

**McDonald Land & Mining Co., Inc.; McDonald Trucking Co., Inc.; McDonald Coal Co.; McDonald Coal Sales Corp.; Thomas Coal Sales, Inc.; Thomas Coal Company, Inc. and United Mine Workers of America.** Cases 6–CA–21378, 6–CA–21551, 6–CA–21636, and 6–RC–10084

January 31, 1991

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On January 25, 1990, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed limited exceptions and a supporting brief, and the Charging Party filed exceptions. The Respondent filed cross-exceptions and a supporting 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,<sup>1</sup> and conclusions,<sup>2</sup> and to adopt his recommended Order.

<sup>1</sup> Both the Respondent and the General Counsel 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the second paragraph of his decision, the judge stated incorrectly the date of the Union's petition in Case 6–RC–10084. The correct date is September 7, 1988.

<sup>2</sup> In adopting the judge's finding that the gap in the voting booth curtain was not objectionable, we rely solely on the fact that there was no evidence that the secrecy of the election was breached or that the gap in the curtain would have a tendency to have an impact on the election.

We agree with the judge that the Respondent violated Sec. 8(a)(1) through Twig McDonald's statement to employee Ralph Kester, a union supporter, that if he did not like working for the Company, he should find a job elsewhere. We therefore find it unnecessary to pass on whether the Respondent also violated the Act by making a similar statement to Lee Weber because such a finding would be cumulative and would not affect the Order.

In adopting the judge's dismissal of the allegation that Lee Weber's job assignment was changed in violation of Sec. 8(a)(3) and (1) of the Act, we find that the General Counsel made out a prima facie case that union animus was a motivating factor in the job assignment change. We conclude, however, that given the judge's crediting of Twig McDonald's and Mike McDonald's testimony concerning Weber's deteriorating job performance and the Respondent's belief that Weber was "goofing off when he should have been working," the Respondent has established that Weber's job assignment would have been changed even in the absence of unlawful motive. *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

We affirm the judge's dismissal of the allegation that Mike McDonald threatened to withhold a planned wage increase because of employee union activity. In doing so, we note that in addition to telling the employees that the Respondent was not allowed to give the increase because it was afraid that the Union would perceive such an increase as an attempt by the Respondent to buy votes against the Union, McDonald also told the employees at the same time that "[I]f and when we are able to give you the raises, we will give them to you." In conjunction with McDonald's initial statement, which related the

The General Counsel has excepted to the judge's finding that Twig McDonald "happened on" employee Wes Lippert at the London jobsite on September 2, 1988. We find merit in this exception. In this regard, Twig McDonald testified at the hearing that after he learned that four of his men were passing out union cards, he "picked" Lippert to talk to "since he was the oldest McDonald Land & Mining employee." We agree with the judge, however, for the reasons stated by him, that Twig McDonald's interview of Lippert did not violate Section 8(a)(1).

In this regard, we cannot agree with our dissenting colleague's characterization of the underlying incident. We find no support in the record for our dissenting colleague's characterizations that Twig "targeted" and "confronted" Lippert and "confrontationally" interrogated him. On the contrary, the record clearly establishes that Twig sought out Lippert because, as the senior employee and an open union adherent, Lippert was in the best position to explain why the employees felt they needed a union. Further, the record clearly indicates that the two men engaged in an honest exchange of views without rancor and in the absence of threats or promises or other coercive activity. In these circumstances, we conclude that Twig's interrogation of Lippert was not unlawful under the criteria set out in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Finally, we note that *Atlantic Forest Products*, 282 NLRB 855, 856 (1987), a case cited by our dissenting colleague, is distinguishable on its facts. In that case, the Board found the interrogation of a known union adherent to be unlawful under the totality of the circumstances set out in *Rossmore House*, supra. In finding the violation, the Board emphasized that the interrogation took place within the context of other related unlawful activity and that the supervisor isolated the employee in the breakroom and acknowledged the impropriety of his question before asking the employee how he was going to vote in the election the next day.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McDonald Land & Mining Co., Inc.; McDonald Trucking Co., Inc.; McDonald Coal Co.; McDonald Coal Sales Corp.; Thomas Coal Sales, Inc.; Thomas Coal Company, Inc., Clearfield,

withdrawal of the wage increase to a desire on the part of the Respondent not to appear to be attempting to influence the election by implementing the increases, we find that McDonald's follow-on statement, quoted above, made it reasonable for the employees to believe that the wage increases would be reinstated at a time when the danger of such an appearance of improper influence had passed, i.e., after the election. Indeed, as it turned out, at the express urging of several of the most active union supporters, the Respondent reinstated the planned wage increase in the pay period immediately following McDonald's remarks in question, about a month before the election. Under all of these circumstances, then, we affirm the judge's dismissal of this allegation.

Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held on October 27, 1988, in Case 6-RC-10084 is set aside and that a new election be conducted.

[Direction of Second Election omitted from publication.]

MEMBER CRACRAFT, dissenting in part.

I agree with my colleagues in all respects except that I find that the Respondent's co-owner and chief executive, Twig McDonald, unlawfully interrogated employee Wesley Lippert about his union activities.

Lippert was the Respondent's most senior employee in length of service—about 15 years—and was one of the three or so most vigorous open supporters of the Union's organizational effort. A few days after Twig first found out about the organizational campaign and about Lippert's aggressive supporting role in it, he sought Lippert out to speak with him about the Union. By this time, Lippert was openly campaigning for the Union and distributing authorization cards.

Twig went to where Lippert was working. He asked him whether he was handing out union cards. Lippert replied that he was. In a way that, according to the judge, made it plain that Twig disapproved of Lippert's union activity, Twig then asked Lippert why he was doing it. According to Lippert, he replied that he thought it would help the employees.<sup>1</sup> Twig said he was disappointed in Lippert for soliciting union cards, that the Union was no good, and that it probably would not help the employees. In response to Lippert's question about what Twig had "against organized labor," Twig replied that:

[I]t took his power away from him to control his employees and would probably break him, and it also took care of the deadheads. Then he went on to say that Fred [London, a leading union supporter] was dumb and that Ralph Kester [another leading union supporter] had a loud mouth.<sup>2</sup>

Analyzing the incident within the framework set forth in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), I find that Twig's questioning of Lippert was itself circumstantially coercive. By way of background, Twig, the Respondent's co-owner, chief executive, and acknowledged leader, specifically targeted longtime employee Lippert for interrogation. He then went to Lippert's workplace unannounced and confronted him on the

<sup>1</sup>According to Twig, Lippert replied that "things ain't getting any better, and we just don't know what to do, and we figured this is the way to go about it." I find no material inconsistency between the testimonies of Lippert and Twig on this subject.

<sup>2</sup>My colleagues characterize this episode as "an honest exchange of views without rancor."

job. Beyond just confrontationally interrogating Lippert about his motives for seeking representation, Twig made his personal disappointment and displeasure over Lippert's protected activities known to Lippert then, and topped the conversation off with a terse "prediction" of financial ruin as the likely result of unionization.

Under all the circumstances, I find that Twig unlawfully interrogated Lippert as alleged. See, e.g., *Atlantic Forest Products*, 282 NLRB 855, 856 (1987).

*Robin F. Wiegand and Karen M. McCullough, Esqs.*, for the General Counsel.

*Carl Belin, Jr., Esq. (Belin, Belin & Naddeo)*, of Clearfield, Pennsylvania, and *Michael Eggert, Esq. (Kirkpatrick & Lockhart)*, of Pittsburgh, Pennsylvania, for the Respondent. *Michael Dinnerstein, Esq.*, of Washington, D.C. and *Louis J. Maholic*, of DuBois, Pennsylvania, for the Charging Party.

#### DECISION

STEPHEN J. GROSS, Administrative Law Judge. The various companies named in the caption together constitute a single integrated business enterprise and a single employer that I will collectively refer to as the Company. The Company admits that it is an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act).

The Company mines coal from surface mines in north-central Pennsylvania. On September 2, 1988, the United Mine Workers of America (the Union or the UMWA) filed a petition (in Case 6-RC-10084) seeking an election among all of the Company's production and maintenance employees. The Board conducted the election on October 27, 1988. The UMWA lost (37 votes cast for the Union, 63 against, 8 challenged ballots, and 1 void ballot) but filed timely objections.

The General Counsel alleges that the Company violated the Act before, during, and after the Union's election campaign—from as early as September 2, 1988, to as late as February 27, 1989.<sup>1</sup> The Union's objections, of course, claim misconduct by the Company during the period between the filing of the elections petition and the election.<sup>2</sup>

I held a hearing in these consolidated cases in Clearfield, Pennsylvania, on April 26, 27, and 28, and on June 12, 1989. Briefs have been filed by the General Counsel, the UMWA, and the Company.<sup>3</sup>

Parts I through XI of this decision discuss, in chronological order the various unfair labor practices alleged by the General Counsel. Part XII covers the Union's election objections.

<sup>1</sup>The dates of the original unfair labor practice charges and the complaints are as follows:

Case	Charge-Complaint
6-CA-21378	11/3/88-12/27/88
6-CA-21551	1/20/89-3/10/89
6-CA-21636	3/2/89-3/24/89

<sup>2</sup>The Acting Regional Director for Region 6 ordered a hearing on the Union's objections and ordered that that case be consolidated with Case 6-CA-21378. Thereafter Cases 6-CA-21551 and 6-CA-21636 were consolidated with those cases.

<sup>3</sup>The General Counsel has moved to the correct the transcript in various respects. No one opposes the motion and it accordingly is granted.

I. DID THE COMPANY UNLAWFULLY INTERROGATE AN  
EMPLOYEE ON SEPTEMBER 2, 1988

Fahy McDonald is one of the Company's two owners and is its chief executive. Everyone associated with the Company calls him "Twig." (Since several different McDonalds played roles to the McDonalds by their first names.)

Wesley Lippert has been with the Company longer than any other employee, about 15 years. Twig McDonald learned in late August 1988, that the UMWA was trying to organize the Company's employees and that Lippert was one of the three or so most vigorous supporters of the organizational effort. A few days later, on September 2, Twig happened on Lippert at one of the Company's jobsites. By then Lippert had begun openly campaigning for the Union. Twig asked Lippert if Lippert was handing out union cards. When Lippert said that he was, Twig asked, "Why are you doing this" in a way that made it plain that he disapproved. Lippert said, "[t]hings ain't getting any better and we just don't know what to do, and we figured this is the way to go about it." Twig then responded by saying that he thought unionization would be bad for the Company and the employees, and by talking about the Company's financial woes.

The General Counsel contends that the Company thereby violated the Act.

My conclusion is that Twig's questioning of Lippert did not violate the Act. Lippert openly and actively supported the Union. It's true that Twig made it clear that he was troubled by Lippert's union activities. But that alone is not enough to turn an otherwise lawful exchange between employer and employee into a violation of the Act. Moreover Lippert's position with the Company McDonald was a secure one. He is virtually an institution at the Company by virtue of his long career there. Finally, as in *Blue Grass Industries*, 287 NLRB 274 (1987), "the questions directed at [the employee] were not made in connection with any threats or other unlawful acts and do not appear from their context to have been aimed at obtaining information which the Respondent could in turn use to take adverse action against [the employee] or the Union."

Like virtually any other employee in that kind of situation Lippert found it uncomfortable to be questioned by his boss about union activities. But being made uncomfortable is not necessarily the same as being unlawfully coerced, and in my view was not here. See *Blue Grass Industries*, above; *Clark Equipment Co.*, 278 NLRB 498, 502 (1986).

II. DID THE COMPANY, AT THE KRESS SITE ON  
SEPTEMBER 8 OR 9, THREATEN TO CLOSE OR TO LAY  
OFF EMPLOYEES IF THE EMPLOYEES VOTED FOR  
THE UNION?

Mike McDonald is Twig McDonald's son, a vice president of the Company, and an admitted supervisor. On September 9, 1988, Mike gave a talk to employees at the Company's "Kress" jobsite.

A. *Mike McDonald's Speech*

Prior to the Union's campaign the Company had advised the employees that it was having problems with its primary customer, Potomac Electric Power Company (PEPCO), and that the Company was facing serious financial problems. Mike McDonald's speech at the Kress site returned to the

subjects of PEPCO and the Company's financial difficulties, but painted a bleaker picture than anything previously told to the employees. Again noting that PEPCO was the Company's biggest customer by far, Mike pointed out that the Company's contract with PEPCO ran out in February (1989), and that in negotiations looking toward a new contract PEPCO was insisting on coal prices the Company could not agree to since they were below the Company's costs. If the PEPCO contract could not be renewed and if Twig could not find new customers to replace PEPCO, said Mike, the impact on the Company would be disastrous. In the very least the Company would have to lay off "quite a few guys," perhaps two-thirds of its employees. And bankruptcy was by no means out of the question. Mike did not link the PEPCO situation to the Union.

Mike also discussed the emotional impact on Twig of the Company's financial problems and of Twig's recent divorce.

As for the UMWA's campaign to organize the Company's employees, Mike continued, the employees should recognize that it presented three problems. First, the Company couldn't afford to pay UMWA wages and fringe benefits. Second, if the Company's creditors knew that its employees were trying to bring the UMWA in, the creditors "might get nervous and decide to throw us [into] Chapter 11." Third, the adverse impact of the unionization effort on Twig's emotional well-being might be enough, along with Twig's other problems, to rob Twig of the drive he needed to find new customers to replace PEPCO.

B. *The Alleged Emotional Impact of the Unionization  
Effort on Twig McDonald*

What Mike McDonald told the employees was that the employees' unionization efforts might have an adverse emotional effect on the chief executive of their Company and that as a result he might be unable to get his job done, thereby dooming the Company.

An employer, says *Gissel*,<sup>4</sup>

May even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . .

The law, certainly, is broad enough in at least some contexts to accept the position that a given set of circumstances may set off a response in someone that is "beyond his control" to do anything about (to use *Gissel's* word).<sup>5</sup> Moreover, Mike McDonald was sincere about what he said; he explained to the employees the unusual circumstances that, he believed, impaired Twig's ability to rebound emotionally; and at the hearing the Company offered to introduce evidence on the subject that, the Company claimed, would support what Mike said about Twig.<sup>6</sup>

I will assume, for present purposes, that Mike had reasonable grounds for his claim about Twig's state of mind. But on a number of counts the Board would be trodding treach-

<sup>4</sup>*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

<sup>5</sup>For example, see the discussion of the insanity defense to criminal charges in, e.g., *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970).

<sup>6</sup>I rejected that offer of evidence. Tr. 554-555.

erous sands indeed were it to permit an employer, under any circumstances, to tell employees' protected activities on a supervisor's emotional well-being might cause the destruction of the Company. Moreover precluding employers from using as an argument against unionization the emotional instability of their managers would not appear to cut unfairly into the arsenal of antiunion contentions available to management.

I accordingly conclude that an employer violates Section 8(a)(1) if one of its supervisors claims that the employees' unionization efforts may damage the viability of the employer because those efforts may adversely affect the emotional well-being of the employer's chief executive, whether or not that claim is accurate, and whether the supervisor contends that that reaction of the chief executive is beyond his control. I accordingly further conclude that Mike McDonald violated the employees' Section 7 rights when he told the employees that a vote by the employees to be represented by a union might affect Twig in a way that would result in the closing of the Company.

*C. The Import of Mike McDonald's Statements to Employees that the Company Could Not Afford the Union*

From an employee's viewpoint, the inescapable implication of what Mike McDonald told the employees was that the Company was financially on the ropes, that if the UMWA won the election the Union would demand substantially higher wages and more costly fringe benefits, that the Company would be unable to meet the Union's demands, and that disaster would result.

I will assume that Mike's statements about the state of the Company's finances were protected by Section 8(c).<sup>7</sup> But I nonetheless conclude that his contention that the Company could not afford the Union violated Section 8(a)(1).

If, in the course of an organizational campaign, employees have made statements about the benefits they expect from unionization, or if a union has stated to employees that unionization would produce certain wage increases or the like, an employer is entitled to refer to those statements and to discuss why those purported benefits might rebound to the employees' detriment if the employer is forced into agreeing to provide them. *Benjamin Coal Co.*, 294 NLRB 572 (1989); *Clintonville Shoe Co.*, 272 NLRB 609 (1984); and *Chester Valley*, 251 NLRB 1435, 1447 (1980).

Mike, however, never told the employees precisely what he was referring to when he said that the Company couldn't afford the Union. Presumably the reference was to the terms of the collective-bargaining contract between the UMWA and the Bituminous Coal Operators Association (BCOA). And I will assume that the employees knew that Mike was referring to those terms. Moreover I recognize that the UMWA does generally require that employers whose employees it represents agree to BCOA's terms. Nonetheless, I think the employees were entitled to an explanation from Mike about why he thought that the UMWA would demand that the Company agree to the terms embodied in that con-

tract. He failed to provide that explanation, and I accordingly conclude that the Company violated Section 8(a)(1). See *Gissel*, 395 U.S. at 618; *Paul Distributing Co.*, 264 NLRB 1378, 1383 (1982).

*D. Mike McDonald's Claim that the Company's Creditors Might Force the Company into Bankruptcy*

Mike told the employees that if the Company's creditors knew that the employees favored unionization, the creditors "might get nervous and decide to throw us [into] Chapter 11." Those are threatening words. Yet Mike uttered them without providing the employees with any facts that would have permitted the employees to make their own evaluation of the likelihood of such action by the creditors. I have no doubt that Mike was merely voicing real worries of his own. But in this "particularly sensitive" area of possible plant closure (*Gissel*, 395 U.S. at 619), that is not good enough. Where the continued existence of the company is under discussion, an employer violates the Act unless its predictions are "carefully phrased on the basis of objective fact." *Id.* at 618. Mike's prediction about the creditors' action was not phrased that way, and the Company thereby violated Section 8(a)(1).

III. DID THE COMPANY, AT THE LONDON SITE ON SEPTEMBER 8 OR 9, THREATEN TO CLOSE IF THE EMPLOYEES VOTED FOR THE UNION

As he had at the Kress site, Mike McDonald told the employees at the London site that Twig was already tired and despondent because of the Company's many problems, that if the UMWA was voted in Twig might not have the desire to hunt for new customers for the Company's coal, and that would mean either drastic reduction in the Company's employment or a complete shutdown.

For the reasons discussed in connection with Mike McDonald's speech at the Kress site, Mike thereby violated Section 8(a)(1) of the Act.

IV. DID THE COMPANY THREATEN TO WITHHOLD A PLANNED WAGE INCREASE BECAUSE OF THE EMPLOYEES' UNION ACTIVITIES

During the period at issue the Company's highest wage rate was \$8.50 per hour. The Company started new employees at \$5 or \$5.50 an hour. Twig McDonald testified credibly that if a new employee is performing well, then "every three or four or five months, and as I'm able . . . I'd add a quarter on here and a quarter on there, and gradually bring them up." Pursuant to that policy, on September 1, 1988, Twig ordered pay increases for four junior employees. Six days later, which was before the pay increases had gone into effect, the UMWA filed its election petition. The Company's labor counsel advised Twig that because of the petition Twig should rescind his order about the pay increases. Twig acted in accordance with that advice.

Twig discussed these circumstances at a supervisors' meeting at which Mike McDonald was present. The discussion there led Mike, on September 15, to tell employees at the Kress site that several of the younger employees who were due pay raises would not be getting them because "we were not allowed to give it to them because we were afraid the

<sup>7</sup>The Company sought to introduce its financial records into evidence on the ground that they would prove the accuracy of the statements by Mike and Twig McDonald that the Company was suffering financial difficulties and could not afford to pay employees higher wages or provide more expensive fringe benefits. I refused to allow those financial records into evidence for reasons discussed at Tr. 536-540 and 552-553.

Union [would] look at it as though we were trying to buy their votes.”

Several of the most actively pronoun employees later talked to Twig about the withdrawn pay increases, saying that they did not want to stand in the way of the higher pay for the employees involved and that they wouldn't object if Twig granted the higher pay. Twig thereupon reinstated his September 1 order, and the four employees did begin getting the increased wage rates.

The General Counsel contends that Mike McDonald's remark violated Section 8(a)(1).

Where employers have previously provided certain benefits in an “indefinite manner,” as here, the Board permits the employers to “tell their employees that those benefits . . . will be deferred during the pendency of organizational efforts where they make clear that the purpose in doing so is to avoid the appearance of interference” *Village Thrift Store*, 272 NLRB 572, 572–573 (1984). On the other hand, an employer may not blame a union for causing a “wage freeze.” *J. & G. Wall Baking Co.*, 272 NLRB 1008, 1012 (1984).

The question ultimately, is the coerciveness of the utterance. Here Mike did say that but for the unionization effort the employees in question would be making more money. But he did not use words of blame in referring to the Union, and did, in a way, take responsibility on behalf of the Company for the withdrawn pay increase (“we were afraid”). My conclusion is that Mike's remark did not violate the Act.<sup>8</sup>

V. DID TWIG MCDONALD, ON OCTOBER 6, 1988, AT THE KRESS SITE, THREATEN TO CLOSE THE COMPANY IF THE EMPLOYEES VOTED FOR THE UMWA?

The General Counsel contends that on October 6 or 7, 1988, Twig, speaking at the Kress site, threatened to close the Company if the employees voted in favor of representation by the UMWA.

Twig McDonald gave an informal speech at the Kress site on October 6. He spoke of the financial difficulties the Company was facing and said that because of those difficulties he didn't see how he could provide the employees with any improvements in pay or fringe benefits. Twig invited the employees to examine the Company's books to verify what he was saying. He went on to discuss the Union's effort to organize the Company. Twig referred to the royalties that employers have to pay under the Union's BCOA agreement and said that, just considering those royalties, there was “no way I could survive” under that kind of agreement.

Twig's reference to the Company's inability to afford a union contract comes closer to passing muster than did Mike's. One of the Union's campaign brochures quoted employee Ralph Kester as stating that among the reasons that he wanted to be represented by the UMWA were the Union's pension and “medical card” benefits—benefits that are funded by the royalties to which Twig referred. Twig backed up his claims of inability to pay more to employees by inviting the employees to check the Company's books. He was rea-

<sup>8</sup>Employee Fred London testified that Twig McDonald told employees that the Company was going to have to withdraw certain pay increases because of the organizing drive. The Union's brief makes the same claim. But the record shows that only Mike McDonald made a statement of that kind to employees.

sonably specific about the contract terms that he was concerned about. And Twig probably did not say in as many words that the Union would in fact insist that the Company agree to the BCOA agreement's terms.

But the implication of Twig's talk was that the Union would insist on the BCOA terms and that that would lead to the shutdown of the Company. Again, the problem is that Twig failed to discuss why he believed that the Union would insist on those terms or, for that matter, on any terms that the Company could not afford. Thus he made no mention of Kester's references to pension and medical benefits. I therefore conclude that the Company violated Section 8(a)(1) when Twig McDonald expressed the belief, without adequate explanation, that unionization would result in the closure of the Company.<sup>9</sup>

VI. RUSS PERKS JR.'S ALLEGED THREAT

Scott Heuser is an employee of the Company. At one time his foreman had been Russ Perks Sr. But Perks had been away from work for months because of an injury. Russ Perks Jr. also works for the Company.

Sometime in early October 1988 Heuser and Russ Junior had a discussion about Heuser's pronoun stance in which Russ Sr.'s name came up. That much is clear. Heuser's version is that Russ Jr. said that when his dad returned to work, Heuser's “ass [was] done around here” because of Heuser's pronoun position. But Russ Jr. denied making any such threat, and I did not find Heuser's testimony any more convincing than Russ Jr.'s. Moreover the record is clear that Russ Jr.'s status with the Company is that of employee and nothing more.

I thus conclude that the complaint's allegation about a threat by Russ Perks Jr. should be dismissed.

VII. DID TWIG MCDONALD, ON OCTOBER 20, 1988, THREATEN EMPLOYEES THAT THE COMPANY WOULD CLOSE IF THE EMPLOYEES SELECTED THE UMWA

On October 20 Twig McDonald visited the Mahon site. Twig's express purpose was to talk to Rodney Bloom about the upcoming election since Bloom was the only employee to whom Twig had not yet spoken personally about the election. Bloom was with Lippert, so Twig talked to them both. Both Bloom and Lippert, it might be noted, openly supported that UMWA.

To some extent Twig repeated the ideas that he had expressed on October 6 in that he said the Company was in bad financial shape, that he couldn't afford to pay the employees anything more than they were presently getting, and that Bloom and Lippert could examine the Company's books to verify that. Twig went on to say that if the Union came in and demanded more for the employees, that might drive the Company out of business. Bloom said his concern was avoiding any more wage cuts. (Communications between Twig and the employees prior to the union drive suggested that a pay cut might be in the offing.) Bloom mentioned that his daughter needed orthodontic work and that he couldn't afford it even at his present pay level. Twig responded that

<sup>9</sup>Some witnesses spoke of Twig's speech at the Kress site on October 6, some referred to a speech there on October 7. But there was only one such speech, probably on October 6.

it would be easier to pay for such things with a \$1-an-hour pay cut than if Bloom were unemployed.

On this occasion, I believe Twig did not exceed the bounds of Section 8(c). Twig's references to demands by the Union and to the Company's closure were conditional ("if the Union came in and demanded more"). And, again, Twig explained to the employees why he was concerned about higher expenses and invited the employees to verify for themselves the Company's problems by examining the Company's books of account.

VIII. DID TWIG MCDONALD, ON OCTOBER 28, 1988, THREATEN EMPLOYEE LEE WEBER WITH DISCHARGE?

Lee Weber was one of the most ardent supporters of the UMWA. Twig McDonald came across Weber the day after the election. Twig had heard that Weber was looking for a job with another employer and asked Weber if Weber had found another job yet. Weber responded with the question, "are you firing me?" Twig retorted something on the order of: "No, I'm not firing you, but if you don't trust me, you don't like me, you think I'm a liar, then your must not want to work around here. So why don't you find another job?"

Weber could not reasonably have heard McDonald's remark as a threat of discharge. To begin with, Twig said that he was not firing Weber. Secondly, in the past Twig had suggested to various employees that if they didn't like working for the Company they should get a job elsewhere—generally in connection with complaints about the Company by the employees. Yet the Company had not fired those employees or even disciplined them.

But as I understand cases like *Rolligon Corp.*,<sup>10</sup> the Board deems to be inherently coercive statements by management officials that they would prefer that employees who favor unionization find work elsewhere.

Twig did not explicitly refer to Weber's support for the Union when he proposed that Weber find another job. But the record compels the conclusion that in Twig's exchange with Weber, Twig was referring to statements that Weber made during the course of the Union's campaign, and that Weber knew that. I therefore conclude that when McDonald suggested that Weber find another job, the Company violated Section 8(a)(1).

IX. THE CHRISTMAS PARTY

Ralph Kester was one of the employees who worked the hardest to bring the UMWA to the Company. The Company held a Christmas party in the Company's shop and Kester and his wife attended. As it turned out, Kester was one of the few prounion employees there, perhaps the only one. He and Twig McDonald got into a spat about a nonunion matter a few minutes after the Kesters arrived at the party. Twig then began a verbal attack on the prounion employees generally (calling them "a handful of assholes") and Kester in particular. Twig's words to Kester were these, more or less:

When are you fucking guys going to quit [trying to bring the UMWA in]? I'm tired of all this union shit. . . . I won the election. You should leave me

alone. If you were any kind of man, you'd get a job somewhere else.

Again, Kester could not reasonably have considered McDonald's statement to be a threat that Kester might be fired. Moreover the election was long past when McDonald uttered the statement, and the utterance occurred in an altogether informal setting. But in light of *Rolligon's* teachings,<sup>11</sup> I conclude that the Company violated Section 8(a)(1) of the Act when Twig McDonald stated to Kester that if Kester "were any kind of man," he would "get a job somewhere else."

X. LEE WEBER'S CHANGED JOB ASSIGNMENT

Lee Weber had been the Company's "lube man" for about 10 years when the UMWA campaign got underway. As noted in part VIII, above, Weber was one of the Union's most ardent supporters.

As lube man, Weber had two main responsibilities. The most important was to change the oil in the Company's dozers, rock trucks, loaders, and other such equipment. The manufacturer of each such piece of equipment specifies how many hours the equipment may be operated before having its oil changed. For a number of reasons it is important that the oil get changed on schedule. It was the responsibility of the equipment operator and his foreman to notify Weber when the equipment was due for an oil change. It was Weber's responsibility, once he was notified, to promptly change the oil.

Weber's other main responsibility related to the 55-gallon drums in the sheds at each of the Company's jobsites. The drums held various kinds of oil. The equipment operators working at the jobsites drew from those drums when their machines ran low. If, for some reason, the drums were empty, equipment might have to be shut down until additional oil could be obtained from one of the other sites or from the Company's garage. Weber's truck carried all the various oils needed at the jobsites, and it was Weber's responsibility to keep the drums filled.

Due to the nature of Weber's job, close supervision was impossible. The Company simply had to trust Weber to put out a reasonable amount of effort in getting his job done.

Weber had never been able to get all needed oil changes done precisely on time or always to fill the oil drums in the shed as often as necessary. That was to be expected. Sometimes, for example, an emergency would require the continued use of a machine that was due for an oil change. In that case the foreman at the site would tell Weber to return when the emergency was over. Or when Weber was at one site, he might get a call to handle an urgent job someplace else. That meant that he would have to leave that first site immediately, without checking the oil drums there.

But starting in August 1988 the Company's foremen began to notice that, more often than had ever been the case in the past, oil changes were running late and Weber was leaving jobsites without checking the oil drums.

Things got worse, not better, in the autumn and winter in respect to both oil changes and the oil drums. The foremen talked about Weber's performance among themselves. But into December they still had not raised the matter with Twig

<sup>10</sup> 254 NLRB 22 (1980). Accord: *Heritage Nursing Homes*, 269 NLRB 230, 231 (1984), *L. A. Baker Electric*, 265 NLRB 1579, 1580 (1983).

<sup>11</sup> See fn. 10, above, and the accompanying text.

McDonald. In the meantime a couple of supervisors questioned Weber about his work. But Weber refused to accept any responsibility for the delayed oil changes and empty oil drums.

Things came to a head at a meeting that Twig McDonald held with his supervisors in late December: A number of the supervisors complained about Weber's failure to get his job done and about a why-should-I-give-a-damn attitude on Weber's part. In response Twig ordered the person in charge of the Company's oil change records to prepare a list showing any overdue oil changes in recent months. The list was prepared and it did indeed show that on numerous occasions Weber had been very late making oil changes.

In the meantime Mike McDonald happened across Weber in circumstances which seemed to Mike to indicate that Weber was goofing off when he should have been working. That led Mike to investigate further, and on several other occasions he noticed the same thing. Mike reported all this to Twig. (Weber testified that Mike was wrong. But whether or not Weber was in fact shirking work, the circumstances were such as to lead Mike to believe that Weber was not doing what he was supposed to be doing.)

On January 20 Twig, having decided that he could no longer trust Weber to meet his responsibilities as lube man, told Weber that he was being taken off the lube truck and being assigned the job of shop mechanic. The Company did not change Weber's rate of pay. But Weber's income may have suffered from the switch because of less overtime.

The General Counsel contends that the Company's real reason for switching Weber's job related to Weber's vigorous support for the UMWA. As lube man Weber visited all of the Company's worksites and had ample opportunity to talk to every employee. The mechanic job, on the other hand, kept Weber in the shop. The Company made the switch, argues the General Counsel, to reduce Weber's effectiveness as a prounion campaigner.

But as indicated in my account of Weber's performance and of the Company's response to it, I find that: (1) the Company had entirely appropriate reasons for switching Weber from lube man to mechanic; and (2) the Company ordered the change solely for those reasons.

#### XI. DENNIS ROWLES' SENIORITY DATE

Dennis Rowles first began working for Company in 1979. In October 1987 he found another job and quit his employment with the Company. That other job didn't pan out and in June 1988 Rowles asked Twig McDonald if he could come back to the Company. Twig offered to put Rowles on part time, and Rowles agreed. Rowles did in fact start working part time for the Company in June.

The Company's policy is that when an employee quits and then returns to the Company, the employee's seniority date becomes the date the employee returned. (There is no dispute about that.) Thus as of the day Rowles returned to work he was the most junior of the Company's employees.

##### A. *Did the Company Promise Rowles Special Treatment?*

The Company has a pension program for its employees. In February or March 1988, when Rowles had not yet returned to the Company's employ, Rowles had asked Kermit Tuning

about getting his pension money from the Company. Tuning indicated that he thought that would be possible. When Rowles rejoined the Company in June he again spoke to Rowles about the pension money. Tuning's response was that since Rowles had come back to work, there was no way that Rowles could receive any pension payout.

In the course of that discussion, Rowles asked if pension would be based on that original date of hire or his rehire date in 1988. Tuning, after checking with Twig McDonald, said that although the pension would reflect Rowles' 8 months absence from the Company, Rowles would be treated as though his date of hire was October 1979. Whether or not Tuning specified that the 1979 date was relevant only for pension purposes, that is what Tuning meant. Moreover anyone knowledgeable about such matters would have realized that Tuning was referring only to Rowles' pension, not his seniority date.

Rowles, however, is not at all knowledgeable about such matters and, moreover, for obvious reasons Rowles wanted to believe that the Company was going to use his original hire date as his seniority date. Rowles thus concluded that what Tuning meant was that the Company had decided to override its usual policy and treat Rowles, for seniority purposes, as though he had never quit.

I absolutely reject Rowles' claim that Tuning told Rowles that the Company would treat Rowles as though his seniority date was his original date of hire. First, I did not find credible Rowles' testimony about the use of 1979 as his seniority date. Second, the Company had no reason to make that kind of exception in Rowles' favor. Third, the Company had plenty of reasons *not* to make that kind of exception—namely, the inevitable reactions of all the employees hired between October 1979 and June 1988 if the Company had granted special treatment to Rowles. And fourth, if the Company had nonetheless inexplicably granted that benefit to Rowles, there probably would have been documentation of that departure from policy, which there was not.

The Company's vacation policy is that everyone with over 1 year's employment with the Company gets 40 hours of vacation pay.

Rowles resumed working full time on September 1, 1988. About 2 months later Rowles asked if he could have a paid vacation. Twig said that he could. That is consistent, of course, with the Company deeming Rowles to be an employee with a seniority date of 1979 (although, even if the Company had granted Rowles the 1979 seniority date, it could presumably have refused to grant him the vacation time since he had not in fact been working throughout the past year). It is also consistent with Twig being willing to do a favor in that one way for an employee he had known since 1979. I find the latter to be the case.

##### B. *Rowles' Protected Activities*

During the campaign Rowles did not take a stand about the Union, one way or the other. But in December or January Rowles decided to support the Union and began wearing a UMWA hat to work.

In mid-January Rowles began complaining orally and in written truck reports about problems with the rock truck that the Company had assigned to him. In one of those reports Rowles said that he was operating the truck against his will. Not long thereafter the Mine Safety and Health Administra-

tion (MSHA) conducted a spot inspection of that truck as a result of a complaint to MSHA. The result was that the truck had to be parked until repaired and that the Company had to pay a small fine. Moreover MSHA subsequently checked another piece of the Company's equipment—also as a result of a complaint someone filed with that agency—and found problems with it, too.

As far as Twig McDonald was concerned, employee complaints to MSHA were not in good faith. Rather, they were the doing of the UMWA and its supporters among the employees and were intended to give the Company a hard time.

Not long after the MSHA inspection, Twig called Rowles into a meeting in which Twig reminded Rowles that under longstanding company policy Rowles did not have to run any equipment that he considered unsafe. As both Rowles and Twig described the meeting, it was low key and not unfriendly.

The Company laid off Rowles in February. Had Rowles had a 1979 seniority date he would not have been laid off. But there is no contention that the layoff was improper in any other respect.

#### Conclusion

The General Counsel's position is that the Company's layoff of Rowles was the Company's way of punishing Rowles for his protected activities. The Company promised Rowles special treatment, the General Counsel contends, and then renege on that promise because of those activities.

As discussed earlier, however, I am convinced that the Company never intended to treat Rowles specially regarding his seniority date and never said that it would. I therefore conclude that Rowles' layoff in February was a routine event in which Rowles' protected activities played no role whatever.

### XII. THE UNION'S OBJECTIONS

#### A. Pay Raises Granted by the Company During the Organizing Drive

In its Objections e, the Union contends that the Company granted pay raises during the organizing drive to employees Jim Anderson and Bill Kendall. The Company did that, the Union claims, because Anderson and Kendall opposed the representation by the UMWA.

The objection is without merit.

Part IV of this decision, above, discusses the pay increase the Company granted. The Company did in fact grant pay increases to Anderson and Kendall during the organizing drive. The Company also granted pay increases to employees Irwin and Wanson, and the Union makes no claims about their prounion or antiunion sympathies. In any case (1) the Company granted the increases only after several of the most active supporters of the Union asked the Company to do so and promised not to object to the pay increases;<sup>12</sup> and (2) the

<sup>12</sup> Question to union activist Fred London:

[D]idn't you . . . call [Twig McDonald] and indicate to him that you people felt that he should go ahead and give the raises?"

A. Yes, I did.

Q. And didn't you tell him the Union wasn't going to object to him giving these raises?

Company had originally ordered the increases prior to the filing of the election petition.

#### B. The Defaced Election Notice

The Board conducted the election in the Company's Curwensville shop on October 27, 1988. Two days earlier, on October 25, employee Lee Weber noticed that an official NLRB election notice posted in that shop had been defaced. Someone had placed a checkmark in the "NO" box of the sample ballot. Shop Supervisor John McDonald (Twig's cousin) had tried to deal with the mark by covering it with correction fluid, but the mark showed through. Weber noticed the partially obscured mark and complained about it to John. John's only communication to Weber was to shrug his shoulders. But John then did promptly obtain another notice and, about 15 minutes after Weber's complaint, replaced the defaced noticed with the new one.

The Union contends, in its Objection g, that the presence of the defaced election notice constitutes objectionable conduct. But of course it does not. See *Patsy Bee, Inc.*, 249 NLRB 976, 986-987 (1980); *Fort Worth Steel Co.*, 242 NLRB 917 (1979). I thus conclude that the objection is without merit.

#### C. The Gap in the Voting Booth Curtain

As usual in Board-conducted elections, voters marked their ballots in a voting booth. To provide secrecy the booth had a curtain across the front that voters were supposed to be able to pull shut. But this time there was a problem with the voting booth: sometimes the curtain would not completely pull shut. That left a gap of up to 10 inches. (Whether there was a gap or not apparently depended upon the size of the voter.) A voter could nonetheless maintain the secrecy of his ballot by positioning himself so that his body was between onlookers and his ballot. If a voter did not do that, and if in the voter's case there was a gap in the curtain, strategically located persons outside the booth could see how the voter marked his ballot.

Lee Weber, who served as observer at the polling place for the UMWA, was one of the persons who noticed the gap in the curtain. Weber did not raise the matter with anyone. No employee complained to the Board agent about the gap in the curtain.

One of the Union's objections to the conduct of the election, Objection h, is that the gap in the voting booth curtain destroyed the secrecy of the balloting process.

I conclude the objection is without merit. It is most unlikely that the gap in the curtain affected the way any employee voted, the gap in the curtain obviously was not the fault of the Company, and the Union's observer did not bring the matter to the attention of the Board agent. See *Sewell Plastics*, 241 NLRB 887 (1979).

#### D. Danny McDonald's Threats

Danny McDonald is Twig's first cousin, once removed. He works for the Company on the reclamation crew. He is paid on an hourly basis. (All of the persons whom the parties agreed are supervisors of the Company are paid a salary.) In the summer he runs a tractor that is equipped to plant seeds

A. Yes, we had discussed it and that is what we decided upon. Tr. 356-357.

and often directs two temporary employees in planting chores. In the winter he fills in wherever the Company needs him. For example he sometimes helps ash the Company's roads. He has no authority to hire, fire, or discipline employees, or to responsibly recommend such actions. And while Danny sometimes does direct employees, such direction is routine in nature.

When Danny went to vote on October 27 the Union challenged his ballot on the ground that he was a supervisor. Danny lost his temper, perhaps because he had been drinking. In short order he threatened to shoot holes in a prounion sign, threatened to beat up a prounion employee, and threatened to shoot another prounion employee and the Board agent.

The Union claims, in Objection a, that the Company ratified Danny's "acts of violence against employees." The Union further claims that (1) Danny's behavior may be attributed to the Company because he is a supervisor, and (2) even if Danny is not a supervisor and even if the Company did not ratify Danny's behavior, "his conduct created such a general atmosphere of fear and coercion that it mandates setting aside the election results."

I conclude that the objection is without merit.

To begin with, Danny is an employee, not a supervisor. Secondly, there is no evidence in the record whatever to the effect that the Company ratified Danny's actions in any way. Thirdly, Danny's threats occurred relatively late in the day (around 4 p.m.). And the Union presented no evidence that any of the employees who were around Danny when he uttered his threats had not yet voted. Rather, the evidence on that subject cuts the other way.

#### E. Was the Company's Election Observer a Supervisor?

In Objection i, the Union contends that the election observer named by the Company, Donald Hepfer, is a supervisor. That objection too is without merit.

The record fails to show that the Company has granted Hepfer any supervisory authority. Hepfer does the maintenance work on the Company's buildings and, in the winter, runs an ash truck. His maintenance work involves repairing furnaces, miscellaneous carpentry, and the like. The Company sometimes provides him with assistants (for example Danny McDonald sometimes helps Hepfer on the ash truck). The Company pays Hepfer \$8.50 an hour, a pay rate all the Company's senior employees make.

#### F. Alleged Illegal Surveillance and Promises of Benefits

In its Objection d, the Union contends that the Company engaged in illegal surveillance of its employees' protected activities. Objection c contends that the Company promised benefits to employees if the Union were defeated. No evidence supports either contentions and I conclude that they are without merit.

#### G. Threats by the Company, Including Threats of Shutdown

In Objection b, the Union objects to threats by the Company of shutdown or loss of jobs if the Union were voted in. Objection f alleges that the Company assembled groups of employees and made threatening statements.

In parts II, III, and V of this Decision I found that Mike and Twig McDonald did unlawfully threaten assembled groups of employees by the manner in which they contended that the employees' selection of the Union to represent them might result in the closing of the Company or the layoff of many employees. Those unlawful threats, moreover, occurred during the election campaign. I conclude, therefore, that Objections b and f have merit.

Since "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election,"<sup>13</sup> I shall recommend that the October 27, 1988 election be set aside and second election be held.

#### CONCLUSIONS OF LAW

1. The Company interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1) of the Act, by the following actions:

(a) Predicting that the employees' selection of the UMWA to represent them might result in the closing of the Company or the layoff of many employees, doing so without sufficient explication of objective facts substantiating such predictions.

(b) Communicating to employees Lee Weber and Ralph Kester that, because of their protected activities on behalf of the UMWA, the Company preferred that they find other employment.

2. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The record fails to show that the Company violated the Act in any other respect.

4. The unfair labor practices referred to in paragraph 1(a) interfered with the rights of the Company's employees to a free and untrammelled choice in the election conducted in Case 6-RC-10084 on October 27, 1988, and have tainted the results of that election.

#### REMEDY

The recommended Order requires the Company to cease and desist from engaging in the unfair labor practices referred to in the above conclusions of law and requires the Company to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

The Respondents, McDonald Land & Mining Co., Inc.; McDonald Trucking Co., Inc.; McDonald Coal Co.; McDonald Coal Sales Corp.; Thomas Coal Sales, Inc.; and Thomas Coal Company, Inc., Clearfield, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Predicting, without sufficient explication of objective facts substantiating such predictions, that the employees' selection of the United Mine Workers of America (UMWA),

<sup>13</sup> *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).

<sup>14</sup> 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.

or any other union, to represent them may result in the closing of the Respondents or the layoff of employees.

(b) Telling employees who engage in protected activities on behalf of the UMWA, or any other union, that because of such activities the Respondents preferred that those employees find other employment.

(c) 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) Post at their facilities copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondents' representative, shall be posted by the Respondents 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 Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps 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.

<sup>15</sup>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 recommend that the election in Case 6-RC-10084 that was held on October 27, 1988, be set aside and that Regional Director for Region 6 conduct a second election at such time as the Regional Director determines that the circumstances permit the free choice of a collective-bargaining representative.

#### 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 try to convince you to vote against unionization by telling you that if a union comes in the Company might be forced to close or lay off employees.

WE WILL NOT tell employees who campaign for the United Mine Workers of America or any other union that we prefer that they find jobs someplace else.

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.

MCDONALD LAND & MINING CO., INC.;  
MCDONALD TRUCKING CO., INC.; MCDONALD  
COAL CO.; MCDONALD COAL SALES CORP.;  
THOMAS COAL SALES, INC.; THOMAS COAL  
COMPANY, INC.