

**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**

**CHARGING PARTY UNITED MINE WORKERS OF AMERICA'S
ANSWERING BRIEF TO RESPONDENT BIG RIDGE, INC.'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION**

Table of Contents

Statement of Respondent’s Meritless Objections Case1

Argument3

I. Allegations of Intimidation And Coercion In Objection 1 Have No Merit.....3

 A. Allegations of Objectionable Threats By Third-Parties Have No Merit.....3

 1. Alleged third-party conduct is subject to a heightened standard.....3

 2. Respondent’s third-party threat allegations have no merit.....5

 B. Allegations Of Objectionable Anonymous Threats Have No Merit.....14

 1. Anonymous phone calls should not be given significant weight and therefore cannot be the basis for overturning an election.....14

 2. Even if anonymous calls could serve as the basis for setting aside an election, employees were not threatened by calls and the threats were not widely disseminated.....15

 C. Allegations Of Objectionable Threats By Local Officers Have No Merit.....20

 1. The standard applied to allegations of objectionable conduct by parties requires widely disseminated threats sufficiently severe to cause fear.....20

 2. Allegations of threats and coercion by Local union officers have no merit....21

II. Allegations Of Misrepresentations In Objections 2 And 3 Have No Merit.....24

 A. The Board does not police the truth or falsity of alleged misrepresentations and only sets aside elections where it is proved forged documents or pervasive deception influence employees’ choice.....27

 1. Facts adduced at hearing demonstrate Respondent’s Objection 2 does not warrant setting aside the election.....30

 a. There is no evidence of forged documents that render voters unable to recognize propaganda for what it is.....33

 b. There is no evidence the Union’s responses to Peabody’s statements about its relationship to Patriot were made in a deceptive manner.....35

c. Any misconceptions existed prior to the union organizing campaign and respondent took steps to dispel them.....	38
2. Respondent’s Objection 3 does not warrant setting aside the election.....	42
III. Respondent Filed Election Objections To Obtain A Tactical Advantage That Could Be Gained Whether Or Not The Objections Are Found To Have Merit.....	42
<u>Conclusion</u>	45
<u>Alphabetical Table of Cases</u>	46
<u>Certificate of Service</u>	47

Pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, the Charging Party, United Mine Workers of America (“UMWA”), files this Answering Brief to Respondent Big Ridge, Inc.’s Exceptions to Administrative Law Judge (“ALJ”) Jeffrey D. Wedekind’s December 1, 2011 decision (“ALJD”), which were filed on December 29, 2011.

The decision that Respondent violated the Act by discharging union supporter Wade Waller because of his union activity is well-supported by the evidentiary record, as reflected by the comprehensive analysis set forth in the ALJD. Indeed, the General Counsel proved beyond any reasonable doubt that Waller's discharge was motivated by unlawful anti-union animus - specifically, a desire to support its election objections and chill employee support for the UMWA in advance of a re-run election. Therefore, the UMWA in this brief focuses exclusively on the Respondent's meritless exceptions to the ALJ's decision to overrule its election objections and recommend that the UMWA be certified as the properly elected exclusive collective bargaining representative.¹

STATEMENT OF RESPONDENT’S MERITLESS ELECTION OBJECTIONS CASE

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. At hearing, Respondent failed to present any evidence at all in support of two of the five objections referred to hearing in the Regional Director’s Report on Objections, and therefore withdrew these

¹ Respondent does not take exception to any of the ALJ's numerous findings that it violated Section 8(a)(1) of the Act, confining its exceptions to the finding that it violated Section 8(a)(3) by discharging union supporter Wade Waller. Respondent implausibly claims that it so confines its exceptions because "the ALJ, it seems, simply assumed a bias in favor of the Company among the supervisory witnesses who testified and that such bias could not be overcome under any circumstances." Brief at 3. The true reason the Company does not take exception to the ALJ's findings that it violated Section 8(a)(1) by threatening employees numerous times before and after the election is the unfortunate lack of any meaningful consequence to these violations in the absence of a *Gissel* bargaining order.

objections, numbered four and five, in response to Charging Party's motion for summary dismissal. Tr. 1956-57. The text of the remaining three objections referred to hearing in the Regional Director's July 22, 2011 Report on Objections, provide in part, as follows:

OBJECTION 1: In this objection, the Employer alleges that during the critical period of the election campaign the Petitioner or employees supporting the Petitioner intimidated, restrained and/or coerced employees eligible to vote in the election, thereby rendering their free choice in the election impossible. GC Ex. 1(k) at 3.

OBJECTION 2: In this objection, the Employer alleges that during the critical period of the election campaign, the Petitioner distributed false and fabricated documents indicating that the Employer was the same legal entity as Patriot Coal, falsely suggesting the Employer was currently signatory to the BCOA collective bargaining agreement, and in doing so "interfered with the free and unfettered choice of employees in the election." GC Ex. 1(k) at 4.

OBJECTION 3: In this objection, the Employer alleges that an agent of the Petitioner falsely represented himself as "President, UMW Local 5929" thereby giving the impression that the Petitioner was already the collective bargaining representative of the voting unit, and that the Petitioner distributed documents to employees similarly indicating to employees that it was already their collective bargaining representative. GC Ex. 1(k) at 5.

In his December 1, 2011 ALJD, Judge Wedekind overruled all of Respondent's

objections. The judge found that most of the conduct alleged in Objection 1 did not even occur, and correctly concluded that the two alleged incidents he determined to have actually occurred were not sufficient grounds for overturning the results of the representation election. ALJD at 14. These two incidents included one anonymous phone call to an employee who opposed the union in which the unidentified caller told him to "watch it" and an innocuous statement from a union supporter to another employee that his absence at union meetings did "not look good at him", which was not even referenced in the Regional Director's Report on Objections. The ALJ's decision to overrule Respondent's Objection No. 1 was appropriately grounded primarily in his determination that witnesses called to support that objection lacked credibility and gave testimony contradicted by other witnesses. The judge also rejected Respondent's allegations in

Objections 2 and 3 that the UMWA had made fraudulent or misleading misrepresentations that warrant overturning the results of the election.

ARGUMENT

“It is well settled that representation elections are not lightly set aside. Thus, there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees. Accordingly, the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *In re Safeway, Inc.*, 338 NLRB 525, 527 (2002) (internal citations and punctuation omitted).

I. Allegations Of Intimidation And Coercion In Objection 1 Have No Merit.

The ALJ determined that Respondent failed to meet its burden of proving much of the misconduct it alleges in the three election objections for which it offered at least some evidence even occurred. As to the alleged conduct that did occur, he concluded Respondent failed to meet its “heavy burden” of proving it so influenced potential voters that free choice was impossible.

A. Allegations of Objectionable Threats By Third-Parties Have No Merit

The ALJ determined that of the threats alleged in Objection Number 1 to have been committed by third-parties, such evidence falls well short of satisfying the heightened standard applied to allegations of third-party misconduct.

1. Alleged third-party conduct is subject to a heightened standard.

In a recent decision refusing to set aside an election based on an employer’s election objections alleging threats delivered by pro-union employees and anonymous telephone callers, the Board explained that “[b]ecause unions and employers cannot control nonagents, ‘there are equities that militate against taking away an election victory because of conduct by a nonagent.’” *Mastec North America, Inc.*, 356 NLRB No. 110, *5 (March 7, 2011). “Simply put,

it is unfair to saddle parties with the consequences of conduct over which they have no control.”

Id. The decision also notes that “the Board and the courts recognize that conduct by third parties is less likely to affect the outcome of the election than employer or union conduct.” *Id.*

“Employees will ordinarily reasonably discount the bravado of coworkers even when... the individual employees theoretically have the capacity to carry out the threat.” *Id.*

In *Mastec North America*, the Board held “[i]t is settled that [it] will not set aside an election based on third-party threats unless the objecting party proves that the conduct was ‘so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.’” *Id.* at *3 (citing the five part test announced in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)). In explicitly “declining to find that all language suggesting a physical threat must be deemed to have serious intent” the Board noted in the particular case before it that “record evidence that similar statements were common in this workplace and among these employees” and made a general observation that “acts of violence or other forms of retaliation perpetrated by employees rarely occur.” *Id.* at *6. The Board relied on these principles in its application of the five factors used to apply the heightened third-party standard first announced in *Westwood Horizons Hotel*, which it set out as follows:

- (1) the nature of the threat itself;
- (2) whether it encompassed the entire unit;
- (3) the extent of dissemination;
- (4) whether the person making the threat was capable of carrying it out and whether it is likely that employees acted in fear of that capability; and
- (5) whether the threat was made or revived at or near the time of the election.

Id.

The Board in *Mastec North America* explained the heightened standard from *Westwood Horizons Hotel* applied to third-party conduct is intended to avoid “the extraordinary potential for disruption of the election process and frustration of employee choice if third-party conduct

were not subject to a heightened standard.” *Id.* at *4 (internal citations omitted) Declining to reverse the results of a 14 to 12 union victory, the Board observed that it has “consistently held that the third-party standard applies even where, as here, there was a narrow electoral margin.” *Id.* at *7, fn. 7.

2. Respondent’s third-party threat allegations have no merit.

Darrell Kirk’s Allegation Wade Waller Threatened Him

The Regional Director’s Report on Objections states that the Employer submitted evidence that pro-union employee Wade Waller threatened to use an object to hit and “beat the f*** out of” Kirk.² Darrell Kirk testified that about a week before the election, Waller was speaking to employee Jim Carrigan in Kirk’s vicinity, when he stated “I’ll show you how to handle motherfuckers like this... You pick something up and you hit them in the fucking head with it, that’s how you handle scabs.” Tr. 1737. Kirk stated about this conversation he was not a part of, “I really just didn’t pay much attention.” *Id.* Kirk testified the Local union’s Financial Secretary Keith Clayton was “kind of floating around there” and later clarified that he was “approximately 20 feet” away. *Id.* Kirk never indicated that Clayton was part of the conversation or gave some indication that he had heard the conversation. Kirk said Waller offered him a vote no sticker and he responded to Waller that he didn’t need anymore, but if Waller needed some he, Kirk, could get them. *Id.* Kirk alleges Waller responded, “Go ahead and vote no and be a fucking scab.” *Id.* Kirk stated, I never had any confrontation or anything of that matter with him after that. *Id.*

² There is no evidence Waller is an officer or agent of Petitioner or the Local union. He was never present when agents of Petitioner discussed organizing strategy, he was never an officer in the Boilermakers Local and has never been an officer in UMWA Local 5929. Tr. 580. Neither the UMWA International, UMWA District 13 nor UMWA Local 5929 ever gave Waller assignments during the organizing campaign, and he was not a member of any organizing committee. Tr. 579.

Kirk testified he heard about Waller's confrontation with Isaac Craig in a conversation with Craig, "three or four days later." Tr. 1740. But this is inconsistent with the affidavit he provided to the Board, in which Kirk had stated he spoke with Craig and learned about Craig's confrontation with Waller "a day or so later." Tr. 1751. Kirk said that it was only after he spoke with Craig that he decided to report the conversation between Waller and Carrigan to management, admitting at trial that if he had not talked to Craig he would have reported the conversation at all. Tr. 1752. There is no evidence the threat was widely disseminated. Numerous witnesses called by the General Counsel and Charging Party who work in a wide variety of shifts and units testified that before the election they had not heard anyone had threatened to hit or beat Darrell Kirk. (Fort, Tr. 133) (Bradley, Tr. 1961) (Hanson, Tr. 2078) (Cole, Tr. 222) (Wise, Tr. 237) (Bishop, Tr. 260) (Z. Gibbons, Tr. 448) (Crissup, Tr. 681) (Hooven, Tr. 732) (Pinkston, Tr. 885-86) (Bartolotti, Tr. 2055).

Kirk's testimony was simply not credible. Asked whether he uses Facebook, Kirk responded "I just post general stuff on how I felt about the Union being in there and how, you know, I've never made threats to anybody or tried to sway anybody's vote." Tr. 1741. Yet this statement is clearly inconsistent with his messages on his Facebook account, where shortly after delivering a Facebook rant about how he's so sick of the UMWA guys" that ends "NO THANKS!! NO UMWA!!!!!" Kirk posts the apparent threat "Let those mutha fuckas try me with that shit, ill [sick] wreck em!!!" GC Ex. 12 at 14.

More than anything else, it's the testimony of James Carrigan that completely destroys Darrell Kirk's credibility. Kirk identified Carrigan as the employee Waller was allegedly speaking with when he claims Waller threatened him. Tr. 1750. Carrigan was called by the General Counsel to testify, and his testimony completely refuted Kirk's allegation when he

testified that he did not know who Waller was until after Waller's termination, Tr. 2088, and specifically denied hearing anyone threaten to hit anybody else in the bathhouse. Tr. 2090.

Carrigan specifically denied witnessing Waller threaten Kirk and denied having heard the exact words Kirk attributed to Waller when they were recited to him at trial. Tr. 2091. Kirk's testimony in support of this and other allegations is simply not credible.

Darrell Kirk's Allegation Korby Kirkman Threatened Him

The Regional Director's Report on Objections states that the Employer submitted evidence that union supporter Korby Kirkman threatened to burn Darrell Kirk's house down.³ Kirk responded "yes" when asked the leading question, "Did there come a time prior to the election when you received a verbal threat about burning your house down?" Tr. 1742. Kirk said that during a shift change, fellow employee Korby Kirkman said "Look at that fucking hat... I ought to burn your fucking house down." Tr. 1743. Kirk never described a time frame in which this alleged threat occurred – he only responded affirmatively to two leading questions from Respondent's counsel: "Did there come a time prior to the election when you received a verbal threat about burning your house down?" Tr. 1742, and "Now that incident with – remark about burning your house down, that would be before the election?" Tr. 1744. Kirkman denied making the threat. Tr. 515.

³ There is no evidence Korby Kirkman is an officer or agent of Petitioner or the Local union. He is not a union officer or agent and has never held a position with UMWA Local 5929. Tr. 2012. Kirkman held a non-officer position in the Boilermakers local, but was no longer in that position as of the Boilermakers' disclaimer interest on April 15. Tr. 503. He was not involved in planning the strategy of the organizing campaign, Tr. 124, and did not serve on an organizing committee. Tr. 209. When asked whether Kirkman is a union official, Peabody Safety and Compliance director Robert Clarida responded that he is not aware of Kirkman holding any position other than miners' representative. Tr. 1922. The position of miners' representative has nothing to do with the union or collective bargaining. Rather, it's a position created by the Mine Act, which "permits any two or more miners to designate a miners' representative for the purpose of traveling with MSHA inspector." Tr. 1928. Korby Kirkman has long been a miners' representative and continues to serve as miners' representative, but this does not establish that he is an agent of the union.

In light of clear evidence Kirk gave false testimony in this matter with regard to other allegations, including but not limited to the threat allegation refuted by Carrigan and the testimony Kirk gave refuted by his own Facebook posts, his allegations should not be credited in over Kirkman's denial of the same. There are other reasons to disbelieve Kirk's testimony. On June 4, 2011, Kirk prepared a sworn affidavit with the assistance of an NLRB Board agent in which he gave detailed information about the alleged threat by Wade Waller, his conversation with Isaac Craig and his reporting of threatening incidents that he stated "were getting out of control." GC Ex. 26. Notably absent from this statement is any mention of Korby Kirkman's alleged threat to burn his house down. *Id.* Kirk's testimony should also be called into doubt by the fact that it was rehearsed with the attorneys in the presence of other witnesses and managers.

Even if one accepts as true the allegation that Kirkman told Kirk he would "burn his fucking house down" Kirk's testimony makes clear the statement was not believed by Kirk to be a serious threat. When asked, "Did you think there was a real threat that he would come and burn your house down?" Kirk responded "I don't know. I really don't have any idea if he would actually burn my house down. I couldn't tell you he could or he couldn't." Tr. 1764. When asked, "You didn't think at the time Korby Kirkman could definitely come and burn my house down?" Kirk did not respond that he did. Instead, he gave the vague response, "He's a human being. He's capable of anything." Tr. 1764. When asked, "Do you think he would burn your house down to help the Union get in there?" Kirk responded, "I don't see why he would." Tr. 1765. Kirk never called the police about the alleged threat and when he asked whether he took any precautions to protect his house, responded "No, I didn't do anything extra, no." Tr. 1766.

There is no evidence of pre-election dissemination of the threat. Kirk testified that he did not tell anyone about the alleged threat, until he gave his statement to Bob Gossman, which is

dated May 26. Tr. 1767, CP Ex. 6. Kirk's testimony establishes that he was not in any manner chilled by the allegedly threatening behavior. He acknowledges that he was open about his position against the union "throughout the entire election campaign, all the way through the election." Tr. 1767. He confirmed that he never stopped openly expressing his opposition to the union and that he "didn't change in any way after Korby Kirkman" is alleged to have threatened him. Tr. 1768.

Ron Koerner's Allegation That Wade Waller Threatened Him

The Regional Director's Report on Objections states that the Employer submitted evidence that Wade Waller threatened Ron Koerner in the presence of Chris Pezzoni. Koerner started working at Willow Lake mine on April 11, 2011, Tr. 1342, was therefore ineligible to vote in the election. Tr. 1365. Koerner testified that on his "second day," while he was with Chris Pezoni exiting a mantrip, Wade Waller "made a comment about the Union gets in, we'll take care of these scabs, is what he said." Tr. 1342. Koerner admits that Wade would have had no way to know his union sentiments at the time of the alleged threat. Tr. 1408.

Koerner and Pezzoni give conflicting testimony about the alleged incident. Koerner testified that Wade's exact words were, "If the Union gets in, we'll take care of the scabs." Tr. 1408. Pezzoni testified that Waller said "You vote UMWA, or scabs like you won't work here." Tr. 1654. Koerner testified that Waller never said the words "A scab like you won't work here." Tr. 1409. Pezzoni's affidavit, which he signed on June 5, 2011, states that Waller told Ron Koerner, "You better vote UMWA or your scab ass is gone." GC Ex. 25. Even though he claimed at hearing this one statement in the affidavit was incorrect, Pezzoni acknowledged that he had reviewed the affidavit prior to signing, initialed each page and made some changes to other portions but not that particular statement. Tr. 1682. When asked by the judge to state the

words Waller actually said, Pezzoni responded with yet a third version: “Vote UMWA or a scab like you will be gone.” Tr. 1682. Koerner repeatedly denied that Pezzoni said anything to him after Waller made this comment. Tr. 1409-10. By contrast, Pezzoni testified that he turned around and looked at Koerner and said “Don’t worry about it” and that Koerner said to him “What the heck is going on around here.” Tr. 1654. On direct, Pezzoni did not say that he responded to Waller, but on cross examination, he testified that he told Waller, “Vote however you want, just keep it to yourself.” Tr. 1672. Koerner states that Pezzoni did not say anything in response to Waller, and specifically denied he said anything like “vote however you want to vote.” Tr. 1409-10.

These inconsistencies are especially striking given that Koerner and Pezzoni had an opportunity to get their stories straight when, along with Bob Gossman and Scott Lawrence, they met with the Company’s lawyers to prepare their testimony together. Tr. 1392-93. Pezzoni testified that he went over his testimony with the lawyers with Bob Gossman present, as well as Ron Koerner, Eric Davis, Scott Lawrence, John Schmidt, and Ray Hood. Tr. 1679-80.

Nothing about this alleged incident was written in several statements where its omission is noteworthy, including Pezzoni’s 5-22 statement, see CP Ex. 6), (Koerner’s 5-26 statement, see ER Ex. 12), and (Scott Lawrence’s 5-21 statement, see GC Ex. 9). Koerner’s explanation as to why he left this alleged incident out of his written statement was “I was new. I didn’t want to rock the boat of [sic] putting down names. I just wanted it to be over with. I didn’t want to make a big deal about it.” Tr. 1367. This explanation is simply not plausible in light of the fact he had already reported the threat to Mine Manager Scott Lawrence. Tr. 1368.

Pezzoni testified that after Wade allegedly made these comments Koerner never told him he was afraid of Wade Waller or that he felt Wade Waller any authority to fire him.⁴ Tr. 1674. Pezzoni also testified that he did not initially consider what Waller had said to be a threat, explaining that “I kind of looked at it at the time like he might just have one bad day...” Tr. 1669.

Mike Morrow’s Allegation That Ron Pinkston Threatened Kyle Hanson

The Regional Director’s Report on Objections states that the Employer submitted evidence that Mike Morrow witnessed Ron Pinkston threaten Kyle Hanson. Former Willow Lake employee Mike Morrow, who now works at Peabody’s Wildcat Hills mine, testified that he saw Ron Pinkston threaten another employee, Kyle Hanson, that if the company became union free, “with your work comp case and the amount of work you have missed, they’ll fire you right off the bat.” Tr. 1867. Pinkston denied making the threat. Tr. 918. Kyle Hanson, who is not an open supporter of the UMWA, testified at hearing that Ron Pinkston never threatened him, and never said he would lose his job for not supporting the UMWA. Tr. 2077, 2079. The allegation is especially baseless and the Company could have discovered as much by simply taking a statement from Kyle Hanson. Instead, it made this frivolous campaign as part of its overall effort to delay certification and postpone bargaining with the UMWA.⁵

Hanson described a conversation with Ron Pinkston in which Pinkston tried to encourage him to vote for the union and reminded Hanson that the union represented him when he was in trouble with the Company for attendance issues related to a serious illness, but categorically

⁴ Threats of job loss or discharge by non-supervisory union supporters are presumably considered noncoercive for the same reason such threats made by representatives of a union are considered noncoercive. *Foxwoods Resort Casino*, 352 NLRB 771, 783 (2008) (citing authority for proposition that “threats of job loss or discharge made by union representatives are considered to be noncoercive since employees can reasonably evaluate such comments as being beyond the union’s control...”.) See also *Bonanza Aluminum Corp.*, 300 NLRB 584, 591 (1990) (“[T]hreats of job loss for not supporting the Union, made by one rank-and-file employee to another, are not objectionable...”)

⁵ See fn.6, for authority that threats of job loss for not supporting the Union, made by one rank-and-file employee to another, are not objectionable.

denied having been threatened. *Id.* The Company could have discovered this on its own had it bothered interviewing Kyle Hanson or Ron Pinkston, but Bob Gossman, who testified he was primarily responsible for the investigation into this matter, did not speak to Hanson or Pinkston.⁶ Tr. 409. The Company's failure to conduct even minimal investigation into Mike Morrow's statement before using it as the basis for one of its objections speaks volumes about the reliability of its other objections, and suggests the objections were filed for the purpose of delaying certification without regard to whether they were meritorious.

Morrow also testified to an allegation that was not described anywhere in the Regional Director's Report on Objections involving an alleged threat made directly to him by Ron Pinkston. Tr. 1869. Because the incident did not appear in the Regional Director's Report on Objections, it is not properly at issue in this case and cannot serve as a basis for setting aside the election. In any event, the credibility of Morrow's testimony is in question given the conflicting testimony of Kyle Hanson, an employee who remained neutral through the election campaign and only testified when compelled by subpoena. Tr. 2084.

According to the allegation not referred to hearing in the Regional Director's Report on Objections, Pinkston posted a pro-union flier on a bulletin board and Morrow went behind him, ripped it down and threw it in the trash. Tr. 1869. Despite Morrow's assertion to the contrary, the bulletin board had long been used by the union – in fact, it was described by Local Vice-President Rodney Shires as “the union bulletin board.” Tr. 2011. Morrow states that “somebody told him what I had done, and he got angry with me and turned and called me a scab and asked me what I pulled down his poster.” Tr. 1869. Morrow says he told Pinkston that he had every

⁶ Ron Pinkston was a steward in the Boilermakers Local, but that position was eliminated when the Boilermakers disclaimed interest on April 15. He is not an officer or agent of the UMWA District 13, International or Local 5929. Tr. 881, 899, 2036. He was not involved in planning the strategy of the organizing campaign, Tr. 124, and did not serve on an organizing committee. Tr. 209.

right to pull down the poster and alleges Pinkston told him, “If that’s how it was going to be, I needed to watch my back and watch every move I make,” which, according to Morrow, was an “insinuat[ion] that if I did something wrong, he would try and get me fired or lose my job for it.” Tr. 1869. Pinkston denies that he told Morrow he needed to watch his back or otherwise threatened him. Tr. 2037. Notably, the statement Morrow purportedly gave to the Employer on May 23 does not reference this threat, stating only that Pinkston “called me a ‘scab’ and yelled at me for pulling down his poster.” CP Ex. 6.

No date was provided for this alleged incident – it was only described, in response to a leading question asking “was it before the election?” as occurring “sometime before the election.” Tr. 1868. Morrow testified that Crit Stephenson overheard him talking about this incident with other employees. Tr. 1873. Even though Respondent called Crit Stephenson as a witness, he did not corroborate Morrow’s story and did not testify about this alleged incident at all. Morrow said he didn’t tell anyone about the incident other than Bryan Head and Russell Cullison, two employees he claims witnessed it first-hand. Tr. 1874. Neither of these employees were called as witnesses by Respondent.

Morrow also claimed that Greg Fort and Rodney Shires witnessed Ron Pinkston allegedly threaten him after he tore down the poster. Tr. 1879-80. Rodney Shires said he did not witness any such incident. Tr. 2011. Shires said he was informed by Pinkston that Morrow had ripped the flier down from the union bulletin board, but testified Pinkston made no mention of an alleged threat. Tr. 2026. Morrow acknowledged that Ron Pinkston has no more authority than he does to get someone fired, which, he agreed “is none.”⁷ Tr. 1875. Morrow could not provide any reason as to why he interpreted Pinkston’s alleged statement that he “better watch every move

⁷ See fn.6, for authority that threats of job loss for not supporting the Union, made by one rank-and-file employee to another, are not objectionable.

[he] make[s]” as a threat of job loss rather than any other type of threat and admitted that Pinkston did not reference job loss. Tr. 1876. Without further explanation, Morrow claims he “understood what he was saying to me... what it was coming off as.” Tr. 1876. Morrow admitted that Ron Pinkston was not on his mind when he cast his ballot. Tr. 1878.

B. Allegations Of Objectionable Anonymous Threats Have No Merit

A significant number of the alleged threats described in the Regional Director’s Report on Objections involve anonymous phone calls, which are alleged primarily by employees whose credibility was seriously undermined by testimony given on other issues in the consolidated case. The Board’s recent decision in *Mastec North America* clearly provides that anonymous telephone threats should not be given significant weight in determining whether an election should be overturned. Even if anonymous calls could serve as the basis for a decision to reverse the will of the majority as expressed in a secret-ballot election, the threats at issue in this case do not satisfy the five part test used to determine whether the threats were so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. There is no evidence that any of the allegedly threatening phone calls were made by agents of the Petitioner. Indeed Respondent admitted that it never learned the identity of anyone who purportedly made a telephone threat. The alleged threats were delivered to a handful of employees and were not widely disseminated prior to the election. There is no indication employees acted in fear at all and there was nothing to suggest the anonymous callers had the intention or capability of carrying out the threats.

1. Anonymous phone calls should not be given significant weight and therefore cannot be the basis for overturning an election.

The Board recently held allegations of anonymous threats made by telephone should not be given “significant weight.” 356 NLRB No. 110 at *4. Emphasizing the potentially disruptive

effect of making parties to the election process accountable for third-party conduct, the Board in *Mastec North America* observed that if “the Board to give the same weight to conduct by third persons as to conduct attributable to the parties, the possibility of obtaining quick and conclusive election results would be substantially diminished.” It explained the heightened standard was even more important in the context of allegedly anonymous threats, explaining “[t]his disruptive potential would be even greater if anonymous threats, such as the telephone call to employee Mays, were given significant weight.” *Id.* The Board unambiguously concluded such allegations of anonymous threats should not be given significant weight in a decision about whether to overturn an election, reasoning that “[t]he prospect of a rerun election might even encourage parties or individuals to manufacture anonymous threats and then attempt to use them to set aside the election.” *Id.* (quoting *Amalgamated Clothing and Textile Workers v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984).

2. Even if anonymous calls could serve as the basis for setting aside an election, employees were not threatened by calls and the threats were not widely disseminated.

Anonymous Call to Terry Glover

The Regional Director’s Report on Objections states that the Employer submitted evidence that an employee received a telephone call threatening that he would be fired if he did not vote for the Petitioner. Terry Glover, in response to a series of leading questions, testified that he received an anonymous phone call on his cell phone a few days after he was injured “in May” but he couldn’t remember the exact date. Tr. 1854-55. He claims that he received the call while in his car on the way to work, and the anonymous caller said “If we don’t go union, you will lose your job over your injury.” Tr. 1855. He said he asked who it was, but the caller hung up. *Id.* He said he “told some people at work” but never testified who he told, how many people

he told or whether the people he told were eligible employees in the bargaining unit. *Id.* There is no evidence the threat was widely disseminated among unit employees. Mr. Glover met with the attorneys in the presence of three other employees, and states they “were all talking” about what they would testify to. Tr. 1859. Mr. Glover spoke with two officials of the union on the night of the election, but never mentioned the anonymous phone call to them. Tr. 1862. Mr. Glover said that fear of losing his job was not on his mind when he voted in the election.⁸ Tr. 1863.

Anonymous Call to Ron Koerner

The Report on Objections also states the Employer submitted evidence that an employee received phone calls from union supporters who told him he should be concerned about his family and that things could happen underground that would look like an accident. Employee Ron Koerner told Mine Manager Scott Lawrence after the election was over that he got a call “a few weeks before the election, saying I better vote for the Union, could be bad for my family and accidents happen underground.” Tr. 1361. Koerner said, about the phone calls, “I didn’t say nothing to nobody about it. I just figured it was just somebody, just stuff going on. I didn’t worry about it, and then I went ahead and told him that night that that had happened, after all this was going on.” *Id.*

Koerner said he did not know who had made the calls and still does not know. Tr. 1362. Koerner wrote a statement for the Employer purportedly signed on May 26 that states in large print that the caller said, “Better Vote UMWA,” but he omitted that statement from his testimony. ER Ex. 12. Lawrence said about the calls made to Koerner that they were “very serious” and he purportedly reported them to Gossman in a statement dated 5-21. Tr. 1434, ER Ex. 5. However, Lawrence did not ask Wade Waller about the calls when he talked to Waller

⁸ Mr. Glover’s subjective feelings confirm the utility of the Board’s holding that threats of job loss or discharge by one employee to another are not objectionable. *Bonanza Aluminum Corp.*, 300 NLRB 584, 591 (1990) (“[T]hreats of job loss for not supporting the Union, made by one rank-and-file employee to another, are not objectionable...”)

about the other things Koerner had reported to him, including threats allegedly made by Waller. Tr. 1435-36. Prior to hearing, Lawrence reviewed his statement with the lawyers, Koerner, Gossman, and three other employees of Respondent at least once, maybe twice. Tr. 1442-43.

There is no evidence the alleged threat was widely disseminated among unit employees. Indeed, numerous witnesses called by the General Counsel and Charging Party who work in a wide variety of shifts and units testified that before the election they had not heard that anyone had threatened to intentionally cause an injury to someone else underground. (Bradley Tr. 1961) (Hanson Tr. 2078) (Carrigan Tr. 2092) (Cole, Tr. 223) (Wise Tr. 237) (Bishop Tr. 260) (Crissup, Tr. 681) (Hooven, Tr. 733) (Pinkston, Tr. 886) (Bartolotti, Tr. 2056). Two employees specifically testified that before the election they had not heard that anyone had said they could cause an injury underground and make it look like an accident. (Bradley, Tr. 1962) (Carrigan, Tr. 2092).

Anonymous Calls to Chris Pezzoni

The Report on Objections indicates the Employer submitted evidence that an employee received threatening phone calls from union supporters regarding statements he made about the union on Facebook. Chris Pezzoni was asked the leading question, “After you made it known on Facebook how you felt about the Union, did you receive any threatening phone calls?” Tr. 1656. He responded, “One. I received two phone calls complete [sic], but one of them was right after the comment was made on Facebook.” *Id.* He stated that on the first call he was asked about his vote, and he responded “I don’t know.” Tr. 1657. Though he never provided a complete account of all that was said on the call, he testified “what stuck out to [sic] that phone call, whoever called me said that there was more than one way to skin a cat, and I really don’t know who used terms like that anymore really, but – so it stuck out to me, that one did.” Tr. 1657. Pezzoni did

not know who made the call. *Id.* Pezzoni testified that he received a second call, in which “they said they seen what I put on Facebook, and scabs like me would be taken care or dealt with at home or at work.” Tr. 1658.

When asked the leading question “were both phone calls before the vote?” Pezzoni replied “yes” but when asked how long before the vote, Pezzoni stated, “I don’t recall.” *Id.* It was only after being asked yet another leading follow-up question, “Was it a week, two weeks, three weeks?” that Pezonni responded “I think the first or the second was two weeks, and the first one was probably three weeks, something like that.” *Id.* Pezzoni stated that he was troubled at having received the call on his home phone, explaining “the mines that I worked for didn’t even have my home number... [s]o whoever it was had to have known somebody that I talked to a lot, which bothered me too, because somebody that was a friend with me would turn around and give them my number after them knowing I don’t want to talk about it or nothing like that.” Tr. 1660. However, he never provided any details regarding any efforts to determine who had made the calls. He admitted he never called the phone company to report the threatening call or sought its help to determine who made the call. Tr. 1688. He never contacted the police about any threats he allegedly received. Tr. 1688. He did not inform anybody with the Company that he had received the threatening phone call until after the election, when he purportedly made his written statement on May 22. Tr. 1688, CP Ex. 6.

Chris Pezonni was clearly not acting in fear after receiving the calls, as evidence by his decision to post on Facebook after the following call the following message:

Well I got a call from a dumb fuck telling me to watch it. He seen what I put on Facebook. He would not say who he was, and that’s about right, I have the right to say anything I want to at home or at work, as well any one of us do. What make you right or me wrong?

Tr. 1684. Asked whether he posted this “very soon after” he got the second call, he responded “Yeah, probably.” Tr. 1685.

There are numerous reasons to doubt Pezonni’s credibility, including the fact he reviewed his testimony prior to trial with attorneys, managers and fellow witnesses all present. His testimony on other issues in this case contain a variety of inconsistencies. In addition, it should be noted that Pezonni began receiving \$65 daily pay increase, known as a step-up or lead man pay, beginning on April 30, around the time he became an open opponent of the union. Tr. 1696, CP Ex. 8. While he testified that had in the past received the \$65 premium occasionally for filling-in for bosses, he did not begin to regularly receive the \$65 until April 30. *Id.*

Respondent did not produce any witnesses to demonstrate dissemination of the allegedly threatening phone calls. Numerous witnesses called by the General Counsel and Charging Party who work in a wide variety of shifts and units testified that before the election, they had not heard anyone had received threatening telephone calls in their home. (Fort, Tr. 133) (Bradley, Tr. 1962) (Hanson, Tr. 2079) (Tr. 2072) (Cole, Tr. 223) (Wise, Tr. 237) (Hooven, Tr. 733) (Pinkston, Tr. 886) (Bartolotti, Tr. 2056). On direct examination, Charging Party’s witness Floyd Shepard was asked a series of yes or no questions in rapid-fire succession concerning the employer’s various objections and initially answered “yes” when asked whether he’d heard anyone had received threatening phone calls in their home. Tr. 1230. Counsel for the Respondent did not follow-up to get details about the nature of the threatening calls Sheppard purportedly heard about, including who made them, who received them, when they were made, or any other details, even though he followed up on the answers Mr. Sheppard gave to other questions. It is entirely possible that Mr. Sheppard was referring to threatening calls that may have been received by union-supporters or calls completely unrelated to the calls at issue in

Respondent's objections. There is some possibility that Mr. Sheppard did not understand the question when asked on direct, given that on cross, when asked about another question in the same series of rapid-fire questions he was asked on direct, he responded "I hadn't heard none of this stuff till I come to this courthouse." Tr. 1248. It cannot be said one way or the other, because Counsel for Respondent, despite having a heavy burden to meet in this case, did not follow-up on Mr. Sheppard's response.

C. Allegations Of Objectionable Threats By Local Officers Have No Merit

Objection Number 1 in the Regional Directors Report on Objections contains only two allegations of misconduct attributable to Local officers. To the extent there is any credible evidence in support of allegations in Objection Number 1 concerning Local union officers, such evidence falls well short of satisfying the standard applied to determine whether conduct interferes with employees' freedom of choice.

1. The standard applied to allegations of objectionable conduct by parties requires widely disseminated threats sufficiently severe to cause fear.

In evaluating whether a party objecting to conduct during the critical period by the other party has carried its heavy burden of proving the election should be set aside, the Board applies the objective standard articulated in the form of a nine factor test in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). Those factors include:

- (1) the number of incidents of misconduct;
- (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit;
- (3) the number of employees in the bargaining unit subjected to the misconduct;
- (4) the proximity of the misconduct to the election date;
- (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees;
- (6) the extent of dissemination of the misconduct among bargaining unit employees;
- (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct;
- (8) the closeness of the final vote;

(9) the degree to which the misconduct can be attributed to the party.

Id. As demonstrated below by reference to the scant facts the Employer introduced in an attempt to support its allegations of misconduct by Local officers, the allegations, even if taken as true, do not establish misconduct sufficiently severe to have caused fear among employees in the bargaining unit.

2. Allegations of threats and coercion by Local union officers have no merit.

The Allegation that Dan Bradley Threatened an Employee

Though it doesn't seem to relate to this or any other allegation in the objection referenced in the Regional Director's Report, Dan Bradley denied that he ever told Chris Pezonni "You haven't been at union meetings; that looks bad on you." Tr. 1962. The ALJ correctly found that this is not a threat or an otherwise objectionable statement in any context.

The Allegation That Rodney Shires and Two Other Men Stared At Duane Shoulders

The Regional Director's Report on Objections states that the Employer submitted evidence that on May 19 and 20, three union supporters encircled an employee who had expressed anti-union sentiments and started at him with their arms crossed as he showered and dressed in the bathhouse. After asking Duane Shoulders who Ron Pinkston and Rodney Shires are, the Company's attorney asked him the leading question, "When you got off work at seven o'clock on the morning of May 19, did you have an incident in the area around the bathhouse that you could tell us about involving Mr. Pinkston, Mr. Shires and a third person?" Tr. 1883-84.⁹ Shoulders testified in response to this prompt that while in the bathhouse preparing to take a shower, he saw Shires, Pinkston and a third unidentified man "sitting at the end of the bench

⁹ Rodney Shires is the former Vice-President of the Boilermakers Local and currently holds that position with UMWA Local 5929. Tr. 2009. Ron Pinkston was a steward in the Boilermakers Local, but that position was eliminated when the Boilermakers disclaimed interest on April 15. Pinkston is not an officer or agent of the UMWA District 13, International or Local 5929. Tr. 881, 899, 2036. Neither man was involved in planning the strategy of the organizing campaign, Tr. 124, and neither man served on an organizing committee. Tr. 209.

where my basket was at.” Tr. 1885. Shoulders stated that he “then went and voted, and when I came back, Shires and Pinkston and this other guy was still standing there and kicked back, their arms like this [folded]... and right there, right down from my basket, and they stayed there, and the whole time I was trying to get undressed and take my shower, and they was there when I left too.” Tr. 1885.

The allegation in the Report on Objections is that Shires, Pinkston and a third person “encircled” Shoulders, but nothing in Shoulders’ testimony or anywhere else in the record even alleges Shires, Pinkston or anyone else ever approached shoulders, encircled him, or did anything other than allegedly look at him. Shoulders only testified that they stared at him when in response to the leading question “Were they staring at you?” he responded “Somewhat, a little bit, yeah.” Tr. 1886. Later, in response to the leading questions, “Did you feel that these men being there that morning had something to do with your having told Greg Fort that you were not supporting the Union?” and “Did you feel they were trying to intimidate you?”, Shires responded, “Yes, sir.” Tr. 1887. The leading questions continued, where Shoulders is asked “Now, the day after the May 19th incident that you described with the guys at the end of the bench, did something similar happen again?” Tr. 1889. He responded that the “same guys” were in the bathhouse the next day, again testifying that he felt uneasy because they were allegedly looking at him again.

Shoulders stated that on May 19th Shires, Pinkston and the third individual were “dressed like they were going underground” and on May 20th, “they all had their camouflage t-shirts on.” Tr. 1891. Rodney Shires testified that he did not work on May 19th or May 20th and therefore would not have been dressing in the bathhouse to go underground. Tr. 2012. Contrary to Shoulders’ testimony, Shires was not dressed in work clothes on the 19th. He was wearing a shirt

and jeans on both days of the election. Tr. 2013-14. He had no reason to be dressed as if he were going underground. Shires only came on mine property to help open and close the polls, going back to the union hall during the time in between. *Id.* Pinkston worked on the 19th, but was off on the 20th and did not go to the mine at all on the 20th until “around 9 o’clock or something like that, just to see the election results.” Tr. 2038. Pinkston corroborated Rodney Shires’ testimony that Shires did not work on May 19th and Pinkston testified that Shires was not with him when he arrived and went to the bathhouse at around 7:00 A.M. on the 19th. Tr. 2038. Pinkston did not see Shires until the evening of May 19th. *Id.* Shires testified that he was not even in the bathhouse on the two days in question and Pinkston denied staring at Duane Shoulders in the bathhouse. Tr. 2039.

Duane Shoulders testified that Ron Pinkston is a “union official with Boilermakers, and I don’t know what his function is there because I don’t know what he does.” Tr. 1883. In fact, Ron Pinkston was a steward in the Boilermakers Local, but that position was eliminated when the Boilermakers disclaimed interest on April 15. He is not an officer or agent of the UMWA District 13, International or Local 5929. Tr. 881, 899, 2036. He was not involved in planning the strategy of the organizing campaign, Tr. 124, and did not serve on an organizing committee. Tr. 209.

According to his testimony, Shoulders voted on the morning of May 19 before he ever felt intimidated or even noticed the three gentlemen staring at him. He did not have sufficient time to disseminate the allegedly threatening conduct, and he did not testify that he told anyone of this alleged incident on May 19 or May 20 before the polls closed. Numerous witnesses called by the General Counsel and Charging Party who work in a wide variety of shifts and units testified that before the election they had not heard anyone had intimidated anyone else in the

bathroom. (Fort, Tr. 133) (Hanson, Tr. 2078) (Wise Tr. 237) (Bishop, Tr. 260) (Z. Gibbons, Tr. 448) (Crissup, Tr. 681) (Hooven, Tr. 732) (Pinkston, Tr. 886) (Bartolotti, Tr. 2055). The record makes clear the incident did not sway his vote, where he testifies that he told other miners “before and after the election” that he was “opposed to the UMWA”, Tr. 1894, and testified that he told other employees shortly after the election that he was “disappointed” with the election results. Tr. 1895.

II. Allegations Of Misrepresentations In Objections 2 And 3 Have No Merit

Despite well-settled law providing that the Board does not police the truth or falsity of parties’ campaign statements, Respondent alleges the union made misrepresentations about its corporate identity and its own identity. Respondent fails to demonstrate any forgery, fails to show the union’s statements were anything more than a response to Respondent’s false propaganda, and fails to show that that the alleged misrepresentations somehow impaired the integrity of the election even though both union and management repeatedly stated to employees that the union would only be able to negotiate a contract if it prevailed in a secret-ballot election.

Objection 2

In Objection Number 2, Peabody alleges that the union distributed false and fabricated documents indicating that the Employer was the same legal entity as Patriot Coal, falsely suggesting the Employer was currently a signatory to the BCOA collective-bargaining agreement. As discussed more fully below, the UMWA never distributed documents indicating Respondent was the same legal entity as Patriot Coal. Throughout the campaign, the Employer repeatedly made two assertions the Local union believed to be false: 1) That there was no relationship and no connection whatsoever between Peabody Energy and Patriot Coal; and 2) that Peabody Energy would never sign a BCOA agreement.

In response to the Company's frequently repeated assertion that Peabody and Patriot were completely unrelated and had no connection, the Local union made a flier comprised of excerpts taken from two SEC documents printed from the internet showing Patriot Coal and Peabody Energy shared an office address, with a hand-written notation that states, "What do you think? Did they lie?" CP Ex. 3. This document was designed to persuade employees that they could not trust the Company, given it would falsely state the two companies were completely unrelated, when in fact it is undisputed and well-known in the coal fields that Patriot Coal was created when Peabody Coal, the predecessor to Peabody Energy, spun off its union operations in 2007.

There is no documentation or testimony substantiating Respondent's claim that the UMWA through forgery or any other means ever conveyed to employees a message that Peabody Energy and Patriot Coal are the *same* legal entity. The Local Union's effort to rebut the Peabody's assertion that it had no connection with Patriot by showing the companies' shared the same office address was not the source of confusion over the companies' identities. To the extent employees held false beliefs as to the relationship between these companies, those beliefs had multiple potential sources predating and/or unrelated to the union's campaign, including: 1) preconceived beliefs as to the relationship between the companies derived from friends, relatives and personal experience; 2) skepticism bred by management's demonstrably false and oft-repeated assertions that there was *no connection* between the companies and that Peabody would *never* sign a BCOA agreement; 3) skepticism bred by the Company's previous attempts to persuade employees they were not Peabody Energy employees; and, 4) management personnel confusion as to the precise legal identity of the various companies following its relatively recent reorganization.

In response to the Company's frequently repeated assertion that Peabody Energy would never sign a BCOA agreement, the Local Union made available at union meetings a document stating that Peabody Coal "already has" in fact "signed the national agreement," to which it attached the front cover and signature page of the 2007 BCOA agreement signed by Peabody Coal Company, predecessor to Peabody Energy. CP Ex. 5. The 2007 BCOA agreement is attached to demonstrate to employees that Peabody had in fact signed a BCOA agreement as recently as 2007, in an effort to persuade employees that they should not trust Peabody management when they so frequently stated Peabody would *never* sign a BCOA agreement. Indeed, the typewritten document states, "Do not be fooled by the message management is putting out." *Id.* Nowhere does this or any other document distributed by the UMWA state that Respondent is currently signatory to the BCOA agreement, and there is no evidence the union ever tried to convince employees that they would be automatically covered by the BCOA agreement if the UMWA were to win the election. There is no documentation or testimony substantiating Respondent's allegation that the UMWA conveyed to employees a message that Peabody Energy and/or Big Ridge, Inc. was already signatory to a BCOA agreement. Indeed, both the union and management repeatedly stated to employees throughout the critical period that the union would need to negotiate a contract if it were to win the election.

Objection 3

In objection Number 3, Peabody alleges that Greg Fort falsely represented himself as "President, UMWA Local 5929" thereby giving the impression that the Petitioner was already the collective bargaining representative of the voting unit, and that the Petitioner distributed documents to employees similarly indicating to employees that it was already their collective bargaining representative. GC Ex. 1(k) at 5. There is no evidence that the union created or

employees received an impression that the UMWA was already collective bargaining representative of the voting unit. Greg Fort's signature as President of the UMWA Local 5929 was fully consistent with his appointment to that position by the UMWA International on or about May 3, the date the Local was formally chartered. Given repeated statements by the UMWA and Peabody throughout the election campaign that an NLRB election would determine whether the employees would be represented by the UMWA or be "union-free," it is difficult to conceive of this objection as anything other than an unwarranted and dilatory attack on the results of the election.

A. The Board does not police the truth or falsity of alleged misrepresentations and only sets aside elections where it is proved forged documents or pervasive deception influence employees' choice.

In its recent decision in *Somerset Valley Rehabilitation and Nursing Center*, the Board certified the results of an election, overruling an employer's objections alleging the union deceived employees with forged campaign propaganda. 357 NLRB No. 71 (August 26, 2011). The Board affirmed the continued viability of its "well-established standard for evaluating misrepresentation in campaign propaganda," holding "an election can be set aside on the basis of misleading campaign statements only if a party has used 'forged documents which render the voters unable to recognize propaganda for what it is.'" *Id.* at *2 (quoting *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982)).

In *Somerset Valley*, the union had distributed fliers suggesting certain employees in the unit had stated they planned to "vote yes," but the employees claimed they had not made the statements. Noting the union had made a reasonable effort to ascertain the employees' support for the union before including them in the flyer, the Board held it amounted to nothing more than a "persuasive piece of campaign literature." *Id.* at *3. The Board's discussion of the contents of

the flier concluded with its application of the test at the heart of the *Midland* standard, where the Board held “readers could ‘recognize the propaganda ‘for what it is.’” *Id.* (quoting *Midland*, 263 NLRB at 131). The Board reaffirmed application of the long-standing *Midland* rule, noting it is necessary to “insure the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results.” *Id.*

The *Somerset* decision mentions, but does not discuss at length, a narrow exception to its *Midland* rule carved out by the Sixth Circuit, which held objectionable misrepresentation could be found “where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.” *Id.* at *2 (quoting *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984)). The Board in *Somerset* did not inquire at length into whether the employees in the flyer had actually stated the words attributed to them. Its analysis in *Somerset* affirms what the Sixth Circuit recognized in *Van Dorn*: the narrow exception under which misrepresentation can be found in the absence of forgery does not swallow the fundamental rule in *Midland*, which is that the Board rejects an approach that focuses on whether a party’s campaign statements are true or false. Whether misrepresentation in the absence of forgery is so pervasive and deception so artful that employees will be unable to separate truth from untruth is still guided by the long-standing rule in *Midland* that the Board “will no longer probe into the truth or falsity of the parties’ campaign statements, and [it] will not set elections aside on the basis of misleading campaign statements.” *Van Dorn*, 736 F.2d at 345 (quoting *Midland*, 263 NLRB at 133).

Whether a party committed objectionable misrepresentations so pervasive and artful to warrant the reversal of an election is not judged on the basis of the ultimate truth or falsity of

campaign propaganda, and election results are not set aside because readers of such propaganda may hold false beliefs on the issues referenced in the propaganda. This is especially true where such beliefs were held long before the onset of the election campaign. The ultimate question is not whether the propaganda at issue is true, false or misleading. The Somerset decision makes clear, that the ultimate question remains whether the employees “could recognize the propaganda for what it is.” The Board’s standard in *Midland* was embraced by the Sixth Circuit in *Van Dorn*, where the court stated “We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.” *Van Dorn*, 736 F.2d at 348.

To set aside the results of an election, it is not enough to show that misstatements and misrepresentations were made by one party; it must also be shown that such statements impaired the integrity of the election so that it cannot be said to reflect the uninhibited sentiment of the employees with respect to the choice they made. No matter the standard applied, the Board has not set aside elections on the basis of alleged misrepresentations where they are not material to the campaign, so that the outcome of the election could not have been affected by the misstatements. *See, e.g., Conalco, Inc.*, 225 NLRB 879, 880 (1976) (“alleged misrepresentations... are not under any standard material in nature and that the election should not be set aside.”) Nor has it set aside elections based on false statements where the party making the misstatement does not have superior knowledge as to the matters misrepresented and the employees possessed independent knowledge with which to evaluate the statements. *See, e.g., NLRB v. S. Praver & Co.*, 584 F.2d 1099, 1102 (1st Cir. 1978). Finally, an alleged misrepresentation is not deemed so artful that employees will be unable to separate truth from untruth where the other party to the campaign is aware of the alleged misrepresentations and has

an opportunity to “take steps to dispel whatever misconceptions that may have arisen in the minds of the employees.” *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1183 (6th Cir. 1988).

1. Facts adduced at hearing demonstrate Respondent’s Objection 2 does not warrant setting aside the election.

One of the documents the employer alleges to have been false and fabricated by the union for the purpose of falsely suggesting the Employer was currently a signatory to the BCOA collective-bargaining agreement is Charging Party Exhibit 3, which is comprised of two separate excerpts from SEC documents printed from the internet that indicate the headquarters for Peabody Energy and Patriot Coal are located at the same address, accompanied by a handwritten notation stating, “What do you think? Did they lie?” CP Ex. 3. Local President Greg Fort testified he posted this document on the union bulletin board in the bathhouse at the mine, because “[t]he Company was telling everybody in their portal meetings and their captive ant-union meetings that Peabody Coal Company had nothing to do with Patriot Coal Corporation.” Tr. 127.

The Company added to the document in Charging Party Exhibit 3 a series of other documents in its Employer Exhibit 21, apparently to give the impression that all of the documents in ER Ex. 21 were distributed together. There is no evidence that any document in ER Ex. 21 other than document in CP Ex. 3 was produced or distributed by any agent of the union or read by any employee in the voting unit. Indeed, counsel for the Respondent admits he attached these other documents in ER Ex. 21 to the single document in ER Ex. 3 in a question to Greg Fort, in which Fort denies having posted them. Tr. 188-89. Fort stated “Today’s the first day I’ve seen them, but that’s not my writing, and I didn’t put them up.” Tr. 189.

James Cole, who works in the bathhouse where the union’s bulletin board is located, reviewed the documents in ER Ex. 21 and testified that he did not recall ever seeing the other

documents in ER 21. Tr. 223. Zach Gibbons testified that he had seen the document in Charging Party Ex. 3 – which is the first page of Employer Ex. 21 - at the union hall, at the top of a stack of documents, but denied seeing the others. Tr. 474. He explained “it wasn't part of the meeting that I recall. It was more something that somebody had and we was all sitting around looking at it and thumbed through it. *I didn't read through the particulars of it. I looked at the front of it, and I was thinking, I think that's the page that I saw* because I noticed the address over on Market Street, saying Peabody's. It was the exact same one for Patriot Coal.” Tr. 475 (emphasis provided). When asked about ER Ex. 21 by Judge Wedekind whether he'd seen “the whole thing” at the union hall Gibbons responded, “It was a stack. I got there late for the meeting *and I picked it up and looked at the front page. I didn't look at the rest of it.*” Tr. 497 (emphasis provided). Judge Wedekind asked, “You never looked at the rest of it?,” to which Gibbons responded, “No I never bothered to look at the rest of it...” Tr. 497.

There is no evidence anyone saw the additional documents attached to ER Ex. 21, let alone evidence that the union distributed them. To the extent these documents were distributed in the union office or at work – and there was no evidence at hearing this happened – they may have been distributed by employees who were not agents of the union. It is possible, though no evidence was adduced at hearing, that the other documents were prepared by employees and brought to union meeting, given Local Vice-President Rodney Shires' testimony that “lots of people were getting on the internet and looking stuff up and bringing it in and setting it on the table for the meetings for the guys to look at. I couldn't tell you who all was doing that. I don't know.” Tr. 2028. Ron Pinkston, who testified that he attended all the union meetings, testified that many people who attended the meetings were bringing documents to the meetings, including “different things involving the UMWA, things about the – whatever people would come up,

showing what Peabody had made, you know, money they were making and just different things of that sort they could find off the internet.” Tr. 2037. Even if these documents had been distributed by the union, nothing in them even suggests a forgery. For the most part, they are printed pages of the companies’ SEC filings with handwritten notations noting purported relationships between Peabody and Patriot.

Charging Party Exhibit 5 is another document the company alleges the union distributed to indicate the Employer was the same legal entity as Patriot Coal and falsely suggest the Employer was currently a signatory to the BCOA collective-bargaining agreement. It is a typewritten document prepared by Greg Fort, stating in part that “Peabody Coal already has signed the National Agreement” that was made available at a union meeting in response to the Company’s campaign claim that it would never sign a BCOA agreement. CP Ex. 5. The document describes the benefits enjoyed by employees at Peabody’s nearby Highland mine, which is represented by the UMWA and covered by the national agreement Peabody signed before it spun-off the Highland mine to Patriot Coal. The document concludes by saying, “We can have it to [sic]... all we have to do is stick together, *do not be fooled by the message that management is putting out...* with a UMWA contract you have the fight to plan your profits and you’re [sic] future along with job rights and security. Without one you only have what they want you to have. VOTE UMWA ON MAY 19 & 20.” *Id* (emphasis supplied). Attached to the typewritten document is a copy of the front cover and signature page of the 2007 BCOA agreement between the UMWA and Peabody Coal Company, LLC, signed before the union mines covered by the contract were spun-off to Patriot Coal Company.¹⁰ When asked why the typewritten

¹⁰ Peabody consultant Joseph Klingl, Peabody’s consultant on the history of UMWA labor contracts, affirmed the 2007 BCOA Agreement included in CP Ex. 3 and ER Ex. 21 “was executed by the unionized subsidiaries of Peabody Energy in January of 2007.” Tr. 1332. Klingl confirmed, “these companies here, these signatories that we

document and copies of the 2007 agreement were made available at a union meeting, Fort responded that it was to counter the Company's repeated claim that they would never sign a BCOA agreement, "to show that was a lie, and that they had already signed a national agreement with the United Mine Workers." Tr. 132. The Local wanted employees to know that since Peabody had signed a BCOA agreement in 2007 covering its subsidiaries listed on the cover of the 2007 Agreement, there was no reason to believe its repeated assertion that it would "never sign a BCOA agreement" covering its subsidiary, the Respondent, Big Ridge, Inc.

a. There is no evidence of forged documents that render voters unable to recognize propaganda for what it is.

Charging Party Exhibit 3 and Exhibit 5 are obviously not forgeries. Handwriting on CP Ex. 3 near SEC statements, asking "What do you think? Did they lie?" makes employees clearly able to recognize the document for what it is – campaign propaganda. There is no evidence that Greg Fort ever represented to anyone that CP Ex. 3 was a single original document. At trial, Zach Gibbons was asked how many documents were used to make CP Ex. 3. He responded, "It appears to me like there might be three there. Wait a minute. That's the back page. Maybe two." Tr. 482.

Respondent's attorneys apparently jumped to the conclusion that CP Ex. 3 was evidence of an attempt by the union to forge documents in an attempt to convince employees that Peabody Energy and Patriot Coal Company were the same company. A relatively lengthy but extremely insightful portion of the trial transcript contains Greg Fort's explanation of the purpose for distributing the documents, and seems to capture counsel for Respondent's realization that Objection Number 2 is much ado about nothing:

see listed on the cover of this agreement, they were all Peabody Energy entities at the time that this agreement was signed." *Id.*

Q. So let me just try to understand this. Your testimony on direct, was that the only reason you posted Charging Party 3 is because two companies had the same address? Is that right?

A. Yes.

Q. At any time during the campaign, did the Union try to link Patriot Coal and Peabody and say they're one and the same company?

A. I don't think it was ever said that they were one and the same company.

Q: What did you say?

A: Like I said, the addresses is the same, you know. A lot of the people out there seem to think that they're the same company, that Peabody is over Patriot. There's a lot of different opinions on it, but, you know, this was put together because, like I said, one of the other guys got it off the internet. It was two pages, one was Peabody and one was Patriot, but the addresses was exactly the same.

Q: And you did the cut and paste here, right?

A: Yes, I put them both on one page.

Q: And did you ever tell any employees that you did a cut and paste here?

A: I don't know that I actually told anybody that I done that. There was a lot of people in the office when it was done.

Q: Did you ever tell anybody the only reason you put this out there is because two corporations so happen to have the same address?

A: Yes, I said that was the reason.

Q: And where is that document, Greg?

A: We told the people, you know, look at it and see what you think yourself. Look at the addresses.

Q: Now, where does it say that on here?

A: Well, it don't say that on there.

Q: I see it says, "What do you think? Did they lie?"

A: You didn't ask me if I wrote it on there.

Q: What is the line that's referred to in the handwritten part of your exhibit?

A: It says, "What do you think? Did they lie?" Like I said it's the same address. It was put up there for the people to look at and come up with their own determinations.

Q: Greg, what was the lie that you were trying to point out to employees on this exhibit?

A: Like I just testified to, it was put up there to let the people see that both companies had the same address. And everybody knows that all of Patriot's operations was Peabody before they were Patriot. As far as what Peabody and Patriot does in that office, I have no idea. I've never been in it.

Q: So as you sit here today, you're denying that the Union tried to say that Patriot and Peabody were one company? Is that correct?

A: I don't know that they're not one company, they are one company or not. The intent of this when it was posted was to show that they were in the same office, same address. That was the only intent behind this right here.

Q: JUDGE WEDEKIND: Well, why did you want to make that point?

A: THE WITNESS: Because John Schmidt, the General Manager at the mine, was real adamant on telling everybody in the meetings that Peabody Coal Company had nothing to do with Patriot Coal Company, that they were out there on their own. And that's the

only reason. You know it seems a little fishy if they're out there on their own, why are they in the same office. That was the intent behind that.

Q: JUDGE WEDEKIND: And as far as, you know, why was he telling everybody that?

A: THE WITNESS: I think it was -- and this is just my opinion. I never heard anybody say that --

Q: JUDGE WEDEKIND: Is it your opinion or do you have any reason to understand -- I mean why would -- you wouldn't just be saying this for no reason, right?

A: THE WITNESS: I think because Patriot Coal Company was under the national agreement with United Mine Workers. And I think that's why they were trying to express to people that they didn't have anything to do with Patriot.

Q: JUDGE WEDEKIND: Is that what you were referring to when you said did they lie?

A: THE WITNESS: Yes.

Q: BY MR. GARNETT: So the lie is that when Peabody said during the campaign we're not a party to the BCOA agreement, you wanted to say to employees that's a lie, correct?

A: No, not that they wasn't a part of it. They kept telling everybody that they would never sign it. John said we'll never sign a national agreement. And it was to show that Patriot was under the national agreement. It was just more or less, you know, they signed it, their signature is on it. Peabody Coal Company is on the signature, and that's why it was put out there...

Tr. 190-194. It is also plainly obvious that Charging Party Exhibit 5 is not a forgery. It consists of a letter clearly attributable to the union – classic propaganda – and the attached cover and signature page of the 2007 BCOA agreement with Peabody Coal are not forgeries, but reproductions of the cover and signature pages of the actual agreement.

b. There is no evidence the Union's responses to Peabody's statements about its relationship to Patriot were made in a deceptive manner.

No officer or agent of the union ever stated that Peabody and Patriot were the same company, and the union did not distribute literature stating such. Tr. 2027. However, Peabody repeatedly communicated to employees the untrue message that Peabody and Patriot were two completely separate companies that had nothing to do with each other. Ron Pinkston testified that during the campaign management repeatedly stated Peabody and Patriot are two completely unrelated companies that “had no connection with each other.” Tr. 888. Sheppard recalls management saying the two companies were completely unrelated. Tr. 1230. When asked whether he had heard anyone in management say Peabody and Patriot are two completely

unrelated companies, Mike Gibbons responded, “Yes. They -- matter of fact, during one of the meetings somebody on our crew, somebody on our unit brought up -- brought up that Patriot Coal's address was in the same building of Peabody's in St. Louis. And then I believe it was Mr. Gossman said that they don't have anything in common, that Patriot's office was located in Creve Coeur.” Tr. 973. Facebook Dan Henderson said that he heard from management “quite a bit” that there was absolutely no relationship, nothing in common, between Peabody and Patriot and that this was said throughout the entire organizing campaign. Tr. 1154-55. Campaign propaganda about Peabody and Patriot having the same address and other similarities or connections were designed to rebut the Company’s repeated lie that Peabody and Patriot had no relationship and no connection whatsoever.

At most of the captive audience meetings, Peabody management repeatedly conveyed to employees the message that Respondent would never sign a BCOA or national agreement with the United Mine Workers. Tr. 132. Indeed, the slides shown to employees at the captive audience meetings include a slide in large bold letters that conveys one and only one message: “Big Ridge, Inc. Will Not Sign the BCOA Agreement.” GC Ex. 22, 4-000012. This message was a major part of Respondent’s anti-union campaign, designed to convince employees that selecting the UMWA would be futile. Numerous employees testified that they recall the employer saying it would never sign a BCOA agreement. (Crissup, Tr. 682); (Pinkston, Tr. 888); (M. Gibbons, Tr. 973); (Sheppard, 1230). Dan Hooven recalled that “[e]very time we had our union-free meeting, when you would come in, on the projector it was on the wall. That was the first thing you would see. I mean the projector would be on and it would be in big, bold letters, we will not sign a BCOA.” Tr. 735. Supervisor Dan Henderson told employees Peabody would never sign a BCOA agreement. Tr. 1152. The UMWA made the 2007 BCOA agreement

available to employees to demonstrate that Peabody had signed a BCOA agreement, but the Union never said Willow Lake employees would automatically get a contract without having to negotiate it.

The Company completely failed in its effort to claim that the UMWA misled employees into believing that the BCOA agreement and its provisions would automatically apply if the UMWA were to prevail in the election. It apparently attempted to substantiate the allegation through Faceboss Dan Henderson, who falsely testified that numerous employees under his supervision stated that they would automatically get a UMWA pension and benefits if the union were to prevail in the election:

Q: Why were the employees talking about the fact that Peabody was signatory to a national agreement or a BCOA agreement?

A. Because if they -- since Peabody was in it, if they voted it in that they would automatically get full pension and benefits and everything.

Tr. 1153. Henderson testified specific employees on his crew had stated that they would automatically get pension benefits if the UMWA were voted in. *Id.* He identified certain employees by name whom he alleged made these statements, including Robert Bartolotti. *Id.* Bartolotti testified that he never stated nor believed he would automatically get a pension if the UMWA were vote in. Tr. 2061. He specifically denied hearing any of the employees Daniel Henderson mentioned state that they would automatically get a pension if the UMWA were to win the election. Tr. 2062. Bartolotti stated that he was never informed by the union that it would automatically get a contract without having to negotiate. Tr. 2060. Chris Pezonni works with Dan Henderson, Tr. 1692, and he stated that he has always understood that the UMWA would need to negotiate with the Company to get a contract. Tr. 1686. He was not asked by the Company to corroborate Henderson's allegation, nor did he volunteer that men on his shift said

the BCOA agreement would automatically apply or men would automatically earn pension credit if the UMWA won the election.

c. Any misconceptions existed prior to the union organizing campaign and respondent took steps to dispel them.

Employees and supervisor alike were confused as to the precise legal identity of the companies and their relationship well before the critical period leading up to the NLRB election. Floyd Sheppard gave testimony that perfectly exemplifies this point. When asked on cross examination whether the union's message to employees was that Peabody and Patriot are one in the same companies, Sheppard never responded that the union communicated the message, but did reply, "Well I know they're the same." Tr. 1250. He went on to explain that his father worked for Peabody's Camp One when it became Patriot's Highland mine and his belief that "Dale Engelhardt running Patriot... [h]e used to be the CEO of Peabody...I mean all they've done is change names." Tr. 1251. When asked whether he'd seen "any documents distributed by the Union to link Patriot and Peabody," Sheppard responded "no" and specifically denied seeing the document in Employer's Exhibit 21. Tr. 1252. Like many people in the Midwestern Coalfields, Mr. Sheppard's experiences and the experiences of his family members had led him to long believe Peabody and Patriot were the same Company. And he held that belief well before the union organizing campaign. Asked what facts he knows about the relationship between Peabody and Patriot, Greg Fort responded, "Very little. I know that at one time all the Patriot Coal operations were Peabody operations. But outside of that, I just thought it was a little odd that they're both under the same address." Tr. 129-30.

Gibbons testified, "[i]t's to the point we make jokes about we don't know who we work for, that we work for three different coal companies. It's the same coal mines." Tr. 483. Asked, "when did those jokes start?," Gibbons responded "[a]s soon as they put the sign up" referring to

a sign outside the mine. *Id.* Asked, “[a]nd when was that?” Gibbons responded, “[i]t's been quite a while back. *Id.* Ron Pinkston testified that he worked with two other men at Peabody’s Eagle 2 Mine, and when he went to Peabody’s Willow Lake Mine and the others went to Patriot’s Highland Mine, all of them kept the same Peabody employee numbers. Tr. 887. Ron Pinkston testified that employees at Patriot’s Highland Mine have told him that Peabody and Patriot are the same company, going so far as to provide the names of Highland miners who have told him this. Tr. 920. Mike Gibbons testified that he believes Peabody owns Patriot because he was speaking with Peabody retirees who showed him a Patriot Coal Company retiree medical card. Tr. 961. There are numerous reasons different miners have different opinions about the ever-shifting relationships between the companies that own the mines. As Mike Gibbons put it, “This is coal mine country. People -- people talk. It's just kind of common knowledge. Peabody, Patriot, Black Beauty -- Mine, they got their -- all kind of -- But Patriot, to my understanding, prior to this was Peabody's Union division so to speak, that way Peabody's name wasn't on a mine that had the UMWA working there.” Tr. 968-69. Mike stated he believed Peabody owned Patriot prior to the union organizing campaign and that he never spoke to any Local union official at Willow Lake about the issue. Tr. 969. He explained further, “You know, that's just -- you just -- in this business you hear things. You got -- you develop opinions and how long ago, thought, you know, Patriot Coal is one of Peabody's little puppet companies.” Tr. 969.

Zack Gibbons was similarly confused about the precise identities of the various companies well before the union organizing campaign. In fact, much of Gibbons’s confusion stemmed from Peabody’s insistence during the last round of contract negotiations that employees of Big Ridge were not Peabody employees. Tr. 483-84. Peabody’s history of misleading its employees about the identity of their corporate employer contributed to Zack Gibbons’ and other

employees' suspicion and disbelief about the identity of Peabody and Patriot. Harry Crissup recalls the Company telling miners they were not employees of Peabody during the last round of contract negotiations. Tr. 682. Even when he was shown by Respondent's counsel that Patriot had a different address than Peabody, he did not change his opinion that "Peabody lied." Tr. 486-88.

To the extent the Employer believes the election was impaired by any confusion over the legal identities of the various companies that all undisputedly share some connection with Peabody, it did not demonstrate how such confusion impaired the election. Nor did it explain how such confusion was attributable to objectionable misrepresentations by the union. In any event, Respondent obviously had superior knowledge of these issues than any of its employees or lower level managers. Moreover, the record makes clear that Respondent took advantage of its ample opportunities throughout the campaign to correct what it believed to be inaccurate statements, as demonstrated by the testimony of Peabody executive Tom Benner:

Q: Were you ever asked by any employees whether the BCOA contract would automatically apply if UMWA was certified as the collective bargaining representative?

A: Yes, that came up various times.

Q: Where did it come up?

A: In the discussions during the presentations or after the presentation...

Q: And what was it that employees said?

A: Was Peabody subject to the BCOA if the mine was represented by the UMWA?

Q: Subject to the BCOA. Did anybody ask whether the BCOA would automatically apply?

A: That - I don't remember anyone specifically asking that question, but the fact that it was automatic - that it would be automatic was discussed.

Q: Okay. It's in one of the slides, right?

A: Yes it is in the slide we did address that.

Q: Did you address it on multiple occasions; make sure employees understood the BCOA agreement would not apply automatically?

A: Yes we did.

Q: And did you make sure that employees understood that if UMWA were to be certified as the collective bargaining representative, that negotiations would commence toward a contract?

A: Yes.

Q: You stated that repeatedly to employees, made sure they understood?

A: Yes.

Q: And you made clear to employees during captive audience meetings that they had a right to cast a secret ballot – decision – excuse me, a secret ballot vote to determine whether or not to be represented by the UMWA; is that correct?

A: That is correct.

Tr. 1506-07. Superintendent John Schmidt testified that during the campaign, “I had - in the pre-shift meeting, several times, communicated that Peabody and Patriot are completely separate entities and not the same company, since the separation, or spinoff of Patriot.” Tr. 1815.

The Company tried but failed to attribute to union forgery and deception its employees’ long-held beliefs - some accurate and some not - about the relationship between Peabody and Patriot. But testimony given at trial demonstrates employees have long been confused about the identities of various companies that have at one time or another been associated with the Peabody name. To the extent there is any confusion about identities of Peabody and Patriot, it was present before organizing drive. This point is perhaps best exemplified by the fact that multiple witnesses for the Company incorrectly identified themselves as being employed by Peabody Coal Company, which is Respondent Peabody Energy’s predecessor and a signatory company named on the front cover of the 2007 BCOA covering the mines that were spun-off to become Patriot Coal. (Carter, “Peabody Coal Company,” Tr. 1558.); (Francescon, “Peabody Coal Company,” Tr. 1700); (Henderson, responded, “Yes” when asked whether he worked for Peabody Coal Company. Tr. 1149). Dan Henderson testified that even he did not know the difference between Peabody Energy and Peabody Coal Company. *Id.* When asked whether Peabody owns Patriot, he responded “I don’t know.” Tr. 1150.

2. Respondent's Objection 3 does not warrant setting aside the election.

In its brief in support of its exception to the ALJ's overruling Objection 3, Respondent focuses exclusively on an April 18 letter Local President Greg Fort typed and sent to Melissa Roby inquiring as to where the Company planned to send dues money that had been collected on behalf of the former Boilermakers local and sent to the Boilermakers International. Tr. 178. ER Ex. 18. The letter, drafted and sent during the period the Local was transitioning between the Boilermakers and the UMWA, identified the Local union as "Coal Miners Local Lodge S-8." The name of the former Boilermakers Local was Boilermakers Local Lodge S-8, but as of the Boilermakers' April 15 disclaimer of interest it was no longer affiliated with the Boilermakers. Tr. 179. Fort explained that during this transition period, "[w]e didn't know where we stood... I just took Boilermakers off of it and just put coal Miners because that's what we are." Tr. 180.

The letter was never distributed to voting unit employees and there is no evidence that Greg Fort ever held himself out as President of "Coal Miners Local Lodge S-8" to any employee – or anyone other than Peabody HR Coordinator Melissa Roby. As Fort testified, the only reason for sending the letter to Roby was "to know where our money was going to be at and how we was going to get it." Tr. 185-86. Fort began to hold himself out as President of UMWA Local 5929 around the time he received a charter from the UMWA International, which occurred around May 3. Tr. 183. This exception, like the underlying objection, is absolutely baseless.

III. Respondent Filed Election Objections To Obtain A Tactical Advantage That Could Be Gained Whether Or Not The Objections Are Found To Have Merit

Respondent's election objections were lawyer-driven, and filed as part of a broader litigation strategy designed to delay the UMWA's certification and the corresponding onset of Respondent's statutory duty to bargain in good faith. Respondent's numerous hallmark violations of the Act have had a devastating impact on support for the UMWA, but its pre-

election violations did not destroy majority support for the UMWA before the NLRB election. Nevertheless, Respondent's pre-election hallmark violations diminished support for the union enough to produce a close result, which has enabled it to prolong certification of the result with years of unnecessary litigation that began with its tactical decision to file meritless election objections. Years of litigation instigated by Respondent's election objections prevented a quick certification of the election results and, even after the UMWA is certified, will allow it to provoke a technical 8(a)(5) charge to commence a "weary course of litigation" that will further prolong the onset of its bargaining obligation.

The trial record clearly demonstrates that Respondent's election objections were cooked-up in the immediate aftermath of a close election solely for the purpose of creating a foundation for litigation delay. There was no indication during the UMWA's pre-election campaign that any manager or agent of Respondent believed the UMWA had engaged in objectionable conduct prior to the election. There is no evidence anyone – employee or manager – ever informed an agent of the UMWA or the Local union of any of the alleged telephone calls or threats at issue in Respondent's objections. Respondent's Human Resources Director Bob Gossman testified that he did not speak with Local union officers about the anonymous phone calls and is not aware of anyone else in management having solicited help from the Local union to investigate or put an end to such conduct. Tr. 415-16. He never reviewed phone records, filed a police report or encouraged an allegedly affected employee to do the same. Tr. 416. Greg Fort, President of the Local union specifically denied ever receiving any information about the allegedly objectionable conduct. Fort, Tr. 133. Indeed, on May 20, after the election concluded and the votes were counted, Willow Lake mine Superintendent Tom Benner congratulated Local union officers Greg Fort, Dan Bradley, Rodney Shires and agents of the UMWA on having run a

clean campaign and stated that it was time to put the election behind them. (Bradley, Tr. 1962-63, 1978-79); (Shires, Tr. 2016).

Respondent's election objections were drafted by the same lawyers who planned and orchestrated the employer's anti-union campaign and participated in the decision to terminate Wade Waller, and were not even reviewed Respondent's top managers before they were filed. Tr. 1479-87. Even though Gossman played a key role in Respondent's efforts to gather employee statements in support of its objections, Tr. 404, he admits he did not even read the objections before they were filed. Tr. 415. Benner did not review them either, testifying "Did I specifically read through all the objections and read them all? I did not." Tr. 1486. Respondent's failure to produce evidence in support of two out of five objections and the complete lack of merit to the others is a strong indication they were filed for the purpose of providing a pretextual explanation for its unlawful termination of Wade Waller and prolonging litigation to obtain postponement of the UMWA's certification.

Respondent's lawyers apparently recruited production managers into their effort to gin up election objections, as evidenced by a startling revelation in the affidavit of one of Respondent's key witness Isaac Craig, in which he stated:

The Employer told us many times to report any harassment. I was approachment [sic] by Scott Lawrence, [Mine Manager] at the end of my shift and he told me to write down everything that happened, he already knew about. He said "**If this had happened before the election it would have helped.**"

GC Ex. 24. Respondent searched high and low for any information, credible or not, to use in its objections, knowing full well the value derived from their filing does not depend on the strength of their merits, but rather the opportunity their filing provides to delay certification through prolonged litigation.

CONCLUSION

Effectuation of majority support for the UMWA - demonstrated through authorization cards signed by 93% of the Willow Lake miners before Respondent's hallmark violations and confirmed by the results of the secret ballot election – will require more than upholding the ALJ's overruling of the Respondent's patently meritless election objections. For the reasons discussed more fully in the UMWA's Exceptions to the ALJD, the UMWA's ability to effectively represent the majority of employees that have twice selected it for that purpose and the very integrity of the Board's process itself depends on the Board's appropriate exercise of its *Gissel* authority in a manner consistent with its precedent discussing the critical need to avoid additional unnecessary litigation in these circumstances. *See, e.g., Power, Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994); *Pope Maintenance Corp.*, 228 NLRB 326 (1977) *enf'd NLRB v. Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978); *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).

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Respectfully submitted,

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Alphabetical Table of Cases

Amalgamated Clothing and Textile Workers v. NLRB, 736 F.2d 1559 (D.C. Cir. 1984)

Bonanza Aluminum Corp., 300 NLRB 584 (1990)

Cambridge Tool & Mfg. Co., 316 NLRB 716 (1995)

Conalco, Inc., 225 NLRB 879 (1976)

Foxwoods Resort Casino, 352 NLRB 771 (2008)

Holding Co., 231 NLRB 383 (1977)

In re Safeway, Inc., 338 NLRB 525 (2002)

Independent Sprinkler & Fire Protection Co., 220 NLRB 941 (1975)

Mastec North America, Inc., 356 NLRB No. 110 (March 7, 2011)

Midland National Life Insurance Co., 263 NLRB 127 (1982)

NLRB v. S. Praver & Co., 584 F.2d 1099 (1st Cir. 1978)

NLRB v. Superior Coatings, Inc., 839 F.2d 1178 (6th Cir. 1988)

Pope Maintenance Corp., 228 NLRB 326 (1977)
enf'd NLRB v. Pope Maintenance Corp., 573 F.2d 898 (5th Cir. 1978)

Power, Inc. v. NLRB, 40 F.3d 409 (D.C. Cir. 1994)

Somerset Valley Rehabilitation and Nursing Center, 357 NLRB No. 71 (August 26, 2011)

The Great Atlantic and Pacific Tea Company, Inc., 230 NLRB 766 (1977)

Van Dorn Plastic Machinery Co. v. NLRB, 736 F.2d 343 (6th Cir. 1984)

Westwood Horizons Hotel, 270 NLRB 802 (1984)

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2012, 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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