UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC. and THE HARRISON COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARION COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MONONGALIA COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARSHALL COUNTY COAL COMPANY, a single employer, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Docket No. 18-1151

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED MAY 3 1 2018
CLERK

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Murray American Energy, Inc., The Harrison County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, and The Marshall County Coal Company, (herein "Petitioners"), hereby petition the United States Court of Appeals for the District of Columbia Circuit to review and set aside a Decision and Order of the National Labor Relations Board ("Board") in the matter styled *Murray American Energy, Inc. and the Harrison County Coal Company, a single*

employer, and 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 United Mine Workers of America, District 31, Local 9909, AFL-CIO, CLC, Murray American Energy, Inc. and the Monongalia County Coal Company, a single employer, and United Mine Workers of America, AFL-CIO, CLC, and Murray American Energy, Inc. and the Marshall County Coal Company, a single employer, and United Mine Workers of America, District 31, AFL-CIO, CLC, Case Nos. 06-CA-169736, 06-CA-170978, 06-Ca-171057, 06-CA-171069, 06-CA-171085, 06-CA-174075, 06-CA-174080, 06-CA-174152, 06-CA-183054, 06-CA-185640, and 06-CA-186015, reported at 366 NLRB No. 80, dated May 7, 2018. *See* Exhibit A. This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act because the NLRB's Decision and Order is a final order. 29 U.S.C. § 160(f). Petitioners are parties aggrieved by this Decision and Order. The Board's Decision and Order is not supported by substantial evidence and is contrary to law.

WHEREFORE, Petitioners respectfully pray that this Court review and set aside the Board's Decision and Order and that Petitioners receive any further relief to which they may be entitled.

Dated: May 31, 2018

Respectfully submitted,

/s/ Margaret S. Lopez_____

Margaret S. Lopez, Esq.
D.C. Bar # 454545

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Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC. and THE HARRISON COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARION COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MONONGALIA COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARSHALL COUNTY COAL COMPANY, a single employer, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Docket No. **18-1151**

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Review was served by United States First Class mail on May 31, 2018, to the following:

Nancy Wilson, Regional Director
Clifford Spungen, Esquire
Zachary Hebert, Esquire
National Labor Relations Board
Region Six
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222

Gabrielle Ulbig, Esquire
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Charles F. Donnelly
United Mine Workers of America, AFL-CIO, CLC
1300 Kanawha Boulevard East
Charleston, WV 25301

/s/ Margaret S. Lopez_____
Margaret S. Lopez

34173105.1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC. and THE HARRISON COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARION COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MONONGALIA COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARSHALL COUNTY COAL COMPANY, a single employer, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Docket No. **18-1151**

RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF PETITIONERS

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Petitioners Murray American Energy, Inc., The Harrison County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, and The Marshall County Coal Company, hereby submit this Corporate Disclosure Statement:

1. The Harrison County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, and The Marshall

County Coal Company are operators of four underground coal mines in West Virginia. These companies are all wholly-owned subsidiaries of Murray American Energy, Inc.

2. Murray American Energy, Inc. is a wholly-owned subsidiary of Ohio Valley Resources, Inc.
3. Ohio Valley Resources, Inc. is a wholly-owned subsidiary of Murray Energy Corporation.
4. Murray Energy Corporation is a wholly-owned subsidiary of Murray Energy Holding Company, its parent company.
5. Murray Energy Corporation holds a 10% or greater ownership interest in Foresight Energy LP, which is a publicly-held company.

Dated: May 31, 2018

Respectfully submitted,

/s/ Margaret S. Lopez_____
Margaret S. Lopez, Esq.
D.C. Bar # 454545

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Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC. and THE HARRISON COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARION COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MONONGALIA COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARSHALL COUNTY COAL COMPANY, a single employer, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Docket No. **18-1151**

CERTIFICATE OF SERVICE

I certify that the foregoing Rule 26.1 Corporate Disclosure Statement of Petitioners was served by United States First Class mail on May 31, 2018, to the following:

Nancy Wilson, Regional Director
Clifford Spungen, Esquire
Zachary Hebert, Esquire
National Labor Relations Board
Region Six
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222

Gabrielle Ulbig, Esquire
United Mine Workers of America, AFL-CIO, CLC
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Charles F. Donnelly
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Charleston, WV 25301

/s/ Margaret S. Lopez_____
Margaret S. Lopez, Esq.

34173099.1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Murray American Energy, Inc. and the Harrison County Coal Company, a single employer, *and* 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* United Mine Workers of America, District 31, Local 9909, AFL–CIO, CLC

Murray American Energy, Inc. and the Monongalia County Coal Company, a single employer, *and* United Mine Workers of America, AFL–CIO, CLC

Murray American Energy, Inc. and the Marshall County Coal Company, a single employer, *and* United Mine Workers of America, District 31, AFL–CIO, CLC. Cases 06–CA–169736, 06–CA–170978, 06–CA–171057, 06–CA–171069, 06–CA–171085, 06–CA–174075, 06–CA–174080, 06–CA–174152, 06–CA–183054, 06–CA–185640 and 06–CA–186015

May 7, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On May 8, 2017, Administrative Law Judge David I. Goldman issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel and Charging Party United Mine Workers of America, AFL–CIO, CLC (UMW) each filed an answering brief,[1] and the Respondents filed reply briefs to the General Counsel's and the Charging Party's briefs.

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

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

[1] The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel moved to strike Exh. A to the Respondents' exceptions brief. We agree with the General Counsel that the exhibit was not introduced as evidence at the hearing and, therefore, cannot be introduced into the record at this point. See Sec. 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's request to strike the exhibit. *S. Freedman Electric, Inc.*, 256 NLRB 432, 432 fn. 1 (1981). We note that even if the Board were to consider the exhibit, it would not affect the outcome of the case. Member Emanuel agrees that consideration of the exhibit, a copy of a Federal court decision vacating an arbitral award in favor of the Union, would not affect the result in this case. However, he would deny the Motion to Strike, as the court's decision was before the judge and in fact referred to in his decision, although he chose not to rely on it.

[2] There are no exceptions to the judge's findings that the Respondents (1) violated Sec. 8(a)(1) by (a) telling Mike DeVault that he would be disciplined for requesting a union representative, (b) impliedly threatening employees with discharge for requesting representatives, and (c) threatening that the mine would shut down if employees filed grievances; (2) violated Sec. 8(a)(3) and (1) by (a) suspending DeVault for requesting a union representative, and (b) suspending Mark Moore on or about June 8, 2016, for filing a grievance; and (3) violated Sec. 8(a)(5) and (1) by failing to timely provide information in response to the UMW's December 28, 2015 information request concerning credentials held by unit employees at the Marion County mine. There are also no exceptions to the judge's findings that the Respondents (1) did not commit independent violations of Sec. 8(a)(1) by (a) disparaging employees who file grievances or (b) creating the impression that they are surveilling employees' union or other protected concerted activities, as opposed to simply surveilling them; and (2) did not violate Sec. 8(a)(3) and (1) by disciplining Jeff Reel in retaliation for his arbitration testimony.

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

We affirm the judge's finding that the Respondents, through Assistant General Mine Foreman Ben Phillips, unlawfully threatened employee Joshua Preston. Stated briefly, the judge found, based on credited testimony, that after Preston told Phillips he wanted union representation at a meeting with Phillips and other supervisors and/or managers (including the mine's assistant superintendent), Phillips stated, among other things, "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." The judge found that this was a "smart-aleck but unmistakable" and "naked" threat to issue written discipline to retaliate against Preston for asserting his right to seek union representation. We agree and find our colleague's contrary view unpersuasive. Phillips' statement contained a direct threat of discipline in retaliation for Preston's request for union representation, and it would have been reasonably understood as such.

Contrary to his colleagues and the judge, Member Emanuel would not find that Phillips' comment to Preston was unlawful. He finds that Phillips' "smart-aleck" remark would be taken by a reasonable employee as just that, rather than as a coercive threat to retaliate against Preston if he asked for union representation.

In adopting the judge's finding that the Respondents violated Sec. 8(a)(5) and (1) by unilaterally changing the hearing location for certain step-three grievance meetings, Members Pearce and McFerran note that requiring employees to travel to the new hearing site would tend to discourage them from pursuing grievances beyond step two.

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. Further, consistent with the Board's decision in *Earthgrains Co.*, 351 NLRB 733, 739–740 & fn. 27 (2007), we find that a notice common to all four of the Respondents' mines, as well as its corporate headquarters, is not warranted. We shall

ORDER

The National Labor Relations Board orders that the Respondents, Murray American Energy, Inc., Harrison County Coal Company, Marion County Coal Company, Monongalia County Coal Company, and Marshall County Coal Company (collectively, the Respondents), St. Clairsville, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge, discipline, closure of their work facility, or other reprisals if they file grievances, request union representation, discuss safety issues, or engage in other union or protected concerted activity.

(b) Suspending employees because they file grievances, request union representation, are the subject of an unfair labor practice charge, or engage in other union or protected concerted activity.

(c) Discouraging employees from making safety complaints to Federal and State authorities.

(d) Placing employees under surveillance while they engage in union or other protected concerted activities.

(e) Refusing to collectively bargain with the United Mine Workers of America, AFL–CIO, CLC and/or its affiliated locals (collectively, the Union) by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondents' unit employees.

(f) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondents' unit employees.

(g) Unilaterally changing the location of step-three grievance meetings without first notifying the Union and giving it an opportunity to bargain.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Mark Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(b) Compensate Mark Moore for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions of Mark Moore and Michael DeVault, and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(d) Furnish to the Union in a timely manner the information requested on December 22, 2015, concerning the Monongalia County mine's absenteeism policy (C&E plan), and on March 28 and 31, 2016, concerning the use of contractors at the Monongalia County mine.

(e) Rescind the change to the location of step-three grievance meetings that was unilaterally implemented at the Marion County mine on or about October 4, 2016.

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

(g) Within 14 days after service by the Region, post at its facilities in Cameron, Mannington, and Metz, West Virginia, St. Clairsville, Ohio, and Kuhntown, Pennsylvania, copies of the attached notices as follows: the notice marked "Appendix A" at its Cameron and Metz, West Virginia facilities; the notice marked "Appendix B" at its Mannington, West Virginia facility; and the notice marked "Appendix C" at its Kuhntown, Pennsylvania

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order that an individual notice be posted at the Harrison County coal mine in Mannington, West Virginia, where the Respondent committed only one violation when it threatened an employee with unspecified reprisal if he filed a grievance. We find, however, that there is "'considerable similarity in the nature of the unfair labor practices'" committed at the Marion County mine in Metz, West Virginia, and the Marshall County mine in Cameron, West Virginia—where the Respondents' threats and unlawful suspensions all concerned employees' right to request representation or to pursue complaints over working conditions through the grievance procedure or with outside authorities, as did the unilateral change at the Marion County mine, surveillance of the Mine Safety and Health Administration meeting, and directive to refrain from submitting health and safety complaints to government agencies—and shall therefore order a common notice posting at those sites. *Wal-Mart Stores*, 350 NLRB 879, 885 (2007) (quoting *Albertson's, Inc.*, 307 NLRB 787, 788 (1992), enf. denied mem. 8 F.3d 20 (5th Cir. 1993)); see also *G. C. Murphy Co*., 216 NLRB 785 (1975). We shall also order the Respondents to post a common notice at the Monongalia County coal mine in Kuhntown, Pennsylvania, and the Respondents' St. Clairsville, Ohio corporate headquarters, as there is evidence that corporate officials were involved in the commission of the information-request violations at the Monongalia County coal mine.

facility and St. Clairsville, Ohio corporate headquarters.[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at the closed facility or facilities at any time since September 8, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 7, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

Cameron and Metz, West Virginia facilities

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge, discipline, or closure of your work facility if you file grievances, request union representation, discuss safety issues, or engage in other union or protected concerted activity.

WE WILL NOT suspend or otherwise discriminate against any of you for filing grievances, requesting union representation, or being the subject of an unfair labor practice charge.

WE WILL NOT discourage you from making safety complaints to Federal and State authorities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT refuse to bargain collectively with the United Mine Workers of America, AFL–CIO, CLC and/or UMW Local 9909 or UMW Local 1638 (collectively, the Union) by unreasonably delaying in furnishing the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT change the location of step-three grievance meetings without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL make Mark Moore whole for any loss of earnings and other benefits resulting from our unlawful suspension of him, plus interest.

WE WILL compensate Mark Moore for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of back-

pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of Mark Moore and Michael DeVault, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

WE WILL rescind the change to the location of step-three grievance meetings that was unilaterally implemented at the Marion County mine on or about October 4, 2016.

MURRAY AMERICAN ENERGY, INC., HARRISON COUNTY COAL COMPANY, MARION COUNTY COAL COMPANY, MONONGALIA COUNTY COAL COMPANY, AND MARSHALL COUNTY COAL COMPANY

The Board's decision can be found at www.nlrb.gov/case/06-CA-169736 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273–1940.

Mannington, West Virginia Facility

APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with reprisal if you file grievances or engage in other union or protected concerted activity.

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

MURRAY AMERICAN ENERGY, INC., HARRISON COUNTY COAL COMPANY, MARION COUNTY COAL COMPANY, MONONGALIA COUNTY COAL COMPANY, AND MARSHALL COUNTY COAL COMPANY

The Board's decision can be found at www.nlrb.gov/case/06-CA-169736 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273–1940.

St. Clairsville, Ohio, and Kuhntown, Pennsylvania facilities

APPENDIX C

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the United Mine Workers of America, AFL–CIO, CLC

and/or UMW Local 1702 (collectively, the Union) by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on December 22, 2015, concerning the absenteeism policy (C&E plan), and March 28 and 31, 2016, concerning the use of contractors.

MURRAY AMERICAN ENERGY, INC., HARRISON COUNTY COAL COMPANY, MARION COUNTY COAL COMPANY, MONONGALIA COUNTY COAL COMPANY, AND MARSHALL COUNTY COAL COMPANY

The Board's decision can be found at www.nlrb.gov/case/06-CA-169736 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273–1940.

Clifford Spungen, Esq. and *Zachary Hebert, Esq. (NLRB Region 6),* of Pittsburgh, Pennsylvania, for the General Counsel.

Jennifer G. Betts, Esq. and *Daniel D. Fassio, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.)* of Pittsburgh, Pennsylvania, for the Respondents.

Gabriele Ulbig, Esq. (United Mine Workers of America) of Triangle, Virginia, for the Charging Parties.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve a variety of discrete unfair labor practices alleged to have occurred at four commonly owned and operated West Virginia mines. As discussed herein, the violations found include incidents of unlawful threats, discipline, surveillance of employees, unlawful failure and delay in providing requested information to the employees' union, and an unlawful unilateral change to the grievance procedure.

STATEMENT OF THE CASE

On February 16, 2016, Michael S. Phillippi filed an filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by Murray American Energy Inc., and the Monongalia County Coal Company, a single employer (collectively, Monongalia County Coal or Murray American), docketed by Region 6 of the National Labor Relations Board (Board) as Case 06–CA–169736. A first amended charge, filed by the United Mine Workers of America, International Union, was filed in the case on June 16, 2016.

Based on an investigation into these charges on June 30, 2016, the Board's General Counsel, by the Regional Director for Region 6 of the Board, issued a complaint and notice of hearing alleging that Monongalia County Coal had violated the Act. On July 13, 2016, Monongalia County Coal filed an answer denying all alleged violations of the Act.

On March 2, 2016, the United Mine Workers of America, District 31, AFL–CIO, filed an unfair labor practice charge against Murray American and the Marion County Coal Company, a single employer (collectively, Marion County Coal or Murray American), docketed by Region 6 of the Board as Case 06–CA–170978. A first amended charge was filed in this case on April 13, 2016.

On March 3, 2016, the United Mine Workers of America, District 31, Local 9909, AFL–CIO, CLC, filed an unfair labor practice charge against Marion County Coal, docketed as Case 06–CA–171057. An amended charge was filed in the case on March 13, 2016, a second amended charge filed on May 12, 2016, and a third amended charge filed on July 8, 2016.

On March 4, 2016, a charge, docketed as Case 06–CA–171069, was filed against Marion County Coal by the United Mine Workers of America, AFL–CIO.

On March 4, 2016, the United Mine Workers of America, AFL–CIO filed an unfair labor practice charge against Monongalia County Coal, docketed by Region 6 as Case 06–CA–171085.

On April 13, 2016, the United Mine Workers of America filed an unfair labor practice charge against Monongalia County Coal, docketed by Region 6 as Case 06–CA–174075.

On April 13, 2016, the United Mine Workers of America, District 31, Local 1501, AFL–CIO, CLC, filed an unfair labor practice charge against Murray American and the Harrison County Coal Company, a single employer (collectively, Harrison County Coal or Murray American), docketed by Region 6 of the Board as Case 06–CA–174080. The charge in this case was amended on June 24, 2016.

On April 13, 2016, the United Mine Workers of America filed an unfair labor practice charge against Monongalia County Coal, docketed by Region 6 of the Board as Case 06–CA–174152.

On August 29, 2016, the United Mine Workers of America,

District 31, AFL–CIO, CLC, filed an unfair labor practice charge against Murray American and the Marshall County Coal Company, a single employer (collectively, Marshall County Coal or Murray American), docketed by Region 6 of the Board as Case 06–CA–183054. An amended charge in this case was filed on September 23, 2016, a second amended charge filed on October 3, 2016, and a third amended charge filed on November 30, 2016.

On October 3, 2016, Joshua Matthew Preston filed an unfair labor practice charge against Marshall County Coal, docketed by Region 6 of the Board as Case 06–CA–185640. An amended charge was filed in the case on December 20, 2016.

On October 12, 2016, the United Mine Workers of America, District 31, Local 9909, filed an unfair labor practice charge against Marion County Coal, docketed by Region 6 of the Board as Case 06–CA–186015. An amended charge was filed in the case on December 14, 2016.

Based on an investigation into these charges on June 30, 2016, the Board's General Counsel, by the Regional Director for Region 6 of the Board, issued an order consolidating Cases 06–CA–174080, 06–CA–170978, 06–CA–171057, 06–CA–171069, 06–CA–171085, 06–CA–174075, and 06–CA–174152, and a consolidated complaint and notice of hearing alleging that Harrison County Coal, Marion County Coal, and Monongalia County Coal had violated the Act. On August 12, 2016, the Respondents filed an answer to the consolidated complaint denying all alleged violations of the Act. On August 8, 2016, the General Counsel, by the Regional Director for Region 6 issued an order further consolidating Case 06–CA–169736 with the previously consolidated cases.

On December 29, 2016, the General Counsel, by the Regional Director for Region 6 of the Board, issued a third order further consolidating Cases 06–CA–183054, 06–CA–185640 (with the charge deemed filed by United Mine Workers of America, District 31, AFL–CIO, CLC), and Case 6–CA–186015, with the previously-consolidated cases, and an consolidated amended complaint and notice of hearing further alleging that Respondent. Marshall County Coal and Marion County Coal had violated the Act. On January 9, 2017, the General Counsel, by the Regional Director for Region 6 of the Board, issued an amendment to the consolidated amended complaint. On January 12, 2017, the Respondents filed an answer to the third order further consolidating cases and amended consolidated complaint, denying all violations of the Act. The Respondents filed responses to the amendment to the consolidated complaint on January 23, 2017, denying all violations of the Act.

A trial in these cases was conducted on January 30, 31, February 1, and March 1, 2017, in Morgantown, West Virginia.[1] Counsel for the General Counsel, the Charging Parties, and the Employer Respondents filed posttrial briefs in support of their positions by April 5, 2017.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Respondent Murray American has an office and place of business in St. Clairsville, Ohio, and is engaged in the mining and nonretail sale of coal through its wholly owned subsidiaries Respondent Harrison County Coal, Respondent Marion County Coal, Respondent Monongalia County Coal, and Respondent Marshall County Coal. The Respondent Harrison County Coal admits and I find that Respondent Murray American and Respondent Harrison County Coal constitute a single-integrated enterprise and a single employer within the meaning of the Act. The Respondent Marion County Coal admits and I find that Respondent Murray American and Respondent Marion County Coal constitute a single-integrated enterprise and a single employer within the meaning of the Act. The Respondent Monongalia County Coal admits and I find that Respondent Murray American and Respondent Monongalia County Coal constitute a single-integrated enterprise and a single employer within the meaning of the Act. The Respondent Marshall County Coal admits and I find that Respondent Murray American and Respondent Marshall County Coal constitute a single-integrated enterprise and a single employer within the meaning of the Act.

The Respondent Harrison County Coal admits, and I find, that in conducting its operations during the 12-month period ending March 31, 2016, Respondents Murray American and Respondent Harrison County Coal collectively sold and shipped from its Mannington, West Virginia facility goods valued in excess of $50,000 directly to points outside the State of West Virginia, and at all material times, the single employer Harrison County Coal has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent Marion County Coal admits and I find that in conducting its operations during the 12-month period ending February 29, 2016, Respondent Murray American and Respondent Marion County Coal collectively sold and shipped from its Metz, West Virginia facility goods valued in excess of $50,000 directly to points outside the State of West Virginia, and that at all material times, the single employer Marion County Coal has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent Monongalia County Coal admits and I find that in conducting its business operations during the 12-month period ending January 31, 2016, Respondent Murray American and Respondent Monongalia County Coal collectively sold and shipped from its Kuhntown, Pennsylvania facility goods valued

[1] Throughout this decision references to the complaint are to the extant consolidated complaint as most recently amended. At the commencement of trial, counsel for the General Counsel moved and I granted his motion to amend the complaint to indicate in paragraph 32(b) that as to the information described in paragraphs 28 and 29(a) of the complaint there was an unreasonable delay in furnishing the Union with this information from April 5, 2016 to January 23, 2017. The parties stipulated (paragraph 13 of Joint Exh. 3) that this information was provided to the Union on January 23, 2017. Counsel for the General Counsel also moved and I granted his motion to amend the date stated in complaint paragraph 27(b) from "September 14, 2016" to "September 14, 2015." Counsel for the General Counsel also moved and I granted his motion to amend the complaint paragraph 32(a) from an allegation that the documents requested in complaint paragraphs 27(a) and (b) were not provided to an allegation that the Respondent unreasonably delayed providing that information until after May 26, 2016. Finally, the transcript in this proceeding his hereby corrected to change the "(v)" on page 9 at line 8 to "(b)."

in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania, and at all material times the single employer Monongalia County Coal has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent Marshall County Coal admits, and I find, that in conducting its business operations during the 12-month period ending July 31, 2016, Respondent Murray American and Respondent Marshall County Coal collectively sold and shipped from its Cameron, West Virginia facility goods valued in excess of $50,000 directly to points outside the State of West Virginia, and at all material times, the single employer Marshall County Coal has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find that the United Mine Workers of America, AFL–CIO, CLC and its local unions, Local 1501, and Local 9909, are each a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.[2]

UNFAIR LABOR PRACTICES

Background

Ohio Valley Resources, Inc. is a wholly-owned subsidiary of Murray Energy Corporation. Respondent Murray American is a wholly-owned subsidiary of Ohio Valley Resources, Inc.

Respondents Marshall County Coal, Harrison County Coal, Monongalia County Coal, and Marion County Coal are wholly-owned subsidiaries of Murray American. As described above, Murray American and each of these subsidiaries is a single employer under the Act. Each of these single-employer respondents operates an underground coal mine in West Virginia (Monongalia County Coal's mine crosses into and has a portal and offices in southwestern Pennsylvania.) Marion County Coal operates the Marion County Mine, Marshall County Coal operates the Marshall County Mine, Harrison County Coal operates the Harrison County Mine, and Monongalia County Coal operates the Monongalia County Mine. Throughout this decision, the respondents collectively are referred to as the Respondent. Given each respondent subsidiary's single-employer status with Murray American, references to a specific company respondent also are to Respondent Murray American.[3]

Ohio Valley Resources, Inc. purchased the stock of the companies operating these mines from Consol Energy, Inc. on or about December 5, 2013.

The hourly production and maintenance employees of the Marshall County mine are represented by United Mine Workers of America (UMWA) Local Union No. 1638. The hourly production and maintenance employees of the Marion County mine are represented by United Mine Workers of America (UMWA) Local Union No. 9909. The hourly production and maintenance employees of the Harrison County mine are represented by United Mine Workers of America (UMWA) Local Union No. 1501. The hourly production and maintenance employees of the Monongalia County mine are represented by United Mine Workers of America (UMWA) Local Union No. 1702. Each local union is an affiliated local union with the United Mine Workers of America International Union (UMW). The union-represented hourly production and maintenance employees of the Monongalia County mine, Marshall County mine, Marion County mine, and Harrison County mine were subject to the terms of the National Bituminous Coal Wage Agreement of 2011, and, effective August 15, 2016, the National Bituminous Coal Wage Agreement of 2016 (the NBCW agreements). The UMW along with the Bituminous Coal Operators' Association is a party to the NBCW agreements.[4]

The Monongalia County mine has approximately 230 hourly employees. The Harrison County mine has approximately 275, the Marshall County mine approximately 545, and the Marion County mine approximately 356.

David Wilkinson is employed by Murray American, and is the manager for human resources and employee relations. In that capacity he is responsible for oversight of all the HR functions at the Murray American operations described above (and some others not relevant to these proceedings). Each of the four locations (Marion County Coal, Monongalia County Coal, Harrison County Coal, and Marshall County Coal) typically has an HR supervisor and an HR coordinator. The exception is Monongalia County Coal which has one HR supervisor onsite. These mine-specific HR managers report to their mine's superintendent or general manager, but they also report to Wilkinson as the HR manager from corporate headquarters. In addition, Assistant Manager of Employee Relations Tim Baum reports directly to Wilkinson (and not to a specific mine manager).

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[2] In their answer, the Respondents deny that Charging Party United Mine Workers of America, District 31 is a legal entity, and assert that it is an administrative subdivision of the United Mineworkers of America. Based on Michael Phillippi's testimony that he is an International Union representative assigned to District 31, and based on the General Counsel's notation (GC Br. at 9 fn. 6) that, if not a stand-alone labor organization, references to District 31 should be considered as references to the UMW, I do not find that it has been proven that District 31 is a labor organization. Rather, I will find and consider it as part of the UMW (International Union).

[3] The Respondent points out on brief (R. Br. at 2) that while each mine subsidiary has stipulated that it is a single employer with Murray American, they have not stipulated that they are collectively single employers—i.e., they have not been stipulated that, for instance, Marion County Coal Company is a single employer with Harrison County Coal Company (or any of the other mine subsidiaries of Murray American). I note only that for liability and remedial purposes the distinction is of no moment. Based on the single-employer stipulations (and findings), in terms of liability Murray American is liable to the same extent as each subsidiary is liable, and each subsidiary is in turn liable to the same extent as Murray American is liable. *Flat Dog Productions*, 347 NLRB 1180, 1182 (2006); *Darlington Mfg. Co.*, 139 NLRB 241, 258 (1962). Hence, through their relationship with Murray American, each subsidiary is joint and severally liable for remedying the violations found.

[4] Although the charging parties in these consolidated cases are variously listed as different local union and international union affiliates of the United Mine Workers, throughout this decision they are referred to collectively as the UMW, Union, or Charging Party without differentiating the specific charging party entity. When relevant, specific reference is made to a local union or to the UMW (the International Union).

Allegations

1. Threat of reprisals if employees file grievances; disparagement of employees who chose to file grievances (Harrison County Coal Mine—Peek/Martin incident—complaint ¶13)

At the mines the parties follow the grievance procedure set out in the National Coal Bituminous Coal Wage Agreement. It contains a four-step grievance procedure culminating in final and binding arbitration. The initial step one involves an oral complaint by an employee to his immediate foreman, who has authority under the agreement to settle the matter or deny the grievance within 24 hours of the complaint. If no agreement is reached the grievance is reduced to written form and pursued to step two by the local union's mine committee with mine management.

In January 2016, Joshua Peek, a shear operator at Harrison County Coal since 2010, claimed that a Longwall Coordinator George McCauley was performing bargaining unit work in violation of the labor agreement. Other than the incident described below, Peek has never initiated a grievance during his employment.

At the time of this incident there were approximately 200 employees on layoff. Peek testified that with all the employees on layoff the mine was "short staffed," and they were "trying to get more stuff done with less people." Peek's undisputed testimony is that "we had several call offs that day, and they wouldn't give us no help, and our coordinator Mr. McCauley, decided to do union work."

Peek confronted McCauley, who told Peek to get back to work. According to Peek, McCauley continued performing bargaining unit work for the rest of the shift, about six more hours. At the end of the shift, Peek told McCauley he was going to file a grievance ("step one him") "for working that day." McCauley told Peek that "he would deny it."

The next day the mine's superintendent, Scott Martin, approached Peek in the lamp room when Peek was getting ready to go down in the mine. Martin said, "hey, I need to speak with you." Peek testified that Martin told him "I seen you filed a grievance on Mr. McCauley." Peek "told him that I had." According to Peek, Martin asked him why he filed the grievance "and I told him that he was working, that we had so many people laid off we needed to get people back." According to Peek, Martin "said he knows that, on that certain day, we had several call offs and he more or less said that he did not staff enough people to accommodate all the call offs and stuff that we have." Peek told him, "I am filing a grievance to prove a point, we need to get people back."

At that point, Peek says that Martin told him, "I am asking you to withdraw that grievance." Peek testified that Martin told him that Peek "was not one of those people to file grievances." Peek told him, "I know, but it's just to prove a point, Scott." According to Peek, Martin responded by saying, "well, I have helped you out in the past," and "I take into consideration when people file grievances when they need help." Peek took this as a reference to favorable treatment that Martin had provided to Peek in the past. For instance, Martin had permitted Peek to transfer to the day shift after a family tragedy made it difficult for him to leave his family alone at night. According to Peek, Martin said "if I needed help in the future, that he would take into consideration whether or not I file grievances . . . . he helps people who don't file grievances." Martin again said he would like Peek "to consider to withdraw my grievance." Peek said, ok, but then paused, and told Martin no, and then Peek walked away.

Peek did not pursue the grievance to step two.

Martin also testified. He explained that in January 2016 he was approached by the longwall coordinator, McCauley, and informed by McCauley that "he thought there was going to be a grievance filed on him" by Peek for "foreman working." Martin testified that he then went to Peek and asked him if he filed a grievance. At this point in the narrative Martin's account departs significantly from Peek's.

Martin testified that he asked Peek about the work allegedly performed by McCauley. After hearing the explanation, he claims he told Peek that he did not believe McCauley was performing bargaining unit work. Martin claims he then said to Peek: "I told him if he wanted to file a grievance that was his right, do what he feels is necessary, that was part of the grievance procedure." Martin testified that "[t]he conversation was over at that point."

Martin denied that he ever said anything to Peek about having done him favors in the past, or about an unwillingness to do favors for an employee who files grievances, or anything about withdrawing the grievance.[5]

I credit Peek's account of the conversation. Peek's demeanor struck me as honest and straightforward account. He did not appear motivated to lie. As he testified, he did not report the conversation to the union or file a charge over Martin's comments: "I just figured I will just let it go." Rather, he cooperated in the case "[b]ecause I was asked to, and I wasn't going to lie about it." On the other hand, Martin's demeanor—a fast-talking and overconfident presentation—struck me the opposite of what I presume was its intent. Moreover, I simply do not believe that after confronting Peek about the grievance he retreated to telling Peek that "if he wanted to file a grievance, that was his right, do what he feels is necessary, that was part of the grievance procedure." That statement sounds contrived and overly solicitous. I do not think he said it. That leads me to doubt the rest of his testimony, to the extent disputed. I credit Peek.[6]

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[5] Martin did not, however, deny telling Peek that he was not "one of those people to file grievances."

[6] The Board has a well-established principle that a factor in determining credibility may be the recognition that the testimony of a current employee which contradicts statements of his or her supervisors is likely to be particularly reliable. See, e.g. *Portola Packaging, Inc.*, 361 NLRB 1316, 1316 fn. 2 (2014) *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995), enfd mem. 83 F.3d 419 (5th Cir. 1996); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified, 308 F.2d 89 (5th Cir. 1962). One reason is that "these witnesses are testifying adversely to their pecuniary interests." *Flexsteel*, supra at 745. Of course, in many cases, there may be a pecuniary or other interest that is *advanced* by an employee's testimony against his supervisor. In any event, this is not often a factor I give weight to, and I certainly avoid misconstruing this principle as any kind of "presumption" of credibility. See, *Portola*, supra, and *Flexsteel*, supra. In my view, mere status should not be the decisive factor in determining a witness' credibility. I

Analysis

Given credibility findings, there is no question but that Martin's statements to Peek constituted an unlawful threat of reprisals if he filed a grievance.

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1). Section 7 of the Act protects employees' right to engage in "concerted activity" for the purposes of "collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It is well settled that in evaluating the remarks, the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Rather, "the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*." *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000) (Board's emphasis), enfd. 255 F.3d 363 (7th Cir. 2001).[7]

"No one doubts that the processing of a grievance" under a collective bargaining agreement "is concerted activity within the meaning of § 7" (*NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 836 (1984)) and therefore it is violative of the Act to interfere, restrain or coerce employees in their grievance-filing activities. *Yellow Transportation, Inc.,* 343 NLRB 43, 47 (2004); *Prime Time Shuttle Int'l,* 314 NLRB 838, 841 (1994).

Here, Martin made clear that his future exercise of managerial discretion would be affected by whether Peek acceded to Martin's request that Peek not pursue his grievance. Whether viewed as a threat of unspecified reprisals for failing to withdraw the grievance or a promise of continued favors for withdrawing the grievance, statements such as Martin's violate the Act. *Inland Steel Co.*, 259 NLRB 191, 194 (1981); *Pioneer Recycling Corp.*, 323 NLRB 652, 658 (1997).

Martin also told Peek that he had not considered Peek "one of those people to file grievances." The General Counsel and Union contend that this constitutes unlawful disparagement of employees who file grievances. I do agree that this comment was yoked to and essentially part of the coercive threat to retaliate against Peek for pursuing his grievance. And I have found that to be unlawful. But I do not agree that this comment should be found to be an independent *additional* violation of the Act. Indeed, the language, even in context, while certainly not a compliment, does not disparage or degrade. Rather, it signals Martin's disapproval of the protected activity of grievance filing, and his disapproval of Peek's willingness to engage in it.[8] I dismiss the additional and independent allegation of disparagement that has been alleged based on this exchange. See paragraph 13(b) of the complaint.

2. Informing employee he would be disciplined for requesting union representation; threatening to discharge employees for requesting union representation; suspension of DeVault (Marion County Coal Mine—DeVault/Scarberry/England/Legg Incident—complaint ¶¶14 & 17)

Marion County Coal employee Mike DeVault was working as a general inside laborer on February 23, 2016. In the morning, he performed a "walk around," accompanying a federal inspector as the inspector looked for safety violations. In the afternoon he was directed to work for Production Foreman Tim Legg who asked DeVault where he had been in the morning. After the shift, while clocking out, DeVault ran into Legg, who informed DeVault that he would be required to be present in a meeting regarding damage to a cable.

DeVault told Legg that he had not been present whenever the cable was damaged, and Legg acknowledged that. At that point, DeVault asked for a union representative to accompany him to the meeting. Legg kept saying, perhaps three times, that DeVault did not need a representative and would not be disciplined. Nevertheless, DeVault remained concerned that he might be disciplined, as he recalled an employee that just a couple of weeks ago, in DeVault's view, had been unjustly disciplined for damage to a cable and Legg had joked that by disciplining the employee they were making him a better operator. DeVault called his local union president, Jason Todd. Todd advised DeVault to go to the meeting but to inform management that if it could lead to discipline he wanted a union representative. DeVault got off the phone and accompanied Legg toward the meeting.

On the way, Legg "turned around and said that the first meeting I wasn't going to be disciplined, but now that I asked for a rep, that I would be." In response, DeVault told Legg that "I am not going back with you now. . . . I want to go back out here and call my rep, and I did."

DeVault called Todd, and he arranged for a coworker, Mike

note however that in this case, Peek's testimony, in addition to being "adverse[ ] to [his] pecuniary interest" (*Flexsteel*, supra) provides no prospect of secondary gain for himself or co-employees through back pay or even the advancement of a grievance, which was not pursued. He does not appear to have anything to gain from his testimony. In this instance then, I rely on the *Flexsteel* recognition of the likelihood that the employee's testimony contradicting statements of his supervisors "is likely to be particularly reliable" as one among many factors weighing in favor of resolving this credibility dispute in favor of Peek.

[7] Thus, the Respondent is in error when it argues (R. Br. at 34) that this allegation must be dismissed because there is no evidence that the Peek or other employees were adversely impacted by the incident. Evidence of the impact of Martin's comments on Peek or other employees is irrelevant.

[8] See, by contrast, *David Saxe Productions*, 364 NLRB No. 100, slip op. at 18–19 (2016) (degrading language about topics involving pay, hours and working conditions unlawful); *Domsey Trading Corp.*, 310 NLRB 777, 793 (1993) (sexual slurs and vulgarities unlawful under Act when part of comments related to protected conduct), enfd. 16 F.3d 517 (2d Cir. 1994); *Advanced Architectural Metals, Inc.*, 351 NLRB 1208, 1216 (2007) (unlawful in context of coercive remarks to tell employee "that if he had any problems, he should talk to her, not to the stupid union"); *Sears Roebuck and Co.*, 305 NLRB 193 (1991) (disparaging comment about union suggesting union "might send someone out to break their legs in order to collect dues" not unlawful in absence of coercive context for remark).

Singleton, to come from underground to represent DeVault. Singleton arrived in about 20 minutes and met DeVault in the lamp room. He and DeVault called Todd again, and then DeVault and Singleton headed into the meeting in the foreman's assembly room.

At the meeting was Mine Foreman Clell Scarberry, Assistant Superintendent Chris England, and Section Foreman Legg. Singleton asked them what the meeting was over. Scarberry led the meeting, and said that he wanted to talk to DeVault about damage to the miner cable. DeVault said he did not know what happened to it because he was not there. Scarberry said, "if you wasn't there, why didn't you come back when I asked you to." DeVault said because he had requested a union representative and was waiting on the representative. DeVault said that Legg had told him "that since he asked for union representation, that he was now being disciplined for it." Scarberry said that "originally the meeting was over the cable incident, but now it was to give me a three day suspension for insubordination." Singleton and DeVault spoke up and said that it was DeVault's right to have a union representative present. Singleton said "they definitely couldn't discipline him for asking for representation." Scarberry "let us know that he didn't want men at this mine that needed reps to speak with him." Scarberry said "that at mines prior to where he worked before, he had fired men for asking for reps." England added that ""the mines that Clell worked at, if you asked for a rep, you're fired." Scarberry said that "if he couldn't talk to his work force, being union employees, if he couldn't talk to them without union representation, that he didn't want them there." Singleton objected that "this is a union mine and that you have to follow the contract." During the meeting, one of the managers told Singleton and DeVault that two or three other employees came back to speak to them without a representative.

Scarberry indicated that he was following through with a 3-day suspension for DeVault. The managers gave DeVault a written disciplinary notice signed by Legg, stating that "pending an investigation he would be suspended for insubordination." The notice explained that DeVault was being disciplined for refusing to come to the meeting with the supervisors even after he "was made aware that no disciplinary action was intended." According to the notice, "I, Tim Legg, instructed Mr. DeVault that his presence was requested in the mine foreman's office . . . upon his second refusal [to attend the meeting without representation] . . . I informed Mr. DeVault that pending an investigation he would be suspended for insubordination." At the meeting, DeVault was told that he was receiving a 3-day suspension with intent to discharge.

The following morning DeVault did not attend work because he was previously-scheduled off due to a mine idle. He received a telephone call from Pamela Layton, a human resources supervisor. Layton told DeVault "there was miscommunication" regarding "yesterday's meeting," and "that all the disciplinary forms . . . handed me would be taken out of my file" and "destroyed." She indicated that the discipline was being rescinded. Layton told DeVault that she had talked to the mine manager, Jack Richardson, about the incident, and that "he felt that I was a hundred percent in the right, and understood exactly why I asked for a rep." DeVault then asked Layton to get the local union president, Todd, on the phone. She did and they had a three-way conversation in which Layton told Todd about the resolution of the discipline. Layton told them that when DeVault returned she wanted "to have a sit down face-to-face with all men involved" and "she also wanted to reassure us that Mr. Legg would be counseled for all actions." There were no further communications regarding the discipline and no follow-up meeting occurred.

DeVault testified that neither Legg, England, nor Scarberry are at the mine any longer. None of them testified. There was no testimony or representation that their whereabouts were unknown, or that they had been subpoenaed but failed to appear. Layton is a current human resources supervisor at the Marion County mine. She did not testify. DeVault and Singleton's testimony was credibly offered, is undisputed, and I credit it.

Analysis

Legg's announcement to DeVault that he was going to be disciplined because he asked for a union representative (complaint ¶14(a)) is unlawful. Even apart from whether an employee has a right to union representation for an interview, he cannot be disciplined for seeking and asserting it. *Wal-Mart Stores, Inc.*, 343 NLRB 1287, 1287 (2004); *Taracorp, Inc.*, 273 NLRB 221, 223 fn. 12 (1984). Threatening an employee with discipline for seeking union representation at a meeting is an unlawful interference with protected and concerted activity.[9]

The allegation (complaint ¶14(b)) that Scarberry impliedly threatened to discharge employees who requested representation is also true, and unlawful. When Scarberry told Singleton and DeVault that "if he couldn't talk to his work force . . . without union representation, that he didn't want them there," that "he didn't want men at this mine that need reps to speak for them," and that where he had worked before "he had fired men

[9] For purposes of this analysis, I assume, without deciding, that DeVault could be disciplined for refusing to go to Scarberry's office without being accompanied by a union representative. However, even granting that assumption, I reject the suggestion by the Respondent that Legg told DeVault that he was going to be disciplined because of DeVault's (initial) refusal to attend the meeting without union representation, or for insubordination, or any other form of disobeying Legg's directive. That is not the testimony of what Legg told DeVault. Legg told DeVault that he "wasn't going to be disciplined, but now that I asked for a rep, that I would be." And England pointedly reinforced the point when DeVault complained in the meeting about Legg's comment. ("the mines that [Scarberry] worked at, if you asked for a rep, you're fired.") Moreover, Scarberry's expressions of hostility toward union representatives accompanying employees to meetings reinforced the point still further. Based on the undisputed testimony, I find that Legg acquiesced in DeVault's taking the time to call Local Union President Todd before heeding Legg's directive to go to the meeting. *T.N.T. Red Star Express, Inc.*, 299 NLRB 894, 895 (1990) (supervisor acquiesced in employee's refusal to report for interview without union representation and therefore employer violated section 8(a)(1) by disciplining employee for it). There is no indication from the testimony that Legg warned DeVault that he risked insubordination or punishment for taking the time to call Todd. I note that the disciplinary notice for insubordination is hearsay (to the extent offered in support of the Respondent's position) and inherently unreliable as evidence of the truth of the matter asserted.

for asking for reps," the threat is unmistakable, and calling it an implicit as opposed to an explicit threat of discharge is generous.

The complaint also alleges (paragraph 14(c)) that England stated that employees would be fired because they requested union representation. However, as the evidence stacks up, England's comment was an endorsement of the risk one ran when asking for union representation in Scarberry's presence. England told DeVault and Singleton that at "the mines that [Scarberry] worked at, if you asked for a rep, you're fired." While this is certainly an endorsement of Scarberry's unlawful threat of discharge, I do not believe it stands as an independent and distinct unfair labor practice, and I will dismiss that subparagraph of the complaint. (paragraph 14(c).)

Finally, the complaint alleges (paragraph 17) that DeVault was unlawfully suspended in retaliation for protected union activity in violation of Section 8(a)(3) and (1).[10] I agree. Again, I assume, without deciding, that the Employer could have disciplined DeVault for an insubordinate refusal to come to foreman's assembly room meeting without a union representative. Even with that assumption, the evidence shows that the motive for the discipline was DeVault's request for union representation—not insubordination, as claimed by the Respondent in DeVault's disciplinary notice. Or to put the matter in terms of the Board's *Wright Line*[11] framework—the Supreme Court-approved analysis for cases turning on employer motivation[12]—the evidence shows that DeVault's assertion of the desire to be accompanied in the meeting by a union representative was a motivating factor for the suspension and the Respondent has failed to prove that it would have taken the same action in the absence of DeVault's protected activity. *Wright Line*, supra at 1089. Thus, inextricably entwined with DeVault's suspension, allegedly for insubordination, was Legg's unlawful threat—indeed, admission—that DeVault was going to be punished for seeking union representation. As noted above, DeVault's assertion of this right was protected activity, and Legg, Scarberry, and England's comments pointedly show that the Respondent was aware of DeVault's protected activity and harbored animus toward it. This proves the *Wright Line* case. The fact that management was savvy enough to assert in DeVault's disciplinary notice that his discipline was for "insubordination" is not convincing in the light of Legg's comments and the unrestrained animus toward DeVault's protected conduct exhibited at the meeting as the discipline was meted out. Indeed, the claim of insubordination appears to be purely pretextual, thus terminating any claim that the Respondent would have taken the same action in the absence of protected conduct. *Rood Trucking*, 342 NLRB 895, 898 (2004); *Austeal USA*, 356 NLRB 363, 363–364 (2010).

It is true, as the Respondent points out, that DeVault never served his suspension. Layton called the next morning and told him the discipline had been rescinded. However, for purposes of relieving the employer of liability under the Act, this is wholly inadequate. See, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).[13] Layton's repudiation was timely, but instead of being unambiguous and specific to the coercive conduct, she attributed the whole thing to a "miscommunication." There was no admission of wrongdoing, much less assurances that the employer will not interfere with employees' statutory rights in the future. Indeed, the unlawful 8(a)(1) threats made in conjunction with the suspension were not repudiated in any way, and these threats were central to the meeting at which the suspension was meted out. Under these circumstances, the Respondent's liability is not relieved by the failure to carry out the suspension.[14]

3. Directing employees not to submit safety complaints to federal and state inspectors; threatening discharge in retaliation for protected activities (Marion County Coal Mine—Hayes/Jones incident—complaint ¶15(a) & b))

December 16, 2015

Employee Jamie Hayes worked at the Marion County mine from June 2010 until June 2016 when he resigned. Safety meetings are usually held right before the start of a shift. On December 16, 2015, Hayes attended a safety meeting in the lamp room at the Miracle Run portal. The meeting was led by Shift Foreman Don Jones. The meeting began at approximately 8 a.m. Also present was the assistant shift foreman, Dave Chapman, and various others including Chris England (who Hayes did not know at the time), a federal MSHA inspector Derek Bragg, Pete Ward, who was the assistant to the mine superintendent, and some other hourly employees.

The subject of the safety meeting was a "D order" MSHA citation. Jones first told the group, to "take a look around this room." He said that "I am old enough to retire, but most of you aren't. You keep notifying the authorities, they are going to shut this place down." Jones told the group that somebody had notified the authorities about the safety issue underlying the D

[10] As any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, any violation of Sec. 8(a)(3) is also a derivative violation of Sec. 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983); *Chinese Daily News*, 346 NLRB 906, 934 (2006) , enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[12] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, (1983) (approving *Wright Line* analysis).

[13] To be effective, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

[14] While Layton told DeVault that the suspension would be removed from his file and destroyed and told Todd that discipline would be rescinded, for purposes of liability and remedy there has been no authoritative confirmation of this. Hence my recommended remedy will include the standard remedial requirement that any reference to the suspension be removed from DeVault's file (if it has not been) and notice be provided to him that this has been done.

order. According to Hayes, Jones said that "we don't need to do that, we need to bring our concerns to the company."

This prompted Hayes to stand up and loudly offer examples of safety concerns that he had brought to Jones and other foremen in recent months and that he felt had not been resolved. Hayes was angry. Chapman intervened and told Hayes to quiet down. Hayes then left the meeting because, as he described it, "I heard enough."

(Then) assistant to the superintendent, Pete Ward, also attended the December 16 safety meeting. Asked at trial if Jones discussed MSHA complaints during the meeting, Ward responded, "Yes, he talked about the fact that we would like for the employees to—if they had complaints or things that they saw or whatever, to bring them to management's attention and give us a chance to take care of them."[15]

Ward also described Hayes as getting "excited" and "agitated" when Jones "started talking about the fact that we would like them to bring complaints to us." Ward reported that Chapman had to intervene. According to Ward, "Chapman stood up and said Jamie, calm down. Let's keep it civilized here, hold it down, be respectful when we are talking." Next Hayes "got mad and grabbed his stuff and took off for the elevator."

Marion County Portal Supervisor Chris Simpson testified that he observed the safety meeting when Hayes became angry at Jones. At the time of the meeting, Simpson was in the hallway into which the lamp room empties, preparing several contractor employees to go underground for the day's shift. He could observe the meeting and hear it from where he was, but he was speaking off and on with the contractor employees in the hallway—he was not in the meeting with Jones and Hayes.

Simpson heard Jones make a comment about "asking for safety concerns to be brought to him so he could take care of them," and Simpson described Hayes aggressively yelling at Jones for about a minute before Chapman intervened. Simpson testified that Chapman intervened when Hayes "made a b[ee]line physically towards [Jones] and was putting his finger in his face."[16]

As to the December 16 safety meeting, I credit Hayes' account of Jones' warning that "they are going to shut this place down" if people "keep notifying the authorities,"—a portion of Hayes' testimony that neither Simpson nor Ward addressed.

I also credit Hayes' testimony that Jones told the group that somebody had notified the authorities about an MSHA safety issue, and "we don't need to do that, we need to bring our concerns to the company." I credit this not only because of Hayes' demeanor, but because of its plausibility. It follows from his shutdown threat. Jones was threatening that if "[y]ou keep notifying the authorities" about safety issues, "they will shut this place down." It is plausible then that in directing employees to bring safety concerns to the company, he told employees to do so instead of bringing the issues to "the authorities." Moreover, as discussed below, the essentially same comments were repeated the next day by Jones in comments to Hayes. Hayes account of the December 17 comments are undisputed.

On the other hand, implausible is that Jones told employees to bring safety concerns to the company, but that this directive had nothing to do with advising employees not to bring issues to MSHA. Indeed, while, Ward drew back from endorsing any suggestion that Jones did not want complaints to go to MSHA—he readily agreed that *Jones discussed MSHA complaints and as part of that discussion* talked about "the fact that we would like for employees to—if they had complaints or things that they saw or whatever, to bring them to management's attention and give us a chance of take care of them." This is consistent with Hayes' testimony, as far as it goes, but it is incomplete and implausible as a full account of what Jones' conveyed to the assemblage. In other words, even Ward's account makes clear that Jones told employees that complaints that have been brought to MSHA should be brought directly to the company to "give us a chance to take care of them." I doubt that Jones' point was lost on anyone at the meeting: it was, as Hayes reported it, that MSHA complaints "don't need to" go to MSHA, "we need to bring our concerns to the company." Because if "you keep notifying the authorities, they will shut this place down."[17]

Simpson was not in the meeting and admittedly overheard Jones' comments from the adjacent hallway while he was otherwise occupied with contractor employees. Accordingly, his account does not warrant crediting over Hayes or Ward. In any event, while Simpson rotely denied leading questions put to him about what he did not hear Jones didn't say, the only thing he recalled that was said about safety complaints was that Jones said "any time they had safety issues, that he wanted to know about them so he could help take care of them," and that Jones "made a comment about coming out and asking for safety concerns to be brought to him so he could take care of them." Simpson may not have heard Jones tell employees "that they had to make safety complaints to him," or that he instructed "employees that they couldn't make safety complaints to MSHA," but Simpson was not in the meeting and, reasonably, was unlikely to have heard everything said.

In sum, I believe and find that Jones made clear that employees should report safety complaints not to MSHA, but rather, to the employer. He also suggested that if employees kept making safety reports to MSHA, "they are going to shut this place down."

December 17, 2015

The next day at work, December 17, 2015, Hayes was ap-

[15] Asked if Jones told employees not to file MSHA complaints, Ward said, "no." Asked if Jones told employees that they had to bring complaints first to management, Ward responded, "no."

[16] Simpson denied hearing Jones tell employees "that they had to make safety complaints to him," or that he instructed "employees that they couldn't make safety complaints to MSHA."

[17] Notably, on this subject, Ward was then asked if Jones told employees not to file MSHA complaints, and Ward said no. I discredit that. Jones might not have said it in those words, but Ward's initial response, when asked if MSHA complaints were discussed, leaves no doubt that Jones made clear that employees were to bring complaints to the company and not to MSHA. Thus, I do not credit Ward's testimony denying that Jones told employees not to file MSHA complaints, and denying that Jones told employees that they had to bring complaints first to management.

proached by Chapman who told him he needed to go to Jones' office and meet with Jones and England. Hayes asked who England was and was told he was the assistant superintendent. Hayes asked if he needed a union mine committeeman present for the meeting. Chapman told him he did not, but said that he did not know why they wanted to meet with Hayes. Hayes hesitated and Chapman yelled at him that it was not an option not to go to the meeting now.

Hayes went back to Jones' office where he found England and Jones. England said that he and Jones wanted to talk about the day before. Hayes told them that he wanted a mine committeeman. England said he did not need one and that he was not being disciplined. Hayes maintained that he wanted a representative. Hayes testified that England said that he (Hayes) was "loud and belligerent" the day before and England claimed that "he had to pull [Hayes] off Don Jones" during the previous day's meeting. Hayes disputed this, telling him "I may have gotten loud, but I totally disagree . . . he didn't have to pull me off of Don Jones. All I did was stand up." England and Jones told Hayes: "they wanted me to come to the company with this stuff, I didn't need to go to the authorities, I need to come to the company for this type of stuff." Jones repeated that "you don't need to notify the authorities, they will shut this place down." Hayes reiterated his view that he had come to the employer on several occasions. This debate continued and England said, "if this happens again, if I get loud or anything, that . . . I will be disciplined and he will let the arbitrator rule on it."

Only Hayes testified about the next-day's meeting. As noted above, testimony indicated that neither Jones nor England still work at the mine. However, there is no reason to believe they were unavailable through subpoena or otherwise. In any event, Hayes' unrebutted testimony was offered credibly.

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" is, I conclude, reasonably understood as a reference to Hayes' (variously-described) "loud" "angry" "excited" "agitated" and "aggressive" demeanor toward Jones in the previous day's meeting.

While I do not credit Simpson's assertion (viewed from outside the meeting, and not corroborated by Ward) that Hayes physically threatened or moved towards Jones in the December 16 meeting, by both Hayes and Ward's account Hayes was angry and loud to the point that Chapman stood up to intervene. As discussed below, the threat of discipline must be considered in the context of Hayes' outburst.

Analysis

The government alleges that Jones unlawfully directed employees to submit complaints to its management, rather than to federal and state inspectors (complaint paragraph 15(a)). Further, the government further alleges that Jones impliedly threatened employees with discharge because of their union or protected activities (complaint paragraph 15(b)).

As I have found Jones made comments to the effect that with regard to MSHA complaints reported to the authorities, employees "don't need to do that, we need to bring our concerns to the company." Such comments were repeated in the December 17, 2015 meeting. ("they wanted me to come to the company with this stuff, I didn't need to go to the authorities, I need to come to the company for this type of stuff"). I agree with the General Counsel that such direction violates the Act. The Act protects employee appeals to governmental agencies in support of employees' rights. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); *Trinity Protection Services*, 357 NLRB 1382, 1383 (2011) ("the Board has held that employees' concerted communications regarding matters affecting their employment with their employer's customers or with other third parties, such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned"). It is beyond cavil that the raising of safety concerns generally, and MSHA complaints specifically, are activity protected by the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1638 (2001) (complaints to MSHA constitute protected activity), enfd. 281 F.3d 442 (4th Cir. 2002); *Stafford Construction Co.*, 250 NLRB 1469, 1477 (1980) (Making safety-related complaints to MSHA is a protected concerted activity). Jones' directive to bring safety matters to the company instead of to MSHA violates the Act.

The Respondent points to the fact that on cross-examination Hayes agreed that Jones told employees they "you don't need to go to the authorities," but did not say "they couldn't go." This phrasing does not warrant dismissal of the violation. As the Supreme Court and the Board have recognized, in determining whether employer pronouncements violate Section 8(a)(1), the assessment "must be made in the context of its labor relations setting," and "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969). To a very real extent the threat of discipline is *inherent* in management's suggestions of how employees should conduct themselves. For example, a supervisor's ""suggestion" to employees to undertake a task is well understood as a directive. In *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993), the Board rejected the judge's conclusion that maintenance of a provision in an employee handbook that announced that employee salaries "shouldn't be discussed with anyone but your supervisor or the Personnel Department" was lawful because the rule "was not mandatory." The Board rejected the suggestion that a finding of violation was necessarily premised on "mandatory phrasing" (or subjective impact or evidence of enforcement), but rather must be assessed based "on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." Id. See also, *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989) (rule "requesting" that employees not discuss wages was unlawful). Jones' suggestion would have reasonably have a tendency to coerce, in violation of the Act.[18]

[18] The Respondent also argues that there is no proof that the Hayes or other employees were affected by Jones' comments. This argument is a nonstarter. Thus it is irrelevant whether or not "the General Counsel has failed to establish that Jones' statements . . . did interfere with,

I also find that in the following day's meeting, England unlawfully threatened Hayes with discipline for engaging in union and protected activity when he told Hayes, after the debate from the previous day continued over whether the company had adequately addressed safety complaints in the past, that "if this happens again, if I get loud or anything, that . . . I will be disciplined and he will let the arbitrator rule on it."

This was explicit threat of discipline (not an implied threat of discharge as alleged in the complaint). The issue is whether the threat was in response to and premised on Hayes' protected conduct of voicing safety complaints at the meeting. I find that it was. The Respondent contends (R. Br. at 25) that in making this threat management "simply wanted to address Hayes' behavior during the safety meeting, which they considered loud and belligerent." However, Hayes' behavior occurred in the course of conduct that is indisputably protected and concerted activity. As noted, safety complaints, particularly voiced at a group meeting, are archetypal activity protected by the Act. Hayes' asserted improprieties—his "belligerence" and "loudness" for which he was being threatened with discipline should it be repeated, "cannot be considered in a vacuum" nor "separated from what led up to it." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 586 (7th Cir. 1965); *Lee's Industries, Inc.* 355 NLRB 1267, 1270 (2010) (behavior in the course of protected and concerted activity cannot be considered in a vacuum—the incident in which he was loud and belligerent "must be considered in its entirety"); *Emarco, Inc.*, 284 NLRB 832, 834 (1987) ("the [intemperate] remarks of the Charging Parties to Poleri cannot be considered in a vacuum").

"The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves." *Health Car & Retirement Corp.*, 306 NLRB 63, 65 (1992), enf. denied on other grounds, 987 F.2d 1256 (6th Cir. 1993), affd. 511 U.S. 571 (1994). "The protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co.*, 282 NLRB 130, 132 (1986). "[T]he proper inquiry in this case is whether [Hayes'] conduct was so egregious to lose the protection of the Act under *Atlantic Steel*." *Public Service Co. of New Mexico*, 364 NLRB No. 86, slip op. at 7 (2016), referencing *Atlantic Steel Co.*, 245 NLRB 814 (1979). "Typically, the Board has applied the *Atlantic Steel* factors to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act." *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014), enfd. 629 Fed. Appx. 33 (2d Cir. 2015).

In this case, it is not a close case. Based on longstanding Board application of the *Atlantic Steel* factors, Hayes' most certainly did not lose the protections of the Act based on his actions at the December 16 safety meeting.[19]

This means, simply put, that the Respondent could not lawfully discipline Hayes for his "belligerence" in the course of his protected activity in discussing safety complaints in the meeting. Similarly, Hayes cannot lawfully be warned and threatened with discharge "if this happens again." I find that the threat to discharge Hayes for his voicing of safety complaints violated Section 8(a)(1) of the Act.

4. Surveillance and impression of surveillance (Devine incident at MSHA office—complaint ¶15(c) & (d))

These allegations involve Safety Supervisor Jeremy Devine's actions while at the Morgantown, West Virginia MSHA office on February 17, 2016. As Marion County Coal's representative in charge of safety and compliance, Devine interacted almost daily with MSHA representatives. On February 17, 2016, he came to the MSHA office in Morgantown for a health and safety conference over an order issued "for accumulations on the 1 east mining section." The meeting was scheduled for 9 a.m. and Devine arrived approximately 15–20 minutes early, which he described as typical for him. He entered, received his visitors tag from the receptionist, and sat in a

restrain or coerce the employees in attendance," or that Hayes subsequently "made a complaint to MSHA and that he was never disciplined for doing so." (R. Br. at 27.) "It is well settled that the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*." *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000) (Board's emphasis), enfd. 255 F.3d 363 (7th Cir. 2001).

[19] The first *Atlantic Steel* factor looks to the place of the discussion. The Hayes incident took place at an employee meeting, a factor weighing in favor of protection. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). Moreover, the incident did not entail a risk of disruption of production as the employees who could hear were assembled at the meeting. *Datwyler Rubber & Plastics*, supra at 670 (location "would not disrupt the Respondent's work process"). The subject matter of the comments is the second *Atlantic Steel* factor. In this case, the subject matter of Hayes' comments was employee safety, a subject that not only goes to the heart of the Act's concerns, but was, indeed, the subject of the meeting. The third *Atlantic Steel* factor is the nature of the outburst. While I agree that Hayes was "out of line" to be loud, or rude, or to storm out of the meeting, his conduct falls far short of the type of "opprobrious conduct" (*Atlantic Steel*, 245 NLRB at 816) that would weigh against continued protection of the Act. Unlike so many "*Atlantic Steel*" cases, Hayes' conduct involved no profanity, no threats—and I have discredited the suggestion that he made any threatening physical movement toward Jones. Hayes' actions have all the earmarks of an impulsive and unpremeditated event, another factor weighing in favor of continued protection under the Act. *Kiewit Power Constructors, Co.*, 355 NLRB 708, 710 (2010) (that employee's conduct consisted of a brief verbal outburst weighs in favor of protection), enfd. 652 F.3d 22 (D.C. Cir. 2011); *Kingsbury, Inc.*, 355 NLRB 1195, 1204 (2010) ("A line must be drawn between situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which misconduct is violent or of such serious character as to render the employees unfit for further service") (internal quotations omitted). Finally, the fourth *Atlantic Steel* factor considers whether employer conduct, such as an employer unfair labor practice, provoked the employees' outburst. In this case, it clearly did. In sum, under *Atlantic Steel*, Hayes' did not lose the protections of the Act.

waiting area chair by the front door until the MSHA representative ushered him into a conference room for his meeting.

From where he sat waiting, he could see the office's large meeting room—a meeting room inside the building with double doors and large windows in the doors that were approximately 6" x 18." The doors and windows were about 20–30 feet from the waiting area. All the chairs in the waiting area, including the one Devine sat in, faced the meeting room. While Devine waited, there was a meeting going on in the large conference room. At some point while waiting, Devine saw through the conference room window and was able to identify Rick Rinehart, Mike Payton, Jeff Maxwell. There were others in the room that Devine could not identify from where he sat, including Marion County Coal employee Jamie Hayes. Payton was an International Union representative. Rinehart was another Marion County Coal employee and chairman of the local union safety committee. Jeff Maxwell was an MSHA investigator. Maxwell exited the room a couple of times and came by the receptionist as he and others worked to solve a printing problem.

When Devine left the waiting area he had to walk by the conference room door to get to the hallway which led to his meeting. His meeting began at 9 a.m. and Rick Rinehart joined it soon after it started, leaving his meeting in the large conference room. This meeting lasted 45 minutes to an hour. After it, Rinehart returned to the large conference room meeting with Maxwell, Payton, and the other individuals. Devine says that after his meeting would have had to pass the large conference room on his way out, but he does not recall any interaction with anyone. Devine essentially testified that he had no specific memory of leaving. He testified that he did not "stick my head in the window."

As noted Mike Payton, a UMW representative, was one of the individuals Devine noticed in the conference room. Payton testified that the meeting was to process an MSHA discrimination charge filed by Marion County Coal employee Hayes who was in attendance at the meeting. Along with Hayes and Payton, another Marion County Coal employee Rinehart was at the meeting. In addition, Jeff Maxwell, the MSHA investigator was also there, his secretary Goldie, Chris Weaver, the litigation officer for MSHA, and C.W. Moore, also from MSHA. The meeting was a confidential investigation into the discrimination charge filed by Hayes and no one representing the Employer was told about the meeting.

Payton testified that in the middle of the meeting, out of the corner of his eye, he saw Jeremy Devine in the window of the large double door. 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 there." At that point, Devine backed away from the window. Payton told the group "that Jeremy Devine was looking through the window to see who was in here." Hayes had his back to the window and did not see Devine. Rinehart, who was sitting beside Payton, testified that he heard someone, probably either Maxwell or Moore, say "what is he still doing here," referring to Devine. When Rinehart looked toward the door, he saw Devine, standing approximately five feet from the door (and the windows) looking into the conference room through the windows. At that point, according to Payton, MSHA investigator Maxwell

> got up and got his cell phone out, walked over to the window, looked through the window, and he called somebody on the phone and told them that management—to keep management away from this door, that he was conducting an investigation.

Rinehart testified that Maxwell stepped out of the conference room, exiting from another door—not the double doors. He could not see where Maxwell went. At this time Devine disappeared from the line of sight of the double doors. Maxwell soon returned to the meeting.

Hayes testified that in the meeting, one of the inspectors, presumably Maxwell, got up from the table and began walking toward the door, talking loudly into what Hayes thought was an intercom system, talking to the front desk, asking if Jeremy Devine was finished with his business in the building, and if he was that he could leave at this time. Hayes did not see Devine. Hayes was unsure of many details, but his credibility his only enhanced by his unwillingness to exaggerate what he remembered. He did not see Devine, but witnessed the disruption of the meeting and Maxwell's communication with the front desk calling for Devine to leave.

In terms of factual findings and credibility, I find that after his conference, Devine's exit route took him by the double doors of the large conference room and that he paused there, pressed close, and peered into the room. Devine's denial of this is mostly assertions of not remembering it. The uproar it caused inside the conference was testified to by three witnesses. I do not believe they invented it. Payton first saw Devine and saw him peering into the room. He alerted the room. Rinehart looked next and saw Devine, this time standing a few feet back from the doors but still looking into the room. Hayes never saw Devine, but, as did the others, testified to the commotion over it and Maxwell's jumping up and exiting the meeting to confront the problem. There were differences in how Payton, Rinehart, and Devine recalled the event, and in their precise description of Maxwell's response, but this struck me as the honest recollection of three people independently recalling a surprise and sudden event.

Analysis

The complaint alleges that (paragraph 15(c)) Devine unlawfully conducted surveillance of employees while engaging in union activity and (paragraph 15(d)) unlawfully gave an employee the impression that he was conducting surveillance of union activity.

Unlawful surveillance occurs when an employer's agent takes intentional action to observe or learn about employee union activity. *Astro Shapes, Inc.*, 317 NLRB 1132, 1133 (1995) (unlawful surveillance for supervisor to park in tavern parking lot where union meeting was scheduled because he was curious how many employees would show up); *Dadco Fashions, Inc.*, 243 NLRB 1193, 1198–1199 (1979) (unlawful surveillance for supervisor purposely to drive by union's roadside park highway meeting "because she was curious"), enfd. 632 F.2d 493 (5th Cir. 1980). See in contrast, *Milum Textile Ser-*

vices, 357 NLRB 2047, 2072 (2011) (no unlawful surveillance where supervisor "in the course of her normal routine" regularly ate lunch parked on street next to the facility where she observed employees engaging in prounion activities) and *Valmont Industries*, 328 NLRB 309, 318 (1999) (no violation where supervisor's presence at motel while union meeting was being conducted there was coincidental and unrelated to union meeting).

By all evidence, on February 17, 2016, Devine was properly in the MSHA offices to attend a meeting on employer business. While waiting for his meeting to begin, he observed from the reception area that union and MSHA officials, and other individuals he could not see, were in a meeting. That was not surveillance, because his presence and observation of these people at the meeting were incidental to his own work. In effect, he observed open activity in the course of his own work routine. However, at the conclusion of his own meeting, Devine did not simply walk past the Union/MSHA meeting and exit the building. He stopped to investigate and see what else he could learn about the meeting, its attendees, and purpose, by standing in the window to meeting room and purposely peering into it. At this point, Devine was engaged in unlawful surveillance of employees engaged in union activity. He had left the role of a supervisor who simply observed open union activity while engaged in his own routine, and become the "curious" supervisor who took steps out of the ordinary to investigate the previously overseen union activity in an effort to learn more about it. This is classic unlawful surveillance. I find the violation of surveillance as alleged.[20]

On the other hand, I dismiss the allegation that Devine unlawfully gave the impression that he was conducting surveillance of employees. This usually describes a violation of the Act—separate from unlawful surveillance—where the employer's agent makes statements to employees or engages in conduct that suggests that, whether it is true or not, employees' union activity is being watched. Devine said nothing to the employees on this subject. Any impression of surveillance he gave was coincidental to and indistinguishable from his actual surveillance. His unlawful surveillance does not provide a basis for two independent violations of the Act. I dismiss the allegation that Devine unlawfully gave employees the impression that their union activity was being surveilled.

5. Threat of shutdown for filing grievances, and discriminatory discipline of Employee Moore on June 8 and September 19, 2016 (Marshall County Coal Mine—Moore/Crowe & Moore Koontz incidents—complaint ¶¶16(a), 19, & 20)

Mark Moore is a continuous mine operator at Marshall County Coal. The continuous mine operator (or "miner" for short) is a machine use to mine coal. The "full face miner" is roughly 16 feet wide and 37–40 feet long, and operates with five employees working on it.

Moore's immediate supervisor is Foreman Scott Meadows. Meadows reports to Shift Foreman John Brone. The assistant superintendent for the mine at the time was Jeff Crowe.

In the summer of 2016, there was a roof fall at Marshall County Coal's Cameron mine. On or about June 7, Moore and coworkers learned of the mine fall when supervisors told Moore and a group of others to report to the Blake Ridge portal to clean up the roof fall. Roof falls are a regular occurrence—Moore estimated they average two to three per summer. Depending on where the roof fall is it is common that the mine cannot run until the roof fall is cleaned up. Out of 550 or more employees working when the mine is in full operation, only about 20–30 are at work after a roof fall, cleaning up so normal production can begin again. The remaining employees are off work without pay until the mine is up and running which can be 1–2 weeks depending on the size of the roof fall.

While waiting for an elevator at the beginning of the afternoon shift, Meadows told Moore, who usually ran the miner, that Moore would be working as a miner helper. Meadows told Moore that foremen would be running the miner. Moore told Meadows that if the foremen ran the miner "I was going to file a grievance because that was my job, and I was the only classified operator there." Meadows told Moore that "it was above his head, it come from Jeff Crowe." Moore did not end up filing a grievance.

The next day, Shift Foreman Brone came into the bath house when Moore was getting ready for his shift, just before 4 p.m., and told him that he had to go to a meeting with Jeff Crowe "ASAP." Moore attempted to call for union representation, but when he could not reach one of the union officials he asked coworker Chris Drummond, who was nearby, to accompany him to the meeting. When he got to Crowe's office, in addition to Moore and Drummond, Brone, Crowe, and a mine foreman named Mike Moore were in the meeting. Mark Moore recorded the meeting and an agreed-to transcript was entered into evidence (GC Exh. 19). The transcript reads as follows:[21]

> **Crowe:** Close the door.
> **Moore:** What's this about Jeff?
> **Crowe:** Come on in.
> **Crowe:** Hey, several foreman walking around saying your step 1 ing everyone last night for working.
> **Crowe:** You didn't step 1 Justin Trout for running torches?
> **Moore:** No.
> **Crowe:** Why would Justin Trout tell me that?
> **Crowe:** Here's my point, I believe you did and if you can't in your head fucking realize there's a real fall in this coalmine and the coalmine shut down and that we're not gonna work everybody to fix it, if you can't in your head figure that out and understand that my fucking bosses are going to help and get this done then go home. And I'm sayin go home now.
> **Moore:** Is that what you want me to do.
> **Crowe:** Do you hear what I'm sayin? Do you have an issue

[20] There is no dispute that Hayes and the union officials were engaged in union and protected and concerted activity when they met with MSHA officials as part of the MSHA complaint process. I also find that it is obvious that Devine would reasonably know, and did know, that the union and MSHA officials he observed in a meeting, with other individuals he did not immediately recognize, were engaged in union activity at the MSHA offices.

[21] The document entered into evidence contains a legend showing that "C: = Jeff Crowe, Assistant Superintendent" and "M: = Mark Moore, UMWA employee." For the convenience of the reader I have substituted "Crowe" for "C" and "Moore" for "M."

with foremen helping down there. Why, why in the fuck would you step on a foreman for helping during a roof fall? Why? Seriously, I want to understand it. Why would you do that? What's the fucking sense in it? What does it prove? What do you get out of it? Please give me an answer why? That's a real shitty thing to do. Do you understand the fucking coal mine[']s down?
Moore: Yeah
Crowe: Do you understand the quicker it gets done, the quicker everybody gets back to work.
Moore: Yeah
Crowe: Do you understand that with fucking cash and the way the coal market is that we can't fucking work the whole coal mine. Do you understand that?
Moore: Yeah
Crowe: Do you understand that? Do you understand the state that the coal market is in?
Moore: Yes I do.
Crowe: Then why in the fuck would you file a grievance on a fucking foreman for fucking helping? You're the only goddamn person here who's fucking done it. You know what, I worked all fucking day today. Step 1 me, do it.
Moore: I didn't see you.
Crowe: You have an issue, a bad fucking issue. No just here, you have it at fucking Cameron. You have a bad fucking attitude. You are the type of people that will shut this fucking coalmine down. Do you understand it? Now do you have an issue if fucking foreman are down there helping?
Moore: I think if you need more people, you should bring more people back I guess, I mean.
Crowe: Answer me, if you go down there and there's foreman working, you got an issue?
Moore: I'm not answering that.
Crowe: Go home. Go home. Go home now. Get out of my office, go home. You're not working. Go home. Get out.
Moore: Ok.
Crowe: Seriously, get out.
Moore: Alright step 1.
Crowe: You said what.
Moore: Step 1.
Crowe: For what, get out, get out, get out of my office now.
Moore: Ok.

Moore was sent home. At the time he was not sure how long the suspension was for but it turned out to be just for the day.

No grievance was filed by Moore. However, on August 29, 2016, the Union filed an unfair labor practice charge over the incident alleging that Marshall County Coal had discriminated against Moore for engaging in protected concerted activity. The charge, docketed as Case 06–CA–183054, alleged that the Respondent "[o]n or about June 8, 2016, . . . discriminated against and disciplined employee Mark Moore for engaging in protected concerted activity, i.e., the initiation of the grievance procedure."

On September 19, Moore was suspended again. This suspension ostensibly occurred because on September 19, Moore was not ready to go underground for his shift at 4 p.m., the scheduled time for the elevator to take his section of miners down to the mine.

That day, Moore clocked into work at 3:56 p.m., but still had to dress and get water. This was five or ten minutes later than Moore testified that he usually clocked in. After clocking in, Moore went to the bath house, got his gear on, went to the warehouse, and stopped at the water van to get his water before proceeding to the elevator.

Moore testified that there were others in his crew waiting in line for the elevator including his foreman Scott Meadows. He also named three other coworkers. Although the evidence is that it was after 4 p.m., the evidence also supports the conclusion that he had not missed his cage, a point that is undisputed by the Employer.

General Superintendent Eric Koontz testified that on September 19, he saw from a camera system in his office that Moore was clocking in at just a few minutes before his designated start time of 4 p.m. Koontz testified that Moore was not heading toward the elevator cage to go underground until approximately 4:07 or 4:08 p.m., something that Koontz documented in support of the suspension after-the fact, by printing out still photographs from his camera system. The photos show Moore at various points including his arrival and his stop for water before heading to the cage. Other employees are in the photos, but Koontz testified he did not know their names or know if they were also late. Koontz testified that he had heard in the past from Brone and from an assistant shift foreman, Phillips, that Moore had an ongoing problem of arriving too close to start time to be dressed and ready to go underground on time. Koontz told Brone to suspend Moore.

As Moore was walking towards the elevator, Shift Forman John Brone yelled for him and told Moore to clock out and go home. Brone said he told Moore that he wasn't dressed and ready for his shift on time. He told Moore that HR would have a meeting with him the following morning.

Another union employee, Colby Yarbrough clocked in at the same time, approximately 3:55 p.m., but was not disciplined. Yarbrough was getting water, about 20–30 feet from the elevators, before heading to the elevators at the same time as Moore. Yarbrough testified that he went down in the elevator with the employees scheduled for the 4 p.m. start time (cage #2, afternoon shift cage priorities sheet), as well as two "long wall guys" who were scheduled to start at 3:45 p.m. Yarbrough has never received counseling or discipline for being late to work. He is unaware of any other employee having been disciplined or counseled, or of Moore having been previously disciplined or counseled (before the September 19 incident).

The next day, September 20, Moore met with General Superintendent Koontz, Amy Bailey from human resources, and Adam Hartley, who was a union committeeman. Koontz began the meeting by asking if anyone was recording the meeting. Koontz told Moore he was sent home for not being ready for his shift, and gave him the suspension letter that would go in Moore's file. Koontz showed Moore the camera stills to which he affixed time-stamps to establish that at and after 4 p.m. Moore was not yet underground. Koontz showed Moore his "clock in times" for the past two months and asked Moore "why [he] pushed [him]self that close to the hour." According to Koontz, "I had HR actually pull some documents up to show

his time probably three or four weeks prior to this incident. It was very clear, he cut it way too close." Koontz told Moore that he "was a very talented employee, that he don't want to fire me. That's why he had the meeting with me, if he didn't care, he would just fire me." Moore asked why it mattered if he was there two minutes before his shift or five minutes before, as long as he was ready on time. Koontz told him, "from 4:00 on, I own you." The meeting ended with Koontz telling Moore to be safe, have a good shift and go to work."

Koontz admitted in his testimony that he was aware of the June 8 discussion between Crowe and Moore—i.e., the one that was recorded—but stated that he was not involved or even in town when it occurred. He also was aware that an unfair labor practice charge had been filed over the incident about two to three weeks before the September 19 suspension, although Koontz said he knew "very little" about it.

The suspension was indisputably Moore's first discipline for being late. Brone testified that he had counseled Moore numerous times, but Moore denied that he previously had been talked to before about this issue.

Analysis

1. The complaint alleges (paragraph 16(a)) that about June 8, 2016, Crowe unlawfully threatened that the filing of grievances would result in the shutdown of the mine in violation of Section 8(a)(1) of the Act. He did say it to Moore in their meeting,[22] and it is unlawful. *Little Egypt Coal Co.*, 272 NLRB 1258, 1269 (1984) (unlawful to tell employees that employer would shut down operations or part of operations if employees won grievances in arbitration); *Midwest Alloys, Inc.*, 261 NLRB 1054, 1059 (1982) (unlawful threat to shutdown machine shop "if the grievances did not stop"). The Respondent effectively concedes the violation on brief. R. Br. at 46 ("Respondents acknowledge that Crowe's statements to Moore during their June 8, 2016 meeting is likely to be the subject of a notice posting").

2. The complaint also alleges (paragraph 19) that about June 8, 2016, the Respondent unlawfully disciplined employee Mark Moore for engaging in union activity. Again, the record is clear that this is what happened—Crowe told Moore to "Go home. Go home. Go home now. Get out of my office, go home. You're not working." As is clear from the transcript of the incident—and the matter is not disputed by the Respondent—Crowe suspended Moore because Moore had filed a grievance and would not promise not to file grievances over supervisors performing bargaining unit work. The Respondent discriminated in violated Section 8(a)(3) and (1) of the Act by disciplining Moore in retaliation for filing grievances and for not promising to cease this protected activity. *Yellow Transportation, Inc.*, 343 NLRB 43, 47 (2004).

3. Finally, the complaint alleges (paragraph 20) that the Respondent's 1-day suspension of Moore (which occurred on September 19 but was confirmed in the September 20 meeting, the date alleged in the complaint) was unlawfully motivated by Moore's protected and concerted union activity (an 8(a)(3) violation) and by the filing of an unfair labor practice charge over his June 8 suspension (an 8(a)(4) violation).[23]

The Respondent rejects these unlawful motives for the suspension, contending that the suspension was a "legitimate disciplinary action" for failing to be dressed and ready for work on time. The Respondent maintains that the General Counsel failed to meet his burden of proving either an 8(a)(3) or an 8(a)(4) violation with regard to this discipline.

As referenced earlier in this decision, the Supreme Court-approved standard for cases turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This holds for motivation-based cases alleging violations of Section 8(a)(3) or (4). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis); *American Gardens Management Co.*, 338 NLRB 644, 645 fn. 7 (2002) (endorsing application of *Wright Line* standard to 8(a)(4) allegations); *Verizon*, 350 NLRB 542, 546–547 (2007).

In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that union or other protected conduct was a motivating factor for the employer's adverse employment action. In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Under the *Wright Line* framework, as developed by the Board, the elements required in order for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are union or protected activity, employer knowledge of that activity, and antiunion animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015). Such showing proves a violation of the Act subject to the following

[22] **Crowe:** ". . . . Then why in the fuck would you file a grievance on a fucking foreman for fucking helping? You're the only goddamn person here who's fucking done it. You know what, I worked all fucking day today. Step 1 me, do it.
Moore: I didn't see you.
Crowe: You have an issue, a bad fucking issue. No just here, you have it at fucking Cameron. You have a bad fucking attitude. You are the type of people that will shut this fucking coalmine down. Do you understand it? Now do you have an issue if fucking foreman are down there helping?

[23] Section 8(a)(4) of the Act provides that it is an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." It is settled that an employer discriminates in violation of Section 8(a)(4) when it takes action against an employee because he was the subject of an unfair labor practice charge filed by his union. See, *Fairprene Industrial Prods.*, 292 NLRB 797, 804 (1989), enfd. mem. 880 F.2d 1318 (2d Cir. 1989); *Cafe La Salle*, 280 NLRB 379, 395 (1986).

affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

Notably, evidence that an employer's rationale for discipline is pretextual adds to the strength of the General Counsel's prima facie case of discrimination. *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3 (2010) (finding of pretext raises an inference of discriminatory motive and negates rebuttal argument that it would have taken the same action in the absence of protected activities); *All Pro Vending, Inc.*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . . .") (internal quotation omitted). Indeed, where "the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct." *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Rood Trucking*, 342 NLRB at 898, quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

In this case, Moore's protected activity over his grievance activity led to his June 8 suspension, which, in turn, was the cause of the August 29 unfair labor practice charge filed over his suspension. The Respondent, including Koontz, the manager responsible for Moore's September 19 suspension, knew of the June 8 incident between Moore and Crowe, and knew about the unfair labor practice charge filed over the incident. (He may also have known that Moore recorded the encounter with Crowe, hence Koontz' demand to know before starting the September 20 meeting whether anyone was recording it.) Thus, whether considered as an 8(a)(3) or an 8(a)(4) case, the first and second *Wright Line* elements are satisfied. The third element of *Wright Line* is also proven. There is evidence of antiunion animus—in incidents detailed both above and below in this decision, including evidence of employer antiunion animus directed specifically at Moore in the incident that triggered the unlawful June 8 suspension and the unfair labor practice charge filed August 29.

In addition to this documented animus, there are additional indicia pointing to animus as a motivation for the September 19 suspension. The Board has long recognized that in discrimination cases unexplained timing can be indicative of animus. *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *North Carolina Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). In this case, the Respondent's witnesses Brone and Koontz contended that Moore had a "repetitive" "habit" of arriving to work a few minutes before 4 p.m., and, therefore, of not being ready to go underground at 4 p.m. I am not sure I believe this wholly undocumented claim, but assuming it is true, the Respondent's witnesses admit that although an ongoing problem, Moore's tardiness had never before been the cause of even a single documented (written) verbal warning. In other words, this ongoing problem had never once warranted a note in Moore's file. This means that the Respondent's position is that although Moore's misconduct was ongoing, and although Koontz testified that in reference to discipline "[w]e are very strict on [ ]our start times," no action was taken against him until the Union filed an unfair labor practice charge over Moore's unlawful suspension by Crowe. Despite, this, Koontz testified that he would issue the same discipline if he "saw somebody late tomorrow." This seems utterly inconsistent with the essential claim that Moore's alleged "repetitive" lateness was known to Koontz, and to foremen, but tolerated with only verbal chiding, until Koontz happened to look up at his camera on September 19, see Moore late, and then moved to have him disciplined. Thus, Koontz' testimony is that such lateness was not tolerated, except, inexplicably, in the case of Moore, until, coincidentally, an unfair labor practice charge was filed over his protected activity, at which point the Employer's patience frayed, and Moore was suspended.

I do not believe it. I find that the timing of the suspension supports the General Counsel's case. Indeed, the longtime asserted tolerance of Moore's lateness, along with the timing of the discipline, suggests that the fact that Moore was still getting set for work at 4 p.m. on September 19, provided a pretext for unlawfully motivated discipline. To add to this, is the implausibility of Koontz' testimony that he was not "looking specifically for Mr. Moore," but rather, just accidently looked at his camera system from his desk and saw Moore late, and acted to record and discipline him. Somewhat remarkably, if this story were to be believed (which it is not), is that Koontz took absolutely no interest in the other employees visible in the photos with Moore. Were they also late? Koontz testified that he had no idea and apparently he had no interest. He professed at trial that he did not know their names, and he did not investigate. One employee, Colby Yarborough, testified without contradiction that he entered and clocked in on September 19, with Moore, was with Moore when they stopped to load up water before heading to the elevators, and headed to the elevators to go underground at the same time as Moore. Yarborough actually went down the elevator that day with two employees scheduled to go down at 3:45 p.m.—not the final 4 p.m. descent for which he and Moore were scheduled. However, notwithstanding the alleged "strict" policies that the Employer followed, Koontz neither noticed anyone else nor had anyone else disciplined. Moore was the only employee whose late arrival mattered.

This is what a pretext looks like. And it is not a particularly elaborate pretext, in which the employee over whom a union files an unfair labor practice for an unlawful suspension suddenly finds that his alleged chronic tardiness is singled out as warranting suspension.

The finding that the Respondent's explanation for the September 19 suspension is a pretext adds to the weight of the General Counsel's case and, indeed, seals it shut, as it pretermits the "need to perform the second part of the *Wright Line* analysis." *Rood Trucking*, supra.

I would add, however, that the Respondent offers no evidence of any import to show that it would have taken the same action against Moore in the absence of his protected activity or the unfair labor practice charge filed to vindicate his protected activity. For instance, the Respondent offered no comparators showing that other similarly situated employees were similarly punished. Indeed, the only documented disciplinary incident involving another employee being late to work was introduced by the General Counsel and concerned an employee given a written verbal warning for arriving and clocking in 48 minutes later than his assigned shift time. Were the finding of pretext not enough to undermine the Respondent's defense, this evidence would cut against any claim by the Respondent (and burden to show) that it would have taken the same action against Moore in the absence of protected activity. *AdvoServ of New Jersey*, 363 NLRB No. 143, slip op. at 33 (2016).

I find that the Respondent's September 19, 2016 discipline of Moore violated Sections 8(a)(3), 8(a)(4), and (derivatively) 8(a)(1) of the Act.[24]

6. Threat to discipline for requesting union representation (Marshall County Coal Mine—Preston/Phillips incident—complaint ¶16(b))

The evidence for this allegation begins with an incident in which Marshall County Coal roof bolter Joshua Preston was working underground at the Blakes' Ridge Portal on September 13, 2016. Assigned to bolt track at a cross cut, he realized that there was no battery or diesel motors underground with him—they were necessary to operate the track bolter machine. Preston reported this to Mine Foreman Kirk. Kirk called Preston's shift supervisor, Teddy Perkins. Kirk then reported to Preston that they were supposed to have brought the "18 jeep," a battery bus that is primarily used by Assistant General Foreman Phillips or Assistant Superintendent Jerod Rine.

After the shift, Perkins told Preston that Assistant General Mine Foreman Ben Phillips needed to see him outside. When he got off the elevator, Preston went to Phillips' office. In the office Preston found Phillips, Kirk, a compliance boss, John Fonda, and the assistant superintendent, Jerod Rine. Preston told Phillips that he heard that Phillips wanted to see him but that he did not want to be in the meeting without union representation. Phillips told Preston that "this ain't a write up," and that "he can still ask me questions without union representation, and we could talk."

According to Preston, Phillips said "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." Then, according to Preston, Phillips began issuing questions, in an irritated manner, phrased as "direct orders", first asking why Preston did not bring a diesel motor for the shift as indicated on the assignment sheet. Preston says he did not answer. Preston testified that Phillips asked the question again, again framing it as a direct order to answer the question. Preston still did not answer. Preston testified that Phillips asked it a third time, by this time raising his voice and giving him another "direct order to answer me." Preston, saying he felt intimidated, answered telling Phillips that that there were no motors underground, and that he spoke to Kirk, who spoke to Perkins, who told him he was to have taken the 18 Jeep. At this point, Phillips asked Kirk if he had looked at the assignment sheet, which would have indicated that a motor was needed for the day's work. Kirk told Phillips that he had not. Phillips told Kirk that the absence of the motor, then, was Kirk's fault, and he looked at Preston and said, "ok," and Preston was allowed to leave.

Kirk and Phillips also testified. Both claimed that Preston came to Phillips' office not pursuant to a request from Phillips, but on "a personal issue" or "matter." However, neither knew or could recall what it was. In any event, by all accounts, including Kirk and Phillips', no personal matter was at any time raised by Preston or addressed by anyone. Phillips denied telling Perkins to have Preston come to a meeting at Phillips' office. Perkins was not called to testify, and thus, Preston's testimony that he was told by Perkins to report to Phillips' office for a meeting was unrebutted (and it was credibly offered).

According to Phillips, Preston just showed up in his office, only Kirk was there—asked who was present, he did not mention Rine or Fonda, who Preston said were also in Phillips' office. (Neither Fonda or Rine were called to testify.). According to Phillips, Preston walked in and said, "hey, Ben, you got a minute, and that's when I said hey, yeah, I need to talk to you. According to Philips, the issue he asked Preston about related to the failure of the crew to use a locomotive to retrieve a bolter with a blown hose and Phillips was asking Kirk about it when Preston walked in. Phillips testified that Preston "just walked out of the office" when Phillips asked him about this, and that he "absolutely" did not say anything about wanting a union representative, and Phillips did not mention anything to Preston about issuing discipline. According to Phillips, "It was a simple question so I could find out the issue [so] I could have the next shift lined up to resolve the issue." According to Phillips, Preston came back "when I said, hey, Josh. I didn't know if he misunderstood or didn't hear, but I think Kirk intervened at that point. Preston was standing in the doorway, John Kirk intervened and answered my question, I told Josh, that's all I needed. I wasn't upset, there was no reason for discipline." According to Phillips, "that was the end of the conversation, other than me saying thank you, that's all I needed to know."

Phillips denied mentioning disciplining or that he made any reference to Phillips returning with a union representative. Both of these assertions were contradicted, not only by Preston, but by Kirk too.

Kirk testified that when Preston started to walk away in response to Phillips' question, Preston "said hold on, I have to go use the phone." According to Kirk, Phillips said, "where are you going? I need to know what's going on, I have to line up the next shift." Kirk testified that Phillips understood that Preston's desire to make a phone call was related to his fear of discipline, and Kirk quotes Phillips—contrary to Phillips' testimony—telling Preston, "I am not issuing discipline, I just need to know what happened on the shift so I can line my other crews up." Kirk also testified that Phillips told Preston: "if you need representation, you can get it, I just need to know what happened on the shift." Then, Kirk testified that he intervened and

[24] *Chinese Daily News*, 346 NLRB at 934.

told Phillips that the machinery wasn't brought down because Kirk had not read the work orders, and that ended the conversation, and Preston left.

Given all this, and their demeanor, it is clear to me that Preston's testimony should be (and is) credited over Phillips and Kirk. To summarize: Phillips' essential claim, that union representation and discipline were unmentioned in the conversation, was directly contradicted by Preston, but also by statements by Kirk that are admissions. See F.R.E. 801(d)(2). And they are admissions that, perhaps unwittingly, corroborate the essence of Preston's claim that his desire for union representation and the perceived threat of discipline was central to the encounter. By itself, this is a factor undermining to Phillips' credibility. Moreover, as noted, although Phillips' asserts that he did not tell Perkins to tell Preston to come to his office, Perkins did not testify, and Preston's assertion that Perkins, in fact, ordered him to the office, is unrebutted. Moreover, while both Phillips and Kirk claimed that Preston came to the office on his own to ask a favor, this is somewhat unlikely given that Preston—by Phillip and Kirk's account—never asked for any type of favor and left as soon as Phillips ceased questioning him. Their claim is is particularly implausible in Phillips' account of the incident, in which there really was no incident, just a friendly question from Phillips to Preston before Preston went on his way (without asking about a favor). There is nothing in his account that would suggest that he would think that Preston had come in to ask for a favor. In my view, Phillips forgot about this part of his testimony as he went through his story. Finally, in terms of demeanor, I found Preston direct and straightforward. Kirk and Phillips both answered questions in a rushed way that did not inspire confidence. Based on all of the above, I credit Preston's account.

Analysis

Preston was directly threatened by Assistant Mine Foreman Ben Phillips after Preston told him that he wanted union representation for the meeting. Phillips' immediate response was that "this ain't a write up," and that Phillips "can still ask [ ] questions without union representation." Phillips then told Preston: "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." This is a smart-aleck but unmistakable threat to issue written discipline to retaliate against Preston if he asked for union representation. An employee cannot be disciplined for the act of seeking union representation. *Wal-Mart Stores, Inc.*, 343 NLRB at 1287; *Taracorp, Inc.*, 273 NLRB at 223 fn. 12. Accordingly, a naked threat to discipline an employee for asserting the right to a union representative would reasonably have a tendency to coerce an employee in the exercise of Section 7 rights and, therefore, is unlawful.[25]

7. Discriminatory warning issued for arbitration testimony (Monongalia County Coal Mine—accountability sheets incident—complaint ¶18)

Jeff Reel works as a general inside laborer for Monongalia County Coal mine. He has worked at the mine since 2007. The HR manager at the mine is Karen Mohan.[26] She reports to the mine superintendent, Mike Nelson.

On Friday, April 8, 2016, the Union and Monongalia County Coal had an arbitration hearing in Fairmont, West Virginia, concerning a grievance over discipline associated with "accountability sheets." Accountability sheets are a one-page form filled out by employees daily and documenting in half hour increments the work they are doing throughout the day. They were used at the Monongalia mine until just before the summer of 2016. The employee signs the completed daily sheet, a foreman also signs, and the accountability sheet is submitted to a box next to the payroll office. Reel was called as a witness for the Union in the arbitration hearing. During the arbitration Reel and other witnesses were asked questions about the accountability sheets and their training on how to complete them. Reel testified that he had never been trained on how to do them and had been filling them out regularly without incident. Reel testified "that from one day to the next, you never know if all the sudden it is wrong" how they are being filled out. In response to one of the questions he testified that he always signed his accountability sheet "Reel, Jeff"—last name first, first name last.

HR Manager Mohan testified that Assistant Manager of Employee Relations Baum told her that Reel had testified in the arbitration that he intentionally filled out the accountability forms incorrectly. Mohan discussed this with David Wilkinson, the manager of human resources and employee relations for Murray American Energy, who has oversight for the HR functions at all of the Murray American operations. Mohan and Wilkinson also discussed with mine superintendent Nelson whether they should take any steps regarding Reel and the accountability forms. Mohan testified that she believed Wilkinson initiated this discussion, probably after learning about it from Baum. Wilkinson testified to a more secondary role. In any event, Mohan testified that the decision was made to meet with Reel and train him on the accountability forms.

Mohan testified that there was no intention to discipline Reel. Wilkinson testified that he understood the purpose of the meeting to be that "[t]hey wanted to talk to [Reel] about some things that he testified to in an arbitration hearing a few days earlier." He testified that he understood from (either) Mohan or Nelson that they did not intend to issue discipline. This was the only time that Wilkinson was aware of that the Employer has ever followed up with an arbitration witness to talk to them about their testimony in the arbitration hearing.

Reel's next day back at work after the arbitration was Monday, April 11, 2016. At the end of the day he submitted his accountability sheet, as usual. When Reel arrived for work the

[25] The Respondent argues that the issue turns on whether or not Preston had reasonable grounds to believe that the meeting would result in discipline, after being told by Phillips that "this ain't a write up." The Respondent argues that Preston did not have reasonable grounds for a belief that the meeting would result in discipline. While I do not agree, it is beside the point. Whether or not Preston was entitled to a union representative, it is unlawful to threaten to manufacture discipline against Preston as retaliation for Preston asking for a union representative. That is what Phillips did.

[26] Mohan was formerly known as, and sometimes referred to in the record, by her maiden name Reno.

next morning, the shift boss, Mike Layman, approached Reel and told him that he was to have a meeting with the Mine Superintendent Mike Nelson at 8 a.m. Layman told Reel that he needed a union representative. Layman said he did not know what the meeting was about. Layman told Reel he did not know if Reel would be working that day. Reel's union representative, Doug Williams was nearby. Reel approached Williams and told him "that human resources was going to have a meeting with him and he wanted a union rep."

Together they proceeded to Nelson's office at the mine's Kuhntown portal offices. They were referred to the HR office and attended a meeting there with Nelson, Mohan and Wilkinson.[27]

According to Reel, Nelson began the meeting by saying to Reel, "the reason for the meeting is for what I testified on Friday in arbitration." Reel described Nelson as speaking in a "[l]oud, aggressive tone." Wilkinson agreed that Nelson was "[p]assionate, loud" which, Wilkinson testified, was "consistent with Mr. Nelson's demeanor." Reel testified that Nelson said: "you said you was never trained on these. Well, this is your official training. You said you write your name backwards, this is bullshit. Why do you do that. You shouldn't do that." Williams testified that "Mike Nelson commented that Jeff had testified at an arbitration prior to this, the accountability arbitration, and Jeff testified that he had been signing his first name last, last name first, and nothing had been done about it until this point. And Mike said he was going to do something about it."

Nelson and Wilkinson went over the accountability sheet with Reel, producing the April 11 sheet that Reel had filled out. Nelson and Wilkinson told Reel he wanted Reel to sign his "official name." Reel asked do I sign "Jeffrey Alan Reel." Nelson told him, no, sign "Jeff Reel." Reel asked if he could sign "J. Reel" or use his "five digit," employee number and Nelson and Wilkinson said, no, "[y]ou're to sign your name."

Reel testified that Nelson told him, "[y]ou got to fill these out the way I tell you to fill these out. This is your official verbal warning." Williams corroborated that Nelson told Reel "this is your official verbal warning." Mohan testified that Nelson told Reel that this "was an unofficial verbal warning." Wilkinson testified that he did not recall Nelson saying that he was giving Reel an official verbal warning." Asked whether it happened, Wilkinson stated, "Not to my knowledge."

Neither Reel nor Williams remember expressly being told that Reel was not going to be disciplined. However, Mohan testified that when Nelson announced that this was "an unofficial verbal warning" she intervened and "clarified that there was no such thing" and that "he had misspoke." Mohan testified that Nelson may have apologized for his statement, but she could not recall whether or not he did. She testified that Wilkinson "clarified that this was not a disciplinary action." Wilkinson testified that during the meeting "Nelson was adamant about the fact that he was not officially, shall we say disciplining him." Nelson did not testify.

The meeting lasted 10–15 minutes. Reel was sent to work after the meeting. The following day, Wednesday, April 13, Reel went in the morning to the HR office to speak to Mohan. He asked Mohan for a copy of the discipline. According to Reel, Mohan said she had to talk to Nelson to see what was going to be in Reel's file. Reel mentioned that Nelson had said "this was my official verbal warning." Reno Mohan said, "I know, I could have choked him when he said that."

Mohan testified that she told Reel "again" that there was no verbal warning. This leads me to conclude that, as Reel testified, he came to see Mohan a second time, the next morning, Thursday, April 14, and asked again for a copy of the disciplinary action. This time Mohan gave Reel a copy of the April 11 accountability sheet and said that at this point in time, this is all they were going to put in his file. Williams testified that he also stopped in and talked to Mohan a few days after the meeting with Reel. Mohan dates this as later the same day that Reel "stopped by again," (also leading me to credit Reel's testimony that he stopped by to talk to Reel twice and the second time was on April 14). Williams mentioned the disciplinary action against Mohan "and she said that they were planning on retracting it." Williams testified that Mohan said "that they didn't want to follow through with it, that she could just strangle Mike for giving him that warning" and "I think she even did the hand gestures." Mohan testified that she told Williams "what I told Mr. Reel, that there was no verbal warning."

The conflicting testimony requires some sorting through. I believe that this incident resulted in an ambiguous situation, in which neither Reel nor Williams were sure whether, in the end, Nelson's meeting constituted disciplinary action against Reel. As discussed below, he was given a "verbal warning"—maybe more accurately called counseling—in the meeting about how to fill out the accountability sheets. In the end, it was not the "official" verbal warnings typically dispensed by management as part of a disciplinary situation. I believe and find that, consistent with Mohan and Wilkinson's testimony, management went into the meeting with Reel and Williams without an intention to issue formal discipline. I found Mohan and Wilkinson creditable in that regard. Having said that, it seems to me that Nelson—the highest ranking official in the meeting—left Reel the impression that he was being verbally warned, if only "unofficially."

I credit the testimony of Mohan, Reel, and Williams, that Nelson told Reel that he was receiving a "verbal warning." Was it an "official" warning as Reel and Williams recalled (and as Wilkinson did not) or was it an "unofficial" warning as Mohan testified? I believe and find that Nelson told Reel that this was his "unofficial" verbal warning. Although I can understand how the word could be misheard by Reel and Williams—the phrasing was peculiar, the situation tense, and the circumstances lent themselves to mishearing "official" for "unofficial"—I credit Mohan on this point. While Nelson seemed to be trying to make sure Reel knew that he was being "verbally warned," the prior arrangement with Nelson, Wilkinson, and Mohan was that this would not be—officially—discipline. Nelson's tacking of the word "unofficial" onto his "verbal warning" threat—as Wilkinson admitted there is no such

[27] Reel testified that he and Williams first went to Nelson's office and were referred to the HR office in the same area. Williams testified that he and Reel went directly to the human resources office. I find the discrepancy to be immaterial, either substantively, or in terms of these witnesses' credibility.

thing—seems plausible under the circumstances, in addition to the certainty with which Mohan appeared to recall it. Less plausible is that Nelson would tell Reel he was receiving an "official" verbal warning, a redundancy which was not in accord with management's subsequent actions or pre-existing plan.

Neither Reel nor Williams remember expressly being told that Reel was not going to be disciplined. However, Mohan testified that when Nelson announced that this was "an unofficial verbal warning" she intervened and "clarified that there was no such thing" and that he "had misspoke." Mohan testified that Nelson may have apologized for his statement, but she could not recall whether or not he did. I do not believe he did, and find that he did not. Mohan testified that Wilkinson "clarified that this was not a disciplinary action." Wilkinson testified that during the meeting "Nelson was adamant about the fact that he was not officially, shall we say disciplining him." Nelson did not testify, although he continues as superintendent. I accept that Mohan, and perhaps Nelson, made some comments at the meeting that, had we a transcript, could be understood as a disclaimer of discipline. I also believe that this was not understood by Reel and Williams. They understood that that Reel had been "verbally warned." And that is what Nelson said, and Nelson—not Mohan or Wilkinson—led the meeting and acted as the boss in the room.

This is also evidenced by Reel and Williams' post-incident follow-up with Mohan to see what was going to be the upshot of this incident. They did not know where Reel stood after this incident, and had to check with Mohan to find out. Her certainty at trial, notwithstanding, immediately after the incident, Mohan also did not know how Nelson was going to leave the matter. The day after the meeting, on April 13, she told Reel that she had to talk to Nelson to see what was going to be put in Reel's file. She knew Nelson had taken the meeting in the wrong direction when he told Reel that it was his "verbal warning," and told Reel that she "could have choked [Nelson] when he said that."[28] But she had to ask Nelson how the matter was going to be handled. Only when Reel returned the next day was Mohan able to tell Reel that the April 11 accountability sheet that had been discussed in the meeting would be in his file as a result of the incident, and nothing else. She also told him there was not going to be a verbal warning. Mohan told Williams that same day "that they didn't want to follow through, that she could just strangle [Nelson] for giving [Reel] that warning."

The upshot is that Reel, indisputably, was given a verbal warning in the meeting—albeit not an "official" written verbal warning as is the practice at the mine. Management had not intended to discipline Reel, and after the meeting, in response to Reel and Williams' questioning, and after checking with Nelson, Mohan declared that there would be no warning. However, the April 11 accountability sheet did go into Reel's file, serving as a permanent reminder should the issue arise again, that Reel had been warned that he is to file the accountability reports in a certain way.

Analysis

The General Counsel alleges that Reel was unlawfully disciplined in violation of Section 8(a)(3) and (1) in retaliation for his testimony at the arbitration case. The Respondent contends that, in fact, Reel was not disciplined, merely "trained" on how to fill out the accountability sheets. Further, the Respondent contends that, even assuming the training may constitute discipline, it was not unlawful, and was issued for lawful and legitimate reasons.

I agree that "warning" that Reel received was unusual, not the typical written verbal warning used by the Respondent. This was an "unofficial" verbal warning, something that has not been shown to be typically part of the Respondent's formal disciplinary system. Were the matter a tabula rasa, I might well conclude that the retention of the April 11 accountability sheet in Reel's personnel file was sufficient to show that the "unofficial" warning "lay a foundation for future disciplinary action," and, therefore, constituted discipline.[29]

In my view, it is unlikely that documentation of this incident *would not* be used to lay the foundation for further discipline should Reel be caught, in the future, filling out his accountability sheets in a manner other than as instructed. However, in *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993), the Board held that the employer did not violate Section 8(a)(3) by issuing a "conference report" to an employee for wearing a union pin, because there was no evidence that the conference report was "even a preliminary step in the progressive disciplinary system." Id. at 403. The conference report in *Lancaster* claimed that the employee demonstrated a "disruptive" pattern of behavior and "of continuing to question Management" and instructed the employee to "discontinue this disruptive behavior immediately" in order to avoid a "formal reminder under the first step of the disciplinary process." Id. The Board rejected the judge's finding that the issuance of the conference report violated Section 8(a)(3). Its issuance

> constituted nothing more than counseling and no discipline was being imposed. . . The General Counsel has failed to prove that the conference report is part of the Respondent's formal disciplinary procedure or that it is even a preliminary step in the progressive disciplinary system. As used by the Respondent, the conference report merely warns an employee of potential performance or behavioral problems.

My review of *Lancaster* leads me to conclude that in order to be considered discipline, the General Counsel must show that a

[28] When Reel spoke to Mohan he referred to Nelson saying that the meeting was his "official verbal warning." In this context, I am sure that Mohan would not bother to correct Reel, telling him, for instance, "oh no, he said it was an unofficial verbal warning." At that moment, whether the warning issued by the mine superintendent was "official" or "unofficial" was quite beside the point. Reel wanted to know what he upshot was—what would be in his file due to the incident. Mohan did not know, she had to check with Nelson to get clarification on that.

[29] As the Board has held, verbal warnings, coachings and reprimands are only forms of discipline if they lay a foundation for future disciplinary action against the employee. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006); *Progressive Transportation Services*, 340 NLRB 1044, 1046 fn. 7 (2003).

warning or training or incident report is part of an employer's discipline system or otherwise proven—not assumed—to lay the foundation for discipline. The evidence is missing here. On that basis I dismiss the 8(a)(3) violation.[30]

8. Information requests (complaint ¶¶27–33)

The complaint alleges a variety of information requests for which information either was not furnished or the furnishing was unreasonably delayed.

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). As the Board explained in *A–1 Door & Building Solutions*, 356 NLRB 499, 500 (2011):

> An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). By contrast, information concerning extra unit employees is not presumptively relevant; rather, relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

Where a showing of relevance is required because the request concerns nonunit matters, the burden is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983); *Shoppers Food Warehouse*, 315 NLRB at 259. "The Board uses a broad, discovery-type of standard in determining relevance in information requests." *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). The issue is whether the Union's request for information is of "probable" or "potential" relevance. *Transport of New Jersey,* 233 NLRB 694, 694 (1977) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)); *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991) ("the information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided"). As the Board affirmed in *W–L Moulding Co.*, 272 NLRB 1239, 1240 (1984), quoting *NLRB v. Rockwell–Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) and *Acme Industrial*, supra at 437, in considering an information request, it is not the Board's role to pass on the merits of the Union's claim, "[t]he Board's only function in such situation is in 'acting upon the possibility that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" Accord, *Howard University*, 290 NLRB 1006, 1007 (1988).

Where the information is requested in connection with a grievance, the Board's test for relevance remains a liberal one. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court endorsed the Board's view that a "liberal" broad "discovery type" standard must apply to union information requests related to the evaluation of grievances. Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in *Moore's Federal Practice* that

> it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy.

4 Moore, *Federal Practice* P26.16[1], 1175–1176 (2d ed.), quoted in *Acme Industrial Co.*, 385 U.S. at 437 fn. 6.

Notably, once the burden of showing the relevance of nonunit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information. Depending on the circumstances and reasons for the union's interest, information that is not presumptively relevant may have "an even more fundamental relevance than that considered presumptively relevant." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969).

The failure to provide requested relevant information is a violation of Section 8(a)(5) of the Act.[31] Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.,* 220 NLRB 189, 191 (1975)*; Procter & Gamble Mfg. Co.* 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Finally, it is important to recognize that "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005).

[30] As it was neither pled nor argued, I do not reach the question of whether the incident with Reel constituted an independent violation of Sec. 8(a)(1).

[31] In addition, an employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See, *ABF Freight System,* 325 NLRB 546 fn. 3 (1998).

a. Request for Monongalia County coal mine contractor invoices for work associated with pumpable crib bags

The mines use pumpable crib bags for roof support in certain portions of the mine. When contractors began performing the work of hanging the pumpable crib bags the Union grieved.

On August 31, 2015, the Union received a favorable arbitration award sustaining the grievances at the Monongalia County mine from Arbitrator Betty R. Widgeon. The arbitrator ordered "compensatory settlement of the hours billed by the contractors for the hanging of the pumpable crib bags—to be divided amongst all classified employees, including those laid off since the grievance was filed."

On September 8, 2015, union representative Phillippi sent an email to Mohan, with the subject line stating "information request." The email stated:

> Karen, I am requesting an invoice of hours billed by any contractors performing work associated with pumpable crib bags from 3-24-15 to present. I need this information so we can discuss settlement per Arbitrator Widgeon's decision.

Mohan responded by email dated September 14, 2015:

> In response to your email dated September 8, 2015, requesting invoices from contractors associated with pumpable crib bags, those invoices in their entirety are being reviewed. As stated by Arbitrator Widgeon's decision, "compensatory settlement of the hours billed by the contractors for the hanging of the pumpable crib bags." The hanging of the bags is a small percentage of the complete project and that percentage is in the process of being determined by Jennchem. Once it is finalized, you will be contacted in order to discuss the details.

Phillippi responded the same day, telling Mohan:

> As I have already been given the total hours worked up to April 2015, I am asking for the same to present. The arbitrator did not ask for Jennchem to assume how long it took. That determination is to be made between the Union and Management. If an agreement is not reached, we will go before the arbitrator for a ruling. Thanks.

Phillippi was referring to information from the contractor Jennchem received March 24, 2015, listing the total hours of work (straight time and overtime) performed by Jennchem employees to date on the pumpable crib project at Monongalia County Coal.

On November 30, 2015, Arbitrator Widgeon issued a supplemental decision ruling on the hours to be paid as part of the remedy. However, the Employer has challenged Arbitrator Widgeon's award in court, and has yet to pay any of the employees for the contractual violation found by Arbitrator Widgeon.

Phillippi received information on Jennchem employees' hours worked on the pumpable crib project on May 26, 2016. Based on the amended complaint allegations (see, Tr. 9–10), this information, provided over 8½ months after the request, has been deemed by the General Counsel to have satisfied the request.

Analysis

In this instance, the Union requested information of a type previously requested and provided by the Respondent for earlier dates. The Union explained to the Respondent that it wanted the information to discuss resolution of an arbitration decision. The arbitration decision involved the very work covered by the information request. In her testimony, Mohan offered no explanation for the delay. On brief, none is offered. Nor does the Respondent's brief challenge the relevance of the requested information at any time from when it was requested to when it was received. The information is relevant to the Union's performance of its representational duties.

The Respondent's sole defense to the violation (R. Br. at 22–23) is the assertion that on February 16, 2017, more than 17 months after the information had been requested and more than 8½ months after the Respondent had provided it, a federal district court issued an order vacating the arbitration award. This defense is a nonstarter and its logic has been rejected by the Board. *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1345 (2010) ("Contrary to the Respondent, the issue of whether it unlawfully refused to provide the requested reports is to be determined by the facts as they existed at the time of the request Inasmuch as the reports were relevant to grievances pending at the time of the request, subsequent events have no impact on our finding of a violation") (citing, *Mary Thompson Hospital,* 296 NLRB 1245, 1250 (1989), enfd. 943 F.2d 741 (7th Cir. 1991)); *Toyota of Berkeley*, 306 NLRB 893, 896 (1992) (subsequent court rulings rejecting contractual argument on which information request based were issued "well after each of the Union's [ ] information requests [and] [c]onsequently, those rulings did not moot the issue of whether the Respondent violated Section 8(a)(5) by failing to provide, in a timely manner, information which was necessary and relevant to the Union's pursuit of reasonable contract-based backpay claims"); See *Finn Industries*, 314 NLRB 556 (1994).

The Union's request for the pumpable crib bag information was necessary and relevant to its representational duties when made. The Respondent's failure to timely furnish it was unlawful. The Board and the public interest in preventing such conduct remains, without regard to the outcome of subsequent contractual disputes, even assuming they moot the current need for the requested information.[32]

[32] Were the Respondent's argument accepted, an employer would be free to ignore any information request related to grievances or arbitration on grounds that subsequent events might undermine the grievance or arbitration award. In essence, the Respondent's argument is a variant of one in favor of deferring information-request cases related to grievance-arbitration, a policy long rejected by the Board. *Postal Service*, 302 NLRB 918, 918 (1991) ("issues concerning a refusal to supply information are not subject to deferral to the grievance-arbitration process"); *Postal Service*, 280 NLRB 685 fn. 2 (1986) ("deferral is inappropriate when, as here, a union has sought information that is relevant to the performance of its statutory function as the employees' bargaining representative"), enfd. 841 F.2d 141 (6th Cir. 1988).

Because the information has already been provided by the Respondent to the Union, the remedy will not include an order to provide the information. Accordingly, I do not reach the Respondent's argument

b. Request for Monongalia County mine C&E plan information

The Employer's C&E plan is a plan and/or policy for monitoring and disciplining employees with "chronic and excessive" attendance problems. The "Bradford plan" was the C&E plan in effect at the Monongalia County mine since 2009 when Consol operated the mine. When Murray American's parent acquired the Monongalia County Coal mine in December 2013, the Union understood that the Bradford plan remained in place until March 2014, when the Employer's C&E plan was introduced.

On December 22, 2015, in preparing for an arbitration over the C&E plan, Phillippi requested, inter alia, the following

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

The request also included additional requests (not at issue in these unfair labor practice hearings) and on January 12, 2016, Assistant Human Resources Manager Tim Baum wrote to Phillippi:

> I assume the requests are for your arbitration case. If so, [which] part of your request is most pressing? In other words which case are your working on first?

Phillippi wrote back a few minutes later, listing the arbitration dates, the first one being the C&E arbitration: "Tim, the information for the C&E plan is for arbitration on 1-26-16."

Baum wrote back the next day, telling Phillippi:

> It is my understanding that the issue of disclosure for the C&E information is before Arbitrator Shaller. We are waiting to see what Arbitrator Shaller rules on the request.

Baum's reference to the arbitrator related to the fact that Phillippi had submitted a subpoena request with the arbitrator seeking to obtain essentially the same C&E information the Union had requested from the Employer. In response to the request for an arbitration subpoena, the Employer opposed issuance of the subpoena. The Employer argued to the arbitrator that the Union had this information in its possession. The arbitrator issued the subpoena, and ordered the Employer to provide the requested information to the Union. However, Baum testified that the Union never served the subpoena. In any event, the Employer did not provide the information in response to the arbitrator's subpoena.[33]

At trial, the parties stipulated that the information responsive to 1, above—"A list of all hourly employees on the Bradford plan Jan. 2014"—was provided to the Union on January 23, 2017, over a year after it was requested. See, Jt. Exh. 3, Stipulation No. 13, referring to complaint paragraph 29(a), which alleges this request for the Bradford plan information).

As to requests 2 & 3, the Employer has not provided information in response to the Union's information request (although as discussed below, it claims that it had previously been made available to the Union).

As to the list of hourly employees on the Murray C&E plan, Mohan testified at trial that she maintains an Excel sheet on her computer that "lists the individuals on the program." However, she did not provide that to Phillippi.

The Employer provides notice of employee absences to the absent employee and a copy of the notice is provided to the local union mine committee. This notice lists the employee's absentee percentage as well as the number of occurrences that he or she received in the past 12 months. However, Phillippi was told that the local mine committee does not maintain these records.

Evidence was presented that at least in some cases notice of changes to the evaluation periods for the C&E plan was posted at the mine. Baum testified that when Murray America's C&E program was "rolled out" in March 2014, the program was attached to paychecks March 7, 2014, "[a]nd we continued to communicate any kind of changes or updates with the program with the work force through . . . ramp meetings [i.e., preshift meetings], we post the information at the mine, we have attached documents to paychecks, we have done everything we can to make sure the union knew what plan was in place with respect to this absentee patrol program." However, Baum did not know if copies of changes to the plan were sent to the union office. Rather, he testified, that mine committee members received notice of C&E plan changes "[a]s an employee of the mine, the mine committee members that were employees at the Mon County Mine got copies of the programs and it was posted at the mine."

Other changes were communicated in 2015 with meetings with the workforce and local union officials. Baum was able to list these changes, in his testimony, in about 30 seconds while testifying during the hearing.

Mohan stated in her testimony that the Bradford plan was last "administered" at the mine prior to end of 2013. She testified that "the most recently updated Bradford plan spreadsheet was in October of 2013."

Analysis

The attendance plan information sought by the Union in December 2015 concerns bargaining unit employees' terms and conditions of employment and, therefore, is presumptively relevant. Nothing in the record overcomes that presumption. In any event, the Union identified the reason for its request—to prepare for a January 2016 arbitration over the C&E plan—in its initial information request seeking these items.

As to the Bradford plan, the parties stipulated that materials responsive to this request were provided to the Union on January 23, 2017, a year after the arbitration, and 13 months after the request. On brief, the Respondent's defense to the Bradford plan information allegations consists of the assertion that:

> As it relates to the Bradford Plan request, Respondents did not violate the Act by failing to provide responsive information

that furnishing of the information should not be required because the district court's ruling obviates the Union's need for the information.

[33] The arbitrator ordered the Employer to furnish "A list of all hourly and employees on the Bradford Plan on January 1, 2014"; "A list of alI hourly employees put on the first version of the Murray attendance plan"; "A list of all hourly employees put on the second version of the Murray attendance plan"; and "A copy of all C&E policies and changes since the Murray acquisition."

> since *no responsive information existed* as Respondents stopped enforcing the Bradford Plan at the Mon County Mine in October 2013.

(R. Br. at 21, Respondent's emphasis.)

I reject this defense as untrue. First of all, it is squarely contradicted by the stipulation of counsel that materials "responsive" to this request were provided to the Union by counsel to the Respondents on January 23, 2017. See Joint Exh. 3, Stipulation No. 13.

Second, to the extent the Respondent's defense is based on Mohan's testimony that the Bradford plan was last "administered" at the mine prior to the end of 2013, and most recently updated in October 2013, this is simply not responsive to the question of who was on the Bradford plan in January 2014. Mohan's testimony is not the same as saying that the Bradford plan was not in effect after October 2013. Any question on this score is removed by the fact that Monongalia County Coal issued a memo to employees stating that "Effective March 1, 2014, the Chronic and excessive Absenteeism Disciplinary Program (the "Program") will no longer calculate absences and occurrences based upon the "Bradford Factor" but will be calculated in a different manner . . . ." The compelling implication is that up to March 1, 2014, the "Bradford"-constructed plan remained in effect.

I find that, as the parties stipulated, responsive information to the Bradford plan request did exist, and that, without explanation or justification, it was not provided to the Union for 13 months. This unreasonable delay violates the Act, as alleged.

As to the Union's request for a list of all hourly employees on the new C&E plan, and any changes implemented to the plan since the Respondent acquired the mine, the Respondent does not (and cannot reasonably) dispute the relevance of the information sought. It does not argue that the material is unavailable or burdensome—indeed, Mohan testified that she maintains a list of individuals on the program on her computer in an Excel sheet, and Baum was able to quickly recite the changes in the C&E plan off the top of his head from the witness stand, i.e., the very information the Union had been requesting for 14 months.

The Respondent's sole defense is its claim that it had previously provided this information, through distribution to local union officials, often incidental to their role as employees. However, this defense has been squarely rejected by the Board. *Lansing Automakers Federal Credit Union*, 355 NLRB at 1352 (even if Union could have obtained the information from talking to its union representatives, employer's failure to supply requested report not justified; "Thus, the Board has held that, absent special circumstances not present or alleged here, an employer may not refuse to furnish relevant information on the grounds that the union has an alternative source or method of obtaining the information"); *King Soopers, Inc.*, 344 NLRB 842, 844 (2005) ("we find that the Respondent's duty to provide the Union with a copy of the Behlke-Mercer agreement was not satisfied merely because the Union might have been able to locate the document in its records"), enfd. 476 F.3d 843 (10th Cir. 2007); *Illinois-American Water Co.*, 296 NLRB 715, 724–725 (1989) (rejecting contention that information did not need to be supplied to union because employer felt the information was in possession of union or available through union stewards or union records), enfd. 933 F.2d 1368 (7th Cir. 1991). See also *Kroger Co.*, 226 NLRB 512, 513–514 (1976) ("Absent special circumstances, a union's right to information is not defeated merely because the union may acquire the needed information through an independent course of investigation. The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form. The union is entitled to an accurate and authoritative statement of facts which only the employer is in a position to make. It is thus clear that where a request for relevant information adequately informs the employer of the data needed, the employer either must supply such information or adequately set forth the reasons why it is unable to comply").[34]

c. Request for Marion County Coal unit employees credentials information

In October 2015, the Union filed a grievance demanding that the company:

> cease and desist in its use of outside contractors in performing Firebossing/Belt Examination duties and related work. We demand to be made whole for all lost wages and benefits [while this] grievance is ongoing until resolved.

The grievance form stated that the union mine committee:

> Request all contacts, billings, inventories, man hours in order to resolve this grievance. Mine committee agrees with Grievants.

On December 28, 2015, in conjunction with this grievance, the Union, by Phillippi, requested the following:

> I am requesting a list of all hourly employees who currently have the[ir] belt examiners certificate, assistant mine foremans [sic] certificate, and/or mine foremans [sic] certificate as of today. Since you have stalled this case with the offer to settle, I need this information by Thursday, December 30. Thanks, Michael Phillippi.

Phillippi testified that he sought this information so he could prove in an arbitration over the subject that union employees had the qualifications and were available to do the work being done by outside contractors. The arbitration was held in January 2016, and the Employer did not provide this information as of the time of the arbitration. During the arbitration the subject

[34] The Respondent erroneously cites *Aerospace Corp.*, 314 NLRB 100 (1994), for the proposition (R. Br. at 21–22) that an "employer need not produce the information in a different form than previously provided just because the union would prefer it." While the Respondent misreads the case, more pertinent is the fact that, because no exceptions were taken to the judge's dismissal in *Aerospace Corp.* of the relevant request-for-information allegation at issue (see, 314 NLRB 100 at fn. 1), the case is without precedential value. *Anniston Yarn Mills*, 103 NLRB 1495 (1953) ("It is the Board's practice to adopt, as a matter of course, findings of Trial Examiners to which no exceptions are filed. In doing so, the Board does not pass upon the merits of the finding or the rationale in support thereof. A finding adopted under such circumstances is not considered a precedent for any other case").

of this information was raised by Phillippi. A representative of the Employer at this arbitration, Brady West, said that "he did not provide the information, he was not going to provide the information, and he would not put on the union's case for them."[35]

The requested information was received on January 23, 2017, almost a year after the arbitration.

Analysis

The Respondent's brief offers no defense on this allegation. There is none apparent from the record. The Respondent was under a duty to make "a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB at 1062 fn. 9. "In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.'" *West Penn Power Co.*, 339 NLRB at 587, quoting *Samaritan Medical Center*, 319 NLRB at 398. Here, the Respondent, through West, affirmatively told the Union that that he was not going to provide the information. Ultimately the Respondent provided the Union with the information, but only 13 months after the request, and a year after West's refusal to do so. This would be information that would be routinely maintained and easily available to the Employer. The delay is unjustified, and a violation of the Act.

d. Request for Monongalia County Coal contractor information (March 28 and 31, 2016)

On March 28, 2016, Phillippi sent the following information request to Mohan regarding contractors working at the Monongalia mine:

> Dear Karen, UMWA INFORMATION REQUEST
> In order to monitor compliance with the Contract and to determine whether or not to file or pursue any grievances, this is to request that you furnish the union with the following information:
> 1. 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;
> 2. 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[.]
> *** ***
> Your prompt provision of this requested information may help us avoid or resolve a number of issues and will be appreciated.
> Thank you, Michael Phillippi[36]

The cover email to the information request sent by Phillippi asked that Mohan "Please respond by Friday April 1, 2016." On March 31, 2016, Phillippi, reiterated the request including the April 1 request for a response.

Phillippi testified that this information was requested to ensure contract compliance and to decide whether to file grievances. "We believe management was violating the contract and put out an information request to find out." Phillippi believed that the contract was being violated because of several arbitration rulings where the Employer had been found to have been using contractors, as well as employees coming to the Union with suspicions that contractors on the property had been performing bargaining unit work. Phillippi testified that, for example, after an arbitration award pertaining to skip ropes, he believed that management continued to perform that work in defiance of the award.

Mohan was the sole HR employee at Monongalia. Within a few days, although the date is not specified in the record, Mohan provided a response to Phillippi, inserting her responses after the requests. Mohan's responses to the items at issue in this case, items 1 & 2, are bolded here for emphasis:

> 1. 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;
> **This request is considered burdensome and it lacks any specifics.**
> 2. 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;
> **Please see response to number 2. We do not maintain records as described.**

On April 5, Phillippi wrote to Mohan protesting the Employer's response:

> Attached is your response to my first request for information. 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 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

[35] Phillippi's account of West's comments are undisputed. West did not testify. In addition to being identified as a representative of the company at arbitration, West was identified by Mohan as one of her "managers . . . . who was assisting with employee relations," and by Wilkinson as "a former HR person."

[36] There were three additional requests in this letter (items 3–5), omitted here, which sought documents showing that any contracted out work was offered first to unit employees (item 3), documents showing that unit employees were unavailable to perform contracted out work (item 4), and documents relating to any work the Employer claimed was "warranty or specialty work" (item 5). The employer's response to these requests are not alleged in the complaint to violate the Act.

> July 2015 to present. We are requesting total and prompt response by Monday April 11, 2016. . . .

Mohan responded, about an hour and a half later:

> 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.

That afternoon, April 5, Phillippi wrote back:

> 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 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.

On April 12, Mohan wrote Phillippi:

> My answers have not changed regarding the UMWA information request you are referring to.

Mohan testified that some of the information requested would not have been maintained, and some, particularly estimates and offers, might no longer exist, but to determine that she would have had to try "to see if anyone kept old emails and attachments." However, she admitted that as to each of these requests she did not ask anyone how to get this information, or whether or where it existed. She consulted with Wilkinson, who advised her to respond to the requests as she did. Mohan testified that that she "would not know where to begin" to collect the information, as "each department handles their own specific issues, and each department head has changed multiple times during this time frame."

To date, this information has not been provided. However, the Union has received similar information in past years pursuant to requests for information. Indeed, similar information was provided in response to requests made in April and May 2016 by Phillippi, which sought information on certain contractors during specified times in April and May. Some information was provided in response to those requests. See, R. Exh. 1.

The Respondent's use of contractors was a frequent source of disputes with the Union. It was the source of many grievances, and multiple arbitrations. It was also a source of multiple information requests, beyond the ones at issue here. More generally, the evidence shows that in 2015 and 2016, the Union, usually through Phillippi, was very active in requesting information from the Respondent on a range of subjects. Most of these requests were to Mohan. Phillippi and Mohan's emails on the subject of information requests show that they were in email contact sometimes multiple times in a day. The exchanges are often spirited, but for the most part the requests were addressed.

Analysis

The General Counsel alleges that the Respondent's failure to provide the information requested in response to items 1[37] and 2[38] of the Union's March 28, and 31, 2016 request for contractor information violated the Act.

The requests constituted an effort to learn the nature, extent, cost, and duration of work being performed by non-employee contractors at the mine for a 9-month period. As the requests seek nonunit information, the relevance of the request is not presumed but must be shown. *Disneyland Park,* 350 NLRB 1256, 1258 (2007). As to nonunit information for which relevance must be demonstrated, "the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances." Id. (footnote omitted.)

Thus, a showing of relevance by the Union is required. However, as noted, this means only a showing of a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Public Service Electric & Gas Co.,* 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998). A "discovery-type standard" governs information-request cases under Section 8(a)(5) of the Act (*NLRB v. Acme Industrial Co.,* 385 U.S. 432, 437 (1967)), even where the relevance of the information must be established, and is not presumed. *Disneyland,* supra at 1258; *Shoppers Food Warehouse,* 315 NLRB 258, 259 (1994).

Here, the record demonstrates that the contractors' work at the mine and their alleged performance of bargaining unit work, was an ongoing and repeated source of dispute between the parties. As the Respondent recognizes (R. Br. at 10), "[a]s is not surprising, the Union frequently objected to the Company's use of contractors; this issue had been the source of grievances and made its way to arbitration on multiple occasions. It has also frequently been the source of information requests to which Mohan has regularly responded" (citations to record omitted). Moreover, the collective-bargaining agreement Article IA, "Scope and Coverage," contains extensive and complex provisions permitting and prohibiting subcontracting depending on the nature of the work at issue.

In these circumstances, the relevance of the request should have been apparent to the Respondent—and indeed, Mohan, although objecting to the breadth of the request, did not question its relevance. In any event, on April 5, in response to Mohan's rejection of the request, Phillippi explained to Mohan in his follow-up note the reasons that he wanted the information: "to monitor and ensure compliance with our contract," to assess "what if any action need be taken" over the contracting out, and

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[37] Item 1 requests:

> 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.

[38] Item 2 requests:

> 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.

to assess whether the work could be done by unit employees. He emphasized the urgency of the request "since contractors such as Jennchem 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." At the hearing, Phillippi explained that the Union's concern about subcontracting that motivated this information request was based on "[a] few arbitration rulings, not just one," and the reports of employees who would report to the Union when they "saw a contractor on the property and thought maybe they were performing classified [unit] work." Phillippi testified that "[w]e believe management was violating the contract and put out an information request to find out."

Based on all of this, I find that the Union satisfied its duty to show the relevance of its request to its representational duties. The Union's request was not, as the Respondent suggests on brief, based on a "generalized conclusory explanation." Rather, the request was directly related to an ongoing issue between the parties that the Respondent admits had been the source of multiple disputes between the parties at the Monongalia mine. The Union is not limited to requesting information for specifically named or even specifically-contemplated grievances, or requests for specifically referenced incidents. The Union's right to knowledge-based representation and bargaining is not a stingily-dispensed right, but rather, a right central to the Act, and part of the promise of union representation. It is a right intended to support the bargaining process: "The objective of the disclosure [of information] obligation is to enable the parties to perform their statutory function responsibly and 'to promote an intelligent resolution of issues at an early stage and without industrial strife.'" *Clemson Bros.*, 290 NLRB 944, 944 fn. 5 (1988) (quoting *Monarch Tool Co.*, 227 NLRB 1265, 1268 (1977)). Given the multiple contract provisions regulating subcontracting, given the multiple arbitrations, grievances, and disputes that have arisen between the parties regarding subcontracting, the Union is well within its rights under the Act to seek to monitor and assess the Employer's contract compliance with the benefit of knowledge of the employer's subcontracting activities.

The Respondent cites to *Disneyland Park*, supra, a case where the Board refused to find a violation for an employer's failure to provide subcontracting information. However, that case is inapposite—and instructively so. In *Disneyland Park*, the Board found that the relevance of a union's request for subcontracting information had not been adequately supported where "pursuant to . . . the collective-bargaining agreement, the Respondent could subcontract, provided that the subcontracting did not result in a termination, layoff or a failure to recall unit employees from layoff. However, the Union made no such claim." 350 NLRB at 1258. By contrast, here the Union directly raised this concern to Mohan of layoffs in explaining the information request and unlike the *Disneyland* contract, the labor contract governing the coal mine is replete with subcontracting limitations and rules on which work is "classified"—i.e., restricted to unit employees.

In response to Phillippi's requests, and his follow up explanation, on April 5, Mohan "maintained the position that [the request] is burdensome and lacks specifics, as stated in my previous response." Mohan wrote that Phillippi should "narrow your requests for information down to a specific date, grievant, contractor, project, etc., and I may be able to provide more information."

Mohan's response is insufficient under the Act. Indeed, it is not straightforward, given that it is clear from Mohan's testimony that she made no effort to check with anyone as to where this information could be found or to what extent the Respondent maintained it. In this regard, the Respondent was obliged to make a reasonable effort to secure the requested information and, if unavailable, explain or document the reasons for the asserted unavailability. *Goodyear Atomic Corp.*, 266 NLRB 890, 896 (1983); *Garcia Trucking Service*, 342 NLRB 764, 764 fn. 1 (2004). It is not unsurprising that the HR department would not maintain much in the way of contractor information—however, the Respondent's good faith duty to provide information requires effort to look beyond the individual office of the individual receiving the information request. But the evidence is that Mohan made no effort to investigate the request internally, and made no effort to comply—even in part—with either of these requests.

As to its claim of burdensomeness, the Respondent has the to do more than assert burdensomeness—it has the "burden of proving its contention that providing the requested information would be overly burdensome." *Mission Foods*, 345 NLRB 788, 789 (2005). The Respondent's blanket assertion to the Union is unavailing. In addition to proving the burdensomeness claim, the Respondent's duty when faced with an ambiguous or overbroad request is to seek an accommodation with the Union. *Goodyear Atomic Corp.*, 266 NLRB 890, 891 (1993). However, a demand, such as Mohan's—for the Union to limit its requests to "a specific date, grievant, contractor, project, etc."—does not amount to a good faith-effort to reach a mutually acceptable accommodation. Indeed, this is precisely the type of information that the Union did not have and was seeking. There is no doubt but that the request was extensive. But the Respondent was essentially asking Phillippi to bargain against himself, and limit his request based on no showing of burdensomeness and no offer to produce (or even look for) any of the information. Had the Respondent made an effort to supply the information—even some of it—and documented to the Union the reasons that some of the request could not be met, we might have a different case. Certainly, the Board considers the complexity and extent of the information requested, and the difficulty retrieving the information, in evaluating the promptness of response required of the employer. *West Penn Power Co.*, 339 NLRB 585, 587 (2003); *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). However, here the Respondent essentially dismissed the request, demanding instead that Phillippi provide exactly the information he did not have, and was seeking through the request, as a condition for Mohan be willing to provide anything. The Respondent offered to provide nothing. Particularly given the admission that she made no effort to comply with the request, or to even investigate what information was available, the Respondent's demand of Phillippi does not reflect a good-faith effort to accommodate the union's request.

Finally, the Respondent argues that the Union's information

request was made in bad faith. The Respondent's "evidence" on this score is the volume of information requests made by the Union over a 9-month period, August 2015 through May 2016 (R. Exh. 10), and the contention that the Union made 50 information requests between December 2015 and May 2016 "while the collective-bargaining negotiations were ramping up between the parties." (R. Br. at 9). The Respondent asserts that the extensive information requests focused on Monongalia County mine—and not the other Murray American mines—and that the requests constituted an effort to "badger" Mohan, who was the only HR employee assigned to Monongalia, and more generally to "put pressure on the Respondent." (R. Br. at 9).

This is a make-weight argument. In the first place, "[b]ad faith is an affirmative defense to an information request and must be pled and proved by the Respondent." *North Star Steel Co.*, 347 NLRB 1364, 1401 fn. 20 (2006); *Hawkins Construction*, 285 NLRB 1313, 1322 fn. 20 (1987), enf't denied on other grounds, 857 F.2d 1224 (8th Cir. 1988). Neither the Respondent's answer to the complaint nor the 14 affirmative defenses it pled raise this defense.

Moreover, and independently, review of the information requests introduced into evidence show nothing on which proof of bad faith can be based. The volume of the information requests does not establish bad faith. Indeed, the information requests show vigilant and aggressive union representation—a union exercising its rights under the Act to question, demand information, and seek out answers from the employer on behalf of the employees it represents. That it was more aggressive than the Respondent would like does not even begin to make out a claim of bad faith. The Respondent's charge that the Union increased information requests in preparation for collective-bargaining negotiations is unproven, but irrelevant. Were it true it is evidence of a union preparing for negotiations, nothing more. That there were more requests at Monongalia than at other mines is of no consequence at all. That the presence of the Union generated more than enough work for one HR representative simply means that this large consortium of a company, with resources and means to employ many HR employees across its holdings, needed to reallocate resources internally.

"[T]he presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown"*; International Paper Co.*, 319 NLRB 1253, 1266 (1995), enf't denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997). Moreover, the Board holds that the good-faith requirement will be satisfied where any of the union's reasons for seeking the information can be justified. *Hawkins*, supra at 1314. Here, the Respondent has failed to prove that the requests were in any way—much less solely—made in bad faith.[39]

I find that the Respondent violated Section 8(a)(5) and (1), as alleged, through its failure to provide any of the requested information for items 1 & 2 of the March 28 and 31, 2016 information request.

9. Unilateral change in hearing location for step three grievances *(Marion County Mine—complaint ¶34)*

As referenced above, the parties follow the grievance procedure set out in the National Coal Bituminous Coal Wage Agreement. It contains a four-step grievance procedure culminating in final and binding arbitration. As discussed, the initial step one involves an oral complaint by an employee to his immediate foreman. If no agreement is reached, step two involves the grievance being reduced to written form on a grievance form and pursued by the Union's mine committee with mine management. Step three involves a meeting between an Employer representative and a UMWA district representative.

Third step grievants do not have to be, and are not always at step three meetings. However, according to both the Union and the Employer witnesses, grievants have a right to attend the third step grievances. Thomas "Pete" Simpson, the general manager of Marion County Coal testified that grievants "have every right to attend the step 3 meetings." Phillippi, testified that "the grievant through the contract has the right to be there for every step of the grievance procedure."

Grievants attend step three meetings off the clock. They are not paid—neither wages nor expenses—if they choose to attend. Phillippi testified that in his experience, grievants attend the majority of the step three meetings. General Manager Simpson testified that "more times than not," grievants do not attend the step three meetings. Wilkinson suggested that grievants participate "[m]ore so at step two than other steps," but did not venture as to how often they attend.

At the Marion County mine, there are three portals at which employees report to work: the Sugar Run portal, Miracle Run portal, and the Metz portal. There is also a prep plant to which some employees report. It is close to the Sugar Run portal. Most of the mine's administrative and managerial offices are located at the Metz portal. It is the "main hub." Approximately 65–75 percent of the mines' employees report to work at the Metz portal. It takes employees between 15–20 minutes on back roads, and by main roads 20–30 minutes to travel from one portal to another. The testimony suggests that the backroads routes are rugged and not well maintained, and suitable only for 4-wheel drive vehicles.

Step three grievances are often heard 10–20 at a time for reasons of efficiency. The typical practice at the Murray American mines until approximately October 2015, was that step three grievances were heard at the portal where the grievant works. Exceptions to this practice appear, based on the record, to be limited to times when the union agreed to discuss the step three at a different location.[40]

[39] The Respondent cites to *NLRB v. Wachter Construction, Inc.*, 23 F.3d 1378 (8th Cir. 1994), a case where the Court of Appeals refused to enforce a Board order finding a violation of the employer's duty to provide information where the court found that the union's request was made in bad faith. But in *Wachter* there was affirmative evidence that the union's information request was intended to harass and coerce employers to do business only with union firms. See *Supervalue, Inc. v. NLRB*, 184 F.3d 949, 952 (8th Cir. 1999) (explaining and distinguishing *Wachter*). There is no similar evidence here—only evidence that the Union's requests added to the work burden of the HR employee assigned to Monongalia County Coal.

[40] The fact of this practice is evidenced by the testimony of Phillippi, who said this was the case "well over 95 percent" of the time; by the

On September 26, 2016, Phillippi emailed Baum and Layton and requested to arrange step three meetings at each of the three portals, indicating some dates he was available in October. After some back and forth about which grievances and dates, on October 4, Baum wrote to Phillippi stating:

> Mike,
> We are available to hear these Step 3's for Sugar [Run portal] and the Prep Plant on Wednesday October 12th. Management wants to hear these grievances at the Metz portal.

Phillippi wrote back that afternoon:

> Tim, Wednesday is fine but they should be held at the portals at which the grievance occurred. The local Union is willing to make an exception if management agrees to let the grievants travel from sugar run and the plant to Metz to hear their grievances while staying on the clock. Thanks,

After checking with other management, Baum wrote back that "Management will not able to accommodate your request." In response, Philliippi asked, "Are we having step 3 at sugar run portal then?" Baum wrote back, "No, management wants to hear the grievances at Metz portal." Phillippi responded: "Tim, we believe this is a unilateral change without first negotiating. I will let the local know and decide how best to proceed. Thanks." The next day, October 5, Phillippi followed up: "Tim, since you are currently only having grievances at the Metz portal, we would like to hear the grievances for Metz on Wednesday October 12. I'll send you list of the grievances tomorrow."

Management's position on this was confirmed on October 6, at the monthly "communication meeting" held between mine management and local union officials. At this meeting, General Manager Simpson told the officials that "if there was going to be a grievance hearing, that the grievant would come to Metz portal. He [Simpson] would not travel to the other portals." Simpson testified that he and local union president Todd argued about this "a little bit," and Todd told Simpson "in no uncertain terms that that was a past practice that they had always down these at their respective portals, and that if I decided to hold them all over at Metz, that he was going to file a labor charge. As soon as I heard that, that was the end of the discussion."

The step three meetings were held at the Metz portal on October 12. There have been no step three grievances held at (or in cases where the grievant was from) the Miracle Run or Sugar Run portals since this issue arose.

Both Baum and Simpson testified that traveling to portals other than Metz to hear step three grievances was burdensome on management, particularly Simpson, given his responsibilities and the demands of his work as General Manager. Simpson's office is at the Metz portal. Simpson, who testified that the refusal to meet away from Metz was his decision, explained that holding the meetings away from Metz put him in the position where he could not get much other work done during the day. When meetings were held at the Metz portal his office was accessible and he was able to get a lot of work done between step three meetings.

Analysis

An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are a mandatory subject of bargaining. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "'The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

There is no dispute but that the grievance procedures constitute a mandatory subject of bargaining. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963). Moreover, it is well settled that "the prohibition on unilateral changes to mandatory subjects of bargaining applies to established past practices even if they are not incorporated in a collective-bargaining agreement." *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 24 (2016); *Exxon Shipping*, 291 NLRB 489, 493 (1988). Here, the evidence is clear that the practice of holding step three meetings at the portal where the grievant worked was understood and adhered to by both parties.

The Respondent made a decision to change this practice. But instead of proposing it, the Respondent implemented it unilaterally, and refused to meet for step three grievances other than at the Metz portal. The Respondent admits that it failed to give notice or bargain over the location of grievance meetings. (GC Exh. 1(ggg) answer to paragraph 34). After first notifying the Union on October 4, 2016, that "Management wants to hear these grievances at the Metz portal," later in the day Baum made clear in response to Phillippi's inquiry that what he meant

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testimony of UMW International Representative Payton, who testified that step three grievances were always held at the portal where the grievant worked, with no exceptions as far as he knew. Assistant Manager of Employee Relations Baum agreed that "[g]enerally speaking" it was "correct" that between January 1, 2014 and October 4, 2016, "step three grievances had been held at the mine portal where the grievant worked with a few limited exceptions." General Manager Simpson testified that when he became general manager at the Marion County mine in March 2016, he was told, probably by HR Supervisor Layton, that step three grievances "were generally held at the portal at which they occurred." Simpson testified that he was not certain, but his understanding was that this had been going on for quite some time. Simpson described some exceptions to that, giving the examples of where "the union knows that [the grievant] is definitely not going to be there . . . then they may bring it up at any of the portals" when the opportunity arises, and where a union committeeman was handling a grievance where he was the grievant, and he was doing step three grievances at a different portal, "they might go ahead and bring their grievance up at a step three, and it would be at a different portal than where they had been because they were a committeeman." See also, Jt. Exh. 3, stipulation 11.

was management was unwilling to hear the Sugar Run grievances at the Sugar Run portal. The Union accused the Respondent of committing a unilateral change without negotiating—Baum said nothing to deny or counter the impression. Moreover, on October 6, Simpson, who was behind the change, made it clear to local union officials that "[h]e would not travel to the other portals" to hear grievances.

This is the opposite of providing the Union with notice and an opportunity to bargain. It constitutes an unlawful unilateral change in violation of Section 8(a)(5) of the Act. At trial, Simpson offered significant testimony as to the burdensomeness of having to travel to each portal and away from his office to hear step three grievances. My finding of a violation, of course, does not suggest that there is not merit to his concerns. But it is precisely those concerns that should have been raised with the Union during good faith negotiations over the subject. Simpson's concerns about the practice is not a matter for this tribunal to address. It is a matter for collective bargaining.

The Respondent's defense is its contention that the change is not material, but rather, "the very definition of *de minimis*" (R. Br. at 8), as it will affect only those who do not work from the Metz portal, who file a grievance that is not resolved at step two, and who elect to attend the step three meeting, and as to that subset of employees, it will likely only affect them once.

I agree that the number of employees who will be directly affected by this change is likely few—at least as a percentage of the total workforce. But that is the wrong frame of reference (and could be said for the grievance procedure as a whole—most employees at most facilities will never be a grievant or have reason to attend a grievance meeting at any step). "The fact that a unilateral change . . . may have affected only one unit employee and not other members of the bargaining unit does [not] render the change inconsequential or insubstantial." *Ivy Steel & Wire*, 346 NLRB 404, 419 (2007); *Caterpillar, Inc.*, 355 NLRB 521, 523 fn. 17 (2010); *Carpenters Local 1031*, 321 NLRB 30, 32 (1996). For those individual employees affected by this unilateral change, there can be no doubt, in my view, of the materiality of the change. A 20–30 minute drive, unpaid (or 15–20 minutes on inhospitable back roads), and likely a return trip, is hardly a de minimis change, compared to the convenience of attending a meeting where one works. I find that the unilateral change is material and a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondents Murray American Energy, Inc., Harrison County Coal Company, Marion County Coal Company, Monongalia County Coal Company, and Marshall County Coal Company (collectively the Respondent) are employers within the meaning of Section 2(2), (6), and (7) of the Act.

2. Murray American Energy Inc. and Harrison County Coal Company constitute a single employer under the Act; Murray American Energy Inc. and Marion County Coal Company constitute a single employer under the Act; Murray American Energy Inc. and Monongalia County Coal Company constitute a single employer under the Act; and Murray American Energy Inc. and Marshall County Coal Company constitute a single employer under the Act.

3. The Charging Parties United Mine Workers of America, AFL–CIO, CLC (UMW) and its local unions, Local 1501, and Local 9909, are each a labor organization within the meaning of Section 2(5) of the Act (collectively referred to as the Union).

4. At all material times, the UMW and/or one of its local unions have been the designated exclusive collective-bargaining representative of a bargaining unit of hourly production and maintenance employees at each of the mines operated by each Respondent named above, and described in this decision, with the terms and conditions of each bargaining unit governed by the terms of the National Bituminous Coal Wage Agreement of 2011 and the National Bituminous Coal Wage Agreement of 2016.

5. The Respondent, at the Harrison County coal mine, in January 2016, violated Section 8(a)(1) of the Act by threatening an employee with unspecified reprisals if the employee filed a grievance.

6. The Respondent, at the Marion County coal mine, on or about February 23, 2016, violated Section 8(a)(1) of the Act by informing an employee he would be disciplined for requesting union representation, and impliedly threatening employees with discharge for requesting union representation.

7. The Respondent, at the Marion County coal mine, on or about February 23, 2016, violated Section 8(a)(3) and (1) of the Act by suspending employee Michael DeVault in retaliation for requesting union representation.

8. The Respondent, at the Marion County coal mine, on or about December 16 and 17, 2015, violated Section 8(a)(1) of the Act by directing employees to submit safety complaints to management rather than to federal and state authorities.

9. The Respondent, at the Marion County coal mine, on or about December 17, 2015, violated Section 8(a)(1) of the Act by threatening an employee with discharge for engaging in protected and concerted activities.

10. The Respondent, at the Morgantown, West Virginia MSHA office, on or about February 17, 2016, violated Section 8(a)(1) of the Act, by engaging in surveillance of employees engaged in activity protected by the Act.

11. The Respondent, at the Marshall County coal mine, on or about June 8, 2016, violated Section 8(a)(1) of the Act by threatening employees that the filing of grievances would result in the mine being shut down.

12. The Respondent, at the Marshall County coal mine, on or about June 8, 2016, violated Section 8(a)(3) and (1) of the Act by suspending employee Mark Moore in retaliation for Moore's filing of grievances under the Act and his refusal to promise to cease such activities.

13. The Respondent, at the Marshall County coal mine, on or about September 19, 2016, violated Section 8(a)(3), (4), and (1) of the Act by suspending employee Mark Moore in retaliation for Moore's protected and concerted activity under the Act and for being the subject of an unfair labor practice charge filed by his Union.

14. The Respondent, at the Marshall County coal mine, on or about September 13, 2016, violated Section 8(a)(1) of the Act by threatening to discipline an employee if he asked for union representation.

15. The Respondent, at the Monongalia County coal mine,

beginning on or about September 8, 2015, violated Section 8(a)(5) and (1) of the Act by unreasonably delaying the furnishing of relevant information requested by the Union including the invoice of hours billed by contractors performing work associated with pumpable crib bags from March 24, 2015 through September 8, 2015.

16. The Respondent, at the Monongalia County coal mine, beginning on or about December 22, 2015, violated Section 8(a)(5) and (1) of the Act by unreasonably delaying the furnishing of relevant information requested by the Union including a list of all hourly employees on the Bradford C&E plan as of January 2014.

17. The Respondent, at the Marion County coal mine, beginning on or about December 18, 2015, violated Section 8(a)(5) and (1) of the Act by unreasonably delaying the furnishing of relevant information requested by the Union including a list of all hourly employees who have belt examiners certificates, assistant mine foremen certificates, and/or a mine foremen certificates.

18. The Respondent, at the Monongalia county coal mine, beginning on or about March 28, 2016, and continuing thereafter, violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the relevant information requested by the Union, including requested information (request items 1 & 2) on contractors and the nature of the work they were performing between July 2015 and March 31, 2016.

19. The Respondent, at the Monongalia county coal mine, beginning on or about December 22, 2015, and continuing thereafter, violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the relevant information requested by the Union, including a list of all hourly employees currently on the new C&E plan, and a copy of all C&E plan policies and changes since the Murray acquisition.

20. The Respondent, at the Marion County coal mine, beginning on or about October 4, 2016, and continuing thereafter, violated Section 8(a)(5) and (1) of the Act by implementing a unilateral change to the grievance procedure by changing the location for step three grievances, without affording the Union an opportunity to collectively bargain.

21. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully suspended employee Mark Moore on June 8, 2016, and again on September 19, 2016, shall make Moore whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful suspensions of him. The make whole remedy shall be computed in accordance with *Ogle Protection Service, Inc.,*183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate Moore for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 6 a report allocating backpay to the appropriate calendar year for Moore. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall also be required to remove from its files any references to the unlawful discipline of Moore and to notify him in writing that this has been done and that the discipline will not be used against him in any way.

Although I have found that employee Michael DeVault was unlawfully issued a suspension in retaliation for engaging in protected activity, the record indicates that the suspension was not implemented, hence there is no need for a backpay make-whole remedy. There is also indication in the record that all discipline related to the incident was rescinded and all reference to the discipline removed from the Respondent's files. To the extent that has not occurred, it is ordered as part of the remedy in this matter, and DeVault shall, in any event, be notified that this has been done and that the discipline will not be used against him in any way.

The Respondent, having unlawfully failed and refused to furnish the Union with requested information, shall provide the Union with the information from items 1 and 2 of the Union's March 28, 2016 information request, and, as requested by the Union December 22, 2015, provide a list of all hourly employees on the C&E plan, and a copy of all C&E plan policies and changes since the Murray acquisition.

The Respondent, having unlawfully unilaterally implemented a change in location for step three grievance meetings shall be ordered to rescind the change and restore the status quo ante.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at each of the Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended[41]

ORDER

The Respondents Murray American Energy, Inc., Harrison County Coal Company, Marion County Coal Company, Monongalia County Coal Company, and Marshall County Coal Company (collectively the Respondent), St. Clairsville, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening any employee with reprisals if he or she files grievances.

(b) Informing any employee that he or she will be disciplined for requesting union representation.

(c) Threatening employees with discharge for requesting union representation.

(d) Suspending any employee in retaliation for requesting union representation.

(e) Directing employees to submit safety complaints to management rather than to federal and state authorities.

(f) Threatening any employee with discharge for discussing safety issues.

(g) Engaging in surveillance of employees while they are engaged in union or other protected activity.

(h) Threatening employees that the filing of grievances will result in the mine being shut down.

(i) Suspending any employee in retaliation for filing grievances and/or refusing to promise to cease such protected activities.

(j) Suspending any employee for union or other protected activity and/or for being the subject of an unfair labor practice charge.

(k) Refusing to collectively bargain with the Union by unreasonably delaying furnishing it with requested information that is relevant to the Union's performance of its functions as the collective-bargaining representative of the Respondent's bargaining unit employees.

(l) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(m) Unilaterally implementing a change to the grievance procedure without affording the Union an opportunity to collectively bargain.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make employee Mark Moore whole for any loss of earnings and other benefits suffered as a result of the unlawful discriminatory discipline against him in the manner set forth in the remedy section of this decision.

(b) Compensate Mark Moore for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar year.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discriminatory discipline of Mark Moore and Michael DeVault, and within 3 days thereafter, notify these employees in writing that this has been done and that the discipline will not be used against them in any way.

(d) Furnish to the Union in a timely manner the information responsive to items 1 and 2 of the Union's March 28, 2016 information request.

(e) Furnish to the Union in a timely manner a list of all hourly employees on the C&E plan, and a copy of all C&E plan policies and changes since the Murray acquisition, as requested by the Union on or about December 22, 2015.

(f) Rescind the change in the step three grievance procedure regarding the location of step three grievance meetings that was unilaterally implemented on or about October 4, 2016.

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

(h) Within 14 days after service by the Region, post at its facilities in St. Clairsvillle, Ohio, Mannington, West Virginia, Metz, West Virginia, Kuhntown, Pennsylvania, and Cameron, West Virginia, copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by the Respondent at any time since September 8, 2015.

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

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

(i) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 8, 2017

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with reprisals for filing grievances.

WE WILL NOT inform you that you will be disciplined for requesting union representation.

WE WILL NOT threaten you with discharge for requesting union representation.

WE WILL NOT suspend you in retaliation for you requesting union representation.

WE WILL NOT direct you to submit safety complaints to management rather than to federal and state authorities.

WE WILL NOT threaten you with discharge for raising safety issues or engaging in other activities protected by the National Labor Relations Act.

WE WILL NOT engage in surveillance of you while you are engaged in union or other activity protected by the National Labor Relations Act.

WE WILL NOT threaten you by telling you that the filing of grievances will result in a shutdown.

WE WILL NOT suspend you in retaliation for filing grievances and/or refusing to promise to cease such activity.

WE WILL NOT suspend you for engaging in union or other protected activity and/or for being the subject of an unfair labor practice charge.

WE WILL NOT unreasonably delay in furnishing the Union with requested information that is relevant to the Union's performance of its functions as your collective-bargaining representative.

WE WILL NOT fail and refuse to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as your collective-bargaining representative.

WE WILL NOT unilaterally implement changes to the grievance procedure without affording the Union notice and an opportunity to bargain over the change.

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

WE WILL make employee Mark Moore whole for any loss of earnings and other benefits suffered as a result of our unlawful discipline of him, plus interest.

WE WILL compensate Mark Moore for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline taken against Mark Moore and Michael DeVault, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL furnish to the Union in a timely manner the information requested by the Union on or about March 28, 2016 (items 1 & 2), and on or about December 22, 2015, to the extent not already provided.

WE WILL rescind the changes in the step three grievance procedure that were unilaterally implemented on or about October 4, 2016.

MURRAY AMERICAN ENERGY, INC., HARRISON COUNTY COAL COMPANY, MARION COUNTY COAL COMPANY, MONONGALIA COUNTY COAL COMPANY, AND MARSHALL COUNTY COAL COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-169736 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.