Fola Coal Company LLC d/b/a Powellton Coal Company *and* United Mine Workers of America, AFL–CIO. Cases 9–CA–44608 and 9–CA–44650

July 31, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On April 16, 2009, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions with supporting argument and the Charging Party filed a limited cross-exception and a brief in support of its limited cross-exception and affirmance of the judge's decision. Thereafter, the Respondent filed a reply to the Charging Party's answering brief and an answering brief to the Charging Party's cross-exception, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply to the General Counsel's answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Fola Coal Company LLC d/b/a Powellton Coal Company, Bickmore, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraph.

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

Dated, Washington, D.C. July 31, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08–1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08–1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08–1162, 08–1214 (July 1, 2009).

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

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

We find without merit the Respondent's exception to the judge's failure to find that James Beighle was not an agent of the Respondent when he informed employee Heath Coleman on July 18, 2008, that he was not allowed to pass out union literature on company property. The judge specifically credited Beighle's testimony that he asked Gary Patterson, the Respondent's president, whether he should say anything to Coleman regarding Coleman's passing out union literature before work and that Patterson told him , "[Y]es." The judge further found that based on Patterson's instruction, Beighle told Coleman exactly what Patterson had said, that Coleman was "not allowed to pass out union literature on company property." By possessing actual authority from Patterson, Beighle served as the Respondent's agent when he told Coleman that he was not allowed to pass out union literature on company property. See *Tyson's Fresh Meats, Inc.*, 343 NLRB 1335, 1336–1338 (2004).

While not necessarily agreeing with all of the factors required for an effective repudiation under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), Member Schaumber agrees that the Respondent failed to effectively repudiate Beighle's statement to Coleman by distributing a document in mid-October that set out employees' rights regarding solicitation and distribution. As found by the judge, the Respondent's distribution of the document some 3 months after the violation was untimely, the document itself did not repudiate Beighle's unlawful conduct, and the Respondent committed another violation during the period between Beighle's unlawful conduct and the distribution of the document. See, e.g., *Cintas Corp.*, 353 NLRB No. 81, slip op. at 2 fn. 8 (2009), and *Chinese Daily News*, 346 NLRB 906, 906 fn. 4 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

[3] We find it unnecessary to pass on whether the Respondent's Sept. 4, 2008 verbal warning to Coleman violated Sec. 8(a)(4) as well as Sec. 8(a)(3) because the remedy for that violation would be essentially the same as the remedy for the 8(a)(3) violation. See *Alcoa, Inc.*, 352 NLRB 1222, 1222 fn. 4 (2008). We amend the conclusions of law and modify the judge's recommended Order accordingly and we shall substitute a new notice to conform to the Order as modified.

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from engaging in workplace conversations relating to the Union while permitting workplace conversations about other subjects, prohibit you from soliciting for the Union during nonworking time, or prohibit you from distributing union literature in nonworking areas on nonworking time.

WE WILL NOT warn or otherwise discriminate against you because of your membership in or activities on behalf of United Mine Workers of America, AFL–CIO, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, rescind the discriminatory warnings issued to Heath Coleman dated February 29, September 4, and September 11, 2008, and expunge them from his employment record.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discriminatory warnings issued to Heath Coleman, and WE WILL, within 3 days thereafter, inform Heath Coleman that this has been done and that the warnings will not be used against him in any way.

FOLA COAL CO. LLC D/B/A POWELLTON COAL CO.

David L. Ness, Esq., for the General Counsel.
David C. Burtin, Esq., for the Respondent.
Charles F. Donnelly, Esq., for the Charging Party.

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. These cases were tried in Charleston, West Virginia, on February 10 and 11, 2009, pursuant to a consolidated complaint that issued on November 24, 2008, and that was amended on January 8, 2009.[1] The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating unlawfully broad rules relating to solicitation and distribution and violated Section 8(a)(3) and (4) of the Act by warning employee Heath Coleman because of his union activities and involvement in filing charges against the Respondent. The Respondent's answer denies any violation of the Act. I find that the Respondent, with the exception of one warning and one 8(a)(4) allegation, violated the Act substantially as alleged in the complaint.

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, Fola Coal Company LLC d/b/a Powellton Coal Company, the Company, is a corporation engaged in the operation of coal mines and a preparation plant at Bickmore, West Virginia, from which it annually sells and ships coal valued in excess of $50,000 directly to points outside the State of West Virginia. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that 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

The Company, located at Bickmore, West Virginia, operates an underground mine, a strip mine on the surface of the land, and a preparation plant at which the mined coal is cleaned prior to shipment. The Company, formerly a subsidiary of Amvest West Virginia Coal, became a subsidiary of Consol Energy on August 1, 2007, when Consol Energy acquired Amvest. At all times material herein Gary Patterson, who is no longer employed by the Company, was president and oversaw the day-to-day operation of the mines. Kenneth Gilliland was the strip superintendent and oversaw the operation of the strip mine. Foreman Eric McGlothlin oversaw the work of the reclamation and refuse crew. The mines operate 24 hours a day, 7 days a week. Employees work 12-hour shifts, with an unpaid half hour for a meal. They work 4 days on and 4 days off. The shifts are referred to as the red team, with a day and night team, and the blue team, with a day and night team. Karl (Kim) Fitzwater is day foreman of the red team.[2]

The organizational efforts of the Union began in early 2008 after employee Heath Coleman, who is on the reclamation and

[1] All dates are in 2008 unless otherwise indicated. The charge in Case 9–CA–44608 was filed on September 18, and was amended on November 19. The charge in Case 9–CA–44650 was filed on October 15, and was amended on November 19.

[2] The Tr., at pp. 259 and 294, incorrectly identifies Karl (Kim) Fitzwater as Benjamin Fitzwater. Benjamin Fitzwater, an employee who is unrelated to Karl Fitzwater, is properly identified at pp. 4 and 184.

refuse crew under the supervision of Foreman McGlothlin, contacted the Union in December 2007. In January 2008, Coleman placed United Mine Workers of America (UMWA) stickers on his hard hat, attached a UMWA key chain to his lunch bag, and began wearing UMWA pins on his clothing. On March 14, the Union sent letters to the Company identifying Coleman and three other employees as members of its In-House Organizing Drive Committee. No supervisor admitted being aware of Coleman's union activity prior to receipt of the letters.

In early April, the Union filed charges relating to various incidents that had occurred in response to the organizational activity of the Union. On July 7, the Regional Director for Region 9 approved a settlement agreement that, among its terms, provides: "The General Counsel reserves the right to use the evidence obtained in the investigation of and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this and any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence." On January 8, 2009, the complaint herein was amended to name five additional supervisors who were alleged to have committed the unfair labor practices in the settled cases. There are no complaint allegations relating to the settled allegations, and the Regional Director did not set aside the settlement agreement. The Respondent filed a motion in limine to preclude the General Counsel from offering evidence relating to the settled allegations in order to establish animus. I denied that motion based upon the foregoing provision relating to the right to use the evidence in the settled cases, but I specifically noted that I would make no unfair labor practice finding with regard to unalleged and settled conduct. See *St. Mary's Nursing Home*, 342 NLRB 979, 980 (2004). In the course of the hearing I did receive evidence relating to the settled allegations. That evidence, which was unrebutted, does establish animus.

The allegations in this proceeding relate to employee Coleman who was issued three verbal warnings and one written warning. One of the verbal warnings related to solicitation. The other two verbal warnings and the written warning relate to the construction of "berms." Coleman's job duties include constructing roads and berms at the strip mine. Coleman acknowledged receiving the verbal warning relating to solicitation. The written warning refers to two verbal warnings relating to berms. Coleman denied receiving the two verbal warnings.

Berms are critical to the safety of employees who operate vehicles at the strip mine. These vehicles include huge trucks, the largest of which can carry over 200 tons. They drive on unpaved roads constructed on the site. Berms consist of dirt, rock, or GOB, which is solid waste material removed from coal in the cleaning process. Berms serve the same purpose as metal guard rails on a highway. They provide a visual guide to the road and prevent the vehicles from running off of the road. A berm must be as high as the middle of the axle of the largest vehicle using a particular road. Due to the size of the largest vehicles, berms on the roads used by those largest vehicles must be higher than 6 feet.

Safety Specialist Doug Martin explained that all employees are responsible for safety. Thus, with regard to berms, any driver who observes a berm that is too low or otherwise unsafe is "supposed to stop and not go through." The driver would be at fault if the driver "saw that there was an inadequate berm and the driver just kept going."

B. Animus Established in the Settled Allegations

I need not burden this decision with a recitation of all of the testimony relating to the settled cases. Employee Coleman recalled that Foreman McGlothlin told him in April that Peter Lilly, a management official with Consol Energy, at a meeting of supervisors, stated that, if the Company were to be unionized, "there would be a substantial layoff of the younger men . . . . because they [the Company] would . . . go to a traditional eight hour schedule which would eliminate the need for an entire shift . . . . [and] lead to the layoff of the younger men." I overruled counsel for the Respondent's hearsay objection to my receipt of the foregoing testimony. Although McGlothlin, an admitted supervisor, attributed the statement to Lilly, that attribution does not alter the fact that his communication of the statement to an employee constituted a threat of layoff. *Albritton Communications*, 271 NLRB 201, 202 at fn. 12 (1984).

At the strip mine, employees and supervisors communicate over citizens band, CB, radios which are in the equipment that the employees operate. Employees on the reclamation crew often worked on foot and would be away from their CB radios. In order to maintain communication, they were issued FM radios that Coleman described as similar to a walkie-talkie. On April 4, McGlothlin directed Coleman to turn in his FM radio. Coleman questioned why, and McGlothlin stated that "they say you don't represent the Company no more, you represent the Union." The notice posted pursuant to the settlement agreement that was approved on July 7 states that the Company will "return an FM radio to Heath Coleman for his use when assigned to safety sensitive job duties." The Respondent, in its brief, correctly points out that the radios were issued for times that employees were not in contact. The brief does not address McGlothlin's undenied comment that he informed Coleman that the radio was taken because Coleman did not "represent the Company no more, you represent the Union."

Employee Steven Beard was told in late March by his supervisor, Charles Hackworth, that President Gary Patterson asked him whether Beard "was a supporter of the Union" and that he replied that he did not know. Supervisor Hackworth then told Beard that he did not want Beard "to mention anything about the Union while I was on the job."

Employee Earl McKown was told in early April by Foreman Kim Fitzwater that, if the employees unionized, there would be layoffs "because they [the Company] would go to an eight hour shift." Employee George Bennett recalled that a similar statement was made in early April to employees in the blasting trailer by Foreman Eric McGlothlin. Employee Benjamin Fitzwater, who is unrelated to Foreman Kim Fitzwater, recalled that, in the bath house in mid-March, President Patterson stated that there "won't be any future here if this place goes union."

Supervisor Hackworth did not testify. Neither President Patterson nor Foremen Fitzwater and McGlothlin denied making the statements to which the foregoing employees testified.

President Patterson testified that a consultant hired by the Company instructed all supervisors in early April regarding

what they could and could not do in the course of an organizational campaign. It appears that the allegations encompassed by the settlement agreement occurred prior to the supervisors' receipt of those instructions. The Respondent argues that no statements reflecting animus have been made since the receipt of those instructions and that various additional charges filed by the Union have been dismissed. Although there is no evidence of any overt threats since April, the record does reveal animus as reflected in the treatment of Coleman. Consistent with the animus expressed prior to April, I cannot conclude that the Company did not thereafter bear animosity towards the organizational efforts of the Union. "[L]atent hostility, which bides its time and lies in wait" has been found to establish a discriminatory motive when the action taken against an active union adherent was "not its real reason." *Marcus Management*, 292 NLRB 251, 262 (1989). The cessation of threats after receiving instructions from the Company's consultant establishes compliance with those instructions, not the absence of animus.

C. The Solicitation and Distribution Allegations

1. July 18

a. Facts

Before 6 a.m. on the morning of July 18, employee Heath Coleman distributed union literature, a union flier, to about a dozen employees in the parking lot at which employees leave their personal vehicles prior to being taken in Company vehicles to the equipment which they operate at the strip mine. There is no claim that Coleman distributed any literature after the shift began at 6 a.m. or in the company vehicles. On that morning, James Beighle, who is alleged in the complaint to have been an agent of the Respondent, was serving as acting foreman of the reclamation crew due to the absence of Foreman Eric McGlothlin. Beighle observed Coleman, and Coleman gave one of the fliers to Beighle.

At the end of the shift, Beighle picked up Coleman to take him back to the parking lot. As soon as Coleman got into the vehicle, Beighle stated that Coleman "had put him on a spot" by handing out "those papers." Coleman noted that Beighle had taken the flier that he gave him. Beighle explained that he did not mean to give it to him, but by "passing it out, . . . because you're not allowed to do that." Coleman asked why, and Beighle stated that "they told me that you're not allowed to pass out union literature on Company property." Coleman disagreed, stating that "they [the Company] probably don't want me to do it, but I'm allowed." Beighle answered that "they told me to tell you that you're not allowed to do that anymore."

Beighle acknowledges that he received a flier from Coleman in the parking lot prior to the beginning of the shift. He took it to a production meeting held later in the morning and showed it to President Gary Patterson. Although Coleman had handed out the flier prior to the shift, Beighle claims that he asked Patterson whether Coleman "was supposed to be handing [it] out on the Company property on Company time." Patterson said that he was not supposed to be doing so. Beighle asked whether he should say anything to Coleman, and Patterson told him, "[Y]es." Beighle claims that he thereafter told Coleman that "he wasn't supposed to be handing out that literature on Company property on Company time."

Patterson admitted that the distribution by Coleman was mentioned at a production meeting but claims that he could not recall whether it was Beighle or someone else who questioned whether solicitation and distribution "could occur on work time." He replied that it could not. He denied telling Beighle to speak to Coleman.

I credit Coleman. Beighle, when asked why there was any conversation about company time in view of the fact that the distribution occurred prior to the beginning of the shift, answered, "I don't know, just asked." I find it incredible that Beighle would report something that had not occurred. The reason that Beighle did not know why he asked about Company property and Company time is because he did not ask about Company time. Coleman had been distributing in the parking lot before work. That is what Beighle would have reported to Patterson, and that is what Patterson told Beighle that Coleman could not be doing. Beighle would not have taken it upon himself to inform Coleman that he could not distribute union literature on Company property unless Patterson told him to do so. I do not credit Patterson. Beighle asked whether he should talk to Coleman and Patterson replied that he should. Beighle did so and told him exactly what Patterson said, "[Y]ou're not allowed to pass out union literature on Company property."

b. Analysis and concluding findings

The complaint, in subparagraph 6(a), as amended, alleges that the Respondent, on July 18, promulgated an unlawfully broad rule prohibiting union solicitation and distribution on Company property. The Respondent's brief does not address Beighle's testimony that he asked President Patterson whether he should speak to Coleman and that Patterson told him, "[Y]es." Nor does the brief address Coleman's testimony. The credited evidence establishes that the Respondent's agent Beighle carried out Patterson's instruction and informed employee Coleman that he was "not allowed to pass out union literature on Company property." The foregoing restriction violated Section 8(a)(1) of the Act.

The Respondent argues that, if a violation be found with regard to Beighle's statement to Coleman, it was effectively repudiated under the criteria of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), by distributing a document in mid-October that correctly sets out employees' rights regarding solicitation and distribution. The Respondent's argument does not address the 3 month lapse between Beighle's statement and the distribution of the document nor the intervening September prohibition stated by Foreman McGlothlin to Coleman regarding speaking about the Union at any time that the employee was being paid by the Company. The document refers to clearing up "confusion." It does not repudiate anything. I reject the Respondent's argument of effective repudiation.

2. September 4

a. Facts

The September 4 incident relates to a conversation between employees Coleman and Robert Rapp that occurred on Sep-

tember 3. Employee Coleman credibly testified that employees regularly talk about nonwork related subjects on the CB radios that the employees use for communication at the strip mine. "You hear talk about basically anything from race cars, to their family, to a trip to the beach, anything really."

On September 3, McGlothlin sent Rapp to assist Coleman. As pointed out in the brief of counsel for the General Counsel, McGlothlin acknowledged that there was no stopping of production, that he knew that "they were going to get out on the ground and talk . . . so that he'd [Rapp] know what to do." They did so. On the way back to their bulldozers, Coleman and Rapp spoke about some property that Coleman had bought and about the Union. Coleman recalls that Rapp mentioned the Union, asking when there was going to be a vote. He replied that the Union was in no hurry and then spoke about benefits. Coleman told Rapp that "if he needed any information and wanted to sign for the Union" to call him at home, that he could "provide him with anything he needed." Coleman stated that he knew that he could not distribute literature in a working area on working time.

Rapp recalled that Coleman brought the Union into the conversation. Rapp testified that, after Coleman spoke of what he felt the Union could do to improve the employees' benefits, he asked whether he would sign an authorization card. He acknowledges that Coleman did not offer him a card. Rapp claimed that, as he was getting back onto his bulldozer, Coleman offered him the 2007 UMWA National Wage Agreement and that he took it "out of curiosity."

Coleman denied that he gave any union literature to Rapp "at the time that we're referring to." Relative to the wage agreement, Rapp initially spontaneously testified that Coleman gave him the wage agreement "that evening-same day." Counsel for the Respondent then asked whether Coleman had tried "to give you a copy of this [the wage agreement] when you were at the jobsite." Rapp answered, "Yes," and thereafter testified that Coleman gave it to him as he was getting back onto the bulldozer. I do not credit that testimony. Rapp agrees that Coleman did not offer him an authorization card. I find it unlikely that Coleman, who admittedly did not offer Rapp an authorization card, would have given him a wage agreement. Coleman knew that he could not distribute union literature in a working area on working time. His credible denial that he gave no literature to Rapp "at the time that we're referring to" is consistent with Rapp's initial spontaneous testimony the he received the wage agreement "that evening-same day." I do not credit his later testimony that he received it on the jobsite.

Rapp spoke of his conversation with Coleman to employee Jeff DeMoss. Foreman McGlothlin testified that DeMoss reported to him that Rapp said that Coleman "asked him if he wanted to sign a Union card and offered him a Union contract." There is no report that Coleman either offered a union card or distributed a union contract. DeMoss did not testify.

Foreman McGlothlin, relying solely upon the report of DeMoss, determined to issue a verbal warning to Coleman. McGlothlin says he consulted with President Patterson and Superintendent Gilliland regarding distribution on working time and interruption of production prior to issuing the warning, but McGlothlin did not claim that DeMoss mentioned interruption of production. Gilliland did not testify, and Patterson did not recall any such consultation. McGlothlin states that he warned Coleman about "solicitation, attempting to pass out Union literature on Company time in a Company working area;" however, on his pocket calendar, he wrote that Coleman was warned for "union talk on pay time." Neither distribution nor interruption of production is mentioned.

Coleman credibly testified that, late in the morning of September 4, Foreman McGlothlin came to where he was operating a bulldozer, and asked him to get into his pickup truck with him. Coleman did so. McGlothlin informed Coleman that "because of those charges that you filed, . . . you can pass out Union literature before and after work, . . . but not on Company time." Coleman asked whether "during lunch and times like when we're not expected to be working I can do it, right?" McGlothlin answered that he could not "because the Company said that they were paying me for that time." McGlothlin continued, stating that "they just wanted me to come and tell you that you could do that now and you picked the wrong time to talk to Robert Rapp." Coleman asked what he meant, and McGlothlin replied that "word got back that you were soliciting Mr. Rapp and offered him a Union card." McGlothlin stated that Coleman could consider their conversation to be a warning.

McGlothlin did not deny that he opened the conversation by referring to charges, charges that he attributed to Coleman although they were actually filed by the Union. Although DeMoss reported only that Coleman asked Rapp whether he wanted to sign a union card, McGlothlin told Coleman that he heard that he had "offered him [Rapp] a Union card."

McGlothlin initially claimed that he spoke with Rapp before warning Coleman, but he thereafter admitted, consistent with his prehearing affidavit, that he did not speak with Rapp until 4 days after he issued the warning. McGlothlin explained that he "let the verbal warning stand" because Rapp told him that Coleman had "offered him a Union card to sign." Rapp acknowledges that he did tell McGlothlin that Coleman offered him a union card, but he admitted that Coleman did not offer him an authorization card on the jobsite.

b. Analysis and concluding findings

Subparagraph 6(b) alleges that the Respondent, on September 4, promulgated an unlawfully broad rule prohibiting union solicitation and distribution on employees' lunchtime. Subparagraphs 7(b), (e), and (f) allege that the Respondent issued a verbal warning to employee Heath Coleman because of his union activities and involvement in filing charges under the Act.

McGlothlin, after referring to charges filed by the Union that he attributed to Coleman, confirmed that Coleman had the right to engage in distribution before and after work but then immediately prohibited him from engaging in distribution on "Company time." Coleman sought clarification, seeking to confirm that he could distribute literature at lunch and "times like when we're not expected to be working." McGlothlin told Coleman that he could not do so at any time that the Company was "paying me for that time." McGlothlin then expanded the prohibition relating to distribution to both "talk" and solicitation, stating that Coleman had "picked the wrong time to talk to Robert

Rapp" and that he had received word that Coleman was "soliciting Mr. Rapp and offered him a Union card." That statement misquoted the report that McGlothlin received. DeMoss reported only that Coleman "asked him [Rapp] if he wanted to sign a Union card." Coleman and Rapp agree that Coleman did not offer Rapp a union card. The entry that McGlothlin made in his log refers to "union talk on pay time."

An employer may not restrict union related conversations while permitting conversations relating to other topics." *Rockline Industries*, 341 NLRB 287, 293 (2004); *Jensen Enterprises,* 339 NLRB 877, 878 (2003). The Respondent has no prohibition upon employees speaking about nonwork related subjects. Employees regularly speak about race cars, family, and trips over the CBs in their Company vehicles. An employer also may not prohibit employees from engaging in solicitation and distribution at all times that they are being paid by the Company. Coleman sought clarification regarding the permission granted to distribute union literature before and after work, asking about lunch and "times like when we're not expected to be working." McGlothlin replied that he could not do so at any time that the Company was "paying me for that time." With regard to solicitation, McGlothlin failed to distinguish between working time and nonworking time, periods that employees are paid but not expected to be working. With regard to distribution, he failed to distinguish between working and nonworking areas.

Although the 8(a)(1) complaint allegation refers to lunchtime, the evidence establishes that the restriction stated by McGlothlin related union activity at any time Coleman was being paid by the Respondent. The Respondent was on notice that the issue herein was the restriction stated by McGlothlin on September 4. This issue was fully litigated. See *Pergament United Sales*, 296 NLRB 333, 335 (1989). Consistent with the foregoing evidence, I find that the Respondent, by prohibiting employees from engaging in workplace conversations relating to the Union while permitting workplace conversations about other subjects, prohibiting solicitation for the Union during nonworking time, and prohibiting distribution in nonworking areas on nonworking time violated Section 8(a)(1) of the Act.

Warning employees for violation of rules that unlawfully limit Section 7 activity violate Section 8(a)(1) of the Act. Insofar as the Section 7 activity for which an employee is warned is also union activity, discipline for engaging in that union activity violates Section 8(a)(3) of the Act. Verbal warnings that serve as a predicate for more serious discipline affect the terms and conditions of an employee's employment. McGlothlin, relying upon the report of DeMoss, informed Coleman that he could not distribute union literature, solicit on behalf of the Union, or talk about the Union at any time he was being paid by the Company and that he could consider their conversation to be a warning. Four days after warning Coleman, McGlothlin spoke with Rapp who informed him that Coleman had offered him a union card and that he, therefore, "let the verbal warning stand." In testimony, Rapp admitted that Coleman did not offer him a union card on the jobsite. Coleman credibly denied that he did so.

The Respondent, citing *DTR Industries*, 350 NLRB 1132, 1136 (2007), argues that the Respondent was entitled to rely upon its "reasonable belief" that Coleman had engaged in the reported conduct. I do not find that the Respondent could have formed a "reasonable belief" without speaking with both Rapp and Coleman. Furthermore, insofar as the issue related to protected activity, the Respondent's mistaken belief, based upon the report of DeMoss, that Coleman did attempt to distribute a union card is no defense. As the Supreme Court stated in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." The foregoing principle is applicable to discipline as well as discharges.

An analysis pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982), is inappropriate herein insofar as there is no dual motive. Coleman did not improperly distribute union literature or solicit on behalf of the Union during working time. He did speak in favor of the Union, but employees are permitted to engage in nonwork related conversations. McGlothlin's calendar reports that he warned Coleman for "union talk on pay time." The Respondent, by verbally warning employee Heath Coleman for engaging in union related conversation while permitting conversations about other nonwork related subjects, violated Section 8(a)(1) and (3) of the Act. *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001).

McGlothlin began the conversation by referring to Coleman's filing charges. Although the charges were actually filed by the Union, Coleman was named in the notice posted pursuant to the settlement agreement. McGlothlin told Coleman that he could distribute before and after work, but then warned him for engaging in "union talk on pay time." The foregoing misattribution, holding employee Coleman responsible for charges filed by the Union, coupled with the contemporaneous verbal warning for conduct in which Coleman was entitled to engage establishes a nexus between the charges and the warning. By warning Coleman for his involvement in filing charges with the Board, the Respondent violated Section 8(a)(4) of the Act.

D. The Warnings Relating to Berms

Coleman, on September 15, was issued a written warning dated September 11 that states that he had, on September 10, been operating "in a dump area without adequate berms." Coleman disputed the accuracy of the warning. The warning refers to Coleman having received two prior verbal warnings relating to inadequate berms, one from Foreman Kim Fitzwater on February 29 and one from Forman Eric McGlothlin on July 21. Coleman denies that he received a verbal warning on either of those occasions.

1. The verbal warning of February 29

a. Facts

On February 29, Coleman was constructing a new road to the Rock Lick Mine. He was operating a bulldozer and constructing the berm as he was constructing the road, which was going downhill. He noticed that the day foreman of the red team, Kim Fitzwater, was observing him from the top of the hill. Coleman recalled that, after about 15 minutes, he called Fitzwater on the CB radio saying, "What do you say, Kimbo, you're not going

to speak?" Fitzwater stated, "[Y]our berm isn't high enough," turned around and drove off. Coleman stated that he just laughed because he knows Fitzwater and considered him to be a friend. There was no mention of a verbal warning.

Foreman Fitzwater confirms that he did speak with Coleman. He initially testified that he informed Coleman that the berms were "not high enough" for the trucks on the road and that, if Coleman did not increase the height, that he was "going to cut my trucks off." The trucks were bringing material to Coleman for construction of the road. On cross examination, Fitzwater explained that, due to a breakdown in a piece of equipment, he directed trucks that were dependent upon that piece of equipment to begin assisting in the construction of the new road by taking material to Coleman. The trucks that he sent were larger than the trucks that had been taking material to Coleman. He admitted that, initially, the berms were adequate but that when he made the "operational decision . . . to use bigger trucks" the berms were inadequate. He informed Coleman of this fact, and Coleman immediately increased the height of the berms. The daily calendar that Fitzwater keeps reflects, for February 29, that, at some point, he wrote, "Keep berms up, axle height, Verbal."

Fitzwater claims that he was unaware of Coleman's union activities. Although irrelevant in view of my finding, hereinafter discussed, that Coleman was not warned on February 29, that the events of that day were thereafter construed as a warning, I find that Fitzwater was aware on February 29 that Coleman supported the Union. Coleman credibly testified that he and Fitzwater "go way back" and that he considered him to be a friend. Fitzwater would have observed the UMWA stickers and paraphernalia that Coleman credibly testified he began wearing in January.

b. Analysis and findings

Subparagraph 7(d) of the complaint alleges that Coleman was issued a verbal warning on February 29. I find that no verbal warning was issued to Coleman on February 29. The berms were of adequate height for the trucks that were initially bringing material to Coleman. Fitzwater did not claim that Coleman failed to increase the height of the berms after his direction to do so when the larger trucks that he sent began assisting in the road construction. I find it incredible that Fitzwater would have issued a verbal warning to an employee who had done nothing wrong. If he did so, the warning was pretextual. Given the concern that the Company places upon safety, Fitzwater may well have made an entry on his calendar relating to the height of the berms for future reference. I find that he did not contemporaneously record that he issued a verbal warning to Coleman. Any warning would have been unjustified insofar as Coleman increased the height of the berms when directed to do so at the point that Fitzwater directed the larger trucks to assist in the construction of the road after another piece of equipment broke down. I credit Coleman that Fitzwater did not inform him that he was issuing him a verbal warning.

I need not speculate with regard to when Fitzwater made the additional entry of "verbal" upon his calendar. I am inclined to believe that he did so in September in order to bolster the Respondent's claim of prior deficiencies on the part of Coleman relating to berm construction cited in the warning dated September 11. Regardless of when Fitzwater made the additional entry, I find that he made the additional entry "later" and that the events of February 29 were thereafter "construed" as a warning. *J. P. Stevens & Co.,* 240 NLRB 579, 584 (1979).

Pursuant to *Wright Line*, supra, I find that Fitzwater was aware of Coleman's union activity. Animus by Fitzwater is established by his undenied threat to employee McKown in early April that, if unionized, there would be layoffs "because they [the Company] would go to an eight hour shift." The verbal warning was one of the predicates cited in the written warning dated September 11, and it therefore affected Coleman's terms and conditions of employment. Thus it was incumbent upon the Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089.

The Respondent has not established, with regard to February 29, either that Coleman was verbally warned on that date or that the events of February 29 would have later been construed as a warning in the absence of his union activity. Coleman did nothing wrong on February 29. The unjustified and pretextual verbal warning that the Respondent dates as having been issued on February 29 was issued because of Coleman's union activity, and, by warning him the Respondent violated Section 8(a)(3) of the Act.

The Respondent argues that this allegation is barred by Section 10(b) of the Act. Insofar as I have found that Coleman first became aware on September 15 that the Respondent was claiming that he had been warned on February 29, there is no 10(b) issue.

2. The verbal warning of July 21

a. Facts

Coleman testified that, on the morning of July 21, he observed that, following an overnight storm, "everything was just torn to shreds basically." The driver of first truck that went down what was referred to as the return road called Coleman on his CB radio and stated that the road would require work "before anybody else can haul," that the road and berm were washed out. Coleman spoke with Foreman McGlothlin and they agreed that the road should be blocked off. Coleman states that he "went to the top of the road and blocked it with an extremely large pile of material to where no one could start down the road."

The Respondent points out in its brief that none of the regularly completed reports of conditions on the site reflect either a washout or other damage. Foreman McGlothlin recalled no rain falling on the night before July 21. The Company introduced weather reports for the nearest cities for which such data is available, Beckley and Charleston, West Virginia. Although, as the brief of the Charging Party points out, those reports reflect a thunderstorm in Beckley and Charleston on the evening of July 20, they report rainfall of only four one hundredths of an inch. Although the berms appeared to be at the proper height on the morning of July 21, McGlothlin observed the trucks traveling upon the road and, because he could see their axles, realized that the berms were too low. He directed Coleman to increase

the height of the berms. Upon returning sometime later, he observed that the height of the berms had not been increased. He confronted Coleman saying, "Heath, I really wished you'd fixed the berm" and that his comment "served as a verbal warning." Coleman confessed that "he'd got busy and forgot to do it." Coleman was not recalled to deny the foregoing statement.

Employee Chase Holcomb testified that, on July 21, he was operating a rock truck and that McGlothlin directed him to dump his load of rocks to block off the road.

I am mindful that sudden mountain storms specific to one area do occur. Thus, I do not consider the weather data to be dispositive of whether an isolated storm occurred. Neither the brief of the General Counsel nor the brief of the Charging Party address the absence of any reports of a washout. No employee was called by the General Counsel to corroborate the level of destruction to which Coleman testified, that "everything . . . tore to shreds" and that the road and berm were washed out on the morning of July 21.

b. Analysis and concluding findings

Subparagraph 7(a) of the complaint alleges than Coleman was issued a verbal warning on July 21. Coleman denies receiving any such warning. Overall I found the testimony of Coleman to be credible, but I find that he failed to recall the verbal warning of July 21. I am satisfied that, sometime in July, the washout incident to which he testified occurred. Nevertheless, I find that Coleman was mistaken with regard to the date of the washout when he blocked off the road. In the absence of any corroboration of Coleman's recollection of a washout on the road on July 21, and in the absence of a denial of the confession that he had forgotten the direction to increase the height of the berms to which Foreman McGlothlin testified, I find that the Respondent established that Coleman was warned, and that he would have received a verbal warning even in the absence of his union activities. I shall recommend that subparagraph 7(c) be dismissed.

3. The written warning of September 11

a. Facts

On September 15, Coleman was issued a written warning dated September 11 that related to events that had occurred on September 10. Coleman and McGlothlin agree that the September 10 incident related to construction of a road adjacent to new slurry cells, but their testimony of what occurred differs. According to Coleman, he was operating a bulldozer and trucks were bringing him material for the construction of the road. He increased the area in which the trucks were backing up by breaking down an existing berm and constructing a new berm that increased the area into which they were maneuvering. Coleman was aware that Foreman McGlothlin observed him as he was doing this. McGlothlin spoke with him on the CB radio asking, "You going to fix that inadequate berm right there?" Coleman replied, "I'm waiting on a load of material right now to widen that road out. . . . I'll put the berm back when I do that." McGlothlin said nothing more to him. Coleman, being on the site and performing the work, did not need to have permission to destroy the existing berm and immediately afterwards construct a new berm.

McGlothlin claims that Coleman was having the trucks drive into the area and dump their loads instead of dumping at the crest and "building the berm as he went." McGlothlin told Coleman that he "needed to get his berms fixed." He admits that he did not, at that time, inform Coleman that he was being warned or that Coleman could thereafter expect to be warned.

Although McGlothlin claimed that the method of building the road being used by Coleman was not the way he "would train people to do it," that he would have had the trucks dump their loads at the crest so that we could be "building the berm as we went," he did not direct Coleman to change the method that he was using to construct the road. Unlike the incident on July 21, McGlothlin does not claim that Coleman failed to comply with his directive. Nevertheless, he claims that he decided, after consultation with President Patterson and Superintendent Gilliland, to issue a written warning to Coleman.

Although the warning is dated September 11, it was not issued until September 15. On that day, McGlothlin and Superintendent Gilliland drove in a pickup truck to where Coleman was working and directed that he join them in the truck. He did so, getting into the back seat. McGlothlin turned and asked, "Do you remember me mentioning a berm to you last week?" Coleman answered, "Yes." McGlothlin told Coleman, "I'm writing you up for it." Coleman replied, "You're what?" McGlothlin repeated, "We're writing you up for it. Here, you can read it." He handed him the warning and Coleman read it. The warning states that Coleman was operating "in a dump area without adequate berms" and refers to verbal warnings on February 29 and July 21. Coleman said he would not sign it because "it's a fabricated lie and you know it is." A pretrial affidavit signed by Coleman does not report what he said, only that he refused to sign the warning because it contained "bogus charges dating back to February 29th, '08," and that he was not guilty of the accusations. Superintendent Gilliland, who did not testify, took the warning from Coleman and signed it. He asked whether Coleman had any questions. Coleman, after initially saying, "No," asked whether anyone else had been written up. Gilliland replied "Yes."

Coleman's question was significant. As already discussed, drivers are prohibited from entering areas with inadequate berms. If, as McGlothlin claims, the berms on the road being constructed adjacent to the slurry cells had been inadequate, the truckdrivers should not have continued to enter that area. Contrary to the answer that Gilliland gave to Coleman, there is no evidence that anyone else was warned. The fact that the drivers had continued to bring road building material into the area in which Coleman was working corroborates his testimony that the berms were adequate and that his conversation with McGlothlin related to his taking out an existing berm and constructing a new berm in order to increase the area into which the trucks were backing. I do not credit McGlothlin's testimony that the berms were inadequate. If the berms had been inadequate, the drivers would not have continued to bring road building material into the area. If they had continued to do so, they also should have been warned.

McGlothlin acknowledges that Coleman refused to sign the warning.

At the end of the workday, McGlothlin spoke with Coleman. He said, "I just wanted to tell you that I didn't have no choice in that stuff a little while ago." McGlothlin did not deny making the foregoing statement.

b. Analysis and concluding findings

Subparagraph 7(c) of the complaint alleges that Coleman was unlawfully issued a written warning on September 15. Consistent with the analysis prescribed in *Wright Line*, supra, there is no question that the Respondent was aware of Coleman's union activity. The continuing presence of the animus shown prior to April is confirmed by the Respondent's reaction to Coleman's distribution of literature on Company property on July 3 and the warning issued to him on September 4 that unlawfully restricted his Section 7 rights. The written warning dated September 11, which was entered into his personnel file, was an adverse action that affected his terms and conditions of employment. I find that the General Counsel established a motivational link between his union activity and the Respondent's action. Thus it was incumbent upon the Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089. The Respondent has not done so.

I have not credited the claim of McGlothlin that the berms adjacent to the slurry cells were inadequate. Coleman properly removed and replaced a berm to provide a larger area in which the trucks could maneuver. The written warning, although citing Coleman for "operating in a dump area without adequate berms," does not set out the height of the existing berms or how high they should have been. It does not address the fact that trucks had continued to bring road building material into the area in which Coleman was working. As the brief of counsel for the General Counsel points out, none of the drivers who had continued to bring material to the area, despite the allegedly inadequate berms, were disciplined. The Respondent's brief does not address the fact that, pursuant to the Respondent's safety policy, the drivers of the trucks would not have entered into the area adjacent to the slurry cells if the berms had been inadequate. The warning also does not mention the testimonial contention of McGlothlin that Coleman should have had the trucks dumping their material at the crest, not driving into the area. If, as McGlothlin contends, his method would have been more efficient, there is no reason that the warning would not have mentioned that fact.

On September 10, Coleman committed no offense. He broke down an existing berm and constructed a new berm in order to increase the area in which the trucks could maneuver. On September 3, Coleman spoke favorably about the Union with employee Rapp. I find that the Respondent was seeking to keep Coleman on a short leash by beginning to build a paper trail. My finding in that regard is confirmed by the failure of McGlothlin to deny that he told Coleman that he "didn't have no choice in that stuff a little while ago." The Respondent issued Coleman a warning for an offense he did not commit in retaliation for his union activity and in an effort to curb further union activity. By so doing, the Respondent violated Section 8(a)(3) of the Act.

The complaint alleges that the warning dated September 11 also violated Section 8(a)(4) of the Act. There is no evidence establishing a nexus between any unfair labor practice charges and the September 11 warning. On September 4, McGlothlin misattributed the charges filed by the Union to Coleman. McGlothlin was not responsible for the September 11 warning, a warning that I have found was issued in retaliation for Coleman's union activity and in an effort to curb further union activity by him. In the absence of any evidence establishing a motivational link between the September 11 warning and the charges filed by the Union, I shall recommend that the 8(a)(4) allegation with regard to the September 11 warning be dismissed.

CONCLUSIONS OF LAW

1. By prohibiting employees from engaging in workplace conversations relating to the Union while permitting workplace conversations about other subjects, prohibiting solicitation for the Union during nonworking time, and prohibiting distribution of union literature in nonworking areas on nonworking time, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By warning an employee because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By warning an employee because of his involvement in the filing of charges with the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (4) and 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.

The Respondent, having unlawfully warned employee Heath Coleman, it must rescind the warnings dated February 29, September 4, and September 11, 2008, and expunge them from his record.

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Fola Coal Company LLC d/b/a Powellton Coal Company, Bickmore, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[3] 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.

(a) Prohibiting employees from engaging in workplace conversations relating to the Union while permitting workplace conversations about other subjects, prohibiting solicitation for the Union during nonworking time, and prohibiting distribution of union literature in nonworking areas on nonworking time.

(b) Warning or otherwise discriminating against any employee because of that employee's membership in or activities on behalf of United Mine Workers of America, AFL–CIO, or any other labor organization.

(c) Warning or otherwise discriminating against any employee because of that employee's involvement in filing charges with the National Labor Relations Board.

(d) 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) Within 14 days from the date of this Order, rescind the discriminatory warnings issued to Heath Coleman dated February 29, September 4, and September 11, 2008, and expunge them from his employment record.

(b) Within 14 days from the date of this Order, remove from its files any reference to the discriminatory warnings and, within 3 days thereafter, notify Heath Coleman in writing that this has been done and that the warnings will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its facilities in Bickmore, West Virginia, copies of the attached notice marked "Appendix."[4] 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 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 18, 2008.[5]

(d) 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.

Dated, Washington, D.C. April 16, 2009

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

[5] In view of my findings regarding the backdated February 29 warning, the earliest unfair labor practice found herein was the July 18, 2008 8(a)(1) violation.

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 had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT prohibit you from engaging in workplace conversations relating to the Union while permitting workplace conversations about other subjects, prohibit solicitation for the Union during nonworking time, or prohibit you from distributing union literature in nonworking areas on nonworking time.

WE WILL NOT warn or otherwise discriminate against any of you because of your membership in or activities on behalf of United Mine Workers of America, AFL–CIO, or any other labor organization.

WE WILL NOT warn or otherwise discriminate against any of you because of your involvement in filing charges with the National Labor Relations.

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

WE WILL, within 14 days from the date of the Board's Order, rescind the discriminatory warnings issued to Heath Coleman dated February 29, September 4, and September 11, 2008, and expunge them from his employment record.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discriminatory warnings and, within 3 days thereafter, notify Heath Coleman in writing that this has been done and that the warnings will not be used against him in any way.

FOLA COLA COMPANY LLC D/B/A POWELLTON COAL COMPANY