

**Addington, Inc., a wholly-owned subsidiary of
Pittston Minerals Group and Larry Stacy.**
Cases 9-CA-33102 and 9-CA-33604

April 30, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND BRAME

On August 29, 1997, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed limited exceptions and a supporting brief. The Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Addington, Inc., a wholly-owned subsidiary of Pittston Minerals Group, Hazard, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c).

“(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. Substitute the following for paragraph 2(a).

“(a) Within 14 days after service by the Region, post at its Hazard, Kentucky facility copies of the attached notice marked ‘Appendix.’³ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in

¹No exceptions have been filed to the judge's findings concerning the alleged violations of Sec. 8(a)(1) of the Act, nor to his finding that the Respondent did not violate Sec.8(a)(3) in refusing to recall Larry Stacy.

²We have modified the recommended Order to include the Board's narrow cease-and-desist provision, which the judge inadvertently omitted.

In accord with *Excel Container, Inc.*, 325 NLRB No. 14 (Nov. 7, 1997), we shall change the date in par. 2(a) of the recommended Order from July 21, 1995, to April 1, 1995, the approximate date of the first unfair labor practice.

³If 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.”

conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1995.”

David Ness, Esq., for the General Counsel.

Forest H. Roles, Esq. and *Mark Heath, Esq.*, of Charleston, West Virginia, for the Respondent.

Timothy Walker Esq., of London, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried in Hazard, Kentucky, on April 30 through May 2 and June 10, 1997, pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board) on April 10, 1996. The complaint is based on an original charge in Case 9-CA-33102 filed on July 21, 1995,¹ and an amended charge filed on November 13, by Larry Stacy (Stacy or the Charging Party) and a charge in Case 9-CA-33604 filed by Stacy on February 14, 1996. Both charges allege that Addington, Inc., a wholly-owned subsidiary of Pittston Minerals Group (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the operation of coal mines in the Commonwealth of Kentucky, where it annually sold and shipped from its Kentucky facilities goods valued in excess of \$50,000 directly to points outside the Commonwealth of Kentucky.

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Mine Workers of America, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In 1994, Pittston Minerals Group acquired the Respondent and it became a wholly owned subsidiary of that organiza-

¹All dates are in 1995 unless otherwise indicated.

tion. In March 1995, the Respondent was composed of four surface mine operations: the University of Kentucky (UK 1 and UK 2); surface mines; a facility in Dundis, Ohio; and the Bubba Branch operation in Knott County, Kentucky. The two main customers of the UK operation in early 1995 were Kentucky May Coal Company (Kentucky May) who had a contractual agreement to take 85,000 tons of coal each month and the American Electric Power Corporation (AEP) at Big Sandy Power Plant who contracted for 45,000 tons of coal per month. Projected coal production at the UK complex during the early part of 1995 was 200,000 tons per month with the remaining coal not designated for the above-noted customers to be sold on the spot market.

At all material times, Edwin Newell held the position of president and George Owens as manager of human resources for Respondent. James Campbell and James Spurlock held the positions of vice president for operations and human resources for Pittston Coal Company and Dencil Arnett and Ed Lewis held the positions of superintendent for Respondent at the UK complex.

Larry Stacy and Ben Miller were the spokespersons for the day- and night-shift employees.

B. Union Organizing

In April and May 1994, employees Miller and Timothy Bush started to organize on behalf of the Union. Approximately 35 authorization cards were signed and returned to Miller. Former Night-shift Foreman Ricky Howard credibly testified that he was aware of ongoing union organizing activity in early May 1994, and during that time he went to a meeting with Respondent's president, Newell, and a guy introduced as a "union buster" from Chicago. During the meeting Newell asked Howard to get the names of the employees that had signed union cards. Newell also told Howard that the employees that signed union cards were troublemakers. In a second meeting with Newell several nights later, Newell again requested Howard to provide the names of the employees that signed union cards and gave Howard a telephone number to report any employees who signed union cards. Newell also asked Howard whether Ben Miller or his brother Carl had signed union cards.

The union organizing activity began to slack off during the summer of 1994. Commencing in April 1995, the union organizing activity resumed and additional union cards were signed by day-shift employees. The union cards signed by employees in 1994, which had become stale, were also recertified at that time.

Superintendent Ed Lewis testified that he was aware of union organizing activity in April 1995 while Newell testified that no union buster from Chicago was present in any conversation he ever had with Howard, he never specifically denied that the above conversations with Howard did not occur nor that the subject of the union was discussed.

C. The 8(a)(1) Violations²

1. Allegations concerning Dencil Arnett

The General Counsel alleges that in late May or early June 1995, Superintendent Arnett, while at the UK mine facilities

²The General Counsel moved to amend par. 4 of the complaint on the first day of the hearing, after giving advance notice to the

threatened an employee that Respondent would close its mine and that employees would lose their jobs in retaliation for engaging in activities on behalf of the Union.

Employee Joe Edward Bush testified that while he held the position of a parts runner he had a conversation with Arnett inside his trailer office. During this one-on-one conversation, which primarily concerned hunting and fishing, Arnett said, "If we signed the Union card, they would shut the job down."

Arnett left the employ of Respondent on or about May 26, but acknowledged that during his tenure, he worked from a small office located in a trailer on the premises of the UK complex.

Arnett admitted that he and Bush were friends and they had gone deer hunting together on several occasions since February 1994, the date Arnett commenced employment.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

Although Arnett denies that he made the statement imputed to him, he admits that during his employment he did have numerous conversations with Bush. I credit Bush's testimony because at the time of the conversation he and Arnett were friends, the conversation occurred during a time when union organizing activity was ongoing at the mine, and representatives of the Respondent had knowledge of the employees union activity. Moreover, Bush testified in a clear and convincing manner and had a better recollection of the conversation. Lastly, I find as Arnett was in the midst of leaving his employment at Respondent in late May 1995 the statement was made to warn his friend about job security if he supported the Union.

In sum, I find that Arnett's statement tended to coerce employees in the exercise of their Section 7 rights and find that it violates Section 8(a)(1) of the Act. See *TSJ Trucking Co.*, 316 NLRB 771 (1995) (threatening plant closure).

2. Allegations concerning Edwin Newell

The General Counsel alleges that about March or April 1995 Respondent, by Edwin Newell, interrogated an employee regarding his union membership, activities, and sympathies and threatened an employee that employees would lose their jobs in retaliation for engaging in activities on behalf of the Union.

Joe Edward Bush testified that he had a conversation with Newell in the UK 2 parking lot and Ed Lewis was also present. During this conversation, Newell asked Bush what he thought about the Union. Bush said that he did not know. Newell said, "If you sign a union card, Pittston will shut the job down and we will lose our job."

Newell testified that he never had a conversation with Bush about the subject of unions at any time. Ed Lewis, who testified during the hearing, did not deny that such a con-

Respondent, to include three independent violations of Sec. 8(a)(1) of the Act. I permitted the amendments, over the objections of Respondent, but granted additional time for the Respondent to prepare its defense. As it concerns Dencil Arnett, the Respondent presented his testimony when the parties reconvened on June 10, 1997.

versation took place or that Newell did not make the statement imputed to him. Rather, when Lewis testified, he stated that he never said that if the Union came in here that Pittston will shut it down (Tr. 498).

I conclude that Newell made the statement imputed to him in March or April 1995. I reach this conclusion for a number of reasons. First, I find that in May 1994 Newell was concerned about union organizing activity at the UK mine and interrogated one of his foreman about who had signed union authorization cards. He also stated that any employees that signed union cards were troublemakers. Thus, Newell previously engaged in similar conduct as alleged in the subject complaint. Second, I find suspicious that Ed Lewis, who I found to be a credible witness and who admitted that he was aware of employees' union organizing activity before June 1995, was not asked nor did he testify about a conversation that he was present at and involved his boss. Lastly, I find that Bush's testimony during the course of the hearing has a ring of truth to it, in both his recollections of the conversation with Newell as well as the conversation with Arnett.

In sum, I find that Newell made the statement to Bush and conclude that it tends to coerce employees in the exercise of their Section 7 rights and therefore violates Section 8(a)(1) of the Act.

3. Allegations concerning Ed Lewis

The General Counsel alleges that about June 16 Respondent, by Superintendent Ed Lewis at the entrance to the UK mine property, threatened employees that Respondent would close its mine in retaliation for engaging in activities on behalf of the Union and informed employees that it would be futile for them to select the Union as their collective-bargaining representative.

Employee Timothy James Bush testified that he overheard a conversation between fellow employee Larry Stacy and Superintendent Lewis around June 16, wherein Stacy told Lewis that the employees were signing cards and organizing. According to Bush, Lewis replied, "[T]hat in his personal opinion, the Union wouldn't never work here, they'd shut it down first." Bush testified that he has trouble reading and writing but immediately after the conversation he made some notes and several days later his girlfriend prepared a more complete statement. Neither Bush's notes nor those of his girlfriend were introduced into evidence. Stacy testified about this conversation and confirmed that he told Lewis that the men were signing union cards. According to Stacy, Lewis said, "You have to do what you have to do."

Lewis admitted on direct examination that he had a conversation with Stacy in June 1995, in which Stacy apprised him that the men were organizing and signing union cards. He responded that, it did not matter to him, "The men could do whatever they had to do and we had to do what we had to do."

When comparing the versions of the conversation among the three individuals, the testimony of Stacy and Lewis is almost identical. There is no mention of closing the mine or that it would be futile for employees to select the Union as their collective-bargaining representative. While the testimony of Bush is closer to the allegations alleged by the General Counsel, I do not find that Bush's recitation of the conversation establishes a violation of the Act. First, according to Bush, Lewis prefaced his statement with the words "in

my opinion." Such a statement would be privileged under Section 8(c) of the Act. Second, I did not find Bush to be a reliable witness due to his difficulties with the written word. I am suspect of what he wrote immediately after he heard the conversation between Stacy and Lewis as it does not comport with the testimony of Stacy and Lewis. Indeed, not only were those notes not offered into evidence but his girlfriends notes were also not introduced into the record.

In sum, I find that Lewis was a credible witness who candidly admitted that Stacy apprised him that the men were engaging in union organizing activities. Likewise, Stacy's version of the conversation is almost identical to that as described by Lewis and neither description is violative of the Act. Lastly, Respondent witnesses Samuel Billiter, Wayne Keaton, and Homer Henshaw, who all were present during the June 16 conversation, did not hear Lewis make any statements about closing the mine because of the employees' union activities or that it would be futile to select the Union as the employees' collective-bargaining representative.

Under these circumstances, I find that the General Counsel has not conclusively established that the Respondent, by Lewis, violated Section 8(a)(1) of the Act and I recommend that this allegation be dismissed.

D. *The 8(a)(1) and (3) Violations*

1. Events leading to the change in work schedule

The UK mine operation was losing money for the first 4 months of 1995. The cost statement for the period January through April 1995 shows losses of \$2,224,000. In March 1995, the projected coal production was a little over 200,000 tons per month with Kentucky May scheduled to take 85,000 tons; AEP, 45,000 tons; and the remaining 70,000 tons of coal was targeted for the spot market. A number of factors impacted on this projection. First, because the price of coal had dropped off, the spot market began to dry up. Additionally, due to business reverses at Kentucky May, they did not purchase their full contractual tonnage during the first 4 months of 1995. Rather than accepting 85,000 tons of coal each month, Kentucky May took an average of 40,000 tons per month.

In April 1995, the Respondent began to evaluate a number of different scenarios on how to operate the mine in a profitable fashion. It was ultimately decided to go to a four-on, four-off work schedule. As part of this decision, it was decided to combine UK 1 and 2 and run the mine as one complex to obtain maximum efficiency. The new work schedule contemplated four different crews for mining coal and the mine would be operated 7 days a week. One crew would work the day shift 4 days a week and one crew would work the night shift 4 days a week. Then, the other two crews would come in on the day shift and night shift and work 4 days. By going to this system and working the equipment 7 days a week, it was projected that the volume of coal output would increase thus reducing the fixed cost per ton, the amount of equipment needed to operate the mine would be reduced considerably, and it would reduce the amount of overtime paid which would lower the labor cost per ton. The work schedule for the first 4 months of 1995 consisted of employees working two 10-hour shifts, 5 days a week, with occasional work on Saturdays. During this period, the employees worked 10 hours of regularly scheduled overtime.

With the projected change in the shift schedule, the 10 hours of regularly scheduled overtime would be eliminated, resulting in a substantial reduction of pay for the employees.

In April 1995, Superintendent Dencil Arnett conducted individual meetings with the employees prior to the implementation of the four-on, four-off work schedule. He told the employees that if the job shut down quite a few individuals would be laid off. By going to the new work schedule, overtime earnings would be cut and very few, if any, people would be laid off. After these meetings, the four-on, four-off work schedule was implemented on May 1. Arnett asked for volunteers to initially work the period of 4 days off while Respondent was in the process of hiring additional workers in order to man the 7-day operation. A number of employees worked the additional hours so that the full impact of the reduced overtime and loss of earnings did not appear until the receipt of the third paycheck on June 9.

2. Events concerning Kentucky May

Michael J. Quillen, president of American Eagle Coal Company, the sales brokerage company that markets and sells coal for Respondent, credibly testified that during the first 4 months of 1995 Kentucky May continually fell behind and did not purchase the contractual allotment of 85,000 tons of coal per month. Accordingly, in early April 1995, Quillen sent a letter of complaint to Kentucky May concerning their not taking the contractual allotment of coal.

Additional letters were exchanged between the parties without resolution. On or about April 10, Lawrence Meade Jr. became president of Kentucky May. After extensive negotiations between Quillen and Meade including the threat of legal action by Respondent, it was agreed in late May 1995 that due to Kentucky May securing substantial spot business on the open market it would contract to take delivery from Respondent for June, July, and August 1995, 116,000 tons of coal which would help make up the tonnage shortfall from the previous 5 months. Under this contractual arrangement, Respondent immediately began shipping 8000 tons of coal each day to Kentucky May.

3. The strike of June 13

Employee Ben Miller finished work at 5 a.m. on June 13 and observed employees picketing at several entrances to the UK complex. In a conversation with Superintendent Ed Lewis on the morning of June 13 at the picket line, Miller told Lewis that the employees went on strike because of unsafe work conditions and the reduction of pay in their most recent paycheck.

Respondent's president, Newell, learned about the strike while he was on vacation. He immediately flew back to Pittston's Lebanon office and met with Vice President of Operations James Campbell. It was initially decided that Respondent would not negotiate with the pickets until they returned to work.

During the first day of the strike, Manager of Human Resources George Owens and Superintendent Lewis met with the strikers on several occasions and were told that the primary reason the employees went on strike was as a result of going to the four-on, four-off work schedule which negatively impacted them financially. During these conversations with the employees on the picket line, Owens told them that

the mine was losing money, the strike would not accomplish anything, and the Respondent would not negotiate or talk about the issues until they returned to work.

On June 13, Joe H. Miller, who worked as a supervisor for Task Trucking, came to the mine to pick up coal and deliver it to Respondent's customers. Miller was stopped at the picket line and talked with Larry Stacy who he knew as Redbud. Stacy gave Miller permission to cross the picket line and asked him to deliver a piece of paper to Superintendent Lewis which contained the economic demands of the employees. Miller took the paper, read it, and went over the list of demands with the pickets. He made notes on the paper, including the words no firing after the strike is settled and all employees could return to work. Miller took the paper back to the mine office and explained the pickets demands to Lewis. Option 1 provided that the pickets did not want anybody fired and a demand to work four 12-hour shifts with each employee receiving a raise to \$13 an hour. Option 2 called for overtime to be paid for all work over 8 hours in a day and time and a half for all work over 40 hours. Additionally, the pickets sought a \$2-an-hour increase for everybody.

Newell returned to work on June 19 and the Respondent decided that no pay increase would be given since the purpose of going to the four-on, four-off work schedule was to reduce labor costs. Likewise, it was agreed that no replacement workers would be brought in to run the mine because of potential violence. Rather, it was decided to keep the foreman working their normal day- and night-shift schedules. During the initial stages of the strike, the supervisors did security work. Thereafter, they started hauling stockpiles of coal to the wash plant, worked in the hollow fields, and completed reclamation work as required by the Commonwealth of Kentucky. After the strike commenced, mine equipment from the Bubba Branch operation that closed was transported to the UK complex and used by the foreman in day-to-day work operations. Likewise, coal was hauled from the mine during the strike by contract truckers to fulfill the AEP account at Big Sandy Power Plant and stockpiled coal was sold on the spot market when possible.

4. The strike's impact on Kentucky May

Several days after the commencement of the June 13 strike, Quillen called Kentucky May President Meade and informed him that because of a labor dispute the Respondent would be unable to provide the previously agreed on 116,000 tons of coal per month for the foreseeable future. Meade told Quillen that the Respondent had an obligation to supply the coal because Kentucky May had gone out and obtained additional spot orders at a low price to make up the tonnage that they agreed to take from Respondent. While the parties agreed to disagree over the terms of their contractual agreement, negotiations ensued and an agreement was reached wherein Kentucky May relieved itself of the obligation to purchase the 116,000 tons of coal for June, July, and August 1995, and the Respondent was relieved of its obligation to supply the tonnage. It was further agreed that even if the labor dispute was resolved and the employees returned to work prior to August 1995 Kentucky May did not have to accept the contractually agreed-upon tonnage from the Respondent.

5. Events leading to the June 21 layoff

Vice President James Campbell testified that after the June 13 strike it was determined that going to the four-on, four-off work schedule caused a reduction in wages and precipitated the strike. Campbell and other high level Respondent officials concluded that in face of substantial monetary losses for the first 5 months of 1995 they could not meet the strikers' demands to return to the prior work schedule and grant a wage increase. Likewise, the strike caused Respondent to lose its chief customer and the capability of supplying 116,000 tons of coal for the next 3 months. Accordingly, on June 19, Campbell recommended to the president of Pittston Minerals Group that the job be shut down and not reopened until a better market for coal sales occurred. This recommendation was accepted by the president on the morning of June 21 in a meeting attended by James Spurlock, James Campbell, and Mike Quillen.

On June 21, Manager of Human Resources George Owens was delegated the responsibility of preparing a letter to all of Respondent's employees at the UK complex that they would be permanently laid off because it was not known when the operation would resume. Such a letter was sent and received by Respondent's employees.

6. The June 26 meeting

Employees Andy Hayes, Roy Dean Combs, and David Jones requested a meeting with Respondent's officials to inquire about the possibility of ending the strike and returning to work. The meeting occurred on June 26 at the Holiday Inn in Norton, Virginia. James Campbell, Edwin Newell, James Spurlock, and George Owens attended on behalf of Respondent.

At the inception of the meeting, Campbell informed the employees that economics caused the shutdown of the mine and it was unknown when the mine would reopen. Campbell told the employees that the mine was losing money and it was decided to go to the four-on, four-off work schedule to save money and avoid laying off a lot of people. The employees were shown computer printouts confirming that the mine had lost in excess of \$2 million during the first 5 months of 1995. In response to a question from the employees why they were laid off, Campbell said it was not because of the strike but due solely to economics.

The meeting ended without any resolution of the strike or a determination when the mine would reopen.

7. The July 14 meeting

Employee Larry Stacy telephoned James Campbell and requested that another meeting be held to discuss the situation. A meeting was held on July 14 at Respondent's Hazard office. Employees Stacy and Ben Miller attended while Respondent was represented by the same individuals who attended the June 26 meeting.

Campbell told the employees that the mine had lost money and orders but if new orders could be found the mine might reopen. He offered to give Stacy and Miller copies of Respondent's financial statements and invited the men to retain their own accountants to review the books. The employees were further told that the mine had lost in excess of \$2 million during the first 5 months of 1995 and that the fixed costs of rental equipment at the mine were in excess of

\$130,000 per month. Campbell also explained that the Respondent went to the four-on, four-off work schedule to become economically viable and to keep from laying off a lot of people.

During the course of the meeting when the subject of safety was mentioned, Campbell told the employees that he took that subject very seriously and Stacy commented that since the Respondent had obtained a full-time safety inspector, things had gotten better. Campbell also informed the employees that the foremen were performing reclamation work and were shipping stockpiled high wall miner coal to the AEP account and small spot market customers. Miller had no objections to the Respondent hauling stockpiled coal or mining equipment off the premises.

Campbell informed Stacy and Miller that some violence occurred on July 5, and a window of a vehicle was broken. Both Stacy and Miller denied any involvement with this incident.

The meeting ended without any resolution of the strike or a timetable for reopening the mine.

8. The reopening of the mine

The employees continued to picket at the UK complex from the inception of the strike to the end of November 1995. Indeed, all employees continued to be permanently laid off during this time period.

In November and early December 1995, Respondent and AEP entered into negotiations to increase the tonnage presently supplied to the Big Sandy Power Plant. It was agreed that, effective in January 1996, AEP would increase its present tonnage of 45,000 to around 80,000 tons of coal per month at the contract price which was \$2 to \$2.50 better than the current spot price. In addition, Respondent was able to obtain a spot sale for high sulfur Hazard 9 coal.

With production anticipated to increase to around 90,000 tons of coal per month, Respondent determined that it would be economically feasible to reopen the mine in January 1996. The Respondent hired a number of former hourly employees through a contractor to do preliminary work before the mine was officially reopened. Employees were obtained in this fashion rather than being brought back under the Respondent's hiring procedures because it would reduce the amount of paperwork and the requirement to complete physical examinations. All former employees who were permanently laid off on June 21 were offered reemployment except Larry Stacy who engaged in picket line violence and misconduct. Vacant positions were filled in accordance with Respondent's needs for specific job titles based on the seniority of the men in those jobs. All employees that desired reemployment commenced work at the UK complex during various dates in January 1996.

9. The refusal to recall Larry Stacy

Larry Stacy started work for one of Respondent's predecessors in January 1987. He worked at a number of Respondent's mines between 1987 and 1992 and then commenced work at the UK mine as a dozer operator. At the commencement of the strike on June 13, Stacy was a grader operator on the day shift.³ He was elected the spokesperson

³ There is no dispute that the employees engaged in a protected strike. While the General Counsel and the Charging Party maintain

for the day-shift employees after the strike began and represented the day-shift workers at the July 14 meeting in the Respondent's Hazard office. Stacy was the only employee not offered reinstatement when the mine reopened in January 1996, because of strike misconduct.

The General Counsel alleges in paragraph 6 of the complaint that Stacy was not reinstated, recalled, or rehired, notwithstanding its recall of all other employees, because Stacy engaged and participated the June 13 strike or because he formed, joined, or assisted the Union and engaged in concerted activities. The Charging Party, in addition to the above position, asserts that Stacy was not rehired or recalled to work because of his active role in the strike and his status as spokesperson for the day-shift employees.

The date of the violence and picket line misconduct took place on July 5. Stacy testified on direct examination that he could not remember whether he was at the picket line on July 5, but stated that he did not on July 5 or on any other occasion throw any rocks or other objects at vehicles entering or leaving the UK complex. He also responded in this fashion at the July 14 meeting when asked about the incident by James Campbell.

Contrary to the position of the General Counsel and the testimony of Stacy, the Respondent asserts that Stacy was at the picket line on July 5 and threw rocks at a supervisor's vehicle, breaking the glass of the back window and damaging the left rear quarter panel. To support this position, the Respondent introduced into evidence a videotape taken on July 5 and the testimony of two witnesses.

James Lee Brogan, the owner of Mountaineer Investigation and Security Incorporated, was employed by Respondent to provide security for the UK complex between the commencement of the strike on June 13 and September 10. On the morning of July 5, Brogan arrived at the UK complex around 4 a.m., and when he came through the picket line he was threatened with a baseball bat by Redbud (Stacy). Brogan then proceeded to a hill approximately 1100 feet from the front gate and joined one of his employees who was stationed there to film the pickets as they came through the front gate and while they patrolled the picket line. On July 5 at 6:20 a.m., the video depicted a vehicle moving through the picket line and one of the pickets throwing a rock in the direction of the vehicle. After the rock was thrown, Brogan personally inspected the damage to the vehicle and learned that it was a Ford Bronco belonging to Supervisor Ron Wheeler. Brogan saw damage to the left fender and the back glass window was broken. He also observed a rock on the floor of the vehicle. He took pictures of the damage and provided the developed pictures and the videotape to the Respondent.

Michael E. Ohlson, an employee, commenced work at the UK complex on March 3 and got to know Larry Stacy during his employment. On July 5, around 6:20 a.m., he was on his way to work and as he was pulling into the entrance to gate 1 about 40-50 feet behind Ron Wheeler's white Ford Bronco, Ohlson heard the sound of breaking glass. He immediately looked up, while in the process of turning into the property, and observed Larry Stacy and another employee

that the strike was called to protest a reduction in pay and unsafe working conditions, the Respondent takes the position that the strike was called solely to protest the employees' reduction in pay.

standing against a big sign and saw Stacy bring his arm back and throw a rock in the direction of Wheeler's vehicle. After he got to the guard's location, Wheeler and Ohlson checked the Bronco and Ohlson saw that the back glass was broken and there was a dent on the left rear quarter panel. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor in the employer's decision." On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. For the following reasons, I find that the General Counsel has not made a strong showing that the Respondent was motivated by antiunion consideration in not recalling or reinstating Larry Stacy. Even if this was not the case, I find that the Respondent would have taken the same action even if the employee had not engaged in protected activity. First, no evidence was presented that Stacy was actively involved in the union organizing campaign in May 1994 or April 1995 unlike employees Ben Miller and Timothy Bush. Significantly, both Miller and Bush were recalled to work in January 1996. Second, while it is acknowledged that Stacy was selected as the spokesperson for the day-shift employees after the commencement of the strike and attended the July 14 meeting with high level officials of Respondent at the Hazard office, the same was true for employee Miller who was selected the spokesperson for the night-shift employees and also attended the July 14 meeting. I find that neither Stacy's union activities or his participation in the strike was in any way related to the Respondent's decision not to recall him to work at the UK complex in January 1996. Rather, I find that Stacy's involvement in strike misconduct was the sole reason he was not recalled or reinstated at the UK complex.

It is noted that absent legitimate business reasons an employer must reinstate striking employees at the termination of certain strikes. *General Chemical Corp.*, 290 NLRB 76, 82 (1988). A refusal to reinstate may be justified by showing that an employee was guilty of serious picket line misconduct. *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). Initially, the employer has the burden of demonstrating the existence of an honest belief that a striking employee engaged in such misconduct. *General Chemical Corp.*, supra. Once such a belief has been demonstrated, the burden shifts to the General Counsel to prove that the employee was not engaged in the alleged misconduct or that the misconduct was not sufficiently serious to forfeit the Act's protection. *Axelson, Inc.*, 285 NLRB 862, 864 (1987).

The Respondent did not recall or reinstate Stacy in January 1996, on the grounds that he threw rocks at a vehicle entering the premises on the morning of July 5. Ohlson personally witnessed the incident and the misconduct was recorded by Respondent's videotape camera operators. Contrary to Stacy's testimony on cross-examination that he was not on the picket line when the back window of Wheeler's white Ford Bronco was broken, both Ohlson and Brogan place him at the picket line on the morning of July 5. I, therefore, find that the Respondent possessed an honest belief that Stacy engaged in the alleged misconduct and that Stacy actually engaged in that misconduct. Throwing rocks at vehicles entering the UK complex constitutes misconduct sufficiently serious to justify an employer's refusal to reinstate a striking employee.

In sum, I find that the General Counsel did not establish the allegations relating to Stacy in paragraph 6 of the complaint, and recommend that they be dismissed.

E. Analysis

The General Counsel in paragraph 5 of the complaint alleges since about June 13, certain employees of Respondent ceased work concertedly and engaged in a strike. In paragraph 6 of the complaint, the General Counsel asserts that about June 21, the Respondent permanently laid off and/or discharged its striking employees because the employees engaged and participated in the June 13 strike or because they formed, joined, or assisted the Union and engaged in concerted activities.

The General Counsel and the Charging Party argue that the employees went on strike for two reasons. The first reason advanced was due to unsafe working conditions at the UK mine and the second reason concerned the employees' substantial reduction in wages due to going to the four-on, four-off work schedule.

The Respondent does not dispute that the employees ceased work concertedly and engaged in a protected strike. Indeed, it discerned from conversations with the employees on the first day of the strike that the substantial reduction of wages precipitated the labor dispute. Respondent adamantly denies, however, that the strike was undertaken due to unsafe working conditions or that the employees were permanently laid off in retaliation for making safety complaints.⁴

With respect to the employees engaging in the June 13 strike because of unsafe working conditions, there was no evidence presented by the General Counsel to support this position. While employees Ben Miller and Andy Hays testified that they went on strike in part because of unsafe working conditions at the mine, no examples or other evidence was presented to establish the existence of unsafe working conditions at the UK complex. Significantly, Larry Stacy stated in the July 14 meeting at Respondent's Hazard office that since the Respondent had a full-time regular safety inspector things had gotten better since Pittston took over.

⁴Numerous employees filed complaints against Respondent pursuant to Sec. 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (Mine Act) alleging that they were permanently laid off because of complaining about alleged danger, safety, or health violations at the UK mine. These allegations were investigated by the Mine Safety and Health Administration (MSHA), U.S. Department of Labor and found to be without merit (R. Exh. 19).

In sum, I conclude and find that the employees did not go on strike to protest unsafe working conditions at the UK complex nor were the employees permanently laid off on June 21 because they protested about unsafe working conditions at the UK mine.⁵

The General Counsel has also advocated the position that the employees were permanently laid off on June 21 because of retaliation for their having engaged in the June 13 strike and/or because of union organizing activity. Contrary to this assertion, Respondent argues that the employees were permanently laid off on June 21 solely for economic reasons and union organizing activities played no role in the decision to effectuate the layoff.

For the following reasons, I find that the General Counsel has not made a strong showing that the Respondent was motivated by antiunion considerations when it permanently laid off the employees on June 21, either because they engaged in the June 13 strike or because of union organizing activity. *Wright Line*, supra. Even if this was not the case, I find that the Respondent would have taken the same action even if the employees had not engaged in protected activity.

First, it is undisputed that the UK operation had been losing money for the first 4 months of 1995. Likewise, during this period Kentucky May did not take its full allotment of coal, the spot market for coal sales dried up, and the demand and price for coal dropped. Accordingly, the Respondent looked at different scenarios on how to operate the mine more efficiently so it could make a profit. It was decided to go to the four-on, four-off work schedule wherein the mine would operate on a continuous 7-day schedule. As is pertinent here, by going to this schedule, it dramatically reduced the amount of overtime paid which substantially lowered the amount of wages paid to employees. This schedule was fully implemented on May 1. Since it was necessary to gradually increase the staff to accommodate this schedule, a majority of the employees worked a number of their regularly scheduled 4 days off during the first month, so it was not until the employees received their paychecks on June 9 that the impact of substantially reduced wages became apparent. It was shortly after this date that the employees called and engaged in the June 13 strike. On or about this date, the financial figures for May 1995 became available and they show that the Respondent lost an additional \$798,000.⁶ Compounding the loss of approximately \$3 million for the first 5 months of 1995, was the inability due to the strike to supply Kentucky May with 116,000 tons of coal for June, July, and August 1995. Accordingly, high level Respondent officials were faced with making a decision to meet the demands of the strikers, hire replacement workers, or shut down the mine until the coal market became profitable. Since

⁵The Respondent argues that the underlying findings of MSHA should be deferred to under the 1979 Memorandum of Understanding Between the Mine Safety and Health Administration and the General Counsel of the Board, concerning cases arising under Sec. 105(c) of the Mine Act. In light of my conclusion above that the June 13 strike and the June 21 layoff were unrelated to or undertaken because of employee complaints about unsafe working conditions, it is not necessary to make such a finding.

⁶Each of the employees that attended the June 26 and July 14 meetings with Respondent representatives acknowledged that they were provided graphs and financial figures showing that the Respondent lost money for the first 5 months of 1995.

Respondent could not afford to pay higher wages in face of substantial monetary losses and was concerned about serious violence if replacement workers were hired, it opted on June 21 to shut down the mine and permanently lay off the employees.

Under these circumstances, I conclude that the decision to permanently lay off the employees on June 21 was solely for economic reasons and was not undertaken to retaliate against the employees for engaging in the June 13 strike. *Armoured Transport of California*, 282 NLRB 850 (1987). Likewise, I do not find the employees' union organizing activity in 1995 caused the strike or led to the employees' layoff on June 21. In this regard, at the time of the strike the union organizing had subsided, no representation petition was filed with the Board, and no evidence was uncovered that the Respondent mounted any campaign against the Union. While I earlier found that Edwin Newell and Dencil Arnett interrogated an employee about his union activities, I note that these conversations involved the same employee, were isolated, and occurred well in advance of the strike. Moreover, other than these two instances, the General Counsel did not introduce any additional evidence concerning employee interrogation or union organizing at a period remotely close in time to the strike.

In conclusion, I do not find that the employees were permanently laid off and/or discharged because they engaged and participated in the June 13 strike or because they formed, joined, or assisted the Union and engaged in concerted activities. Accordingly, I recommend that paragraph 6 of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating an employee concerning his union sentiments and threatening to shut the job down.
4. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by permanently laying off and/or discharging its employees because the employees engaged and participated in a strike or because they formed, joined or assisted the Union and engaged in concerted activities.
5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Addington, Inc., a wholly-owned subsidiary of Pittston Minerals Group, Hazard, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union membership, sympathy, and activities.

(b) Threatening employees that the job will shut down in retaliation for the employees' union activities.

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

(a) Within 14 days after service by the Region, post at its UK 1 and 2 mine facility in Hazard, Kentucky, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 21, 1995.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸If 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."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees about their union activities.

WE WILL NOT threaten employees that the job will be shut down in retaliation for their union activities.

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

ADDINGTON, INC., A WHOLLY-OWNED SUBSIDIARY OF PITTSTON MINERALS GROUP