

**A & M Trucking, Inc. and District 17, United Mine Workers of America, AFL-CIO.** Cases 9-CA-31200 and 9-CA-31407

August 22, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

The issues presented here are whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing new rules for bargaining unit employees and by failing to bargain with the Union about the effects on unit employees of a decision to close the Respondent's facility.<sup>1</sup> The Board has considered the decision and the record<sup>2</sup> in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, A & M Trucking, Inc., Mt. Carbon, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(b) and (c) and reletter the subsequent paragraphs.

“(b) Rescind and remove from its files any disciplinary action that may have resulted from the enforcement of unilaterally implemented rules about absenteeism, stopping along travel route, and reporting for work, and notify any affected employees in writing

<sup>1</sup>On June 14, 1995, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

<sup>2</sup>We note that the Respondent's brief in support of its exceptions includes, as attachments, documents which it did not introduce at the hearing. The Respondent has failed to show that these documents were newly discovered or previously unavailable. Even assuming their admissibility, these documents would have no effect on our findings and conclusions.

<sup>3</sup>In adopting the judge's recommended limited backpay remedy for the Respondent's failure to bargain over the effects of its decision to cease operations, we rely on *Transmarine Corp.*, 170 NLRB 389 (1968). We shall also amend the recommended remedy to reflect the violations found, and make the appropriate changes in the Order and notice, by requiring the Respondent to make unit employees whole for any losses suffered as a result of its unlawfully implemented rules and to rescind any disciplinary actions resulting from the enforcement of those rules. Any amounts due shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

that this has been done and that the disciplinary action will not be used against them.

“(c) Make whole, with interest, unit employees for any loss of wages and benefits suffered as the result of its unilateral changes in rules about absenteeism, stopping along travel route, and reporting for work.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT make unilateral changes in our employees' wages, hours, working conditions, or other conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with District 17, United Mine Workers of America, AFL-CIO in accordance with the requirements of the National Labor Relations Act.

WE WILL NOT fail and refuse to bargain with District 17, United Mine Workers of America, AFL-CIO with respect to the effects on our employees of our decision to close our operations.

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

WE WILL rescind the new rules that we unilaterally implemented in September 1993, about absenteeism, stopping along travel route, and reporting for work and WE WILL make our employees whole, with interest, for any losses resulting from the unilateral implementation of the new policies.

WE WILL rescind and remove from our files any reference to discipline resulting from enforcement of the aforementioned rules and WE WILL notify any affected employees that this has been done and that the discipline will not be used against them in any way.

WE WILL make our employees whole by paying those employees who were laid off on November 29, 1993, when we closed our operations, normal wages

for a period specified by the National Labor Relations Board, plus interest.

WE WILL, on request, bargain collectively with District 17, United Mine Workers of America, AFL-CIO with respect to the effects on our employees of our decision to close our operations, and reduce to writing any agreement reached as a result of such bargaining.

A & M TRUCKING, INC.

Vyrone A. Cravanas, Esq., for the General Counsel.  
Leslie K. Kiser, Esq. (Lewis, Friedberg, Glasser, Casey & Rollins), of Charleston, West Virginia, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On charges filed October 8 and December 13, 1993,<sup>1</sup> in Cases 9-CA-31200 and 9-CA-31407, respectively, complaints were issued<sup>2</sup> alleging that, collectively, A & M Trucking, Inc.<sup>3</sup> violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by (a) promulgating and maintaining since specified dates in September 1993, policies regarding absenteeism, reporting for work or tardiness, and stopping along travel routes, all without prior notice to the Union and without affording the District 17, United Mine Workers of America, AFL-CIO<sup>4</sup> an opportunity to bargain even though these subjects assertedly relate to wages, hours, and other terms and conditions of employment of the involved unit<sup>5</sup> and are mandatory subjects for the purpose of collective bargaining, and (b) closing its operations on or about November 23 without notice to the Union thereby denying the Union the opportunity to bargain over the effects of closure on the unit. Respondent denies violating the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by General Counsel on May 1, 1995, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a corporation, has been engaged in transporting coal in the vicinity of Mt. Carbon. Before it ceased operating in November 1993 from Mt. Carbon, Respondent, during the prior 12 months, provided services valued in excess of \$50,000 for Cyprus Corporation, a nonretail West Virginia enterprise, which in turn, annually sells and ships goods valued in excess of \$50,000 from its West Virginia fa-

cilities directly to points outside the State of West Virginia.<sup>6</sup> 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 Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICE

### The Facts

On February 4, 1991, the president of Respondent, Tony Mayes, and a representative of the Union signed a "MEMORANDUM OF UNDERSTANDING,"<sup>7</sup> General Counsel's Exhibit 2, which agreement is attached hereto as Appendix A.

Ronnie Niger, who worked as a truckdriver for Respondent and who was also the chairman of the mine committee, testified that the document set forth above was a collective-bargaining agreement between the Respondent and the Union; that the agreement was extended, "it was an extension just that was agreed on between the men, and Tony. We was, basically, working without anything, but under the same terms of the contract"; and that the agreement remained in effect until Respondent ceased operating in the vicinity of Mt. Carbon.

Bess testified that when the agreement described above was about to expire, the Union asked for negotiations with Respondent. Initially the law firm of Dooley & Dooley, of Cumberland Gap, Tennessee, represented Respondent at the negotiations which began in April 1993. Dooley & Dooley, according to the unrefuted testimony of Bess, verbally agreed with the Union to continue to work under the old contract until such time as negotiations were concluded. Subsequently, James Simmons, who is president of a company named Personnel Management, represented Respondent. Negotiations began in April 1993.

In September 1993, Respondent posted rules regarding employee absenteeism, stopping along travel route, and reporting for work, General Counsel's Exhibits 3(a), (b), and (c), respectively. Niger testified that Mayes posted the rules and that the Union was not given the opportunity to bargain with respect to the rules before they were posted. Bess testified that the employees told him about the rules being posted and that no representative of Respondent gave the Union notice or discussed the rules with him, Bess, before they were posted. There were no negotiations regarding the rules but the Union protested the postings with Simmons.

On November 29, when the employees reported for work, the gates to Respondent's facility were locked. Niger and another of Respondent's employees, John Riddle, who was a committeeman,<sup>8</sup> went to the office of Cyprus Chilton, who owned the property and spoke to Kyle Viers, the job superintendent. Respondent hauled coal for this Company from the mountaintop to a river tipple where it was loaded on barges.

<sup>1</sup>All dates are in 1993 unless otherwise stated.

<sup>2</sup>A complaint was issued in Case 9-CA-31200 on November 19. It was amended on September 27, 1994. The complaint in Case 9-CA-31407 was issued January 24, 1994. The Cases were consolidated by order dated September 28, 1994.

<sup>3</sup>Hereinafter referred to as Respondent, Employer or the Company.

<sup>4</sup>Hereinafter referred to as the Charging Party or the Union.

<sup>5</sup>The unit is described as follows:

All truckdrivers employed by Respondent at its facility located in Mt. Carbon, West Virginia excluding all professional employees, guards, and supervisors as defined in the Act.

<sup>6</sup>Robert Bess, a field representative and district executive board member of the Union, testified that Respondent hauled about 13,500 tons of coal a day for Cyprus Chilton, which coal cost about \$25 a ton in 1993 and which coal was distributed throughout the United States to various utility companies. This testimony was not refuted.

<sup>7</sup>The document as introduced here contains one attachment, which attachment is not pertinent here.

<sup>8</sup>Respondent's employee James Sampson, who is also a committeeman, corroborated the testimony of Niger and Riddle about the lockout.

Viers told them that if they wanted a job they would have to speak to Mike Taylor because he and not Mayes now hauled the coal. Niger testified that Taylor was not associated with Respondent; and that Respondent had not given him or anyone at the Union prior notice that it was going to shut down. Bess testified that he went to the jobsite that day to make sure that nothing out of the ordinary happened; that prior to the closure, Mayes neither gave him any indication or notice that the operation was going to be terminated nor did Mayes give him the opportunity to bargain with respect to the effects of the closing; and that subsequently he unsuccessfully attempted to contact Mayes, leaving messages with the lady who answered the telephone at the number that he had for Mayes. Bess also testified that since the time of the shutdown, Mayes has not given him any opportunity to bargain with respect to the effects of the closing; that the Union has not engaged in any effects bargaining with anyone from Respondent regarding the effects of the closing; and that the Union did not waive its right to bargain over the aforementioned rules or the effects of the closing.

Albeit represented at the hearing here by counsel, Respondent did not call any witnesses or introduce any documentary evidence.

#### Contentions

On brief, the General Counsel contends that the three above-described rules implemented by Respondent in September 1993 are mandatory subjects of bargaining, *Venture Packaging*, 294 NLRB 544 (1989); that the Board has held that an employer's unilateral change in work rules violates Section 8(a)(5) of the Act, where a union does not clearly and unmistakably waive its right to bargain about the new rules, *Equitable Gas Co.*, 303 NLRB 925 (1991); that, as Bess testified, no such waiver was ever granted by the Union to Respondent; that while it is well established that an employer has the right to close its entire business for any reason and there is no attendant duty to bargain over its decision, *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965), it is equally well established that an employer must bargain with its employees' bargaining representative over the effects of its decision to close its business operations, *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and in order for such effects bargaining to be meaningful, the employees' bargaining representative must be given adequate notice of the employer's decision to close, *NLRB v. Emsing's Supermarket*, 872 F.2d 1279 (7th Cir. 1989); and that in the circumstances present here, it is clear that Respondent breached its statutory duty to bargain with the Union over the effects of its decision to close its operations.

Respondent did not file a brief.

#### Analysis

In *A & M Trucking*, 314 NLRB 991, 992-993 (1994), the Board found as follows regarding the above-described memorandum:

The memorandum, although brief, is a valid agreement with a fixed duration, reduced to writing, and executed by the parties. Further, the memorandum contains sufficient terms and conditions of employment to stabilize the bargaining relationship between the parties. *Central Plumbing Co.*, 198 NLRB 925 fn. 1 (1972); see

also *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

The Board went on to find as follows:

[W]e find that the Respondent had an enforceable contractual relationship with the . . . [Union] and that the Respondent's failure to furnish the requested information to . . . [the Union] and to discuss grievances with the designated representative of . . . [the Union] violated Section 8(a)(5) and (1) of the Act. [Footnotes omitted.]

The above-described new policies which Respondent unilaterally implemented in September 1993 concern mandatory subjects of bargaining since they involve changes in its employees' "wages, hours, and other terms and conditions of employment." In making these changes in policy without giving the Union prior notice and without giving the Union the opportunity to bargain, Respondent violated the Act as alleged.

Respondent closed its operation on November 29 without giving notice to the Union and without affording the Union an opportunity to bargain about the effects on the employees of the Respondent's decision to close. As pointed out by the General Counsel on brief, while an employer can decide to cease doing business, it is obligated to afford the union an opportunity to discuss the impact and effect of the closing on bargaining unit employees, *Merryweather Optical Co.*, supra. Respondent, by failing to afford the Union an opportunity to bargain about the effects of its closing on bargaining-unit employees, violated Section 8(a)(5) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. The 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. The Respondent violated Section 8(a)(5) and (1) of the Act by (1) unilaterally making changes in policy which concern mandatory subjects of bargaining since they involve changes in its employees' "wages, hours, and other terms and conditions of employment," without giving the Union prior notice and without giving the Union the opportunity to bargain and (2) closing its business on November 29, 1993, without affording the Union an opportunity to discuss the impact and effect of the closing on bargaining unit employees.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall order it to cease and desist, and to take certain affirmative action to effectuate the policies of the Act. The Respondent unlawfully and unilaterally made changes in policy in September 1993 concerning mandatory subjects of bargaining. I shall order the Respondent to cease and desist from unilaterally instituting any such changes in policy. Af-

firmatively, I shall order the Respondent to rescind the September 1993 changes in policy.

I have further found that the Respondent failed to afford the Union an opportunity to bargain about the effects of its closing on bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act. In order to effectuate the purposes of the Act, I shall order the Respondent to bargain with the Union concerning the effects of closing on all bargaining unit employees. Under the present circumstances however, a bargaining order alone is an inadequate remedy, since the Respondent's unlawful failure to bargain at the time of the shutdown denied the employees an opportunity to bargain at a time when there would have been some measure of balanced bargaining power. In order to create an atmosphere under which meaningful bargaining can be assured, some measure of economic strength must be restored to the Union. Therefore, I shall accompany the order to bargain over the effects of the closing with a limited backpay requirement designed to make the employees whole for losses suffered as the result of the Respondent's failure to bargain, as well as to recreate to some degree a situation in which the parties' bargaining positions are not entirely devoid of economic circumstances for the Respondent.

Accordingly, I shall order the Respondent to bargain with the Union, on request, about the effects on bargaining unit employees of the closing of the Respondent's operations, and to pay these employees amounts at the rates of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on bargaining unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of these employees exceed the amount the employee would have earned as wages from November 29, 1993, the date on which the Respondent closed its operations, to the time he secured equivalent employment elsewhere, or the date when the Respondent announces its willingness to bargain, whichever occurs sooner; provided, however, that in no event shall the sum be less than these employees would have earned for a 2-week period at the rates of their normal wages when last in the Respondent's employ. Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, A & M Trucking, Inc., Mt. Carbon, West Virginia, its officers, agents, successors, and assigns, shall

<sup>9</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Unlawfully and unilaterally making changes in its employees' hours, working conditions, or other terms and conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with the Union in accordance with the requirements of Section 8(a)(5) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Rescind the policies unilaterally and unlawfully implemented in September 1993 on absenteeism, stopping along travel route and reporting for work.

(b) Make whole its employees by paying those employees who were laid off on November 29, 1993, when the Respondent terminated its operations, normal wages plus interest for the period in the manner set forth in the remedy section of this decision.

(c) On request, bargain collectively with District 17, United Mine Workers of America, AFL-CIO with respect to the effects on its employees of its decision to terminate its operations, and reduce to writing any agreement reached as a result of such bargaining.

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

(e) Mail an exact copy of the attached notice marked "Appendix B"<sup>10</sup> to District 17, United Mine Workers of America, AFL-CIO and to all the employees who were employed at its former place of business at Mt. Carbon, West Virginia, on November 29, 1993. 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 mailed immediately upon receipt.

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

<sup>10</sup>If 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 A

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
A & M TRUCKING, INC.  
AND  
UNITED MINE WORKERS OF AMERICA

(1) "A & M" agrees to pay (truckdrivers) at the rate of Ten Dollars (\$10.00) per hour for the first Forty (40) hours of work per week, and at the rate of One and One-half (1 1/2) times the rate of Ten Dollars (\$10.00) per hour for the number of hours worked each week in excess of forty (40) hours.

(2) "A & M" agrees that it will recognize the seniority rights of "Employees" under the terms of this agreement. Each employee shall be entitled to seniority as defined: layoffs, callbacks, and shift preference commencing three months after the date of becoming a new employee.\*

(3) The "Employee" or its committee, agrees to submit in writing, on a monthly basis, a list of problems which may affect the "Employees" and "A & M." The Employer agrees to meet with the committee after five working days after "A & M" receives a list of problems.

(4) "A & M" agrees that it will recognize the settlement of dispute as defined in Article XXIII of the National Bituminous Coal Wage Agreement of 1988.

(5) "Employees" agrees that "A & M" shall withhold and charge to "Employees" all applicable Federal, State, and Local Taxes or cost levied, based upon wages or compensation paid to "Employees," and/or the U. M. W. of A. dues, fees, or other assessments levied or required by the U. M. W. of A.

(6) It is hereby agreed by all parties "A & M," "Employees" and U. M. W. of A. that this agreement shall not be reopened for the purpose of renegotiation of any of the terms of this agreement until February 1, 1993.

(7) It is agreed by the parties hereto, that the management of the trucking operation, the direction of the "Employees" and the right to hire and discharge are vested exclusively in "A & M."

\*Definition of New Employee: Any truck driver paid by "A & M" Trucking, Inc." prior to this agreement will not be classified as a New Employee.

FOR THE UNION:	FOR THE COMPANY:
Mark Mar[ ]	Tony Mayes
Int. Rep.	Pres.
2/4/91	2-4-91

RATE OF PAY FOR NEW EMPLOYEES

\$8.00 Per-Hour for the first 8 months  
\$9.00 Per-Hour from 8 months to 16 months  
\$10.00 Per-Hour after 16 months

FOR THE UNION:	FOR THE COMPANY:
Mark Mar[ ]	Tony Mayes
Int. Rep.	Pres.
2/4/91	2-4-91