

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

**In the Matter of:**

**BIG RIDGE, INC.,**

**Respondent,**

**and**

**UNITED MINE WORKERS  
OF AMERICA,**

**Charging Party.**

**Case Nos.   14-RC-12824  
                  14-CA-30379  
                  14-CA-30406**

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**CHARGING PARTY UNITED MINE WORKERS OF AMERICA’S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION**

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Pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, the Charging Party, United Mine Workers of America (“UMWA”), files three exceptions to Administrative Law Judge Jeffrey D. Wedekind’s December 1, 2011 decision (“ALJD”) in the above-captioned proceeding. All three exceptions relate to the judge’s mistaken conclusion that there is no need for a *Gissel* bargaining order in this case due to his recommended certification of the UMWA’s election victory – a decision that permits the demonstrably anti-union mine operator to further delay the onset of its bargaining obligation by instigating a weary course of “technical 8(a)(5)” litigation.

First, the UMWA excepts to the ALJ’s conclusion that “there is no need to issue a *Gissel* bargaining order as the Employer will be legally obligated to recognize and bargain with the Union based on its certification,” which led him to deny the General Counsel and Union’s

request for an adequate remedy on the erroneous premise that certification left “nothing... for a remedial *Gissel* bargaining order to remedy.” ALJD at 54. Second, the UMWA excepts to the ALJ’s conclusion that “there is insufficient evidence that the Employer’s unfair labor practices, rather than its lawful antiunion campaign (which... included lawful discussion of UMWA-represented mines that had closed), caused most of the decline in the Union’s support.” ALJD 54. Third, the UMWA excepts to the ALJ’s conclusion that there is not “sufficient evidence that the Union’s support has continued to decline since the election due to the Employer’s unfair labor practices...” ALJD at 54.

The UMWA requests that the Board reverse the judge’s decision that the *Gissel* remedy is not necessary, which is inconsistent with Board precedent holding that a *Gissel* bargaining order is especially appropriate where, like here, the union prevailed in a Board election despite the employer’s numerous hallmark violations of the Act. The Board has repeatedly held in these circumstances that withholding the *Gissel* remedy and issuing a certification alone enables an employer whose anti-union animus has been proven to provoke a weary course of “technical 8(a)(5)” litigation to further delay its statutory obligation to bargain with the union selected by its employees.

### **Statement of the Case**

In early April 2011, an overwhelming majority – 93% - of the coal miners employed at the Willow Lake mine in Saline County, Illinois signed authorization cards designating the UMWA as their collective bargaining representative. The UMWA demanded recognition on April 7, 2011. Even though these employees were already organized as a union, the mine operator, Big Ridge, Inc., a subsidiary of Peabody Energy (hereafter “Respondent”, “Company”, or “Peabody”), responded to the demand for card-based recognition of the UMWA with a

professionally orchestrated campaign of coercive conduct, including the numerous hallmark violations proved at trial as reflected in the ALJD.

Despite the coercive impact of the Company's unlawful pre-election conduct, a majority of the miners – approximately 52% - selected the UMWA again on May 19 and May 20, 2011 in a secret ballot election conducted by the NLRB. But the Company's unlawful campaign only intensified after the close election. Indeed, many of the hallmark violations proved at trial address post-election conduct, including more closure threats and the discharge of the most prominent union activist. The Company filed in Region 14 objections to conduct affecting the results of the election on May 26, 2011 – the same day it decided to unlawfully discharge the union activist.

The Director of Region 14 issued a Report on Objections on July 22, 2011, referring each of the Respondent's five election objections to hearing. The objections were consolidated with the amended complaint issued in the unfair labor practice cases and the consolidated matter was set for hearing, which commenced on August 29, 2011 before ALJ Wedekind. The General Counsel presented evidence in support of the unfair labor practice allegations and request for a *Gissel* remedy, while the Company presented evidence in support of only three of its five election objections. After nine days of hearing, the record in the consolidated proceeding was closed on September 30, 2011.

The ALJD issued December 1, 2011 overruled all of the Company's objections and found merit to most of the unfair labor practice charges the Region included in its amended complaint, including: five pre-election hallmark threats of mine closure and job loss; one pre-election promise of education benefits; two post-election hallmark threats of mine closure disseminated widely on Facebook and two more hallmark threats of closure made directly to groups of

employees at the worksite; and the post-election hallmark discharge of the most outspoken union activist.

Though the UMWA won the May 2011 election despite the employer's numerous hallmark violations of the Act, the close result enabled the company to interpose meritless election objections solely for the purpose of delay. Because the ALJ erroneously concluded the UMWA's election victory rendered a *Gissel* bargaining order unnecessary, the Board's drawn out process for resolving a "technical 8(a)(5)" test of the UMWA's certification threatens to add years of additional delay before the union is certified, undermining the standing of a union that enjoyed support of 93% of the Willow Lake miners prior to the Company's commencement of the unlawful campaign that it has complemented by dilatory and frivolous litigation.<sup>1</sup>

#### **EXCEPTIONS, SUPPORTED BY CITATION TO THE RECORD AND AUTHORITY**

The specific question at issue in the UMWA's Exception 1 is whether the Board will continue its policy of avoiding unnecessary delay by adhering to its precedent that a *Gissel* bargaining order is appropriate, in addition to certification, when a union prevails in an election despite the employer's unfair labor practices. In Exception 2, the question at issue is whether there is factual and legal support for the judge's implausible conclusion that rapid loss of support for the union that paralleled the onset and escalation of the employer's unlawful campaign cannot be attributed to its unlawful conduct, which included numerous hallmark violations. In Exception 3, the question at issue is whether there is factual and legal support for the judge's mistaken finding that the post-election intensification of the Company's unlawful conduct did

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<sup>1</sup> Such delay not only undermines the union's ability to effectively represent employees in collective bargaining, it sometimes negates the employees' Section 7 choice altogether when the time between their selection of the union in an election and the Board's processing of a "technical 8(a)(5)" charge takes so long that the Board refuses to issue (or courts refuse to enforce) a post-certification bargaining order. *See NLRB v. Thill Inc.*, 980 F.2d 1137 (7th Cir. 1992) (refusing to enforce order issued nine years after employer refused to bargain in good faith following union victory in representation election).

not further diminish support for the UMWA, which is clearly demonstrated by uncontroverted evidence that attendance at union meetings continued to drop dramatically in the aftermath of post-election hallmark violations.

Analysis of the propriety of the *Gissel* remedy is not limited to the employer's unlawful pre-election conduct and its dramatic impact on support for the UMWA. The employer's unlawful post-election conduct and its impact on the steadily diminishing support for the union must be taken into account, in addition to the harm caused by the passage of time during foreseeable and avoidable litigation testing the UMWA's certification.

**Exception 1 - The ALJ Erroneously Concluded That His Recommended Certification Moots the *Gissel* Bargaining Order Request**

By deciding that his recommended certification left nothing for a *Gissel* order to remedy, the judge rejected the General Counsel's view that the union's election victory makes a bargaining order remedy even more appropriate. The General Counsel argued "the fact that the Union managed to win the election makes a bargaining order more appropriate, not less, as there is no possibility that issuance of a bargaining order imposes union representation on a unit that has not demonstrated majority support." General Counsel's Post-Hearing Brief at 102. In support of this argument, the General Counsel noted that in "a case in which the Board affirmed the appropriateness of a bargaining order despite the Union having prevailed in an election, a major factor supporting its issuance was the 'weary course' of 'prolonged litigation' that would inevitably follow a union's certification if the bargaining order were not issued." *Id.* (citing *Pope Maintenance Corp.*, 228 NLRB 348 (1977)) ("Even with an immediate bargaining order, the employees, who signified almost a year ago that they wanted representation, must continue to wait while the Board and courts wind their weary way through this prolonged litigation" even though "[a]ll issues that would ultimately be presented in a refusal-to-bargain case testing its

certification are presently ripe for decision [in the initial case consolidating the General Counsel's bargaining order request and the employer's challenges in the representation case]."), *enf'd N.L.R.B. v. Pope Maintenance Corp.*, 573 F.2d 898 (5<sup>th</sup> Cir. 1978).<sup>2</sup>

The UMWA expanded on the General Counsel's argument and cited additional authority on this point in its own post-hearing brief. *See* UMWA Post Hearing Brief at 2-13 (*citing Power, Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994) (noting "[t]he present case is unusual in that despite Power's unfair labor practices, the union ultimately won the election" to hold "any remedy short of a retroactive bargaining order might 'put a premium upon continued litigation by the employer'" such that a "recalcitrant employer[ ] might be able by continued opposition to union membership indefinitely to postpone performance of [its] statutory obligation"); *Holding Co.*, 231 NLRB 383 (1977); *The Great Atlantic and Pacific Tea Company, Inc.*, 230 NLRB 766 (1977); *Independent Sprinkler & Fire Protection Co.*, 220 NLRB 941, 964 (1975) ("issuance of a certification without a bargaining order might well require the Union to institute still another unfair labor practice proceeding in order to compel this antiunion company to honor the certification by bargaining with the Union, even though the probably determinative issues [the challenged voters' allegedly unlawful terminations] have been disposed of herein.")).

It bears emphasis that a *Gissel* bargaining order case like this one – involving a union election victory - is substantially different from the usual *Gissel* case in which the order is needed because unlawful practices caused the union to lose a Board election. Ordinarily, the

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<sup>2</sup> In footnote 55 on page 54 of the ALJD, the judge addresses only a small portion of the authority briefed in support of the General Counsel's argument. The judge notes that in *Pope Maintenance* and *Power, Inc.* the Board issued a bargaining order in addition to certification because challenged ballots had not been opened and "it was therefore unclear at the time of the decision whether the union would win the election." This is a distinction without a difference, inasmuch as the Board in both cases explicitly stated that a primary reason for issuing the bargaining order was to avoid undue delay associated with foreseeable "technical 8(a)(5)" proceedings that would follow the employer's inevitable refusal to bargain. The judge also fails to recognize that the D.C. Circuit in *Power, Inc.* enforced the Board's bargaining order, citing the need to avoid delay, even though it knew at the time of its decision that the union had won the election.

Board is cautious about imposing the bargaining obligation where majority support has only been expressed through cards rather than the preferred method of an NLRB supervised election. In such cases, concern for employees Section 7 rights compel the Board and courts to closely scrutinize the reliability of authorization cards and whether the unlawful conduct was sufficiently severe and pervasive to render a fair re-run election unlikely. *See, e.g., Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 440 (7<sup>th</sup> Cir. 1993) (“Our hesitancy to approve Board-imposed bargaining orders stems from the concern, articulated by the Supreme Court in *Gissel*, for the section 7 rights of the employees.”); *General Fabrications Corp.*, 328 NLRB 1114, 1116 (1999) (“[t]he *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights to bargain collectively and to refrain from such activity.”) Here, unlike most bargaining order cases, results of a Board supervised election establish that majority support for the union was diminished but not destroyed by the employer’s unlawful conduct. The confirmation of card-based majority support in an NLRB election – the gold-standard for certification<sup>3</sup> – significantly mitigates, if not obviates the underlying cause for cautious scrutiny into the impact of the employer’s unfair practices. A cautious inquiry into the likelihood the unlawful practices could be remedied by another election is similarly superseded, given a majority has *already* been demonstrated in an election.

The relatively small subset of *Gissel* cases involving a union election victory, cited above, place a special emphasis on the harm caused by extended litigation delay in a manner that mirrors a court’s irreparable harm analysis of the destructive impact of prolonged delay in an injunction case. Therefore, the Board’s exercise of its *Gissel* authority in a manner consistent with these cases is especially likely to be well-received by a district court in the Seventh Circuit,

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<sup>3</sup> "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory-indeed the preferred-method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969).

given the Circuit’s instruction that when “exercising its *Gissel* power, the Board ought to do what a district judge does when issuing an injunction: determine what remedy is necessary as of the time the order issues, taking into account both the likelihood of error and the costs of false positives and false negatives.” *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156, 1162 (7<sup>th</sup> Cir. 1990). In this case, a primary focus of the analysis of the propriety of a *Gissel* order in accordance with the Seventh Circuit’s instruction would entail a balancing of the potential harm that could result if *Gissel* relief is granted against the potential harm that could result if it is withheld.

Due to the union’s election victory and inevitable certification, the potential harm that could result to the employer if the Board exercises its *Gissel* authority is nil. The Board will render a final decision on the merits of the employer’s election objections at the same time it renders a decision on the General Counsel’s request for a *Gissel* order. The substance of the ultimate decision will be whether or not the employer is required to bargain with the union. The only possible outcome under which the Company will not be required to bargain with the union would entail the Board sustaining the Company’s election objections and denying the General Counsel’s bargaining order request. Each of the other three possible outcomes will result in an order that the Company bargain with the union.<sup>4</sup> If the Board determines the employer cannot prevail on its election objections, there is no possibility the employer could suffer harm from a *Gissel* bargaining order, which, unlike a certification alone, is immediately enforceable in federal court.

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<sup>4</sup> The limited universe of possible outcomes of the Board’s final decision on the merits of the consolidated case are all expressed in this table:

	Election Objections Sustained	Election Objections Overruled
Gissel Order Issued	Employer ordered to bargain	Employer ordered to bargain
Gissel Order Denied	No order to bargain	Employer ordered to bargain

By contrast, the majority of employees who have selected UMWA representation through cards and in a secret ballot election would suffer pronounced harm if the Board declines to exercise its *Gissel* authority in this case, thereby smothering the organizing effort with years of additional, needless litigation delays. As discussed in the cases cited above, issuance of a certification without a *Gissel* order would provoke a refusal to bargain, requiring the employees who selected the UMWA to “continue to wait while the Board and courts wind their weary way through this prolonged litigation” even though “[a]ll issues that would ultimately be presented in a refusal-to-bargain case testing its certification are presently ripe for decision [in the initial case consolidating the General Counsel’s bargaining order request and the employer’s challenges in the representation case].” *Independent Sprinkler & Fire Protection Co.*, 220 NLRB at 964.

The significant harm caused by passage of time in the absence of an immediately enforceable *Gissel* order is two-fold. The inevitably long period of stagnation in which the Willow Lake majority will be denied their right to collectively bargain during resolution of the “technical 8(a)(5)” will extinguish the employees’ “spark to organize.”<sup>5</sup> And passage of time also reduces the likelihood the Board will be able to secure enforcement of an order following its adjudication of the consolidated case – whether a *Gissel* bargaining order or an order years later compelling the Company to honor certification of the election results. Indeed, employees who vote for a union in a Board election are sometimes denied their right to collective bargaining

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<sup>5</sup> “As time passes the likelihood of union formation diminishes, and the likelihood that the employees will be irreparably deprived of union representation increases. The “dischargees” will seek, and obtain, new employment. Their search may require them to move, or may lead them to a preferable job. Meanwhile, the employees remaining at the plant know what happened to the terminated employees, and fear that it will happen to them. The union’s position in the plant may deteriorate to the point that effective organization and representation is no longer possible. As time passes, the benefits of unionization are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable. That loss, combined with the likelihood that the Board’s ability to rectify the harm is diminishing with time, equals a sufficient demonstration of irreparable harm to the collective bargaining process.”

*NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996) (internal citation omitted).

when the time between their selection of the union in an election and the Board's processing of a "technical 8(a)(5)" charge takes so long that the Board refuses to issue (or courts refuse to enforce) a post-certification bargaining order. *See, e.g., NLRB v. Thill Inc.*, 980 F.2d 1137 (7th Cir. 1992) (refusing to enforce order issued nine years after employer refused to bargain in good faith following union victory in representation election).

The Courts have criticized the "notoriously glacial" pace of Board proceedings." *Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7<sup>th</sup> Cir. 2011). In this case, the Board has within its power the ability to cut short those proceedings by a year or more, if it decides to exercise its *Gissel* authority in a manner consistent with its precedent, cited above, holding a *Gissel* bargaining order is especially appropriate where a union has won a secret ballot election despite numerous hallmark violations, and certification alone would result in an unnecessary weary course of additional litigation. A decision to exercise *Gissel* authority in this case is a question of Board policy. It is nothing less than a decision whether to effectuate the Section 7 rights of a majority of Willow Lake miners or undermine them in a suffocating and weary course of perfectly foreseeable and indefensibly unnecessary proceedings.

**Exception 2 – The ALJ Erroneously Concluded That the Dramatic Decline In Support For The UMWA Cannot Be Attributed To the Employer's Numerous Hallmark Violations**

The ALJ erroneously concluded that "there is insufficient evidence that the Employer's unfair labor practices, rather than its lawful antiunion campaign (which... included lawful discussion of UMWA-represented mines that had closed), caused most of the decline in the Union's support." ALJD 54. Despite finding that the union suffered a rapid and dramatic loss of support coinciding with the period in which the employer made repeated unlawful threats of mine closure and discharged a union activist, the judge concludes the General Counsel failed to meet some undefined evidentiary benchmark necessary to demonstrate a causal nexus between

the unlawful conduct and loss of support. This conclusion is contrary to well-settled law as to the impact of hallmark violations, ample evidence of the impact of the employer's unlawful conduct and well-settled Board law holding that a rapid decline in support for a union coinciding with hallmark violations is evidence in and of itself that the unlawful conduct caused the decline.

Support for the UMWA steadily diminished as a result of the employer's unlawful pre-election conduct and has continued to decline as a result of the employer's unlawful post-election conduct. The authorization cards presented to the Employer on April 7 and the results of the Board-supervised election on May 19 and 20 are properly viewed of as one-time measurements - "snapshots" - of support for the UMWA at a particular frozen moment. A comparison of the 93% support reflected in the UMWA's card majority and the 52% support reflected in the election results reveals the approximate impact of the employer's unlawful pre-election conduct. Similarly, a comparison of attendance at the union's monthly meetings during the time it enjoyed 52% support reflected in the election results with the significantly diminished attendance at more recent monthly union meetings, discussed more fully below, demonstrate the impact employer's post-election hallmark violations.

The judge concludes that because the Company's "lawful" antiunion campaign "included lawful discussion of UMWA-represented mines that had closed," he is unable to attribute employees' fear of mine closure to management's numerous unlawful threats that it would close the mine. ALJD at 54. In essence, the judge concludes the UMWA is not entitled to a meaningful remedy for the corrosive impact of the employer's unlawful conduct, because the law permits the Company to launder its supervisors' unlawful mine closure threats through discussion of UMWA mine closure at its captive audience meetings.<sup>6</sup> In so concluding, the

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<sup>6</sup> The ALJ's decision that management's reference to mine closure at the captive audience meetings precludes him from finding that the employer's unlawful threats caused the union to lose support is puzzling in light of his

judge rejects well-settled law addressing the corrosive impact of hallmark closure threats as well as arguments from the UMWA and General Counsel that in the absence of its disavowal of supervisors' unlawful mine closure threats, management's discussion of UMWA mine closure "buttresses" lower-level supervisors' threats of mine closure and magnifies their unlawful impact.<sup>7</sup>

#### Reference to UMWA Mines That Had Been Closed Buttressed Unlawful Threats of Closure

In addition to his description of direct dissemination of the Company's unlawful threats among employees, the General Counsel's post-hearing brief also contends that the impact of the threats was amplified or "buttressed" by management's discussion of UMWA mine closure at captive audience meetings. *See* Post-hearing brief of the General Counsel at 101 (citing *Altman Camera Co., Inc.*, 207 NLRB 940 (1973), enf'd 511 F.2d 319 (7<sup>th</sup> Cr. 1975) (enforcing bargaining order as remedy to threats of closure and interrogation made by low-level supervisors to 16 employees in a 67 employee unit that were "buttressed" by statements of upper-level management at captive audience meetings that were not alleged to be unlawful.)

The General Counsel's reliance on *Altman Camera* for his argument that unalleged conduct may "buttress" the impact of unlawful conduct at issue in the Complaint finds support in other *Gissel* decisions. For example, in *Monroe Auto Equipment Co.*, the Board affirmed the decision of an ALJ that even though a company newspaper advertisement discussing a history of UAW plant closure had not been specifically alleged as an 8(a)(1) violation, it was nevertheless

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explanation as to why such references do not shield the employer from liability for the threats: "To excuse these statements simply because high-level managers made lawful statements would encourage unprincipled employers to adopt a two-tier campaign strategy, one lawful and one unlawful, knowing full well that the former would insulate the latter. Such a two-tier or two-track strategy could obviously prove quite effective, as first-line supervisors normally have the most regular contact with the employees and may be viewed as more trustworthy or likely to reveal the company's true intentions than corporate 'suits.'" ALJD at 25. This is precisely the unprincipled strategy employed herein, and its adoption will be encouraged by the ALJ's decision to withhold an adequate remedy.

<sup>7</sup> The ALJ found that numerous supervisors repeatedly made unlawful mine closure threats to large numbers of employees, and also found that the employer never disavowed these threats. See ALJD at 25, n.25.

germane to his *Gissel* analysis of the impact of closure threats alleged in the complaint. 230 NLRB 742, 756 n. 24 (1977) ("Even if I were not to find that the January 22 advertisement constituted an independent violation of Sec. 8(a)(1), it would still be appropriate to consider its content in assessing the impact of Respondent's other conduct.") The ALJ in *Monroe Auto Equipment Co.* cited *Altman Camera Co., Inc.* as authority for the proposition that the unalleged communication about plant closure buttressed the impact unlawful threat. *Id* at 755 ("The January 22 advertisement placed by Respondent drove that threat home with considerable force.")

#### Closure Threats Buttressed by Management Reference to Closed UMWA Mines Terrorized The Workforce

Amplification of the unlawful closure threats by management's repeated reference to UMWA mine closure at the captive-audience meetings had a tremendous impact on UMWA support, as evidenced by the testimony of the representative complement of employees and documentary evidence of their sentiments reflected in social media posts. On May 13, employee David Teegarden posted to his Facebook page, "They will close the Mines if it goes UMWA u can count on it. If u went to the meeting and read between the lines u would see this." GC Ex. 12 at 3. The buttressing of the impact of the unlawful mine closure threats by references to UMWA mine closure at the captive audience meetings was described by employee Mike Gibbons while he was being cross examined by Respondent's counsel:

Q. Okay. All right. So although I -- I'm, you know, going to give this a try, I don't expect this, you know, to get the answer I want, but I'm going to try it anyway. Is it possible that even one of these employees might have felt they didn't want to vote for the UMW because they were concerned about the history of the closing of UMW mines in the Illinois Basin and not because somebody told them or intimidated them?

A. Oh, there's all kinds of possibilities, but when you see that --

Q. Well --

A. -- and then you got the Company telling you they're going to --

...

A. When you got that record, you know, up there --

Q. Uh-huh.

A. -- and then you've got your company representatives telling you if you vote the UMWA in, they'll shut this mine down, yes, you know, **it all works hand-in-hand.**

Q. Uh-huh.

A. That will put the fear in somebody.

Tr. 984 (emphasis supplied).

The record is replete with evidence that the unlawful threats of mine closure and management's reference to UMWA mine closure did, indeed, work "hand-in-hand" to convince employees that UMWA representation made loss of employment more likely, thereby eroding support for the UMWA. Local President Greg Fort heard "concerns from the people, especially a lot of the younger guys, was that if they voted the UMWA in, they were going to lose their job, that they were going to shut down. And we had a number of people tell us, hey, I've got kids, I've got family to take care of, and I can't lose my job." Tr. 115. Asked how many said this, Fort said "There was a lot of them. It was hard to, you know, remember all of them. But I would say there was well up in the neighborhood of 100 to 200 of them." *Id.* Asked when he heard this, Fort stated "During [sic] up to the elections and we've heard them after the election. We're still hearing the same thing... We constantly had people coming up, you know, [sic] that they were afraid the mine was going to shut down." Tr. 115, 119.

Even witnesses who gave testimony in support of the Company's objections testified that they were concerned about threats the mine would close if the UMWA were to win the election. Company witness Chris Pezzoni stated that in the period before the election, he believed "that the UMWA meant no coal" even though at that time he had never heard the traditional UMWA organizing expression, "No coal, no contract." Tr. 1673. Indeed, he testified that a UMWA victory would be bad for his family and stated his belief was that "it would have a ripple effect

on everybody, not just my wife and kids and my family, if the mine was to close down.” Tr. 1673. When Company witness Duane Shoulders was asked whether “a lot of employees were concerned the mine would shut down if it went with the UMWA,” he responded, “I heard [sic] might be layoffs.” Tr. 1894. Asked the follow-up question, “You heard a lot of employees concerned about there would be layoffs at the mine with the UMWA?” Shoulders responded “Yeah, in a way, maybe if they went UMWA. Tr. 1894.

#### The Post-Election Discharge of Union Activist Waller Further Chilled Support for the UMWA

"The discharge of union adherents has long been considered by the Board and the courts to be a 'hallmark' violation of the Act because of its lasting effect on election conditions." *Center State Beef & Veal Co.*, 330 NLRB 41, 43 (1999); *Michael's Painting, Inc.*, 337 NLRB 860, 861 (2002), *enfd.* 85 Fed. Appx. 614 (9<sup>th</sup> Cir. 2004) (discharge of union adherents and threat of plant closure are the most flagrant violations as they tend to destroy election conditions for a longer period of time); *Cogburn Healthcare Center*, 335 NLRB 1397, 1400 (2001) (discharge of employees who lead organizing drive strikes at heart of Act and is not likely to be forgotten soon by employees). *See also Electro-Voice*, 83 F.3d at 1573 (“Meanwhile, the employees remaining at the plant know what happened to the terminated employees and fear that it will happen to them.”) Threats of mine closure and job loss intensified following the UMWA’s election victory, and their coercive effect was magnified by the discharge of union activist Wade Waller, which was announced to employees at the same time the Company informed the workforce it was filing election objections to obtain a rerun election. In a series of post-election meetings described in the Company’s own presentation materials as updates on the NLRB proceedings, the Company has repeatedly referenced Waller’s discharge.

Wade Waller was a generally well-liked and popular employee who knew many employees on a variety of shifts and crews because he worked an above-average amount of overtime. His union sympathies were well known, as evidenced by his “scab song” supervisors asked him to sing and the fact he was the first person to stand up and ask to sign a UMWA card at one of the first organizing meetings in late March. Waller testified, “And the meeting was about over. And I stood up and said, well, I'm not scared to let them know what I'm voting out there for signing this card, so go out and tell them, I don't care.” Tr. 560. In its opening statement at trial, the Company admitted that Wade Waller’s conduct established him as the single most prominent union supporter. As part of his explanation of the purported reason for Waller’s discharge, the Company’s attorney stated:

It's not for singing songs over the radio. It wasn't for wearing UMWA stickers on his hat. As we know, lots of guys wore UMWA stickers. **His conduct stood out more than anybody else's.**

Tr. 67 (emphasis supplied).

The Company has been continuously referring to its unlawful discharge of Waller at post-election meetings of assembled employees that have continued as part of its ongoing campaign against the UMWA. When asked whether the Company announced it would be challenging the results of the election at the same meeting it informed employees of Waller’s discharge, Mine Superintendent John Schmidt responded “I do not recall if those happened at the same time or not.” Tr. 1830. When pressed for details about what was said at the meetings at which the election challenge was discussed, he responded “I read from a script. I believe the script is out there, but for me to say word for word what it was, I'd have to refer to that script.” Tr. 1830.

The script was provided in response to the General Counsel’s subpoena, along with a series of documents prepared by a team of management officials for the purpose of

communicating with employees through Powerpoint presentations and speeches, including Schmidt, who used the document as talking points. Tr. 1326-27 [Joe Klingl]. One such document containing talking points Schmidt communicated to employees about the Company's objections entitled "Company Objections to the NLRB Election" states in full:

Today, Big Ridge, Inc., filed objections with the National Labor Relations Board (NLRB) requesting a new election. The objections are based on threats, intimidation, coercion and fraudulent conduct that affected the election. This conduct created fear and confusion that prevented employees at Willow Lake from exercising their rights their rights to choose and speak freely for themselves. We believe every employee has the right to choose to be represented by a union or union-free and that includes the right to a fair election free from intimidation, fear, coercion and misrepresentation. We are committed to ensuring that every employee is afforded that right. We will not tolerate inappropriate conduct, including threats or intimidation. We will keep you informed. Please contact John, Ray, Bob or any manager with questions or concerns.

GC Ex. 22 at 4-000031 and 4-000032. As indicated in its first sentence, this message was communicated to employees on May 26, 2011, the date the Company filed its objections. GC Ex. 1(d). That same day, during a conference call in which he received input from the same high-level Peabody officials and the attorneys involved in the preparation and filing of the Company's objections, Peabody Executive Tom Benner made the decision to terminate Wade Waller. Tr. 1478-79, 1483, 1486.<sup>8</sup> Mr. Benner and the other parties to the call knew of the objections at the time of the decision. *Id.* Waller was informed of his termination shortly after he reported for work the next day.

At some point during the week beginning June 5, 2011, Schmidt again communicated a message to employees using a similar document, entitled "Update On Company Objections to NLRB Election," which stated in part: "As we have stated repeatedly, we will not tolerate

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<sup>8</sup> Tom Benner, who made the final decision to terminate Waller, Tr. 1463, explained to a group of assembled employees that he "was the only person within Peabody and in the Midwest that has the authority to terminate people, not their supervisor, not their mine manager, no one at the property" and that he was "the only one that has that authority." Tr. 1474. Employees therefore know that the decision to terminate Waller had been made at the highest levels of Peabody management.

inappropriate conduct, including threats or intimidation.” GC Ex 22 at 4-000033-34. The Company’s message concluded with the statement: “We continue to believe that the best future for this mine is to operate union-free, where you speak for yourself and we work as a team.” *Id.* By the time this message was delivered, employees were aware of the employer’s contrived justification fo Waller’s discharge and recognized the significant implication of the statement that the Company would “not tolerate inappropriate conduct, including threats or intimidation.” *Id.* In subsequent meetings with assembled employees, the documents containing the message Schmidt communicated to employees indicates he addressed the subject of Waller’s discharge directly, stating: “There have been rumors that the NLRB has ordered the Company to return Wade Waller to work. That is also false.” GC Ex. 22 at 6000039.<sup>9</sup> Waller has become the centerpiece of the Company’s “re-vote” campaign.

Isaac Craig, the employee with whom Wade Waller had a heated confrontation prior to his discharge, was asked by counsel for the Company, “[H]ave employees blamed you for Wade Waller’s termination, either directly or indirectly?” Tr. 1520. Craig responded, “Not directly. I would think indirectly. There’s a lot of people that haven’t spoken to me since then, and whether that has to do with that or not, that’s their business. I don’t care, but I would – I think some people think that, yeah.” *Id.* According to Craig, “a lot” of employees know Waller was terminated and believe, rightly or wrongly, he is at least partly to blame. This is further evidence, from the testimony of a Company witness, of the fact that Waller’s discharge has been widely disseminated and had a significant impact on the miners.

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<sup>9</sup> On the document provided by the Company, entitled “Update on NLRB Election” the printed text quoted herein was modified by hand. The typewritten word “Company” is scratched out and replaced by the handwritten words “Big Ridge” and the typewritten words “That is also false” are scratched out and replaced by the handwritten words “This is not true.”

Even though he was on a different shift, employee Korby Kirkman heard that Waller had been discharged, “for threatening to whip somebody.” Tr. 511. Kirkman stated he thought it was out of the ordinary for Waller to have been discharged for that reason, referring to it as “childish.” Tr. 511. Asked to explain what was “childish,” Kirkman stated, “That he would get fired for threatening to whup somebody.” Tr. 507. Employee Brian Bishop testified that employees were “enraged” about Waller’s discharge in light of his dependability as an employee. Tr. 259. Employees Greg Fort, Harry Crissup, James “Ricky” Cole, Johnny Wise, Brian Bishop, Zack Gibbons, Korby Kirkman, Daniel Hooven, Michael Bevis, Ronnie Pinkston, Michael Gibbons, Ancil Holman and Jim Carrigan testified that they learned of Waller’s discharge through coworkers. Tr. 89, 220, 236, 257, 446, 506, 531, 680, 731, 842, 880, 952, 2068. There is ample evidence that Waller’s discharge had the significant and long-lasting impact on employee support for the union that is discussed in the numerous cases explaining why the discharge of union supporters is a “hallmark” violation.

The Temporal Connection Between a Dramatic Drop In Support for the UMWA and the Employer’s Unlawful Conduct Is Sufficient Evidence Of Its Impact

In a period of approximately 45 days the nearly unanimous support for the UMWA as reflected in authorization cards signed by 93% of miners dropped to 52% as reflected in the results of the Board supervised election. As discussed more fully below in reference to Exception 3, support for the UMWA has continued to decline after the election as the result of the employer’s ongoing campaign of unlawful closure threats and the discharge of prominent union supporter Wade Waller.

Where multiple hallmark violations occur in a short period of time coinciding with rapid loss of support for the union, the Board does not require strict proof of causation to support a *Gissel* order. The General Counsel argues persuasively that evidence of multiple hallmark

violations coinciding with a drastic decrease in support for the UMWA within a short period of time has been found to support a bargaining order. *See* General Counsel’s Post-Hearing Brief at 99 (*citing J.L.M., Inc.*, 312 NLRB 304, 305 (1993), *enf. denied due to passage of time*, 31 F.3d 79 (2d Cir. 1994) (approximately 50% drop in support between cards signed and votes cast for union)). In such cases, the rapid loss of support is measured by the difference between the number of cards signed and the number of votes received in the election. In *Sheraton Hotel*, 312 NLRB 304, 305 (1993), the Board held issuance of a bargaining order was supported by its finding that the union had obtained 128 authorization cards, and a little more than a month later received only 60 votes in the election. In its more recent decision in *Evergreen America Corp.*, the Board cited with approval this finding of dramatic rapid loss of support in *Sheraton Hotel* as supportive of a bargaining order, observing “[t]hat type of finding can be made here as well.” 348 NLRB 178 (2006). Even though the union in *Evergreen America* had “obtained 62 valid cards, and garnered only 52 votes in the election” – a much less drastic loss of support than occurred in *Sheraton Hotel* or the instant case – the Board nevertheless found it “sufficient to dissipate its majority status” and therefore supportive of a bargaining order.

#### The Employer Should Bear The Risk That Its Wrongdoing Will Be Held Against It

The judge’s conclusion that dramatic and rapid loss of support for the union cannot be attributed to the employer’s unlawful threats of mine closure and the much publicized discharge of Waller does not square with evidence of employees’ widespread beliefs that UMWA representation made mine closure more likely and Waller was discharged for his union activity. It cannot be justly concluded that the Company’s putatively lawful communication about UMWA mine closure was more likely the reason for the loss of support than its simultaneously delivered unlawful threats of mine closure and discharge of the leading union activist. A

presumption that a rapid and dramatic loss of support for the union was caused by the employer's putatively lawful campaign rather than the numerous hallmark violations proved at trial flies in the face of logic, is contrary to well-settled law as to the impact of hallmark violations, and it lets the employer escape any meaningful consequence of its unlawful conduct.

Fortunately, the Board and courts do not share the judge's view. Precedent explaining the tremendous impact of hallmark violations – especially closure threats and the discharge of union supporters - is so widely accepted that it need not be discussed at great length. The Board's approach in these cases is consistent with the foundational legal principle that the wrongdoer bears risk that its unlawful conduct is going to be held against it. *See, e.g. Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-5 (1946) (“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”); *BE &K Const. Co. v. Will & Grundy Counties Bldg. Trades Council*, 156 F.3d 756, 770 (7th Cir. 1998) (“[W]here, as here, the uncertainty as to the damages stems from the defendants' illegal conduct, the defendants should not benefit from the uncertainty they created.”)

Application in the *Gissel* bargaining order context of this well-settled legal principle that a wrongdoer should not be able to assert as a defense the unavailability of a precise measure of the harm inflicted by its wrongdoing is perhaps most colorfully and cogently explained by Administrative Law Judge Michael D. Stevenson in a decision recommending issuance of a bargaining order:

Long ago, it was written that while on the road to Damascus, Saul of Tarsus was struck by a bolt of lightning, after which he had a brief conversation with a divine presence. These events led to Saul's sudden conversion and transformation into St. Paul. 9 Acts 3-6 (rev. Stand ed. 1952), quoted in *Ehlert v. U.S.*, 402 U.S. 99, 108 (Douglas J. dissenting) (1971). Lower courts too have referenced Saul's sudden conversion in connection with a litigant's alleged sudden change of beliefs, particularly in a Selective Service context. In

*Speer v. Hedrick*, 419 F.2d 804, 806 (9th Cir. 1969), a habeas corpus case filed by a serviceman ordered to a combat zone, the court noted that while sudden Road to Damascus conversions are not impossible or even unusual, but that when such a claim is asserted, Selective Service authorities are authorized to treat its sincerity as suspect based on the suddenness of the conversion considered in context. In the instant case, there was also an alleged sudden transformation of bargaining unit employees from union supporters to union opponents in a period of about six weeks. Rather than being struck by a bolt of lightning like Saul, these employees were hit by a baseball bat, wielded by Morse, Moore, and other agents of Respondent. In sum, I do not question the employees' conversion, I reject it as having been coerced by unfair labor practices.

*Kirby Canyon Recycling and Disposal Facility*, 2000 WL 3366545 (NLRB Div. of Judges November 3, 2000) (some internal citations omitted).

**Exception 3 – The ALJ Erroneously Concluded There Is Insufficient Proof That Support For The UMWA Has Continued To Decline Since The Election Due To The Employer’s Unfair Labor Practices**

The Company’s numerous hallmark violations of the Act and the amplification of their impact by upper level management at on-the-clock meetings of assembled employees continued to devastate employee support for the union’s organizing drive after the election. As the General Counsel explained in his post-hearing brief, there is uncontroverted evidence in the record that employee attendance at union meetings dwindled substantially after the Company commenced its anti-union campaign and continued to decline after the election. General Counsel’s Post-hearing Brief at 96-97.

Local union Vice President Rodney Shires and union supporter Ron Pinkston gave **consistent** and **uncontroverted** testimony as to the sharp decline in employee attendance at union meetings. In March, approximately 80-90% of employees attended the Union's meetings. Tr. 2009; 2036. After the Company’s first hallmark closure threats buttressed by discussion of UMWA mine closure at its captive audience meetings, employee attendance at union meetings fell to approximately 50%. Tr. 2010. This is the approximate level of support for the UMWA reflected in the election results. That support continued to drop after the election, as reflected by

the fact that only about 15 to 20 employees (less than 5%) attended the Union's meetings just prior to the hearing in September. Tr. 2010, 2036. According to Pinkston, the number of attendees at union meetings has been "continuously dropping." Tr. 2036; 2046-47.

On cross examination, employee Ron Pinkston, who has attended all the Union meetings, said "whenever we started having meetings at the mine, the Company was having meetings with us, that's when the people started backing off coming [to union meetings.]" Tr. 2042. When asked to explain why he believes attendance has been declining, Pinkston explained, "a lot of people don't want to be, they're scared of being involved with it, or showing they're involved, because of their job situation, feels like it comes back on them." Tr. 2047. This fear was the product of the hallmark closure threats buttressed at the captive audience meetings.

Uncontroverted evidence that attendance at union meetings began to drop at the time the employer began to make hallmark closure threats and continued to decline after the election as the hallmark violations intensified is strong evidence of the impact of the Company's unlawful conduct.<sup>10</sup>

### **Conclusion**

Though they had an obviously dramatic impact on support for the UMWA, the Company's hallmark violations did not destroy majority support for the UMWA by the time of the election. But the Company's numerous pre-election hallmark violations diminished support for the union enough to produce a close result which, the Company hopes, has enabled it to prolong certification of the result with years of unnecessary litigation. At the same time its lawyers filed frivolous objections to commence that weary course of litigation, the Company

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<sup>10</sup> Incidentally, when Asked to describe the primary concern voiced by employees at the sparsely attended most recent union meeting, Local Vice President Rodney Shires illustrated the harmful effect of passage of time discussed by the Seventh Circuit in *Electro-Voice* when stated "The most things that I heard at the meetings and at the mines is when is this thing going to be over. You know, we had our vote and done it the right way and won and, you know, when's the end of it? When is it going to be certified." Tr. 2010.

intensified the number and severity of its hallmark violations by firing Waller and having its front-line supervisors increase the number and volume of closure threats. The inevitable result – as predicted in numerous Board cases discussing the impact of hallmark violations – has been a tremendous reduction in open support for the union as reflected by meeting attendance. Under these circumstances, support for the UMWA cannot be expected to survive years of unnecessary litigation that can only be avoided by the Board’s appropriate exercise of its *Gissel* authority in a manner consistent with its precedent.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 28, 2011, a true and correct copy of the foregoing document was delivered via electronic mail and electronic delivery to the following parties:

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