based on the animus, albeit weak, reflected in Jacobs' threats, and the timing of Ross' suspension shortly after the MSHA inspection. Also relevant is the departure from usual practice of issuing warnings for safety violations before preceding to a 3-day suspension under Respondent's progressive discipline system.

(2) Respondent's burden

Examining the evidence to determine whether Respondent would have taken the same action it did even if Ross had not engaged in protected conduct, there is much to support Respondent's case. As a threshold matter, Respondent demonstrated that Ross was regarded as a good employee. He received a significant and nonroutine merit wage increase on January 27, 1980. While the initial recommendation was made by Ross' previous supervisor, King (who left about the time of the MSHA inspection), the increase was approved by the members of the management hierarchy who participated in the determination to suspend Ross on January 31, 1980.

Safety Engineer Phillips[14] issued a safety violation to Ross and recommended his suspension as he had in two other situations involving employee safety violations.[15] In those cases his recommendations to the employees' first-level supervisors were not accepted and the matters proceeded no further. In the instant matter Phillips sought Ross' supervisor, Kenny Roberts, and only when he could not locate Roberts did he go to higher management with his suspension recommendation. Thus, Phillips' actions and his recommendation are consistent with his own past practice and are free from any evidence of disparate treatment or pretext.

Phillips' recommendation for a 3-day suspension was considered by White, the maintenance supervisor; Flynn, the maintenance manager; Kent Olsen, the vice president of human resources, who, while stationed in Denver, Colorado, was coincidently present at the mine; and Sid Shatley, the personnel manager. Phillips was asked if he knew "who Ross was" Phillips acknowledged that Ross was the miners' representative but indicated that this did not matter to him inasmuch as Ross' safety violation in his view merited a suspension. Phillips was required by Flynn to prepare a written statement reciting the events and to present it to Ross for his adoption to confirm the facts before a final determination was made. Thus, the management body was conscious of Ross' status as miners' representative and made an effort to determine if the facts asserted by Phillips were to be controverted by Ross before taking action on the suspension recommendation. This evidence indicates to me, and I find, that Respondent's action against Ross was made cautiously, with knowledge of Ross' special status as the first and only official miners' representative, soon after a MSHA inspection of the mine.

Respondent's history of the application of its progressive discipline system was widely known. Respondent's hierarchy knew in disciplining Ross that others had been terminated without going through each step of the progressive discipline process. The evidence indicates that foremen talked among themselves concerning matters of employee discipline and that management was also involved in adverse actions in part to insure uniformity of treatment between supervisors and among groups of employees. Employees, too, testified credibly that they were aware that employees had been terminated on the spot in certain instances bypassing intermediate disciplinary steps. So, too, however, it was known that no employee had been suspended for operating a grinding machine without safety eye covering when an employee had not received a previous written warning. Employee Tommy Roberts testified that when he had previously been a foreman for Respondent he had observed employees "grinding" without regulation eye protection and had never issued an employee a written warning. White knew or should have known that employee Johnston, who he suspended for receiving a second warning in August 1979, had not been suspended for his first warning issued for grinding without goggles. Thus, if Phillips acted consistently with his own personal past practice in recommending a 3-day suspension for Ross, the approval and implementation of the recommendation by his superiors was not consistent with Respondent's past practice.

[13] I have rejected as evidence of animus, *supra*, the statements of Kenny Roberts on January 11, 1980.

[14] Phillips' supervisory status was disputed at the hearing with the General Counsel contending that he was a supervisor and agent of Respondent and Respondent denying both allegations. I would find Phillips an agent of Respondent when he was acting as an instructor at new employee training sessions even were he not a statutory supervisor; see discussion of the agency of Jacobs, *supra*. Based upon the fact that Phillips issues safety violations which may initiate the progressive discipline system, I would also find him to be a supervisor if it were necessary to do so. The determination of the status of Phillips is not relevant to this case, however, inasmuch as the decisionmakers in the Ross suspension are admitted statutory supervisors and Phillips is not alleged to have independently violated the Act.

[15] The General Counsel makes much of the fact that Phillips did not take similar action when he discovered an electrician grinding without safety goggles. I find Phillips' explanation of his differing conduct persuasive. Phillips testified that the electrician claimed ignorance of the safety rule, whereas Ross acknowledged the eye cover rule and his knowing breach. Further, the electrician was wearing safety glasses and violated the rule only in not wearing the required goggle or shield type of eye cover whereas, insofar as the record reflects, Ross was grinding without any eye protection whatsoever.

These reviewing agents knew or should have known that no suspension under similar circumstances had occurred and that employees would also likely perceive the suspension of Ross as unprecedented. Such suspension of the miners' representative could reasonably be expected to have a chilling effect on employee rights to utilize both MSHA and to contact their miners' representative.

All of the above factors present a close factual question. The evidence at this stage of the analysis does not preponderate in favor of either party. The burden, however, as noted above, has shifted to Respondent in this aspect of the case. I need not decide therefore whether the General Counsel would have met any burden assigned to him to prove that Respondent would have discharged Ross even had there been no protected conduct. I find that Respondent has not met the burden which has shifted to it and that, therefore, the General Counsel must prevail on this allegation. This assignment of the burden to Respondent after the General Counsel perfects its *prima facie* case is the clear intent of the Board's *Wright Line* analysis. As the Board noted (251 NLRB at 1087): "This distinction is a crucial one since the decision as to who bears this burden can be determinative." Accordingly, having found that the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to suspend Ross, and having further found that Respondent has not met its burden of demonstrating that its suspension would have taken place even in the absence of Ross' protected conduct, I find that Respondent violated Section 8(a)(1) of the Act in suspending Ross for 3 days.

Upon the foregoing findings of fact, and the entire record herein, I make the following:

CONCLUSIONS OF LAW

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

2. Respondent has violated Section 8(a)(1) of the Act (1) by threatening employees with discharge if they file safety complaint charges against Respondent with the Mine Safety and Health Administration and (2) by suspending employee Richard Ross for 3 days because of his activities as miners' representative at Respondent's mine.

3. Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Because of the context of the July 30, 1979, threat, stated as an "off the record" admonition by an instructor to new and returning employees, I find Respondent created the impression among employees that Respondent maintained both a formal, public, and proper set of rules and a second, secret, sub-rosa, or confidential set of rules and practices which, even if unspoken, control employees' job security. Such an impression is difficult to remedy for the normal Board remedial notice may be perceived by employees as yet another formal, public assertion by Respondent that it would comply with the letter of the law while it continued to apply its secret, contrary standards. For this reason I shall require a rather more lengthy notice than would otherwise be the case in the normal situation.

Further, because one violation of the Act occurred during the formal employee training program and undermines employee access to MSHA, a public entity critically important to insuring mine employees' health and safety, I shall require that Respondent distribute copies of the attached notice to new employees in its training program for a calendar year.

Having found that Respondent unlawfully suspended employee Ross for 3 days without pay on January 31, 1980, I shall order that Respondent make Ross whole for any loss of wages and other benefits he may have suffered thereby, to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest calculated in accordance with the policy of the Board set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), *Olympic Medical Corporation*, 250 NLRB 146 (1980); see also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I shall also order that Respondent preserve and make available to the Board or its agents, upon request, all payroll and training course records necessary to insure that it complies with the terms of this Order.

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

ORDER[16]

The Respondent, Atlas Minerals, Division of Atlas Corporation, Moab, Utah, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge if they file safety complaints with the Mine Safety and Health Administration.

(b) Suspending the officially designated miners' representative because of his activities pursuant to the Federal Mine Safety and Health Act of 1977.

(c) 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) Make employee Richard Ross whole for loss of wages and other benefits deferred as a result of the 3-day suspension he received on January 31, 1980, together with appropriate interest, as set forth in the section of this decision entitled "The Remedy."

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Expunge from any and all personnel records and reference to the 3-day suspension Richard Ross received on January 31, 1980.

(c) Post at its facility in Moab, Utah, copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including the employee training room and 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.

(d) Distribute to each employee attending MSHA approved new and returning employee training programs, during the next 1-year period, a copy of the attached notice marked "Appendix."

(e) Preserve and, upon request, make available to the Board or its agents, for inspection and copying, all payroll and training course records necessary to insure compliance with the terms of this Order.

(f) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that all allegations of the complaint not hereinabove found to violate the Act are dismissed and that all motions inconsistent with the above Order are denied.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."