Taft Coal Sales & Associates, Inc. and Walter Energy, Inc. and Walter Minerals, Inc. *and* United Mine Workers of America, District 20. Cases 10–CA–088599 and 10–CA–093022

January 10, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On June 13, 2013, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Taft Coal Sales & Associates, Inc., Walter Energy, Inc., Walter Minerals, Inc., a single employer, Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. January 10, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jeffrey D. Williams, Esq., for the Acting General Counsel.
Stephen E. Brown, Esq. (Maynard, Cooper & Gale, PC), for the Respondents.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Birmingham, Alabama, on April 23, 2013. The original charge was filed by the United Mine Workers of America, District 20 (the Union) on September 5, 2012.[3] The consolidated complaint (the complaint) alleged, inter alia, that: Walter Energy, Inc. (Walter Energy), Walter Minerals, Inc. (Walter Minerals) and Taft Coal Sales & Associates, Inc. (Taft) constituted a single employer enterprise (the Respondents); and violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by threatening and interrogating employees, and unilaterally laying off workers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Taft, a corporation, has operated a coal mine in Walker County, Alabama (the Choctaw Mine). Annually, in conducting such operations, it purchases and receives goods valued in excess of $50,000 directly from suppliers outside of Alabama. Based on the foregoing, the Respondents admit, and I find, that Taft is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. They further admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The majority of the controlling facts are undisputed.[4] Walter Energy, a publicly traded Delaware corporation, is a leading

[1] 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that the Respondent did not assert, as an affirmative defense, that the Board should defer this case while the Union's grievance over the June 27, 2012 layoff at the Choctaw mine is being processed.

We adopt the judge's recommendation of a full reinstatement and backpay remedy, rather than the limited backpay remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). See, e.g., *Plastonics, Inc.*, 312 NLRB 1045 (1993). ("The traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes requiring the payment of full backpay, plus interest, for the duration of the layoff"). Here, the Respondent failed to bargain in good faith with the Union about *both* the decision to lay off unit employees and its effects. We correct the judge's analysis to the extent that it suggests a *Transmarine* remedy would only be applicable if the Respondent had laid off the entire unit. See *KGTV*, 355 NLRB 1283, 1286 (2010).

[3] All dates herein are in 2012, unless otherwise stated.

[4] Unless otherwise explained, factual findings arise from admissions, joint exhibits, stipulations and uncontroverted testimony.

producer of coal. Walter Minerals, a coal mining operation, is a wholly owned subsidiary of Walter Energy. Taft, which is a wholly owned subsidiary of Walter Minerals, operates the Reid School and Choctaw Mines in Birmingham, Alabama.

1. Common corporate leadership

Several key leaders hold simultaneous roles for the Respondents:

	Walter Energy	*Walter Minerals*	*Taft*
Walter Scheller	Chief Executive Officer (CEO) and Director	Director	Director
Charles Stewart	Senior Vice President (Sr. VP), Project Development	President	President
Robert Kerley	VP, Corporate Controller & Chief Accounting Officer	Director	Director
Michael Hurley	VP, Tax	VP, Tax	VP, Tax
Earl Dopplett	Sr. VP, General Counsel & Secretary	Secretary	Secretary
Michael Griffin	Assistant Treas. & Interim Treas.	Asst. Treas.	Asst. Treas.

(Jt. Exh. 2(a).)

2. Labor relations

Steve Dickerson, human resources manager for Walter Minerals,[5] handles labor relations and personnel matters for both Walter Minerals and Taft.[6] See, e.g. (R. Exh. 11). He testified that he is unauthorized to bind Walter Energy concerning labor relations and personnel matters. He added that Walter Energy has no involvement in Taft's day-to-day labor relations or personnel matters. He receives his performance review and direction from Thomas Lynch, senior vice president, human resources at Walter Energy.[7] (Tr. 229.) He also reports to Jan Kizziah, vice president of operations for Walter Minerals. (Tr. 230.)

3. Wages and benefits

Taft's employees receive their paychecks and benefits directly from Taft,[8] which independently sets their wages. Taft's wage, bonus and retirement system differs from Walter Energy's compensation system. Regarding insurance, Lynch testified:

> There's a master corporate policy. It essentially functions as an umbrella policy, where the subsidiaries, including Taft . . . have unique provisions and unique administration in the area of workers' compensation . . . . And the corporation pays the premium under the master policy and then charges back the cost of that to the subsidiary.

(Tr. 169.) Taft independently handles its unemployment insurance.

4. Operations

Lynch testified that Walter Energy has no involvement with Taft's day-to-day operations, personnel matters or labor relations issues. Each entity maintains separate bank accounts and fiscal records. Taft transmits monthly financial reports to Walter Energy. Walter Energy and Taft share a common address and phone number in Birmingham. (Jt. Exh. 2(a).) Walter Minerals has a separate address and phone number, although it is also headquartered in Birmingham. (Id.) Walter Minerals and Walter Energy share an email system and web address. (Jt. Exh. 2(g), (j).)

B. Neutrality Agreement

On December 9, 2011, Walter Energy and the Union agreed that, if the Union attempted to unionize the Choctaw Mine or its other mines, Taft would remain neutral and use a card check procedure to gauge employee support (the Neutrality Agreement). (Jt. Exh. 2(b).) The Neutrality Agreement, however, banned the Union from using it to prove single employer status in the current litigation. Specifically, it stated that:

> Nothing in this MOU, its implementation . . . or the negotiations for the labor agreements . . . shall . . . be . . . offered as evidence . . . to create a . . . single employer . . . relationship between . . . [Walter Energy and the] mining operation.

(Id.)

C. Union's Organizing Drive

In March, the Union began organizing the following bargaining unit (the unit):

> All hourly paid non-supervisory employees [employed by Taft at its Choctaw Mine] . . . , excluding all supervisory employees, coal inspectors, weigh bosses, watchmen, clerks, technical employees and engineering employees.[9]

(GC Exh. 1.)

1. Supervisor Nixon Hill's statements

a. Plant closure allegation

Robert Plunkett, a driver, stated that, in March,[10] he and Hill

[5] The parties stipulated that he is an agent of Walter Minerals, within the meaning of Sec. 2(13) of the Act.

[6] Although the record reveals that Walter Energy acquired Taft in 2008, it is silent regarding how Dickerson of Walter Minerals became responsible for Taft's labor and personnel relations.

[7] The parties stipulated that Lynch is an agent of Walter Energy, within the meaning of Sec. 2(13) of the Act.

[8] Taft has a unique employer ID number, and independently handles payroll taxes. (R Exh. 9.)

[9] There were approximately 90 employees in the unit at that time.

[10] He recalled that he signed a union authorization card on April 5 and placed this conversation roughly 2 weeks earlier. The complaint identified this conversation as occurring on March 22, which is reasonable.

had this exchange:

> He picked me up [in his truck] from dropping off another piece of equipment and we was riding back to my truck and he just said, "I wonder how many people's going to lose their jobs," and I said, "what are you talking about?" He said, "well, they sign that Union in, they'll be a lot of people lose their jobs, and they'll close the mine down." He said, "if you all sign in, they'll close the mine down," and I said, "well, they can't close it down because of Alabama Power owns the coal and they're going to want to get it out." And he said, "they can sure shut it down."

(Tr. 29–30.) (Grammar as in original.)

Hill flatly denied this conversation, and averred that Plunkett's account was implausible because he never would have allowed him to ride in his truck. He added that he and Plunkett had a poor relationship, and suggested that Plunkett's bias likely colored his testimony.

Given that Plunkett testified that Hill threatened him, and Hill denied the threat, I must make a credibility determination. For several reasons, I credit Plunkett. First, he had a credible demeanor; he was consistent and equally helpful on direct and cross examination, and appeared committed to relaying truthful testimony. His testimony was generally consistent with his sworn affidavit. Hill, on the other hand, appeared less than credible. His explanation that Plunkett lied about riding in his truck appeared concocted and implausible. It is also probable that he was concerned that his threat, which violated the Neutrality Agreement, could result in his own disciplinary action, and such anxiety colored his testimony.

b. Interrogation allegation

Joey Jones, another employee, testified that he and Hill had this conversation in the "bathhouse" parking lot:[11]

> He come up . . . at the end of the shift, and I asked him about a day shift job and he told me . . . all the day shift guys voted on the Union. How did you vote? I said I didn't vote.

(Tr. 45–46.) (Grammar as in original.)[12] Hill denied this exchange.

Given that Jones stated that Hill interrogated him, and Hill denied such inquiry, I must make a credibility determination. For several reasons, I credit Jones. First, he had a straightforward and honest demeanor. Second, he was consistent on direct and cross-examination, and consistent with his affidavit. Lastly, as noted, Hill was not credible.

[11] Although the complaint set this exchange on March 22, he recalled it as occurring in May. I find, however, that he was likely confused and will use March 22. Specifically, it is improbable that this discussion, which centered upon the day-shift miners' union votes, occurred in May, given that their votes were previously cast in April. (Jt. Exh. 2(c).)

[12] He acknowledged wearing a union sticker on his hardhat during the campaign, but, reported that Hill did not supervise his shift or likely observe the sticker. Hill solely denied the conversation at issue, and never contended that he was aware that Jones was a union supporter.

2. Voluntary recognition

On April 18, the Union advised Scheller that it had obtained:

> [A] majority of Authorization Cards signed by employees desiring . . . them as their Collective Bargaining Agent at the . . . Choctaw Mine.

(Jt. Exh. 2(c).) On May 24, an arbitrator affirmed their majority status. (Jt. Exh. 2(e).) Since June, the parties have been negotiating a first contract for the unit. (Jt. Exh. 2(g),(l)-(m).)

D. Decreased Coal Demand

At some point, Alabama Power, a major coal purchaser, informed Taft that it would reduce its future purchases.[13] On June 21, Taft amended Alabama Power's coal purchasing agreement to reflect their decreased demand, which resulted in a 125,000-ton cut in coal production at the Choctaw Mine. (Jt. Exhs. 1, 2(h).)

E. Layoffs at the Choctaw Mine

In June, Taft's superintendent, David Peters, and Dickerson decided that the Choctaw Mine's unexpected cut in coal production necessitated a layoff. (Jt. Exh. 1.) On June 25, Lynch informed Union International Vice President Daryl Dewberry, that:[14]

> [T]he Taft/Choctaw mine of Walter Minerals, Inc. has been challenged [by] . . . reduced demand for thermal coal . . . . Alabama Power has reduced the amount of coal it will be purchasing . . . this year by 125,000 tons. Alabama Power has not requested any coal . . . for 2013.
>
> As a result . . . , this week we will be announcing workforce reductions at the mine. A total of 21 represented positions will be eliminated, and [affected] employees . . . will be notified on . . . June 27. Walter Energy continues to have opportunities for experienced surface miners in Northeast British Columbia, and we are planning to . . . discuss these openings the week following notification.
>
> . . . .
>
> Please let me know if you have any questions or would like to discuss these actions in greater detail.

(Jt. Exh. 2(i)); see also (R Exh. 12.)

Dewberry testified that he first learned about the layoff on June 25. He recalled telephoning Dickerson on June 26 and requesting a layoff list. He indicated that, on June 27, Dickerson emailed him this list.[15] (Jt. Exh. 2(j).) He contended that, after reviewing the list, he disappointedly learned that junior miners were retained over qualified senior miners.[16] He stated that this discovery prompted him to telephone Scheller and

[13] This re-evaluation was prompted by the existence of cheaper fuel alternatives (i.e., natural gas), which made coal usage less desirable.

[14] The layoff reduced the unit by roughly 25 percent.

[15] The email contained Walter Energy's logo and website; in addition, Dickerson's email address was associated with Walter Energy (e.g., name@walterenergy.com).

[16] The Union also filed a grievance over the layoff under another labor agreement. (R. Exhs. 1, 13.)

complain, who, in turn, assigned the issue to Lynch. He added that, when he notified Scheller about Hill's plant closure threat and interrogation, he replied that, "if that did take place, he'd fire [him]."[17] (Tr. 64.)

Dickerson mostly corroborated Dewberry's account, but, added that Dewberry never sought bargaining, after being told about the layoff. He stated that the layoff could have been delayed by a couple of days, if the Union had sought to bargain. He admitted, however, that he never told the Union that he would delay the layoff. He indicated that unit employees were selected for layoff on the basis of their skills, seniority, safety practices, and attendance.

Lynch initially denied being involved in the layoff, beyond communicating with the Union. He added, however, that he reviewed the June 25 layoff letter before dispatch. He stated that he became involved in the layoff discussions, after Scheller directed him to respond to Dewberry. Lynch contended that his layoff dealings were excluded from evidentiary usage under the Neutrality Agreement.[18]

F. July 9 Meeting and Correspondence

On July 5, Dewberry sent Lynch a letter, which requested a meeting about the layoffs. (Jt. Exhs. 1, 2(k), 9).) On July 6, Lynch replied:

> We would be happy to take you through the . . . methodology used to select individuals for the workforce reduction. Does Monday, July 9 . . . work for you? . . . . [T]he selections were based on individual skills, with additional considerations given to seniority and age.
>
> . . . .
>
> If you have details on the claim that a mine supervisor told an employee that signing a union card would be damaging to his ongoing employment prospects, I would . . . like to have that claim investigated. Walter Energy, Inc. and its subsidiaries are committed to upholding the . . . Act.

(R. Exh. 6.)

Dewberry testified that, on July 9, he met with Lynch and Dickerson, and protested his ongoing exclusion from the layoff decision-making process. He added that every facet of the layoff was already a fait accompli, by the time he was notified.

Lynch stated that he met with Dewberry on July 9 concerning the layoff. He stated that the meeting was short; he recalled describing Taft's rationale. He added that the Union did not make any proposals regarding the layoff.

G. Closure of Taft's Reid School Mine

In March 2013, the Union and Taft held negotiations over the closure of the Reid School Mine. (R. Exh. 11.) On March 29, 2013, the parties entered into a closure agreement, which was signed by Dickerson. (Id.) This agreement provided, inter alia, that Taft employees could be recalled to open positions at Walter Minerals. (Id.) Following the closure of the Reid School Mine, Taft's mining equipment was shipped to a Walter Minerals jobsite.[19]

III. ANALYSIS

A. Single-Employer Status

1. Applicable law

In *Cimato Brothers, Inc.*, 352 NLRB 797, 798 (2008), the Board held:

> In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's-length relationship among seemingly independent companies. *Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001).

This inquiry assesses whether nominally "separate corporations are not what they appear to be, [and] that in truth they are but divisions or departments of a single enterprise." *NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 402 (1960). Centralized control of labor relations is, generally, considered to be the most important factor in this analysis. See, e.g., *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988). "[C]ommon ownership, while significant, is not determinative in the absence of centralized control over labor relations." *Mercy Hospital*, supra, 336 NLRB at 1284.

2. Common ownership

Walter Minerals and Taft are wholly owned subsidiaries of Walter Energy. The common ownership factor, consequently, favors single-employer status.

3. Common management

There is strong evidence of common management. Scheller is the CEO and director of Walter Energy, and director of both subsidiaries. Stewart is a senior vice president for Walter Energy, and president of both subsidiaries. Kerley is a senior vice president for Walter Energy, and director of both subsidiaries. Hurley is the senior vice president, tax, and Griffin is the assistant treasurer for all Respondents. Dopplett is the senior vice president for Walter Energy, and the secretary for both subsidiaries. The common management factor, thus, heavily favors single-employer status. See *Pathology Institute*, 320 NLRB 1050 (1996).

[17] Scheller was, without explanation, not called to rebut this testimony.

[18] This argument is unreasonable. First, the Respondents offered voluminous evidence of Lynch's layoff dealings as joint exhibits and during their case-in-chief. These actions, as a result, waived any reasonable objection concerning the admission of Lynch's layoff dealings. Second, evidence regarding Lynch's layoff dealings was not excluded under the Neutrality Agreement, which solely banned usage of evidence concerning, "its implementation . . . or the negotiations for the labor agreements." Lynch's layoff dealings, however, were far afield of this evidentiary ban.

[19] There is no evidence of analogous transactions, or that this transfer was not an "arms-length" deal.

4. Interrelation of operations

There is mixed evidence of interrelated operations, which neither strongly supplements, nor greatly detracts from, single-employer status. Specifically, although Taft and Walter Energy share common addresses, each maintains separate bank accounts and financial records, and, with the exception of labor relations, as will be discussed below, are essentially run independently. While Taft shipped its equipment to Walter Minerals after the Reid School Mine closed, there is no evidence of similar transactions amongst the Respondents, or that this transfer was not an "arms-length" deal. Moreover, even though the Respondents share some common insurance benefits, there is no evidence that any entity pays less than their pro rata share for such benefits, or that such arrangements extend beyond insurance. Each entity has unique tax identification numbers, independently handles payroll taxes, and employs distinct compensation systems. Respondents utilize Walter Energy's email system and website and display its logo on certain communications. Respondents make independent hiring decisions, and, subject to the limited exceptions described below, there is no evidence that employees transfer between Respondents.

5. Common control of labor relations

There is significant evidence that Walter Energy and Walter Minerals exercise common control over Taft's labor relations. Scheller, Lynch, and Dickerson all exercise such control.

Scheller, Walter Energy's top official, heard Dewberry's complaints about Taft's layoff, a significant labor relations issue, and assigned this matter to Lynch. He also entertained Dewberry's complaints about a Taft supervisor's potential labor law violations, and similarly assigned this task to Lynch. He also pledged that, if these allegations were true, he would personally fire the offender. These actions demonstrate a substantial wielding of labor relations power; it is highly significant that Scheller never responded to Dewberry that these matters were outside of his jurisdiction because Taft was an independent entity.

Lynch, Walter Energy's top human resources official, became heavily involved in Taft's labor relations issues, when he notified the Union about Taft's layoff, met with the Union about this matter, and scrutinized the layoff list before its release. He investigated the interrogation and plant closure threat allegations involving a Taft supervisor. Finally, his June 25 layoff letter offered affected Taft employees jobs at Walter Energy's Canadian mining operations. These actions similarly demonstrate a significant exercise of labor relations power over Taft's affairs.

Dickerson, Walter Minerals' top human resources official, handles labor relations issues for Taft and Walter Minerals. He identified who would be laid off, and communicated with the Union about this matter. He negotiated the closure agreement at Taft's Reid School Mine. There is also evidence that his labor relations activities are monitored by Lynch, who reviewed the Taft layoff list, and conducts his performance reviews.

6. Conclusion[20]

Respondents are a single employer. They are commonly owned and managed. Although there is only limited evidence of interrelated operations, there is strong evidence that Walter Energy and Walter Minerals commonly control Taft's labor relations. It is also evident that Walter Energy, via Lynch's supervision of Dickerson, exercises common control over Walter Minerals' labor relations. This centralized control, which is the primary factor in the analysis, strongly favors a single-employer finding regarding all three entities.

B. Unilateral Layoff[21]

Respondents violated Section 8(a)(5), when they unilaterally laid off unit employees at Taft, without notice or bargaining. An economic layoff decision is a mandatory bargaining topic. *McClain E-Z Pack, Inc.,* 342 NLRB 337 (2004); *Toma Metals, Inc*., 342 NLRB 787, 787 fn. 1 (2004). This remains true, even where the entity previously exercised unlimited discretion before unionization. See *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990). This duty additionally requires bargaining over the layoff's effects. *Toma Metals, Inc*., supra.

The Board has held that "when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining." *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988). To establish waiver of a statutory right to bargain over mandatory subjects, there must be a clear and unmistakable relinquishment. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983). A waiver can be gleaned from: express contract language; or conduct (i.e., past practice, bargaining history, action or inaction). *American Diamond Tool*, 306 NLRB 570 (1992). A party asserting waiver has the burden of establishing its existence. *Pertec Computer*, 284 NLRB 810 (1987).

Good-faith bargaining requires timely notice and a meaningful opportunity to bargain. No impasse is, accordingly, possible when an employer presents a union with a "fait accompli" regarding a mandatory bargaining topic. *Dorsey Trailers*, *Inc.*, 327 NLRB 835, 858 (1999), enfd. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000). The Board has further held that:

> To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli.

Ciba-Geigy Pharmaceutical Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983); see also *Toma*

[20] In making this finding, no reliance was placed on the Neutrality Agreement, which precluded usage of "[its terms,] its implementation, its execution, the discussions leading up to its execution, or the negotiations for the labor agreements" in finding single employer status. See (Jt. Exh. 2(b).)

[21] These allegations are listed under pars. 12 and 14 of the complaint.

Metals, Inc., supra, 342 NLRB at 787 fn. 1 (announcement of layoffs on implementation date is unlawful).

In the instant case, Lynch advised the Union, on June 25, that Taft was eliminating 21 unit positions on June 27. When Dewberry asked Dickerson to supply him with a layoff list on June 26, Dickerson declined and advised him that he would release the list, after affected employees were first advised on June 27. Under these circumstances, the Union was presented with a fait accompli, which precluded meaningful pre-implementation bargaining. Respondents unilaterally decided to conduct the layoff, identified who would be laid off, and determined what transfer opportunities would be allocated to affected miners, without offering the Union any opportunity to bargain over these matters. Simply put, the Union was not even told who would be laid off, until after the layoff was enacted. Such unilateral action was unlawful.

C. Threat and Interrogation Allegations[22]

1. Threat

Hill violated Section 8(a)(1), when he advised Plunkett that, "they'll close the mine down," if employees unionized. An employer violates Section 8(a)(1) when it engages in conduct that might reasonably tend to interfere with employees' Section 7 rights. *American Freightways Co.*, 124 NLRB 146 (1959). This includes plant closure threats in retaliation for engaging in union activity. *Mid-South Drywall Co.,* 339 NLRB 480 (2003).

2. Interrogation[23]

Hill unlawfully interrogated Jones, when he asked him whether he voted for the Union. In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.

Hill, a supervisor, tied his query about whether Jones voted for the Union to Jones' question about whether he might be awarded a coveted day-shift position. Under these circumstances, Hill's interrogation left Jones with the very reasonable and strong impression that his union support, if any, would deeply prejudice his ability to obtain the day-shift position. This interrogation was, therefore, unlawful.

CONCLUSIONS OF LAW

1. Walter Energy, Walter Minerals, and Taft are a single employer, and are jointly and severally liable for the violations of the Act found herein.

2. Walter Energy, Walter Minerals, and Taft are individually, and as a single employer, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union is, and, at all material times, was the exclusive bargaining representative for the following appropriate unit:

> All hourly paid non-supervisory employees employed by the Respondents at the Choctaw Mine, excluding all coal inspectors, weigh bosses, watchmen, clerks, technical employees, engineering employees, and all guards and supervisors as defined by the Act.

5. Respondents violated Section 8(a)(1) of the Act by:

a. Interrogating employees about their Union or other protected concerted activities.

b. Threatening to close the Choctaw Mine, if employees selected the Union as their collective-bargaining representative.

6. Respondents violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with the Union concerning the June 27 layoff at the Choctaw Mine.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY[24]

Having found that Respondents committed unfair labor practices, they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since Respondents violated Section 8(a)(5) by unilaterally laying off 21 unit employees at the Choctaw Mine on June 27, they must offer those employees immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights. Respondents shall also make whole

[22] These allegations are listed under pars. 8 and 13 of the complaint.

[23] Respondents' assertion that this allegation is precluded under Sec. 10(b) is meritless. The interrogation occurred on March 22, which is less than 6 months before the September 5 filing of the charge.

[24] Counsel for the Acting General Counsel's request for a remedy under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), in his posthearing brief is denied. A *Transmarine* remedy would be warranted, for example, if Taft announced on June 27 that it was closing the Choctaw Mine and unilaterally laying off the entire unit, which was not done. See, e.g., *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191 (2012). In the instant case, however, the June 27 layoff reduced the unit by 25 percent and Taft continued to operate the Choctaw Mine. As a result, the Board's traditional make-whole remedy is appropriate. See *Toma Metals*, supra.

these employees for any loss of earnings and other benefits they may have suffered by reason of their unilateral action. Backpay shall be computed on a quarterly basis from the date of their layoffs to the date of their proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondents shall also file a report with the Social Security Administration, which allocates backpay to the appropriate calendar quarters. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). They shall also compensate affected employees for any adverse tax consequences associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year. Id.

In addition to the traditional physical posting of paper notices, Respondents will distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to their employees, if they customarily communicate with workers in this manner. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[25]

ORDER

The Respondents, Taft Coal Sales & Associates, Inc. and Walter Energy, Inc. and Walter Minerals, Inc. Birmingham, Alabama, a single employer enterprise, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that mining operations will close, if they engage in union or other protected concerted activities.

(b) Interrogating employees about their union or other protected activities.

(c) Laying off employees, without notifying the Union, or affording it an opportunity to negotiate over the decision or the effects upon this appropriate bargaining unit:

> All hourly paid nonsupervisory employees employed by Respondents at the Choctaw Mine in Birmingham, Alabama, excluding all coal inspectors, weigh bosses, watchmen, clerks, technical employees, engineering employees, and all guards and supervisors as defined by the Act.

(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) On request, bargain collectively in good faith with the Union as the exclusive representative of employees in the above-described unit concerning its decision to lay off employees at the Choctaw Mine, as well as the effects of this decision, embody any resulting understanding in a signed agreement and, thereafter, comply with the terms of such agreement.

(b) Within 14 days from the date of the Board's order, offer the 21 employees, who were laid off at the Choctaw Mine on June 27, 2012, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make the 21 affected employees whole for any loss of earnings and other benefits suffered as a result of the unilateral action against them, in the manner set forth in the remedy section of this decision.

(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for the 21 affected employees.

(e) Compensate the 21 affected employees for the adverse tax consequences, if any, associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(f) 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 backpay amounts due under the terms of this Order.

(g) Within 14 days after service by the Region, physically post at each of its Walter Energy, Walter Minerals, and Taft facilities in Birmingham, Alabama, and electronically send and post via email, intranet, internet, or other electronic means to unit employees, who were employed at its Choctaw Mine facility in Birmingham at any time since March 22, 2012, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondents' authorized representative, shall be physically posted by Respondents and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by Respondents 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, any of the Respondents has gone out of business or closed the facilities involved in these proceedings, Respondents shall duplicate and mail, at their own expense, a copy of the Notice to all current employees and former employees employed by it at the Choctaw Mine facility at any time since March 22, 2012.

(h) 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 it has taken to comply.

Dated, Washington, D.C. June 13, 2013

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

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

APPENDIX

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 that our mining operations will close, if you support the United Mine Workers of America, District 20 (the Union), or any other union.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT fail or refuse to bargain in good faith with the Union, as the exclusive collective-bargaining representative of employees in the bargaining unit described below, by laying off employees at the Choctaw Mine without prior notice to the Union or affording it an opportunity to bargain concerning the layoff and its effects on unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, on request, bargain collectively in good faith with the Union as the exclusive representative of employees in the following appropriate unit concerning our decision, and the effects of our decision, to lay off employees, and, thereafter, comply with the terms of such agreement:

> All hourly paid nonsupervisory employees employed at Taft's Choctaw Mine in Birmingham, Alabama, excluding all coal inspectors, weigh bosses, watchmen, clerks, technical employees, engineering employees, and all guards and supervisors as defined by the Act.

WE WILL within 14 days from the date of the Board's order, offer the 21 employees, who were laid off at the Choctaw Mine on June 27, 2012, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the 21 affected employees whole for any loss of earnings and other benefits suffered as a result of our unlawful action against them, with interest.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for the 21 affected employees.

WE WILL compensate the 21 affected employees for the adverse tax consequences, if any, associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year.

TAFT COAL SALES & ASSOCIATES, INC. AND WALTER ENERGY, INC. AND WALTER MINERALS, INC.