

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

ROCKWELL MINING LLC

and

Case 09-CA-206434

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

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF**  
**TO RESPONDENT'S ANSWER**  
**TO EXCEPTIONS FILED BY GENERAL COUNSEL**

Pursuant to Section 102.46(h) of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel hereby submits a Reply Brief to Respondent's Answering Brief.

In answering General Counsel's exceptions to Judge Bogas' Decision, Respondent continues its attempts to steer the Board's attention towards the outcome of Hager's accident, while glossing over its uncontested history of showing leniency towards employee accidents. Respondent would have this Board begin and end its review of this matter with Hager's accident – mischaracterizing the General Counsel as second-guessing its decision to terminate Hager. (R. Ans. Br. p. 10) <sup>1/</sup> In support, Respondent cited multiple cases that stand for the general notion that an employer acts lawfully when it terminates an employee who engages in misconduct and causes property damage. *Id.* Respondent has chartered this course because it knows full well that its history of responding to employee misconduct, and accidents that caused property damage, with leniency, renders its decision to terminate Hager an anomaly.

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<sup>1/</sup> References to the Administrative Law Judge's Decision will be designated as (ALJD p. \_\_\_\_); references to Respondent's answering brief will be designated as (R. Ans. Br. p. \_\_\_\_); references to the trial transcript will be designated as (Tr. \_\_\_\_); references to the General Counsel's exhibits are designated as (G.C. Ex. \_\_\_\_); references to the Joint exhibits will be designated as (J. Ex. \_\_\_\_); and references to Respondent's exhibits will be designated as (R. Ex. \_\_\_\_).

Prior to Hager, Respondent had **never** terminated another employee who engaged in misconduct resulting in property damage. (ALJD p. 17, ll. 9-12) That includes employee David Muenich, who negligently operated a loaded fuel truck on a combustible coal seam in an area where other pieces of equipment and employees were located. (Tr. 214-215) Even more, that accident was Muenich's second—he previously broke the tail light of a “lizard truck” by backing that truck into a crusher. (J. Ex. 1; G.C. Ex. 7) Instead of terminating a two-time violator of Respondent's safety and misconduct policies, who admitted to being inattentive, Respondent showed leniency and returned Muenich to work after a 3-day suspension. (J. Ex. 1) This is the same employment decision that Judge Bogas found to be influenced by antiunion animus. (ALJD p. 15, ll. 48-49) Yet, Respondent chose to terminate Hager on the heels of his open and active union and Board activities for a split-second decision, in an area of the mine where no other employees were located, even though Hager had no other documented instances of misconduct while working at Glancy. <sup>2/</sup>

Implicitly acknowledging the damning implications of its disparate treatment, Respondent dangles before the Board the shiny lure of repair costs and man-hours to distract from its true motivations. The undersigned respectfully urges this Board to refrain from taking the bait. Muenich's accident caused in excess of \$10,000 in damage to his fuel truck, an amount that Respondent considered to be “major equipment damage.” (G.C. Ex. 6; R. Ex. 18) As Evans put it, it was “an expensive situation,” which kept the fuel truck out of service for several weeks. (Tr. 184, 284) And as Evans admitted, the expense incurred due to Hager's accident was not the

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<sup>2/</sup> Evidence that Respondent refrained from terminating known union supporters **after** Hager's termination is unavailing. Failure to terminate or otherwise discipline known union supporters after Hager's termination evinces nothing more than Respondent's understanding that it was being investigated for unlawfully terminating a leading union adherent, and further similar actions might sour its chances of successfully defending itself.

overriding factor in deciding to terminate his employment. (Tr. 185) <sup>3/</sup> While Hager's accident resulted in larger repair costs and a bit more out-of-service time, a quick reading of Respondent's written policies discloses that disciplinary actions are not contingent upon damage totals. All Respondent is supposed to consider is whether the misconduct resulted from negligence. (J. Ex. 7) Both Muenich and Hager were found by Respondent to have acted negligently, yet it was the person with no known union sympathies and a prior accident who was returned to work, and the leading union adherent with no prior history of misconduct or accidents who was terminated. <sup>4/</sup>

Finally, the leniency that Respondent would have shown Hager but for his protected union and Board activities is further borne out in Respondent's own evidence. Respondent contends that "[e]ven if Evans and Milam ultimately concluded that Hager was not task trained on the rock truck, Respondent is not required to consider it as a mitigating factor just because the General Counsel thinks it should." (R. Ans. Br. p. 14) It is not the General Counsel who "thinks [Respondent] should." On the contrary, it is Respondent's own decision makers who do. Respondent's decisional document summarizing the reasons for Hager's termination states that "[m]anagement took Mr. Hager's comments on the training into consideration when making a decision," and Milam testified that "[Respondent] definitely would have looked at [Respondent's failure to task train Hager] and taken it into consideration as far as mitigating circumstances surrounding the accident." (Tr. 348-349; G.C. Ex. 3)

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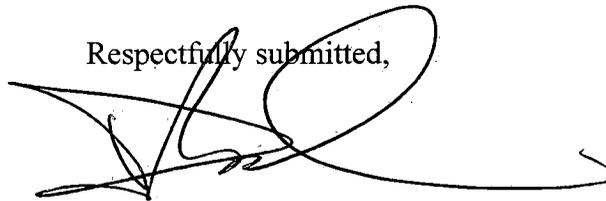
<sup>3/</sup> Respondent makes the incredible claim, for the first time in these proceedings, that Hager's accident caused a 22-day stoppage of Respondent's operation at Glancy. (R. Ans. Br. p. 5) That assertion was not supported by any citation to the record, has no basis in the record, and should be summarily rejected.

<sup>4/</sup> In Respondent's attempt to cast aside its written disciplinary policy, it claims that Evans evaluates all incidents individually. (R. Ans. Br. p. 7) The obvious self-serving nature of that assertion cannot be understated. Extrapolated further, Respondent implicitly admits that it chooses to deviate from an overtly specific disciplinary rule when it sees fit. The clear problem for Respondent in so arguing, however, is that it has admitted that Evans injects subjective considerations into what should be an objective decision. And as has already been established, *ad nauseam*, Judge Bogas found that Evans once inserted anti-union considerations when deciding to return Muenich to work. It follows, then, that Evans again let his subjective anti-union sentiments infect his decision to terminate Hager, the leading union adherent with no disciplinary record and who openly challenged Evans on multiple occasions in all-employee meetings. (Tr. 49-51, 108)

By Respondent's own admission, its "investigation" into Hager's claim that he was never task trained began—and ended—with its reliance on Miller's assertion that Hager's task training had been completed short of his signing the form. (R. Ans. Br. p. 14) Miller's claim that a week had passed before he attempted to garner Hager's signature on the task training form is objective evidence that should have reasonably caused Evans and Milam to dig further. They turned a blind eye, or understood the gravity of Miller's mistake and overtly chose to ignore it anyway, knowing full well that Respondent had a history of leniently finding mitigating circumstances in **every other** case of employee-caused accidents at Glancy. Should it have acknowledged the depth of Miller's deception, Respondent would have been left to reach the conclusion that Hager had not been trained. And as Milam's decisional document and testimony made clear, if Hager had not been task trained, Respondent would have **definitely** taken that fact into consideration. Given that neither Milam nor Evans testified that Respondent would have discharged Hager notwithstanding whether he was task trained, one can only infer that it would not have.

Dated: August 29, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel A. Goode", with a large, sweeping flourish extending to the right.

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CERTIFICATE OF SERVICE

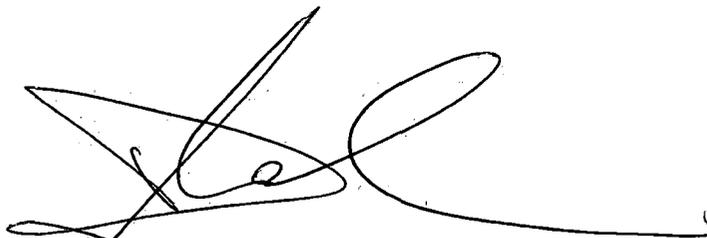
August 29, 2018

I hereby certify that I served the attached Counsel for the General Counsel's Reply Brief to Respondent's Answer to Exceptions Filed by General Counsel on all parties by electronic mail at the addresses listed below:

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