

**Dollar Branch Coal Company, Division of Chaney
Creek Coal Corporation and Jimmy Sizemore.**
Case 9-CA-19020-1

27 July 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 25 August 1983 Administrative Law Judge Walter J. Alprin issued the attached decision. The Respondent filed exceptions and a supporting brief,¹ and the Charging Party filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified, and to adopt the recommended Order³ as modified.

The judge concluded that the Respondent violated Section 8(a)(1) of the Act by discharging employee Jimmy Sizemore because he and other employees complained about their working conditions. We agree with the judge, but only for the following reasons.

The pertinent facts, more fully set forth in the judge's decision, are as follows.

In September 1982,⁴ the Respondent changed the third-shift working hours at its mine from 11 p.m. to 7 a.m. to 2 to 10 a.m. Sizemore and other employees who worked the shift were dissatisfied with the new schedule and asked their leadman, Ronnie Napier, to speak to Superintendent Glen Caldwell about returning to the original working hours.⁵ Napier later told third-shift employees that

he had spoken with Caldwell, but that Caldwell could not switch the hours for them.

About 10:45 p.m. on 8 November, Ronnie Napier and another third-shift employee, Delbert Couch,⁶ both intoxicated, went to the mine, ordered the entire second shift out at gunpoint, closed the mine, and forced the second-shift employees to join them in a "strike." Napier and Couch kept the mine closed throughout the night, making it impossible for either the second or third shift to work.⁷ Napier and Couch allowed second-shift employees to leave the mine around 2 a.m., by which time all third-shift employees had reported to work. The third-shift employees, aside from Ronnie Napier and Couch, were Sizemore, Mosley, David Rife, and Rickey Napier.⁸

Throughout the night, Napier and Couch telephoned Caldwell at his home and asked him to come to the mine to discuss the change in shift hours and an insurance matter apparently of concern only to Napier. Caldwell waited until he thought Napier and Couch were no longer intoxicated, and came to the mine at 5 a.m.⁹ He met with the six employees and asked them in turn to state their complaints. Ronnie Napier, Rife, and Sizemore replied that they disliked the new working hours and wanted to return to the 11 p.m. to 7 a.m. hours.¹⁰ Rickey Napier and Mosley said nothing. Caldwell listened to the responses and then sent the employees home, telling them to return to work on the next shift.

Caldwell's superior, John Chaney, spoke with Caldwell that morning, 9 November, about the events at the mine, and Caldwell recounted the employees' complaints to him. Chaney concluded that employees on both shifts had participated in closing the mine and initially decided to discharge them all. Later in the day, however, Caldwell told Chaney that second-shift employees had not been involved. Chaney instructed Caldwell to fire everyone on the third shift, allegedly for destroying

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has implicitly 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.

³ In accord with *Sterling Sugars*, 261 NLRB 472 (1982), we shall modify the judge's recommended Order to require the Respondent to remove from its files any reference to the unlawful discharge and notify Sizemore in writing that this action has been taken and that the discharge will not be used against him in any way.

⁴ All dates are in 1982.

⁵ Third-shift employee Donnie Mosley worked outside the mine as a loader and was the only employee on that shift whose hours were not changed; he continued to work the 11 to 7 shift. The judge inadvertently refers to Mosley as "Mosely."

⁶ The judge inadvertently refers to Couch as "Crouch."

⁷ The judge more fully details Napier's and Couch's unprotected conduct; we note, however, that insulators were shot off the power line, and a shot was fired through the mine office door.

⁸ Rickey Napier is unrelated to Ronnie Napier; all references to "Napier" refer to Ronnie.

⁹ All six third-shift employees had remained at the mine, waiting for Caldwell. According to Mosley's undisputed testimony, Napier stated that Caldwell "was going to meet to see what their demands was [sic] and see what all the complaints were." Sizemore testified that he stayed at the mine to "find out when they [sic] Caldwell was to come in and what was going on. What about the hours and stuff."

¹⁰ Although the judge found that Couch also complained about the hours at this meeting, Couch did not testify, and the record is unclear as to what, if anything, he may have said to Caldwell. Rife testified he told Caldwell that the new work schedule was making him sick, and Sizemore testified he told Caldwell that he just wanted what the others wanted, to have the original shift hours restored.

property and drinking on the job. Caldwell discharged Rickey Napier that afternoon. Rickey met with Caldwell and told him he had not been involved. After Caldwell so informed Chaney, Rickey was rehired sometime on 9 November.

When Mosley reported to work the next night, Caldwell fired him, allegedly for refusing to identify the employee responsible for the shooting while the mine was closed. The Respondent also discharged Rife, for reasons undisclosed on the record. Both filed charges with the Board, and the Respondent rehired them in return for withdrawal of their charges. Sizemore reported to work on the 2 a.m. shift, but Caldwell said he was expecting more trouble and that Sizemore should go home and return to the mine later in the day. When Sizemore returned as instructed, Caldwell told him he was fired because of the mine closing and his complaints about the hours.¹¹

Sizemore filed for unemployment compensation with the Kentucky unemployment commission shortly after his discharge. In the unemployment proceeding, Caldwell stated that the Respondent discharged Sizemore for refusing to work on 9 November and for complaining about shift hours. Chaney did not appear before the unemployment commission, but testified in the instant proceeding that the Respondent discharged Sizemore because he destroyed company property and was drinking on the job. Chaney denied that Sizemore's complaints had any bearing on his discharge.¹²

The Respondent has advanced differing and often contradictory reasons for Sizemore's discharge. According to Sizemore, Caldwell told him he was fired over the mine shutdown and complaining about the hours. Chaney authorized Caldwell to represent the Respondent before the unemployment commission, where Caldwell stated that the Respondent discharged Sizemore for complaining about the hours and refusing to work the shift he was supposed to work. Caldwell testified in the Board proceeding that Sizemore's complaints about shift hours played no part in his discharge, and that all "third-shift employees refused to work except one man [Rickey Napier]," who was reinstated. Still later in his testimony, Caldwell stated that he did not know why Sizemore was discharged, but

that Chaney's motivation in firing him was "probably" for destroying company property. Chaney testified that he discharged the third-shift employees for drinking on the job and destroying company property, but as the judge found, Chaney predicated his decision on Caldwell's report.

Thus, on two occasions, in conversation with Sizemore when he was discharged and at the unemployment hearing, Caldwell admitted Sizemore had been terminated for complaining about shift hours. There is no credited evidence supporting any of the other reasons given for the discharge—that Sizemore engaged in unprotected activity in connection with the mine closing, or that he refused to work his scheduled hours on 9 November. There is no evidence contradicting the judge's finding that only Napier and Couch engaged in unprotected activity during the night and early morning of 8 and 9 November, and the judge specifically rejected Caldwell's testimony that Sizemore refused to work that morning, crediting instead Sizemore's, Rife's, and Rickey Napier's testimony that Caldwell heard their complaints and told them to return to the mine on the following shift. In agreement with the judge, then, we find that the Respondent discharged Sizemore solely because of his complaints about the hours. There remains, however, the question whether Sizemore's complaints constitute protected concerted activity under the Act.

In *Meyers Industries*¹³ we described concerted activity as conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself," and stated:

Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.¹⁴

About 3 weeks before the mine closure, Sizemore joined with his fellow third-shift employees in sending Napier to voice their dissatisfaction about the new hours and to request a return to the previous hours. This is classic concerted,¹⁵ as well as protected,¹⁶ activity. Then, when Caldwell met with the employees at the mine on 9 November and asked them what their complaints were, Size-

¹¹ The judge found that neither Chaney nor Caldwell investigated who had been involved in the mine closure and associated destruction. The Respondent disputes this finding, contending that Caldwell testified at length about his consultations on 9 November with second-shift employees who witnessed the shutdown. Although Caldwell's testimony on this point is uncontradicted, we note that, in any event, he learned nothing from these consultations to establish that Sizemore, Rife, Mosley, or Rickey Napier was involved in unprotected activity.

¹² Although Chaney made the decision to discharge the third-shift employees, his decision was based entirely on Caldwell's 9 November report to him.

¹³ 268 NLRB 493, 497 (1984).

¹⁴ Member Zimmerman, who dissented in *Meyers Industries*, more broadly finds that Sizemore's conduct was concerted and protected under any view of the applicable law.

¹⁵ See *United Inventories of Dallas*, 239 NLRB 1414, 1415 (1979).

¹⁶ See, e.g., *McNeil Industries*, 216 NLRB 343 (1975); *Ohio Oil Co.*, 92 NLRB 1597 (1951).

more and Rife, who had not participated in the un-protected activity, again mentioned shift hours. Because Caldwell knew of the third-shift employees' earlier protest, and because Sizemore and Rife merely reaffirmed their dissatisfaction with the hours at the 9 November meeting, the Respondent's discharge of Sizemore because of those complaints clearly violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dollar Branch Coal Company, Division of Chaney Creek Coal Corporation, Manchester, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs.

"(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way."

2. Substitute the attached notice for that of the administrative law judge.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

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

WE WILL offer Jimmy Sizemore immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Jimmy Sizemore that we have removed from our files any reference to his dis-

charge and that the discharge will not be used against him in any way.

DOLLAR BRANCH COAL COMPANY,
DIVISION OF CHANEY CREEK CORPO-
RATION

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. The complaint herein issued January 11, 1983. The ultimate issue is whether Dollar Branch Coal Company, Division of Chaney Creek Coal Corporation (Respondent) engaged in an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Jimmy Sizemore. The questions involved are whether complaints generated by working conditions and erupting into antiemployer violence remain, as regards an employee not involved in the violence, concerted activities protected by the Act, and whether the discharge resulted from these activities. The matter was heard by me at Corbin, Kentucky, on April 26, 1983.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs submitted about June 2, 1983, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, mines and processes coal at Manchester, Kentucky. It admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Until September 1982¹ the five-member third shift at Respondent's mine operated from 11 p.m. to 7 a.m. The shift hours for all but the "outside loader" were then temporarily changed to operate from 2 to 10 a.m, in order to increase production to fill current orders. In the middle of October, Charging Party Jimmy Sizemore and other employees discussed the new hours with their foreman Ron Napier² and asked him to see about returning to the original shift hours. Napier said he would speak to his supervisor, Mine Superintendent Caldwell. He later reported back that Caldwell would not do anything about the shift hours.

On November 8, at the end of the third shift, employee Rife had car trouble, and joined coemployees Crouch and Napier. They spent the day playing pool and drinking beer, and during the afternoon Crouch and Napier mentioned closing the mine. Rife fell asleep in Napier's car, and woke up to find himself at the mine shortly after

¹ All dates are in 1982 unless otherwise stated.

² There are two individuals here involved named Napier. Ron Napier, foreman of the third shift, was not a supervisor within the meaning of the Act. Rickey Napier, always referred to by his full name, was also employed on the third shift.

10 p.m., though the shift did not start until 2 a.m. Crouch and Napier had continued drinking and were intoxicated.

Napier used the mine phone to call the second-shift workers out of the mine. He also turned off the safety equipment and electrical power, making operations impossible. When the workers came out, Napier pointed his rifle at them and said, "We're going out on strike. Who's with me and who's against me? I've got six shells and I'll take six of you with me." One of the employees raised a hand to turn off his helmet light, and Napier swung the rifle around toward him. Concerned for their safety, the employees assured Napier that they were with him. The foreman of the second shift finally got Napier to put down his rifle, but Napier ordered that no one was to return to work until he had spoken to Supervisor Caldwell about shift hours and insurance.³ Caldwell was phoned, and second-shift employees told him what had happened. Napier told the second shift employees to go home shortly before 2 a.m., by which time the remaining third shift employees, including Sizemore, had arrived. Napier's physical closing of the mine kept the third shift from working, but, awaiting Caldwell's arrival, they remained in and around the mine office. Napier and Crouch were very intoxicated, shot several insulators from the power line, and fired one round through the office door. Napier spoke to Caldwell by phone several times during the night, issuing what Caldwell considered to be threats. Caldwell did not come to the mine, but phoned the police. The police phoned the mine and were told that there was a "peaceful demonstration," and did not go there.

Caldwell felt that Napier was sobering up and went to the mine at 5 a.m. He noted the glass insulators destroyed, the bullet hole in the door, about seven beer cans on the property, and three holes in the office sheet-rock walls.⁴ He spoke to each of the third-shift employees in turn, asking what their complaints were. Napier responded it was the change in shift hours and his problems with insurance claims. Crouch, Rife, and Sizemore responded that it was the change in shift hours. Rickey Napier and Mosley made no comment during this meeting.

Caldwell testified that the third-shift employees all refused to go back to work at the established shift hours. The employees testifying, viz, Sizemore, Rife, and Rickey Napier, said that Caldwell merely listened to their responses to his question as to their complaints, and then told them to report for their next shift. I accept the testimony of the employees. The conversation took place sometime after 5 a.m. and with the shift ending at 7 a.m. it is highly unlikely that Caldwell would have ordered the men into the mine at that point.

John Chaney, the owner of the mine, had been alerted about 7 a.m. that there was a problem, and went to the mine about 9 a.m., by which time only first-shift employ-

ees were present. He noted the beer cans, the bullet hole in the office door, the broken glass insulators, and the holes in the office wall, and he spoke to Caldwell. Caldwell told him that the men had complained of the shift hours and of Napier's complaint about insurance. Chaney drew the conclusion that all of the second- and third-shift employees had been involved in the mine close-down, drinking, and destruction, and his first reaction was to fire all of them. When Caldwell told him that the second shift had not been involved, he instructed Caldwell to fire all the third shift for drinking and destroying property. Neither Chaney nor Caldwell investigated who had actually been involved.

The same day, third-shift employee Rickey Napier spoke to Caldwell, who then told Chaney that Rickey Napier had not been involved. He was rehired and told to report the next time there would be a third shift working, November 14. Mosley, whose hours as "outside man" began at 11 p.m., reported for work as directed the next shift, and was told by Caldwell that he was fired for refusing to report who had done the shooting the previous night. Mosley was later rehired after having filed an unfair labor practice charge, which he thereupon withdrew. Rife was also rehired after having filed a charge, which he likewise withdrew.

Sizemore came to work his next shift, and was told by Caldwell that more trouble was expected that night and that he should go home and return in the daytime. Sizemore did so, and was then told by Caldwell that he was fired for participating in the mine closing and for complaining about shift hours. When the fired employees filed for unemployment compensation Caldwell reported that Sizemore was fired for refusing to work the morning of November 9 and, in addition, because of his complaints regarding shift hours. Chaney testified at this proceeding that Sizemore and the others were fired for drinking and destroying property, and that the complaints regarding shift hours were unknown to him prior to the morning of November 9 and were not a reason for his deciding to discharge any of the employees.

Discussion

The complaints regarding change of shift hours, made prior to November 8 by individual employees to Ron Napier and by him to Caldwell, constitute concerted and protected activities. The actions of Crouch and of Ron Napier the night of November 8 and early morning of November 9, however, constituting violence and assault in order to accomplish a work stoppage at Respondent's mine, do not enjoy the protection of Section 7.

Caldwell's investigation of the work stoppage was limited to again listening to the complaints of the employees about the change in shift hours and the failure of the insurance plan to pay certain claims. It did not extend to determining which third-shift employees were involved in the assault and which were its victims. He obviously based his recommendations for discharge and for rehiring on whether the employee had complained of the change in working conditions. Thus, while Rickey Napier, who remained silent when asked about complaints during the meeting after the violence, was recom-

³ Napier apparently was being dunned for medical bills which he thought Respondent's insurance should cover.

⁴ Sizemore testified that the holes had existed prior to this incident, while Mine Owner Chaney testified he had not seen them about a week before. I find, to the extent it may matter, that these holes were not made during the incident.

mended for rehiring as not having been involved in the work stoppage; Rife and Sizemore, equally innocent of the violence but having reiterated their complaint at the meeting, were discharged and not recommended for rehiring.⁵ I conclude from the above that Caldwell's actions were motivated by the employees' participation in concerted and protected activity and the desire of Caldwell to chill and terminate complaints regarding the change in shift hours. Respondent has admitted that Caldwell is a supervisor and agent within the meaning of Section 2(11) and (13) of the Act, and it is obvious from the effectiveness of his recommendations on hiring and firing that such is the case.

As has been demonstrated, Caldwell's report was responsible for the discharge and failure to rehire. Caldwell knew of the concerted activity, and the concerted activity was a motivating factor in Caldwell's action. Respondent is charged with Caldwell's knowledge⁶ whether or not his specific acts were actually authorized or later ratified.⁷ Respondent has failed to show it had reasonable cause to believe that Sizemore engaged in unprotected activity,⁸ and I find that Respondent utilized the violence of some employees as a pretext to terminate all those, including Sizemore, who persisted in objecting to the change in working conditions.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Jimmy Sizemore about November 10 because of his complaints regarding working conditions Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged an employee, I find it necessary to order it to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his termination until the date of Respondent's offer of reinstatement, less net earnings, to which shall be added interest

⁵ Mosely's discharge, while not for complaining of the shift change, was for allegedly failing to inform on the identity of the employee causing damage.

⁶ *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408 (5th Cir. 1981).

⁷ Sec. 2(13) of the Act.

⁸ *Big Three Industrial Gas Co.*, 230 NLRB 392, 403 (1977).

to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).⁹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation¹⁰

ORDER

The Respondent, Dollar Branch Coal Company, Division of Chaney Creek Coal Corporation, Manchester, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment, because they complain about working conditions.

(b) 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 which is necessary to effectuate the policies of the Act.

(a) Offer Jimmy Sizemore immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of discrimination against him in the manner set forth in the section of this decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Manchester, Kentucky place of business copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁹ See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

¹⁰ 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.

¹¹ 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."