

**Grand Canyon Mining Company and United Mine Workers of America.** Cases 11-CA-15801 and 11-CA-16059

August 25, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On April 17, 1995, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed 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 in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

<sup>1</sup> The Respondent has 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.

<sup>2</sup> Contrary to the dissent, we find that the Respondent knew of Casteel's union activity before the Respondent transferred him to section two of the mine. The evidence shows that Casteel was the leading union advocate in that he contacted the Union about organizing the Respondent's employees. He also drafted a letter praising the Union and announcing an initial organizing meeting that he distributed by placing copies inside the vehicles of the unit employees in the Respondent's parking lot. Although our colleague claims that the Respondent was unaware of this activity, we stress that the day before Casteel's transfer, Supervisor Doug Wright told an employee that another supervisor, Elmer McCoy Jr., had seen 16 employees attending a recent union meeting. Even our dissenting colleague finds that the Respondent unlawfully created the impression of surveillance by Wright's statement. We rely on Wright's admission of the Respondent's union surveillance, as well as Supervisor McCoy's postlayoff comment that Casteel and another employee had been "talking union," in finding that the Respondent knew of Casteel's union activity and transferred him in retaliation for it. Accordingly, we adopt the judge's finding that Casteel's transfer and subsequent layoff violated Sec. 8(a)(3) of the Act.

We find it unnecessary to pass on the judge's finding that Supervisor Doug Wright made a threat of mine closure during his conversation with employees Ronald Fields and Donis Cook as the remedy would be cumulative in light of the violations the Respondent committed here.

In adopting the judge's finding that Sam Blankenship was the Respondent's agent on the basis of apparent authority, we rely on the evidence that Blankenship contracted with Rapoca Energy, the owner of the real estate, to mine the land and then assigned those rights to the Respondent; that Blankenship personally guaranteed to Rapoca Energy the Respondent's "performance of all obligations" arising under his contract with the mine owner; that the Respondent is paying Blankenship up to \$4 million over the life of their contract as consideration for the mining rights; that Blankenship often visits the mine site; that the Respondent's employees refer to Blankenship as "the man with the money"; and that Blankenship must approve all requests for spare mining parts needed by the Respondent.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Grand Canyon Mining Company, St. Paul, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER STEPHENS, dissenting in part.

I would not find that employee Ronnie Casteel was discriminatorily transferred to section two in violation of Section 8(a)(3), and therefore I would not agree that his layoff, when that mine section closed 5 days later, amounted to an unlawful discharge. To begin with, according to the uncontested finding of the judge, the Respondent's closure of section two was entirely lawful. Second, notwithstanding evidence of animus against the Union generally in statements by the Respondent's supervisors before the transfer, there is no evidence that the Respondent was aware of Casteel's union sentiments or activity before that date. In fact, although Casteel had placed union leaflets in employees' cars prior to this transfer, the record indicates that a different employee was suspected of having done so. Supervisor Elmer McCoy's postlayoff remark to employee James French that the men in section two were laid off because Casteel and employee Dennis Dutton were "talking union" does not establish a motivation for the transfer. Indeed, in light of the dismissal of the allegation of unlawfulness of the layoff itself, the remark is simply an unlawful coercive statement by a supervisor that is not indicative of motives for management decisions affecting section two. Finally, in the absence of any evidence about Casteel's skills and specialties, Mine Superintendent Sawyer's testimony that Casteel was transferred from section one because that section was now being "pillared" and Casteel was a better roof-bolter is not rebutted. Accordingly, I would find that the General Counsel failed to prove by a preponderance of the evidence that Casteel's transfer was for an unlawful reason.

The judge incorrectly stated in fn. 4 of his decision that employee Larry French's alleged constructive discharge resulted from his transfer to section one of the Respondent's mine operations on November 16, 1993. The record shows that French's discharge did not occur until the Respondent transferred him from the first shift to the second shift of section one about February 25, 1994. We do not find that correction of this misstatement is sufficient to affect our finding that the Respondent violated Sec. 8(a)(3) by constructively discharging French.

*Donald R. Garttalaro, Esq.*, for the General Counsel.  
*George J. Oliver, Esq. (Smith, Helms, Mulliss & Moore, L.L.P.)*, of Raleigh, North Carolina, for the Respondent.  
*Jerry Stallard, Esq.*, of Coeburn, Virginia, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on October 19, 1994, at Abingdon, Virginia. The hearing was held pursuant to an order consolidating cases, consolidated complaint, and Notice of Hearing (the complaint) issued on July 21, 1994 by the Acting Regional Director for Region 11 of the National Labor Relations Board (the Board). The charge in Case 11-CA-15801 was filed by the United Mine Workers of America (the Union) on December 27, 1993, and was served on the Grand Canyon Mining Company (the Company or the Respondent) on December 27, 1993. An amended charge was filed by the Union in Case 11-CA-15801 on January 28, 1994, and was served on the Company on January 28, 1994. A second amended charge in Case 11-CA-15801 was filed by the Union on February 8, 1994, and was served on the Company on February 8, 1994. The charge in Case 11-CA-16059 was filed by the Union on June 2, 1994, and was served on the Company on June 2, 1994. An amended charge was filed by the Union in Case 11-CA-16059 on June 20, 1994, and was served on the Company on June 20, 1994.

The complaint alleges the Company interrogated its employees concerning their union activities, threatened its employees with termination if they engaged in such activities, threatened its employees with mine closure because of such activities, created the impression that union activities of its employees were under surveillance, advised its employees that fellow employees were laid off because of their activities on behalf of the Union in violation of Section 8(a)(1) of the Act, and laid off and thereafter failed and refused to recall its employees in violation of Section 8(a)(3) of the Act. Additionally, the consolidated complaint alleges the Company constructively discharged, and thereafter failed and refused to reinstate its employee, Larry French, in violation of Section 8(a)(3) of the Act. The complaint is joined by the answer filed by the Respondent wherein it denies the commission of the aforesaid unfair labor practices.

The complaint further alleges the foregoing alleged unfair labor practices were committed by the following named persons who, at all material times, have been, and are now, agents of the Company, acting on its behalf and who are supervisors within the meaning of Section 2(11) of the Act:

Gary Horn	Owner
Bill Sawyers	Superintendent
Larry Addair	Supervisor
Elmer McCoy Jr.	Supervisor
Tim Woods	Supervisor
Doug Wright	Supervisor

The Company denies that Tim Woods is an agent acting on its behalf, or a supervisor within the meaning of Section 2(11) of the Act. The complaint also alleges that at all times material, Sam Blankenship has been, and is now, an agent of the Company, acting on its behalf, and is an agent within the meaning of Section 2(2) and (13) of the Act. The Company further denies that Sam Blankenship is an agent acting on its behalf within the meaning of Section 2(2) and (13) of the Act. As to all others, the Company admits they are agents, acting on behalf of the Company and are supervisors within the meaning of Section 2(11) of the Act.

On the entire record in this proceeding, including my observations of the witnesses who testified, and after due consideration of the briefs filed by the parties, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

## The Business of the Company

The complaint alleges, the Company admits, and I find the Company is a Virginia corporation with a place of business located at St. Paul, Virginia, where it is engaged in the operation of a coal mine, that during the past 12 months, which period is representative of all times material, the Company purchased and received at its St. Paul, Virginia facility goods and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Virginia, and sold and shipped from its St. Paul, Virginia facility products valued in excess of \$50,000 directly to points outside the Commonwealth of Virginia. The Company is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION

The complaint alleges, the Company admits, and I find that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Interrogation of Its Employees*

## 1. By Elmer McCoy Jr. on or about November 1, 1993

The complaint alleges Elmer McCoy Jr., on or about November 1, 1993, interrogated employees concerning their union activities. No evidence or testimony, however, in support of this allegation was presented by the counsel for the General Counsel. Thus, pursuant to the Company's request for dismissal of this allegation in its posthearing brief, this allegation is dismissed.

## 2. By Doug Wright on or about November 16, 1993

The complaint alleges the Company, through its supervisor, Doug Wright, interrogated its employees concerning their union activities, on or about November 16, 1993. Ronald Fields testified that he and Donis Cook were in section two of the mine when Doug Wright "came over and he said, 'boys, let's talk union.'" Fields further testified that they were not "expecting anything like that to be said" and, thus, did not respond because they did not know what to say. Donis Cook also testified about Doug Wright's comments to him and Ronald Fields on or about November 16, 1993. Cook testified Doug Wright "come up to us and he said, 'When are you going to strike?'" Cook then responded to him that he did not know what Wright was talking about. Doug Wright did not testify, nor was any other evidence produced by the Company to refute either Cook or Field's testimony.

Generally, where a party fails to call a witness who may be reasonably assumed to testify favorably for the party, an adverse inference may be drawn regarding any factual ques-

tion on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122 (1987). Here, Wright is the only company representative likely to have any knowledge of his alleged conversation with Donis Cook and Ronald Fields. The Company asserts, however, it did not call him because it had discharged him due to his violation of company rules and Federal regulations. Thus, an adverse inference can be drawn from his failure to testify regarding the allegation of his interrogation of Cook and Fields. I find, however, inconsistency between Cook and Field's testimony regarding Wright's alleged interrogation of them. Thus, although an adverse inference can be drawn against the Company for its failure to call Wright to testify, the inconsistent statements between the testifying witnesses about the statement allegedly made to them compels a finding that the allegation of unlawful interrogation has not been sufficiently proven and must be dismissed.

*B. Threatened its Employees with Termination if They Engaged in Union Activities*

Elmer McCoy Jr. in mid-November 1993

Paragraph 9(b) of the complaint alleged Elmer McCoy Jr., in mid-November 1993, threatened its employees with termination if they engaged in union activities. In its posthearing brief, the Company requested that this allegation be dismissed as counsel for the General Counsel offered no testimony in support of this allegation. On a close reading of the transcript, however, I found testimony by Dennis Dutton that corresponds to this allegation. The time frame of the alleged threat of termination was set about 1 to 2 weeks prior to Dutton's layoff of November 21, 1993. Dennis Dutton testified he was alone with Elmer McCoy Jr. when Mr. McCoy, Jr. said to him "that if Castro<sup>1</sup> didn't hush, that they was going to get rid of him." Counsel for the Company did not cross-examine Dutton's testimony, nor offer any evidence that directly refutes this testimony. The only testimony offered to rebut Dutton's testimony occurred when McCoy, Jr. was asked if he had worked at any time with Dutton. His response was no.

Although Dutton's testimony appeared to be proffered in furtherance of this allegation, counsel for the General Counsel, in his posthearing brief, stated that this testimony was offered only to "establish background animus because this allegation had not been made prior to the time of trial." Thus, although I credit Dutton's unrefuted testimony, I am dismissing the allegation contained in 9(b) of the complaint, in reliance on the representations in both the Company's and General Counsel's posthearing briefs.

*C. Threatened its Employees that the Mine Would Be Closed Because of Their Union Activities*

1. Doug Wright: week of November 7, 1993, on or about November 16, 1993

Paragraph 9(c) of the complaint alleges the Company, during the week of November 7 and through its supervisor, Doug Wright, threatened its employees that the mine would be closed because of their union activities. Counsel for the

General Counsel then offered testimony that the correct date for this allegation was November 13, and so corrected in its posthearing brief. Troy Salyers testified that Supervisor Wright told him, and employees Mike Richardson and Eddie Fuller that if the men supported the Union, the Union would work them out of a job and the Company would close the mine for a year and then reopen it. Counsel for the General Counsel did not offer the testimony of either Mike Richardson or Eddie Fuller to corroborate Salyers' testimony. As discussed supra, however, the Company did not call Supervisor Wright to testify, nor did it offer any other evidence to refute Salyers' testimony. Thus, I credit Salyers' testimony and find Supervisor Wright did make such statement to the three named employees.

Merely finding that Supervisor Wright made this statement does not, however, by itself, establish a violation of the Act. The Company avers the statement attributed to Supervisor Wright is ambiguous on its face, and is nothing more than his individual opinion as to what effect the Union could or would have on the employees at the mine. Thus, the Company claims it is protected speech, pursuant to Section 8(c) of the Act, and did not constitute a threat or promise.

To support its position, the Company cites four cases, one of which is *Atlantic Forrest Products*, 282 NLRB 855 (1987). In *Atlantic Forrest*, the company president discussed eight unionized operations of the organization that were closed or were expected to close because of "unprofitable" operations, and some of those operations had incurred strikes. He then discussed Atlantic Forrest's own performance and its profitability, noting that it had lost money due to external forces, which forces he then identified. These statements were alleged to be threats of plant closure should the union campaign be successful. The Board found the statements were based on objective facts, however, and noted that companies have the right to support their opinions by citing past experiences with the same union in other plants the company operates. Thus, these statements were not found by the Board to be threats to close merely because the mine became unionized, but were predictions of effects based on objective criteria.

Further, I note the three other cases cited by company counsel are equally unpersuasive. For instance, in *Beverly California Corp.*, 310 NLRB 222 (1993), the statement by the company administrator was that "the facility would be closed before any union is allowed in and then no one will have a job." The administrative law judge, with Board approval, found this to be a threat in violation of Section 8(a)(1) of the Act. This statement is similar to Supervisor Wright's statement in this case. Thus, I find Supervisor Wright's statement to constitute a threat, violative of Section 8(a)(1), as in *Beverly*. Further, it is not an ambiguous statement, as claimed by company counsel, nor is it merely an opinion of what effect the Union would have on the Company, based on objective criteria, as in *Atlantic Forrest*. Also, the second part of this statement, that they would then reopen the mine in about a year, clearly shows that the mine would be closed merely to avoid unionization. Thus, I find the Company violated Section 8(a)(1), through Supervisor Wright, by threatening to close the mine due to union activities.

It is also alleged that Supervisor Wright, on November 16, 1993, threatened to close the mine due to employees' union

<sup>1</sup> Castro is a nickname for Ronald Casteel, who initiated contact with the Union.

activities. Ronald Fields testified he and Donis Cook were making a shuttle car splice and Supervisor Wright came over “talking about the owners of the mines and everything and said that Tim Woods said that Sam Blankenship would shut the mines down if the men voted union.” The testimony of Donis Cook corroborated Fields’ testimony. Counsel for the Company asserts this testimony is unsubstantiated hearsay and should not be the basis of finding a violation of the Act.

Supervisor Wright’s statement is not hearsay, however, because as a supervisor, hence agent, of the Company, he is making the assertion the mines would be shut down if the men voted union. Furthermore, his statement is not being offered for the truth of the matter asserted—whether Blankenship told Tim Woods that the mines would be closed. Instead, it is Supervisor Wright that is making the assertion that it will happen, even if it is, in part, based on what he heard. Additionally, the importance of the statement is not its truth, but the effect on the hearer. Here, its effect on the hearers, employees Cook and Fields, is intended to be, and is in fact, coercive against their voting for the Union. Thus, the statements of both Cook and Fields are admissible. Furthermore, as previously mentioned, Supervisor Wright did not testify at the hearing, therefore, the testimony regarding the allegation he threatened mine closure if the Union prevailed, remains unrefuted. Accordingly, I credit the testimony of both Cook and Fields that Supervisor Wright, on or about November 16, threatened mine closure should the Union prevail, and find the Company thereby violated Section 8(a)(1) of the Act.

#### 2. By Elmer McCoy Jr. in mid-November 1993

It is alleged the Company, in mid-November 1993 and through its Supervisor Elmer McCoy, Jr. threatened its employees that the mine would be closed because of their union activities. No evidence or testimony, however, in support of this allegation was presented by the counsel for the General Counsel. Thus, pursuant to the Company’s request for dismissal of this allegation in its posthearing brief, this allegation is dismissed.

#### 3. By Tim Woods on or about November 16, 1993

It is alleged the Company, on or about November 16, 1993, through its Supervisor Tim Woods, threatened its employees the mine would be closed because of their union activities. This allegation stems from Supervisor Wright’s statement (as credited above) to Donis Cook and Ronnie Fields that Woods had told him Sam Blankenship would close the mine if the men voted union. The Company asserts Woods was not a supervisor on November 16, 1993, although the Company admits Woods was a “fill-in” supervisor for approximately 6 weeks during 1993.

Assuming, arguendo, that Woods was a supervisor on or about November 16, 1993, I find Supervisor Wright’s statement cannot be imputed to Woods. There is no direct evidence that Woods ever uttered the statement to Supervisor Wright that Sam Blankenship told him the Company would close the mines if the employees voted for the Union. As previously mentioned, Supervisor Wright did not testify during the hearing. Further, there is no allegation, nor evidence proffered that Woods uttered this statement directly to the employees. Thus, I find the General Counsel has failed to es-

tablish that Woods threatened the employees with mine closure if they voted for the Union. Accordingly, I shall recommend this allegation be dismissed.

#### 4. Sam Blankenship on or about November 18, 1993

It is alleged the Company, through its agent, Sam Blankenship, threatened its employees the mine would be closed because of their union activities. The Company first asserts that Sam Blankenship is not an agent of the Company. Second, the Company claims if Blankenship was an agent, the General Counsel offered no evidence that would support a finding that Blankenship actually made the statement in question.

With respect to the Company’s contention that Blankenship is not an agent of the Company, the Company argues the General Counsel failed to introduce any testimony indicating the employees believed Blankenship was acting on behalf of the Company at any time material to this case, or that he had at any time actually acted on behalf of the Company. Horn also testified he is the sole owner and operator of the Company and no other individual has any interest in the Company. Horn also testified the sole interest Blankenship has in the Company is his interest in the assignment agreement.

Blankenship was the original party who contracted with Rapoca Energy to mine the Grand Canyon Mines. Blankenship assigned his rights to mine land owned by Rapoca to the Company, for which he receives compensation. Moreover, Horn testified Blankenship assigned his rights to the Company because he wanted out of the day-to-day operations, and has not been involved with such operations since the assignment. Finally, the Company contends that although Blankenship may have visited the mines, no testimony or other evidence was produced showing that he acted or purported to act on behalf of the Company.

The General Counsel asserts, however, that Blankenship’s financial interest in the Company’s proper performance of its contract is considerable as he is to be paid up to \$4 million over the life of the contract. Further, Donis Cook testified that Sam Blankenship and Gary Horn were the owners of the Company. He was then asked whether he knew that for a fact. His response was, “Well they’re the men that’s always in charge.” Moreover, Cook testified that Tim Woods always referred to Blankenship as “the man with the money.” Additionally, Cook was asked if he knew what, if any, relationship Blankenship had with the Company, and he replied, “He’s the guy—if you need parts, you’ve got to call him before you get parts, so evidently he’s got a lot to do with it.”

James French also testified he had worked for both Sam Blankenship and Gary Horn in either 1985 or 1986 in a mine called Misty Beck. Thus, I find from this unrefuted testimony, Blankenship and Horn have been copartners and/or co-owners of other mines prior to the contract involved here with Grand Canyon Mining. This fact is not enough to establish the two are actually co-owners for purposes of running the Company involved here. It does support an inference, however, that employees, who were aware of their prior partnership arrangement, would reasonably believe Blankenship and Horn were partners for purposes of running this particular Company. This may have been further reinforced by Blankenship’s visits to the mines, as reflected in the record, being referenced to as “the man with the money,” and the

testimony of Cook that Blankenship's permission was required before any parts were ordered. Thus, cumulatively, these factors indicate the employees had a reasonable belief that Blankenship was involved in the operation of the mine, regardless of whether he actually was involved in it. As I find Blankenship to have possessed at least apparent authority to bind the Company, I will now address the allegation that he threatened its employees that the mine would close due to the employees' union activities.

Ronald Casteel testified about the statement allegedly uttered by Blankenship on or about November 18, 1993.

When I finished up my job, I was standing there and they [Blankenship, Bill Sawyers and Larry Addair] was walking around the corner going towards it. I walked around to the corner also, and as I walked toward the corner there, Dennis Dutton had done took a load of rock to dump, and I hear somebody say, Addair what have you heard about the union. Have you heard anything about the union. Presumably, Addair says I hear a little. A shuttle car was returning, I couldn't hear nothing else said, but I did catch on the latter end of the conversation "That's all right, I'll lay off two months and hire a new crew."

When he was asked if he knew who made this last statement, however, he replied, "No, I don't have any idea."

Donis Cook also testified about this conversation, as allegedly relayed to him by Larry Addair, although he testified the date was November 17, 1993.

About 12 o'clock in the day, Sam and Bill [Blankenship and Sawyer] came up to the section and went across the section and looked at the coal and they took Larry Addair over there. When Larry come back, Larry said, "Sam asked me if I had heard any union talk up on the section." And that he told Sam, "No, he hadn't heard any." He said, "The reason that some of the men thought the reason that Jack McCarty was laid off was because of the letters." And then he said, "Sam will not work under a union. He will shut it down for a couple of months and then he will start right back up."

Larry Addair also testified regarding this alleged conversation that took place on or about November 18, 1993. He denied that Blankenship ever made the alleged statement, and that their conversation around the date in question involved only coal quality and running out of gob area. Addair also did not recall having the above-mentioned conversation with Cook.

I credit Casteel's testimony that the conversation took place between Sawyers, Addair, and Blankenship for purposes of proving antiunion animus. As Casteel admitted, however, he does not know which of the men involved uttered this statement. I thus do not find that it has been shown Blankenship was responsible for making it. Moreover, the alleged conversation between Addair and Cook in which Addair conveyed Blankenship's alleged statement is not enough to prove Blankenship actually uttered this statement. Cook's testimony about what Addair told him that Blankenship told him is simply hearsay and is inadmissible if offered, as here, for the truth of the matter asserted (that Blankenship made this statement to Addair). Thus, I dismiss

this allegation against the Company as to Blankenship's alleged threat of mine closure due to the employees' union activity.

#### 5. Larry Addair on or about November 17 or 18, 1993

It is alleged the Company, through its Supervisor Larry Addair, threatened its employees that the mine would be closed because of the employees' union activities. The same testimony, above, of Cook's account of their conversation and of Addair's denial of such conversation, relates to this allegation. I credit Cook's testimony that Supervisor Addair conveyed to him Blankenship's threat of mine closure if the employees supported the Union. Cook's overall account of this incident convinces me he was a truthful witness who candidly reported only what he had heard. I find that by this threat of mine closure by Supervisor Addair, the Company violated Section 8(a)(1) of the Act.

#### D. Created the Impression that the Union Activities of its Employees Were Under Surveillance

##### Doug Wright on or about November 7, 1993

It is alleged the Company, through its Supervisor Doug Wright, created the impression that the union activities of its employees were under surveillance on or about November 7, 1993. In support of its allegation, counsel for the General Counsel offered the testimony of Donis Cook. Cook testified that on or about November 15, 1993, Supervisor Wright approached him outside the mine office and asked him when the employees were going to strike and when they were going to sign cards. Cook said he did not know what Supervisor Wright was talking about. Supervisor Wright said, "[Y]ou know what I am talking about. There was sixteen of you at the meeting. Junior saw you all up there. I know there was sixteen of you at the meeting."

The Company relies on *Clark Equipment Co.*, 278 NLRB 498 (1986), in its denial that Supervisor Wright's comments to Cook constituted an impression that the union activities of its employees were under surveillance. In *Clark Equipment*, a supervisor, 1 week before an election, said to an employee, "[N]ot many people were attending the union meetings on Sunday." The employee then asked how the supervisor knew about this, the supervisor responded that he had heard about it. *Clark Equipment* at 503. The Board found this statement was not enough, by itself, to lead an employee to reasonably believe the Company had intentionally begun a program of surveilling employees' union activities, as the statement to the employee contained only general or known facts that he had "heard."

In *Gupta Permold Corp.*, 289 NLRB 1234 (1988), however, the Board affirmed the administrative law judge's finding that a company supervisor created the impression that the employees' union activities were under surveillance. In *Gupta*, the supervisor stated to the employee that he knew there were 13 people at the union meeting the previous day. This was, in fact, the exact number attending the meeting. *Gupta* at 1247. The administrative law judge found it reasonable for employees to believe the company had a meeting under surveillance in circumstances in which a high-ranking company official makes a reference to a specific number of employees at a union meeting, for no apparent reason, and which number corresponds to the actual number of employ-

ees in attendance. Further, in *Link Mfg. Co.*, 381 NLRB 294 (1986), the Board reversed the administrative law judge's finding that the company's supervisor did not create an impression of surveillance. In *Link*, the supervisor asked the employee how the union meeting went on the previous day and also said he knew that some 36 employees had signed union cards. This was enough, the Board found, to create an impression of surveillance.

Here, Supervisor Wright told Cook he knew there were 16 employees at the meeting, much like the supervisor in *Gupta*. Further, he stated that he knew this information because "Junior" had seen them and not because he had just heard it around the mine as if it were general knowledge. Moreover, I find Junior in this case refers to Elmer McCoy Jr., a company supervisor, and the fact that he was named as the person who saw the people at the meeting would tend to lead employees to reasonably believe the union activities were being surveilled by the Company. Thus, both Gupta and Link support a finding here that Supervisor Wright created a reasonable impression in the employees that their union activities were under surveillance, and the Company thereby violated Section 8(a)(1) of the Act.

*E. Solicited its Employees to Withdraw Their Support for the Union*

1. Tim Woods on or about November 16, 1993

It is alleged the Company, through Supervisor Tim Woods, solicited its employees to withdraw their support for the Union, on or about November 16, 1993. The Company asserts counsel for the General Counsel failed to elicit any testimony or other evidence to support this allegation and, therefore, it should be dismissed. I find, pursuant to the Company's assertion and a review of the record, the General Counsel did not elicit testimony to support this allegation. Therefore, this allegation is here dismissed.

2. Gary Horn in mid-December 1993

It is alleged the Company, through its Owner Gary Horn, solicited its employees to withdraw their support for the Union in mid-December 1993. In support of this allegation, counsel for the General Counsel offered the testimony of Donis Cook and James French. Cook testified about a meeting Horn had with the employees in which he told the employees to reconsider what they had done and they could get their union cards back by sending a certified letter to the union hall. James French testified about this same meeting. French stated that Horn asked them to get their union cards back by sending a registered letter.<sup>2</sup>

Horn also testified about his statements during that meeting with employees. He stated: "[t]he only thing I said was that to get your card back, if you wanted to, you probably could send a certified letter. That was the extent of it." He also said he did not give them the address to send the letters to, any instructions drafting the letter, nor did he assist anyone in drafting a letter. This does not contradict the testimony of either Cook or French. Thus, the only issue is whether Horn's statement during that meeting violates the

<sup>2</sup>Although both French and Cook erroneously testified the meeting took place on December 8, 1993, this error is immaterial to the determination of this issue.

Act. For the reasons set forth below, I find Horn's statements are not violative of the Act, and therefore dismiss this allegation.

In *R. L. White Co.*, 262 NLRB 575 (1982), the company vice president distributed a pamphlet that contained eight questions and answers regarding how employees could get their union cards back. The Board found the pamphlet did not violate Section 8(a)(1) of the Act, even though it was distributed gratuitously. The Board stated:

An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether the employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.

*R. L. White Co.* at 584 (citing *Aircraft Hydro-Forming, Inc.*, 221 NLRB 581, 583 (1975)). Further, merely furnishing the address of the Union does not constitute unlawful assistance. The statement here is not unlike that involved in *R. L. White Co.* Horn did not make any attempt to ascertain whether employees would try to get their union cards back, did not offer any assistance to the employees, nor was his statement enough to make the employees feel threatened if they did not seek such revocation. Thus, Horn's statement does not violate Section 8(a)(1). Accordingly, this allegation is dismissed.

*F. Advised its Employees that Fellow Employees Were Laid Off Because of Their Activities on Behalf of the Union*

Elmer McCoy Jr. on or about November 23, 1993

It is alleged the Company, through its supervisor, Elmer McCoy Jr., on or about November 23, 1993, advised its employees that fellow employees were laid off because of their union activities. In support of this allegation, counsel for the General Counsel offered the testimony of James French. French testified he had a conversation with Supervisor McCoy about 3 days after the November 1993 layoff. French alleges Supervisor McCoy told him he "heard Bill Sawyers say that morning that the reason that the men were laid off in Section 2 was because Ronnie Casteel and Dennis Dutton were talking union." In rebuttal, the Company offered the testimony of Supervisor McCoy. McCoy denied ever having a conversation with French, regarding Sawyer's alleged comments about the layoff. In fact, McCoy so vehemently denied it that he answered the question before company counsel was able to complete the question. McCoy also testified he never had such a conversation with anyone, nor would he ever have had a conversation of that nature.

I credit the testimony of James French. I found French to be a credible witness who testified in a forthright manner and who remains an employee of the Company, with the corresponding likelihood that he would not be motivated to testify adversely to the Company unless his testimony was true. I thus find that McCoy made the statement attributed to him and the Company thereby violated Section 8(a)(1) of the Act.

*G. Company Laid Off and Thereafter Failed and Refused to Recall its Employees on or About the Dates Set Opposite Their Names*

It is alleged the Company laid off and thereafter failed to recall the employees named below because the employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid. By such acts, it is alleged the Company violated Section 8(a)(1) and (3) of the Act.

Fredrick Bateman	November 21, 1993
Ronald Casteel	November 21, 1993
Dennis Dutton	November 21, 1993
Ronald Fields	November 21, 1993
David Kennedy	November 21, 1993
Jack McCarthy	November 11, 1993
Harold McCoy <sup>3</sup>	November 21, 1993
Troy Salyers	November 21, 1993
Rickey Williams	November 21, 1993
Donis Cook	November 21, 1993
Denney Eary	November 21, 1993
David Morrisette	November 21, 1993
Frank Sutherland	November 21, 1993
Garney Turner	November 21, 1993

On or about November 21, 1993, the Company stopped mining section two of the mine and laid off most of its employees who worked in that section. The General Counsel contends the Company stopped mining section two in retaliation against its employees for supporting the Union. The Company contends the General Counsel failed to establish a prima facie case that the layoff was based on union activities. Alternatively, the Company argues if a prima facie case was established the Company has submitted legitimate, non-discriminatory business reasons for its actions.

In support of his contention, the General Counsel offered the testimony of Troy Salyers, Ronald Fields, Jack McCarthy, Frederick Bateman, Dennis Dutton, Donis Cook, and Ronald Casteel. In its defense, the Company offered the testimony of Bill Sawyers, Larry Addair, and Gary Horn.

Troy Salyers testified about a conversation with Supervisor Addair prior to the layoffs of November 21, 1993, regarding the continued mining of section two:

Larry said we had all kinds of work there, which we—they had talked about—the coal had dropped down about six foot, which is about normal height for jawbone anyway. . . . But they had us like three panels projected off lefthanded, right behind us, and he said they could go that way, and then we'd faced up some on the right hand side to go righthanded. We faced them up so they was ready to start a section there, and then we was going to go straight up ahead between two old Eastover section.

<sup>3</sup>On February 10, 1994, the Board notified the Union, in writing, that the allegation regarding the termination of Harold McCoy had been dismissed.

Salyers was then asked what had been discussed about going between the two Eastover sections. He replied:

Well, I—I thought that was where we was headed, where we was going, that the direction we was headed, because he kept talking about getting some high coal over there because he had worked at Eastover, and he said them big sections was high, and I was—I understood that's where we was going to then [where the number two section was going].

On cross-examination, however, he was asked if Supervisor Addair had ever spoken with him about any problems in the Eastover properties of which he was aware. He replied, "[H]e said there was high coal over there and he said if we cut into it, it would probably wash us out." Salyers was asked what Supervisor Addair meant by that. Salyers said, "[i]t was flooded out over there where they—mined, but he said when we got so close that we'd start drilling test holes."

Ronald Fields, in his testimony, explained what a projection was. "It's a panel. It's a [sic] projected on the map, but it's not, you know, it just shows you the direction of an intended section, you know, on the map." Fields was then asked whether he had ever seen a projection for section two, prior to the layoff. He replied yes, approximately 6 weeks or so before the November 21 layoff. He then testified what he saw on that projection:

Well, they showed projected sections turning righthanded and lefthanded off of the number two panel. That would be sections turning righthanded off of the section I was working on, which was number two, and lefthanded, be driving off in those directions, right and left.

His direct testimony was completed with questions pertaining to how he found out he was laid off. He stated his wife received a phone call, he thinks from Bill Sawyer, who told her he was laid off. Fields was not home at the time so his wife conveyed the message to him.

On cross-examination, Fields was questioned whether he and Supervisor Addair had ever had discussions with respect to the Eastover properties. He replied, "[p]ossibly I did. I don't know for sure." Fields was then asked to relate those discussions.

Well, if we talked anything about Eastover properties it was the, you know, the conditions of the sections that we were driving towards or something of that nature, or possibly the coal heights on those sections.

Fields was then asked whether it was true he was aware there were a lot of water problems in that mine. He replied, "[y]es, there would be a water problem there." Fields also stated it was true that the old mine was flooded. He was asked whether he had ever expressed to Supervisor Addair his concerns about getting too close to those workings, and whether he was concerned about the flooding. He replied, "[b]ecause we were driving toward those sections. That would be a every day hazard to a man's mental state, you know, to think you're driving towards old mines that's flooded with water. Yes, sir." He also stated they were heading right between those old workings.

Fields was then asked about the condition of section two. He replied, “the coal was getting lower, but as far as the conditions, the top and everything was in fairly good shape.” He also testified they had roof falls on section two on and off the belt lines. Further, he stated they used a 5- or 6-foot point anchor bolt. He also admitted it was difficult to operate the equipment in that side of the mine of section two in which the seam height was low. He also testified there was quite a bit of rock from section two and, on occasion, they had to gob. Gobbing, he explained, is separating out the rock debris and storing it underground, which improves the quality of the coal by keeping the reject rate down. He said Supervisor Addair probably mentioned the reject level, but not all the time. He also answered both he and his coworkers were concerned about being in those low conditions, in section two. Additionally, he testified the seam height of the coal had been gradually decreasing.

On redirect, Fields was asked to explain what he meant when he said the conditions of section two were bad, but he had driven through a lot worse to get to where they were. He replied, “well, we drove a projected section back from the area of the face where we were, a lot lower and as much rock or more to where we set up that projected section.” Further, he was asked about the jawbone seam, and about his testimony that at one point they were mining in 4-foot seam and it got up to 14 foot.

I’d say that was 20 breaks out of the face where we were mining at the present. A break is 80 foot long, so you’d say 20 by 80, back out of the out—by area of the face. We drove a place in the belt heading—or no it was in the number five heading, it went from four to fourteen foot in a cut or two, the coal height.

Additionally, Fields testified he had about 12-1/2 years experience with jawbone seams, which was the type of seam he was working with at the Company.

The jawbone seam has a tendency to go up and down. It’s a roll type coal. At one break it’ll be low, the next break will be high. Its height is inconsistent, you know. It’s not—it doesn’t stay one height or start at one height and stay that way, it’ll roll. It’ll go up and down, the height.

Moreover, the height of the seam at the mine involved here fluctuated, he testified, “[B]ut it’s six and half, seven foot on the average, you know, the coal.”

Jack McCarthy testified he attended a union meeting in the early part of November. His brother, Jerry McCarthy, is a safety coordinator. Jack McCarthy stated he quit around November because the Company brought in some diesel equipment. Jack McCarthy also testified his brother called him around the time he quit, asking him about the union organizing letters that were put in employees’ vehicles. Jack McCarthy returned to work in early November, for about 6 or 8 days, until Bill Sawyers told him he was laid off due to a lack of work. McCarthy testified he asked Sawyers if he was being laid off because of the letters that were put in automobiles. Sawyers responded no, it was “nothing like that. He swore it wasn’t that. But, I mean—my brother had already called me, you know, and told me that somebody had accused me of doing it.”

McCarthy was also asked about the mining conditions in section two. He replied, “[p]retty good I thought.” When asked how the conditions in section two compared with the other section of the mine, he replied that section one was a little higher. When asked to clarify what he meant, he replied, “[P]robably a couple of feet in height, the seam was, the seam of coal.” He also testified that at the time he was laid off, the seam height of the coal was around 4 or 5 feet all the way across the face.

David Kennedy also testified about his November 22 lay-off. Sawyers telephoned Kennedy and told him he was permanently laid off. Kennedy testified, however, that at the time he was hired, Sawyers told him there was probably 15 to 20 years of work at the mine. Additionally, prior to the layoffs, Kennedy had spoken to Supervisor Addair about the Eastover mines. Supervisor Addair told Kennedy they were “going to drive in between two sections of Eastover—drive a section in between two sections of Eastover.”

On cross-examination, Kennedy testified that the roof conditions of section two “was good at times and other times it wasn’t.” He was then asked what he meant when he said sometimes the roof conditions were not good. He said there was “rock in the coal, I mean rock.” He was then asked whether they were required to take any extra precautions with regard to the roof in section two, and he replied, “no.” He also did not know whether they were using any extra length bolts, whether they had to narrow the width of the drive on his machine, etc. He testified the seam height at the time he was laid off was 4 to 5 feet. Further, he testified there “was quite a bit” of rock being mined at that time, and that would affect the quality of the coal. Kennedy was also asked whether the Company instructed him in procedures in running the equipment that would result in better efficiency and less rock. He replied no. He also testified there was some gobbing, “but not very much, maybe a few cars gobbed that I know of.”

Kennedy also testified Supervisor Addair never spoke with him about the problems in the Eastover mine. He did, however, hear “some talk it could have been flooded, but I don’t know if Larry told me it was flooded or not.” Kennedy also testified he had never heard anything regarding the Company receiving less money for each ton of coal. Finally, he testified that D. R. Jessee was hired in the mine before he was and remained in employment after the layoff. On redirect, he was asked whether Harold McCoy was senior to him. He replied McCoy was hired after he was, but McCoy remained employed there after the layoff.

Fred Bateman worked in section two. Bateman testified he heard other employees talking about the Union in October 1993. He signed a union card on November 7, 1993, and attended a union meeting on or around November 7, 1993. He was laid off on November 21, 1993. On cross-examination, he was asked whether there was cribbing along the belt line. He said yes, and it was the second shift (evening) who was primarily responsible for doing this maintenance work. He testified there was a lot of cribbing because of roof problems. Bateman was also asked about the quality of coal coming off the belt in section two. He testified the quality of the coal in both Sections One and Two “was good because the belt stayed black all the time, just full of coal.” He was further asked if he recalled seeing any rock in the coal and he replied:

Not that much, what would fall off the roof and stuff, you know, when—well, during the winter the top changes and it will let some of it fall down. That's the only time I seen it.

Bateman was then asked whether the Company's supervisors ever talked to him or other employees about the amount of rock in the coal and he said, "Mr. Sawyers never did say anything to me about it." Finally, Bateman testified that neither his immediate supervisors, nor his coworkers ever discussed the need to operate more efficiently.

Dennis Dutton testified he worked in section one of the mine, starting in October 1991 or 1992. During 1993, he started working in section two. Dutton found out about union activity from a note left on his vehicle. He attended many union meetings, beginning on or around October 31, 1993. He signed a union card on November 7, 1993. Dutton also testified that before he began attending union meetings, he had spoken to Bill Sawyers about the quality of coal at Grand Canyon. This discussion took place a couple of weeks before the employees signed the union cards.

Well, it was—kind of had a, you know, I guess about four foot of coal. He said they were going to try to go through it. If they can't, he was going to move the section back about eight breaks and start another panel.

Dutton was also asked about a conversation he had with Sawyers about 2 days before the layoff:

I asked Bill when he was going to move the section back. He said "well, there is a lot of stuff going on right now and we might just send you on down the road."

On cross-examination, Dutton was asked whether there was a lot of rock just prior to the layoff, and he replied, yes. "There was a lot of rock coming out, but we was gobbing it." Dutton also testified they were still getting the same tonnage of coal as before, but they were gobbing to keep the rejects down. They did this, he said, after Sawyers "hollered inside and tell us too much rock is coming out and to gob it. That's what we done." Dutton was also asked how senior he was compared to other employees who were retained after the layoff. James French, Fred Phillips, and Billy O'Quinn were all more senior than he was because all were hired before his latest hire date.

Donis Cook testified he was working in section two in 1993. He found out about the union campaign from a letter left in his vehicle. He attended the second union meeting and he also signed a union card. Cook testified he was informed of the layoff by a phone call from Bill Sawyer. Cook was asked whether he saw any projections for mining section two prior to the layoff. He replied yes and this projection (or mine map) indicated, "that we would be there for a long time." Cook also testified that before the layoff, "Larry Addair said where we were at when we got laid off that we were going to turn to the left and drive a section a long ways down in that direction." Cook was called back to work at the mine by the Company on December 8, 1993, and is currently employed by the Company.

Ronald Casteel testified he drafted the union letter that was placed on or in everyone's vehicles, on or around Octo-

ber 27, 1993. Casteel found out he was laid off when Bill Sawyers called his wife and left the message. On cross-examination, he was questioned about the mining conditions of section two. He was asked whether they had been having difficulty in running the equipment at the face of section two. He replied no. He was also asked if they were mining a lot of rock with the coal during that time, and he replied, "[n]ot no more than they usually had been mining over the years." He was then asked whether the seam of coal had gradually been decreasing:

It dropped some due to the fact it was jawbone coal. It would be up and down—you couldn't say fifty foot ahead that it would be ten feet high which it will become, or fifty foot ahead that it would be down to 48 inches.

Casteel also testified the supervisors had never discussed anything with them about the coal quality. Casteel was also asked about the different roof bolts used for section one and section two, "number one we would vary from there. We'd go from four foot glue to a six foot glue to eight foot glue." And, in section two, they would primarily use a 6-foot glue bolt.

James French testified he learned of the union campaign from the letter placed on his truck. He also attended the union meetings in early November. James French was also asked about the different bolts being used on Sections One and Two. On section one, he testified, they are using 5-foot stress point bolts. Prior to that, they had been using a 4-foot bolt on the panels. He also testified the 5-foot point anchor bolts, used in section two, were more difficult to work with than the 4-foot bolts used in section one. He also stated, however, the roof conditions of Sections One and Two "were pretty well the same conditions," and that no extra precautions had to be taken with section two. He was also asked about a statement he had made in his affidavit, that Sawyers had said the coal in section two was too low to mine economically, and he testified that Sawyers had said this on Monday, after the layoff. Finally, French testified the Company was pillaring section one at the time of the layoff. He then testified that pillaring is the last thing a mining Company does before finally leaving a mine site.

William Sawyers testified he has been employed by the Company for about 3 years as superintendent. Sawyers was questioned about Rapoca's notice to the Company regarding its intention to increase the cost associated with cleaning the coal. Sawyers responded that Gary Horn had told him about it, on or about October 15, 1993, and that it was to be effective around November 1, 1993. The General Counsel then asked Sawyers whether Horn had told him to find ways to cut the cost of mining, and to more closely monitor the mining operation. Sawyers replied yes.

Sawyers testified that around November 18 or 19, he and Horn decided they could no longer afford to operate section two and decided to shut it down. Horn then gave Sawyers instructions to "pick out the people that I thought would be best suited, and we did it that way." Further, he testified that Horn never told him who to lay off, only to close section two. Sawyers stated he then started calling the employees on November 19 to inform them they were laid off. On the first phone calls, he told the employees section two was shutting

down and they were laid off until further notice. After these initial calls, Horn told Sawyers that the closure was permanent and to so inform the employees that he laid off.

Later in the hearing, Sawyers was called again, this time by company counsel. He was asked about the conditions in section two, and testified,

The conditions wasn't very good considering what we've had overall in the mines. They were—the seam was getting lower and we had problems with that—we call that the number one main, and we had problems with our top from the time we started until we ended it in November.

Sawyers was then asked how he decided who was to be laid off, and he replied, "I tried to use—by the norm, I tried to use the hiring date, which wasn't always true. I tried to use the hiring dates they were hired." Further, he stated, "I also used the man's abilities and the man's performance." Sawyers was also asked whether there were any exceptions to his decision to try to retain the more senior employees. He replied that there were. He testified, "we kept Eddie Fuller . . . over Donis Cook, which Eddie was the mechanic, and Donis was the electrician, and I guess that was it." He then, after having trouble remembering, was asked about Harold McCoy. "Oh, yes, sir. I missed his name somewhere. . . . I also kept Harold McCoy in light of—instead of Dave—Dave Kennedy." He was then asked to explain why he did this. He said, "I decided that Mr. McCoy, and which he was a better miner operator, did a better job." One other person mentioned as an exception was Leonard Jackson, a roof bolter, general inside. When asked why he kept Jackson, he responded, "[a]lso, he did a better job . . . than the people I laid off." Sawyers also testified he recalled Donis Cook to replace Eddie Fuller about 2 weeks after the layoff. Further, he also attempted to recall Troy Salyers, Rick Williams, Dave Morrisette, Ron Casteel, and Dave Kennedy, but he either received no response or was told they had found other jobs.

Sawyers was also asked whether he could recall having a conversation with David Kennedy regarding the Company's coal reserves being good for 15—20 years. Sawyer said no, he did not have such a discussion. He testified, however, he "may have had a general discussion with employees concerning the coal reserves." He was asked to clarify this statement: "Well, one is always—people would always ask me how much we had left, and I'd say well, there's plenty of coal left at the mines in reserves here." Sawyers also stated he never had a discussion with Dennis Dutton, nor any other employees, about moving the section two direction. When asked if there were any plans to drive the mine in any other direction, he replied his intentions at the time were only to keep driving forward like they were going. On cross-examination, Sawyers testified no one from section one was laid off. He also testified he did not lay off all the men from section two—he kept Harold McCoy and the four men on the evening shift. Moreover, he contended he had not heard anything about union activity until after the layoff.

Larry Addair testified he was the section two foreman over production on dayshift. He was asked about the condition of section two during September through November 1993. He stated:

The seam of coal itself was low; it was getting lower all the time that we was mining it; the further we advanced into coal seams, it started getting from six foot down to about twenty-eight inches. We had a real irradical roof conditions, just sixteen foot widths to try to control our bad top and stuff like that.

Addair was also questioned regarding his conversation with Sawyers about the mining conditions:

Well, he told me that they had took a cut on their cost of their coal—or price for coal, and said that our reject was real high up on this section at that time, and he asked me what we could do to, you know, get the reject back down to where they could live with it.

Addair testified it was necessary to gob rock to keep reject rates down. Addair also testified he had discussions with employees on his crew about the quality of coal.

I continuously talked to them about the quality as far as reject and stuff like that—job on the seam has got a inherited rash—I mean inherited reject in it, and every way we could control it, we tried to do so.

Addair also testified that Blankenship and Sawyer asked him whether the height had picked up, but he could not remember the date they asked him this question. "I discussed with them that we was running out of gob areas because we was getting the gob closer to the face before we could make a belt move and stuff." Addair denied having a conversation with Donis Cook about driving off section two in another direction. He also testified he expected the November layoff.

Well, I'd been laid off two other times myself on account of reject and stuff at that mines. When it got high they couldn't handle it at the prep plant, I was laid off two other different times. I knew that reject had to be high by taking the top and stuff that we was taking. I didn't know nothing about as far as when it was going to be, but I suspected that it could happen at any time. [Tr. 375.]

Gary Horn, the owner and operator of the Company, testified at length concerning the reasons for the closure of section two. The Company was formed in 1991, and Horn was assigned Sam Blankenship's rights and duties under a mining contract between Blankenship and Rapoca Energy, the holder of the mining rights. Blankenship was to receive compensation for this assignment and Horn would be paid for the coal he mined by Rapoca Energy, on a contractually fixed clean ton basis after it had been processed by Rapoca's preparation plant. Prior to the commencement of mining the coal, the requirements of the Mine Safety Health Act had to be met with several required approvals, including ventilation and roof control. The approval for ventilation requires a year's projection showing the planned direction of the mine and the adequacy of the ventilation system. The projections were drafted by Rapoca's Engineering department for the Company.

The Company had been mining section one for about 1-1/2 years and the quality of the coal had been very good. The coal has been running in a 6- to 8-foot seam height with an average of 10 inches of rock in the coal. In section one 4-foot resin bolts are used to ensure the integrity of the roof, except in a small area where 5-foot torque tension bolts are

used, as this small area is similar to section two in its characteristics of instability. In section two, 6-foot torque tension bolts are required to create a beam to support the roof. The use of the extra precautions for section two are more involved, time consuming, and expensive. The Mine Safety Health Administration (MSHA) has required the Company to use these bolts on section two since late 1992. Section two has had continual roof support problems and about 18 roof falls, which led MSHA inspectors to require the use of the 6-foot torque tension bolts. In addition, there were problems in section two with staying in the seams of coal as rock on top of the coal would fall as they mined the coal. As a result of the instability of the rocks, they left 12 inches of coal at the top of the seam unmined in order to help hold the rock and prevent it from falling. Horn also testified that the mining in section two was approaching the old Eastover Mines, which had been closed because they were filled with water. Horn was concerned for the health and safety of the mine workers, his equipment, and his investment as they approached this area. Horn requested a topographic map from Rapoca Energy's Engineering department, which confirmed his suspicions about the Old Eastover mines' proximity to the area section two was headed toward.

Additionally, section two was producing twice as much rock in the coal as section one. Horn received calls from Rapoca complaining of excessive rock in the coal from section two, resulting in an increased rejection rate. On March 15, 1993, Horn received a letter from Rapoca documenting their complaints about the quality of coal. In his efforts to improve the quality of coal produced in section two, Horn expressed his concerns that Rapoca would not tolerate continued poor quality of coal. He told Sawyers to talk to the foremen and seek suggestions on the elimination of excessive rock and the possibility of gobbing the rock when it fell from the roof. In addition, Horn compared the production of section one and Two for August, September, and October. In August, section one yielded 32,140 tons of material (mixture of coal and rock) as compared to 16,952 tons for section two. In September, section one yielded 23,430 tons of material and section two yielded 18,000 tons. In October, section one yielded 29,270 tons, whereas section two yielded 17,640 tons.

On October 15, 1993, Horn received another letter from Rapoca. This letter informed him they were continuing to have problems marketing the coal and that the reject rate was increasing. Moreover, Rapoca complained the poor quality of coal was increasing their cost on the wear and tear of their preparation plant. Finally, the letter communicated to Horn that, effective November 1, 1993, because of the above problems with his coal, Rapoca would be paying Horn \$1 less per clean ton of coal. Additionally, cutting through the rock on section two was increasing his costs of production because of the wear and tear on his mining equipment. Horn had another discussion with Bill Sawyers because "things looked grim . . . what else could we do, was there anything that we could do to keep this section running." Then, during the first part of November, the seam height of the coal in section two got worse, down to the 20- or 30-inch range. Finally, on or around November 17 or 18, 1993, Horn made the decision to close section two of the mine.

I decided that there—the only way that I could keep Grand Canyon Mining operating was to take advantage of the location that I could run the most coal the less cost and try to be as efficient as I could to cope with the dollar less per ton that I was going to receive for the coal. Therefore, I decided that I would have to stop the Number Two section area of the mine from—from mining.

I decided to lay off one crew of men—that that I would instruct Bill to keep one crew of men, the number of men that would be required to run the Number One section location of the mine; that for him to come up with a crew that would help us continue to have a job.

Horn testified that he gave no specific instructions to Sawyer as to which men to retain. In response to a question concerning his exact instructions to Sawyer, he replied:

My instructions was to—to get him a crew that would be consistent on the productivity end of it, and to try to keep people that we were familiar with that could do any particular job, and to try to go by the people that had been with us longer if possible, if we had people that could contribute to keeping the job running.

Horn testified that the reject rate, prior to the closure of section two, was "generally in the 50 to 55 percent range." After section two was closed, however, his reject rate improved to "generally the low 40 reject range." Further, he stated that 1 month, the reject rate went down to 29 percent.

Finally, on direct, Horn was asked when he first became aware there was any type of union activity occurring at the mines. He replied he received a Petition for the Union on December 17, 1993, and this was the first he heard of any union activity. Horn then contacted an attorney and he and his company managers received training on what they could and could not do during the union activity. Within 2 weeks of contacting his attorney, Horn held a meeting with his employees. At this meeting, Horn discussed the problems he had been having with the mine. Further, he expressed his disappointment that the employees had contacted a union and he asked them to get their union authorization cards back.

On cross-examination, Horn was questioned concerning Rapoca's projections to turn left in section two. Horn stated they were required to present projections to supply up to a year's mining to get an approved ventilation plan. Horn testified he knew these projections were not practical because there would have to be a major cost adjustment to mine in that area. Horn further testified the mine inspectors of MSHA knew these projections were not accurate. Finally, on cross-examination, counsel for the General Counsel questioned Horn about why he did not pillar section two if he had no future plans to mine that section. Horn replied he would have liked to, but Rapoca would not allow him to do so.

#### Analysis

I find the counsel for the General Counsel has made a prima facie case of a violation of the Act by the layoffs of the employees of section two of the mine. To establish a prima facie violation of Section 8(a)(3) and (1) of the Act,

the General Counsel has the burden of establishing the alleged discriminatees were engaged in union activities, the Company knew of such conduct, the Company's conduct was motivated by antiunion animus, and such conduct had the effect of discouraging membership in the Union. *Athens Disposal Co.*, 315 NLRB 87 (1994).

Initially, I find that most of the employees who were laid off engaged in union activities. Bateman, Casteel, Dutton, Fields, Kennedy, McCarthy, Salyers, and Cook were engaged in union activities. They each testified they attended the early union meetings and all signed union cards on November 7, 1993. No evidence about Williams, however, Eary, Morrisette, Sutherland, or Turner's involvement in union activities, if any, was introduced.

Counsel for the General Counsel established the employer had knowledge of the employees' union activity, based on the commission of the 8(a)(1) violations of the Act as found supra. These violations establish the Company harbored an antiunion animus toward employees engaged in the union activities. No evidence was proffered, however, to show whether Harold McCoy, the Farmer brothers, Fuller, or Wright, who were section two employees originally retained after the layoff, were engaged in union activity. Additionally, no evidence was offered to show that the section one employees, none of whom were laid off, were not generally engaged in union activity. This would have more directly shown disparate treatment. Thus, I find the General Counsel has established a prima facie case that the layoff was motivated by such animus on the part of the Company.

Once a prima facie case has been substantiated by the General Counsel the Company has the burden of proving, by a preponderance of the evidence, that it would have engaged in such conduct in the absence of the unlawful motivation. I find the Company has met its burden of rebutting the prima facie case of a violation of Section 8(a)(3) and (1), by showing the layoffs would have occurred due to legitimate, non-discriminatory reasons, even in the absence of the unlawful motivation, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); and *Roure Bertrand DuPont, Inc.*, 271 NLRB 443 (1984).

Company Owner Gary Horn testified credibly and persuasively that section two of the mine was closed due to economic reasons. Section Two had roof support problems, requiring the implementation of extra measures to ensure against roof falls. These extra measures, including the use of different roof bolts, were more costly and labor intensive and, as such, increased the Company's cost of production, while decreasing the Company's profits. Section two produced twice as much reject as section one, which cost the Company more money. This was further documented by two separate letters from Rapoca to Horn, in which Rapoca was complaining about the increasingly high reject rate and strongly suggesting Horn correct the situation. Moreover, in the second letter, Rapoca informed Horn it was decreasing, by \$1 per ton, the price at which it bought coal from the Company, effective November 1, 1993. Finally, Horn's testimony of his concern about the mining of section two approaching the old Eastover Mines was also compelling. The Eastover Mines were closed because they were filled with water. Horn confirmed this with Addair, a former foreman of

the Eastover Mines. Horn also reviewed topographic maps that indicated the same problem. Thus, as they were approaching these flooded mines, it was reasonable for him to be concerned about the safety of his employees and his equipment if he continued mining in that direction.

Sawyers corroborated Horn's testimony regarding the mining conditions in section two and testified that the height of the seam was decreasing. Further, Addair testified the coal seams were getting lower and the roof conditions seemed to be getting worse. Addair also stated the reject rate was high in section two and they were gobbing a lot to try to contain this problem, and they were running out of gob areas. Finally, some of the employees' testimony corroborated Horn's testimony of the problems of section two. Salyers testified that Addair had spoken to him about approaching the Eastover Mines and the concern that it would flood section two of Grand Canyon Mines if they continued in the direction they were heading. Also, Fields, although testifying that the top was in good shape, admitted there had been roof falls in that section, and that the coal was getting lower. Fields also conceded it was difficult to operate the equipment in that part of section two where the seam height was low, and he also stated there was a great deal of rock from section two so they were gobbing to try to keep the reject rate down. Moreover, Kennedy stated there was a great deal of rock being mined from section two and it was affecting the quality of coal mined from section two. Kennedy also stated he had heard the Eastover Mines could have been flooded, but he did not recall where he had heard this from. Bateman also testified about the bad roof conditions and stated there was a lot of cribbing in section two to help support the bad roof.

Testimony of other employees seemed to contradict the testimony of the above-mentioned employees and of the Company. As the company supervisors and owner's testimony was consistent, however, and many of the testifying employees corroborated at least parts of their testimony, I find sufficient evidence was adduced to prove the existence of poor mining conditions in section two. Further, the evidence established the potential of flooding from the Eastover Mines if they continued in the direction that they were mining. Thus, the Company sufficiently met its burden of showing other legitimate, nondiscriminatory reasons for the closure of section two of the mine and that the closure of section two would have occurred even in the absence of the employees' engagement in concerted activities.

The analysis, however, cannot end here. Although I find the actual closure of section two was based on economic reasons, the question remains whether the Company transferred certain employees to section two just prior to its closure so it could dismiss them due to their union activities. Ronald Casteel was the only one of the named employees laid off, who was transferred to section two just prior to the layoff. All others had been working in section two since their hire date, or throughout 1993. Thus, I will focus here only on Casteel, who, on November 16, 1993, was transferred from section one to section two. For the reasons discussed here, I find the Company violated Section 8(a)(3) and (1) of the Act, when it transferred Casteel from section one to section two of the mine and included him in the layoff.

The General Counsel alleges Sawyers transferred Casteel to section two because he knew Casteel did not like section two. This, the General Counsel avers, is indicated by his re-

fusal of the same transfer in July 1993, and his subsequent layoff for this refusal. Further, the General Counsel submits Sawyers knew that even if Casteel accepted the transfer, the Company was planning to close section two and Casteel would be laid off with the other employees working in section two. Casteel testified Elmer McCoy told him Sawyers had ordered the transfer. Further, on his way to section two Casteel testified he picked up one of the mine telephones and eavesdropped on a conversation between Sawyers and McCoy in which Sawyers asked McCoy how Casteel had reacted to his transfer.

The Company claims Casteel's transfer was a business decision. Sawyers testified at the time of the transfer, they were pillaring section one, which requires setting timbers to use as a roof support, as opposed to using roof bolts. Sawyers believed French "would be a better timber man and Mr. Casteel would be the better roof bolter operator." Thus, he transferred Larry French<sup>4</sup> to section one and Casteel to section two. There is little evidence, however, the Company transferred men from section to section. In fact, Sawyers, on cross-examination, was questioned about the employees who were laid off following the closure of section two and why no one from section one was laid off. His response was, "I believe in something that's not broken, you don't fix it. The people on Number One was doing a good job, and I normally try to keep things rolling." Thus, if this truly is his policy, Sawyers would not have transferred Casteel out of section one. Therefore, based on the contradictory testimony of Sawyers, I find the Company has not met its burden of proving a legitimate, nondiscriminatory reason for transferring Casteel to section two. The transfer was merely a pretextual step the Company took in an attempt to create a valid reason to lay off Casteel. The fact that this section was closed only 5 days after the transfer of Casteel reinforces this finding.

Jack McCarthy was laid off on November 11, 1993. McCarthy had quit around the first part of November, "over the diesel equipment they had brought in there." That is also when his brother Jerry, a safety coordinator at the mine, called him to tell him the Company thought he was the one responsible for putting the letters regarding a union inside other employees' vehicles. Then, after "six or eight days . . . or maybe two or three days" he went back to work. Subsequently, after working about "six or eight days," he was informed by Sawyers that he was laid off. This occurred on November 11, 1993. McCarthy testified Sawyers told him he was laid off because there was not enough work. Sawyers essentially testified to the same thing.

I find the Company committed no 8(a)(3) and (1) violations when it laid off McCarthy. As McCarthy testified, he quit in the first part of November. At this same time, his brother called him to ask him about the letters left in the employees' vehicles. Thus, the Company already suspected McCarthy was heavily involved in the union campaign at this first part of November when he quit. If the Company did not desire to employ McCarthy any longer because of his Union activities, it could have validly refused reemploy him when he came back after a few days. The Company, how-

<sup>4</sup>As there is a separate allegation that Larry French was constructively discharged by this transfer, I will address this in a later discussion.

ever, rehired him. Thus, I find the Company, in laying off McCarthy on November 11, 1993, was not motivated by antiunion animus. Instead, McCarthy was laid off due to a lack of work, as Sawyers testified.

*H. Respondent Company Constructively Discharged,  
and Thereafter Failed and Refused to Reinstate  
Employee Larry French on or About  
February 25, 1994*

The complaint alleges the Company constructively discharged, and thereafter failed and refused to reinstate, Larry French, on or about February 25, 1994, because French joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

To prove a prima facie case of constructive discharge, the General Counsel must prove (1) the burdens imposed on Larry French were intended to cause and did cause a change in his working conditions that were so difficult or unpleasant as to force him to resign; and (2) such burdens were imposed by the Company because of Larry French's union activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1968). Once the General Counsel has proven a prima facie case of constructive discharge, the burden shifts to the Company to prove a legitimate, nondiscriminatory reason for the change in conditions. For the reasons discussed below, I find the General Counsel has proven a prima facie case of constructive discharge for Larry French. The Company, however, was unable to meet its burden of proving a legitimate, nondiscriminatory reason for transferring French.

The Company contends that by transferring Larry French, it did not change his general working conditions as he retained the same pay, duties, and benefits. In *American Licorice Co.*, 299 NLRB 145 (1990), however, the Board found a change in the employee's working conditions when the Company refused to allow the employee to transfer to the second shift when she requested the transfer to attend to child care problems. The Board, in so finding, reversed the administrative law judge's finding that none of the employee's conditions were changed because conditions for first and second shift were basically the same, and the Company's refusal to transfer her was essentially personal and not work related. The Board found this interpretation too narrow. Thus, here, if the Company had knowledge Larry French was not able to work the second shift because of transportation problems, its transfer of him to second shift would result in a constructive discharge of him because it made his working conditions so difficult and unreasonable as to force him to resign.

Here, there is sufficient evidence to show the Company knew Larry French had transportation problems and depended on his brother to get to work. During January 1994, Larry French's truck motor "blew up" and he began to depend on his brother to get to work. James French, Larry French's brother, testified he parked in the parking lot, which was 200 to 300 feet from the mine office. He also testified company supervisors used the same lot. Larry French and Supervisor Elmer McCoy Jr. testified that McCoy rode once with Larry and James French. Given these facts and the fact

he had been riding with his brother for well over a month, I find the company supervisors were aware Larry French was dependent on his brother for transportation to work. Further, assuming arguendo, they were not aware of this, both Larry French and Sawyers testified Larry French told him as much when Sawyers informed him of the transfer. Nonetheless, Sawyers insisted on the transfer. Thus, Larry French, with no way to get to work on the second shift, was forced to resign.

The second element of the General Counsel's prima facie case is whether the transfer was facilitated because of Larry French's union activities. The Company alleges it had no knowledge of his union activities. Further, even if it was aware of his union activities, the decision to transfer him was made almost 3 months after the November 1993 layoffs. Thus, if the Company wanted to get rid of him, it would have done so during that time. Also, the Company argues, the transfer involved four individuals, including Larry French, and therefore, he was not singled out.

The General Counsel offers the testimony of Larry French to prove the Company had knowledge of his union activities. When Larry French was asked whether Sawyers told him why they were transferring him, he testified adamantly that Sawyers never told him. Yet, his brother James French testified that when Larry French told him of the transfer, he also told him the reason Sawyers gave him for the transfer was because he was not bolting fast enough. Further, James French was then asked what Larry's reaction was to that reason, and he testified Larry said it was a lie. I credit James French's testimony as the more reliable as he seemed to remember the details well. Further, given that the testimony contradicts his brother's testimony, it would seem that if he were motivated to testify untruthfully, he would have given an answer that corroborated his brother's testimony.

Larry French testified that alleged Supervisor Woods told him he thought French was a union instigator. Woods admitted this statement, but said he was only joking. Further, French testified McCoy told him he had heard from Woods that French was a union instigator. McCoy never admitted nor denied this statement in his testimony. Thus, French's testimony remains unrebutted in this regard and I credit it.

French attended union meetings and signed a union card. In mid-December, the Company received the Union's petition to be recognized as the employees' collective-bargaining representative. Further, as found supra, Supervisor Wright created the impression of surveillance of the employees' union activities by reciting the number of employees attending the meeting with information from another supervisor (McCoy), I find the evidence supports a finding that the Company was aware of those employees who did attend the meeting, including Larry French. Thus, I find the evidence establishes that the Company had knowledge of Larry French's union activities and its transfer of French to the second shift was motivated, in part, because of his involvement in these activities.

As a prima facie case has been proven by the General Counsel, the burden shifts to the Company to prove it would have transferred Larry French even in the absence of his engagement in concerted activities, based on legitimate, nondiscriminatory reasons. The Company has failed to meet its burden here. The Company alleges it transferred Larry French to second shift because of his inability to bolt the requisite number to maintain the Company's production

standards on first shift as this cost the second shift lost production because it had to bolt extra to make up the difference. Sawyers testified he therefore transferred two roof bolters from second shift to first shift, and two roof bolters from first shift to second shift. McCoy's testimony set out the same scenario as Sawyers. Therefore, the Company argues, its transfer of Larry French was, part of an effort to improve production in the mine and was thus, motivated by a legitimate, nondiscriminatory purpose.

I find, however, the Company's purported reason for the transfer is pretextual. No evidence was offered by the Company that the two roof bolters transferred from second shift to first shift were faster bolters than Larry French. Larry French had worked with Sawyers and Blankenship as a roof bolter in prior years with no reported problems. Further, if Larry French had never gotten the hang of roof bolting and was adversely affecting production, I find it unlikely that he would have been transferred from second shift to first shift in 1993. Therefore, based on all the foregoing reasons, I find the Company constructively discharged Larry French because of his engagement in concerted activities on behalf of the Union.

#### CONCLUSIONS OF LAW

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

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by a threat issued by its supervisor, Doug Wright, on November 13, 1993, to employee Troy Salyers that the Company would close the mine if the employees supported the Union, and by a threat issued by Wright on November 16, 1993, to employees Ronald Fields and Donis Cook that Blankenship (a reputed owner of the mine) would shut down the mine if the employees voted for the Union.

4. Respondent violated Section 8(a)(1) of the Act by the threat of mine closure if the employees supported the Union, which was conveyed to employee Donis Cook by Supervisor Larry Addair, on or about November 17 or 18, 1993.

5. Respondent created the impression that the union activities of its employees were under surveillance, in violation of Section 8(a)(1) of the Act, by the comments made by its supervisor Doug Wright, that he knew about a union meeting that had been observed by a company official.

6. Respondent violated Section 8(a)(1) of the Act by Supervisor Elmer McCoy Jr.'s statement to employee James French that the men in section two had been laid off because employees Ronald Casteel and Dennis Dutton were discussing the Union.

7. Respondent violated Section 8(a)(3) and (1) of the Act by its transfer of Ronald Casteel to section two and its consequent layoff of Casteel when section two was closed.

8. Respondent violated Section 8(a)(3) and (1) of the Act by its constructive discharge of employee Larry French.

9. Respondent did not otherwise violate the Act.

10. The above unfair labor practices have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has violated the Act, it shall be ordered to cease and desist therefrom, and to take certain affirmative actions, including the posting of an appropriate notice, designed to effectuate the purposes of the Act, including the rescission of its unlawful transfer and discharge of its employee Ronald Casteel and its unlawful discharge of employee Larry French. It shall also be ordered to reinstate these employees to their former positions or, if their former positions no longer exist, to substantially equivalent ones and to make them whole for all loss of pay and benefits, including seniority and other rights and privileges sustained by them as a result of Respondent's discrimination against them. Backpay and benefits shall be with interest as computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>5</sup> Respondent shall also remove from its records of all references to the unlawful actions taken against these employees and inform them in writing that this has been done and that such unlawful actions shall not be used against them in any manner in the future. Respondent shall also preserve all necessary records for computing backpay and benefits and make them available to the Regional Director for Region 11, or his representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

## ORDER

The Respondent, Grand Canyon Mining Company, St. Paul, Virginia, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Threatening its employees with closure of the mine if the employees support the Union or otherwise engage in concerted activities.

(b) Creating the impression of surveillance of the union activities of its employees.

(c) Telling employees that other employees have been laid off because of some employees' engagement in union activities.

(d) Transferring and laying off employees because of their engagement in union activities.

(e) Constructively discharging employees because of their engagement in union activities.

(f) 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 actions necessary to effectuate the policies of the Act.

(a) Rescind its unlawful transfer and layoff of employee Ronald Casteel and its unlawful discharge of employee Larry French and offer them full reinstatement to their former positions or, if their former positions no longer exist, to substan-

tially equivalent positions, and make them whole for all loss of earnings and benefits with interest as prescribed in the remedy section of this decision.

(b) Remove from its records all references to the unlawful transfer and layoff of Casteel and the unlawful discharge of Larry French and inform them in writing that this has been done and that such unlawful actions will not be used against them in any manner in the future.

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

(d) Post at its St. Paul, Virginia facility copies of the attached notice marked "Appendix"<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Company's authorized representative, shall be posted by the Company 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 Company to ensure that the notices are not altered, defaced, or covered by any other material.

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

As to all violations not specifically found here, the complaint is otherwise dismissed.

<sup>7</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."

## 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.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with mine closure if they engage in union activities.

WE WILL NOT create the impression of surveillance of our employees' union activities.

WE WILL NOT tell our employees that employees have been laid off because of the engagement in union activities of some employees.

<sup>5</sup>Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>6</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.

WE WILL NOT transfer and discharge our employees because of their engagement in union activities.

WE WILL NOT discharge our employees because of their engagement in union activities.

WE WILL rescind our unlawful transfer and layoff of employee Ronald Casteel and our unlawful discharge of employee Larry French and offer them full reinstatement to their former positions or, if their former positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and benefits resulting therefrom less any net interim earnings, plus interest.

WE WILL remove from our records all references to the unlawful transfer and layoff of employee Ronald Casteel and the unlawful discharge of employee Larry French and inform them in writing that this has been done and that such unlawful actions shall not be used against them in any manner in the future.

Our employees have the right to join and support the United Mine Workers of America, or to refrain from doing so.

GRAND CANYON MINING COMPANY