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**Big Ridge, Inc. and United Mine Workers of America.**  
Cases 14–CA–030379, 14–CA–030406, and 14–RC–012824

August 31, 2012

DECISION, ORDER, AND CERTIFICATION OF  
REPRESENTATIVE

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On December 1, 2011, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision in this consolidated unfair labor practice and representation proceeding. The Respondent and the Charging Party each filed exceptions and supporting briefs.<sup>1</sup> The Charging Party also filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs,<sup>2</sup> and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions and to adopt the recommended Order.<sup>4</sup>

<sup>1</sup> We deny as moot the Charging Party's May 2, 2012 motion for expedited processing.

<sup>2</sup> There are no exceptions to any of the judge's 8(a)(1) findings.

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

Although Member Hayes does not agree with some of the reasons stated by the judge for crediting one witness over another, he agrees that there are insufficient grounds for overruling the judge's credibility resolutions. In any event, even if the third-party actions alleged by discredited witnesses took place, they would not warrant setting aside the election.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>4</sup> The Charging Party has excepted to the judge's denial of the Acting General Counsel's request for a *Gissel* bargaining order. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Acting General Counsel has not excepted to this denial. On April 30, 2012, after the judge's decision issued, a federal district court ordered interim relief pursuant to Sec. 10(j) of the Act, which, *inter alia*, required the Respondent to cease and desist its unlawful activities and to offer former employee Wade Waller interim reinstatement to his former position. See *Harrell v. Big Ridge, Inc.*, 193 LRRM 2431 (S.D. Ill. 2012) (unpub.).

The judge's rationale for denying the *Gissel* order suggests that the Board will not issue a *Gissel* order concurrently with a certification of representative. Contrary to the judge, Board precedent supports our

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Big Ridge, Inc., Equality, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

IT IS FURTHER ORDERED that, in Case 14–RC–012824, the Respondent's objections to the election are overruled.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the United Mine Workers of America, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

All Production and Maintenance employees including Underground, Preparation Plant and Underground Recovery employees employed by the Employer at the Willow Lake Mine, Big Ridge Portal #1 and Big Ridge Portal #2, excluding all other employees, laboratory technicians, sample takers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. August 31, 2012

Brian E. Hayes,

Member

authority to do so as a proper exercise of our broad discretionary authority to fashion remedies under Sec. 10(c) of the Act. See, e.g., *Concrete Form Walls, Inc.*, 346 NLRB 831, 840 (2006), enf'd. 225 Fed.Appx. 837 (11th Cir. 2007); *General Fabrications Corp.*, 328 NLRB 1114, 1116 fn. 17 (1999), enf'd. 222 F.3d 218 (6th Cir. 2000). In this case, however, we find that the interim relief provided by the district court's 10(j) order, our certification of the Charging Party as the unit employees' exclusive bargaining representative, and the failure of the Acting General Counsel to except to the judge's denial of a *Gissel* order are all factors weighing in favor of finding that traditional remedies are now sufficient to redress the effects of the Respondent's unfair labor practices. We therefore need not pass on whether, absent any of these factors, a *Gissel* remedy might be warranted.

The judge denied the Acting General Counsel's requests for a remedial order that would require the Respondent to reimburse discriminatee Waller for any excess Federal and State income taxes he may owe from receiving a lump sum backpay award, and to submit appropriate documentation to the Social Security Administration so that Waller's backpay will be allocated to the appropriate periods. In the absence of exceptions, we decline to address these requests. We note, however, that the Board has invited all interested parties to file briefs regarding whether, in connection with the award of backpay, the Board should routinely require the tax compensation and the Social Security reporting requirement remedies. See *Latino Express*, 358 NLRB No. 94 (2012).

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

## (SEAL) NATIONAL LABOR RELATIONS BOARD

*Patrick H. Myers, Esq. and Paula B. Givens, Esq.,* for the General Counsel.

*Timothy A. Garnett, Esq. and Bernard P. Jeweler, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.),* for the Respondent.

*Arthur Traynor, Esq.,* for the Charging Party.

## DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In March 2011, the United Mine Workers of America (UMWA) began an organizing campaign to represent the approximately 440 production and maintenance workers at the Employer's Willow Lake underground coal mine in Equality, Illinois. The workers were already represented at that time by the Boilermakers Union, but negotiations for a new contract to replace the existing agreement expiring April 15 were not going well. In any event, the UMWA campaign was quite successful, garnering authorization cards from 93 percent of the unit employees, and the Boilermakers later disclaimed interest when the contract expired. (Tr. 75, 104, 138, 143, 276–277; Jt. Exh. 1.)

The Employer, however, denied the UMWA's April 7 request for voluntary recognition. Moreover, it subsequently conducted a vigorous "union free" campaign in response to the UMWA's April 8 petition to the NLRB for a secret-ballot election. It held a series of group meetings with employees, which included slide shows, films, and presentations by officials from Peabody Energy, the Employer's parent company. It distributed flyers with employee paychecks, mailed letters and a videotape to the employees' homes, and made antiunion stickers available for employees to wear on their hardhats. It also polled the mine supervisors to determine how the employees would likely vote, and directed the supervisors to make one-on-one contact with each employee and encourage them to vote "NO." (Tr. 130, 144, 276, 292, 308, 373, 400, 423–424, 819, 1130, 1497, 1719, 1780, 1807, 1912, 1934, 2057–2070; GC Exhs. 8, 14 (p. 5), 22; CP Exh. 4.)

Nevertheless, the UMWA narrowly won the May 19 and 20 election by a vote of 219–206; of the 425 employees who voted (97 percent of those eligible), approximately 52 percent voted "YES."<sup>1</sup> However, on May 26, the Employer filed timely objections alleging that the UMWA, "its officers, agents, and/or others," had engaged in improper conduct during the critical preelection period, including threatening employees with bodily harm and distributing false and fabricated documents. Accord-

<sup>1</sup> The Regional Director's report on objections (GC Exh. 1(k)) incorrectly states that the election was conducted on May 20 and 21. (Tr. 602.)

ingly, the Employer requested a rerun election. (GC Exhs. 1(d) and (k).)

Thereafter, on May 27, June 29, and July 22, the UMWA filed a series of unfair labor practice charges against the Employer. The Union alleged that the Employer had engaged in various unlawful conduct, both before and after the election, including threatening employees with mine closure and job loss and discharging a prominent union supporter (Waller). (GC Exhs. 1(e), (i) (attachment), and (g).)

On July 22, the NLRB Regional Director issued a report and order directing a hearing on the Employer's election objections. The same day, on behalf of the General Counsel, he also issued a complaint on the Union's charges. As subsequently amended on August 16, the complaint asserted, among other things, that the Employer's unlawful conduct rendered a fair rerun election unlikely and that a remedial bargaining order should therefore be issued, based on the Union's initial 93-percent card majority, under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 595 (1969). (GC Exhs. 1(k) and (n).)

Pursuant to the Regional Director's order consolidating the cases, a hearing on the foregoing election objections and unfair labor practice allegations was held before me over 9 days between August 29 and September 30 at the Federal courthouses in Benton, Illinois, and Paducah, Kentucky. Thereafter, on November 4, 2011, the General Counsel, the Union, and the Employer, filed posthearing briefs.<sup>2</sup>

Based on the briefs and the entire record,<sup>3</sup> for the reasons fully set forth below, I find that the Employer's election objections are without merit and that the UMWA should be certified as the unit employees' properly elected exclusive collective-bargaining representative. I further find that the Employer committed several of the alleged pre and postelection unfair labor practices, including discriminatorily discharging Waller.

<sup>2</sup> In the absence of any opposition, the transcript is corrected as set forth in my November 8, 2011 Notice to Show Cause, which has been added to the record as ALJ Exh. 1. I also grant counsel for the General Counsel's unopposed motion to correct his brief to include pages that were inadvertently omitted due to a scanning error.

<sup>3</sup> In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; and "inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole'" (*Daikichi Corp.*, 335 NLRB 622, 623 (2001), enf. mem. Sub nom. *Caikichi Corp. v. NLRB*, 56 Fed. Appx. 516 (D.C. Cir. 2003), quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)). I have also considered the apparent interests, if any, of each witness in the outcome of the representation and/or unfair labor practice proceedings, including (with respect to employee witnesses) whether, and the degree to which, the witness had openly supported or opposed the Union during the election campaign. See, e.g., *T. Steele Construction, Inc.*, 348 NLRB 1173, 1175 fn. 2 (2006); and *Suniland Furniture Co.*, 158 NLRB 62, 65 (1966), enf. denied on other grounds 387 F.2d 123 (5th Cir. 1967). See also *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1317 (7th Cir. 1989). However, this factor has only been considered in conjunction with other factors, as a possible or likely motive for the witness to fabricate, embellish, or deny the alleged objectionable or unlawful events, and not as a determinative factor in itself. See *A-W Washington Service Station*, 258 NLRB 164 fn. 1 (1981).

However, I deny the General Counsel's request for a remedial *Gissel* bargaining order.

#### I. EMPLOYER'S ELECTION OBJECTIONS

The party seeking to overturn the results of a secret-ballot election has the burden of showing, by a preponderance of the evidence, both that the alleged conduct actually occurred, and that the conduct warrants a rerun election. See, e.g., *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 316 (6th Cir. 1987), cert. denied 484 U.S. 896 (1987). Here, the Employer filed five objections to the election, each of which allegedly warranted a new election (GC Exh. 1(d)). However, it withdrew the last two of the objections at the hearing (Tr. 1957). Further, as discussed below, with regard to the remaining three objections, the Employer has failed to fully satisfy its burden in one respect or the other under the relevant standards.

##### Objection 1

The Employer's first objection alleges that "the Union, by its officers, agents, and/or others, during the critical period, intimidated, restrained, and/or coerced eligible employees, rendering their free choice in the election impossible" (GC Exh. 1(d)). In support, the Employer cites the following:

- (1) two alleged threats by employee Waller;
- (2) an alleged threat by employee Kirkman;
- (3) an alleged threat by employee Pinkston;
- (4) four alleged anonymous threatening phone calls;
- (5) an alleged threat by Union Recording Secretary Bradley; and
- (6) two instances of alleged intimidating conduct by Union Vice President Shires, Pinkston, and another union supporter. (Emp. Br. 28–40.)

#### A. Whether the Alleged Conduct Actually Occurred

##### 1. Wade Waller's alleged threats

Waller, 53, has approximately 28 years mining experience and worked as a ram car driver at the Willow Lake mine for over 7 years prior to his May 27 discharge (Tr. 553–554). Although he was not an officer or agent of the UMWA,<sup>4</sup> he was a vocal union supporter. Indeed, not only did he admit using the word "scab" quite a lot underground (in reference to nonunion workers), he also admitted making up an unflattering song about scabs, which he sang at the mine during the relevant period (Tr. 557–558, 590–592, 605).<sup>5</sup>

As indicated above, the Employer alleges that Waller made two objectionable threats prior to the May 19 and 20 election

and his subsequent discharge: the first to employees Pezzoni and Koerner, and the second to employee Kirk.

##### a. Waller's alleged threat to Pezzoni and Koerner

To establish the first threat, the Employer presented the testimony of Pezzoni and Koerner. Pezzoni is a shift leader and was an eligible voter in the election. He openly expressed his opposition to the UMWA both at the mine and on Facebook (Tr. 1654–1656, 1672, 1676, 1695; GC Exhs. 8 (A crew), 12; CP Exh. 8). Koerner is a new employee who was hired on April 11, was not an eligible voter (although it is not clear he or others knew this), and had not yet openly expressed his views at the time he alleges the threat occurred (Tr. 1341, 1365, 1408; Jt. Exh. 1; GC Exh. 25).

Both Pezzoni and Koerner testified that the alleged threat occurred while they were working together, i.e., side-by-side, underground. However, beyond this, their accounts diverge. For example, Pezzoni testified that Waller said, "You [better] vote UMWA, or scabs like you won't work here" (Tr. 1654). See also his May 26 statement to the Company (GC Exh. 9, p. 6) (Waller said, "[Y]ou better vote UMWA or a scab like you won't work here"); and his June 5 pretrial NLRB affidavit (GC Exh. 25) (Waller said, "[Y]ou better vote UMWA or your scab ass is gone"). Koerner, however, specifically denied Pezzoni's version (Tr. 1409). He testified that Waller said, "If the Union gets in, we'll take care of these scabs" (Tr. 1342). Compare also his May 26 statement to the Company (GC Exh. 9, p. 9) (which asserted that "several comments" were made that "if union gets in we will take care of scabs" (emphasis added)).

Similarly, Koerner testified that the incident occurred on his second day of work at the mine (i.e., around April 12), which was over a month before the election (Tr. 1342). However, in a previous written statement to the Company on May 26, Pezzoni stated that the incident occurred only about 2 weeks before the election (i.e., around May 5). (GC Exh. 9, p. 6.) Although Pezzoni later testified at the hearing that the incident occurred earlier, this was in response to a leading question from the Employer's counsel ("Do you recall being with [Koerner] his first days on the job and Wade Waller made a comment to him?"). (Tr. 1653.) Moreover, Pezzoni admitted on cross-examination by counsel for the General Counsel that, when he last met to discuss his forthcoming testimony with the Employer's counsel the week before the hearing resumed on September 27, Koerner and several other company witnesses were "all in there together" and "we was all going over our time line to make sure that when we broke down, . . . nothing changed" (Tr. 1679–1681).<sup>6</sup>

<sup>4</sup> The Employer's posthearing brief (p. 38) appears to concede this. In any event, the record indicates that Waller was never an officer or agent of the Local in any capacity (Tr. 511, 561, 579, 580, 607).

<sup>5</sup> The lyrics of the song, which begin "I'm proud to be a coal mining scab . . ." (and appear to be very loosely based on the song "Coal Miner's Daughter," by Loretta Lynn), were aptly described at the hearing by employee Koerner as "disgusting" (Tr. 1349–1350). However, the record indicates that vulgar language is common at the mine (Tr. 217, 251, 395, 525, 874, 1440, 1784). In any event, the Employer does not contend that the song justifies either overturning the election or terminating Waller.

<sup>6</sup> See also Koerner's testimony, Tr. 1393–1394 (confirming that Pezzoni and several other company witnesses were present when he met and discussed his forthcoming testimony with the Employer's counsel). Arguably, the collective, "round-table" manner in which the Employer's counsel interviewed Pezzoni, Koerner, and some of the other company witnesses prior to their testifying (see fn. 53, below) was inconsistent with the purpose of the sequestration order issued at the request of the General Counsel at the start of the hearing. At that time, I specifically advised counsel (all experienced labor attorneys) that the order was being issued "consistent with the *Greyhound Lines* Board decision" (which sets forth a model order providing, inter alia, that "no

Koerner also testified that he and Pezzoni were the only witnesses to Waller's comment (Tr. 1342). However, Pezzoni testified that "another gentleman" had walked by with Waller (Tr. 1654). See also his May 26 statement to the Company (GC Exh. 9, p. 6) ("Waller and another walked by"). Pezzoni also testified that he told Koerner not to worry about it, and vote whatever way he wanted (Tr. 1654, 1672). However, Koerner denied that Pezzoni said this or anything else after Waller's comment (Tr. 1409–1410).

Reasonable factfinders might disagree whether the foregoing differences between Pezzoni's and Koerner's accounts are "minor and explicable" or evidence of embellishment or "invention." *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1046 (7th Cir. 2006). However, there are other substantial reasons to doubt their testimony about the alleged incident. For example, Pezzoni testified that the Company had told employees to report any harassment during the campaign, and that he took Waller's comment as a threat. Yet neither he nor Koerner ever mentioned the incident to anyone until May 26, after the Union won the election, when as indicated above they both gave statements to the Company's human resources senior manager, Gossman. (Tr. 1367, 1655, 1668–1669; GC Exh. 9, pp. 6, 9.)

Further, both Pezzoni and Koerner had pecuniary and/or personal interests in testifying for the Company against Waller. Both remained employees of the Company at the time of the hearing, and thus had "reason to testify in its favor and avoid the ire of [their] superiors." *Advocate South Suburban Hospital*, 468 F.3d at 1046. In addition, Pezzoni was a strong opponent of the Union during the campaign, and, as discussed below, Koerner had other problems with Waller that he had likewise reported to management.<sup>7</sup> Finally, both gave incredible testimony on these and other matters as well.

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witness may discuss with other potential witnesses either the testimony that they have given *or that they intend to give*." 319 NLRB 554, 554 (1995) (emphasis added)). (Tr. 19–20.) I also reminded counsel of the sequestration order, as well as their duty to enforce it, at the end of the first week of hearing, before the Respondent put on its case (Tr. 1167–1171). Although I did not specifically forbid counsel from talking to multiple, corroborating witnesses simultaneously, this was arguably implicit and therefore reasonably encompassed within the express terms of the *Greyhound* order. See *State v. Presley*, 514 P.2d 1234, 1236 (Ariz. 1973). See also *Aalon v. State*, 247 Ga.App. 37, 39, 543 S.E.2d 78, 80 (Ga.App. 2000); and *State v. Dodge*, 564 P.2d 312, 313 (Utah 1977). However, I have found no clear Board guidance on the matter. Further, while the General Counsel and the Union properly argue that close scrutiny should be given to the testimony of the Employer's witnesses who participated in such group interviews with other, corroborating witnesses, they do not specifically argue that the sequestration order was violated. Finally, I would reach the same credibility resolutions herein regardless of whether the order was violated. Accordingly, I find it unnecessary to decide the issue.

<sup>7</sup> Although Koerner was ineligible to vote based on his hire date, like Pezzoni he was listed as a vote against the UMWA in the Company's preelection poll of the supervisors in early May, as well as in the third, postelection poll conducted in June (GC Exh. 8 (A crew)). However, there is no other evidence to corroborate the polls, which are clearly hearsay as to whether Koerner was actually, rather than merely perceived to be, against the Union. Accordingly, I have given the Em-

ployer's polls no weight in evaluating Koerner's interests in the outcome of this proceeding.

Waller, of course, also had a strong motivation to deny the incident, which he repeatedly did before and at the hearing (Tr. 588, 590, 593, 1932; GC Exh. 9, p. 8). However, unlike Pezzoni and Koerner, Waller impressed me as a credible witness overall. He testified in an earnest and even manner, demonstrated good memory and recall, and was not overly defensive or evasive. Moreover, he readily admitted to a number of things that could be used against him, including, as noted above, that he used the word "scab" a lot and wrote and sang an unflattering song about scabs.

Accordingly, for all the foregoing reasons, I find that the Employer has failed to establish by a preponderance of the evidence that the first alleged threat occurred.

*b. Waller's alleged threat to Kirk*

In support of the second alleged threat, the Employer presented the testimony of Kirk. Kirk has been employed as an examiner at the mine for several years and, like Pezzoni, openly expressed his opposition to the UMWA both at the mine and on Facebook (Tr. 514–515, 1737, 1743, 1768; GC Exhs. 8 (B crew), 12, 13, 26). Kirk testified that Waller made the threat to him one evening on the midnight shift while they and another employee (Carrigan) were dressing near each other in the bathroom. Kirk testified that, after he put down his helmet, which had several "Vote No" stickers on it, Waller said to Carrigan:

"I'll show you how to handle motherfuckers like this." And he kind of put his head towards me, and he said, "You pick something up and you hit them in the fucking head with it, that's how you handle scabs." And I just really didn't pay much attention. He went on along the same grounds, and after I got dressed, he said, "Hey, Kirk, you need any stickers?" And he had a "Vote No" sticker, and I proceeded to tell him no, I didn't need any more, but if he needed some, I could get him some. And his comment after that was, "Go ahead and vote no and be a fucking scab." [Tr. 1737, 1750.]

However, there are significant problems with Kirk's testimony. For example, both in his June 4 pretrial NLRB affidavit (GC Exh. 26) and at the hearing (Tr. 1737), Kirk stated that the incident happened about a week before the election (i.e., around May 12). Indeed, he seemed certain of this, as he testified that it was just 3 or 4 days before he learned of a verbal confrontation that Waller admittedly had with another employee (Craig) on May 21 (Tr. 1740). See also Kirk's June 4 affidavit (GC Exh. 26) (Craig told him about his verbal confrontation with Waller "a day or so" after Waller's bathroom statement). However, Waller testified, and the Company's payroll records confirm, that from March 30 until his discharge on May 27, Waller worked the midnight shift only once: on May 5 (Tr. 647, 1986–1988; GC Exh. 27). Further, he was on vacation in Florida from May 6 through May 17 (Tr. 580; GC Exh. 4).

There are also other substantial reasons to doubt Kirk's testimony. For example, although Kirk testified that he took Waller's statement "very seriously" (Tr. 1739), he admitted that he never mentioned it to anyone until after the Union won the

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ployer's polls no weight in evaluating Koerner's interests in the outcome of this proceeding.

election and Craig told him about his confrontation with Waller (GC Exhs. 9, 26; Tr. 1752, 1756). In addition, as both a current employee and strong opponent of the UMWA, he had both a pecuniary and personal interest in providing evidence to support the Company's objections to the election. And, as discussed below, his testimony about other alleged incidents lacked credibility as well.

Moreover, both Waller and Carrigan denied that the incident ever occurred (Tr. 577, 606, 2090–2091). I credit their testimony as it is consistent with other, undisputed evidence and their overall testimony and demeanor and the record as a whole provide no substantial reason to discredit it. Although Carrigan (like many of the miners who testified) admitted to having problems hearing (Tr. 2090), Kirk alleged that Waller spoke in a loud voice and that Carrigan was dressing right next to Waller (GC Exh. 26). Further, Carrigan exhibited only mild difficulty hearing in the courtroom. Finally, while the Company's poll results indicate that Carrigan was believed by his supervisors to be in favor of the UMWA in May and June (GC Exh. 8 (third shift)), there is no other evidence of Carrigan's union sympathies to corroborate the polls, which as noted earlier (fn. 7) are clearly hearsay as to whether Carrigan was actually a union supporter. In any event, the Employer does not specifically contend that Carrigan should be discredited for this (or any other) reason, and I would credit Carrigan even assuming the Company's polls were accurate. See fn. 3, above.

Finally, I reject the Employer's suggestion (Br. 30) that an adverse inference should be drawn from the Union's failure to also call Local Financial Secretary Clayton to testify about the alleged incident. The Employer cites Kirk's testimony that Clayton was present in the bathhouse at the time. However, Kirk initially testified that Clayton was "just kind of floating around there" (Tr. 1738). Although he subsequently testified that Clayton was "approximately 20 feet" away, this was in response to a leading question ("And you say he was nearby?"). Further, Kirk never specifically testified that Clayton actually witnessed the incident or reacted to it in any way. In any event, given the other evidence presented at the hearing, which as discussed above persuasively discredits Kirk's allegations, there was no real need to call Clayton to testify. An adverse inference is therefore inappropriate. *One Stop Kosher Supermarket*, 355 NLRB 1237, 1238 fn. 3 (2010). See also *Advocate South Suburban Hospital*, 468 F.3d at 1049.

Accordingly, for all the above reasons, I find that the Employer has failed to establish, by a preponderance of the credible evidence, that either of the alleged threats by Waller actually occurred.

## 2. Kirkman's alleged threat to Kirk

The Employer also alleges that another employee, Kirkman, made a preelection threat to Kirk. Kirk testified that, during a shift change, while he was coming into the unit, Kirkman passed him going out and said, "Look at that fucking hat. I ought to burn your fucking house down" (Tr. 1743).

Again, however, there are substantial reasons to doubt Kirk's testimony. First, although Kirk testified that Kirkman's entire unit was going out at the time, he never identified any other employee who would have witnessed the incident. (Counsel

never asked him.) Second, although the incident allegedly occurred sometime before the election, Kirk admitted (Tr. 1767) that, like the alleged incident with Waller, he never mentioned it to anyone, either at the mine or on Facebook, until after the Union won the election when he gave his May 26 statement to the Company (GC Exh. 9, p. 4). Third, as discussed above, as a current employee and strong opponent of the Union, Kirk has both a pecuniary and personal interest in bolstering the Company's objections and overturning the election.

Further, Kirkman denied that he ever made this or any other comment to Kirk about Kirk's opposition to the Union (514–515). Kirkman is a 5-year employee of the mine and serves as a miners' safety representative under the Mine Safety and Health Act (MSHA). He also briefly served as union steward for his crew before the Boilermakers disclaimed interest on April 15 (Tr. 503–504), and openly supported the UMWA in the election campaign (Tr. 505). However, there is no evidence that he has held any position with the UMWA or otherwise served as its agent since that time. Nor is there any evidence that he has a history of similar conduct or that the Employer has ever disciplined him for similar conduct.<sup>8</sup> Moreover, his overall testimony and demeanor betrayed no substantial reason to discredit him. On balance, therefore, I conclude that his testimony is worthy of belief despite his interest in preserving the Union's favorable election results.

Accordingly, like Waller's alleged threats, I find that the Employer has failed to establish, by a preponderance of the credible evidence, that the alleged threat by Kirkman actually occurred.

## 3. Pinkston's alleged threat to Hansen

The Employer alleges that another employee, Pinkston, also made a preelection threat. Pinkston was a union steward and member of the bargaining committee until the Boilermakers disclaimed interest on April 15, and he supported the UMWA during the campaign (Tr. 869, 881, 898, 916–917, 2036, 2041).

To prove this allegation, the Employer presented the testimony of Morrow, a former employee at the mine. Morrow testified that one day just before the election, as he and another employee (Hansen) were waiting to go underground, Pinkston approached and had the following exchange with Hansen:

Pinkston . . . asked him, he had heard he had changed his mind, that he was not going to vote for the Union. [And Hansen] said, you know, I'm really not sure, I just want to have a job. Pinkston then went and turned and said that, with your past history, with your work[ers] comp case and the amount of work you have missed, they'll fire you right off the bat. [Tr. 1867.]

However, there are substantial reasons to doubt Morrow's testimony. First, Pinkston and Hansen, the two parties to the conversation, disputed Morrow's version. They readily admitted that the conversation occurred and that Pinkston was concerned about whether Hansen had actually changed his mind about voting for the UMWA. Both also confirmed that Hansen

<sup>8</sup> There is also no record evidence that the Employer has disciplined Kirkman for this alleged incident.

had a history of absenteeism due to illness, and that the Boilermakers Union had helped him retain his job at the mine. However, both denied that Pinkston told Hansen that the Company would immediately fire him if the Union did not win the election. Rather, as Hansen testified,

[Pinkston] said, I heard you were going to vote non-union. And he said what's going on, I thought you were on our side. And he said, you got in trouble one time for occurrences and we went in and helped you. He said, I thought you'd stick with us. And so this is not verbatim—I don't recall exactly what he said, but more or less, you know, who's going to help you if you're going to get in trouble again? Was pretty much basically all that was said. [Tr. 916, 918, 2076–2077.]

Second, although Morrow specifically identified two other employee witnesses who might corroborate his version (Tr. 1868, 1873)—one of whom (Cullison) has consistently been perceived by his supervisors as against the Union (GC Exh. 8 (C crew))—the Company never called either to testify. See *C & S Distributors*, 321 NLRB 404 fn. 2 (1996) (party's failure to call an identified, potentially corroborating bystander is properly considered in evaluating whether that party has carried its burden of proof by a preponderance of the evidence).<sup>9</sup>

Third, although Morrow no longer works at the mine, he is not a disinterested witness. Morrow openly opposed the UMWA during the campaign; indeed, he admitted that, on another occasion, when he saw Pinkston posting a pronoun flyer on the bulletin board, he went up behind Pinkston and “ripped” the flyer down and “threw it in the trash.” (Tr. 1869.)<sup>10</sup> Further, he continues to work at another, nonunion mine owned by Peabody, which as indicated above is the Employer's parent company (Tr. 287, 415, 1817–1819, 1866, 1869, 2075, 2080). In contrast, as reflected by the subject conversation itself, Hansen was at most a lukewarm or equivocal supporter of the Union. (See also Tr. 2075) (Hansen did not wear pronoun stickers or otherwise openly support the Union); and (GC Exh. 8 (C crew)) (indicating that Hansen was perceived by his supervisors to favor the Union in April, oppose the Union in the May, and again favor the Union in June).<sup>11</sup>

<sup>9</sup> The other employee (Head) was listed as against the Union in both preelection polls, but for the Union in the postelection poll. It is unnecessary to decide whether the failure to call Cullison and/or Head warrants drawing an adverse inference, as I would find that the Employer failed to carry its burden of proof regardless.

<sup>10</sup> See also GC Exh. 8 (C crew). As described by Morrow, the flyer stated, “Without the UMWA, you better get used to being on your knees begging,” and showed a miner on his knees begging another man standing over him (Tr. 1869). Although there are differences in the accounts of what happened next, it is undisputed that Pinkston was upset by Morrow's conduct and called Morrow a “scab” (Tr. 1869, 2049–2050; CP Exh. 6, p. 3). However, the Employer does not contend that any of Pinkston's actions in connection with this incident (either his posting the flyer or his reaction to Morrow's ripping it down) constitute objectionable conduct warranting a rerun election.

<sup>11</sup> As noted above, GC Exh. 8 (poll results) is clearly hearsay as to whether employees were actually for or against the Union, rather than just perceived to be by their supervisors. However, in this instance there is corroborating evidence. See *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994) (corroborated hearsay is admissible and entitled to

For all the foregoing reasons, I find that Hansen's version is the more credible description of the conversation. Accordingly, like the alleged threats by Waller and Kirkman, I find that the Employer has failed to establish, by a preponderance of the evidence, that the alleged threat by Pinkston actually occurred.

#### 4. Alleged anonymous threatening phone calls

As indicated above, the Employer also alleges that the election should be set aside because of four anonymous threatening phone calls to employees prior to the election. In support, the Employer presented the testimony of the three employees who allegedly received the anonymous calls: Pezzoni, Koerner, and Glover.

##### *a. Alleged calls to Pezzoni*

As discussed above, Pezzoni openly opposed the Union, both at the mine and on Facebook. Pezzoni testified that he received two calls prior to the election. In the first, the anonymous caller asked Pezzoni about his vote, and when Pezzoni indicated that he did not know, the caller said, “[T]here is more than one way to skin a cat.” In the second, the anonymous caller said he had seen what Pezzoni had posted on Facebook, and “scabs like him would be taken care of or dealt with at home or at work.” (Tr. 1656–1658.)

Again, however, there is substantial reason to doubt Pezzoni's testimony. For example, Pezzoni testified that the second call in particular bothered him because “we work in a very dangerous environment anyway, and accidents can happen and may look like an accident” (Tr. 1658). However, he admitted that he never contacted the phone company or the police to investigate who had made the anonymous calls (Tr. 1688). Nor did he inform anyone at the Company about the calls until at least a week after the second call, on May 22, after the Union won the election, when he gave a statement to the Company about them (Tr. 1688; CP Exh. 6, p. 7). Finally, although he had previously mentioned the second call on his Facebook page, at that time he simply said:

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 as any one of us do. What makes you right or me wrong? [Tr. 1684.]

I find that, at a minimum, Pezzoni has embellished or exaggerated what was said in the calls. Specifically, I discredit his testimony that the first anonymous caller said that “there is more than one way to skin the cat” or made any similar statement or threat. As there is no other evidence of the call, I therefore find that the Employer has failed to establish that any such statement or threat was made. See generally *300 Exhibit Services & Events, Inc.*, 356 NLRB No. 66, slip op. at 1 fn. 2 (2010), and cases cited there (uncontradicted testimony need not be accepted as true if it contains improbabilities or there are other reasonable grounds for believing it is false). As for the second call, I find that the Employer has adequately estab-

some weight in Board proceedings). Accord: *Conley Trucking*, 349 NLRB 308, 310 (2007), *enfd.* 520 F.3d 629 (6th Cir. 2008).

lished, at most, that the anonymous caller said that he had seen what Pezzoni had posted on Facebook and to “watch it.”

*b. Alleged call to Koerner*

As discussed above, Koerner was hired shortly after the election petition was filed. Koerner testified that, a few weeks before the election, he received an anonymous phone call saying “I better vote for the Union, could be bad for my family and accidents happen underground” (Tr. 1361–1362). See also his previous May 26 statement to the Company (GC Exh. 9, p. 9) (“I . . . received threatening phone call pertaining to upcoming union election. Was told be concerned about family and also things could happen underground to look like accident. Better vote UMWA.”).

However, again, I discredit Koerner’s testimony. Like Pezzoni, Koerner admitted that he “didn’t say nothing to nobody” about the anonymous call until after the Union won the election. Further, his only explanation for not doing so was, “I just figured it was just somebody, just stuff going on; I didn’t worry about it.” (Tr. 1362.)<sup>12</sup>

I find it inherently improbable that Koerner would not have been worried about such a call, or that he would not have told anyone about it. Like the alleged second anonymous call to Pezzoni, the call on its face threatened both him and his family with serious injury. Further, as discussed elsewhere in this decision, Koerner’s testimony was not credible with respect to various other matters as well. Accordingly, as there is no other evidence of the alleged call, I find that the Employer has failed to establish that it actually occurred. See generally *300 Exhibit Services*, above.

*c. Alleged call to Glover*

Glover is also a relatively new employee, but was hired a month prior to the election petition, and was therefore eligible to vote in the election. Glover testified that, a few days after he sustained an injury, he received an anonymous call on his way to work. Glover testified that

the caller just said, “if we don’t go union, you will lose your job over your injury.” And I asked who it was, and they hung up. [Tr. 1855.]

Unfortunately, there are also substantial reasons to doubt this testimony. First, Glover admitted that he had simply “pulled” the tendons and ligaments in his shoulder; that he only missed a half shift of work; and that he was placed on light duty by the Company (Tr. 1855, 1863). Thus, it does not appear he was in any real danger of losing his job at that time. Second, although Glover testified that he told “some people” at work about the call, he never identified on the record who they were (the Employer’s counsel never asked him), and they were never called to corroborate his testimony. Third, Glover admitted that he opposed the Union during the campaign (Tr. 1863), and there is no evidence that he ever mentioned the call until May 24, after

<sup>12</sup> It is also noteworthy that Koerner appeared to testify that he actually received more than one call. See Tr. 1361 (“I had received phone calls”). However, as indicated above, he only mentioned receiving one call in his previous, May 26 statement to the Company (Emp. Exh. 12).

the Union won the election, when he gave a statement to the Company (CP Exh. 6, p. 2).

Finally, Glover did not impress me as a particularly reliable witness overall. For example, he denied ever hearing any rumors about the mine shutting down, or any employees expressing concern about the mine shutting down, if the UMWA won the election (Tr. 1861). However, there is overwhelming evidence that such rumors were rampant and a primary concern and subject of conversation among employees (See Tr. 114–115, 119, 220, 446, 526, 678, 728–730, 880, 957, 985, 1011–1012; GC Exh. 12; and Emp. Exh. 22.)

For all the foregoing reasons, therefore, I discredit Glover and find that the Employer has failed to establish that the alleged call actually occurred. See generally *300 Exhibit Services*, above.

5. Recording Secretary Bradley’s alleged threat to Pezzoni

The Employer also alleges that a preelection threat was made to Pezzoni by Bradley, who has served as local recording secretary for both the Boilermakers and the UMWA. Pezzoni testified that, on his way to the mine one day to get his paycheck, Bradley and several other unknown union supporters approached his vehicle to give him a flyer at a stop sign near the mine. Pezzoni testified that Bradley

asked me how I was feeling about the vote, and I said I don’t know. And he later went to say that it didn’t look good on me because I hadn’t been going to no union meetings. So I said well, I’ll take your piece of paper, and I took the piece of paper and went on in to work. And then came back out, and nobody stopped me when I came out. [Tr. 1659.]<sup>13</sup>

Pezzone’s testimony is generally consistent with his May 22 statement to the Company (CP Exh. 6); and his June 5 NLRB statement (GC Exh. 25), both of which state that the incident occurred on May 12, a week before the election. Further, unlike the more serious alleged threats by Waller and the anonymous caller(s), it is not surprising that Pezzoni would have waited until after the election to report Bradley’s comment, which, as discussed infra, is ambiguous and relatively innocuous.

Moreover, although Bradley denied making such a comment to Pezzoni (Tr. 1962), he admitted that he handed out flyers on the bypass road in front of the mine (Tr. 1975). And he never denied that he and other union supporters approached and had a conversation with Pezzoni at the stop sign. (Counsel never asked him.)

Finally, there is no reason to believe that Bradley would not have had such a conversation with Pezzoni. Although Pezzoni openly opposed the Union during the campaign, it is entirely possible that Bradley would not have known this because he had been out on workers’ compensation since September of

<sup>13</sup> The Employer also presented evidence that, on a separate occasion, Bradley put a UMWA sticker on the grille of another employee’s truck that was parked at his chiropractor’s office. Indeed, Bradley readily admitted that he did so (Tr. 1963, 1982). However, the Employer’s posthearing brief does not cite this conduct as a basis for overturning the election.

2010 (Tr. 1974).

Accordingly, notwithstanding Pezzoni's dubious credibility overall,<sup>14</sup> I find that the Employer has shown, by a preponderance of the evidence, that Bradley did have a conversation with Pezzoni at the stop sign and that it was consistent with Pezzoni's description.

6. Alleged intimidating conduct by Union V.P. Shires, Pinkston, and another union supporter

In support of this allegation, the Employer presented the testimony of Shoulders. Shoulders is a 4-year employee who works as a water pumper on the midnight shift (11 p.m.–7 a.m.) and openly opposed the Union during the campaign (Tr. 1881–1882, 1894, 1899–1900). Shoulders testified that two essentially identical incidents occurred in the bathhouse after his shifts ended on May 19 and 20, the days of the election. Shoulders testified that, on May 19,

I went around there to my basket to get ready to take a shower and everything, and . . . Pinkston, Shires, and another gentleman—I don't know what his name was, was sitting at the end of the bench where my basket was at. But as I came in, one of my friends asked me, he said, have you voted yet? And I looked at my watch and I said, well, it's quarter after. I said can I go like this? Being dirty. And my—he said yeah. Because I knew at 7:30 they would close the polls, I'd have to come back at 9:00 to vote. So I went and voted, and when I came back, Shires and Pinkston and this other guy was still sitting there on my same bench where I dress, and they sat there and kicked back, their arms like this [folded], their feet out . . . 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.]

Similarly, Shoulders testified that,

[t]he next day [May 20] my routine is I go over and talk to my partner on the day shift. And I was a little bit longer that day, I believe, and I came over. There's a bar comes down our baskets hang off of, with a bunch on either side. Well, the next day they're opposite of my basket or behind it, leaning up against the bar, like the bar is going across here and all three of them is like this, and my basket is on the other side like right here. And they sat there and stared at me, mad, and everything, all three of them, never said a word. It was—made me uneasy. I'm trying to get undressed and take a shower and go home. There's three grown men standing there, frowning with their arms [folded] up there on the rail. [Tr. 1890–1891.]

Shoulders testified that, on both occasions, he felt that the three were “up to no good.” He said he felt this way because he knew that Shires, the local union vice president, and Pinkston were mad at him because he had previously told the local union president (Fort) that he did not support the UMWA. In addition, they did not normally dress near him and were not usually there when he took a shower. (Tr. 1886–1887, 1890–1891.)

<sup>14</sup> See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

However, there are significant problems with Shoulders' testimony. For example, Shoulders testified that all three men were dressed in their work bibs on May 19. But, it is uncontroverted that Shires did not work on May 19 and only came to the mine that morning to set up for the first voting session. It is also uncontroverted that he was escorted off the property after the polls opened at 6 a.m. (an hour before Shoulders' shift ended), and did not return until just before the afternoon session began at 2 p.m. (Tr. 2012–2013, 2021, 2038.)<sup>15</sup>

Moreover, Shoulders never identified the “friend” in the bathhouse who reminded him to go vote on May 19 (the Employer's counsel never asked him). Nor was he or any other employee called to corroborate Shoulders' testimony that Shires, Pinkston, and another individual were hanging out in the bathhouse on either day.<sup>16</sup>

Finally, although Shoulders testified that there are one or two other employees he talks to every day (Tr. 1890, 1894), there is no evidence that he ever told them or any other anyone else about the incidents until 4 days later, on May 24, when he gave a statement to the Company (CP Exh. 6, p. 5).

For all the foregoing reasons, I discredit Shoulders' testimony about the incidents in its entirety. Rather, I credit Shires and Pinkston, who both denied the alleged incidents (Tr. 914, 2012–2014, 2021–2023, 2039). Accordingly, I find that the Employer has failed to establish by a preponderance of the evidence that the alleged incidents actually occurred.

*B. Whether the Conduct Found Warrants Setting Aside the Election*

As discussed above, the Employer has adequately established that two of the alleged preelection incidents actually occurred: (1) the anonymous call to Pezzoni where the caller stated that he had seen what Pezzoni posted on Facebook and that Pezzoni should “watch it”; and (2) Recording Secretary Bradley's comment to Pezzoni that it did “not look good on” him for not going to union meetings. However, for the reasons discussed below, the Employer has failed to establish that these two incidents warrant a new election, either individually or cumulatively.

1. Anonymous call to Pezzoni

Anonymous phone calls and other preelection campaign conduct that cannot be attributed to either the employer or the union are evaluated under the so-called “third-party” standard. To establish that such conduct warrants overturning the election, the objecting party must show that the conduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Mastec Direct TV*,

<sup>15</sup> According to the Company's campaign materials, there were three voting sessions on May 19: 6–7:30 a.m., 2–3:30 p.m., and 10–11:30 p.m. On May 20, there was just one session, from 6–7:30 a.m. See GC Exh. 22, p. 15.

<sup>16</sup> Although Shoulders testified that employees on the unit who run coal get out later than him, between 8:30 and 9 a.m., he admitted that some of the mechanics and sometimes the electrician get off work at the same time he does (Tr. 1899). He also admitted that, while no other employees were dressing near him on May 19, there “might have been a few” employees “around.” (Tr. 1886.)

356 NLRB No. 110, slip op. at 3 (2011) (citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)); and *Electra Food Machinery*, 279 NLRB 279 (1986). See also *Textile Workers v. NLRB*, 736 F.2d 1559, 1562 (D.C. Cir. 1984).<sup>17</sup>

Whether vague comments like “watch it” would reasonably engender fear of reprisal obviously depends on the surrounding circumstances. Where both the speaker and the context are known and the comment could reasonably be construed as an improper or unlawful threat to retaliate against protected activity, the Board has found such comments to be coercive and therefore unlawful. See, e.g., *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001) (finding that manager’s comment to an employee that whoever had posted certain union signs and decals “better watch out” violated Section 8(a)(1) of the Act).

Here, however, neither the speaker nor the context is known. The caller was anonymous. And it is unclear which of Pezzoni’s Facebook comments the anonymous caller was referring or responding to. The record contains several preelection comments that Pezzoni posted to the Facebook page of Section Foreman Henderson on May 12 and 13. (Pezzoni and approximately 24–33 other employees were among Henderson’s 460 Facebook “friends”). (See GC Exhs. 12 and 15; Tr. 1052, 1054, 1089, 1093, 1262.)<sup>18</sup> They include two May 12 posts making derogatory comments about Pinkston and Local President Fort, and a May 13 post urging UMWA supporters to go work elsewhere (GC Exh. 12, pp. 4–5, 17). However, Pezzoni’s prehearing NLRB affidavit states that he received the second anonymous call after he posted comments on May 14 stating that he was concerned the mine would shut down (GC Exh. 25).

Further, regardless of which of Pezzoni’s posts prompted the anonymous caller to tell him to “watch it,” the caller’s comment could reasonably be interpreted as a lawful warning rather than an improper threat. Thus, if the comment was in response to Pezzoni’s derogatory posts about Pinkston and/or Fort, it could reasonably be interpreted as a warning that such public comments might have undesirable legal consequences. See generally *Causes of Action for Internet Defamation*, 32 Causes of Action 2d 281 (Updated August 2011). And if the comment was in response to Pezzoni’s expressed concern about the mine shutting down, it could reasonably be interpreted as a warning that such public comments could be used either directly or indirectly against the Company to support a rerun election if the

Union lost. See *Frates, Inc.*, 230 NLRB 952 (1977), and cases cited there.<sup>19</sup>

Moreover, even assuming, arguendo, that the comment would more likely be interpreted as an improper threat than a lawful warning, it was a relatively tame threat in the context of the Employer’s workplace. As fully discussed below with respect to the Employer’s disparate treatment of Waller, much more direct and explicit threats of physical harm during arguments among employees were a frequent and tolerated occurrence at the mine.

Finally, there is no record evidence that any employee at the mine actually read Pezzoni’s post about the call on his Facebook page, or otherwise knew about the call, prior to the election. (As noted, there is no record evidence regarding Pezzoni’s Facebook page or his “friends.”)

Accordingly, for all the foregoing reasons, I find that the Employer has failed to establish that the anonymous caller’s bare comment that Pezzoni should “watch it” was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. See generally *Mastec Direct TV*, above, and cases cited therein.

## 2. Recording Secretary Bradley’s comment to Pezzoni

As noted above, preelection conduct by party representatives or agents is evaluated under a different standard. In order to establish that such conduct warrants overturning the election, the objecting party must show that that the conduct has “a reasonable tendency to interfere with employee free choice.” See, e.g., *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 597 (2006). In applying this standard, the Board considers a number of factors, including the number and severity of the incidents and whether they would likely cause fear among the employees; the number of employees subjected to the conduct; whether the incidents occurred close to the election date; the extent to which the conduct was disseminated among employees; and the closeness of the final vote. See *Taylor Wharton Division Harsco Corp.*, 336 NLRB 157, 158 (2001), citing *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986). See also *Family Service Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999).

Here, as discussed above, Bradley made the subject comment to Pezzoni only about a week before the election, and the vote was relatively close (Tr. 219–206). However, the comment was not particularly severe. Bradley simply stated that it “did not look good on” Pezzoni that he was not attending union meetings, in response to Pezzoni’s statement that he did not

<sup>17</sup> *Cedars Sinai Medical Center*, the primary case relied on by the Employer, is distinguishable. Although the Board in that case applied the less restrictive standard for party conduct in evaluating anonymous threatening phone calls (whether the conduct has “the tendency to interfere with employees’ freedom of choice”), the Board emphasized that it was doing so because no party had filed exceptions to the judge’s use of that standard. 342 NLRB 596, 597 fns. 10 & 12 (2004).

<sup>18</sup> Henderson testified that a total of about 25 of his Facebook friends are mine employees (Tr. 1093), but the General Counsel counts 33 based on a comparison of GC Exh. 15 (the list of Henderson’s Facebook friends) and Jt. Exh. 1 (the list of employees on payroll as of April 9, 2011).

<sup>19</sup> Of course, it is also possible that an agent or ally of the Company made the anonymous call to manufacture a later objection in the event the Union won the election. See *Textile Workers*, 736 F.2d at 1568 (“ordering a rerun election on the basis of anonymous incidents can be devastatingly unfair to the majority of employees who have voted for the union; an unscrupulous employer could encourage anonymous pro-union incidents in order to give it grounds for use later to reverse the election result if it loses”). Or the caller might have been responding to some other offensive comment, not directly related to the election, that Pezzoni may have posted on his own or someone else’s Facebook page. (Pezzoni’s Facebook page is not in evidence.)

know how he was going to vote. If this was a threat of physical harm, it was wearing an unusually thick veil. In context, Bradley's comment would more reasonably be interpreted as a mere expression of skepticism about Pezzoni's professed uncertainty. In any event, there is no evidence that Bradley or any other UMW officer or agent made any similar comments to any other employees. Nor is there any evidence that Pezzoni mentioned Bradley's comment to anyone prior to the vote.

Applying the relevant factors, therefore, I find that the Employer has also failed to establish that Bradley's isolated comment to Pezzoni warrants overturning the election. Accordingly, as the Employer has failed to establish that any of the other alleged threats actually occurred, I find that the Employer's first objection is without merit.

#### Objection 2

The Employer's second objection 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 [Bituminous Coal Operators Association] collective bargaining agreement." The Employer asserts that this conduct was "calculated to misinform employees" into "believing that all they had to do [to] get the BCOA agreement was to vote for the Union—the collective bargaining agreement had already been negotiated on their behalf." (GC Exh. 1(d); Emp. Br. 41–42.)

In support of this objection, the Employer submitted into evidence a series of documents (Emp. Exh. 21) which purport to show a link between Peabody Energy and Patriot Coal. The first document is a single page. The top half of the page contains contact information about Peabody, including its address in St. Louis (701 Market Street). The bottom half contains similar contact information about Patriot Coal Corporation, including the identical address. Local Union President Fort admitted that someone in the union office printed the contact information off the companies' separate internet website pages, and that he put them together on a single page and posted it on the bulletin board in the wash house during the campaign in order to show that the companies had the same address. He testified that he did so because the Company was telling employees in the antiunion meetings that they were unrelated companies and that Peabody would never sign the BCOA. He also admitted that he handwrote "WHAT DO YOU THINK? DID THEY LIE?" which appears in the margin of the page. (Tr. 126–128, 188, 190–194; see also CP Exh. 3.)

The additional documents include: (1) a pronoun flier that begins "PEABODY COAL ALREADY SIGNED THE NATIONAL AGREEMENT"; (2) the cover page of the 2007 Coal Wage Agreement between the UMW and six coal companies, including "Peabody Coal Company, LLC"; and (3) the signature page of the agreement, showing that it was signed by the President of Peabody Coal Company, LLC (with the same listed St. Louis address above). Fort likewise admitted that the Union placed these documents on a table at one of the local union meetings for employees to read and take with them (Tr. 131; see also CP Exh. 5; and U. Br. 56–57, 62–63).

Finally, the documents also include selected pages from separate 10-K forms filed by Patriot Coal and Peabody Energy, as well as a list of officers of Patriot Coal that likewise appears to have been obtained off the internet. Like the first document, these documents include handwritten notes in the margins, including one on the 10-K forms stating "Peabody Still Affiliated w/Patriot Coal," and several on the list of Patriot officers indicating that all or some of the officers are "affiliated with Peabody," "Former Peabody," or "Peabody." The record indicates that these documents were also passed around at a union meeting (Tr. 474–475, 482). However, there is no evidence that it was the Union, as opposed to just one of its supporters, that did so. Fort denied posting or distributing them, and the record indicates that many employees did their own internet searches and brought the information to union meetings (Tr. 189, 482, 2028, 2037).

The Employer also presented Joseph Klingl, Peabody's former vice president for labor relations and a consultant to its unionized subsidiaries since 2005, to testify about the history of Peabody Energy and Patriot Coal. Klingl acknowledged that Peabody Energy (formerly known as Peabody Holding Company) used to own various unionized subsidiaries, including Peabody Coal, and that Peabody Coal was still Peabody Energy's subsidiary at the time Peabody Coal executed the Coal Wage Agreement with the UMW in January 2007. Klingl also acknowledged that Peabody Energy created Patriot Coal as part of its plan to spinoff some of its less productive underground mines, and that Patriot Coal shared the same address when it was part of Peabody Energy. However, he testified that Peabody Energy did, in fact, spinoff the mines in October 2007, including the Peabody Coal and other mines listed on the 2007 Agreement; that the Peabody Coal name was dissolved at that time; and that Patriot Coal now owns the mines. He further testified that Peabody Energy and Patriot Coal no longer share the same address, employees, executives, or assets, and that they are now listed as separate independent companies on the New York Stock Exchange (BTU and PCS, respectively) and have no corporate relationship. (Tr. 1317–1321, 1331–1332.)

The Union made no real attempt to refute Klingl's testimony that there is no longer any corporate relationship between the two companies. Nevertheless, for the reasons set forth below, I find that the Employer has failed to establish that the posting or distribution of the above-described documents by union officials or supporters suggesting otherwise warrants overturning the election.

As recently summarized by the Seventh Circuit:

Under *Midland National Life Ins. Co.*, 263 NLRB 127, 133 (1982), the Board will not "probe into the truth or falsity of the parties' campaign statements, [or] set elections aside on the basis of misleading campaign statements. [It] will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." The rationale for the rule is that employees are "mature individuals who are capable of recognizing campaign propaganda . . . and discounting it." *Id.* at 130

(quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977)).

*NLRB v. E.A. Sween Co.*, 640 F.3d 781, 784–785 (2011). See also *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011).

Here, it is not clear which of the above-described documents the Employer contends were fraudulent. The Employer's posthearing brief initially states that the Union distributed "a fake document" (without specifying which one), but then appears to argue that all of the "Peabody/Patriot documents" were "fake" (Br. 42). In any event, the Employer has failed to meet its burden. There is no contention or evidence that any of the information that the Union or its supporters obtained off the internet was altered in any way. For example, the Employer never introduced any documentary evidence to show that, at the time of the campaign, Patriot Coal's website listed a different address than Peabody Coal's website.

Moreover, the employees could easily identify the documents as campaign propaganda. Thus, it is obvious that the first document was spliced together from two websites: the bottom half with Patriot Coal's information had different lettering and was placed at an odd angle from the top half with Peabody's information. (See also Tr. 482.) As indicated above, both it and most of the other documents also had handwritten notations on them. And the Union showed employees where to go on the internet if they wanted to look up the information for themselves (Tr. 474).

Further, *Albertson's Inc.*, 344 NLRB 1357 (2005), the only case cited by the Employer, is distinguishable. In that case, the letter distributed by the union was "clearly fake" and the union remained silent even after the employer provided clear evidence to the union that it was not authentic. Here, as indicated above, there is no evidence that the circulated documents were fraudulent. And while it is undisputed that the Employer repeatedly told the employees during the campaign that there was no relationship between the two companies (GC Exh. 22; Tr. 734, 888, 973, 1152–1155, 1230, 1815), there is no record evidence that it provided them or the Union with any documentation of this.

Finally, there was certainly reason for the Union and the employees to remain skeptical in the absence of such documentation. As indicated by Klingl, the companies have a complicated history. See also the testimony of Mine Foreman Carter and Mine Manager Francescon (Tr. 1558, 1700) (initially testifying that they worked for "Peabody Coal" before being corrected by the Employer's counsel that they work for Peabody Energy); and Peabody Vice President of Midwest Underground Operations Benner (Tr. 1456, 1486) (initially testifying that he is employed by Peabody Energy, but later testifying that he is employed by "Peabody Investment Corporation," and ultimately agreeing with the General Counsel that "it is confusing").<sup>20</sup>

<sup>20</sup> Counsel for the Employer represented on the first day of hearing that Peabody Investment "employs and is the payroll function for Peabody Energy." (Tr. 56.) And as discussed *infra*, Benner admitted that he made the decision to discharge Waller from the Big Ridge Willow Lake mine. However, the relationship between Peabody Investment

Accordingly, for all the foregoing reasons, I find that the Employer's second objection is likewise without merit.<sup>21</sup>

### Objection 3

The Employer's third objection alleges that the Union sent a letter and other documents and notices to employees' homes falsely representing that Fort was an elected official of the UMWA and giving the impression that the UMWA was already the collective-bargaining representative of the unit even before the election. In support of this objection, the Employer cites an April 18 letter authored by Fort. The letter is addressed to the Company's HR Coordinator and advises that,

[a]s of April 15, 2011, Local S-8 is no longer a part of the International Brotherhood of Boilermakers. The operating name for Local S-8 will be Coal Miners Local Lodge S-8, AFL-CIO. Everything with Local S-8 stays and operates the way it has in the past except that it will be handled through our Local Office and Local Officers. Our dues, fees and assessment structure will stay the same it has always been. Effective April 15, 2011 all dues, fees and assessments and all reports to do with the following should be sent directly to Local Lodge S-8 Secretary Treasurer. . . Clayton. . . [Emp. Exh. 18.]

As indicated by the Union, however, this letter is not at all supportive of the Employer's objection. The letter was addressed to the Company, not to employees, and there is no evidence that the letter was distributed to employees. Further, it is signed by Fort as "Local Lodge S-8 President" and does not even mention the UMWA. Finally, as the Employer concedes (Br. 43), unlike in *Albertson's*, *supra*, the letter was not a forgery.

At the time it filed its objections, the Employer also submitted another letter authored by Fort. (See GC Exh. 1(k).) The letter is unaddressed and undated, but was obviously and admittedly sent to the unit employees sometime during the campaign (Tr. 122, 194). In addition, unlike the April 18 letter to the Company, it is signed by Fort as "President, UMWA Local #5929." (CP Exh. 2.) However, the Employer's posthearing brief does not even mention the letter.

In any event, I find that this letter also fails to support the objection. It is uncontroverted that the Local was, in fact, chartered by the UMWA in early May, after it obtained its 93-percent card majority and the Boilermakers' disclaimed interest, and that the charter designated Fort as president (Tr. 183, 1972–1973). It is also undisputed that the Company had previously notified all employees, shortly after the Boilermakers contract expired and it disclaimed interest on April 15, that the

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and Peabody Energy and Big Ridge (and Patriot Coal, if any) was never fully addressed or explained by Klingl, Benner, or any other former or current officer of Peabody.

<sup>21</sup> For the same reasons, I would reach the same conclusion under the broader rule adopted by the Sixth Circuit in *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (1984) (election may be set aside "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"). See generally *Somerset Valley*, above.

mine was now “union free.” (See Tr. 130; and CP Exh. 4.) (“Did You Notice? You have more money in your paycheck today. That’s because the mine is now union-free, and there is no longer a dues checkoff requirement. . . .”). And nothing in Fort’s letter suggested otherwise. Rather, the letter urged the employees to “vote for the UMWA” so that it could “negotiate a good contract” for them.

Accordingly, like the Employer’s first and second objections, the Employer’s third and last objection is without merit.

In sum, contrary to the Employer’s contention, there is no evidence that “the Union orchestrated a campaign to intimidate and mislead employees” (Br. 28). Nor do any of the two alleged preelection incidents that occurred provide a sufficient basis, either individually or cumulatively, to set aside the results of the May 19 and 20 secret-ballot election. See generally *Textile Workers*, 736 F.2d at 1569; and *NLRB v. Lake Holiday Associates, Inc.* 930 F.2d 1231, 1238 (7th Cir. 1991). As the UMWA received a clear majority of the votes in the election (there were no challenged ballots), it is therefore properly certified as the exclusive collective-bargaining representative of the unit employees under the National Labor Relations Act.

## II. EMPLOYER’S ALLEGED UNFAIR LABOR PRACTICES

As indicated above, the General Counsel alleges that the Employer, through its supervisors and/or agents, committed a number of unfair labor practices before and after the election, including making numerous threats of mine closure and job loss and discharging Waller, in violation of Section 8(a)(1) and (3) of the Act.<sup>22</sup> Just as the Employer had the burden to prove its objections to the election, the General Counsel has the burden of proving these unfair labor practice allegations by a preponderance of the evidence. For the reasons set forth below, I find that the General Counsel has done so with respect to several of the alleged pre and postelection 8(a)(1) violations, as well as the alleged postelection 8(a)(3) discharge of Waller.

### A. Alleged 8(a)(1) Violations

#### 1. Section Foreman Henderson

The General Counsel alleges that most of the unlawful mine-closure statements were made by Henderson. Henderson has been a miner for about 8 years, and has worked at the Willow Lake mine since February 2010. He is the section foreman (or “face boss”) on the A crew, unit 4, and an admitted supervisor and agent (Tr. 1068–1069; GC Exhs. 1(n) and (r)).

<sup>22</sup> Jurisdiction is uncontested. As indicated above, the Employer is an Illinois corporation that operates an underground coal mine in Equality, Illinois. The Employer admits, and I find, that it sold and shipped over \$50,000 in goods outside of the State, and purchased and received over \$50,000 in goods from outside the State, in the 12 months ending June 30, 2011, and that it is engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Employer also admits, and I find, that the UMWA is a labor organization within the meaning of Sec. 2(5) of the Act.

#### a. Henderson’s alleged statement to “Gibby” in mid-April<sup>25</sup>

In support of this allegation, the General Counsel presented the testimony of one of two Gibbons brothers employed at the mine (who will be referred to here by his nickname “Gibby” to distinguish between the two). Gibby has worked at the mine for 3 years and was assigned to A crew, unit 5 during the relevant period. He was a strong and open supporter of the UMWA during the campaign. (Tr. 928, 957, 974; GC Exh. 8.)

Gibby testified that, in mid-April, right after the election date was set, he and Henderson had a brief, private conversation above ground about the Union. Gibby testified that the election was “all the talk all the time” at the mine during that period, and that Henderson told him, “[Y]ou know, if you vote the UMWA in, [the] mine will close. It will shut the mine down.” Gibby responded that it was better to shut it down than work as a scab, and the conversation ended. (Tr. 941–942, 982.)

Henderson denied that he made any such statement. Indeed, he testified that he and Gibby “hardly ever spoke”—that they “never [had] really talked”—as they were on different units. (Tr. 1638–1640.)

Henderson, however, impressed me as one of the least credible witnesses in the proceeding. He was a markedly evasive and poor witness overall. For example, he was initially reluctant to even admit that the Company wanted employees to vote “NO” in the election (Tr. 1072–1074, 1130)—even though this is both obvious and heavily documented. Similarly, he initially testified that he did not know whether the Employer was concerned about which employees did or did not support the Union. However, he later admitted that the Company had asked him several times which employees in his unit he thought would vote for the Union, and that he was present at a meeting when all of the A crew section foremen provided this information to Mine Manager Francescon. (Tr. 1073–1080.) Further, as discussed above, there is no dispute that the Company did, in fact, conduct such polls among its supervisors. (See GC Exh. 8.)

Henderson also repeatedly testified that the Company instructed him and other supervisors to talk to employees about the UMWA only if asked, and that he followed this instruction and only talked to employees if he was asked about his past experience with the UMWA at another mine (Liberty). (Tr. 1129–1132, 1631.) However, no such restriction was set forth in the Company’s “NLRB Election Conduct Guidelines” for the supervisors. The guidelines advised that the supervisors were “free to communicate facts, opinions and experiences,” but not to “SPIT”—spy, promise, interrogate, or threaten (GC Exh. 14, pp. 3–4). Nowhere did the guidelines say that the supervisors could only share “facts, opinions, and experiences” if asked. In fact, the guidelines specifically instructed the supervisors to “make sure you make one-on-one contact” with each of the employees on their last shift and “encourage them to vote ‘NO’” before they go to vote (GC Exh. 14, p. 5). See also employee Shepherd’s testimony (Tr. 1254) (Henderson ap-

<sup>25</sup> This is one of several 8(a)(1) allegations added to the complaint at the hearing. See Tr. 925–927; and GC Exh. 1(t).

proached him and asked why he thought the Union would help the mines.).

Henderson also testified that, when he told employees about his experience at Liberty (which he testified closed about a year after the UMWA was voted in), he just said that the UMWA had failed to support the miners after the mine closed.

Q. And did you basically say the same thing to all the people you spoke to about the Liberty situation?

A. Yes.

Q. All right. And can you tell us what you would say to employees when you did speak about the Liberty situation?

A. I just told them to think what's right for them, because when I was at Liberty, we were running good. They brought UMWA in, they were supposed to be behind us. The mine shut down, we didn't get any severance pay, no job placement. It was just like we paid all the dues for nothing.

Q. Okay. So those are the words that you used?

A. Yes.

Q. To people? So I take it you didn't do I understand correctly your concern was with how the UMWA treated you after the mine closed?

A. Yes.

(Tr. 1631–1632, 1648.) However, Henderson admitted that he personally believed that Liberty had been shut down because of the UMWA (Tr. 1085, 1648). And, as indicated above, the Company told him he was free to share his opinions.

Moreover, there are substantial reasons to disbelieve Henderson's denial of this particular conversation with Gibby. For example, although Henderson testified that he would not have talked to Gibby because he was on a different unit, on earlier examination he had admitted that he frequently talked about the election, not only with the employees on his crew, but with employees who dressed beside him and who he got diesel for. (Tr. 1631.) Indeed, he admitted that he talked to one employee (Hooven) every day before shift, usually in the diesel barn, even though Hooven, like Gibby, worked on unit 5 rather than unit 4 (Tr. 1094–1096). (See also Tr. 945, 948.)

On examination by the General Counsel, Henderson also admitted that he personally believed that the mine would shut down if the UMWA was voted in; that the employees would be voting themselves out of a job (Tr. 1087–1088). He likewise admitted that he thought the employees had actually put him on the unemployment line when he heard the UMWA had won the election (Tr. 1090, 1096–1097). As discussed below, this is graphically confirmed by two posts he made on his Facebook page shortly after the vote tally (sans any mention of his experience at Liberty).

I also reject the Employer's various arguments why Gibby's testimony should be discredited. The Employer first argues that it is highly improbable that Henderson would have made the alleged threat of mine closure to Gibby because of the professional training he received. However, Henderson made the alleged statement to Gibby early in the campaign, and the record fails to establish that he had been fully trained at that time. (See Tr. 1121.)

The Employer also argues that Gibby should be discredited because he admittedly did not mention this or any other mine closure statement by Henderson in the pretrial affidavit he gave to the NLRB investigator on June 14 (Tr. 977). However, Gibby explained that he was never asked by the investigator about any such statements by Henderson (Tr. 982), and counsel never offered the affidavit or any other evidence into the record to impeach his explanation.

The Employer finally argues that Gibby should be discredited because of his personal animosity toward Henderson. However, Gibby freely offered during direct examination, without any prompting from counsel, that he did not "care that much" for Henderson, explaining that their personalities do not click (Tr. 959, 986, 1001). Further, Henderson himself could cite only one prior incident, when he and Gibby had "a little argument, I guess," over the easiest and quickest way to put a pinner in the mine face (Tr. 1638–1639).

Finally, while Gibby was certainly not a disinterested witness given his strong sympathies for the Union, he impressed me overall as one of the more credible witnesses in the proceeding. He testified in an even and earnest manner, and his demeanor otherwise betrayed no reason to discredit him.

Accordingly, for all the foregoing reasons, I credit Gibby and find that the General Counsel has adequately established, by a preponderance of the evidence, that the alleged statement was made. I also find that the statement violated the Act. Although supervisors have the right to express their opinions to employees about the economic consequences of union activity, it is well established that such opinions "must be carefully phrased on the basis of objective fact to convey [a] . . . belief as to demonstrably probable consequences beyond [the employer's] control." *NLRB v. Gissel Packing*, 395 U.S. at 618. Here, the credited facts indicate that Henderson did not provide any factual context whatsoever, much less an objective basis beyond the Company's control, for his belief that the mine would shut down if the UMWA won the election. Rather, he made an unqualified statement that the mine would shut down if the UMWA won the election. See, e.g., *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 322–323 (7th Cir. 1995), *enfg.* in relevant part 313 NLRB 1275 (1994) (supervisor's statement to employee that "if we got a union in there we'd be in the unemployment line" violated 8(a)(1)).

Contrary to the Employer's suggestion (Br. 20), the mere fact that Henderson was a low-level supervisor, and thus did not himself have authority or say in deciding whether the mine would shut down, does not render his statement noncoercive. See *Pickering & Co.*, 254 NLRB 1060 (1981) (remarks by low-level supervisors can be just as coercive as those by other supervisors and managers), recently cited with approval in *TCB Systems, Inc.*, 355 NLRB 883, 884 (2010). See also *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1190 (7th Cir. 1993), *enfg.* in relevant part 306 NLRB 166 (1992) (rejecting employer's argument that shop manager's statement to employees that the terminal would probably close because of the union election did not violate 8(a)(1) because he was a low-level supervisor).

Henderson's statement also is not mitigated by the fact that his superiors subsequently communicated, during the employee

captive-audience meetings, objective facts about other UMWA-represented mines that had closed (GC Exh. 22; Tr. 424).<sup>24</sup> See *Smithfield Foods, Inc.*, 347 NLRB 1225, 1228 (2006) (statements to several employees by company consultant and supervisor that there was a good chance the employer would close the plant, or that the employer would close the plant, if the union won the election, violated 8(a)(1) even though the employer's top officials repeatedly and lawfully described to employees in speeches, videos, and letters how the three previous unionized occupants of the facility had closed).

Nor is Henderson's statement cured or rendered harmless by other general statements made by his superiors that the Company could not lawfully threaten employees and would bargain in good faith if the Union was elected (GC Exh. 22; Tr. 1241–1242).<sup>25</sup> As discussed below, this was not the only unlawful

<sup>24</sup> Whether the Company's formal "union free" meetings—or "scab school" as some prouion employees derisively called them (Tr. 512)—were mandatory is not critical to the allegations in this case. There is no allegation that anything objectionable or unlawful was said or done in the meetings, or that the last meeting was held within 24 hours of the election in violation of the *Peerless Plywood* rule (107 NLRB 427 (1953)). However, the credibility of witnesses clearly is critical. It is therefore worth noting that I discredit Operations Manager Schmidt's testimony that the meetings were nonmandatory and that employees could choose not to attend (Tr. 1810). First, given the substantial resources invested in planning and conducting the meetings, as well as the opportunity cost to the mine in lost production time, it is inherently improbable that Schmidt would have permitted all of the employees to skip the meetings without excuse or penalty. Second, there is no documentation that Schmidt ever communicated that the meetings were voluntary; indeed, the record indicates the opposite. See Mine Manager Francescon's testimony, Tr. 1719 (he thought the meetings were mandatory); Section Foreman Carter's testimony, Tr. 1573 (he did not know whether they were mandatory or not); employee Gibbons' testimony, Tr. 464 (he asked not to go to one of the meetings, but was told he had to); and employee Gibby's testimony, Tr. 980, 986, 988 (he attended the meetings because he was on the clock and told to go by his boss, even though he "hated every second of each one of them" and "did not want to be in there"). Although three of Schmidt's other subordinate managers or supervisors—Human Resources Senior Manager Gossman, Supervisor Hendricks, and Section Foreman Stephenson—testified that the meetings were nonmandatory, their testimony is particularly unpersuasive. Gossman did not testify that the meetings were nonmandatory (Tr. 1943) until after he heard Schmidt testify. (Gossman was the Employer's designated trial representative and therefore exempt from the sequestration order. Tr. 20.) Further, when previously called as a 611(c) adverse witness on the second day of hearing (Tr. 298), Gossman appeared to agree with the Union's counsel that they were "captive audience meetings held at the workplace that all employees were required to attend" (Tr. 423). With respect to Hendricks, his testimony is weak on its face; although he denied that the meetings were mandatory, he acknowledged (consistent with the testimony of the Gibbons brothers) that employees could not "just take a break if they wanted to," and that he was unaware of any other options (Tr. 1779). As for Stephenson, as discussed *infra*, there is little reason to believe virtually any of his brief testimony (Tr. 1911).

<sup>25</sup> The record indicates that the Company also showed a video to employees in which a paid actor stated, "We are not saying that being UMWA means our mine will close." (Tr. 1945.) However, Peabody Vice President Benner, who presented at all of the meetings (Tr. 1457, 1488), testified that he did not himself ever assure employees the mine would not be shut down if the UMWA won (Tr. 1503). (Although the

statement by a supervisor; the record indicates that Henderson made several such statements to employees before or after the election, and that other supervisors made similar statements as well. To excuse these statements simply because high-level managers made lawful statements would encourage unprincipled employers to adopt a two-tier campaign strategy, one lawful and one unlawful, knowing full well that the former would insulate the latter. Such a two-tier or two-track strategy could obviously prove quite effective, as first-line supervisors normally have the most regular contact with the employees and may be viewed as more trustworthy or likely to reveal the company's true intentions than corporate "suits." See *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 824 (D.C. Cir. 2001), *enfg.* 328 NLRB 991 (1999) (noting that, in such circumstances, "a reasonable [employee] would . . . likely . . . conclude[] that [management's] public statements were primarily for show while the [first-line supervisor or agent's] private warnings reflected management's actual position").

Finally, while there is no overt evidence that the Employer intentionally adopted such a strategy, as indicated above its campaign guidelines (GC Exh. 14) instructed the supervisors to make contact with employees and urge them to vote "NO," and did not specifically caution that their opinions should be carefully expressed on the basis of objective facts beyond the Employer's control. The guidelines simply cautioned that their opinions could not be a "threat." Cf. *Garvey Marine*, above (finding that campaign statements by boat pilots were attributable to the employer and unlawful where the employer had specifically instructed them to convince the deckhands to vote against the union, even though the employer had also informed the pilots that they were expected to stay within the limits of the law). And see generally *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (setting forth requirements for effective repudiation of unlawful conduct).

The Employer makes no attempt to distinguish the above-cited legal authority. Nor does it cite any contrary authority. Accordingly, considering the totality of the circumstances, I find that Henderson's statement to Gibby (as well as several of his other alleged statements discussed below) had a reasonable tendency to engender fear that the mine would be closed if the Union was elected, and therefore violated Section 8(a)(1) of the Act.

*b. Henderson's alleged preelection statements to Shepherd*

The General Counsel also alleges that Henderson made two unlawful statements to, or in the presence of, Shepherd. Shepherd is an 8-year employee of the mine who, like Gibby, was assigned to the A crew and openly supported the Union during the campaign (Tr. 1214, 1229). Shepherd testified that Henderson made both of the statements on the same day, when the belts were down.

record includes a Facebook post reporting that he had made such assurances to one employee (Emp. Exh. 22), it is clearly hearsay (Tr. 463), is not corroborated, and the Employer's posthearing brief does not rely on it.)

I was up on his unit. And he comes up to my ram car. And he said do you mind talking to me about this union stuff. And I'm like, no, I don't care to. He asked me why I thought the Union would help the mines. And I told him that I thought it would help the mines, a happy workforce, and make it a safer place. We had a conversation about that. And he was really respectful. He never—it was a conversation. And he said that he felt like if we voted in the Union, if the Union wins that from what he's being told that the mines would shut down.

....

And I asked him why he thought that. And he said, well, just by everything that is being said to him that he feels like it would shut down.

....

[W]e sat there at the ram car and we talked for a while about that. . . . And he said, well, the belt is going to be down for a while, he left and told everybody to take dinner. So I went to the dinner hole and everybody was talking about the union stuff, and then I overheard Daniel saying that yeah, if they vote the Union in, this place is done, they're going to shut it down.

With respect to both the statement to him and to the crew, Shepherd testified that these were Henderson's exact words as he recalled them. (Tr. 1253–1255.)

Henderson, however, denied making these specific statements. He testified:

I remember having a conversation because I only had Shepherd on my unit, probably less than five times. And I remember everyone was talking about union stuff, but [ ] Stevens—he's on my left side, miner man. Blake is my right side miner man, and most of the time they don't come—all the car drivers ain't at the feeder—usually ain't at the feeder whenever that goes down, and I talked with them, but it was my right car drivers only. It was Shepherd and Dewayne, I believe; [ ] Collins had walked over there. . . . The only thing that was said from me was telling my story again about Liberty.

Henderson also denied that anyone in management had ever told him the mine would be shut down if the UMWA was voted in. (Tr. 1642–1646.)

Again, I find that Shepherd's testimony is more worthy of belief. Like Gibby, Shepherd impressed me overall as one of the more credible witnesses in the proceeding. Although he was likewise not a disinterested witness, his testimony was not always favorable to the General Counsel. Moreover, notwithstanding their different views of the UMWA, Shepherd was actually one of Henderson's "friends" on Facebook (Tr. 1262; GC Exh. 15). In contrast, as fully discussed above, Henderson was a particularly poor witness overall.

Further, while none of the other employees at the dinner hole were called to corroborate Shepherd's testimony about Henderson's statement, the record indicates that they are all regularly assigned to the unit and supervised by Henderson, and thus might very well be reluctant to testify against him. See *Advocate South Suburban Hospital*, 468 F.3d at 1046. See also *Flexsteel Industries*, 316 NLRB 745 (1995), enf. mem. 83

F.3d 419 (5th Cir. 1996), and cases cited therein. In any event, given the clear credibility differences between the two witnesses, Shepherd's testimony alone is sufficient to establish that the statements were made.

Accordingly, I find that the General Counsel has established by a preponderance of the evidence that Henderson made the alleged statements. For the reasons fully discussed earlier, I also find that the statements had a reasonable tendency to engender fear that the mine would be shut down if the UMWA was voted in, and therefore violated Section 8(a)(1) of the Act.

*c. Henderson's May 20 postelection Facebook posts*

The General Counsel also alleges that two comments Henderson admittedly posted on his Facebook page shortly after the votes were tallied unlawfully threatened employees with mine closure. The first comment was posted at 10:10 a.m. and stated:

how can you bee so blind to vote the damn umwa in they shut every down that they represent and you think peabody is goin to stand for them??? We aint loaded shit aint got a bargaining chip and most all you ignorant fucks that strutted around with your camo we are everywhere shirts are the kind of people that need the union.....excuse me while i go vomit and and start sending out resumes.

The second comment was posted shortly thereafter, at 10:36 a.m., and stated:

sick to my stomach because i get my son on all 3 of my days off now when this mine shuts down ill have to go back to driving 50 miles to get two off or stay around here and work 6 and 1.

(GC Exh. 12, pp. 1, 2; GC Exh. 13, p. 1 (duplicate); Tr. 1089–1090.)<sup>26</sup>

For the same reasons discussed above regarding Henderson's other mine-closure statements, I find that the foregoing posts violated Section 8(a)(1) of the Act. Contrary to the Employer's unsupported contention, it is immaterial that the comments were made by Henderson on a social media site when he was

<sup>26</sup> All Facebook posts are quoted exactly as they appeared; no attempt has been made to correct misstrokes or misspellings, expand abbreviations, or add punctuation. Henderson at some point also indicated that he "liked" the following comment posted on his Facebook page by an employee on May 13, prior to the election:

These union guys kill me, especially the ones who have never worked umwa but yet they know so much about it, if they vote that joke of a union in and they shut us down I hope you people can't find a job, and if you think perimeter cuts will stop them you have lost your mind because they can cut perimeters over at wildcat, and if you thin...k that isn't they're plan then why are we parking new equipment over at the plant and why are there 3 management jobs unfilled and the warehouse has quit stocking stuff that we normally keep, we are not loading shit and they have about had they're fill of us to begin with and this will be the final nail in the coffin! (GC Exh. 12, p. 4.)

However, there is no allegation that he violated the Act by doing so. Cf. *Foxwood Resort Casino*, 356 NLRB No. 111 (2011) (employer argued that former employee's Facebook comment should be attributable to the union because a union agent had indicated agreement with it by pushing the "like" button).

not at work. As noted above, approximately 25–33 of his Facebook “friends” were employees at the mine (see fn. 18 and accompanying text). Further, on its face, the first comment was addressed directly to the mine employees who voted for the UMWA (“how can you be[] so blind”). Cf. *Bruce Packing Co.*, 357 NLRB No. 93 (2011) (supervisor’s interrogation of employee about union activity violated 8(a)(1) even though the conversation occurred after the employee’s shift and the supervisor was her friend and godfather to one of her sons); *Regal Health & Rehab Center, Inc.*, 354 NLRB 466 (2009), reaffirmed and incorporated by reference 355 NLRB 352 (2010) (nursing director’s statements to employee violated 8(a)(1) even though the statements were made while driving with employee to a restaurant after work); *Wake Electric Membership Corp.*, 338 NLRB 298, 299–300 (2002) (general foreman’s statements to employee violated 8(a)(1) even though they were made at the employee’s home outside of work hours and the foreman was intoxicated); *Electronic Data Systems Corp.*, 305 NLRB 237, 238 (1991) (supervisor’s comment to employees in break room violated 8(a)(1) regardless of whether he intended it merely as a “friendly warning”); and *Progressive Mine Workers District 1 v. NLRB*, 187 F.2d 298 (7th Cir. 1951), enfg. 89 NLRB 1490 (1950) (local union president’s comments to employees violated 8(b)(1)A even though the conversation occurred at their homes and he stated that he was speaking to them “as a friend”).

Moreover, even if Henderson had not intended his Facebook posts to be seen by the Willow Lake employees, it was virtually certain under the circumstances, and therefore reasonably foreseeable, that they would be (Tr. 1090). Indeed, he received several responses, including a favorable one from unit employee Craig (“Ill puke arm in arm with ya”), and an unfavorable one from Waller’s spouse (“IM THANKFUK N U CAN DELETE ME IF U WANT TO! IM PROUD OF THE MEN THAT VOTED N STRUTTED THEIR SHIRT!”). (GC Exh. 12, p. 2.)<sup>27</sup> Accordingly, the Facebook posts clearly violated the Act. See generally *National Assn. of Government Employees (IBPO)*, 327 NLRB 676, 680 (1999), enfd. mem. 205 F.3d 1324 (2d Cir. 1999), and cases cited there (a respondent’s statement to a nonemployee may properly be held unlawful if it is reasonably foreseeable that employees would learn of it).

*d. Henderson’s alleged May 20 postelection statement in the bathhouse*

The General Counsel alleges that Henderson also made an unlawful statement in the bathhouse later the same day, after the second shift. In support of this allegation, the General Counsel presented the testimony of Shepherd and Gibby. Shepherd testified that, on May 20, after completing the second shift,

I’m coming out of the shower. I’m going to my basket to get dressed. Earlier in the day, when Gibby come through, he gave

<sup>27</sup> Henderson admitted that his May 20 posts on his own Facebook page would also have appeared on the “CoalMinerPeabodyYes” website (Tr. 1091), which, according to Waller’s spouse, is a website “just for the guys out there that work to blab” (Tr. 1067). See also Tr. 1053, 1066; GC Exh. 13, pp. 20–21.

me a UMWA hat. It’s a black one with gold letters. And put it in my basket. I never even tried it on yet. I got dressed. [Henderson] comes in the bathhouse. I go over to the mirror, put it on, looking at it. [] Henderson approaches me and says, looks at me and says . . . I hope you’re fucking happy that you just voted all these people out of their fucking jobs. . . [H]e was mad. And we was pretty nose to nose. And I’ve never seen him that way. And I had to walk away. [Tr. 1220.]

Gibby testified that he likewise heard Henderson make such a statement. Specifically, he testified that, as he was coming out of the shower, he saw Henderson up towards the opposite corner of the bathhouse and heard him say, “I hope you’re happy. You voted yourself out of a job. You voted us out of a job.” He did not, however, notice who Henderson was talking to. (Tr. 971–972.)

As for Henderson, he denied making any such statement in the bathhouse (Tr. 1087, 1641). Indeed, he denied that he ever “personally” (i.e., in person) told anyone that he was upset about the election results (Tr. 1089). However, he admitted that he worked the second shift that day (Tr. 1089).<sup>28</sup> As discussed above, he also admitted that he believed in his mind at the time that the employees had just voted themselves out of a job.

On balance, I find that the testimony of Shepherd and Gibby, which is essentially consistent and corroborative, is more worthy of belief. First, given Henderson’s angry rant on Facebook, it is not improbable (even considering his previous training) that he would have made a similar angry comment to Shepherd (who, as indicated above, was one of his Facebook “friends”) later the same day. Second, as discussed above, both Gibby and Shepherd impressed me as particularly credible witnesses, whereas Henderson was an exceptionally poor witness overall.

Accordingly, considering all the relevant factors, I find that the General Counsel has adequately established that the alleged statement was made. I further find, for the same reasons set forth above with respect to Henderson’s other statements, that the statement violated Section 8(a)(1) of the Act.

*e. Henderson’s alleged statements to Hooven and Wise on May 21*

The General Counsel alleges that Henderson also made unlawful statements the following day, on May 21. In support of this allegation, the General Counsel presented the testimony of Hooven and Wise. Hooven has been employed at the mine since November 2010. He is assigned to A crew, unit 5, and reports to the shift leader on that unit (Davis), who runs the unit in the absence of a section foreman. (Tr. 716, 1070, 1077–1078, 1138.) Hooven was one of the most outspoken supporters of the Union; indeed, he testified that nobody was more outspoken than him except Waller (Tr. 731, 762).

<sup>28</sup> It is uncontradicted that the section foremen must complete certain paperwork at the end of every shift, and that everybody else is therefore usually gone by the time they take their showers (Tr. 1526, 1634, 1693–1694). However, May 20 was obviously not an ordinary day. Moreover, both Shepherd and Gibby did, in fact, testify that Henderson entered the bathhouse well after them.

Hooven testified that, after the shift, around 12:30 at night, he was approached in the parking lot by Pezzoni (who, as discussed earlier, is a shift leader and openly opposed the Union).

[Pezzoni] asked me, he said I'm going to need to talk to you. I was like okay. So we had a conversation. We were talking about the Union. He asked me if I had ever intimidated someone or been intimidated. And I said no. I said, no, I've never been intimidated before or I haven't intimidated anyone. And he said, well, I'm just saying that.

[A]nd about this time here comes [Henderson]. And he's sore. He's mad about the Union, about how the vote went. . . .He was coming from the bathhouse. . . .And as he passed us, he turned around and he said [...] I told [Pezzoni], I said, well, everybody knows how I voted and how I felt, and I said it's over. And that's when he was, like I said, a couple of steps passed us. He turned around and he was pointing at me. . . . And [] Henderson said I hope you're happy, you just put us all on the G.D. unemployment line. I mean that was his exact, pretty much his exact words. He said that's fine, that's fine, he said, because Peabody knows. They've got a list. They know everybody that was wearing their hats, putting stuff in their cars, and putting those things in your cars, wearing your shirts in and out.

And about this time that's when [] Wise come and he heard him. [Wise] had actually passed us. And when he kind of got loud, [Wise] come over and interrupted and interceded for me. Because I mean I just put my head down, because I already felt bad enough. They had already made me feel, you know, they had already made me feel bad for doing what I thought was right. And . . . [Wise] said to [Henderson] and he's like we're just working for a better day. And he started, you know, they just walked off. And that was pretty much the end of that. [Tr. 724–725.]

As indicated above, Wise also testified about this incident. Wise has been a mine employee for 6 years. He is assigned to the A crew as well, but is on unit 2 and reports to Section Foreman Parkinson (Tr. 234; see also Tr. 833, 1078). He was also an open union supporter during the campaign (Tr. 239–240). Wise testified that:

I was leaving the bathhouse and I heard [] Hooven and [] Henderson arguing. And so I—presently [] Hooven had told me that he had been harassed by different individuals at work. And when I walked out, I heard them arguing. And I thought I could go over and see if maybe I could help. And when I approached I asked [] Henderson if—why he was being such a sore loser about the election. And he told me he wasn't a sore loser and that we all were going to be unemployed. So I asked him why he thought we would [be] unemployed. And he told me to use my head, that Peabody will wait until the TVA contract runs out and shut the doors. [Tr. 235.]

Both Pezzoni and Henderson denied that Henderson made any of the foregoing statements to Henderson and Wise. Indeed, Henderson denied that he even had a conversation with Hooven or Wise in the parking lot that day. (Tr. 1634–1635, 1664.)

Again, on balance, I find that the testimony by Hooven and Wise is more credible. First, their accounts are generally consistent and corroborative. Although there are parts of each that are not addressed by the other, this is consistent with their testimony that Wise came along after Hooven and Henderson had already begun their conversation, and that Wise and Henderson walked off together after Wise intervened.

Second, Pezzoni admitted that he works the same shift and time period as Henderson, and that the shift ends at 11:30 (Tr. 1692–1693). Although he testified that he and other employees are usually gone by the time Henderson and other section foremen leave (see fn. 28, above), Pezzoni admitted that he will sometimes see his section foreman in the parking lot after the shift (Tr. 1694).

Third, it is undisputed that the Company began collecting statements from employees after the election to support filing objections to the election (Tr. 346). Indeed, Pezzoni gave such a statement to the Company the following day (CP Exh. 6). Thus, it is not surprising that Pezzoni, who admitted having “a lot of” conversations with Hooven (Tr. 1664), would have asked Hooven in the parking lot about whether he had ever been intimidated or intimidated anyone during the campaign. Indeed, Pezzoni never specifically denied have the conversation. (Counsel never asked him.)

Fourth, as noted earlier, Henderson also admitted that he talked to Hooven frequently, including about the Union (Tr. 1094–1096). And given Henderson's previously discussed statements on Facebook just a day earlier, it is not improbable that he would have made similar statements to Hooven and Wise.

Fifth, Hooven had previously reported Henderson's May 21 statements, including Henderson's comment about the Company keeping a list, in the affidavit he gave the NLRB investigator on June 14 (Tr. 799–800). Hooven could not have known about the existence of such lists at that time unless someone had told him.<sup>29</sup> The Employer did not produce the lists (i.e., the results of its supervisory polls) until the first day of hearing, in response to the General Counsel's August 8 subpoena, after I rejected the Employer's assertion that any such documents were protected by the attorney-client and work product privileges (Tr. 24–57).<sup>30</sup>

Finally, unlike Henderson and Pezzoni,<sup>31</sup> Hooven and Wise

<sup>29</sup> Hooven alleged in his affidavit that Davis had made a similar statement to him about the Company keeping a list of union supporters (Tr. 797). See also Tr. 726 (Davis told him in mid-May that he needed to watch his back; that he had an “X” on his back; and that he was making himself a target by wearing prounion hats, etc.). However, like Henderson, Davis denied making any such statements to Hooven (Tr. 1604).

<sup>30</sup> The subpoena requested “for the period April 1, 2011, to the present, all documents regarding the union sentiments of Respondent's employees, including but not limited to documents identifying which employees did or did not support the Union.” (GC Exh. 1(p).)

<sup>31</sup> Regarding Pezzoni (who was also a Facebook “friend” of Henderson's), see the discussion of the Employer's election objections, above. See also Tr. 1672–1673 (initially denying that he thought the mine would close if the employees voted for the UMWA; subsequently admitting that he posted a comment on Facebook stating something like

generally impressed me as credible witnesses. Although the Employer cites various reasons why Hooven should be discredited, none has any substantial basis. For example, at the hearing, the Employer's counsel made much of the fact that Hooven hugged and goosed Henderson in the hallway outside the courtroom prior to testifying, arguing that this evidenced a psychiatric condition affecting his competency to testify (Tr. 741–745).<sup>32</sup> Counsel make the same argument in the Employer's posthearing brief (Br. 19). However, while goosing is undoubtedly rare among courthouse lawyers, it is apparently common among coal miners. As Mine Manager Francescon, one of the Employer's own witnesses, testified:

[I]f you've ever worked in a coal mine, there's goosing going on. If you want to bring up anything with hands, it's all the time going on as far as the goosing and this and that . . . there's a lot of goosing going on. [Tr. 1716.]

(See also Tr. 1705.) Further, Hooven testified, without contradiction, that Henderson gooses him all the time at work. He also provided an eminently reasonable explanation why he gave Henderson a hug:

because I wanted to prove that there was no kind of barrier between the UMWA and what I felt in my heart. Just because I'm out there with my union brothers, that doesn't mean that me and him still can't talk. We've still got to run coal. We've still got to work together. We've still got to even maybe fish one day together, hopefully, and we'll start talking next. [Tr. 773–775.]

The Employer also summarily argues that Hooven should be discredited because he “was implicated in giving willfully false testimony” to the NLRB investigator against Davis (Br. 16). The Employer appears to be referring to Davis' testimony that Hooven voluntarily confessed that he had given such false testimony in a conversation they had underground in mid to late July. According to Davis, he was walking by the feeder when Hooven, who was the feeder watcher that day, asked him to come over and talk for a few minutes. Hooven was visibly upset, emotional, and crying, and Davis thought that he might be hurt or sick. However, instead, Hooven told him that he had given an affidavit to the NLRB stating that Davis had made various unlawful comments during the campaign, and that the affidavit was not true. Hooven told him that Fort, the union president, had asked him to “write the affidavit on me.” (Tr. 1586–1588.)

The Employer argues that Davis' account of this conversation is uncontroverted because Hooven never rebutted it. However, this is incorrect; Hooven specifically addressed the alleged incident. He acknowledged that he had a conversation with Davis about his NLRB affidavit, but testified that it was

that; but testifying that he did not really believe that and posted the comment only “because I was pissed at other people out at the mines, things they were saying”).

<sup>32</sup> The issue arose when counsel attempted to question Hooven on cross-examination about whether he takes any psychiatric medication or has received any psychiatric treatment. Following a discussion of the matter (outside the presence of the witness), I sustained the Charging Party's objection.

prompted by the unusual way Davis was treating him that day. Hooven testified that Davis was “acting differently,” not joking and laughing as usual, and was being “real hard and dogging” him. When Hooven asked Davis what was wrong, Davis replied, “[Y]ou know good and GD well what's going on. . . . I know what was written about me.” Davis told him “from now on you're going to be on the feeder, and that's where your ass is to stay.” Hooven admitted that, after this, he did break down and cry, both from the pressure and because he thought he had gotten Davis in trouble. However, he testified that he simply told Davis that the Union had asked him to give a statement to the NLRB about what he recalled happened during the campaign. He specifically denied both that he gave false testimony about Davis to the investigator, and that he ever made a contrary confession to Davis. (Tr. 775, 782–789, 795.)

Moreover, I find that Hooven's version of the conversation has the greater ring of truth. It is inherently improbable that Hooven would have initiated such a conversation with Davis for no reason. Further, although Davis initially testified that he did not know that Hooven had given the affidavit or what it alleged at the time of the conversation (Tr. 1598), he later admitted on cross-examination that the Company had previously met with him and recited the allegations set forth in the NLRB's letter to the Company (Tr. 1609, 1617). I find that either Davis was told by the Company that Hooven had made the allegations, or that he had independent knowledge of this (either because he remembered who he made the alleged statements to or found out by other means) prior to his conversation with Hooven.<sup>33</sup>

There are also other substantial reasons to question Davis' testimony. Although Davis is still a shift leader and was eligible to vote in the election, he essentially runs Hooven's unit in the absence of a section foreman. Further, he is “next in line” to be a section foreman (Tr. 1070). He also openly opposed the Union during the campaign. (See Tr. 1590–1593.) Thus, he had both a pecuniary and a personal interest in testifying for the Company. Finally, as discussed below, he gave incredible testimony with respect to various other matters, including the events leading to the May 27 discharge of Waller.

Accordingly, notwithstanding their own interests in the outcome of this proceeding, I credit Hooven and Wise and find that the General Counsel has adequately established, by a preponderance of the evidence, that Henderson made the alleged statements to them. I further find that the statements to Hooven and Wise violated the Act. The mine-closure statements were unlawful for the same reasons discussed above with respect to Henderson's other, similar statements. As indicated by the General Counsel, the “keeping a list” statement to Hooven was likewise unlawful, as it suggested that the Company intended to take unspecified reprisals against employees who had openly supported the Union in the election.<sup>34</sup>

<sup>33</sup> Neither Hooven's affidavit nor the NLRB's letter to the Company describing the allegations against Davis were introduced into the record.

<sup>34</sup> The General Counsel does not contend that this statement unlawfully created an impression of surveillance. See generally *United Charter Service, Inc.*, 306 NLRB 150 (1992).

*f. Henderson's other alleged statements*

The General Counsel also alleges that Henderson made numerous other unlawful statements of a similar nature to or in the presence of Gibby, Shepherd, and Hooven from about mid-April to May 20, 2011. One of these allegedly occurred in mid-May, and the others on “more precise dates unknown to the General Counsel.” However, it is unnecessary to delay a decision to address these allegations as they involve the same individuals as similar violations already found above, and the General Counsel failed to call corroborating witnesses or offer other substantial evidence that Henderson’s additional statements were heard or disseminated to other unit employees. Thus, the additional alleged violations would be cumulative and add nothing of significance to either the scope of the cease and desist order or the justification for the requested *Gissel* bargaining order. See, e.g., *Regency House of Wallingford, Inc.*, 356 NLRB No. 86, slip op. at 6 fn. 15 (2011); *Evergreen America Corp.*, 348 NLRB 178 fn. 3 (2006); and *Abramson, LLC*, 345 NLRB 171 fn. 1 (2005).

2. Section Foreman Bowlin

The General Counsel also alleges that Bowlin, another section foreman and admitted supervisor, made an unlawful mine-closure statement to an employee during the campaign. In support of this allegation, the General Counsel presented the testimony of Frailey. Frailey has worked at the mine for 8 years, and was assigned to Bowlin’s crew and unit (B crew, unit 4) during the relevant period. (Tr. 1007.)

Frailey testified that the conversation occurred about 3 weeks before the election, when he was underground working by himself cutting a crosscut. He testified that

we had some free time, the belts went down and I had backed the miner up out of the cut and [Bowlin] had come over to me and said I need to talk to you. And so he proceeded on telling me, you know—I was like what about you know? And he said, well, I want to tell you about the Union. . . . He just was talking against it, things like that, and was telling me that if we voted the Union in, that they would shut the mine down. So then I asked him, well, how do you know? He said, well, I have 30-something years and he said I’ve seen it happen before. They’ll shut the mine down. . . . He went on with the conversation that if they did vote the Union in—or we did vote the Union in, that within a year, that the mine would be shut down. [Tr. 1008–1010.]

I credit Frailey’s testimony for several reasons. First, Bowlin confirmed that he and Frailey had a conversation about the Union, as well as some of the details in Frailey’s account. (See Tr. 1916) (confirming that he said something about being around a long time). Second, Bowlin initially offered only a weak denial that he had made the alleged statement about the mine shutting down. See *id.* (“not that I recall;” “I don’t recall that”). Third, Bowlin’s own description of the conversation did not have the ring of truth. Thus, he testified that Frailey initiated the conversation about the Union and asked him what he “thought about what was going to happen.” Bowlin testified that “I told him I couldn’t comment on that, and I said he’d have to make up his own mind.” (Tr. 1916.) However, as pre-

viously discussed, the clear weight of the evidence, including the Company’s own campaign guidelines (GC Exh. 14), indicates that the section foremen were expected by the Company to initiate contact with their employees and share their negative experiences with and opinions about the Union. Fourth, Bowlin subsequently acknowledged that he did, in fact, tell other employees about his experiences with the UMWA, when he was asked by the employees (Tr. 1917). Thus, it is unlikely he would have refused to do so with Frailey.

Finally, there are no substantial reasons in the record to discredit Frailey. While the Company’s poll results indicate that Frailey was believed by his supervisors to be in favor of the UMWA (GC Exh. 8 (B crew)), there is no other evidence of Frailey’s union sympathies to corroborate the polls, which as previously discussed are clearly hearsay as to whether Frailey was actually a union supporter. In any event, the Employer does not contend that Frailey should be discredited for this (or any other) reason, and I would credit Frailey even assuming the Company’s polls were accurate. See fn. 3, above.

Accordingly, I find that the General Counsel has adequately established by a preponderance of the evidence that Bowlin made the alleged statement to Frailey. Like Henderson’s mine-closure statements, I also find that the statement violated Section 8(a)(1) of the Act, as it was unqualified, without any expressed factual context or objective basis beyond the Company’s control.<sup>35</sup>

3. Compliance Supervisor Clarida

The General Counsel also alleges that Compliance Supervisor Clarida (likewise an admitted supervisor) made an unlawful mine-closure statement during the campaign. In support of this allegation, the General Counsel presented the testimony of Kirkman. As previously discussed above in the objections case, Kirkman is one of the miners’ safety representatives under MSHA. He was also briefly a steward for the Boilermakers until it disclaimed interest, and he openly supported the Union during the campaign.

Kirkman testified that, in early May, while he and Clarida were escorting an MSHA inspector underground, the two of them started talking about all the graffiti around the mine (“Vote NO,” “Vote Yes”), and how tacky it looked.

I told him that I didn’t think it needed to be there, that it looked bad and being a little bit cocky, I said it didn’t matter, we was going to win the vote anyway. . . . [Clarida] told me that if we did win the vote, that they would shut the mine down, and I told him that it was their mine, they can do with it what they want to do with it. [Tr. 504 505].<sup>36</sup>

<sup>35</sup> At the hearing, the Employer tried to cast doubt on whether Bowlin was referring to the Company or the Union when he allegedly said “they” would shut the mine down. However, Frailey testified that he was certain that Bowlin was referring to the Company, noting that Bowlin specifically stated during the course of their conversation that “Peabody would not run under a UMWA contract.” (Tr. 1016.) As indicated above, aside from citing Bowlin’s testimony, the Employer’s posthearing brief offers no specific reason why Frailey’s testimony in this or any other respect should be discredited.

<sup>36</sup> Union President Fort testified that Kirkman told him about Clarida’s statement the next day, in the bathhouse (Tr. 118). Although

Again, I credit Kirkman's testimony. Like Bowlin, although Clarida denied that he made the alleged statement, he confirmed that he had such a conversation with Kirkman during the MSHA inspection. He also confirmed some of the details of the conversation. (See Tr. 1923) ("We were kind of laughing because everywhere you looked you saw vote no, vote yes, vote no. We were commenting about that."). Further, he gave inconsistent testimony on cross-examination about other details. Thus, he testified that both he and Kirkman thought the graffiti looked bad, but would only acknowledge that Kirkman "could [have]" commented about it looking bad. It is not clear how Clarida could have known Kirkman thought the graffiti looked bad if Kirkman did not say so. Clarida also gave weak testimony as to other details. Thus, he testified that he "did not remember" Kirkman saying that the graffiti was unnecessary because the Union was going to win anyway, but acknowledged that there was a "possibility" Kirkman said that. (Tr. 1926.) Finally, as discussed earlier, Kirkman gave credible testimony in the objections case.

Accordingly, I find that the General Counsel has adequately established by a preponderance of the credible evidence that Clarida made the alleged statement to Kirkman. I also find that the statement violated Section 8(a)(1) of the Act. Like the mine-closure statements by Henderson and Bowlin, it was unqualified, without any expressed factual context or objective basis beyond the Company's control. Further, as discussed earlier, contrary to the Employer's contention, it makes no difference that Clarida only supervised nonunit salaried workers and did not himself have the authority to shut down the mine.

#### 4. Fill-In Mine Manager Hendricks

The General Counsel also alleges that Hendricks, a fill-in mine manager and admitted supervisor, made an unlawful statement to an employee. In support of this allegation, the General Counsel presented the testimony of Gibbons (Gibby's brother). Gibbons has worked at the mine for 7 years and is on B crew. He was an open union supporter during the campaign. He did not wear UMWA stickers on his hat because he is an EMT. However, he had pronoun stickers on his dinner bucket, which he hangs on a roof bolt close to where he works. (Tr. 439, 454.)

Gibbons testified that the alleged statement was made on May 15 or 16, the last or second to last day his crew worked prior to the election. Gibbons testified that he was working by himself setting the miner up on unit 1, when Hendricks

come up and exchanged pleasantries briefly[.] [A]nd he asked me if I was still supporting the Union, if I still planned on voting yes. I told him yeah, and then he said, well, you know what they're saying. He said you might be voting your job away, voting yourself out of a job, something like that. . . . I told him I didn't give a damn. I said I'd as soon shut the damn doors on the place because they've been screwing us ever since we've been there. [Tr. 440-441.]

Hendricks denied having such a conversation with Gibbons or making the alleged statement. Although he admitted having daily conversations with Gibbons during that period, he testified that he never brought up the Union because he knew what Gibbons' intent was. (Tr. 1774, 1777.)

I find that Gibbons' testimony is more worthy of belief. As discussed above, the Company's election conduct guidelines specifically instructed the supervisors to make "one-on-one contact" with each employee during the last shift before the election and encourage them to vote "NO" (GC Exh. 14, p. 5). There was no exception listed for employees who had openly supported the Union up to that time. Thus, as it is undisputed that the crew was not scheduled to work on May 17, 18, and 19, Hendricks would have violated the Company's instructions if he did not have a conversation about the Union with Gibbons on May 15 or 16.

Further, Hendricks did not impress me as a particularly reliable witness generally. For example, as previously noted (fn. 24), he initially denied that the Company's "union free" meetings were mandatory, but later admitted that there were no other options. In contrast, Gibbons impressed me as a credible witness overall.<sup>37</sup>

Accordingly, I find that the General Counsel has adequately established by a preponderance of the evidence that Hendricks made the alleged statement to Gibbons. For the same reasons discussed above, I also find that the statement violated Section 8(a)(1) of the Act.

#### 5. Group Executive Meintjes

The General Counsel also alleges that Peabody Group Executive Meintjes made an unlawful statement that impliedly promised to pay for an employee's education if the Union lost the election. Meintjes allegedly made the statement to Hooven in mid-May. Hooven testified that he had asked for, and was granted, the opportunity to talk personally with Meintjes near the dinner hole after one of the captive-audience meetings. During the course of their conversation about the union campaign, Hooven mentioned that he only had a high school degree, and still needed a few credits to get an associates degree. Meintjes replied that it would be good for him to finish school

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this testimony was at least arguably nonhearsay under FRE 801(d) (out of court statements offered to rebut an express or implied charge of recent fabrication), in response to the Employer's hearsay objection, counsel for the General Counsel stated that Fort's testimony was being offered only to establish "dissemination" (which became the code word and signal throughout the hearing that evidence was being offered solely to support issuance of a *Gissel* bargaining order). Indeed, counsel made this statement even knowing that Fort's testimony was corroborated by Kirkman (and thus would have been admissible under Board law even if it was hearsay). See Tr. 118, 505. Accordingly, and as the General Counsel's posthearing brief does not cite Fort's testimony in support of the allegation, I have given it no weight.

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<sup>37</sup> Contrary to the Employer's posthearing brief (p. 23), Gibbons' pretrial affidavit did not state that the conversation with Hendricks occurred on May 18. The affidavit stated that the conversation occurred "a day or so before the election, I can't recall a more specific date." Gibbons credibly testified that, when he gave the statement to the NLRB investigator, he had forgotten that he had 3 days off before voting, i.e. that it was actually one or two work days before the election. (Tr. 454.)

and get a degree in mechanics or electrical work because the Company always needed mechanics and electricians.

And . . . I said, well, I haven't been to the school, the maintenance school or anything. And [Meintjes] said, well, if this was a non-union coal mine, . . . I could put you through school. He said maintenance school is [where to] get your electrical card because I told him I didn't have my electrical card, either. And he said I could put you through school, but he said . . . because it's union . . . my hands are tied. [Tr. 717–719, 747–752.]

Hooven testified that Mine Superintendent Hood was also present and heard the entire conversation (Tr. 747).

The Employer did not call either Meintjes or Hood to testify. Hooven's testimony therefore stands un rebutted.<sup>38</sup> Accordingly, as there is no other substantial basis to discredit Hooven's account, I find that Meintjes made the alleged statement to Hooven.

I further find that that the statement was unlawful. The Employer argues that Hooven admitted that the conversation was cordial and that Meintjes made no overt promises or threats (Tr. 764). However, the General Counsel alleges that the statement was an *implied* promise of benefits if the Union lost the election. And the law supports the General Counsel's allegation. See, e.g., *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980); *Ranco Inc.*, 241 NLRB 685, 685 (1979); *Hanover House Industries*, 233 NLRB 164, 168 (1977); and *Sandy's Stores, Inc.*, 163 NLRB 728, 735 (1967), *enfd.* in relevant part 398 F.2d 268 (1st Cir. 1968). The Employer's posthearing brief does not address any of this case authority. Nor does it cite any contrary authority. Accordingly, I find that the statement violated Section 8(a)(1) of the Act as alleged.<sup>39</sup>

#### 6. Mine Manager Francescon

The General Counsel also alleges that Francescon, an A-crew mine manager and admitted supervisor, made an unlawful statement. In support of this allegation, the General Counsel presented the testimony of Bevis, and employee on Francescon's crew. Bevis testified that, in late May, shortly after the election, he and Francescon were having a personal conversation and Francescon "said he hopes between all the voting and everything else that went on up at the mine, that we all don't lose our jobs" (Tr. 837).

<sup>38</sup> As indicated by the General Counsel, the Employer's failure to call Meintjes in these circumstances also warrants an adverse inference that his testimony would not have been favorable to the Employer. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* mem. 861 F.2d 720 (6th Cir. 1988). However, I would reach the same conclusion regardless.

<sup>39</sup> Although the Employer's answer denied that Meintjes is a supervisor or agent of the Company within the meaning of the Act, the Employer's posthearing brief does not argue for dismissal on this ground. Further, it is undisputed that Meintjes is employed by Peabody (Tr. 1486), the Employer's parent company. Accordingly, in agreement with the General Counsel, I find that, at a minimum, Meintjes is an agent of the Employer within the meaning of Sec. 2(13) of the Act. See generally *D & F Industries*, 339 NLRB 618, 619 (2003) (Board applies common law agency principles in determining whether an employee is an agent of an employer).

Bevis, however, was an extremely poor historian. For example, although he initially testified that Francescon referred to "the voting," he later testified only that Francescon "probably" referred to the voting (Tr. 863). He also subsequently testified that he was not sure if Francescon actually said "everything going on" ("It's been so long ago . . . I—I don't know the exact words but that was my—I put them words in there, you know"). Further, he testified that it was his "impression" that Francescon was referring to things such as the mine's low production and recent problems with MSHA (Tr. 859).

Moreover, although Francescon admitted having a conversation with Bevis, he likewise could not recall exactly what was said. And he confirmed Bevis' "impression" that he referred to the mine's poor production and safety record. (Tr. 1706.)

Accordingly, I find that the General Counsel has failed to prove this allegation by a preponderance of the evidence. The allegation is therefore dismissed.

#### 7. Schmidt, Hood, and Benner

The General Counsel also alleges that Operations Manager Schmidt, Mine Superintendent Hood, and Peabody Vice President Benner impliedly promised that employees' terms and conditions of employment would improve if the Union lost the election.<sup>40</sup> Specifically, the General Counsel alleges that, following the Company's third and last captive-audience "union free" meeting in mid-May, Schmidt, Hood, and Benner told Gibby that employees did not need a union—that management could do more for employees and treat them better without a union—and that Schmidt also said that he wanted to pay employees better but he could not now because he was bound by a contract. (GC Br. 58.)

I find that the General Counsel has failed to adequately prove this allegation as well. There is no dispute that Gibby stayed after one of the captive audience meetings and expressed concern to Schmidt and Benner that his mine manager (Francescon) was trying to get him fired. There is also no dispute that a conversation ensued, not only about Gibby's expressed concern, but also about the union campaign in general. However, both Schmidt and Benner denied that they said anything significantly different during the conversation than what they had said at the meeting (Tr. 1460–1462, 1808–1812, 1827). Further, although both Gibby and Shepherd (who was also present during part of the conversation) testified to the contrary, their separate accounts about various other details of the conversation raise substantial doubts as to the accuracy of their recollection of this particular event. For example, their testimony differed as to who reassured Gibby that Francescon could not fire him (Shepherd said it was Benner; Gibby said it was Human Resources Senior Manager Gossman, who he said was also there); how many or which other employees were present during the first half of the conversation (Shepherd said two, including Hooven; Gibby said about five and did not list Hooven among them); who specifically made the alleged statements (Gibby said "they" made the first statement without

<sup>40</sup> The complaint also includes an additional allegation involving Schmidt (par. 5(H)). However, the General Counsel has withdrawn that allegation (GC Br. 63).

specifying who made it; Shepherd said that Schmidt and Benner made the statements; and neither specifically testified that Hood made the statements); and when during the conversation the statements were made (Shepherd said both were made while he was there; Gibby said the second was made after Shepherd and the other employees had left). (Tr. 932–938, 1222–1225, 1243–1245.)

There were similar inconsistencies between the testimony of Schmidt and Benner. For example, Benner agreed with Gibby that the conversation occurred after the third and last meeting (Tr. 1475), but Schmidt testified that it was after the second (Tr. 1806). (Shepherd was never asked.) On the other hand, Schmidt agreed with Gibby and Shepherd that Gibby initially raised his concern about Francescon during the meeting, and was asked to hold it until after the meeting (Tr. 1807, 1822); but Benner testified that Gibby first raised his concern after the meeting (Tr. 1473–1474). Like the inconsistencies between Gibby and Shepherd, these inconsistencies raise doubts about the reliability of their recall of the event. However, as indicated above, it was the General Counsel's burden to prove that unlawful statements were made by a preponderance of the evidence. That burden was substantially more difficult in this instance, as it was not a brief conversation (according to Gibby, it lasted for at least 30 minutes), and both Gibby and Shepherd confirmed that Schmidt and Benner did, in fact, repeat the same things during the conversation that they had stated during the meeting (the lawfulness of which have not been challenged). (Tr. 938, 992, 1225.)

In short, given all the foregoing circumstances, more was required to prove that the statements made by Schmidt, Benner, and Hood during the conversation actually violated the Act. Perhaps the burden could have been met with additional witnesses, such as Hooven (if he was there) and/or one or more of the other employees (if more than one other was there). But, none were asked to testify about the conversation. Accordingly, this allegation is likewise dismissed.

#### *B. Unalleged 8(a)(1) Violations (Shift Leader Davis)*

The General Counsel's posthearing brief also requests that 8(a)(1) violations be found based on certain unalleged statements made by Shift Leader Davis; specifically: (1) statements Davis made to Hooven in mid-May that the Company was keeping a list of employees who wore union shirts and hats, that he needed to watch his back, and that he had an "X" on his back (see fn. 29, above); and (2) statements Davis subsequently made to Hooven after learning what Hooven had alleged about him in his NLRB affidavit (see part II,A,1,e, above). The General Counsel argues that the Employer was put on notice that such violations might be found when the General Counsel amended the complaint on the fifth day of hearing to allege that Davis was an agent of the Employer (Tr. 1117). The General Counsel further argues that the unalleged violations were, in fact, fully litigated.

I reject the General Counsel's arguments. First, the mere fact that Davis was added as an alleged agent was not sufficient to give the Employer notice that the foregoing incidents would be alleged as 8(a)(1) violations. The complaint alleges a total

of 50 named individuals as supervisors and agents of the Employer, and the vast majority of them are not, and never were, the subject of any alleged violations in this proceeding.

Second, like these other alleged supervisors and agents, there were alternative reasons for the General Counsel to allege Davis to be an agent. For example, as discussed below, he played a central role in one of the incidents cited by the Company in support of Waller's discharge. It was therefore important for the General Counsel to establish his status as a Company agent (which I find below he clearly was) to support the General Counsel's contention that the Company did not really believe Waller had committed the alleged offense or that it warranted any discipline.

Third, Hooven had already testified about the incidents at the time the General Counsel offered the agency amendment. Thus, there was no apparent reason why the incidents would not have been added to the complaint as well if that was the General Counsel's intention.

Fourth, there were many possible reasons why the General Counsel might have chosen not to amend the complaint to allege the additional violations; for example, because the evidence was insufficiently corroborated; because the violations would be cumulative and have no significant effect on the remedy and order; and/or because there is a need for a prompt resolution of the consolidated representation case.

Fifth, the General Counsel did, in fact, specifically amend the complaint around the same time to allege numerous other 8(a)(1) violations by other supervisors and agents, including the allegations against Bowlin and Francescon, and additional allegations against Henderson. (See Tr. 925–927; GC Exh. 1(t).) *Expressio unius est exclusio alterius*.<sup>41</sup>

Sixth, it cannot reasonably be concluded that the unalleged violations were fully litigated. The facts underlying both emerged only incidentally during the hearing, relative to Hooven's overall credibility. Had the Employer been given adequate notice that the conversations were actually being alleged as violations to support a cease and desist and *Gissel* bargaining order, it might very well have chosen to alter its litigation strategy and/or present additional evidence to rebut the General Counsel's evidence. It also most certainly would have addressed the allegations in its posthearing brief (which it did not).

Accordingly, the General Counsel's request to find that Shift Leader Davis' statements to Hooven violated 8(a)(1) is denied. See *Dilling Mechanical Contractors, Inc.*, 348 NLRB 98, 105 (2006); *Stagehands Referral Service*, 347 NLRB 1167 (2006); *Allied Mechanical Services, Inc.*, 346 NLRB 326, 329 (2006); *Desert Aggregates*, 340 NLRB 289, 292 (2003); and *Mine Workers District 29*, 308 NLRB 1155, 1158 (1992). See also *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir.

<sup>41</sup> At the end of the hearing, counsel for the General Counsel also made a general motion to amend the complaint "to conform to the testimony and evidence." However, I denied the motion as too vague and nonspecific, and counsel declined to offer any more specific amendments. (Tr. 2134–2136.)

1987); and *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983).<sup>42</sup>

*C. Alleged 8(a)(3) Discharge of Waller*

The General Counsel's last allegation is that the Employer discharged Waller in violation of Section 8(a)(3) of the Act.

1. Factual background

As noted earlier, the Employer terminated Waller on the morning of May 27, the day after it filed its objections to the election. The Employer had begun collecting statements from employees to support the objections several days earlier. (Tr. 346; CP Exh. 6.) During the same period, the Employer also collected statements from employees and supervisors about certain additional alleged incidents involving Waller that occurred shortly after the election. Altogether, the following eight statements were collected that alleged or referenced conduct by Waller (GC Exh. 9):

1) May 26 statement by employee Pezzoni:

I was shift leader on left side. Unit was down. Had to pull up miner cable. Had [ ] Koerner helping. [ ] Waller and another walked by and said to you better vote UMWA or a scab like you won't work here. I told him to vote whatever he wanted to. Just keep it to himself. This all occurred about two weeks before we voted.

2) May 26 statement by employee Koerner:

I . . . received threatening phone call pertaining to upcoming union election. Was told be concerned about family and also things could happen underground to look like accident. Better vote UMWA. Also several comments made if union gets in we will take care of scabs. Also had 2001 Dodge Ram Truck had scab scratched in side of door.

3) May 26 statement by employee Kirk.

I had on 2 separate occasions where I thought someone that was prounion tried to intimidate or threaten me because of my opinion. On the first, [ ] Waller worked a midnight shift. He did not talk to me directly but talked to someone about me loudly and at a distance of 2 feet. He stated that he should pick something up and hit that scab motherfucker, that's how you deal with fucking scabs. That if I thought he was an old man he would pick up something and beat the fuck out of that scab motherfucker. . . .

4) May 23 statement by Safety Supervisor Schiff:

On 5/20/2011, at the start of the 2nd shift, [ ] Waller came into the bath house and started yelling: Fuck all you fucking scabs!

5) May 21 statement by Mine Manager Lawrence:

On 5-21-11 . . . Koerner came in the [mine manager's] office and said someone had scratch 'Scab' on his truck. I went outside and took picture of his truck. This happened on 5/20/22 2nd shift.

[On] 5-21-11 at about 3:10 p.m. . . . Koerner came in the office and said that he was afraid to go underground. I asked him what was wrong, one of the guys from his unit told him to watch out for [ ] Waller. He also said that someone was giving him a bad time.

He said that he has had phone calls before the election. They said to watch out for your family. And that they would take care of things underground and make it look like an accident. [ ] Waller also told him that he could flag him all he wants and he would not stop.

6) May 21 statement by employee Craig.

I was sitting in staging area in front of the food machine talking to [ ] Wiggins when [ ] Waller confronted me about a few Facebook comments. He said "hey [Craig] I hear you have a potty mouth on that Facebook." I said yeah. He then said "my wife didn't appreciate that especially since you were directing it toward me." I said I never directed anything at anyone on there. He went on to say "fuck you scab fuck you I'll find you in the parking lot you scabby bastard."

He then left and within a minute he came back to a face to face confrontation and said "anytime you want a piece of this old man come get it." I then told him again I never said anything about him or anyone explained myself and then he walked away.

This was witnessed by [ ] Koerner, [ ] Wiggins, and [ ] Easley.

7) May 26 statement by employee Easley:

On about Saturday the 21st I seen [ ] Craig and [ ] Waller having a verbal confrontation by the vending machines. Some words were exchanged on both sides. [Waller] went back into the bathhouse and a few minutes later came back out and told [Craig] they could go out to the parking lot or something to that manner.

8) May 26 statement by Human Resources Senior Manager Gossman:

This morning I talked with [ ] Koerner about his witnessing an incident with [ ] Waller threatening [ ] Craig. Koerner did confirm that he had heard Waller tell Craig that he didn't appreciate his language on Facebook and that his wife had been offended when reading it. Craig had replied that he had not directed anything toward Waller or his wife and didn't understand why he would be upset. Waller got angry and told Craig he would catch him in the parking lot and take care of the matter. After that comment Waller left the area. Within a few minutes Waller returned and told Craig that he should meet him in the parking lot and that if he wanted a piece of this old man just come and get it.

<sup>42</sup> I find that the Board's recent decision in *Bruce Packing Co.*, 357 NLRB No. 93 (2011), is distinguishable, as the 8(a)(1) allegation there had been fully litigated.

On the afternoon of the 26th, Gossman reviewed the information in the foregoing statements with Peabody Vice President Benner.<sup>43</sup> Benner gave Gossman “a green light” to discharge Waller after offering him an opportunity to deny or explain the allegations.<sup>44</sup>

Early the following morning, around 7 a.m., when Waller arrived for his shift, he was immediately escorted to Gossman’s office. Gossman advised Waller that he had heard that he had been threatening employees. He specifically mentioned the most recent alleged incident with Craig, which Waller generally admitted, although he said they both had said “Fuck you” to each other, and that he referred to meeting Craig “out in the road” rather than in the parking lot. Gossman also asked Waller if he had ever “threatened an employee that he would not stop his coal hauler for him no matter how much the employee flagged him down.” Waller denied that he had ever done that or would ever do that. Gossman also asked Waller if he had yelled “Fuck all you fucking scabs” in the bathhouse, and Waller denied that as well. Gossman then asked Waller if he had told an employee that “you better vote UMWA or a scab like you won’t work here anymore.” Waller denied that too.

At that point, Gossman decided there was no point asking Waller any more questions and handed him his termination letter, which he had prepared prior to the meeting. In its totality, the letter stated as follows:

There have been several reports of certain employees threatening or intimidating other employees in the last several weeks. As you are aware this type of behavior is prohibited by Company policy. During our investigation of the allegations you were implicated in this type of behavior. There are numerous witness accounts and several occasions where threats and/or intimidation appear to have been employed.

As stated above, this type of behavior is contrary to Policy and will not be tolerated. For these reasons your employment with Big Ridge, Inc. Willow Lake mine is terminated effective immediately.

<sup>43</sup> The General Counsel alleges, the Respondent’s posthearing brief does not dispute, and I find, that Benner is at least an agent of the Employer within the meaning of Sec. 2(13) of the Act. See generally *D & F Industries*, 339 NLRB at 619.

<sup>44</sup> These facts are necessarily based on the testimony of Gossman and Benner, the only two witnesses to testify about their May 26 conversation. It is again noteworthy, however, that there are several inconsistencies in their accounts. For example, Gossman said he reviewed the information with both Benner and Operations Manager Schmidt, who both participated in the meeting by conference call, and that the three of them together made the decision to terminate Waller (Tr. 317, 319, 321–324, 2131). Benner, however, said that he was present at the mine that day and met with Gossman face-to-face; that his boss (Burggraf), Peabody Group Executive Meintjes, and the Employer’s lead counsel (Garnett) and another attorney (Steffensmeier) participated in the meeting by conference call; and that he (Benner) made the decision to terminate Waller. Further, Benner did not mention Schmidt being present, either in person or by phone. (Tr. 1462–1463, 1466, 1478, 1486, 1508.)

(GC Exh. 23.) Waller responded that he could not believe what was happening, and the meeting ended. He was then escorted to the parking lot with the personal effects from his basket.<sup>45</sup>

## 2. Legal analysis

The General Counsel argues, and the Employer does not dispute, that the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is the appropriate test for evaluating Waller’s discharge.

Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the [discharge]. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.

If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee’s union activity. To establish this affirmative defense, “[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.”

*Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007) (citations omitted). See also *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011).

<sup>45</sup> The foregoing summary of the meeting is based on the written account Gossman prepared shortly after the meeting (GC Exh. 9, p. 8), Gossman’s testimony (Tr. 317, 321–322, 402, 1930–1933), and Waller’s testimony (Tr. 573–575, 632–639). Although Waller testified that Gossman asked him if he had “threatened to run over somebody if they kept flagging,” this is essentially consistent with Gossman’s written account, i.e. even assuming that Gossman’s account is accurate, it would reasonably be interpreted the way Waller described it. However, I discredit Gossman’s account that Waller responded only that he “did not know anything about that.” Although such a limited response would not be inconsistent with Waller’s testimony that he did not know what Gossman was talking about—since Gossman did not offer any details and Waller had never threatened to run over anyone with his coal hauler—I credit Waller’s testimony that he also flatly denied that he did, or ever would do, such a thing. Finally, contrary to the Employer, I find no significance in the fact that, according to Gossman’s account, when he told Waller there were “a lot of” witnesses to the alleged incidents, Waller responded that he was “aware” of that. First, Waller admitted to the incident with Craig in the staging area, and thus obviously had personal knowledge that there were witnesses. Second, Gossman had revealed that one of the other alleged incidents occurred in the bathhouse. Third, it is undisputed that, in fact, there were *no* witnesses to the alleged “flagging” incident between Waller and Kerner at the feeder—which as discussed *infra* has now evolved into the Employer’s primary justification for Waller’s discharge. In any event, given the context of the conversation, it is clearly unreasonable to conclude that Waller’s response was an admission that his prior denials were false, rather than simply an acknowledgment that the Company had apparently found “a lot of” employees to make allegations against him.

Applying the foregoing analysis, for the reasons set forth below, I find that Waller's discharge violated Section 8(a)(3) of the Act as alleged.

*a. Waller's union activity*

There is no dispute that Waller actively and openly supported the UMWA during and after the campaign. He frequently wore a camouflage UMWA shirt back and forth to work. He put 8–10 UMWA stickers all over his hardhat. He even put on one of the Company "VOTE NO" stickers and covered up half of it to read "VOTE UMWA." He also distributed at least 100 UMWA stickers to other employees. And, as discussed above, he wrote and sang a derogatory song at the mine about "scabs" who did not support the UMWA. (Tr. 79–82, 236, 447, 507, 526, 554–559, 651, 732, 840, 881, 885.) In short, although many other employees also openly supported the UMWA, and Waller himself did not claim to be the UMWA's strongest supporter, there is abundant evidence confirming that he was, in fact, one of the strongest and most outspoken UMWA supporters at the mine (Tr. 84, 731).

*b. Employer's knowledge of Waller's union activity*

It is also undisputed that both Gossman and Benner were well aware of Waller's strong and open support of the Union prior to terminating him. Both of the Company's preelection polls, which Gossman kept in his desk, identified Waller as prounion. (See GC Exh. 8 (A crew); and Tr. 29.) Further, as indicated above, several of the statements Gossman gathered and reviewed with Benner specifically mentioned Waller's strong prounion sympathies and/or alleged conduct related to his prounion activities. (See also Tr. 1466.) Finally, the Employer filed objections to the election based in substantial part on those allegations the day before discharging Waller.

*c. Employer's antiunion animus*

The Employer's antiunion animus is also well established by the record. As discussed above, the Employer mounted an aggressive antiunion campaign in response to the UMWA's demand for recognition and election petition. Further, both before and after the election, several supervisors and managers at various levels, including Section Foremen Henderson and Bowlin, Compliance Supervisor Clarida, Fill-In Mine Manager Hendricks, and Peabody Group Executive Meintjes, unlawfully threatened or promised benefits to employees.

Moreover, there is strong circumstantial evidence that the Employer's antiunion animus motivated the decision to discharge Waller. See generally *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935–939 (D.C. Cir. 2011) ("most evidence of motive is circumstantial"); *NLRB v. Union-Tribune Publishing Co.*, 1 F.3d 486, 489–493 (7th Cir. 1993) ("circumstantial evidence that a dismissal was improperly motivated may be sufficient"); and *NLRB v. Advance Transportation Co.*, 965 F.2d 186, 190–194 (7th Cir. 1992) ("The Board is free to rely on circumstantial as well as direct evidence in assessing motive.").

First, by all accounts Waller was a good employee. He was hard-working, experienced, dependable, well-liked, and willing to fill in on his days off (Tr. 258–259, 269, 315–316, 446, 554, 659, 838, 1518, 1669). Although he had a reputation for being loud (which, again, Waller himself freely admitted), he did not

have a reputation for being violent (Tr. 159, 341, 605). Further, until his discharge, he had never been called into the office or disciplined for even the slightest infraction, safety-related or otherwise, over the entire 7 years of his employment at the mine (Tr. 314, 568, 664).

Second, heated arguments and angry confrontations in which employees threatened to physically injure each other were both common, occurring weekly if not daily, and well tolerated at the mine (Tr. 103–104, 161–162, 197–200, 218, 507, 525, 693, 871, 894, 1290, 1295, 1571, 2097–2098). It is undisputed that, since 2002, when Peabody acquired the Willow Lake mine (Tr. 1339), the Employer had *never* prohibited or discharged any other employee for such conduct in the absence of any significant physical contact (Tr. 89, 378, 395–396, 525, 576, 1274, 1786–1787).

Indeed, the General Counsel presented several specific examples where managers or supervisors were aware that an employee had threatened to physically injure another employee, but either no discipline or only a 3-day suspension was issued. One example was an undisputed incident in early 2010 when an employee (Lane), who already had a longstanding reputation as a hothead, got mad and told an employee that he would shoot him if he had a gun in his truck, simply because the employee had insisted that Lane put his reflective vest on. Although the employee later reported this to his supervisor, and Lane subsequently admitted it, no action was taken against Lane. (Tr. 1025, 1031–1035, 1274–1277, 1286–1287.)

Another, more-recent example occurred in early May, when an employee (Tadlock) got mad at another employee (Crissup) for calling him a "fucking scab" during a work related argument. When Tadlock saw Crissup later in the office, he told Crissup he had "just made a great enemy," that he would "not always be here," and that he would "catch" Crissup off the property and "beat your guts out." Although Section Foreman Carter witnessed the incident, no disciplinary action was taken against Tadlock.<sup>46</sup>

Another recent example involved a confrontation on July 11 between Maintenance Supervisor Hilliard and Section Foreman Stephenson in front of Mine Manager Hughes. Hilliard was upset with Stephenson over a work-related issue earlier that day and started yelling at him in the dinner hole. When Stephenson made a comment to Hughes that "I don't have to put up with this," and that he was "going to the front office tonight after

<sup>46</sup> The foregoing account is based on the credible testimony of Crissup, as well as employee Cole, who witnessed the incident and generally corroborated Crissup's testimony (Tr. 214–217, 226, 668–675, 684–685, 701–702, 710–711). See also Tr. 374–375, 378, 2127. Carter also confirmed much of Crissup's and Cole's accounts, including that there was a confrontation between Tadlock and Crissup. Although Carter attempted to minimize the incident, his inconsistent answers to several questions raise substantial doubts about his testimony. For example, he initially testified that he had to separate them (Tr. 1562–1563), but later denied that he physically separated them (Tr. 1567). Similarly, he initially testified that they were just arguing and cussing at each other and did not make any threats (Tr. 1562–1563), but subsequently testified that he had "no recollection" of what Tadlock said to Crissup (Tr. 1568). Accordingly, I discredit Carter to the extent his testimony differs with Crissup and Cole.

work,” Hilliard came over and said, “Don’t talk behind my Goddamn back. I’ll kick your fucking ass. I’m going to quit here one of these days, and when I do, I’m going to come and look you up, son.” Stephenson replied, “Well, I’m not fucking hard to find,” and said to Hughes, “I have two witnesses that heard him threaten me.” Hilliard replied, “That’s not a threat; that’s a promise. If you want to walk around the corner, we can settle this now.” The argument died down at that point, and no disciplinary action was taken against Hilliard.<sup>47</sup>

Other examples include two recent incidents in March and July 2011, where the Employer issued only 3-day suspensions to two employees (Bryan and Ashby) even though they actually made physical contact during their heated arguments with other employees. (See GC Exhs. 10–11; and Tr. 93, 98, 377–384.)<sup>48</sup>

<sup>47</sup> The foregoing account is based on the credible testimony of employee Bishop, who witnessed the incident (Tr. 245–250). Stephenson also testified about the incident, and confirmed that Hilliard was upset with him and called him an “ass” or “asshole.” He also confirmed that Mine Manager Hughes was present and said something to Hilliard. However, Stephenson otherwise attempted to minimize the incident and denied that Hilliard had made any threats, claiming that he has trouble hearing and did not hear what Hilliard said. (Tr. 1904–1909.) I discredit his testimony in this respect. It is not only unbelievable on its face (he exhibited at most mild difficulty hearing on the witness stand) but also contrary to what he told another employee (Mocaby) shortly after the incident (Tr. 2112–2114). Further, Stephenson gave similarly evasive and incredible testimony on other matters as well. For example, as discussed above, the Company’s election conduct guidelines specifically instructed the supervisors to make “one-on-one contact” with each and every employee before they voted and encourage them to vote “NO.” (GC Exh. 14.) Nevertheless, when I asked Stephenson if the Company had ever encouraged him to talk to employees about his opinions of the UMWA, Stephenson replied:

A. No, not really. I mean, yes—but—

Q. No, yes?

A. Yes.

Q. In what way?

A. Just, you know—I mean, other than meetings—as far as personal one on one, no.

Q. No what?

A. No, I didn’t get involved in that.

Q. My question was did the Company encourage you to get involved in it, by talking to other employees about your opinion of the UMWA?

A. They talked to us about, you know, what’s going on, but as far as encouraging us to do it all the time, no. [Tr. 1912.]

<sup>48</sup> The General Counsel also presented evidence of several other, less recent examples. One of these involved an actual physical confrontation in 2007 between Mine Managers Francescon and Ward in the bathhouse. According to employee Holman, one of several employees who witnessed the incident, Ward called Francescon a “suck ass,” after which Francescon grabbed Ward and threw him to the floor, twice. Neither was ever disciplined for the incident. (Tr. 522–524.) Although Francescon denied that any such confrontation ever occurred, and that he and Ward had simply stumbled over a bench while kidding around (Tr. 1704), I find that Holman’s testimony is more worthy of belief and I credit it. In another, undisputed example, which occurred in 2005, an employee (Vaughan) allegedly threatened employees that he had a 9mm gun in his truck and would go get it if he needed to. Then-Mine Superintendent Phillips (Hood’s predecessor) confronted Vaughan about this alleged incident the next day. Vaughan at that time initially denied it, but then admitted that he could have said that, because em-

Perhaps because of all the foregoing evidence, the Employer no longer even contends that most of the alleged incidents described in the eight above-quoted statements warranted Waller’s discharge. Although Gossman testified at the hearing that all of the alleged incidents in the eight statements were the basis for Waller’s discharge (Tr. 330–331, 348), the Employer’s posthearing brief does not cite any but the May 20 “flagging” incident with Koerner, i.e., it does not contend that any of the other alleged incidents involving Koerner, Kirk, or Craig set forth in the eight statements reviewed by Gossman and Benner justified Waller’s discharge. Indeed, the Employer now specifically admits that saying “fuck you” to an employee or calling an employee a “scab” is not grounds for discharge. (See Tr. 395; and Br. at 11 fn. 2.) Further, notwithstanding Gossman’s testimony, the Employer has never specifically contended in this proceeding that Waller was responsible for the anonymous phone calls or scratching Koerner’s truck. (Waller denied any involvement in the incidents (Tr. 565), and there is no evidence otherwise.)

Finally, the overwhelming weight of the evidence indicates that the Employer has never really believed that the May 20 flagging incident was anything more than a routine work dispute—certainly not that Waller actually threatened to run over or “kill” Koerner and other employees (Gossman’s words, Tr. 388) with his coal hauler. As indicated above, the alleged incident is the subject of just one sentence at the very end (almost as an afterthought) in the May 21 statement Mine Manager Lawrence submitted to Gossman. Further, the sentence simply states “Waller also told [Koerner] that he could flag him all he wants and he would not stop,” with no further details.

Moreover, Koerner did not even mention the flagging incident in his statement. Shift Leader Davis also never provided a written statement about the incident, even though he was running the unit the night,<sup>49</sup> and Koerner, who was his feeder watcher, allegedly complained to him shortly after the incident occurred (Tr. 1355, 1594–1596, 1611–1615).<sup>50</sup> Indeed, there is no evidence that Davis even bothered to talk to Waller about the incident at the time, even though he knew that Waller would continue hauling and dumping coal at the feeder throughout the remainder of the shift. Nor did he immediately report the incident to Lawrence, his mine manager that evening, the mine superintendent, or any other management official (Tr. 1597).

ployees had been teasing him. Vaughan was never disciplined; indeed, he was promoted to production supervisor a month or so later. (Tr. 872–874, 891–894.)

<sup>49</sup> The General Counsel alleges, the Employer’s posthearing brief does not dispute, and I find, that Davis was essentially employed as an acting section foreman, and was an agent of the Employer within the meaning of Sec. 2(13) of the Act, during all relevant times. See generally *D & F Industries*, 339 NLRB at 619.

<sup>50</sup> It is undisputed that, although flagging someone with a helmet light means “stop,” if there is actually someone in the approach to the feeder, the feeder watcher is supposed to blow a horn. It is also undisputed that Koerner did not blow his horn on the night of the alleged incident, or tell anyone that he had done so. (Tr. 208–209, 264–265, 1105, 1188, 1349, 1390–1392, 1450, 1543, 1614.)

Lawrence likewise did not take any action to immediately remove Waller from the workplace when he found out about the flagging incident from Koerner on Saturday, May 21, while investigating the incident between Waller and Craig. Rather, he simply filled out his written statement based on his conversation with Koerner and left it in Gossman's mailbox for Gossman to find on Monday. After briefly interviewing Waller about his confrontation with Craig and the alleged flagging incident (albeit without mentioning Koerner or where the incident occurred), he also let Waller go ahead and work on Sunday, May 22. (Tr. 84–88, 571, 1432–1437, 1445–1446; GC Exh. 4.)

Nor was any immediate action taken to remove Waller from the mine after Gossman was eventually informed of the incidents on Monday morning, May 23 (Tr. 437, 1435, 1444–1445). Waller was permitted to work on May 24, as well as on his next two regularly scheduled days off, May 25 and 26. (Tr. 357–359, 571; GC Exh. 4.)

Finally, like Koerner's own statement, Gossman's statement about his interview with Koerner on the morning of May 26 makes no mention whatsoever of the flagging incident, much less any threat to run over or "kill" Koerner or other employees. When asked about this at the hearing, Gossman testified that Koerner verbally gave him the details of the incident, including why he was flagging Waller: because "there was traffic in the area . . . other cars, could have been cars, could have been people, whatever, and he had tried to flag Waller off at the feeder." However, on further examination, Gossman admitted that, in fact, Koerner never told him anything about why he was trying to flag Waller, and that he never bothered to ask. (Tr. 360–365.)<sup>51</sup> Gossman also admitted that he never interviewed the employee who, according to Lawrence's May 21 statement, Koerner said had warned him to "watch out" for Waller.<sup>52</sup>

In sum, the preponderance of the evidence clearly indicates that the Employer never really believed that the incident was anything more than what Waller testified to at the hearing: he and Koerner simply had a disagreement over whether the feeder was too gobbled up to continue dumping his coal. Koerner "flagged" him with his helmet light to stop dumping so that it would not get gobbled up, and Waller decided to override him and continue dumping because he did not believe Koerner, who

<sup>51</sup> Lawrence gave similarly inconsistent testimony. Compare Tr. 1447 (Koerner did not tell him why he wanted Waller to stop), with Tr. 1459 (Koerner told him he wanted Waller to stop because the feeder kept "bogging out" and he had to keep going back to reset it).

<sup>52</sup> Gossman testified that he did eventually talk to the employee (Meadows) a week before the hearing. When asked by counsel for the General Counsel what Meadows said, Gossman testified:

[Meadows] said, yeah, he probably did. He was aware of the situation. He knew about the—that [Waller] had given Koerner a hard time. He himself was generally out of the way. He's a roof bolter, which means that normally he wouldn't have that much association with Waller.

Q. I'm sorry. I'm not clear. Did [Meadows] remember telling that to Koerner or not?

A. Yeah, he told me that he remembered talking to him.

Q. Okay. Did he, did he tell you that he told him beware of [] Waller?

A. No. [Tr. 372.]

was new to both the mine and feeder watching, had any idea what he was talking about, and the Company was pushing the crews to get their production numbers up. (Tr. 465, 561–563, 611–616, 1801.)

Thus, the incident had nothing to do with threatening to run over or "kill" anyone, because the car was already stopped at the feeder and dumping. Nor did it have anything to do with "safety"—a word emphasized by Gossman and Benner in their testimony but which does not appear anywhere in Waller's discharge letter—or a fear that Waller's conduct could result in a repeat of a 2010 fatal coal hauler accident at the mine. (Tr. 348, 1464–1467, 1509.) Rather, this was simply how Gossman and Benner chose to spin the incident because they knew that the other alleged incidents alone were insufficient to justify discharging Waller given the Company's history of tolerating similar or worse conduct by others unrelated to union activity.<sup>53</sup>

#### d. Employer's affirmative defense

As indicated above, the Employer argues that it would have discharged Waller even absent his union activities because his alleged statement to Koerner at the feeder ("no matter how many times you flag me I'm not going to stop") threatened Koerner and his coworkers with "possible grievous harm or death." (Br. 8.) However, in order to meet its burden under *Wright Line*, the Respondent must show that it actually had a reasonable belief that Waller threatened Koerner or other employees with such harm or death, and that it acted on that belief when it discharged him. *J. J. Cassone Bakery, Inc.*, 350 NLRB 86 (2007), citing *McKesson Drug Co.*, 337 NLRB 935, 937 (2002). See also *Robert Orr/Sysco Food Services, LLC*, 343

<sup>53</sup> To the extent Gossman, Lawrence, Davis, and Koerner gave testimony contrary to the above findings, I discredit their testimony for all the reasons set forth here and previously with respect to other alleged incidents. Among other things, therefore, I discredit Koerner's testimony that he felt threatened by Waller (Tr. 1342). Koerner admitted that he had been warned by Hooven during his feeder-watcher training that some of the drivers would continue dumping their coal even when he did not want them to. (Tr. 1381–1382.) I likewise discredit Davis' testimony to the extent it supports Koerner's testimony that he felt seriously threatened and was afraid of Waller. I also discredit Davis' testimony that he was not carrying a radio that night, and thus could not have heard the argument Koerner described between him and Waller at the feeder (Tr. 1597, 1622). Davis had previously testified that Koerner had "called me up" to the feeder to tell him about the incident with Waller (Tr. 1594). Further, the record indicates that the section foreman for each unit has a radio "at all times" because he is responsible for the unit (Tr. 1651); that, although Davis is a shift leader, he is responsible for running his unit because there is no section foreman assigned to his unit (Tr. 716, 1070, 1077–1078, 1138); and that he is therefore likewise normally assigned a radio (Tr. 1621, 1651). Finally, although I would reach the same credibility resolutions in any event, I note that Lawrence and Koerner admitted that they and Davis all went over their testimony together as a group with Gossman and the Employer's counsel prior to testifying. (Tr. 1393–1394, 1442–1444; see also Tr. 1680–1681 (Pezzone); and Tr. 1995 (Gossman).) As previously noted (fn. 6), I agree with the General Counsel and the Union that, in these circumstances, the testimony of each of these witnesses, to the extent it was presented to corroborate the testimony of the other witnesses, warrants close scrutiny.

NLRB 1183 (2004) (while an employer has a legitimate concern about workplace violence, it is the Board's function to determine whether the employer's actions were actually motivated by that concern).

Here, as fully discussed above, the Employer has clearly failed to meet its burden. The overwhelming weight of the record evidence shows that, in fact, the Employer never really believed that Waller had threatened the safety, health, or life of Koerner or anyone else, or that the incident was anything other than a routine work dispute. Rather, Gossman and Benner deliberately twisted Waller's alleged statement into a threat to seriously injure or "kill" Koerner and other employees to help bolster the Company's allegations against Waller in the election-objections case and remove from the unit one of the Union's most vocal supporters in advance of the requested rerun election. Cf. *Swan Coal*, 271 NLRB 862, 870-871 (1984).<sup>54</sup>

Accordingly, for all the foregoing reasons, I find that the General Counsel has proven, by a preponderance of the credible evidence, that the Employer discharged Waller for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. The Employer has failed to establish that the UMWA, by its officers, agents, and/or supporters, engaged in objectionable conduct warranting a new election.

2. By threatening employees with mine closure, job loss, and other unspecified reprisals if or because the employees supported the UMWA, and impliedly promising employees benefits if the employees vote against the UMWA, the Employer has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By discharging Waller on May 27 because of his support for the UMWA and to discourage other employees from supporting the UMWA, the Employer has also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

4. The General Counsel has failed to establish that the Employer violated the Act by the statements allegedly made to employees during or after the campaign by Mine Manager Francescon, Operations Manager Schmidt, Mine Superintendent Hood, Shift Leader Davis, and Peabody Vice President of Midwest Underground Operations Benner.

<sup>54</sup> The record indicates that Waller was initially awarded unemployment compensation benefits following his termination (CP Exh. 7), but this was reversed on appeal when Waller failed to appear (Exh. 16). (Waller had lost his home and did not get the notice in the mail. Tr. 654-655.) In any event, there is no evidence that the state agency considered the same evidence that was presented over the course of the 9-day trial in this proceeding, and the Employer does not contend that the state agency did so (its posthearing brief does not even mention the state agency's determination). Accordingly, while I have considered the state agency's decision, I have not given it controlling weight. See generally *Whitesville Mill Service Co.*, 307 NLRB 937, 945 fn. 6 (1992).

#### REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order the Employer to cease and desist from threatening employees with mine closure, job loss, or other unspecified reprisals, impliedly promising employees benefits, or discharging employees, to discourage union activity. I shall also order the Employer to offer reinstatement to Waller and make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as required in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I shall also order the Employer to remove from its files any reference to Waller's discharge and to notify Waller in writing that this has been done and that the discharge will not be used against him in any way.

#### *Gissel* Bargaining Order

As indicated above, the General Counsel and the Union also request a remedial *Gissel* bargaining order. They contend that such an order is warranted because the Employer's unfair labor practices included several "hallmark" violations, which continued after the election, were disseminated among the unit employees, and had a devastating impact as demonstrated by the steep decline in the Union's support between March to May, citing, e.g., *Garvey Marine, Inc.*, 328 NLRB 991 (1999), enf. 245 F.3d 819 (D.C. Cir. 2001).

However, while all of the foregoing are well-established factors supporting the issuance of a *Gissel* order, there are also many other factors, likewise frequently considered by the Board and/or the courts, militating against such an order. For example, only a handful of supervisors, managers, and employees were directly involved in the unfair labor practices. Further, while there is evidence that the unfair labor practices were disseminated among employees, this is not a small operation; there are three shifts with multiple crews and units. Moreover, the Union actually won the election notwithstanding the Employer's unfair labor practices. And, while its victory was surprisingly narrow, given its large card majority, there is insufficient evidence that the Employer's unfair labor practices, rather than its lawful antiunion campaign (which, as discussed above, included lawful discussion of UMWA-represented mines that had closed), caused most of the decline in the Union's support. (See, e.g., Tr. 985.) Nor is there sufficient evidence that the Union's support has continued to decline since the election due to the Employer's unfair labor practices, or that the Employer has actually taken steps to effectuate its threats by closing the mine in retaliation for the Union's election victory.

The Employer argues that the foregoing factors clearly tip the balance against a *Gissel* bargaining order. However, it is simply unnecessary at this point to resolve how the balance tips. There is nothing left for a remedial *Gissel* bargaining order to remedy; the Union received a majority of the votes in the election, there are no challenged ballots, and I have overruled

the Employer's objections and issued an order certifying the Union as the exclusive collective-bargaining representative of the unit (see below). In short, there is no need to issue a *Gissel* bargaining order as the Employer will be legally obligated to recognize and bargain with the Union based on its certification.<sup>55</sup>

The Union nevertheless argues that the Employer may delay recognition and bargaining by appealing my decision and recommended order to the Board—which may soon again temporarily lose its quorum due to political inaction (see *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010))—and thereafter the court of appeals. This is certainly true. It is also true that undue delay can be extremely harmful. See John C. Truesdale, *Battling Case Backlogs at the NLRB*, 16 Lab. Law. 1, 2 (2000) (“The harmful consequences of . . . long delays are clear: representation elections and labor disputes left unresolved; unfair labor practices left without remedy; increased back pay liability for respondents; ineffective or unenforceable orders; and, generally, an erosion of judicial respect for, and public confidence in, the Board. *Lex dilaciones semper exhorret*: The law abhors delays—and for good reason” (citations omitted).)

However, the Employer could also seek Board and court review of a recommended *Gissel* bargaining order. And, given the several factors, discussed above, weighing against such a remedial order here, it is far from certain that a district court would issue, or that an appeals court would uphold, an interim injunction affirmatively requiring the Employer to comply with the order while an appeal is pending. Compare *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied 117 S.Ct. 683 (1997); and *Barker ex rel. NLRB v. Regal Health & Rehab Center*, 632 F.Supp.2d 817 (N.D.Ill. 2009) (granting interim *Gissel* orders in small bargaining units where, in addition to making numerous threats of plant closure, etc., the employers discharged 25–30 percent of the unit employees, effectively killing the employees' organizing efforts).

Accordingly, the request by the General Counsel and the Union for a *Gissel* bargaining order is denied.

#### Additional Remedies

Finally, the General Counsel also requests a number of additional remedies pursuant to GC Memorandum 11-08 (March 11, 2011). Specifically, the General Counsel requests that the Employer be required to: (1) reimburse Waller for any excess in Federal and State income taxes he may owe from receiving a lump-sum backpay award; and (2) submit appropriate documentation to the Social Security Administration so that Waller's backpay will be allocated to the appropriate periods. (GC Br. 103.)

The Employer offers no argument against these remedies in its posthearing brief, even though it was given notice in the complaint that the General Counsel intended to seek them (GC Exh. 1(i)). Further, the remedies do not on their face appear

<sup>55</sup> *Power, Inc.*, 311 NLRB 599 (1933); and *Pope Maintenance Corp.*, 228 NLRB 326, 348 (1977), enf'd. 573 F.2d 898 (5th Cir. 1978), the primary cases cited by the General Counsel and the Union, are distinguishable. In those cases, there were determinative challenged ballots that had not yet been opened, and it was therefore unclear at the time of the decision whether the union would win the election.

punitive in any way, and the Board has never held that they are punitive or otherwise inappropriate. However, the Board recently gave notice that, because such remedies have not been issued in the past, they should not be granted in individual cases in the absence of a full briefing. *Consumer Products Services, LLC*, 357 NLRB No. 87, slip op. at 2 fn. 3 (2011). Thus, as no such briefing has yet occurred in this case, and delaying a decision to solicit such briefing would clearly be improper for the reasons set forth above, the General Counsel's request is denied.

Accordingly, on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended Certification of Representative<sup>56</sup> and Order.<sup>57</sup>

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of valid ballots have been cast for the United Mine Workers of America (UMWA), and that it is the exclusive collective-bargaining representative of the following employees as described in the Stipulated Election Agreement:

All Production and Maintenance employees including Underground, Preparation Plant and Underground Recovery employees employed by the Employer at the Willow Lake Mine, Big Ridge Portal #1 and Big Ridge Portal #2, excluding all other employees, laboratory technicians, sample takers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

#### ORDER

The Respondent, Big Ridge, Inc., Equality, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - a. Threatening mine closure, job loss, or other unspecified reprisals because employees support the United Mine Workers of America (UMWA).
  - b. Promising employees benefits if they oppose the UMWA.
  - c. Discharging or otherwise discriminating against employees because of their support for the UMWA or to discourage employees from supporting the UMWA.
  - d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
  - a. Within 14 days from the date of the Board's Order, offer Waller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

<sup>56</sup> See *Fox-Woods Resort Casino*, 356 NLRB No. 111, slip op. at 1 fn. 2 (2011); and *Talmdge Park, Inc.*, 351 NLRB 1241 fn. 4 (2007).

<sup>57</sup> If no exceptions are filed as provided by Sec. 102.46 and 102.69 of the Board's Rules and Regulations, the findings, conclusions, and recommended Certification and Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

b. Make Waller whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

c. Within 14 days from the date of the Board's Order, remove from its files any reference to Waller's unlawful discharge, and within 3 days thereafter notify Waller in writing that this has been done and that the discharge will not be used against him in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its facility in Equality, Illinois copies of the attached notice marked "Appendix."<sup>58</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2011.

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

<sup>58</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., December 1, 2011

## APPENDIX

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

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

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with mine closure, job loss, or other unspecified reprisals because you support the United Mine Workers of America (UMWA).

WE WILL NOT promise you benefits if you oppose the UMWA.

WE WILL NOT discharge or otherwise discriminate against you because you support the UMWA or to discourage your coworkers from supporting the UMWA.

WE WILL NOT in any like or related manner interfere, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Waller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Waller whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, in the manner set forth in the Board's decision.

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

BIG RIDGE, INC.