

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

ROCKWELL MINING LLC

and

Case 09-CA-206434

UNITED MINE WORKERS OF AMERICA,
INTERNATIONAL UNION, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE:

This matter is before Administrative Law Judge Paul Bogas upon a Complaint and Notice of Hearing that issued on December 20, 2017,^{1/} in the above-captioned charge filed by the United Mine Workers of America, International Union, AFL-CIO (Union). The complaint alleges that Rockwell Mining LLC (Respondent or Rockwell), violated Section 8(a)(3) and (4) of the Act by suspending and terminating employee Jerry Hager. (G.C. Ex. 1(e))^{2/} The administrative hearing on the allegations of the complaint was held on April 3 and 4, 2018, in Charleston, West Virginia.

As set forth in more detail herein, this case perfectly illustrates the perils faced by otherwise safe, hard-working, and trusted employees who choose to lead their fellow employees through a hard-fought union organizing campaign. Prior to his widespread involvement with an organizing campaign at Respondent's Glancy Surface Mine, Hager was considered by Respondent to be its "ace" excavator man on night shift. He was entrusted by Respondent with operating in dangerous environments and clearing mountainsides for future mining. Not once did Hager give Respondent any reason to doubt his capabilities. Yet, once Hager openly supported the Union's organizing campaign, and stood up to management, he became dispensable. At its first opportunity, Respondent seized upon a reactionary, split-second decision made by Hager that resulted in an admittedly serious accident, by summarily suspending and terminating Hager with only the appearance of an investigation.

The undersigned respectfully submits that the record evidence, viewed as a whole, establishes that General Counsel has met his burden under *Wright Line* in both the 8(a)(3) and

^{1/} Hereinafter, all dates occurred in 2017 unless otherwise noted.

^{2/} References to the transcript record will be designated as (Tr. __); references to General Counsel's Exhibits will be designated as (G.C. Ex. __, p. __); references to Respondent's Exhibits will be designated as (R. Ex. __, p. __); and references to the Joint Exhibits will be designated as (J. Ex. __, p. __).

(4) context, and Respondent's defenses simply cannot withstand scrutiny. Accordingly, Counsel for the General Counsel respectfully prays that Your Honor find Respondent violated both Section 8(a)(3) and (4) of the Act when it suspended and terminated Hager's employment.

II. STATEMENT OF FACTS:

A. Respondent's operation at the Glancy Surface Mine in Wharton, West Virginia.

Respondent, a subsidiary of Blackhawk Mining, LLC (Blackhawk), operates the Glancy Surface Mine (hereinafter Glancy) in Wharton, West Virginia, which is part of its "Rockwell" operation. (Tr. 129) Rockwell is a complex of different facilities, including two preparation plants, three deep mines, and at least two surface mines, including Glancy. *Id.* Employees at Glancy are involved in the mining of both steam coal and metallurgical coal above ground. *Id.* Joe Evans is the General Manager for Respondent (Tr. 128; G.C. Exs. 1(e), (g), (n)) and Colin D. Milam, Jr. is Respondent's Human Resources Manager. (Tr. 130; G.C. Exs. 1(e), (g), (n))

B. Jerry Hager is hired by Respondent in April.

Jerry Hager began his employment with Respondent on April 25 after being recommended for employment by Jeffrey Caldwell, Property Manager for Kanawha Eagle Mining, LLC, another subsidiary of Blackhawk. (Tr. 20; R. Ex. 20, p. 1; R. Ex. 20, p. 30) Caldwell's recommendation was made a part of Hager's personnel file with Respondent. *Id.* During Hager's interview and pre-hire process, he was told by Judy Bailey and Wes Harvey, then Superintendent for Respondent, that he would be operating a bulldozer and excavator for Respondent. (Tr. 20-21; J. Ex. 1, p. 1) There was no discussion of Hager operating a "rock truck," i.e., a 785C Caterpillar mining truck (hereinafter 785C or rock truck). While discussing the position with Harvey and Bailey, Hager explained that he needed a day shift position.

(Tr. 21) Hager also explained his past work experience, which included “sloping” and putting in “benches,” technical terms used by bulldozer operators. (Tr. 21) Thereafter, Respondent hired Hager - initially on day shift. (Tr. 22) Ultimately, however, Respondent assigned Hager to begin his employment on night shift, explaining that it needed Hager’s experience on night shift because it didn’t “have an ace excavator man on nights.” (Tr. 22-23; G.C. Ex. 18) (emphasis added) Milam told Hager they would work on getting him to day shift as soon as possible. (Tr. 23)

C. Hager begins his employment, primarily operating a bulldozer on night shift.

On night shift, Hager was supervised by Charlie “Worm” Meddings, Respondent’s Surface Foreman. (Tr. 24; J. Ex. 1, p. 1) On his first day, Hager was taken to the equipment that he would be operating and was task trained by Meddings on the D11 bulldozer and the 3118 Caterpillar excavator. (Tr. 25, 31-32; G.C. Exs. 2, 24; R. Exs. 24, 25) Both Meddings and Hager individually initialed and signed the official training form as proof that Hager received the training. (Tr. 26) Hager was not task trained on the 785C rock truck at this time. (G.C. Ex. 2)

According to 30 C.F.R. § 46.7, if a miner is being assigned a new task, like driving a 785C rock truck for the first time at a new mine, a miner with previous work experience performing that task does not need to be task trained if he can “demonstrate the necessary skills to perform the task in a safe and healthful manner.” *Id.* Demonstrating that a miner can perform said task in a safe and healthful manner, from both a regulatory and prudent business practice perspective, should take place prior to that miner operating the piece of equipment during production. (Tr. 331-332)

Hager spent most of his time on night shift operating a bulldozer. While on night shift, Hager operated a bulldozer on all but three or four days; on those three or four days, he operated

an excavator. As a bulldozer operator, Hager had many duties. For one, he was responsible for “shoving the shot.” After Respondent detonated explosives in a certain section of the mine, called a “shot,” it was then necessary for the bulldozer operators to remove, or shove, the overburden (dirt, rock, waste, etc.) which typically sits on top of the coal. (Tr. 26-27) Additionally, Hager performed work in the “drill bench” process. *Id.* In his bulldozer, Hager was entrusted by Respondent to safely work on a “blank” side of the hill—he was the first man to begin clearing that side of the hill so that area could be mined. *Id.* Hager cleared areas on top of the coal seam and created benches, or ledges, similar to a road, so that Respondent’s other machinery could access the area for explosives. *Id.* It is a dangerous job, as one slip up could send the bulldozer careening down the side of the hill. (Tr. 28) Hager received no disciplinary incidents and had zero accidents while on night shift. (R. Ex. 20)

D. Hager becomes involved with the organizing campaign initiated by the Union and Respondent shows its hostility toward the campaign.

In late June or early July, Hager learned of an ongoing organizing effort by the Union seeking to organize Respondent’s workforce at Glancy. (Tr. 33) He very quickly became involved. *Id.* On about Thursday July 6, Hager held an employee meeting at “Farley’s Branch,” an area off the jobsite. (Tr. 34) The meeting was held at about 3:30 a.m., after the night shift had ended. (Tr. 34) At the meeting, Hager announced that he had been asked to solicit employees to sign union authorization cards, and he passed out cards for employees to sign if they chose to do so. (Tr. 34) About 19 employees were present for the meeting, two of which had family members in management positions within Blackhawk. *Id.*

The following day, on Friday July 7, Respondent learned of the Union’s ongoing organizing campaign, more specifically that authorization card-signing efforts were underway, and it swiftly mobilized its response. (Tr. 131; J. Ex. 1, p. 1) Mere days after learning of the

organizing effort, Respondent held all-employee meetings for both day and night shift on Tuesday July 11, and many of its senior managers were in attendance, including Evans, Milam, and Senior Vice-President of Operations for Blackhawk, Jeff Sands. (J. Ex. 1, p. 1) Hager attended the night shift meeting, held around 5:00 p.m. (Tr. 37) ^{3/} Evans, who spoke during the meetings from a prepared outline, discussed a number of topics, several of which highlighted Respondent's disdain toward the Union's campaign. (J. Ex. 2) For example, Evans not-so-subtly implied that Respondent's customers would view a unionized Glancy as an undependable source of coal - a supply chain interrupted by a newly-unionized workforce. (J. Ex. 2, p. 4) ^{4/}

At the July 11 meeting, Hager spoke up and raised several group concerns after Respondent finished its presentation. (Tr. 38) Hager noted that several employees had concerns about wiper blades needing replacement, the absence of cleaning supplies, and air conditioners not working and needing repaired. *Id.* It was apparent from Hager's questions and statements at the meeting that he was speaking on behalf of his fellow employees. (Tr. 38-39) ^{5/}

Respondent wasted no time addressing issues raised by employees. In response to Hager's comments at the July 11 meeting, wiper blades were ordered immediately, Hager's air conditioner in his bulldozer was fixed that day, and new undercarriages were ordered for the bulldozers. (Tr. 41-42) During a second all-employee meeting held on July 13, and attended by

^{3/} Of particular note, as Hager walked up to the meeting, Jeff Sands said "how are you doing Jerry Hager." Sands knew Hager by name, yet Hager had never met Sands prior to that meeting. (Tr. 39)

^{4/} No charge was filed over this statement and it is not alleged as unlawful in the complaint. However, Counsel for the General Counsel will argue herein that it is proof of Respondent's animus towards unionization and the Union campaign. See *Stoody Co., Div. of Thermadyne, Inc.*, 312 NLRB 1175, 1182 (1993) (finding of animus based on, in part, conduct not alleged in the complaint). See also, *Gencorp*, 294 NLRB 171, 171 fn. 1 (1989) ("Board has consistently held that conduct that may not be found violative of the Act may still be used to show antinunion animus).

^{5/} For example, Hager made the following statements at the July 11 meeting: "Nobody's here against you. Everybody's willing to work, because everybody's got a job." "People's trying to work. We got a job to do. Nobody's against Worm [Charlie Meddings] downing equipment." (Tr. 38-39) He also stated that "a lot of guys had been complaining" about wiper blades not being replaced. (Tr. 38).

a host of Rockwell and Blackhawk management as well as Blackhawk CEO Mitch Potter, one employee raised concerns about his loader seat being held up by a rock. (Tr. 42) His seat was fixed in less than five minutes that day. *Id.* Employee Kevin Lambert asked if Respondent could fix the backup camera on his loader. (Tr. 41) Potter “spun around,” asked his maintenance boss if the camera came factory installed, and upon confirmation that it did, ordered the camera to be fixed. ^{6/} *Id.*

Additionally, Evans and Meddings personally spoke to employee David Muenich concerning how he should vote regarding the union. ^{7/} On July 25, after Muenich returned to work following a workplace accident and three-day suspension, Evans gave Muenich a ride to his work truck at the start of his day. (Tr. 24) While the two were riding in Evans’ truck, Evans mentioned to Muenich that there was “union stuff” that had started, and Evans hoped that Muenich would view the Employer favorably for having returned him to work and vote against the union. ^{8/} (Tr. 95) On either July 26 or July 27, Meddings, unsolicited, told Muenich that senior Blackhawk manager Sammy Maggard was, in fact, the person who had saved his job, not James McDonald, a coworker and friend of Muenich’s. (Tr. 96-97) ^{9/} Thereafter, Meddings asked Muenich to join him in the mine trailer, where Meddings proceeded to explain to Muenich that, should the Union prevail in the upcoming election, the length of the Glancy mining operation would be cut in half due to costs associated with a unionized workforce. (Tr. 97)

^{6/} See fn. 4, *supra*.

^{7/} The Union filed an “RC” petition seeking to represent production and maintenance employees employed by Respondent at Glancy on July 14, in Case 09-RC-202389. (J. Ex. 3) The election was held on August 3. (J. Ex. 1, p. 1)

^{8/} See fn. 4, *supra*.

^{9/} While Muenich testified that Meddings said only “Sam” when explaining who saved his job, from both Muenich and Maggard’s testimony at the hearing, it seems clear that Meddings meant Sammy Maggard when he said “Sam.” (Tr. 96-97, 274)

Meddings said there is no chance the Glancy operation would last until the year 2025, the expectation at that time. ^{10/} (Tr. 97)

E. Respondent moves Hager to day shift where he continues to openly support the Union's campaign.

On the evening of July 14, Meddings telephoned Hager and told him that he could move to day shift if he was still interested. ^{11/} (Tr. 42, 340) Hager asked what equipment he would be operating on first shift. Meddings told Hager that he would mainly be running bulldozers on day shift, and Hager accepted the offer to switch shifts. ^{12/} (Tr. 42-43) Hager began working his first day shift on July 17. That day, he reported to work shortly before 6:00 a.m., and attended a pre-shift safety meeting held by James Miller, Respondent's day shift foreman at that time.

(Tr. 43; J. Ex. 1, p. 1) At the safety meeting, upon request by Miller, Hager identified himself as one of two new employees on day shift, the other being employee Lawrence Fox. (Tr. 44)

Contrary to what Meddings had said, Miller told Hager that he would not be operating a bulldozer. (Tr. 44) Miller gave him the option of operating a water truck or a rock truck and he chose the 785C rock truck. *Id.* However, he told Miller that he had not been trained on the rock truck. *Id.* In response, Miller told Hager that they would "get with him in a little bit," gave him the number of the truck that he would be operating, and told him to "get on the bus." ^{13/} *Id.*

Hager followed Miller's orders. (Tr. 45) After arriving at his truck, he conducted a pre-shift inspection – on his own – and began operating the truck as instructed, hauling from a pit being

^{10/} See fn. 4, supra.

^{11/} At the hearing, Hager testified that he received the phone call from Meddings on the Friday before his move to day shift. Hager believed the phone call occurred on Friday, July 17. However, all parties agree that Hager was moved to day shift on Monday, July 17, which would make July 14 the Friday before his move to day shift, and the date he spoke with Meddings about his move.

^{12/} During the interview process, Hager had informed Respondent that he desired to work first shift due to having sole custody of his daughter. (Tr. 21)

^{13/} Employees are transported each day to their mining equipment by a school bus, or portal.

loaded by employee Derek “Hollywood” McComas. (Tr. 45) At no time prior to this did Respondent task train Hager on the 785C. In fact, Respondent never task trained Hager on a 785C prior to his accident, in a 785C, on July 24.

To say that operating a 785C is different from operating a D11 bulldozer, or an excavator, is an understatement. First, the substantial differences between these three pieces of equipment are easily discernible by even an untrained eye. (R. Exs. 15, 24, 25) A 785C is essentially an oversized dump truck, operated by a steering wheel and four rubber tires. (Tr. 47) On the other hand, the bulldozers used at Glancy are controlled using levers (not a steering wheel), the oversized blade on the front, and a brake pedal needed to regulate speed as the bulldozers run “wide open” once started. *Id.* Bulldozers, as well as excavators, move using tracks versus rubber tires. They are more skilled positions, and unquestionably require a different skill-set than operating a 785C. Hager did have experience, generally, operating rock trucks, however he had not operated one since 2013 or 2014, and had never operated one at Glancy. (Tr. 48)

During his first week on day shift, Hager attended two all-employee meetings held by Respondent, at least one of which Respondent called to discuss the Union campaign. (Tr. 50) That meeting was held later in the week, likely either July 20 or July 21. (Tr. 49, 106) ^{14/} Following Respondent’s presentation, employees were given the floor. (Tr. 50) As he had done on July 11, Hager spoke out. Hager asked Evans of Dave Muenich’s whereabouts following his workplace accident. (Tr. 50-51) Evans indicated that Muenich was on suspension due to the “extensive damage” he caused. (Tr. 51) In front of approximately 40 employees, including

^{14/} Hager could not remember the exact date of the meeting. However, as discussed in detail below, employee Dave Muenich’s suspension was discussed at the meeting, and all parties agree that Muenich was suspended on Wednesday, July 19 for a workplace accident that occurred that day. Thus, the meeting was likely held on either July 20 or July 21. Employee James McDonald, who was in attendance at the same meeting, also testified that he remembered the meeting being held on either July 20 or July 21. (Tr. 106)

Evans and other management, Hager responded: “Right there itself is why we need a union . . . have you talked to Dave about his wife . . . you know his wife left him. Lost his house, his pension . . . he only got to see his boys every other weekend. All he has left was that job.” (Tr. 51) When Evans responded that the Employer did not know any of that information, Hager said “well, that’s why we need it . . . This is right here alone why you need a third party, because we’re not a happy family.” (Tr. 51) Employee James McDonald, who was in attendance at that meeting, also remembered Hager telling Evans that Muenich’s situation was a perfect example for why Respondent’s employees need a union. (Tr. 108)

F. Hager is involved in a workplace accident on July 24.

The following week, Respondent again assigned Hager to work in a 785C rock truck, including on July 24. (Tr. 52) That day, though, he was operating his truck out of a different pit from which he had never hauled. *Id.* At around 9:00 a.m. that morning, coming out of the pit where his truck had just been loaded, Hager made a sweeping 90 degree right-hand turn onto the haul road. *Id.* In the middle of his turn, his hard hat, which he had placed on his “buddy” seat, fell out of the seat and onto the floor of his cab. ^{15/} *Id.* The floorboard of Hager’s cab was entirely open; there was no separation between the driver’s floorboard and the buddy seat’s floorboard. (G.C. Ex. 22) Consequently, Hager’s hard hat fell behind the gear shift, at most one foot from his pedals. (Tr. 58; G.C. Ex. 22)

Fearing that his hard hat might lodge itself behind one of his pedals, Hager instinctively bent down to retrieve his hard hat. (Tr. 52, 79; R. Ex. 6, p. 30) Hager expressed this fear, i.e.

^{15/} Respondent offered testimony that Hager should have put his hard hat in the compartment under the buddy seat, or hung it on a hook near the passenger door. First, Respondent did not offer any evidence showing that there was such a hook in Hager’s 785C on the day of his accident. Hager offered uncontested testimony that there was not a hook in his truck on the day of his accident. (Tr. 72) Moreover, Hager testified that often the compartments are filled with cleaning supplies, or electronics, as a reason he did not put his hard hat in the buddy seat compartment. (Tr. 74) Miller, Respondent’s current Superintendent, corroborated Hager on that point. (Tr. 260) Finally, Maggard confirmed that the compartment is relatively small in size, and thus would fill up quickly should there be cleaning supplies and other electronics in the compartment. (Tr. 267)

that his hard hat might interfere with the use of his pedals, to Mine Safety and Health Administration (MSHA) investigator Aaron Cline when Cline interviewed Hager after the accident. (R. Ex. 6, p. 30) Hager made a reactionary, split-second decision that happened within seconds. (Tr. 52, 79) As Hager looked up after retrieving his hard hat, his truck was veering through a berm and down the side of the hill. (Tr. 59) There were no other trucks on the haul road at the time of the accident. (Tr. 58-59) After rolling, Hager's truck landed right-side up at the bottom of an abandoned pit, an area that had been blocked off so no employees or equipment could access it. (Tr. 59, 149; J. Ex. 6, p. 4)

James Miller visited the scene of Hager's accident. (Tr. 60) Once Hager had been removed from the truck, mere minutes after he rolled his rock truck down the side of a hill, he spoke with Miller. (Tr. 61) Miller told Hager that he needed Hager's task training forms, and Hager told Miller that he did not have the forms, as he had never been task trained on the rock truck. (Tr. 61) Miller's eyes "got real big," and he left the scene of the accident; he returned about 10 to 15 minutes later to tell Hager that he had filled out the form for Hager to sign. *Id.* Having not been task trained, Hager told Miller he would not sign the form. *Id.* Shortly thereafter, Hager was taken to a local hospital by ambulance, where he was diagnosed with two broken vertebrae and placed on pain medication. (Tr. 61-63)

Hager was discharged from the hospital on the evening of July 24. (Tr. 63) He spoke with Cline that evening, and spoke again with an MSHA investigator two or three days later concerning his cellphone. *Id.* At no other time did Hager speak with any other MSHA investigators. (Tr. 64) Ultimately, Hager's injuries kept him out of work until he was medically cleared to return to work on September 18. (Tr. 64)

G. Respondent is issued citations by both MSHA and the State of West Virginia Office of Miners' Health, Safety and Training.

Following Hager's accident, Respondent notified MSHA of the accident and MSHA immediately began an investigation. In the process, MSHA issued several orders in order to control the accident scene, and prevent any additional injuries. (R. Ex. 6) On July 25, one day after Hager's accident, Cline modified his initial "K" order "to allow two excavators to replace, build up, and strengthen the berms on the affected hill." (R. Ex. 6, p. 10) (emphasis added) Further, on August 7, Cline issued an "Incident Investigation Data" report where he determined that the root cause of Hager's accident was that Respondent's "policies and procedures failed in assuring that equipment operators have full control of their equipment while in operation [and] failed in assuring that any material that is in the cab of mobile equipment is secured while the equipment is in operation." (R. Ex. 6, p. 32) Similarly, the day after Hager's accident, MSHA required Respondent to conduct meetings with its employees in response to the accident. (Tr. 252-253; R. Ex. 7)

Also in response to Hager's accident, Respondent was required to submit an update to its ground control plan, a statutorily required mining plan that must be submitted to MSHA under 30 C.F.R. § 77.1000. (G.C. Ex. 20, 21) Respondent updated its ground control plan with two safety precautions lacking from its original plan, both in response to Hager's accident. (G.C. Ex. 20, p. 3) Finally, on July 27, the State of West Virginia Office of Miners' Health, Safety and Training issued Respondent a citation for improper berm heights, finding the berms to be inadequately constructed "in that a 785C Caterpillar rock truck was driven through a 35 foot section of the berm . . ." (G.C. Ex. 19) (emphasis added)

H. Respondent filed objections to the August 3 election.

On August 3, an election was held in Case 09-RC-202389, and the Union prevailed. (J. Ex. 1, p. 1-2) Five days later, Respondent filed objections to the election and Jerry Hager's union activities, prior to the petition being filed, were featured heavily. (J. Ex. 4) A hearing was held on August 24 to take evidence regarding Respondent's objections to the August 3 election. (J. Ex. 1, p. 2) At the objections hearing, Hager provided testimony disputing the allegations raised in Respondent's objections, thereby providing testimony favorable to the Union's position on the aforementioned objections. *Id.* Subsequently, on February 16, 2018, the Regional Director for Region Nine certified the Union as the exclusive bargaining representative of the corresponding unit, and Respondent has challenged that certification with the Board. *Id.*

I. Immediately after Hager was medically cleared, Respondent suspended and terminated his employment.

On September 15, Hager received medical clearance to return to work. (Tr. 64) The following Monday, September 18, Hager returned to work, presented Respondent with his medical clearance paperwork, then met with Evans and Milam for a return to work meeting, where the parties briefly discussed his accident. ^{16/} (Tr. 65; G.C. Ex. 4) From the outset, Respondent deviated from its practices in handling Hager's return to work. Only Evans and

^{16/} Respondent presented "expert" witness Eric Waller to bolster its argument for why it waited until September 18 to take action against Hager, and also for a discussion related to MSHA law. First, Counsel for the General Counsel maintains his objection that Waller was not a qualified expert under Federal Rules of Evidence Rule 702. Respondent offered no evidence that distinguished Waller from any other attorney who practiced MSHA law or worker's compensation law as part of a larger practice; he is not certified as a worker's compensation specialist, nor is there any evidence that he has given presentations related to MSHA or West Virginia State Workers' Compensation Law. At most, Waller is a practicing attorney who has provided advice to clients on MSHA and West Virginia workers compensation law. Beyond Counsel for the General Counsel's Rule 702 objection, Waller's testimony is, frankly, irrelevant to this case. Respondent proffered evidence as to why it decided to wait until September 18 to take action against Hager. Waller's testimony adds nothing to Respondent's decision, as he did not represent Respondent herein. Regarding the MSHA investigation, Waller admitted that he was not in any way involved with the MSHA investigation into Hager's accident. He thus cannot speak to why MSHA did, or did not, cite Respondent for possible violations. Waller's testimony should be disregarded as speculative, irrelevant and improper Rule 702 testimony.

Milam met with Hager, contrary to Respondent's "Teamwork Program" handbook, which states: "In the event of an incident where medical treatment is required on mine property, at least (3) members of the Operational Safety Review Board will participate in a return to work interview with the employee(s)." (J. Ex. 8, p. 8) In employee Dave Muenich's return to work meeting on July 24, he was afforded the opportunity to speak with four members of management. (G.C. Ex. 7) Similarly, employee Dave Dingess spoke with Milam, Evans, and an individual named Charlie Tuck in his return to work meeting. (G.C. Ex. 11) Yet, Hager was only given the opportunity to speak with Milam and Evans, the same members of management who had been present for Hager's statements in support of the Union at various captive-audience meetings. (Tr. 50; J. Ex. 1, p. 1)

Respondent's notes of Hager's return to work meeting document the matters discussed during the meeting. (G.C. Ex. 4) In the meeting, Hager again informed Respondent that he had never been task trained on a rock truck. *Id.* Nothing in Respondent's notes reflect that it ever asked Hager why he chose to reach down and retrieve his hard hat; surely had that question been asked, Respondent would have noted the answer. *Id.* Importantly, Hager was truthful, honest, and humble; he admitted that his actions caused the accident, that there was no mechanical issue with the truck, and that he was sorry. *Id.* At the conclusion of the meeting, Evans suspended Hager pending investigation. (Tr. 65)

On September 21, Respondent, through Milam and Evans, informed Hager via telephone that he was terminated. (Tr. 66) Yet again, Hager informed Respondent that he had not been task trained on the rock truck. ^{17/} (G.C. Exs. 3, 4) Apparently, Respondent "took Mr. Hager's

^{17/} Hager's testimony on this point should be credited, and no weight should be given to Miller's related testimony and/ or any other evidence introduced by Respondent on this point. Hager testified clearly, consistently, and with confidence. He provided specific testimony comparing his experiences between his first day of work and his first day on day shift. He also offered an uncontested, descriptive account of Miller's reaction when Hager told him he

comments on the training into consideration when making a decision.” (G.C. Ex. 3) However, because it concluded that Hager had been task trained, Hager’s statement did not amount to a mitigating factor. *Id.* Furthermore, according to Respondent’s internal termination document, Hager was fired for a “negligent, unsafe act” and because Respondent found him to have been “negligent while operating a 785 rock truck.” (R. Ex. 20, p. 33) In terminating Hager, Respondent maintains that it reviewed and followed its disciplinary policy, which states that “[a]busing company equipment or property or negligent use or operation of company tools, equipment or vehicles will result in immediate termination.” (Tr. 368-369; J. Ex. 7, p. 32)

J. In other circumstances, Respondent showed leniency towards employees.

As referenced previously, employee Dave Muenich caused “major equipment damage” when he drove his loaded fuel truck over a coal ledge. (G.C. Ex. 6) The accident occurred while Muenich was operating a fuel truck and re-fueling other pieces of equipment. (G.C. Exs. 7, 8) Evans described it as “an expensive situation,” which kept the fuel truck out of service for several weeks. (Tr. 184, 284) The accident was caused when Muenich, while looking in his rear-view mirror to spot the next truck he was to refuel, drove forward and ran his truck over a three-foot coal ledge. *Id.* Indeed, according to Evans, Muenich drove 100 feet, or 33 yards, while not paying attention and, as a result, ran over the coal ledge. (Tr. 184) Like Hager after his accident, Muenich admitted that the accident was completely his fault, further admitting that

had not been task trained immediately following the accident. Miller, on the other hand, often testified in a quiet, timid, and contradictory manner. For example, at one point, Miller claimed that it took “15, 20 minutes or so” to task train Hager. (Tr. 228) Yet, later in his testimony, Miller claims the task training was not complete for upwards of a week due to necessary observation of Hager in the truck. (Tr. 255-256) Miller admitted on cross-examination that for task training observation purposes, he would need to make sure an operator could operate a truck forward, in reverse, and make turns. (Tr. 261) Nothing in Miller’s testimony suggests that he undertook such observation with Hager; in fact, Miller admitted that he did not. Finally, the task training form introduced by Respondent to support its assertion that Miller trained Hager is vastly dissimilar to the other task training forms completed by its employees and their trainers. (R. Ex. 14; G.C. EX. 26) Miller admitted that he wrote Hager’s initials on the task training form, yet the form clearly contemplates that both the trainer and the student will individually initial the form once training has taken place. (Tr. 232) For all of these reasons, Hager’s account should be credited.

he was not paying attention. (G.C. Ex. 7) Moreover, Respondent considered Muenich's actions negligent. (Tr. 211, 280, 281, 356) Muenich negligently operated a loaded fuel truck on a combustible coal seam in an area filled with other trucks and employees. (Tr. 214-215)

Notwithstanding the above, and even though Respondent's policy unequivocally states that negligence in Respondent's equipment will (not could) result in immediate termination, Respondent showed leniency to Muenich. In doing so, Respondent credited Muenich's argument that no berm was present even though, according to Evans, not only was Respondent not required to maintain a berm in that area, it was actually not possible to maintain a berm in that area of the mine. (Tr. 184, 213) Evans acknowledged that "the shear dropoff, arguably, could have had [sic] something to let him know that it's not a ramp, so you can't proceed." (Tr. 214) In the end, Respondent only suspended Muenich, even though it found him to have violated safety rules, engaged in substandard work, and acted negligently. (G.C. Ex. 6)

Respondent experienced yet another workplace accident on October 3. On that day, employee Dave Dingess tipped an excavator that landed on its side, resulting in minor injuries to Mr. Dingess. (G.C. Exs. 12, 13; R. Ex. 9, p. 2) Apparently Dingess was using a hammer attachment on his excavator to break up the very rocks that his excavator was positioned on, and in doing so, caused other rocks to shift underneath his machine, causing the accident. *Id.* Further, Dingess caused his excavator, a very large piece of machinery, to tip over in an area travelled by trucks and employees. *Id.* Lastly, the accident caused \$13,500 in damage, and necessitated the excavator being out of service for at least one month. (Tr. 285)

Once again, Respondent went to great lengths to justify its decision not to terminate Dingess. In its "Incident Investigation Report," Respondent determined that Dingess' "improper position for the task" was the immediate cause of the accident. (G.C. Ex. 13) In order to prevent

recurrence, Dingess was instructed to operate the excavator on stable ground while busting rocks; the clear implication being that in this instance, he failed to operate his equipment on stable ground. (G.C. Ex. 13) Yet, in Milam's notes regarding Respondent's decision to retain Dingess, created after the incident investigation report, he wrote: "[i]t is possible that Mr. Dingess did not have proper positioning to remove himself and the equipment . . . This issue may have led to an increased risk of turning the machine over." (G.C. Ex. 10) (emphasis added)

IV. LEGAL ANALYSIS:

- A. Respondent violated Sections 8(a)(3) and (4) of the Act when it suspended Hager on September 18, and terminated him on September 21, in retaliation for his open and known union support and his testimony at the August 24 objections hearing.

1. Legal Framework.

In order to establish unlawful discrimination under Section 8 (a)(3) and (4) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Newcor Bay City Division*, 351 NLRB 1034, 1034 fn. 4 (2007) (Section 8(a)(4) cases are analyzed under the *Wright Line* framework).^{18/}

^{18/} The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB 363, 363 (2010)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless. See, e.g., *Lucky Cab Company*, 360 NLRB 271 (2014); *ManorCare Health Services – Easton*, 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a

prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 (“the Board’s construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation”). The employer has the burden of establishing that affirmative defense. *Id.*

2. Hager suffered multiple adverse employment actions after Respondent learned of his open and known activities in support of the Union, as well as his testimony in the Board proceedings.

Establishing the first three elements necessary for General Counsel to carry his *Wright Line* burden are met here with zero resistance. Hager was suspended on September 18 and terminated on September 21. About two-and-a-half months earlier, Hager began openly and persistently advocating employee support for the ongoing union campaign. On July 6, Hager organized an employee meeting where he solicited employees to sign Union authorization cards. The meeting was attended by approximately 19 employees. Five days later, in a captive audience meeting attended by many high-level managers of Respondent and Blackhawk, Hager rebutted Respondent’s antiunion message by raising several employee concerns. On either July 20 or 21, Hager directly challenged Joe Evans in another captive audience meeting in front of approximately 40 employees, explaining to Evans specifically why Respondent’s employees at Glancy needed the Union. Finally, on August 24, Hager testified at the Board-run objections hearing in support of the Union’s opposition to Respondent’s objections to the August 3 election.

Furthermore, Respondent cannot credibly argue, nor is it expected to do so, that it was unaware of Hager’s pervasive support for the Union prior to suspending and terminating him. Respondent’s objections to the August 3 election specifically name Hager as having allegedly engaged in objectionable conduct at the aforementioned July 6 employee meeting. Respondent was present for Hager’s testimony at the objections hearing. Lastly, Respondent did not contest

Hager's corroborated testimony that he directly challenged Evans at the all employee captive audience meeting on about July 20 or 21. It is clear that Hager had engaged in union activities known by Respondent prior to his unlawful suspension and discharge.

3. Hager's protected union and Board activities were a motivating factor in Respondent's decision to suspend, and ultimately, terminate him.

The record evidence is replete with examples of Respondent's hostility towards Hager and the Union campaign in general. To begin with, it is Respondent's perception of Hager's union activities at the July 6 union meeting that has led it to challenge, to the Board, the Regional Director's unit certification in this matter. Also, he is the only bargaining unit employee named in Respondent's objections. Accordingly, Hager is the face of the opposition as it relates to the Union prevailing in the election and ultimately being certified as the unit's exclusive collective-bargaining representative. Undoubtedly, Respondent considers Hager's protected union activities as the reason it lost the election.

In addition to Respondent's hostility towards Hager's July 6 union activities, the timing of his suspension and discharge, in relation to his union and Board activities lends further support to the argument that Respondent was motivated by his activities when it suspended and discharged him. Respondent will likely point out that Hager's suspension and termination occurred more than two months after Hager's union activities on July 6, 11, 20 or 21, and a few weeks after he testified at the August 24 objections hearing. However, that argument is spurious. By Respondent's own admission, it believed it was hamstrung by West Virginia Workers compensation law from taking adverse employment actions against Hager while he was on worker's compensation; it needed to wait until he was medically cleared to return to work before Respondent could do so. Therefore, while weeks had, in a technical sense, passed between Hager's union and Board activities and the time of his adverse employment actions, Respondent

effectively seized upon its first opportunity to take action against Hager. In this matter, then, timing and opportunity cannot be parsed. Respondent's decision to take action against Hager at its first available opportunity after Hager's extensive Union activities, as well as his Board testimony in opposition to its objections to the election, supports a finding that it harbored animus towards those protected activities.

Furthermore, like the two previous factors, Respondent's deviation from its stated policies, and its lackluster investigation, support a finding that Respondent harbored animus towards Hager's Union and Board activities. Instead of being afforded the opportunity to speak with three members of Respondent's Operational Safety Review Board, as called for in Respondent's Teamwork Program handbook and afforded to every other employee in his position, Hager was forced to meet with the two members of management most familiar with his active Union support. When they met with Hager, they simply asked if he had anything to add to the accident. (Tr. 65) Nothing in Respondent's notes reflect that they asked Hager why he reached down to grab his hard hat, nor anything more to suggest it was doing anything other than going through the motions. If they had done so, Hager would have told them precisely what Cline was told—that he made a reactionary, split-second decision out of fear that his hard hat would interfere with his pedals. However, Respondent was uninterested in why Hager reacted the way he did; the record evidence supports a finding that even before "interviewing" Hager, Respondent had already determined to suspend, and ultimately terminate, Hager's employment.

Additionally, Hager's adverse employment actions occurred on the heels of Respondent's active anti-union campaign. It is true that Respondent was not charged with having violated the Act while conducting its anti-union campaign. However, Board law is clear that unalleged anti-union conduct, even that which is not illegal, may form the basis for finding animus towards

union activity. See *Stoody Co., Div. of Thermadyne, Inc. and Gencorp*, supra. Here, the record contains several examples of Respondent's conduct which, while unalleged in this complaint, supports a finding of animus toward union activity, including: (1) Evans' statement at the July 11 captive audience meeting that customers in the industry opt for "union-free" coal in order to maintain a dependable and uninterrupted source of coal; (2) Evans' un-contradicted statement to Muenich that he hoped "this" (read: Respondent returning Muenich to work) would persuade him to vote in Respondent's favor; (3) Respondent and Potter's clear, and near immediate, remedying of grievances raised by employees in the July 11 and 13 captive audience meetings; and (4) Meddings' uncontested and brazen statement to Muenich that the length of the Glancy operation would be cut in half should the Union prevail in the election. Respondent's above-cited conduct paints a clear anti-union picture that extends well-beyond Section 8(c) allowances. And it is this backdrop that preceded Hager's suspension and termination.

Based on the evidence discussed above, and for further reasons discussed below, Respondent clearly harbored animus towards Hager's protected Union and Board activities.^{19/} Consequently, General Counsel has met his *Wright Line* burden in establishing that Hager's known union and Board activities were a motivating factor in his suspension and termination. As a result, the analysis now shifts to Respondent to prove that it would have taken the same action even in the absence of Hager's protected activities.

^{19/} The record also contains significant evidence of disparate treatment. Such evidence can be used to show both Respondent's animus towards Hager, and its inability to meet its *Wright Line* burden. *Wright Line*, 251 NLRB at 1090-1091. For purposes of efficiency, the discussion of disparate treatment is located in the following Section, where Respondent's failure to meet its *Wright Line* burden is analyzed. However, that disparate treatment evidence is also evidence that Respondent was motivated by Hager's pervasive Union activities when it decided to take adverse employment actions against him.

4. Viewed as a whole, the record evidence does not support a finding that Respondent would have taken the same action against Hager even in the absence of his protected activities.

The record abundantly establishes that Respondent has a history, if not an overt practice, of deviating from its disciplinary policy and its handbook to show leniency towards employees. However, this includes every employee except for Jerry Hager. At the outset, the record contains no evidence that Respondent has ever discharged another employee for engaging in negligence, or causing a workplace accident. Further, the disciplinary rule implicated in Hager's situation states in no uncertain terms, negligent operation of Respondent equipment will result in immediate termination. Will result, not could result. Yet both Joe Evans and Colin Milam admitted that not every employee who engages in negligence is fired by Respondent; no doubt a stunning admission in the face of such an unequivocal rule. That testimony is corroborated by Evans' admission that he, Respondent's ultimate decision-maker, considered Muenich's July 19 accident to have resulted from negligent operation of Respondent's fuel truck. Once again a damning admission that Respondent has no qualms deviating from its written policies when it suits its own interests.

A review of the facts concerning Muenich's July 19 accident and Hager's July 24 accident show striking similarities. Both Hager and Muenich admitted that their accidents were 100 percent their fault. (G.C. Exs. 4, 7) Both accidents resulted from their individual failures to keep their eyes on the road in front of them. *Id.* In both instances, their accidents were "expensive" and caused "extensive" damage to Respondent equipment, and caused lengthy out-of-service time for their respective pieces of equipment. (Tr. 51, 184; G.C. Ex. 6) The accidents occurred 5 days apart, and both operators were found to have violated safety rules in the negligent operation of equipment. (G.C. Ex. 6)

Furthermore, in many ways, Muenich's negligent conduct was more severe and put more employees in danger than Hager's. Muenich drove his fuel truck one-third the length of a football field forward while looking in his rear-view mirror to spot the next truck he needed to fuel. (G.C. Exs. 6, 7) He did this while operating a loaded fuel truck on a combustible coal seam in an area of the mine where other trucks and employees were present. Moreover, Muenich had already received a written warning for a previous accident. (J. Ex. 1, p. 2) Hager's accident, on the other hand, resulted from a split-second reactionary decision that occurred while no other trucks were on the haul road, and he landed in an abandoned pit that was specifically blocked off so no other employees or equipment could access the area.^{20/} Muenich overtly, and consciously, decided to operate his vehicle while looking in his rear-view mirror with no justifiable purpose. Hager, conversely, reacted to a potentially dangerous situation; there can be no question that an out-of-control rock truck careering down a steep haul road could have drastic and fatal consequences.

Moreover, Hager had no disciplinary history, and was considered by Respondent, at least initially, as their "ace" excavator man on night shift. (G.C. Ex. 18) This makes Respondent's failure to follow its own practices and find mitigating circumstances in Hager's case astonishing. Indeed, the lengths Respondent went to justify returning other employees to work after termination-worthy conduct is laughable. For Muenich, an employee with an accident on his record, Respondent cited as a mitigating circumstance the fact that a berm had not been constructed in the area where his accident occurred. Such alleged mitigation is rendered false by the fact that Respondent was not required to maintain a berm in that area because it was not possible to do so. Moreover, it additionally ignored the fact that Muenich, who had to have

^{20/} This is not meant to downplay the seriousness of Hager's accident. General Counsel does not dispute the seriousness of Hager's accident. Instead, it is offered to show the equal seriousness of Muenich's accident as a comparator to Hager's.

accessed the “ramp” moments prior in order to fuel the other trucks, had 100 feet to locate the very ramp he had just utilized. And notwithstanding everything above, in failing to immediately terminate an employee found to have negligently operated a piece of Respondent’s equipment, Respondent ignored its written policy.

In the case of Dingess’ accident, Respondent’s investigation found that Dingess had improper position for the task he was performing, which caused his accident. (G.C. Ex. 13) Yet, in its decisional document returning Dingess to work, Respondent unbelievably wrote that “it [was] possible” that Dingess had improper positioning for the task, which “may” have resulted in an increased risk of accident. (G.C. Ex. 10) No—Dingess did have improper positioning which did result in his accident. Respondent presented no evidence to substantiate its significant softening—from its investigation report to its decisional document—in how it viewed the nature of Dingess’ accident. Even more, Dingess felled his large excavator in an area that was frequently travelled by trucks, so much so, that he chose not to take one practical measure in order to avoid rocks entering the path of trucks being operated in the area. (G.C. Ex. 11)

In light of Respondent’s documented willingness to show leniency towards employees with the same, if not more serious, accidents as Hager’s, it is truly telling that Respondent could not, or more accurately, would not, find any basis for leniency towards Hager. Respondent could have chosen from any one, or all, of the following mitigating circumstances:

(1) Unlike Muenich and Dingess who caused accidents in equipment in which they had been task trained and had operated throughout their career, Hager had been in the 785C for one week, and was hauling from an unfamiliar pit on the day of his accident.

(2) Even though Hager had driven a rock truck at prior places of employment, a quick perusal of his resume would have shown Respondent that Hager had not done so in 3 or 4 years.

Additionally, operating a rock truck is entirely different from operating the bulldozer that Hager had grown accustomed to. It presumably takes time, and practice, to become comfortable with the operation of the truck, and to figure out its various handling components, the steering radius, braking, etc.

(3) As found by the State of West Virginia Office of Miners' Health, Safety and Training, Respondent's berms were inadequately constructed. (G.C. Ex. 19) In the face of this citation, Evans testified that when evaluating mitigating circumstances, Respondent incredibly found no issues with the berms at the site of Hager's accident. (Tr. 185) Hager drove through the berm at an angle, not straight through as suggested by Evans, and as such, the inadequacies of the berm construction may have been an important consideration.^{21/} Similarly, MSHA, although it did not cite Respondent for inadequate berms, found that Respondent's berms needed to be built up, and strengthened, instead of simply being replaced. In light of Respondent finding the absence of berms as a mitigating circumstance in Muenich's case, even though it was impossible to maintain berms in that area, it is astounding that Evans ignored the citation and the language in MSHA's order, evidence that there were in fact issues with the berm that Hager drove through.

(4) MSHA found, in no uncertain terms, that the failures of Respondent's practices and policies were the root cause of Hager's accident. (G.C. Ex. 16) As Evans astutely recognized, had Respondent appropriately trained its employees, Hager's accident may have been preventable. (Tr. 199)

^{21/} The State of West Virginia Office of Miners' Health, Safety and Training found that Hager drove through a 35 foot section of the berm. (G.C. Ex. 19) Given that the 785C brochure entered into evidence lists the inside body width of the 785C as 18 foot 1 inch wide, it is clear to even the untrained observer that Hager went through the berm at an angle. (R. Ex. 3, p. 21)

(5) Respondent never inquired as to why Hager bent down to grab his hard hat prior to stopping his vehicle. Had it done so, it would have learned that Hager feared his hard hat would interfere with the pedals and his operation of the truck. An undeniably legitimate concern.

In addition to the five listed above, Respondent failed to properly task train Hager before assigning him to begin operation of the 785C. Had Respondent done more than a cursory review of the evidence on this issue, it likely would have concluded that Hager was not properly trained prior to being put into the truck. Respondent's first clue: in a complete departure from past practice, Miller, who himself had properly completed the task training and forms for several employees mere weeks prior to Hager beginning on day shift, apparently left unsigned Hager's task training form for one week. (R. Ex. 14; G.C. Ex. 26) Had Respondent investigated its supervisors' task training practices, including Miller's, it would undoubtedly have seen that Hager's case stood in stark contrast to the others. Now, given that Respondent would have been subjected to serious citations, fines, and penalties if it had failed to task train Hager prior to his accident, it is no real surprise that Respondent is standing behind Miller. In doing so, however, it willingly ignored concrete, objective evidence that Hager was not properly trained prior to his accident.

Moreover, whereas Respondent relied upon the statements of Muenich and Dingess to find mitigating circumstances, Respondent not only ignored the objective evidence regarding its failure to properly train Hager, it ignored his repeated statements to the same. Instead, Respondent credited Miller and hearsay statements allegedly from Cline that Hager purportedly admitted to being task trained.^{22/} It did so, however, ignoring the very reasons it proffered for

^{22/} Joe Evans testified that Safety Director Justin Ray followed up with the state and federal authorities regarding the task training. (Tr. 173) Your Honor should draw an adverse inference concerning Respondent's failure to call Ray to testify to this point. Given that Ray is certainly favorably disposed to Respondent, one can only assume that Ray would not corroborate Evans' general testimony. See *International Automated Machines*, 285 NLRB 1122,

waiting until Hager was medically cleared to formally interview him. Respondent allegedly waited to interview Hager until he was medically cleared in order to afford Hager an opportunity to present his version of the story, including any mitigating circumstances, in an unhindered fashion free from the injuries, pain medication, and immediateness of the accident that hindered Hager in the days that followed his wreck. (Tr. 211-213) Yet, when Hager informed Respondent on September 18 and 21 that he had not been task trained on the rock truck, Respondent instead chose to believe a hearsay version that Hager supposedly provided on the day of his accident, encumbered by severe injuries, trauma, and pain medication. Given Milam's testimony, and his decisional document regarding Hager's termination, it is clear that Respondent would certainly have considered its failure to properly train Hager as a mitigating circumstance. In light of that admission, of course Respondent chose to credit a hearsay statement made while Hager was inhibited by pain, trauma, and medication; crediting his uninhibited statements on September 18 and September 21 would have been cause to return him to work.

Even more, while Respondent dug deep to find justifiable reasons to return Dingess and Muenich to work after their accidents, Respondent actually invented new policy standards in order to justify terminating Hager. Throughout Respondent's witnesses' testimony, and Respondent's counsel's opening statement, mention was made of varying degrees of negligence. (Tr. 125, 164, 184, 280) As in, Muenich was returned to work because he engaged in a lesser form of negligence, whereas Hager engaged in gross negligence. Your Honor will find no references to negligence-related sliding scales in Respondent's disciplinary policy, handbook, or teamwork program manual. Quite the opposite—as discussed above, Respondent's policy

1123 (1987), *enfd. mem.* 861 F.2d 720 (6th Cir. 1988) (adverse inference was warranted for respondent's failure to call its production manager to testify about significant disputed matters).

unequivocally dictates immediate termination for an employee who engages in negligence, no matter the degree to which they were negligent.^{23/} And the only employee negatively affected by Respondent's newly applied negligence standard, to date, happens to be the in-house face of the organizing campaign.

Further, Respondent's other anticipated *Wright Line* defenses equally fail. Should Respondent argue that the repair costs stemming from Hager's accident alone differentiate his situation from others, that argument must fail. While Hager's accident does appear to be more costly than the others, in dealing with equipment that costs hundreds of thousands of dollars, if not millions, the difference between \$51,000, and \$13,500 in Dingess' case and approximately \$12,000 in Muenich's case, is not as vast as it may seem at first blush. Nevertheless, Respondent does not have any monetary damage threshold in its disciplinary policy to differentiate the seriousness of accidents. Negligence is negligence, no matter the cost to repair the equipment. Most importantly, Evans testified that the expense incurred by Hager's accident was not the overriding factor in deciding to terminate his employment. (Tr. 185)

Likewise, based upon irrelevant evidence proffered by Respondent, it will likely argue that its actions towards known union supporters subsequent to Hager's accident prove it did not harbor animus towards Hager's union activities in deciding to take adverse action against him. That argument, however, is nothing more than a red herring, and deserves little attention. To say that Respondent was not motivated by Hager's union activities at the time it took action against him *because* it chose not to discipline known union adherents who caused accidents *after* Hager had been terminated, after the instant charge had been filed, and in one instance, after the instant complaint issued, is irrelevant, frivolous, and borderline insulting. Nothing more need be said.

^{23/} Respondent's attempt to impart a new negligence standard into its disciplinary policy is particularly indicative of animus towards Hager, beyond its tendency to show disparate treatment.

Notably, there is no record evidence that Muenich had engaged in union activities, or that Respondent was aware that Muenich had engaged in union activities, at the time it returned him to his position on July 24. The same can be said for Dingess.

Based on the overwhelming evidence discussed above, the record does not support a finding that Respondent would have terminated Hager even in the absence of his protected activities. Instead, the ample disparate treatment evidence shows unequivocally that but for Hager's Union and Board activities, Respondent would not have suspended and terminated him, even considering the seriousness of his accident. Because General Counsel has met the requirements of *Wright Line* to establish a discriminatory motive in Hager's suspension and termination, and Respondent has failed to prove that it would have taken the same action towards Hager regardless of his protected activities, the undersigned respectfully requests Your Honor to reach the only conclusion possible—that Respondent violated Section 8 (a)(3) and (4) of the Act when it suspended and terminated Hager.

V. PROPOSED NOTICE:

Counsel for the General Counsel urges Your Honor to consider the proposed attached Notice to Employees as part of the remedy in this case.

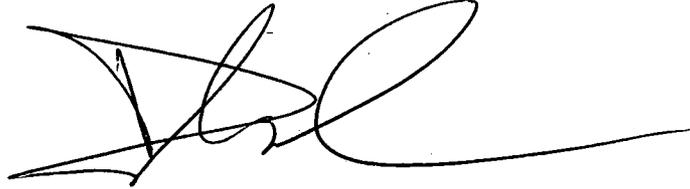
VI. CONCLUSION:

For the reasons discussed above, Counsel for the General Counsel respectfully requests Your Honor to find that Respondent violated Sections 8(a)(3) and (4) of the Act as alleged in the instant Complaint and to fashion an appropriate remedy in this case. Respondent had at its disposal a number of mitigating circumstances, to use its term of art, to justify returning Hager back to work following his medical clearance. Any combination of which, or even some standing alone, would undoubtedly justify Respondent's doing so. Respondent's decision to

ignore those circumstances, especially in light of its history of showing leniency and the questionable mitigating circumstances found applicable in Muenich and Dingess' respective cases, speaks volumes.

Dated: May 9, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Goode', with a long horizontal line extending to the right.

Daniel A. Goode
Counsel for the General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT suspend or fire you because of your support for the United Mine Workers of America, District 17, or for any other Union, or for assisting or giving testimony to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jerry Hagar immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL pay Jerry Hagar for the wages and other benefits, plus interest, he lost because we fired him.

WE WILL remove from our files all references to the September 18, 2017 suspension and September 21, 2017 discharge of Jerry Hagar and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL compensate Jerry Hagar for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL pay Jerry Hagar for all search-for-work expenses and work-related expenses regardless of whether he received interim earnings in excess of these expenses, during any given quarter or during the overall backpay period, plus interest.

WE WILL reimburse Jerry Hagar for reasonable consequential damages, if any, incurred by him, plus interest.

ROCKWELL MINING, LLC

(Employer)

Dated: _____

By: _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Telephone: (513)684-3686
Hours of Operation: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to Field Attorney Daniel A. Goode.

CERTIFICATE OF SERVICE

May 9, 2018

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on the parties by electronic mail today to the following at the addresses listed below:

Anna M. Dailey Esq.
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Charleston, WV 25339-1887
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Brian Lacy, International Representative
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1300 Kanawha Blvd
East Charleston, WV 25301-3001
Email: brianlacy74@gmail.com

A handwritten signature in black ink, appearing to read 'Daniel A. Goode', with a long horizontal line extending to the right.

Daniel A. Goode
Counsel for the General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271