

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MURRAY AMERICAN ENERGY, INC. AND
THE HARRISON COUNTY COAL COMPANY,
A SINGLE EMPLOYER,

and

Case 06-CA-174080

UNITED MINE WORKERS OF AMERICA,
DISTRICT 31, LOCAL 1501, AFL-CIO, CLC

MURRAY AMERICAN ENERGY, INC. AND
THE MARION COUNTY COAL COMPANY,
A SINGLE EMPLOYER

and

Cases 06-CA-170978
06-CA-171057
06-CA-171069 and
06-CA-186015

UNITED MINE WORKERS OF AMERICA,
DISTRCT 31, LOCAL 9909, AFL-CIO, CLC

MURRAY AMERICAN ENERGY, INC. AND
THE MONONGALIA COUNTY COAL COMPANY,
A SINGLE EMPLOYER

and

Cases 06-CA-169736
06-CA-171085
06-CA-174075 and
06-CA-174152

UNITED MINE WORKERS OF AMERICA,
AFL-CIO, CLC

MURRAY AMERICAN ENERGY, INC. AND THE
MARSHALL COUNTY COAL COMPANY, A
SINGLE EMPLOYER

and

Cases 06-CA-183054 and
06-CA-185640

UNITED MINE WORKERS OF AMERICA,
DISTRICT 31, AFL-CIO-CLC

**RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE DAVID GOLDMAN'S DECISION AND
REQUEST FOR ORAL ARGUMENT**

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Consistent with Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondents submit this Brief in Support of Exceptions.¹ This matter arises out of a consolidated set of unfair labor practice charges filed against Respondents, coal company employers, by the United Mine Workers of America (the "Union" or "UMWA"). The hearing of these allegations lasted several days, beginning in January 2017 and concluding on March 1, 2017. The Administrative Law Judge ("ALJ") issued his decision on May 7, 2017, approximately one month after post-hearing briefs were submitted to him. Respondents now except to many aspects of the ALJ's Decision, as well as to his findings, rulings, and conclusions.

As discussed in Respondents' exceptions and the brief below, the ALJ made numerous erroneous findings, rulings, and conclusions. For example, the ALJ failed to fairly and properly consider the record evidence and applicable legal precedent, and failed to properly require the General Counsel to prove, by a preponderance of the evidence, all allegations in the Complaint. The record evidence, when viewed fairly and consistently with applicable precedent, demonstrated that Respondents acted consistently with their obligations under the Act.²

I. QUESTIONS INVOLVED

This case boils down to six determinative issues:

¹ Respondents incorporate by reference their Post-Hearing Brief, filed on April 5, 2017, which contains significant additional detail about Respondents, their operations, and various relevant background facts.

² Internal references to the record will follow the same format as Respondents' Post-Hearing Brief. Thus, references to the hearing transcript will be "Tr." followed by the appropriate page number. The parties' Joint Stipulation will be referenced as "Jt. Stip." followed by paragraph number. The parties' Joint Exhibits will be referenced as "Jt. Ex." followed by the exhibit number. General Counsel exhibits and Respondents' exhibits will be similarly referenced "GC Ex." or "Resp. Ex." followed by the exhibit number. The Complaint is referenced as "Compl." followed by the appropriate paragraph number. References to the ALJ's Decisions will be "D." followed by the appropriate page and line number.

1. Did Respondents violate Sections 8(a)(1), 8(a)(3), and/or 8(a)(4) of the Act in disciplining Mark Moore because of his protected activity? (Exceptions 29-35)

2. Did Respondents violate Section 8(a)(1) of the Act with respect to statements made to Joshua Peek³, Jamie Hayes, and Joshua Preston? (Exceptions 7-28)

3. Did Respondents violate Section 8(a)(1) of the Act by engaging in unlawful surveillance of Jamie Hayes? (Exceptions 25-28)

4. Did Respondents violate Sections 8(a)(1) and 8(a)(5) of the Act in responding to certain information requests? (Exceptions 42-52)

5. Did Respondents make an unlawful unilateral change concerning the location of a Step 3 grievance meeting? (Exceptions 40-41)

6. Did the ALJ's Decision, conclusions, and proposed remedies properly consider the record evidence, and legal precedent? (Exceptions 1-52)

As detailed below and in Respondents' Post-Hearing Brief, the undisputed facts and applicable legal authorities require a resounding "no" to each question. Indeed, the facts and authorities established that:

1. Mark Moore was issued a one-day suspension because he violated a facility rule. He did not deny this violation. The ALJ nevertheless found the discipline unlawful by improperly imputing animus, by making inconsistent and unsupportable credibility findings, and by ignoring evidence that supports Respondents' legitimate, non-discriminatory reasons for the action taken. The ALJ's findings and conclusions regarding the discipline of Moore should be rejected and the Board should find that Respondents did not discipline Moore because of any protected activity, and, therefore, his suspension did not violate the Act.

³ Joshua Peek is incorrectly identified as Joshua "Peak" in the hearing transcript.

2. Respondents did not engage in interference regarding the challenged interactions with Joshua Peek, Jamie Hayes, and Joshua Preston. To reach his findings and conclusions regarding these employees, the ALJ failed to properly apply relevant legal standards and made unsupportable factual findings.

3. Respondents did not engage in surveillance of Jamie Hayes. Rather, a management representative of Respondents happened to be in the same location as Hayes. The testimony of witnesses for the General Counsel that was credited by the ALJ to reach a conclusion of surveillance was inconsistent and incredible, and the ALJ misapplied relevant precedent concerning surveillance to reach his conclusions.

4. Respondents were well within their rights in how they responded to certain Union information requests. The ALJ's contrary findings and conclusions are unsupported by the evidence and the law, and should be rejected by the Board.

5. Respondents made no unlawful unilateral change. The at-issue change did not meet the materiality threshold required for unlawful employer action. As such, the ALJ's findings and conclusions are unsupported by the evidence and the law, and should be reversed.

6. The ALJ's findings, conclusions, and proposed remedies fail to properly consider the record evidence and applicable legal precedent.

Myriad other substantive and procedural errors also warrant reversal and are discussed in detail below.

II. ARGUMENT

A. REQUEST FOR ORAL ARGUMENT

Respondents request oral argument on their exceptions. Oral argument will assist the Board's understanding of the case in several respects:

First, due to the volume of the record and the sheer number of allegations and issues presented, oral argument will aid the Board's overall understanding of the case.

Second, the Board's complete and careful consideration of this case, including its allowance of oral argument, is imperative to the fair administration and enforcement of the Act and to the future operations of Respondents. Allowing oral argument will assist the Board with understanding the broader context in which the evidence should be viewed.

B. EXCEPTIONS APPLICABLE TO MULTIPLE FINDINGS, RULINGS, AND CONCLUSIONS OF THE ALJ (Exceptions 1 - 6)

The ALJ committed numerous errors which unfairly disadvantaged Respondents, favored the General Counsel and the Union, and tainted almost every aspect of the ALJ's Decision. The breadth and harmful impact of the ALJ's multiple errors is illustrated by the record and the ALJ's own Decision. Among other errors, the ALJ repeatedly made findings of fact and reached conclusions based on faulty credibility determinations, and failed to fairly consider, or wholly disregarded, substantial record evidence. While exceptions to the ALJ's specific findings on various Complaint allegations are discussed in later sections, these overarching errors provide compelling legal justification to overturn, in large part, the ALJ's Decision.

1. The ALJ Erred in Relying on Inferences to Support Predetermined Legal Conclusions

"Inference piled on inference is not a substitute for evidence." *Interlake Iron Corp. v. NLRB*, 131 F.2d 129, 131 (7th Cir. 1942). To constitute a preponderance of the evidence, the record "must do more than create a suspicion of the existence of the fact to be established." *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939). Here, for example, the ALJ relieved the General Counsel of its burden of proof by inferring through speculative findings that manager Eric Koontz must have had animus towards employee Mark

Moore because another manager had animus. D. 27:30-41. This is precisely the type of inference piled upon inference that is prohibited.

2. The ALJ's Credibility Determinations Evidence Clear Bias and Are Not Supported by the Record

Respondents recognize that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Prods. Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). An ALJ's factual findings as a whole must show, however, that the ALJ "implicitly resolve[d]" conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982). Critically, while an ALJ may resolve credibility disputes implicitly rather than explicitly, he only may do so if his "treatment of the evidence is supported by the record as a whole." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir. 1996) (emphasis added).

In large part, the ALJ made little effort to articulate his reasons for crediting or discrediting testimony other than to state generally that he believed or did not believe witnesses, and then label their testimony as either credible or not credible. D. 7:9-18. The ALJ also failed to explain why he resolved nearly every credibility issue in favor of the General Counsel's witnesses. Accordingly the Board should overturn or remand the ALJ's Decision in this case.

Moreover, the ALJ failed to explain why he concluded that testimony by multiple witnesses was mutually corroborating – even when there was significant factual inconsistency – when that testimony was offered by General Counsel witnesses, but that testimony by multiple witnesses was *not* mutually corroborating when it was offered by Respondents' witnesses. *Compare* D. 19-20 (clearly contradictory testimony of General Counsel witnesses Mike Payton, Rick Rinehart, and Jamie Hayes, was nevertheless credited) *with* D. 29-31 (testimony with

minor, if any, contradictions, found not credible). Indeed, as it relates to allegations of unlawful surveillance, the General Counsel called three witnesses who testified to accounts that differed on the timing of the surveillance, the exact conduct that purportedly constituted surveillance, and the nature of witnesses' discussions about the surveillance. In response, the ALJ brushed aside these critical differences and credited the witnesses' contradictory testimony, stating that their accounts reflected "the honest recollection of three people independently recalling a surprise and sudden event." D. 20:36-38. Yet, as it relates to an allegation of an unlawful threat, the ALJ refused to credit largely internally consistent testimony of two witnesses called by Respondents, teasing out flimsy (and mostly inaccurate) minor contradictions in the witnesses' word choice. D. 30:25-31:3.

For all these reasons, the ALJ's credibility determinations should be reversed.

3. The ALJ's Decision Is Not Supported by a Preponderance of the Evidence, Much of Which Was Not Considered or Addressed

Throughout the Decision, the ALJ completely ignored testimony and evidence that militates against his conclusions. The ALJ's findings regarding Mark Moore are illustrative. To bolster a finding that a discipline issued to Moore was pretextual, the ALJ suggested that Respondents offered "no evidence of any import" to show they would have taken the same actions absent Moore's protected activity. D. 28:42-44. The ALJ failed to substantively address, however, a discipline in the record issued to an employee for being late to his shift – the same basis for Moore's discipline. The ALJ appears to have rejected this comparator evidence because it was offered into the record by the General Counsel rather than by Respondent. D. 28:42-49. But the fact that the comparator discipline was offered by the General Counsel, who puts on its case first, rather than by Respondents, who put on their case last, does not somehow mean the evidence must be ignored. Yet, this is what the ALJ did. ALJs must consider all

evidence – not just evidence that supports their desired outcome. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 509-10 (7th Cir. 2003) (“This was error, because the ALJ was obligated to consider all relevant evidence, not just the evidence that favored her ultimate conclusion.”). The ALJ’s failure to consider relevant evidence is error and must be reversed by the Board.

C. EXCEPTIONS APPLICABLE TO 8(a)(3) AND 8(a)(1) ALLEGATIONS (Exceptions 7 - 39)

1. The ALJ Erred in Concluding the General Counsel Met its Burden of Proof Concerning Allegations Relating to Jamie Hayes (Exceptions 13 - 28)

The Complaint contained several allegations relating to bargaining unit member Jamie Hayes. The ALJ’s conclusions that Respondents violated the Act related to Hayes through (a) Don Jones’ request that employees bring safety matters to the company’s attention; (b) Chris England’s threat of discipline related to Jamie Hayes’ loud and belligerent conduct during a safety meeting; and (c) Jeremy Devine’s presence at an MSHA office are erroneous as a matter of law and fact. Jones did not prohibit employees, including Hayes, from addressing safety concerns through reporting to MSHA. Additionally, England did not threaten Hayes with discharge or discipline because Hayes raised safety concerns – instead, England indicated that Hayes may be subject to discipline to the extent he engaged in belligerent conduct in the future. Finally, Devine was at MSHA’s offices for a wholly unrelated matter and not to engage in unlawful surveillance of union activity. Accordingly, those portions of the ALJ’s decision should be reversed.

a) The ALJ Erred in Concluding that Don Jones Directed Employees To Bring Safety Matters to the Company Rather than to MSHA

The ALJ’s determination that “Jones made clear that employees should report safety complaints not to MSHA, but rather, to the employer” is not supported by the record. D. 15:7-8.

Instead, the ALJ's determination relies in large part on his unsupported credibility determinations and unwarranted assumption that because MSHA complaints were discussed during the safety meeting on December 16, 2015, there was "no doubt" that Jones directed employees to bring complaints to Respondents and not to MSHA. D. 15 n. 17.

i. The ALJ's Credibility Determinations Are Not Supported by the Record

Respondents recognize that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of relevant evidence convinces the Board that they are incorrect. *See, e.g., Katz's Delicatessen*, 80 F.3d at 765; *Berger Transfer & Storage Co.*, 678 F.2d at 687; *Standard Dry Wall Prods.*, 91 NLRB 544. The Supreme Court has instructed that the Board may not make its determination:

. . . merely on the basis of evidence which in and of itself justify[es] it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn.

See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Rather, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera Corp.*, 340 U.S. at 487). It is "not good enough" that the record contain some evidence that could conceivably have supported an ALJ's finding. The *Universal Camera* standard is met only if the ALJ discusses, and provides citations to, that evidence. *Sears, Roebuck & Co.*, 349 F.3d at 514, citing *Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding that "the ALJ must minimally articulate his reasons for crediting or rejecting evidence"); *PPG Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part); *Fortuna Enters., L.P.*, 354 NLRB

202, 203 (2009) (failure to make detailed factual findings and credibility resolutions resulted in remand of finding of Section 8(a)(1) violation).

In reaching his conclusions about these alleged 8(a)(1) violations, the ALJ discussed the testimony of three witnesses: Jamie Hayes (called by the General Counsel), Pete Ward (called by Respondents), and Chris Simpson (called by Respondents). The ALJ made little effort to articulate his reasons for crediting or discrediting the testimonies of Hayes, Ward and Simpson other than to state generally that he determined credibility and to label testimony as either credible or not credible. For instance, in labeling Hayes' testimony credible, the ALJ relied partly on "Hayes' demeanor," which he did not describe, and the testimony's "plausibility." D. 14:32-33. Similarly, in determining that he would not credit Ward's testimony, the ALJ generically stated that it was implausible, yet failed to provide any specifics to support this finding. D. 14:40-41. Finally, the ALJ stated that Simpson's testimony did not warrant crediting over Hayes or Ward because "Simpson was not in the meeting and admittedly overheard Jones' comments from the adjacent hallway while he was otherwise occupied with contractor employees." D. 15:5. However, Simpson testified that the hallway was merely an "attachment" of the room in which the safety meeting was held, and that while he was intermittently speaking with other employees, "whenever the head honcho talks, you usually pay attention to what's going on." Tr. 355:10-13, 22-23. Accordingly, in explaining how he came to his conclusions, the ALJ relied largely (a) on amorphous concepts of general plausibility, or (b) with Simpson, a misunderstanding of Simpson's observation of the December 16, 2015 safety meeting.

The Board should overturn or remand the ALJ's decision that Don Jones' directed employees not to file complaints with MSHA in violation of Section 8(a)(1).

ii. The Board is Free to Draw Different Inferences and Conclusions from the Evidence

As outlined above, Respondents recognize that the “clear preponderance of the evidence” standard governs Board review of an ALJ’s credibility determinations. However, that standard does not apply to a judge’s factual findings or the judge’s derivative inferences or legal conclusions. *Plaza Auto Ctr., Inc. & Nick Aguirre*, 360 NLRB 972, 980 (2014). Accordingly, the Board may draw different derivative inferences and conclusions from the evidence than did the ALJ. *Id.* at 981. (citing *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977)).

Here, the ALJ credited Hayes’ account of the December 16, 2015 safety meeting – specifically, that Jones told a group of employees that someone had notified authorities about an MSHA issue and “we don’t need to do that, we need to bring our concerns to the company” and that Jones warned that “they are going to shut this place down” if people “keep notifying the authorities.” D. 14:26-27, D. 14:30-32. Based on this credibility determination, the ALJ concluded that Jones directed employees not to file complaints with MSHA, in violation of Section 8(a)(1). In drawing this conclusion, the ALJ rejected an alternative conclusion – that Jones asked that employees bring complaints to Respondents without directing or prohibiting employees from also bringing complaints to MSHA.

There is direct evidence in the record to support this alternative conclusion. Indeed, Hayes testified that Jones did not tell employees they could not bring complaints to authorities or that they would be disciplined for doing so. Tr. 195:20-24. Additionally, the testimonies of Respondent’s witnesses, Ward and Simpson, supported this alternative conclusion. Specifically, both testified that Jones did not tell employees not to file MSHA complaints, or state that employees must first bring such complaints to the Company. Tr. 353:13-18 (Simpson, C);

358:22-359:1 (Ward, P). However, the ALJ ignored this aspect of Hayes' testimony, and, as described above, summarily refused to credit Ward's and Simpson's testimonies that Jones did not tell employees not to file MSHA complaints or tell employees they had to bring complaints first to management, despite the fact that they were consistent with Hayes' testimony.

Although the ALJ concluded that the evidence of record established that Jones told employees not to bring complaints to MSHA, and thereby violated Section 8(a)(1), the Board should reject these conclusions and reverse given that the weight of the evidence does not support his conclusions.

b) The ALJ Erred in Concluding that England threatened Hayes with Discharge Because He Engaged in Protected Activity

The ALJ determined that Chris England explicitly threatened Hayes with discipline in response to Hayes' voicing of safety complaints during the December 16, 2015 safety meeting. D. 17:16-22. This determination is not supported by applicable Board precedent.

The ALJ found that England's threat that "if this happens again, if I get loud or anything, that . . . [Hayes] will be disciplined and [England] will let the arbitrator rule on it" was reasonably understood as a reference to Hayes' "loud," "angry," "excited," "agitated," and "aggressive" demeanor towards Jones during the December 16, 2015 safety meeting. D. 16:9-12. Multiple witnesses testified to Hayes' conduct during the safety meeting, including Hayes, who acknowledged that he was loud and angry, and that Dave Chapman felt compelled to intervene. Tr. 189:2-5, 10-12; 197:15-16; 198:3-4, 8-10 (Hayes, J.); 354:4-15 (Simpson, C); 359:12-16 (Ward, P). Despite this testimony, the ALJ ultimately concluded that Hayes did not lose the protection of the Act, and in so concluding, the ALJ misapplied Board precedent.

Respondents recognize that in the context of concerted protected activity, "a certain degree of leeway" is allowed; however, this leeway is balanced against an employer's right to

maintain order and respect. *Daimlerchrysler Corp. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW), Local 412, (Unit 53), AFL-CIO*, 344 NLRB 1324, 1329 (2005) (citing *Piper Realty*, 313 NLRB 1289, 1290 (1994)). Where an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act's protection. *Id.* Whether the Act's protection is lost depends on a balancing of four factors: (1) the place of discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.* (citing *Atlantic Steel Co.*, 245 NLRB 814 (1979)).

After considering these factors, the ALJ incorrectly determined this case "is not a close case" and that Hayes "most certainly did not lose the protections of the Act based on his actions at the December 16 safety meeting." D. 18:19-21. The ALJ found the first factor – the location of the discussion – to weigh in favor of protection because it took place at an employee meeting. D. 18 N. 19. Contrary to the ALJ's assessment, the first factor weighs against protection as Hayes' belligerent conduct occurred during a meeting attended by both supervisory and nonsupervisory personnel, which would tend to affect workplace discipline by undermining the authority of the supervisor subject to Hayes' verbal assault. *See Daimlerchrysler Corp.*, 344 NLRB at 1329 (citing *Aluminum Co. of America*, 338 NLRB 20, 21 (2004) (outburst in employee break room overheard by supervisor and two employees); *Piper Realty Co.*, *supra*, (outburst in supervisor's office with door open overheard by two clerical employees)). In addition to finding that the second and third factors weighed in favor of protection, the ALJ also concluded that the final factor – whether the outburst was in any way provoked by an unfair labor practice – weighed in favor of protection as well because Respondent's behavior "clearly" provoked Hayes' outburst.

D. 18 n. 19. As outlined in the previous section, Respondent vigorously disputes the ALJ's conclusion that Don Jones directed employees not to bring safety complaints to MSHA in violation of Section 8(a)(1). Accordingly, Respondent disputes the ALJ's related conclusion that the fourth factor weighs in favor of protection. Hayes' outburst was an unwarranted response to Jones' request that employees bring safety complaints to the company so that they could be addressed. Because two factors clearly weigh against protection, the case is in fact a "close case," and the ALJ's determination that Hayes' conduct was protected should be overturned.

c) The ALJ Erred in Concluding that Jeremy Devine Engaged in Unlawful Surveillance of Union Activity

The ALJ also concluded that Devine engaged in unlawful surveillance of union activity while he was present at MSHA's offices for a wholly unrelated matter. This conclusion is unsupported by the record or applicable law.

i. The ALJ's Credibility Determinations are Not Supported by the Record

The ALJ's conclusion that Devine engaged in unlawful surveillance of Jamie Hayes at an MSHA office in February 2016 is largely based upon the inconsistent testimony of the General Counsel's witnesses. As noted *supra*, (p. 7 to 11), the testimony of the General Counsel's witnesses was incredibly varied regarding Devine's purported behavior, and the ALJ erred in finding it to be credible.

With respect to Devine's supposed surveillance, Rick Rinehart testified that Devine was standing approximately five feet from the door to the meeting room and was "[j]ust kind of looking in the door, looking in the window." Tr. 173:15-22. In contrast, Mike Payton testified that Devine "had *his face against the window* and he was moving his head up and down and kind

of looking side to side, like this, to see who was in the room, and he looked directly at me and kind of made a face as if what's going on in here." Tr. 159:17-21 (emphasis added).

Each of these witnesses (in addition to Hayes) also relayed wildly different accounts of the response to Devine's purported surveillance. Rinehart testified that another attendee of the meeting, Jeff Maxwell, immediately exited the meeting room; however, Rinehart could not see whether Maxwell spoke with Devine. Tr. 178:20-179:4. Rinehart also testified that Maxwell made a phone call upon returning to the meeting room, but he could not hear what the subject of the call was. Tr. 180:13-19. Payton testified that Maxwell did not leave the room, but instead called "somebody outside the room" and told them to "keep management away from the window." Tr. 164:2-14. According to Hayes, who never saw Devine, an unidentified investigator got up and "got on the intercom system on the wall" and, "I guess was hollering to the front desk, and he got on there and asked if Jeremy Devine was finished with his business in the building, he could leave at this time." Tr. 193:6-16.

Despite the many inconsistencies in these witnesses' accounts of Devine's conduct and the response thereto, the ALJ credited these accounts, stating simply that they still appeared to be "the honest recollection of three people independently recalling a surprise and sudden event." D. 20:37-38. In contrast to the inconsistent and dramatic accounts of the General Counsel's witnesses, Devine provided straightforward testimony that explained why he was at the MSHA office that day, and why he had reason to pass by the meeting room. Specifically, Devine testified that he had to walk past the meeting room on his way to and from his own meeting. Tr. 390:2-11. Devine denied that he approached the windows to that room or otherwise put his head to those windows to see who was in the room. Tr. 390:1-3. And, Devine testified that he was not at the MSHA office to spy on Jamie Hayes and had no knowledge that Hayes was even there

(until the unfair labor practice charge leading to this case was filed). Tr. 393:2-3. As evidenced by the record, the General Counsel erred in finding the testimony of the General Counsel's witnesses to be credible and in relying upon it to conclude that Devine engaged in unlawful surveillance.

ii. Devine's Conduct Did Not Constitute Unlawful Surveillance

The ALJ's error in crediting the inconsistent and unreliable accounts of the General Counsel's witnesses is compounded by the fact that the conduct those witnesses describe does not constitute unlawful surveillance. The ALJ acknowledged that Devine was properly at the MSHA offices to attend a meeting on employer business, and that as the representative in charge of safety and compliance, Devine interacted almost daily with MSHA representatives. D. 19:9-12, 21:8-9. The ALJ also found that Devine could see into the large meeting room at the MSHA office from where he sat in the waiting area, and that Devine had to pass by the large meeting room on his way to and from the location of his own meeting. D. 19:18, 19:31-32, 20:28-29. Notwithstanding these findings, all of which support the conclusion that Devine's presence at MSHA and any observation he made of union activity was coincidental, the ALJ concluded that Devine engaged in "classic unlawful surveillance." D. 21:20-21. Specifically, the ALJ determined that Devine did not simply walk past the meeting and exit the building. D. 21:13-14. Instead, he "stopped to investigate and see what else he could learn about the meeting, its attendees, and purpose, by standing in the window to the meeting room and purposely peering into it." D. 21:14-16.

Even if Devine did "peer" into the window, such conduct does not constitute unlawful surveillance. As explained in a decision cited by the ALJ, "[t]he mere presence of a supervisor or management official at a location where union activity is taking place does not establish

unlawful surveillance. “[W]here purely fortuitous circumstances bring such parties together there is no dogmatic legal principle by which the employer would be declared to have violated the Act.” *Valmont Indus., Inc. & United Steelworkers of Am., AFL-CIO, CLC*, 328 NLRB 309, 318 (1999) (quoting *Gossen Co.*, 254 NLRB 339, 353 (1981)); *see also N. Berkshire Cmty. Servs., Inc.*, 1-CA-45210, 2010 WL 805666 (Mar. 9, 2010) (noting that Board jurisprudence in the area of surveillance recognizes that open union activity may well be observed by supervisors and the Board’s analysis focuses on whether these observations were ordinary or represented unusual behavior).

Here, it has been established that Devine was properly at MSHA’s offices. The fact that protected activity may have been occurring there on the very same day, and in a meeting room in clear view of Devine, is purely fortuitous. Moreover, the fact that Devine may have paused or peered into the meeting room as he walked past - - which is by no means conceded - - is ordinary far from unusual. Indeed, Devine interacted with individuals at the MSHA office regularly and would have recognized many of the people in the meeting room. It is only natural that he may have paused momentarily to see who was there. Such conduct is not the product of unlawful surveillance. Instead, it is the product of happenstance and natural human curiosity. *See N. Berkshire Cmty. Servs., Inc.*, 1-CA-45210, 2010 WL 805666 (Mar. 9, 2010) (determining there was insufficient evidence to conclude unlawful surveillance occurred in a parking lot where there was nothing unusual about the employee’s presence in the lot at that time and, while an encounter with another employee was more suggestive, there was no evidence it was the product of surveillance as opposed to happenstance).

Critically, the Board has cautioned that “mere suspicion cannot substitute for proof of an unfair labor practice.” *Lassell Junior College*, 230 NLRB 1076, n. 1 (1977). While the ALJ may

have been suspicious of Devine's behavior, suspicion does not serve as a substitute for proof. Unfortunately, the ALJ let suspicion influence his conclusion, which was otherwise supported only by inconsistent and unreliable testimony. As a result of these errors, the ALJ's determination that Devine engaged in unlawful surveillance should be reversed.

2. The ALJ Erred in Concluding the General Counsel Met its Burden of Proof Concerning Allegations Relating to Joshua Peek (Exceptions 7 - 12)

The ALJ also erred in concluding that Respondents violated the Act regarding the conduct of Harrison County Coal superintendent, Scott Martin. While the ALJ properly dismissed one allegation concerning Martin, he failed to appropriately address an allegation concerning threats of reprisals and applied unfair credibility determinations inconsistent with the record.

a) Factual Background

This allegation concerned an interaction which allegedly occurred between a Union-represented employee, Joshua Peek, and Martin. Only two witnesses testified regarding this interaction, and while their testimony was similar, it diverged in critical ways. Peek, a member of the Union, filed a grievance in January 2016, alleging that a supervisor, George McCauley, was performing bargaining unit work. Tr. 253:23-254:1, 254:13-18. The next day, the witnesses agreed that Martin approached Peek to discuss the issue. Tr. 257:1-9 (Peek, J.); 284:20-21 (Martin, S.). Martin testified that he went to speak with Peek as he understood that Peek was intending to or had filed a grievance against McCauley for performing bargaining unit work. Tr. 285:1-15. Martin further testified that he specifically inquired as to what work McCauley was performing, and what Peek alleged was the loss that was suffered. Tr. 285:8-9. Martin testified that he then asked whether Peek and McCauley were working together, to which Peek replied that they were. Tr. 286:10-13. Martin explained at the hearing that he expressed his opinion that

he did not believe McCauley had violated the collective bargaining agreement, but that Peek had a right to grieve the issue. Tr. 286:16-25. Martin's testimony was specific, clear, and detailed.

Peek testified that, during the conversation, Martin told him he considered whether employees filed grievances when they need assistance. Tr. 258:14-17. Peek further claimed that Martin said he had assisted Peek in the past, and insinuated that he would not extend such courtesy if Peek filed the grievance against McCauley. Tr. 259:13-16. Notably, Peek did not report the alleged conversation to the Union, and asked no one to file any charge about the matter. Tr. 259:21-260:3. Peek stated he was solicited by the Union to participate in the charge and hearing. Tr. 260:4-5. Martin, for his part, denied that any such discussion regarding favors he had done for Peek in the past occurred, and denied that he asked Peek to withdraw the grievance at any point. Tr. 287:1-15.

b) Legal Argument

The ALJ's conclusions relating to the Peek allegations suffer from multiple errors.

First, the ALJ's credibility determinations suggest bias. The ALJ discredited Martin because he thought Martin was "fast-talking and overconfident," and further indicated that he "simply [did] not believe" that Martin would have told Peek that he had the right to file a grievance. D. 7:15-19. Yet, Martin's purported "fast-talking" and confident demeanor is equally characteristic of a witness certain in his testimony and confident that he violated no established laws. Moreover, the ALJ's "simple" refusal to believe that Martin would have assured an employee that he had the right to file a grievance is illogical – were Martin the type of manager that threatened reprisals for the filing of grievances or who told employees that they could not file grievances, one would expect to see many more allegations about Martin in this case, which contains unfair labor practice allegations spanning nearly a year's time. However, this is the

only allegation that relates to Martin. Accordingly, the ALJ's credibility findings, which are the primary basis for his finding of a legal violation concerning Peek, should be reversed.

Moreover, the ALJ erred in shifting the burden of proof to the Respondents regarding this 8(a)(1) allegation. The circumstances of the conversation, even as explained by Peek, have no reasonable tendency to coerce employees in their exercise of rights under the Act. Indeed, Peek himself has admitted that there was no adverse impact at all from this conversation, and volunteered that he did not even intend to pursue the matter. Tr. 259:21-260:3. As such, the ALJ erred in finding an 8(a)(1) violation.

In short, the ALJ's conclusions relating to this alleged threat of reprisals should be reversed.

3. The ALJ Erred in Concluding the General Counsel Met its Burden of Proof Concerning Allegations Relating to Mark Moore (Exceptions 29 - 35)

The ALJ also erred in his findings and conclusions relating to bargaining unit employee Mark Moore. In the Complaint, the General Counsel made three discrete allegations surrounding Moore. The first two – an 8(a)(1) and an 8(a)(3) allegation, respectively – concerned an interaction between Moore and assistant superintendent Jeffrey Crowe on or about June 8, 2016, which related to a tense conversation between the two about a mine shutdown. Respondents do not except to the ALJ's findings and conclusions concerning this interaction. Respondents do except, however, to the ALJ's findings and conclusions relating to a one-day suspension issued to Moore on or about September 19, 2016.

a) Factual Background

By way of background, the first incident involving Moore began on June 7, 2016. On this date, there was a roof fall at the Marshall County Mine. Management employees pitched in to help clean the roof fall. This was an effort to speed the process up in a difficult economic

environment, yet Moore threatened to file a grievance about this conduct. Tr. 118:6-24. The next day, June 8, 2016, Moore met with Crowe to discuss Moore's grievance and the reality of what a roof fall means to a mine. The parties stipulated to a transcript of this conversation, which Moore surreptitiously recorded through his phone. Jt. Ex. 3, ¶ 12. After this interaction, Moore was suspended for a day and ultimately filed a charge with the Board in or around August 2016. Tr. 122:9-12.

The second incident occurred on September 19, 2016. Moore was assigned to the afternoon shift, with a start time of 4:00 p.m. Tr. 124:3-5. When employees start a shift to go underground, they are conveyed to the "bottom" of the mine via an elevator commonly referred to as a "cage." To facilitate logistics, there is a set order in which employees travel to the bottom. Tr. at 323:17-22. Employees are asked to change crews often, so employees must be dressed and ready for work at their appointed start time. Tr. 323:6-10, 325:9-326:10 (E. Koontz). Moore admitted that knew he "had to be ready to go underground at 4:00." Tr. 127:16-18. However, on September 19, Moore was not prepared to go underground at 4:00. The ALJ appeared to concede as much in his Decision. Respondents introduced photos from surveillance video which showed that Moore was still finishing his preparations to go underground at 4:07. Resp. Ex. 7. Moore verified that the photographs were taken of him, and Eric Koontz, general superintendent, testified how the photographs were created. Tr. 133:12-136:6; 328:20-329:2. Koontz also explained that the time stamps on the pictures show an *earlier* time than would be registered on the official time clock. Tr. 329:16-330:3. This means that Moore was even later than the time stamps on the photos indicated.

Koontz has the video surveillance system available in his office. Tr. 328:20-25. When he saw Moore still preparing to go underground well after 4:00, he sent John Brone, shift foreman,

to speak with Moore. Tr. 327:4-12. Koontz testified that he knew that Brone and Tim Phillips, Assistant Shift Foreman, had spoken with Moore previously about his arrival time, and how he was often cutting it close to being late. Tr. 327:4-19. Brone confirmed that he had previously spoken with Moore about the issue often. Tr. 348:2-9. Because of this, when Koontz noticed Moore still not prepared to go underground, he believed disciplinary action was required. Tr. 327:4-12. He instructed Brone to send Moore home for the day and inform him that they would have a disciplinary meeting the following day. Tr. 327:23-328:19. Moore was issued a one-day suspension. GC Ex. 14.

Importantly, Koontz was not involved in the previous incident on June 8, 2016, and was on vacation that week. Tr. 337:24-338:4. Koontz testified that he had no involvement in the labor charge filed because of that incident, had some vague awareness of it, but would not participate in handling any charges unless he was personally involved. Tr. 338:11-17.

b) Legal Argument

The ALJ erred in concluding that the circumstances of Moore's discipline constitute a violation of the Act. Fundamentally, although in a very verbose fashion, the ALJ found a violation because he believed that Respondents' explanation for Moore's discipline (his failure to be dressed and ready by 4:00) was a pretext since Moore had an ongoing history of being late that was previously not the subject of discipline. D. 27:15-28:36. In reaching this conclusion, the ALJ ignored critical testimony and discounted comparator evidence. More specifically, the ALJ ignored Moore's admission that he knew that he had to be dressed and ready to work at 4:00. The ALJ also ignored Moore's acknowledgment that he was not, in fact, ready. The ALJ also failed to address evidence that at this same mine, Respondents issued a discipline to an employee for being late for his shift. D. 28:42-48.

The ALJ also erred in imputing animus relating to the June 8, 2016 incident and unfair labor practice charge to Koontz, the decision maker of the September discipline, even though Koontz truthfully testified that he had no involvement in the June 8, 2016 incident and was nothing more than nominally aware of any charge filed by Moore. Tr. 337:34-338:4. As the decision maker in this matter, his lack of involvement in the other charge, and lack of awareness of any allegations in that charge at the time discipline was issued, strongly indicate a lack of animus to support an 8(a)(3) or 8(a)(4) allegation.

The ALJ also improperly relied on the testimony of Colby Yarbrough that he was similarly behind schedule that day, but not disciplined. In crediting Yarbrough's testimony, and relying on it to find pretext, the ALJ failed to acknowledge that Yarbrough's testimony was internally inconsistent. He stated, in the same answer, that he arrived to work at "5 to 4:00" and "quarter til 4:00." Tr. 141:8-10 (Yarbrough, C.). These are materially inconsistent times, and provide no evidence of value since Yarbrough's sole testimonial purpose was to bolster the General Counsel's position that Moore was singled out and was not, in fact, the only employee who was late. Indeed, there can be no certainty, *from Yarbrough's own testimony*, about what time he arrived. While the ALJ was quick to discredit Respondents' witnesses for perceived testimonial flaws, he ignored Yarbrough's internally contradictory testimony which should have discredited him entirely.

In short, the ALJ's findings and conclusions regarding Moore's September discipline should be reversed.

4. The ALJ Erred in Concluding the General Counsel Met its Burden of Proof Concerning Allegations Relating to Joshua Preston (Exceptions 36 - 39)

The ALJ next erred in his conclusion that Respondents threatened bargaining unit employee Joshua Preston. In reaching his conclusion, the ALJ discredited mutually

corroborative testimony from Respondents' witnesses, and stretched to find a legal violation on weak facts.

a) Factual Background

Respondents acknowledge that there are two, very different, renditions of the events that underlie these allegations. The first, provided by Preston, lacks corroboration. The second, provided by the testimony of management employees Ben Phillips and John Kirk, is consistent and uniform.

The stories are consistent about one piece of background: During Preston's shift on September 13, 2016, Preston ran into an issue with moving a track bolter on the section, in that there was not a motor available to move the bolter into position. Tr. 211:4-7, 15-17 (Preston, J); 311:12-14 (J. Kirk); 317:2-7 (B. Phillips).

Preston's account of what happened next is as follows: he claims he was summoned to Phillips' office by a management employee named Teddy Perkins. Tr. 214:1-5. Preston claims he knocked on the door and then, with no prompting, requested union representation. Tr. 215:3-6. By Preston's own account, Phillips had said nothing at this point, and Preston apparently had no knowledge of the subject or nature of the meeting. *See Id.* In response, Preston testified that Phillips stated that he was not disciplining Preston, and that he just had a few questions. Tr. 215:14-17. From there, Preston claims that Phillips told Preston that if he wanted to be disciplined, Phillips could find something to discipline him for and Preston could return the next day with representation for a disciplinary meeting. Tr. 215:24-216:2. Phillips then supposedly launched, unprompted, into a series of what Preston called "direct orders." Tr. 216:6-7. The "orders" were questions regarding why the track bolter was not moved during the shift. Tr. 216:5-217:1. Preston testified that he refused to respond initially. Tr. 216:15, 21. Preston then

added, prompted by questions from counsel, that Phillips grew more agitated during the exchange, and that Preston would have rated Phillips' volume level as a "7 or an 8" on a scale of one to ten. Tr. 217:2-5. At that point, Preston allegedly responded to Phillips and informed him that there were no available motors to move the track bolter. Tr. at 217:16-20. Preston testified that Kirk then intervened and took responsibility for the issue, at which time the meeting concluded. Tr. 217:23- 218:3.

Phillips' and Kirk's account was as follows: Both stated that Preston was not called to Phillips' office, but rather stopped by uninvited and unexpected. Tr. 310:24-311:2 (J. Kirk); Tr. 316:19-21 (B. Phillips). Kirk and Phillips testified that when Preston appeared, Phillips asked him why a motor was not taken to address the issue with the track bolter since it had just happened earlier that day. Tr. 311:9-14 (J. Kirk); Tr. 317:1-10 (B. Phillips). At that time, Preston made no response, and attempted to leave the office. Tr. 311:15-19 (J. Kirk); Tr. 317:11-15 (B. Phillips). Preston made no explicit request for union representation, but rather asked to make a phone call, implying that he was contacting a representative. Tr. 311:20-21, 312:2-5. Phillips called Preston back to the office, and said he just had a question. Tr. 311:25-312:5, 312:19-313:2 (J. Kirk); Tr. 317:1-24 (B. Phillips). Both Kirk and Phillips testified that Phillips was not agitated, issued no orders for Preston to answer, and that the conversation was nothing atypical. Tr. 312:16-18 (J. Kirk); Tr. 318:8-13, 23-25 (B. Phillips). Both agreed that never during the exchange was Preston threatened with discipline. Tr. 313:3-6 (J. Kirk); Tr. 318:19-25 (B. Phillips). Both also agreed that Kirk jumped in to explain what happened and then the conversation ended without fanfare. Tr. 312:7-10 (J. Kirk); Tr. 318:4-7; 320:1-5 (B. Phillips).

b) Legal Argument

The ALJ made numerous fundamental errors in his analysis of the General Counsel's allegations relating to Preston.

First, the ALJ's credibility determinations are implausible and unsupported by the record testimony. He credited Preston and discounted Phillips' and Kirk's testimony. Importantly, Preston's testimony stands alone in this matter. He testified (implausibly) that although he did nothing wrong, and Phillips had not indicated to him the purpose of the meeting, he immediately requested union representation at the outset of his conversation with Phillips and Kirk. Preston is the only voice that claimed that Phillips made any threat of discipline, and even that testimony was *preceded by testimony in which Preston admitted that Phillips said that he would **not** discipline him.*

The more credible testimony was that rendered by Kirk and Phillips, which was consistent. They testified that Preston was asked a question when he came to the office for another purpose, and when he attempted to walk away without answering, Phillips simply asked him what had happened. This was nothing more than a brief passing conversation about the happenings of the day, and no threats were issued. Kirk jumped in to answer Phillips' question because he knew the answer, and the matter was dropped. The fact that Kirk's and Phillips' accounts are similar should have been given credence over the uncorroborated testimony of Preston, particularly given the ALJ's other credibility findings when multiple witnesses testified on behalf of the General Counsel. *See Mid-West Tel. Serv., Inc.*, 2011 WL 6839035 (N.L.R.B. Div. of Judges Dec. 28, 2011) (crediting the mutually corroborative testimony of two witnesses because it was detailed and reflected certainty about the events).

To discredit Respondents' witnesses, the ALJ created a testimonial conflict where none existed. He made a finding that "Phillips denied mentioning discipline or that he made any reference to Phillips returning with a union representative," and claimed that Kirk directly contradicted this testimony. D. 30:21-23. In fact, Phillips actually testified as follows:

Q: Okay. Did he say at any point then that he wanted a representative?

A: I never heard those words out of his mouth, absolutely not.

Q: What did you say in response to him? Did you say anything about him -- excuse me, let me rephrase. Did you say anything to him about issuing discipline during that meeting?

A: No, I would have no reason to issue discipline. It was a simple question so I could find out the issue to I could have the next shift lined up to resolve the issue.

Tr. 317:16-24.

Contrary to the ALJ's claims, which he relied on to find Phillips not credible, Phillips never stated he made no mention of discipline; instead, he stated that had "no reason to issue discipline." Tr. 317:22. Moreover, Phillips did not state *he* made no reference to Preston returning with a union representative; he said that he "never heard those words" out of *Preston's* mouth. Tr. 317:18. The ALJ's conclusions regarding the Preston allegation are infested by a credibility determination that is unsupported by the record. As such, his findings should be reversed.

Moreover, even if Preston's testimony was properly credited, which it should not have been, the ALJ erred in concluding that there was a violation of Section 8(a)(1). It is black letter law that, to carry the burden on an 8(a)(1) interference charge, the General Counsel must prove by a preponderance of the evidence that the actions of the employer were objectively sufficient to restrain, coerce or interfere with employees' rights under the Act. *Cheney Constr., Inc.*, 344 NLRB 238, 239 (2005). Similarly, the Board considers all of the surrounding circumstances to

determine if a statement by management could reasonably tend to have a coercive impact that interferes with the free exercise of employee rights. *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003). In a terse, one-paragraph analysis, the ALJ concluded that a “smart-aleck” statement attributed to Phillips by Preston (e.g., “I never intended to write you up, but if you want wrote up, I can find something to write you up with, and you can come back tomorrow at 4:00 with your union representation”) was a “naked threat to discipline an employee for asserting the right to a union representative” and that such a statement would reasonably have a tendency to coerce an employee. D. 31:5-17. This is unsupported by the record. The totality of the circumstances, as described by the witnesses, demonstrate a meeting where, at worst, the parties had a misunderstanding about one another’s purpose and intent. A reasonable person would not have found Phillips’ statement, if it occurred, to be coercive given the surrounding circumstances of the conversation.

Accordingly, the ALJ’s findings and conclusions should be reversed.

D. EXCEPTIONS APPLICABLE TO ALLEGED UNILATERAL CHANGE ALLEGATIONS (EXCEPTIONS 40-41)

The ALJ also incorrectly concluded that the General Counsel had established an 8(a)(1) and 8(a)(5) violation of the Act regarding an alleged unilateral change. In doing so, the ALJ ignored critical, undisputed evidence; applied circuitous and logically-flawed reasoning; and failed to discuss directly relevant Board precedent. For all of these reasons, and as described below, the ALJ’s findings and conclusions relating to an alleged unilateral change should be reversed.

1. Factual Background

This unilateral change allegation concerns the General Counsel’s contention that Respondents violated the Act when the Marion County Mine elected to hold Step 3 grievance

meetings, and just Step 3 meetings, at one particular location rather than at multiple locations. The Marion County Mine contains four employee reporting locations: (1) the Metz Portal; (2) the Miracle Run Portal; (3) the Prep Plant; and (4) the Sugar Run Portal. GC Ex. 11. It was undisputed that approximately 75% of the Marion County Mine's employees report to the Metz Portal. Tr. 292:13-22; 368:19-20. It is the "hub" of the mine, containing not just the vast majority of employees, but also critical management and administrative offices such as the general manager's office, as well as the offices of the superintendent, human resources, the engineering department, staff department heads, and the safety department. Tr. 292:13-22. It was also undisputed that it takes only 15 to 20 minutes to drive from any of the other employee reporting locations to the Metz Portal. *See* Tr. 49:12-20 (Phillippi, M.).

Under the parties' collective bargaining agreement, there are four steps in the grievance process. Jt. Ex. 1-2, Art. 23. Step 1 involves an aggrieved employee raising an issue with his immediate supervisor. *Id.* If denied, the employee raises the issue with his mine committee, who reduces the grievance to writing and submits it to mine management. A Step 2 grievance meeting is scheduled. Tr. 269:4-15. The Step 2 grievance meeting involves local mine Human Resources Department personnel, the local mine committee, and the grievant. *Id.* If not resolved at Step 2, the grievance is referred to Step 3. Step 3 involves executive mine management and typically corporate Human Resources for the Company and a district representative for the Union. Tr. 269:16-24. If a resolution is not reached at Step 3, the grievance is referred to arbitration. *Id.* The parties' collective bargaining agreement is silent as to where any of the meetings should be held. *See generally* Jt. Ex. 1-2.

At the Marion County Mine, the mine superintendent typically attends the Step 3 meetings. Tr. 369:11-13. Respondents' witnesses testified without contradiction that, generally,

Step 3 meetings last a full day, with multiple grievances scheduled for discussion during that day. Tr. 294:23-295:2. Further, it was undisputed that lengthy breaks often occurred between Step 3 meetings. Tr. 374:17-19. It was further agreed by all witnesses that employees may participate in Step 3 meetings, but they are not paid for their time, they are not a mandatory participant, and not all employees elect to attend such grievances. Tr. 295:3-7 (Baum, T.); Tr. 370:16-25 (Simpson, P.).

The parties stipulated that “[f]rom the period January 1, 2014 to October 4, 2016 Step 3 grievance meetings at Marion County Coal Company had been held at the mine portal at which the grievant worked with limited exceptions including but not limited to instances where the grievant did not wish to participate in the Step 3 or the grievant was an officer involved in Step 3 processing away from his home portal.” Jt. Stip. ¶ 11. At the hearing, witnesses testified surrounding the circumstances of the alleged unlawful change. The dispute centered on discussions that occurred in October 2016, when a Union representative attempted to schedule multiple Step 3 grievance meetings at each of the portals. GC Ex. 11. In response, Marion County Mine management indicated that it wished to hold such meetings at one localized location, the Metz Portal. GC Ex. 11.

The decision to do so was made by Pete Simpson, the mine’s general manager. Tr. 296:12-14. Simpson’s decision was guided by it being extraordinarily burdensome for him to travel to the other portals for Step 3 meetings. Tr. 298:1-15. For example, Simpson testified that all of his support staff is at the Metz Portal, and holding meetings at this location allowed him to access his staff on breaks. Tr. 373:14-25. Moreover, in between the Step 3 meetings when held at Metz, Simpson testified that he could return to his office to perform work. Tr. 373:9-374:13. He could also obtain operational documents which are only housed at the Metz Portal. *Id.* When

the Step 3 meetings are held at other Portals, Simpson testified that he did not have access to these same resources. Tr. 374:23-375:3. No witnesses contradicted Simpson's testimony about the burden of traveling to various portals for Step 3 meetings that relevant employees may not even attend.

2. Legal Argument

The ALJ inappropriately concluded that Respondents violated the Act by changing the location of Step 3 meetings at the Marion County Mine. His conclusions are unsupported by the record evidence and contrary to the law. They should be reversed.

a) The ALJ improperly shifted the burden of proof to Respondents

It is the General Counsel's burden to prove that a change in the location of Step 3 grievance meetings was a "material, substantial, and a significant" change. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). Yet, here, the ALJ reversed, blurred, and/or altogether ignored the correct allocation of the burden of proof. The Decision nowhere articulates the analytical framework that was applied in evaluating the parties' respective burdens on the 8(a)(1) and 8(a)(5) unilateral change allegations. The ALJ did not discuss or address the burdens of proof in such claims or evaluate the evidence offered by the General Counsel in the context of its burden. Instead, his analysis of the unilateral change allegation involves a naked mischaracterization of Respondents' position with no discussion of whether the General Counsel met its burden. Thus, the ALJ's analysis of the unilateral change allegations was plain error that requires reversal.

b) Respondents Did Not Violate the Act

The ALJ properly explained that an employer violates Section 8(a)(5) of the Act only if it makes a *material* unilateral change. D. 52:27-28. More specifically, however, Board precedent clarifies that "there must be evidence that the unilateral change was a 'material, substantial, and

significant' change to employees' terms and conditions of employment." *Salem Hosp. Corp.*, 360 NLRB No. 95, at *2, (Apr. 30, 2014) (quoting *Carey Salt Co.*, 360 NLRB No. 38 (2012); *Peerless Food Prods. Inc.*, 236 NLRB 161 (1978)). The Board has said that to constitute a unilateral change that violates the Act, the employer's action must have a real impact on, or cause a significant detriment to, employees or their working conditions. See *Pan-American Grain Co.*, 343 NLRB 318, 331 (2004); *Southern Cal. Edison Co.*, 284 NLRB 1205, 1205 fn. 1 (1987), *enf'd*. 852 F.2d 572 (9th Cir. 1988).

Respondents cited, and the ALJ completely ignored, the Board's decision in *Success Village Apartments, Inc.*, 348 NLRB 579 (2006), to support their position there was no unlawful unilateral change. There, the Board evaluated whether the employer's change to its parking policy, which is a mandatory subject of bargaining, violated Section 8(a)(5) of the Act. The underlying change resulted in employees being forced to walk approximately 200 additional yards farther from their vehicles to the employer's main building where they reported to work. The Board ruled this minor change failed to rise to the level of being material, substantial, and significant and, therefore, there was no 8(a)(5) violation.

Here, in concluding there was a material unilateral change, the ALJ stated that "there can be no doubt, in my view, of the materiality of the change" because a 20-30 minute unpaid (or 15-20 minute) drive is "hardly a de minimis change, compared to the convenience of attending a meeting where one works." D. 53:31-35. The ALJ cited no Board precedent in support of this *ipse dixit* conclusion. Instead, he mischaracterized Respondents' position on the materiality of the change as being solely based on the percentage of the total workforce that was impacted. This mistakes Respondents' argument. Respondents argued, and the facts amply demonstrate, that the Marion County Mine changed no wages, no benefits, no bases for discipline, no

schedules, and no other traditional term of employment for its employees. It did not eliminate employees' right to participate in the grievance process. It eliminated no step in the grievance process. Rather, all that it changed was the location for meetings at one step of the grievance process – a step that does not even mandate employee participation.

More specifically, Respondents argued, consistent with Board precedent, that not only is the universe of employees impacted by this change incredibly small, but that for this small percentage of impacted employees, the actual amount of impact is immaterial (a 15-20 minute drive). The record reflects that the *only* employees who could even theoretically be affected are those that meet *all* of these conditions: (i) Who are among the 25% or less of the Marion County Mine's workforce who do not report to the Metz Portal; (ii) Who file a grievance; (iii) Which does not resolve the grievance at Step 1; (iv) Which also does not resolve the grievance at Step 2; *and* (v) Who elect to attend the Step 3 grievance meeting. Even then, the only impact is an extra 15-20 minute drive *one time*. This is not a material change. It should not have been found to be so. The ALJ's conclusion that there was a violation of Section 8(a)(5) under these facts is baseless.

E. EXCEPTIONS APPLICABLE TO ALLEGED INFORMATION REQUEST VIOLATIONS (EXCEPTIONS 42 - 52)

The ALJ also erred in finding that Respondents violated Sections 8(a)(1) and 8(a)(5) of the Act regarding an assortment of information request allegations. In reaching his erroneous conclusions, the ALJ should have credited the testimony of Respondents' witnesses as it was often undisputed. Further, the ALJ failed to properly consider relevant case law. His findings and conclusions should be reversed.

1. Respondents Properly Responded to an Overly Broad and Harassing Information Request Concerning Contracting Out Information (Exceptions 46 - 52)

The ALJ improperly concluded that Respondents violated the Act regarding a breathtakingly broad request made on March 31, 2016 about contracting out information. Contrary to the ALJ's conclusions, the record demonstrated that the information request was, on its face, overly broad and unduly burdensome, and that it was unquestionably made in bad faith.

a) Factual Background

The specific request at issue was made by email on March 31, 2016 to Karen Mohan, the Human Resources Manager at the Monongalia County Mine (the "Mon County Mine"), and sought – broadly – copies of all documents that related to contractors used by the mine during a nine-month period. GC Ex. 10. Not satisfied with requesting such a broad swath of documents, the Union compounded the burdensome nature of its request by stating that it desired a response by the very next day, April 1, 2016. *Id.* The Union representative making the request, Michael Phillippi, admitted that the information request was designed to simply "ensure compliance" with the contract, and that it was not tied to a specific grievance or arbitration. Tr. 41:7-10.

Within the information request were five subcomponents. Specifically:

- The Union sought "Copies of all invoices, bills, and any other document submitted by ANY contractor describing the type and duration of any work performed by a contractor at any time between July, 2015 and present." GC Ex. 10. Mohan responded in writing to the Union that this specific request was burdensome and lacked any measurable specifics. *Id.* At the hearing, she testified without contradiction that the Mon County Mine does not maintain the information requested and that she did not know how to collect it. Tr. 427:22-428:12.
- Next, the Union sought "Copies of all Bid Forms, estimates, Offers or any other document describing the nature, extent, type and duration of the work to be done submitted by a contractor for work to be done at the mine at any time between July, 2015 and present." GC Ex. 10. Mohan responded in writing to the Union that the Mine did not maintain such a list. At the hearing, Mohan clarified, again,

that the Mine did not maintain these records – this testimony was, again, undisputed. Tr. 428:13-21.

- Third, the Union sought “Copies of any rosters, lists, reports, memorandum, documents, or postings showing that any work contracted out was first offered to Bargaining Unit Employees before being contracted out.” GC Ex. 10. Again, Mohan responded in writing that the Mine did not maintain such a list. *Id.* At the hearing, Mohan restated that this information was not maintained by the Mine. Tr. 428:25-429:5.
- Fourth, the Union sought “Copies of any rosters, lists, reports, memorandum or documents showing that Bargaining Unit Employees were unavailable to perform any work contracted out at any time between July, 2015 and present.” GC Ex. 10. Similarly, Mohan responded in writing that the Mine did not maintain such a list. *Id.* At the hearing, she testified without contradiction that this information was not maintained by the Mine. Tr. 429:6-11.
- Finally, the Union made the following information request: “If you claim that any work performed by a contractor any time from July, 2015 to present, is or was warranty or specialty work, please provide copies of any and all documents supporting this contention and identify the job or jobs involved and the dates of the project.” GC Ex. 10. Mohan responded that the Mine did not claim anything and did not maintain such a list. GC Ex. 10. She also testified without contradiction at the hearing to the same facts. Tr. 429:12-430:1.

Paragraphs 3 through 5 of this contracting out information request are not at issue in this case. Apparently, the General Counsel concluded that these requests were unreasonable and credited the Respondents’ position that the requested information did not exist. This point is noted obliquely by the ALJ. D. 44 N. 36.

By way of background, Mohan testified, without contradiction, that while third-party contractors are often used at the Mine, there is no set system for managing or controlling contractors. There is no central person tasked with arranging for contractors, no centralized repository for contractor information, and no system or spreadsheet for tracking contractor information. Tr. 425:3-21. Rather, each individual department head or coordinator manages contractor issues and needs on an ad hoc, case-by-case basis. Tr. 425:16-21. As is not surprising, the Union frequently objected to the Company’s use of contractors; this issue has

been the source of grievances and made its way to arbitration on multiple occasions. Tr. 276:24-277:4. It has also frequently been the source of information requests, to which Mohan has regularly responded. Tr. 426:4-9.

After he received the mine's response, Phillippi emailed Mohan the following on April 5, 2016:

Your purported response to our information request is totally inadequate and unresponsive. We need the information to monitor and ensure compliance with our contract. The need for your immediate and complete responses and documents is even more urgent since contractors such as Jen Chem [sic] and GMS are on the property while we have employees available and/or on layoff who can perform the work apparently being done by the contractors. Your provision of the requested information will let us determine, what, if any, action need be taken. We are also aware of contractors recently violating a cease and desist order from Arbitrator Allen pertaining to skip ropes. We are requesting invoices, quotes, and any other information showing the work these contractors are performing or have performed. We are also requesting the same information for all contractors that have been on the property from July 2015 to present. We are requesting total and prompt response by Monday April 11, 2016.

GC Ex. 10, p. 001076. In response to Phillippi's email, Mohan emailed Phillippi the following on April 5, 2016:

Your request is not specific to any grievance or arbitration. I maintain the position that it is burdensome and lacks specifics, as stated in my previous response to your questions. Please narrow your requests for information down to a specific date, grievant, contractor, project, etc. and I may be able to provide more information.

GC Ex. 10, p. 001076. Later that same day, Phillippi responded to Mohan, stating the following via email:

As I've indicated, we need the information to monitor your compliance with the contract and determine whether or not the filing or pursuit of any grievances are warranted-particularly in light of the continued presence of contractors such as Jen Chem [sic] and GMS on the property. Your prompt and complete

responses to our requests will enable us to determine what, if anything, needs to be done.

GC Ex. 10, p. 001078. Mohan responded to Phillippi that, given his failure to narrow his request in any measurable way and his continued insistence on all of the information sought in his request, her response had not changed. *Id.*

At the same time Phillippi was pursuing his burdensome request for all information relating to contractors, he made reasonable, tailored requests for contractor information to which the mine comprehensively responded. *See, e.g.*, Resp. Ex. 1, p. 001090; Tr. 59:10-14 (Phillippi, M.) (admitting that the information was provided). Indeed, the Union often makes requests for contracting out information specific to a contractor or a date. When the requests are tailored in this fashion, Mohan offered uncontradicted testimony that she has often located information for Phillippi and the Union. Tr. 440:1-6.

b) Legal Argument

The ALJ made several flawed legal and factual conclusions in finding that Respondents violated the Act in their response to this information request.

i. The ALJ Erred in Finding the Information Relevant

As an initial matter, the ALJ misapplied the relevant standard for relevancy as it relates to this request for contracting out information. Board law is clear that “[i]nformation about subcontracting agreements, even those relating to bargaining unit employees’ terms and conditions of employment, is not presumptively relevant.” *Disneyland Park*, 350 NLRB 1256, 1258 (2007) (citing *Richmond Healthcare*, 332 NLRB 1304, 1305 n. 1) (2000)). As noted by the ALJ, (D. 46:35-38), under these circumstances, the Union is under the burden to establish the relevance of such information. *Ohio Power Co.*, 216 NLRB 987 (1975).

Here, the requests for information concern non-bargaining unit employees. As such, the General Counsel, on behalf of the Union, must demonstrate a reasonable belief, supported by objective evidence, that the requested information is relevant. *See Knappton Maritime Corp.*, 292 NLRB 236, 238-39 (1988). There must be evidence either (1) that the union demonstrated relevance of the non-unit information or (2) that the relevance of the information should have been apparent to the respondent under the circumstances. *See Allison Corp.*, 330 NLRB 1363, 1367 n. 23 (2000). An assertion of relevance must be made with some precision; a generalized, conclusory explanation cannot trigger an obligation to supply information. *Island Creek Coal, Co.*, 292 NLRB 480 n. 19 (1989). Absent a showing of relevance, the employer need not provide the requested information. *Disneyland Park*, 350 NLRB 1256.

Respondents cited a case, *NLRB v. Wachter Constr., Inc.*, 23 F.3d 1378 (8th Cir. 1994), which the ALJ rejected as inapposite. In fact, *Wachter* is directly factually analogous to this matter. There, the Eighth Circuit reversed and denied a Board order holding that an employer violated Section 8(a)(5) by failing to furnish requested information to the union. The underlying information request at issue, which was incredibly overbroad, involved information relating to subcontractor agreements and the wages paid by subcontractors to their employees/laborers. Much of this information was not even in the employer's control. The Eighth Circuit concluded that the union sought this information to try to pressure the employer into only hiring unionized subcontractors to perform services. The union proffered no evidence of why this information was relevant other than to allege that it was necessary to ensure compliance with the collective bargaining agreement. The Eighth Circuit explained that such a boilerplate response cannot establish relevancy for information going back over a substantial period of time, and found that

the union's request was not made in good faith. *Id.* at 1385. *See also Island Creek Coal Co. v. NLRB*, 899 F.2d 1222 (6th Cir. 1990).

Here, the ALJ erred in finding that the General Counsel met its burden of showing relevancy. As properly noted by the ALJ, the request was not presumptively relevant as it related to contracting out information. D. 46:35-38. Thus, the burden was on the General Counsel to establish relevance. However, both at the hearing, and in its contemporaneous communications with Respondents, the Union offered a conclusory explanation of "ensuring compliance" with the collective bargaining agreement. While Phillippi, on behalf of the Union, testified ambiguously about generalized concerns with contract compliance, the basis for the request communicated to Respondents is just the type of vague, non-specific justification found inadequate under the Act. *See Wachter Constr., Inc.*, 23 F.3d 1378 (8th Cir. 1994). Indeed, the record evidence demonstrated that Phillippi could make specific requests about contracting out information when he had specific concerns about contract violations. R. Ex. 10. The fact that he failed to do so in this instance demonstrates that his pretextual explanation of "ensuring compliance" with the contract was a make-weight position not rooted in reality and insufficiently precise under Board precedent. Because the information request was not relevant, Respondents had no obligation to respond to it and the ALJ's conclusions concerning this allegation should be reversed.

ii. The ALJ Erred in Concluding that Mohan's Response was "Insufficient Under the Act"

Even if the ALJ properly concluded that the request was relevant, he compounded his error by concluding that Respondents' response was insufficient under the Act. D. 48:29-30.

Board law dictates that if an information request is overly broad and unduly burdensome, and the employer notifies a union of its concerns, the union must try to accommodate and discuss

the issues with the employer. *See United Parcel Serv. of Am., Inc. & Int'l Bhd. of Teamsters, Local Union 373*, 362 NLRB No. 22 (2015) (“If, for example, the employer has a legitimate claim that a request for information is unduly burdensome or overbroad, it must articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation. Correspondingly, where an employer fulfills those obligations, the union may not ignore the employer’s concerns or refuse to discuss a possible accommodation, even when the requested information is presumptively relevant.”). A union’s refusal to engage in a dialogue or acknowledge a legitimate concern by an employer can also serve as evidence of a union’s bad faith in making the information request. *See id.* (noting that where the respondent sought to lessen its burden by negotiating an accommodation based on the union’s needs, and the union ignored the request for an explanation and merely repeated that it wanted every document requested “[b]oth the failure to explain and the refusal to compromise reflect on the Union’s motivation.”).

Here, there can be no serious question that the information request was broad. Even the ALJ acknowledged as much, noting that “[t]here is no doubt but that the request was extensive.” D. 48:50. But the ALJ wrongly concluded that Mohan failed to respond to the request in good faith because he found that, by asking Phillippi to narrow his request, she somehow was asking him to “bargain against himself.” D. 48:50-51. This is illogical as Mohan’s request for a dialogue about the scope of the request is precisely the action the Board counsels employers to engage in when they receive broad information requests. The ALJ faults Respondents for failing to search for relevant records, but assigns no problems whatsoever to the Union when it fails to live up to its obligations under Sections 8(a)(1) and 8(a)(5). Notably, and ignored by the ALJ, is the fact that the Board concluded that, regarding three of the five requests made by Phillippi

concerning contracting out, the Respondents met their obligations when they engaged in the same conduct challenged here as unlawful.

The ALJ concluded that Mohan's request to the Union that it limit its request in some identifiable fashion, such as by date, grievant, contractor, or project, was not in good faith because the Union could not possibly have had sufficient information to perform such narrowing. D. 48:41-49:13. This conclusion is also unsupported by the record. To the contrary, the record reflects that at the same time Phillippi was making unreasonably burdensome requests for all contracting out information, he was simultaneously making tailored requests for more specific contracting out information. R. Ex. 10. As such, the record demonstrates that the Union did have the ability to more narrowly tailor its request. Under Board precedent, it had a good faith obligation to attempt to do so regarding this request. It did not. And, as a result, no unfair labor practice should have been found.

iii. The ALJ Erred in Rejecting Respondents' Bad Faith Defense

The ALJ also erred in failing to adequately consider Respondents' arguments concerning the Union's bad faith in making the information request.

Respondents offered evidence at the hearing concerning the voluminous and unreasonable nature of the Union's information requests at the Mon County Mine. Indeed, the evidence established that, between December 2015 and May 2016, while collective bargaining negotiations were ramping up between the parties, Mohan received approximately 50 information requests from the Union. Tr. 414:16-19. The requests were principally made by Phillippi. Tr. 414:20-22. Admitted into evidence at the hearing as Respondents' Exhibit 10 was a thick 150-page stack of emails documenting the Union's incessant information requests. From these requests, it is clear that Phillippi often made multiple requests (as many as five separate

requests, each often with multiple subparts) on the same day. *See, e.g.*, Resp. Ex. 10, pp. 001487-001489, 001505-001511. Moreover, he often demanded responses to his requests within one or two days. *See, e.g.*, Resp. Ex. 10, p. 001507. And, worse, Phillippi refused to work with the mine or provide any relief from his burdensome requests. Resp. Ex. 10, p. 001511.

Board law indicates that a union's information request need not be honored when made in bad faith. *See W. Elec. Co.*, 223 NLRB 86, 92 (1976) ("It cannot be gainsaid that, under the Act, an employer must furnish a duly designated collective-bargaining agent with sufficient relevant data to enable that labor organization intelligently to bargain with respect to wages, hours, and other terms and conditions of employment for the members which it represents. However, a union's request for information presupposes that it seeks such information as a good-faith act in the discharge of its duty as the exclusive representative of the unit employees, rather than as an harassing tactic and not in a *bona fide* effort to obtain pertinent bargaining data."). The Board considers the totality of the circumstances to determine if there is evidence of bad faith. *See, e.g., KLB Indus., Inc. d/b/a Nat'l Extrusion & Mfg. Co. & Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am.*, 357 NLRB 127, 130 (2011) ("To the extent that an employer truly is faced with abuse or harassment, longstanding Board precedent already provides a defense.") (citing *Farmer Bros. Co. & Teamsters Local No. 206, Affiliated with Int'l Bhd. of Teamsters, AFL-CIO*, 342 NLRB 592, 594 (2004) ("An employer is not obligated to comply with a request for wage information when the information is not sought in good faith by the union as an aid to the performance of its statutory duties but is sought for a bad-faith purpose.")).

The ALJ rejected this argument indicating that the record contained "nothing on which proof of bad faith can be based." D. 49:31-32. This is simply not the case, and this cursory

rejection of Respondents' argument should be reversed for a more thorough exploration of the issue. In reality, the record contains evidence of:

- an avalanche of approximately 50 information requests at one facility;
- the fact that when Respondents tried to engage in a dialogue with Phillippi concerning the request, asking him to narrow it or provide guidance about what, specifically, he was looking for, he repeatedly refused to do so, insisting on complete and total compliance;
- the fact that Phillippi simultaneously made tailored requests concerning contracting out information yet pled inability to do so with respect to this broad request.

See generally GC Ex. 10. Under the NLRA, Respondents satisfied their obligations by raising their concerns and attempting to seek compromise on the request.

No violations should be found regarding this information request.

2. Respondents Met Their Duties Under the Act With Respect to a Request Concerning Absence Plans (Exceptions 44 - 46)

The ALJ also erred in his analysis of another information request allegation concerning absence control plan information. Contrary to the ALJ's conclusions, the record demonstrated that Respondents did not violate Sections 8(a)(1) or 8(a)(5) concerning this information request either. The information request sought information that either (a) did not exist; or (b) had already been provided. Respondents communicated this to the Union. As a result, the ALJ should have found that Respondents satisfied their obligations under the Act.

a) Factual Background

This set of information request allegations also related to the Mon County Mine and concerned information about two separate absence control plans: the Bradford Plan and the Chronic & Excessive Absenteeism Plan, which the parties call the C&E Plan (or Program).

The C&E Plan is an absentee program that was implemented by Respondents on March 1, 2014. GC Ex. 9; Tr. 301:6-10, 302:2-13. Under the C&E Plan, employees are "on" the

Program when their absentee percentage and their occurrences meet certain defined Plan parameters. Tr. 431:16-21. When an employee is placed on the C&E Plan, they receive a typed letter. Tr. 431:22-432:4. It was undisputed that the Union is given copies of all letters relating to the Plan and which are provided to employees. Tr. 301:11-21 (Baum, T.); 432:5-25 (Mohan, K.). The Bradford Plan was an absence control plan used by prior operator Consol beginning in 2009. Tr. 35:21-36:1. Mohan testified without contradiction that the last time the Bradford Plan was administered at the Mon County Mine was before the end of 2013; specifically, October 2013. Tr. 430:16-431:5. The Union admitted that it knew of no absence notices issued under the Bradford plan in late 2013 or early 2014. Tr. 67:17-21.

In 2016, the parties held an arbitration relating to the C&E Plan. Tr. 36:5-7. Before that arbitration, the Union made the following request:

I am requesting information for the C&E plan arbitration for Local 1702. I am requesting:

1. A list of all hourly employees on the Bradford plan Jan. 2014
2. A list of all hourly employees currently on the new C&E plan
3. A copy of all C&E plan policies and changes since the Murray acquisition

GC Ex. 6.⁴ The request was made by Phillippi through email on December 22, 2015 to Mohan and Timothy Baum, a corporate Human Resources employee. GC Ex. 6. On January 12, 2016, Phillippi followed up with Baum about the request. GC Ex. 7.

The next morning, Baum replied that he understood that the information request was currently the subject of a request by the Union to the parties' selected arbitrator for the issuance

⁴ The information request was transmitted via email. The email transmitting the information request also contained requests for other, unrelated items. Only the first three requests for information are at issue in this case.

of a subpoena, and that the Company would wait to respond until after the arbitrator ruled on the subpoena request. GC Ex. 7. The mine formally responded to the Union's subpoena request by arguing to the arbitrator that the Union already had a copy of the C&E Plan and any changes. GC Ex. 8. The mine also explained to the arbitrator that the Union already had a copy of all notices to employees concerning their placement on the Plan. GC Ex. 8. The arbitrator, Elliot Shaller, ultimately granted the Union's request for a subpoena. Resp. Ex. 4, p. 000988. The arbitrator informed the Union, however, that it was responsible for serving the subpoena. Resp. Ex. 4, p. 000988. Yet, it is undisputed that the Union never served the subpoena. Tr. 300:21-25.

At the hearing, Phillippi claimed that he never received copies of the changes to the C&E Plan. Tr. 69:8-14. But Baum testified without contradiction that the mine has been transparent about changes to the language of the C&E Program, providing its initial terms and all changes to every employee at the mine, including Union representatives. Tr. 73:3-19 (Phillippi, M.); Tr. 302:2-13, 308:8-15 (Baum, T.)

b) Legal Argument

The ALJ erred in finding violations regarding this information request.

First, the ALJ erred in concluding that there was a violation, in the form of delay, regarding the information request about the Bradford Plan. D. 41:27-42:5. The specific request sought “[a] list of all hourly employees on the Bradford plan Jan. 2014.” Respondents, in the weeks before the unfair labor practice hearing, produced to the Union the last list available, which was from October 2013. In their post-hearing brief, Respondents argued that there should be no violation found because there was no actual responsive document to the Union's request since there was no Bradford Plan list from January 2014. The ALJ rejected this argument, concluding that the “compelling implication” was that, up to March 1, 2014, the “Bradford’-constructed plan remained in effect.” D. 41:50-42:1.

To reach this conclusion, he relied on a document that stated that effective March 1, 2014, the Mine would no longer rely on the Bradford Plan. However, he ignored clear testimony on the very issue of the date the Bradford Plan was no longer effective. Mohan, the custodian of records relating to administration of the absence plans, testified without contradiction that the Bradford Plan was not relied upon at the Mon County Mine after October 2013. Tr. 430:23-431:1. And, indeed, Phillippi, on behalf of the Union, admitted that he was unaware of any discipline issued to employees at the Mon County Mine under the Bradford Plan after October 2013. Tr. 67:17-21. Mohan testified that she searched for documents in response to the Union's information request and could locate no lists of employees on the Bradford Plan after October 2013. Tr. 431:2-5. The ALJ's failure to credit this testimony, which clarifies that there was no January 2014 Bradford Plan list as requested by the Union, necessitates that his conclusion, which was based on an ambiguous statement in one document, be reversed.

The ALJ also erred in his findings concerning the C&E Plan requests. The two remaining pieces of information requested – a list of all employees on the C&E Plan and a copy of all changes to the C&E Plan – were already in the possession of the Union. Company witnesses testified – without contradiction – that the Union was provided all of the requested information concerning the C&E Plan. Tr. 301:11-21, 302:2-13, 308:8-15 (Baum, T.); 432:5-15 (Mohan, K.). The ALJ did not discredit this testimony. Nevertheless, he concluded that Respondents had to re-produce the information already provided to the Union. This conclusion is contrary to Board law. *See, e.g., Aerospace Corp.*, 314 NLRB 100 (1994) (an employer is under no obligation to comply with a request to produce information in a different form where the information has already been furnished). There should be no violation found.

3. The ALJ Erred in Ordering a Remedy Concerning Crib Bags (Exceptions 42 - 43)

The ALJ also found a violation regarding a delay in providing information at the Mon County Mine concerning pumpable crib bags. Crib bags are used for roof support in coal mines. Tr. 29:10-17. The Union filed a grievance arguing that the hanging of crib bags was bargaining unit work, but the mine was improperly using contractors to do this task. Tr. 30:5-21. Initially, an arbitrator issued an award concluding that the hanging of the bags was bargaining unit work. *Id.* The information request sought invoices from the contractor used to hang crib bags, Jenn Chem, so that an appropriate remedy could be issued. GC Ex. 2; GC Ex. 3; Tr. 31:6-8. The mine responded to this request, but took approximately 8-and-a-half months to do so. Tr. 32:1-10. After testimony was introduced about crib bags in this matter, the United States District Court for the Northern District of West Virginia vacated the arbitrator's decision, concluding that the hanging of crib bags was properly contracted out. *See* Exhibit A to this Brief.

Respondents argued that, given these facts, no remedy should be issued concerning this information request. While the ALJ disagreed, the non-effectuation doctrine permits the Board to conclude that since the arbitration award is a legal nullity, it would not effectuate the purposes of the Act to order a remedy concerning an information request solely tied to that defective award. *Fabrica De Muebles P.R.*, 107 NLRB 905 (1954) (dismissing complaint where the Board was convinced "that it would not effectuate the purposes of the Act to issue an 8(a)(5) order"). Accordingly, the ALJ's conclusion as to this violation should be reversed.

III. CONCLUSION

Because of the above facts and legal authorities, the portions of the ALJ's Decision excepted to by Respondents should be reversed.

Respectfully submitted,

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Dated: June 5, 2017

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed this 5th day of June, 2017.

A true and correct copy of the foregoing has also been sent via U.S. First-Class Mail, Postage

Prepaid, upon the following:

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30024580.1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EXHIBIT A

MONONGALIA COUNTY COAL COMPANY

Plaintiff,

v. // CIVIL ACTION NO. 1:16CV04
(Judge Keeley)

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION and
UNITED MINE WORKERS OF AMERICA, LOCAL UNION 1702

Defendant.

**MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT [DKT. NO. 13] AND GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 15]**

Pending for consideration are cross motions for summary judgment filed by the plaintiff, Monongalia County Coal Company ("Company"), and the defendants, United Mine Workers of America, International Union and United Mine Workers of America, Local Union 1702 (collectively "Union"). Finding that the Arbitrator's decision fails to draw its essence from the collective bargaining agreement and instead reflects the Arbitrator's own notions of right and wrong, the Court grants the Company's motion (dkt. no. 15) and **VACATES** the Arbitrator's award.

I. FACTUAL BACKGROUND

The Company operates the Monongalia County Mine (the "Mine"), an underground coal mine located in West Virginia and Pennsylvania. The Union represents the Company's bargaining unit (union) employees for purposes of collective bargaining. The Company and the Union are bound by a collective bargaining agreement ("CBA")

MONONGALIA CTY. COAL CO. V. UMWA

1:16CV4

**MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT [DKT. NO. 13] AND GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 15]**

(dkt. no. 7-1) that governs the wages, hours, and working conditions of union employees at the Mine.

In 2015, the Company contracted with a third-party, Jennchem, to design, supply, and install a pumpable crib system¹ in the Mine. This system requires workers to hang cylindrical bags from bolts installed in the mine roof at predetermined locations. The bags are then filled with a cementitious mixture, which dries quickly and forms a strong concrete-like pillar that provides support to the ceiling of the mine.

At the outset, union mine employees hung the bags and Jennchem employees filled them with the cement mixture. After problems arose with the bag hanging performed by the union employees, however, the Company decided that, because of Jennchem's familiarity and expertise with the product, Jennchem should perform the entire operation. When the Union objected, the Company countered that it was allowed to contract all of this work out to Jennchem under

¹"Cribbing" is used to support the ceiling of a mine. Traditionally, cribbing consisted of multiple layers of wood stacked in a box-like formation from the ground to the roof. Modern advances, however, have provided other forms of cribbing, including hydraulics, mechanical jacks, or concrete-like pillars, such as the ones at issue here.

MONONGALIA CTY. COAL CO. V. UMWA

1:16CV4

**MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT [DKT. NO. 13] AND GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 15]**

Article 1A, § (i) of the CBA. This Article provides in pertinent part as follows:

All construction of mine or mine related facilities including the erection of mine tipples and the sinking of mine shafts or slopes customarily performed by classified Employees of the Employer normally performing construction work in or about the mine in accordance with prior practice and custom, shall not be contracted out at any time unless all such Employees with necessary skills to perform the work are working no less than 5 days per week, or its equivalent for Employees working alternative schedules.

(dkt. no. 14 at 4).

The Company justified its decision to contract out the bag hanging to Jennchem based on the fact that, pursuant to Article 1A § (i), all union employees involved were working five days per week. The Union disagreed, arguing that, because hanging the bags was work previously performed by union workers, its members had suffered a loss of work. After the parties were unable to resolve the matter through the grievance process, the matter was referred for resolution to Arbitrator Betty Widgeon ("Arbitrator").

II. PROCEDURAL BACKGROUND

On July 10, 2015, the Arbitrator conducted a hearing with the parties at which the Company presented two arguments. It first contended that the installation of the pumpable crib bags was

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construction work under Article 1A, § (i) of the CBA. It next asserted that, because the Mine's union employees were working no less than five days per week, it was free to contract that work to Jennchem. Although the Union did not dispute that its members were working no less than five days per week, it contended the work involved was "maintenance" work under Article 1A, § (g)(2),² which required the Company to use only union workers. Thus, it reasoned that, even if all union members were already working a full work schedule, the maintenance work would have resulted in overtime and additional payments into the employees' benefit fund.

²Article 1A, § (g)(2), provides in pertinent part:
Repair and Maintenance Work - Repair and maintenance work of the type customarily performed by classified Employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, in which case, upon written request on a job-by-job basis, the Employer will provide to the Chairman of the Mine Committee a copy of the applicable warranty or, if such copy is not reasonably available, written evidence from a manufacturer or a supplier that the work is being performed pursuant to warranty; or (b) where the Employer does not have available equipment or regular Employees (including laid-off Employees at the mine or central shop) with necessary skills available to perform the work at the mine or central shop.

Dkt. no. 14-1 at 4.

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The Arbitrator rendered a decision ("Decision") favorable to the Union on August 31, 2015. She found that the Company had violated the CBA by using Jennchem to complete bargaining unit work (dkt. no. 4). Specifically, her Decision concluded that the "installation of pumpable cribs does not fall into the construction exception, and because it is, at the very least, repair and maintenance work, it is Union work." Dkt. no. 4 at 4. The Decision also required the Company to cease and desist using outside contractors to hang the bags, and awarded the Union compensatory damages for the hours billed by Jennchem. Id.

Following the Decision, a dispute arose concerning the formula to be used in determining the amount of damages to be paid by the Company (dkt. no. 14-1). After additional briefing, the Arbitrator issued a Supplemental Decision, accepting the Union's position and basing her award of the hours due on the calculations and estimates supplied by the Union (dkt. no. 4-1). Accordingly, she ordered the Company to compensate the Union for 3,000 labor hours connected to the bargaining unit work performed by Jennchem. Id.

The Company filed suit against the Union on January 8, 2016 (dkt. no. 1). Its complaint challenges the Arbitrator's Decision on the basis that it 1) exceeded the scope of the Arbitrator's

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authority and power; 2) failed to draw its essence from the Agreement; 3) was based on the Arbitrator's own notions of right and wrong; 4) was arbitrary and capricious; and 5) conflicted with public policy interests by undermining enforcement of the Agreement. As a remedy, it sought to vacate the Arbitrator's award with prejudice.

The Union filed a combined answer and counterclaim on February 17, 2016, challenging the Court's jurisdiction to vacate the award because the Agreement provides for final and binding arbitration as the sole means of resolving disputes arising under the Agreement (dkt. no. 7). Its counterclaim seeks a declaration that the award is final, binding, and enforceable. It also asks the Court to compel enforcement of the award and to permanently enjoin the Company from utilizing third-party contractors in any manner inconsistent with the Agreement.

Both parties have moved for summary judgment (dkt. nos. 13 and 15), and those motions are fully briefed and ripe for review.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate where the "depositions, documents, electronically stored information, affidavits or

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declarations, stipulations . . . , admissions, interrogatory answers, or other materials" establish that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a), (c)(1)(A). When ruling on a motion for summary judgment, the Court reviews all the evidence "in the light most favorable" to the nonmoving party. Providence Square Assocs., L.L.C. v. G.D.F., Inc., 211 F.3d 846, 850 (4th Cir. 2000). The Court must avoid weighing the evidence or determining its truth and limit its inquiry solely to a determination of whether genuine issues of triable fact exist sufficient to prevent judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of informing the Court of the basis for the motion and of establishing the nonexistence of genuine issues of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has made the necessary showing, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256 (internal quotation marks and citation omitted). The "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent the entry of summary judgment; the

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evidence must be such that a rational trier of fact could reasonably find for the nonmoving party. Id. at 248-52.

B. Judicial Review of Arbitration Awards

Judicial review of arbitration awards is "among the narrowest known to the law." PPG Indus. Inc. v. Int'l Chemical Workers Union Council of United Food and Comm'l Workers, 587 F.3d 648, 652 (4th Cir. 2009) (internal citations omitted). Arbitration awards are presumptively valid. Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606, 608 (4th Cir. 1996). This is because the parties to a CBA "bargained for the arbitrator's interpretation and resolution of their dispute." Id. Consequently, courts generally defer to the arbitrator's reasoning and should not overturn their factual findings unless there has been fraud by the parties or dishonesty by the arbitrator. Id. Indeed, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." PPG Indus., 587 F.3d at 652 (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).

Nevertheless, courts should overturn arbitration awards when the "award violates well-settled and prevailing public policy,

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fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's own notions of right and wrong." Mountaineer, 76 F.3d at 608 (citing Misco, 484 U.S. at 38). Thus, an "arbitrator cannot 'ignore the plain language of the contract' to impose his 'own notions of industrial justice.'" PPG Indus., 587 F.3d at 652 (quoting Misco, 484 U.S. at 38).

A court's review "must determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably, but simply whether he did it." Mountaineer Gas, 76 F.3d at 608. This determination requires the Court to examine: "(1) the arbitrator's role as defined by the Agreement; (2) whether the award ignored the plain language of the Agreement; and (3) whether the arbitrator's discretion in formulating the award comported with the essence of the Agreement's proscribed limits." Id. (citing United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

Moreover, when construing the contract, "the arbitrator must take into account any existing common law of the particular plant or industry, for it is an integral part of the contract." Clinchfield Coal Co. v. District 28, United Mine Workers of America & Local Union No. 1452, 720 F.2d 1365, 1368 (4th Cir. 1983)

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(quoting Norfolk Shipbuilding and Drydock Corp. v. Local No. 684 of the Int'l Brotherhood of Boilermakers, 671 F.2d 797, 800 (4th Cir. 1982)). Finally, "[t]he 'basic objective' of a reviewing court in the arbitration context is 'to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.'" PPG Indus., 587 F.3d at 654 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995)).

IV. DISCUSSION

The material facts in this case are not in dispute. The parties either agree or concede that the work of hanging the bags was previously performed by union employees, and that those employees were working no less than five days per week during the relevant time period. The Company assigns two legal errors to the Arbitrator's Decision. First, it asserts that the Decision ignores the plain language of the CBA, as well as the "common law of the shop." Second, it contends that the damages awarded in the Supplemental Decision are arbitrary and capricious, and based on her own sense of fairness or equity. The Union argues that, under the CBA, the parties agreed to be bound by the Arbitrator's decision, and further argues that legal precedent requires courts

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to give arbitrators great deference and only overturn their awards in the most limited of circumstances, none of which they contend are present in this case.

A. The Arbitrator's Decision That The Work Was Not Construction

Cognizant of the very limited circumstances under which it may overturn an arbitration award, this Court still must do so if the award "fails to draw its essence from the collective bargaining agreement." Mountaineer Gas, 76 F.3d at 608. In determining whether the Arbitrator did her job, the Court must determine "whether the award ignored the plain language of the Agreement." Id.

The question presented is whether the work of hanging the bags was construction work or repair and maintenance work. Under the CBA, if the work was construction, the Company was free to contract it to Jenchem because union employees were working no less than five days per week. See Dkt. no. 14-1 at 5. If, however, the work was repair and maintenance, it belonged solely to the union employees, with limited exceptions that are not present in this case. See Dkt. no. 14-1 at 4. Because union employees were working no less than five days per week, the Union contended that hanging the bags was repair and maintenance work.

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In order to determine whether the work was construction or maintenance, the Arbitrator necessarily had to construe the relevant language of the CBA, which does not explicitly categorize the work at issue. In support of its position, the Company submitted multiple prior arbitral decisions, which defined construction as "the creation of something new that had not existed before" (dkt. no. 4 at 4). Thus, "because the pumpable cribs were being erected and placed where there previously was nothing," the Company argued that "there is nothing to maintain" and the work "can only ever be viewed as construction." Id.

The entirety of the Arbitrator's reasoning rejecting this argument and concluding that the work was maintenance and repair work, not construction, is contained in a single paragraph of her Decision (dkt. no. 4 at 4). Disagreeing with the Company's characterization of the work, she found that, "[i]n the places where the pumpable cribs are being erected, there was previously something there: coal." Id. That coal "kept the ceiling of the mine from collapsing." Id. She credited the Union's argument that, "with the removal of the coal, various measures were put into effect to keep the ceiling stable and that the installation of these cribs was one of those measures." Id. The Arbitrator did not

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"view[] each installation . . . as an individual construction project or even as a part of a larger construction project but as steps taken to maintain the integrity and stability of the mine ceiling." Id.

The words "construction" and "repair and maintenance" have distinct and clear definitions in the context of this case. To "construct" means "[t]o form by assembling or combining parts; build."³ To "maintain," on the other hand, has two plausible definitions that could apply to this case: either "[t]o keep in an existing state; preserve or retain" or "[t]o keep in a condition of good repair or efficiency."⁴ As the Company noted, and the arbitral precedent it cited confirms, in this context, the common usage of "repair and maintenance" refers to the upkeep of equipment,

³See Construct, American Heritage Dictionary, <https://ahdictionary.com/word/search.html?q=construct>. Interestingly, Black's Law Dictionary (6th Ed. 1998) explicitly differentiates between the two terms, as it defines "construct" thusly:

To build; erect; put together; make ready for use. To adjust and join materials, or parts of, so as to form a permanent whole. To put together constituent parts of something in their proper place and order. "Construct" is distinguishable from "maintain," which means to keep up, to keep from change, to preserve.

⁴See Maintain, American Heritage Dictionary, <https://ahdictionary.com/word/search.html?q=maintain>.

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machinery, or existing facilities.⁵ Indeed, the language of the CBA's clause covering repair and maintenance work supports such a finding, as it strongly suggests that it applies to machinery or equipment, and twice references that the repair or maintenance work might be performed in the "central shop." See Dkt. no. 14-1 at 4.

Despite the fact that the plain language of the CBA appears clear, the Arbitrator may have found some ambiguity, although she did not explicitly say so. See PPG Indus., 587 F.3d at 654 (noting that courts should not second-guess an arbitrator's finding of ambiguity). The Court recognizes that "construing or applying the contract" is generally within the exclusive purview of the Arbitrator. See PPG Indus., 587 F.3d at 652.

Nevertheless, had the Arbitrator found some ambiguity in the contract, she was not at liberty to impose her "own notions of industrial justice." Id. (quoting Misco, 484 U.S. at 38). Rather, she was obligated to look to the "existing common law of the particular plant or industry, for it is an integral part of the

⁵See, e.g., Case No. D-971AI-9, Consol-McElroy Coal Co. and UMWA Local Union 1638, District 6, at 11-12 (Dec. 3, 1997) (Nicholas, Arb.) ("On the other hand, repair and maintenance that is work which - by definition - involves repairing existing equipment or servicing machinery or facilities in order to keep them in good working order.") (dkt. no. 18-1 at 96-97).

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contract." Clinchfield Coal, 720 F.2d at 1368 (quoting Norfolk Shipbuilding, 671 F.2d at 800).

The Company provided the Arbitrator with numerous arbitral decisions defining construction work, including several that specifically concluded installation of roof support systems, such as the pumpable crib pillars at issue, was construction work, not repair or maintenance.⁶ Some of those decisions also held that the definition of construction in the coal industry was a matter of res judicata.⁷ The union provided no contrary precedent, and the Arbitrator cited none.⁸

⁶The list of cases provided by the Company in support is quite lengthy and need not be fully cited here. Those cases are collected at dkt. no. 18 at 13-14 n. 3; dkt. no. 18-1 at 1-108; dkt. no. 18-2 at 1-103; dkt. no. 16-2 at 8-54. These decisions are important in the instant case not only because they discuss the definition of construction work, but also for their precedential value.

⁷See, e.g., Case No. D-20001AG-11, ARB No. 98-06-99-0258, McElroy Coal Co. v. Local Union 1638, District 6 (July 17, 2000) (Harr, Arb.) (finding that definition of construction within industry was matter of res judicata); Case No. D-881AI-2, ARB No. 84-2-87-146, Greenwich Collieries Co. v. UMWA Local Union 1609, District 2, (Jan. 15, 1988) (Joseph, Arb.) (finding "arbitral consensus" that when new items are installed it constitutes construction).

⁸In point of fact, in a previous arbitration, the Union had conceded that installation of pumpable crib pillars was construction work. Dkt. No. 18-1 at 34, 42.

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Those past arbitral decisions clearly define the differences between construction and repair and maintenance work. Indeed, for decades arbitrators have concluded that

[i]n the usual sense, construction work . . . is work which brings something new to the mine which had not existed prior to the performance of the work in question. On the other hand, repair and maintenance that is work which – by definition – involves repairing existing equipment or servicing existing machinery or facilities in order to keep them in good working order. Generally speaking, repair and maintenance work does not involve introducing new material into the mine or the erection or fabrication of facilities which have not previously been part of the mine facilities.

Consol-McElroy Coal Co. v. UMWA Local Union 1638, District 6, Case No. D-971AI-9, (Dec. 3, 1997) (Nicholas, Arb.); see also, Consol - McElroy Coal Co. v. UMWA Local Union 1638, District 6, Case No. D-971AI-8, (Sept. 22, 1997) (Hammer, Arb.) (noting that repair and maintenance generally refers to the upkeep or restoration of equipment and machinery, while construction involves erecting, fabricating or installing mine or mine related facilities).

Several arbitral decisions specifically address whether roof supports are construction work. In Consol-Consol-McElroy Coal Co. v. UMWA Local Union 1638, District 6, Case No. D-971AI-9, (Dec. 3, 1997) (Nicholas, Arb.), for example, Arbitrator Samuel Nicholas held that the installation of steel arches to support the roof of

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a mine was construction work. Finding that the steel arches had never been present in the mine prior to their installation, he concluded that their installation constituted construction work. Id.

Arbitrator Nicholas used the same reasoning in another case in which he decided that installation of supplemental roof supports, specifically, "pizza jacks," was construction work rather than maintenance work. Pittsburg & Midway Coal-North River Mine v. UMWA Local Union 1926, District 20, Case No. D-20051AI-5 (Oct. 12, 2005) ("Clearly, and as other arbitrators have said, you cannot repair something into existence." (citing Island Creek Coal Co., Hamilton #2 Mine, 84-23-87-49-ICC at 9 (1997) (Phelan, Arb.))).

Several arbitral decisions specifically address the installation of concrete roof support pillars using collapsible forms hung from the ceiling similar to the pumpable crib bags used by the Company in this case. In one such case, Arbitrator Lynn Wagner found that hanging the collapsible forms was a component of the concrete pillar installation process, and thus construction work. Consol-Loveridge Mine v. UMWA Local 9909 in District 31, Case No. D-20081AG-1 (Mar. 3, 2008) (Wagner, Arb.) (also noting that "the Arbitrator lacks the contractual authority to ignore such

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binding ARB decisions and to, in effect, rewrite the Contract to conform with the Union's position").

Finally, in a decision directly on point, Arbitrator Elliot Shaller addressed a grievance over the identical pumpable crib bags installed by the same contractor involved here.⁹ The decision in The Marshall Cty. Coal Co. v. United Mine Workers of America, Local 1638, Case No. 11-31-15-101 (July 27, 2015) (Shaller, Arb.), began by acknowledging the "ample arbitral precedent . . . construing the term ['construction'] in a uniform way." Id. at 18. Arbitrator Shaller reiterated the definition of construction work as "involving the erection, fabrication or installation of new mine or mine-related facilities or additions," and noted in its distinction from repair and maintenance work. Id. He also recognized that the industry's definitions and distinctions were "so well settled that in a case involving this mine Arbitrator Don Harr ruled that the prior authority required him to apply the principle of arbitral res judicata pursuant to ARB 78-24 (February 19, 1980.))" Id. at 14.

⁹The facts in the Marshall Cty. Coal case are on all fours with the facts in this case. Nonetheless, Arbitrator Widgeon refused to address it because, although the Company submitted the decision to her on July 27, 2015, she stated that she had closed the record earlier that same day. Nonetheless, it is persuasive in its reasoning, and informative in its compilation of prior arbitral precedent, which was clearly available to the Arbitrator.

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After discussing much of the same precedent cited by the Company in this case, he concluded that the "installation of permanent roof control support in an area in which it did not exist . . . mak[es] it 'construction.'" Id. at 23.

These decisions establish that, under the "industrial common law – the practices of the industry and the shop – [which] is equally a part of the collective bargaining agreement although not expressed in it," the work in question in this case was construction work. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581-82 (1960); see also Clinchfield Coal Co. v. District 28, United Mine Workers of America, 556 F.Supp. 522, 530 (D.C.Va. 1983), aff'd, 730 F.2d 1365 (4th Cir. 1983) (citing Warrior & Gulf); Clinchfield Coal Co. v. UMWA, Dist. 28, 567 F. Supp. 1431, 1434 (W.D. Va. 1983), aff'd, 736 F.2d 998 (4th Cir. 1984) (applying principle that past decisions by the Arbitration Review Board under the National Bituminous Coal Wage Agreements constituted part of the common law of the shop).

Certainly, by ignoring this overwhelming precedent, if not the plain language of the CBA, the Arbitrator substituted her own "notion of industrial justice" when she concluded, without any support beyond the Union's argument, that the installation of the

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pillars was maintenance of the roof rather than construction of something new brought into the mine. Indeed, her conclusion that "there was previously something there: coal" contradicts the prevailing definition in the coal industry that construction work entails "bringing something to the mine that was not there before." Dkt. no. 4 at 4.

Not only does her conclusion misread the arbitral precedent, it is illogical. The defining characteristic of construction work is not whether there was something previously in the location of the construction, but whether the construction "brings something new to the mine which had not existed prior to the performance of the work in question." See Consol-McElroy Coal Co., Case No. D-971AI-9. Moreover, by concluding that work cannot be considered construction where coal previously was located, the Arbitrator effectively rendered all work below the surface to be repair and maintenance work – regardless of its true nature.¹⁰

¹⁰Nor does the Arbitrator's conclusion that the installation of the pumpable crib pillars was maintenance of the roof make practical sense. One could not credibly argue that an underground pipe is maintaining the earth above it, or that the foundation walls of a building are maintaining the earthen walls surrounding it. Of course, deeming the work maintenance was the only way the Union could have recovered given its concession that union employees were working no less than five days per week.

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Clearly, the installation of the pumpable crib bags, indeed the installation of the finished support pillars in toto, is construction work. Not only does this conclusion comport with the overwhelming arbitral precedent and the plain language of the CBA, and is consistent with the Court's objective of "ensur[ing] that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." PPG Indus., 587 F.3d at 654 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995)).

Past arbitral decisions, which are "equally a part of the collective bargaining agreement although not expressed in it," remove any doubt that the work in question here was construction work. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581-82 (1960). To allow the Arbitrator to ignore such consistent arbitral precedent would eviscerate the holdings of Warrior & Gulf and Clinchfield that explicitly incorporate such precedent into the CBA. 363 U.S. at 581-82; 556 F.Supp. at 530 Because the arbitral precedent forms the common law of the shop, which necessarily is part of their CBA, the parties should be able to rely on such precedent to guide their actions, which is exactly what the Company did in this case. See id. at 582.

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In conclusion, despite the extremely narrow scope of judicial review of arbitration decisions, the Arbitrator's Decision in this case "fail[ed] to draw its essence from the collective bargaining agreement," instead "reflect[ing] the arbitrator's own notions of right and wrong." Mountaineer, 76 F.3d at 608 (citing Misco, 484 U.S. at 38). Accordingly, the Court **VACATES** the Arbitrator's award **WITH PREJUDICE**.

B. The Damages Award in the Arbitrator's Supplemental Decision

Having concluded that the work at issue was construction work, the Court need not decide whether the amount of damages calculated in the Arbitrator's Supplemental Decision (dkt. no. 4-1) was arbitrary or capricious. Nonetheless, because the Company has presented this argument in its motion for summary judgment, the Court will turn briefly to the issue.

Had the work in question been maintenance work, it would have been under the exclusive jurisdiction of the union employees, and the Arbitrator would have been fully within her authority to award the damages she did. See Brown & Pipkins, LLC v. Service Employees Int'l Union, 2017 WL 280733, at *7 (4th Cir. 2017) (noting that "we give arbitrators wide latitude to formulate remedies" (citing Enterprise Wheel, 363 U.S. at 597)). This includes her finding

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that, even though the employees were working five days a week, they would have been able to procure overtime to perform the work. See Consolidation Coal Co. v. United Mine Workers of America Dist. 31, Local Union 1702, 2013 WL 4758601, at *5 (N.D.W.Va. 2013) (noting that it was "within the scope of the arbitrator's authority" to award damages, including finding that the work would have eventually been done by union employees on overtime).

Therefore, to the extent it was necessary for the Arbitrator to calculate an award of damages to the Union, which the Court concludes it was not, the Arbitrator's Supplemental Decision clearly weighed the competing labor time estimates and, regardless of whether there may have been a more accurate formula, her calculation should remain undisturbed. Had the work in question actually been repair or maintenance, the amount of the Arbitrator's award would have drawn its essence from the CBA, and there would be no basis to overturn the calculation. See Baltimore Regional Joint Bd. v. Webster Clothes, Inc., 596 F.2d 95, 98 (4th Cir. 1979) ("[The Arbitrator's] award is legitimate only so long as it draws its essence from the collective bargaining agreement" (quoting Enterprise Wheel, 363 U.S. at 597)).

V. CONCLUSION

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1:16CV4

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT [DKT. NO. 13] AND GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 15]

For the reasons discussed, the Court **DENIES** the Union's motion for summary judgment (dkt. no. 13), **GRANTS** the Company's motion for summary judgment (dkt. no. 15), **VACATES** the Arbitrator's award, and **ORDERS** this case stricken from the Court's active docket.

It is so **ORDERED**.

The Court directs the Clerk to transmit copies of this Memorandum Opinion and Order to counsel of record and to enter a separate judgment order.

DATED: February 16, 2017

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE