

UMWA Exhibit 1

Decision of Administrative Law Judge
Paul Bogas, excerpted

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Massey Energy Company and its subsidiary, Spartan Mining Company d/b/a Mammoth Coal Company and United Mine Workers of America.
Case 9–CA–42057

September 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 21, 2007, Administrative Law Judge Paul Bogas issued the attached decision. Respondents Massey Energy Company (Massey) and Mammoth Coal Company (Mammoth) filed separate exceptions and supporting briefs; the General Counsel and the Charging Party Union filed answering briefs; and Mammoth filed a reply brief.¹ The General Counsel filed cross-exceptions and a supporting brief; the Respondents filed answering briefs; and the General Counsel filed a reply brief.

The National Labor Relations Board² has considered the decision and the record in light of the exceptions and briefs. With respect to the allegations regarding Mammoth's conduct, we have decided to affirm the judge's rulings, findings,³ and conclusions as modified below

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

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed __U.S.L.W.__ (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

³ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces 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.

In adopting the judge's finding that Mammoth's conduct evidenced anti-union animus, Member Schaumber does not rely on various statements made by Massey's chief executive officer, Donald Blankenship

and to adopt his recommended Order⁴ as modified and set forth in full below. In order to expedite the issuance of this Decision, we have decided to sever the allegation of Massey's liability for the unlawful conduct found here and to reserve that issue for separate resolution.

Background

In August 2004, Massey, through a subsidiary, purchased the Cannelton/Dunn mining operation in Kanawha County, West Virginia from Horizon Natural Resources (Horizon), which had filed for bankruptcy. Since at least 1969, the Union has been the bargaining representative of the coal-mining employees at the Cannelton/Dunn operation (under a succession of owners); Horizon had adopted the National Bituminous Coal Wage Agreement of 2002 with the Union. Shortly before the sale to Massey, however, the bankruptcy judge issued an order authorizing the rejection of this collective-bargaining agreement, including the agreement's successorship clause, which forbids the sale of any operation to any buyer that does not agree to assume the collective-bargaining agreement.

Massey created a subsidiary, Mammoth, to operate the Cannelton/Dunn mine, which it did beginning December 4, 2004. Although Mammoth hired 219 employees to perform bargaining unit work, it did not continue the employment of the approximately 211 bargaining unit employees. While the Union informed Massey that 250 unit employees were willing to return to work,⁵ and many of those employees applied for employment with Mammoth, only 19 former unit employees were hired. Mammoth declined to recognize the Union, and it imposed new terms and conditions of employment, including wages lower than those paid by Horizon.

The General Counsel alleged, and the judge found, that Mammoth violated Section 8(a)(3) and (1) of the Act by refusing to hire Horizon's union employees at the Cannelton/Dunn operation in order to avoid incurring a bargaining obligation with the Union. The General Counsel also alleged, and the judge found, that Mammoth violated Section 8(a)(5) and (1) by failing and refusing to recognize the Union as the bargaining representative of the bargaining unit employees and by unilaterally chang-

that he opposed the Union. Member Schaumber would find that these statements came within the protection of Sec. 8(c) of the Act.

⁴ In addition to the remedies provided in the judge's order, the General Counsel requests a public reading of the Board's notice. We decline to grant this remedy, and accordingly deny the General Counsel's request.

The record indicates that the judge misspelled Jackie Danbury's name in his recommended Order; we have corrected the spelling accordingly.

⁵ This number may have included laid-off Horizon employees.

ing the bargaining unit's terms and conditions of employment. For the reasons discussed below, we agree.

Discussion

I. Mammoth's discriminatory refusal to hire unit members

For the reasons discussed by the judge in his decision, we adopt his conclusion that Mammoth unlawfully discriminated on the basis of union status when it refused to hire 85 former Horizon employees based on their membership in the predecessor's bargaining unit and their prouction sentiments.⁶ In this regard, we reject Mammoth's contention that application of the evidentiary burdens set forth in the Board's recent decision in *Toering Electric*, 351 NLRB 225, 233 (2007), which the judge declined to apply, dictates a different result. Even assuming that *Toering* applies to cases in which a successor employer has attempted to avoid a bargaining obligation by refusing to hire the employees of its predecessor,⁷ we would find that the General Counsel has satisfied the evidentiary burden imposed on him in *Toering* by showing that the discriminatees herein were genuine applicants protected by the Act.

In *Toering*, which did not arise in the context of a successor's discriminatory refusal to hire the employees of

⁶ Mammoth has excepted to the judge's finding that it unlawfully refused to hire applicant Lawson Shaffer, an employee on injured status at the time it took over the operation and who later applied for and received Social Security disability insurance benefits. In adopting the judge's conclusion that the Respondent discriminated against Shaffer, we do not rely on the judge's finding that Shaffer would not have quit his job upon qualifying for disability benefits from the Social Security Administration. We will leave to the compliance stage the issue of whether to toll the backpay period because Shaffer's physical condition had rendered him unavailable for work when he qualified for disability benefits. See, e.g., *Aero Ambulance Service*, 349 NLRB 314, 314-316 (2007); *Performance Friction Corp.*, 335 NLRB 1117, 1119-1120 (2001).

The judge inadvertently listed discriminatee Dewey Dorsey with several other applicants who declined a job offer from Mammoth or chose not to proceed further in the hiring process. In fact, the judge had credited Dorsey's account that he did not turn down a job offer.

⁷ Cf. *Planned Building Services*, 347 NLRB 670 (2006). In that decision, decided before *Toering Electric*, the Board held that elements of the General Counsel's initial burden of proof under *FES* do not apply where (as in the instant case) a successor employer has discriminated in hiring against its predecessor's employees in order to avoid a bargaining obligation. Id. At 673-674 (2006). Specifically, the Board stated that it serves no purpose in a successorship case, where an incumbent work force has been performing the jobs in question, to require the General Counsel to prove that the existing employees have relevant training and experience. Similarly, because a successor employer must fill vacant positions in starting up its business, there is no reason to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire. Instead, the Board held, a discriminatory refusal to hire requires the General Counsel "... to prove [only] that the employer failed to hire employees of its predecessor and was motivated by antiunion animus." Id. at 673.

its predecessor, the Board⁸ held that "an applicant for employment entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer." Id. at 228. The Board imposed upon the General Counsel the ultimate burden of establishing genuine applicant status by showing both an application for employment and that the application reflected a genuine interest in becoming employed. Id.

In the instant case, the employees of Mammoth's predecessor had been performing the same jobs at the same location where Mammoth planned to resume mining. Union officials as well as individual employees repeatedly informed the Respondent that the predecessor work force was ready, able, and willing to fill any and all available mining positions. Moreover, the union president personally submitted 53 applications on behalf of unit members, and many individual unit members applied directly to Mammoth through Massey job fairs or by handing in an application to Mammoth supervisors or other Mammoth employees. In addition, the record reflects, and the judge found that Mammoth routinely hired employees who failed to submit formal applications.⁹ Therefore, on the record before us, we would conclude that the General Counsel satisfied his initial burden of demonstrating the discriminatees' application for employment within the meaning of *Toering Electric*.

We would also find that Mammoth has not identified any evidence that might call into question any of the discriminatees' actual interest in employment. Contrary to Mammoth's contention, picketing to protest Massey's takeover of the Cannelton/Dunn operation did not indicate a lack of interest in employment; in fact, as the judge found, the pickets encouraged union members to apply for work with Mammoth.¹⁰

Mammoth's contention that the submission of applications *in bulk* indicates a lack of genuine interest in employment also fails. The Board specifically held in *Toering* that "[t]he fact that applications may be submitted in a batch is not, in and of itself, sufficient to destroy genuine applicant status, provided that the submitter of the batched applications has the requisite authority from the

⁸ Chairman Liebman and then Member Walsh dissented in *Toering*.

⁹ As the judge noted, the Respondent recruited, interviewed and hired many of the nonunit employees of its predecessor without requiring a formal application and could have followed the same practice with unit employees.

¹⁰ Furthermore, even assuming that alleged threats to employees who crossed the picket line were made, because they were not linked to any individual picketer they would not disqualify any of the applicants. See *Beard Industries*, 311 NLRB 768, 769 (1993) (picket-line misconduct does not disqualify individual strikers from rehiring unless they are linked to specific misconduct).

individual applicants.” 351 NLRB at 233 fn. 51. That was the situation here: the individual applicants filled out the applications themselves, signed them, and gave them to the Union to convey to Mammoth. Thus, even if conveying the applications could be said to be “applying” on their behalf, *id.* at 233, the applicants clearly authorized the Union to do so by giving it their filled-out and signed applications.¹¹ Accordingly, even if *Toering* were to apply in this case, we would find that the General Counsel has proved that the individual discriminatees qualified as genuine applicants entitled to the Act’s protection.

2. Mammoth’s unlawful refusal to recognize and bargain with the Union

We also agree with the judge that Mammoth is the statutory successor to Horizon at its Cannelton/Dunn operation because: (1) Mammoth conducted essentially the same business at the same location as Horizon did, and (2) the majority of the newly constituted bargaining unit employees would have been composed of former employees of the predecessor, absent Mammoth’s unlawful discrimination.¹² *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), *enfd.* in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). Consequently, we agree that Mammoth was obligated to recognize and bargain with the Union as the unit employees’ exclusive bargaining representative. *Love’s Barbeque*, *supra*, 245 NLRB at 82; *NLRB v. Burns Security Services*, 406 U.S. 272, 280–281 (1972).

We also adopt the judge’s finding that Mammoth’s discriminatory refusal to hire unit employees, and its announcement to applicants that its operation would be nonunion, disqualified it from setting initial terms and conditions of employment.¹³ See *Love’s Barbeque*, *supra*

(discriminatory refusal to hire majority unit of predecessor’s employees precludes employer from unilaterally setting initial employment terms); *Advanced Stretchforming International*, 323 NLRB 529, 530–531 (1997), *enfd.* in relevant part 233 F.2d 1176 (9th Cir. 2000) (statement to prospective employees that operation would be nonunion precludes successor from unilaterally setting initial employment terms). Accordingly, we adopt the judge’s conclusion that Mammoth violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union and by unilaterally imposing new terms and conditions of employment on the bargaining unit.

ORDER¹⁴

IT IS ORDERED that paragraph 5 of the amended complaint, relating to the liability of Respondent Massey Energy Corporation, is severed and reserved for separate consideration and decision by the Board.

IT IS FURTHER ORDERED that the Respondent, Spartan Mining Company d/b/a Mammoth Coal Company, Leivasy, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of Horizon Natural Resources Company’s Cannelton/Dunn operation (the predecessor employer) because of their union-represented status in the predecessor’s operation, or because of their union activities, or otherwise discriminating against these employees to avoid having to

A successor that acts lawfully is not legally obligated to accept a predecessor’s collective-bargaining agreement, but only to bargain with the majority representative of its employees. *Burns*, 406 U.S. at 284. Indeed, unless the “perfectly clear” exception applies, a successor may normally set initial employment terms without bargaining. *Id.* at 294–295.

Here, however, under extant Board precedent, Mammoth’s own postsale conduct (its continuation of Horizon’s business, its discriminatory refusal to hire the predecessor’s employees, and its announcement to prospective employees that Mammoth would be nonunion) triggered an obligation to bargain over the employees’ initial terms and conditions of employment. *Advanced Stretchforming*, *supra*; *Love’s Barbeque Restaurant*, *supra*. Member Schaumber did not participate in *Advanced Stretchforming* or *Love’s Barbeque* and does not pass on whether those cases were correctly decided. However, he applies that authority here for institutional reasons. Cf. *Smoke House Restaurant*, 347 NLRB 192, 193 fn. 7 (2006) (Chairman Battista and Member Schaumber, concurring), citing *Pacific Custom Materials, Inc.*, 327 NLRB 75 (Member Hurtgen, dissenting).

¹⁴ We have modified the Order and notice to reflect that the violations found and remedies imposed are limited to Mammoth, and to sever the allegations concerning the liability of Massey. Likewise, for purposes of this decision, the remedy portion of the judge’s decision applies solely to Mammoth.

At the General Counsel’s request, we have also corrected the judge’s inadvertent error in the description of the collective-bargaining unit contained in his recommended Order and notice.

¹¹ In any event, it appears that the Union resorted to batched applications because of the obstacles to application imposed by Mammoth and the lack of success encountered by individual applicants.

¹² In finding that Mammoth conducted essentially the same business as did Horizon at the Cannelton/Dunn operation, the judge referred to Mammoth’s post-takeover relocation of equipment and the use of highway trucks to move coal as unilateral changes made without regard to its bargaining obligation. We need not address whether or not these unilateral changes were subject to mandatory bargaining because we agree with the judge’s central finding that these and other changes did not alter the essential nature of the business at the Cannelton/Dunn operation, the mining and processing of coal.

¹³ The judge correctly rejected Mammoth’s contention that requiring it to bargain with the Union over the employees’ initial terms and conditions of employment would negate the bankruptcy court’s order setting aside the collective-bargaining agreement. In agreeing with the judge, we do not rely on his statement that the Respondents would have been obligated to honor the existing terms and conditions of employment for the life of the collective-bargaining agreement if the bankruptcy court had not rejected the successorship provision in the agreement.

recognize and bargain with the United Mine Workers of America (the Union).

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees engaged in the production of coal, including the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail, not owned by the Respondent), repair and maintenance work normally performed at the mine site or at the Respondent's central shop; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at the Respondent's mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(c) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

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

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

(a) Notify the Union in writing that it recognizes the Union as the exclusive representative of the bargaining unit employees under Section 9(a) of the Act and that it will bargain with the Union concerning terms and conditions of employment for the unit employees.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) At the request of the Union, rescind any departures from the terms and conditions of employment of unit employees that existed immediately prior to the Respondent's takeover of the predecessor employer, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until it negotiates in good faith with the Union to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of the judge's decision, the unit employees for losses caused by the Respondent's failure to apply the terms and conditions of employment that existed immediately prior to their takeover of the predecessor employer.

(e) Within 14 days from the date of this Order, offer employment to the following named former employees of the predecessor employer in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

Michael Armstrong, Charles Bennett, Randel Bowen, Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danbury, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair, Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion "Pete" Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight, Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker, Jr., Larry Vassil, Thomas Ward, James Whittington, Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, Fred Wright.

(f) Make the employees referred to in the preceding paragraph 2(e) whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to hire them, in the manner set forth in the remedy section of the judge's decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the employees named in the preceding paragraph 2(e) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an

electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in and around Kanawha County, West Virginia, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its facilities at any time since December 3, 2004.

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

Dated, Washington, D.C. September 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) 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 Federal labor law and has ordered us to post and obey this notice.

¹⁵ 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."

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to hire bargaining unit employees of Horizon Natural Resources Company's Cannelton/Dunn operation, the predecessor employer, because of their union-represented status in the predecessor's operation, or because of their union activities, or otherwise discriminate against these employees to avoid having to recognize and bargain with the United Mine Workers of America..

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All employees engaged in the production of coal, including the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail, not owned by us), repair and maintenance work normally performed at the mine site or at our central shop; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at our mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

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

WE WILL notify the Union in writing that we recognize it as the exclusive representative of our unit employees and that we will bargain with it concerning terms and conditions of employment for unit employees.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, at the request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of Horizon's

Cannelton/Dunn operation, retroactively restoring pre-existing terms and conditions of employment, including wage rates and benefit plans, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of Horizon's Cannelton/Dunn operation.

WE WILL, within 14 days from the date of the Board's Order, offer employment to the following named former employees of Horizon's Cannelton/Dunn operation, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

Michael Armstrong, Charles Bennett, Randel Bowen, Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danbury, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair, Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion "Pete" Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight, Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker, Jr., Larry Vassil, Thomas Ward, James Whittington, Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, Fred Wright.

WE WILL make the above-named employees whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire the above-named employees and, within 3 days thereafter, notify each of them in writing

that this has been done and that the refusal to hire them will not be used against them in any way.

SPARTAN MINING COMPANY D/B/A MAMMOTH COAL COMPANY

Engrid Emerson Vaughan, Esq., Donald A. Becher, Esq., and Linda B. Finch, Esq., for the General Counsel.

Richard R. Parker, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), of Nashville, Tennessee, for Respondent Massey Energy Company.

Forrest H. Roles, Esq. and Brace R. Mullett, Esq. (Dinsmore & Shohl L.L.P.) of Charleston, West Virginia, for Respondent Spartan Mining Company d/b/a Mammoth Coal Company.

Charles F. Donnelly, Esq., of Charleston, West Virginia, and *Judith Rivlin, Esq.,* of Fairfax, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Montgomery, West Virginia, on 16 days commencing on January 22 and concluding on March 15, 2007. The United Mine Workers of America (the Union) filed the original charge on June 2, 2005, and amended charges on June 28 and July 22, 2005, and June 22, 2006. The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on August 18, 2006, and an amended complaint and notice of hearing on October 6, 2006 (the complaint).

The complaint alleges that the Respondents—Massey Energy Company (Massey) and its subsidiary, Spartan Mining Company d/b/a Mammoth Coal Company (Mammoth)—violated the National Labor Relations Act (the Act) when they began staffing and operating Mammoth as a successor to Horizon Natural Resources Company (Horizon). More specifically, the complaint alleges that since about December 3, 2004, Mammoth violated Section 8(a)(3) and (1) when it refused to employ bargaining unit employees of Horizon in order to avoid an obligation to recognize and bargain with the Union as a successor, and also because those individuals were union members and engaged in protected activities. If not for that discrimination, the complaint avers, the majority of Mammoth's work force would have been comprised of individuals previously employed by Horizon, and a responsibility to recognize and bargain with the Union would have been triggered. The complaint alleges that Mammoth violated Section 8(a)(5) and (1) of the Act when it failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and unilaterally established mandatory terms and conditions of employment for employees in the bargaining unit. In addition, the complaint alleges that the unfair labor practices of the Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act. Both Respondents filed timely answers in which they denied having committed any of the violations alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Mammoth, a corporation, with an office in Leivasy, West Virginia, is engaged in the mining, processing, and shipping of coal at various facilities in and around Kanawha County, West Virginia. In conducting these activities during the 12 months preceding issuance of the complaint, Mammoth purchased and received at its Kanawha County, West Virginia facilities, goods valued in excess of \$50,000 directly from points outside the State of West Virginia. I find that Mammoth is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Massey, a corporation, with its principle office in Richmond, Virginia, performs various administrative services for its subsidiaries and operations, and satisfies the Board's direct outflow and/or direct inflow nonretail jurisdictional standards. Massey, through its subsidiaries and operations, annually mines and ships out of the State of West Virginia, coal worth more than \$50,000. I find that Massey is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. OVERVIEW

In August 2004, Respondent Massey, through its operating subsidiary, A.T. Massey Company (A.T. Massey), bought certain assets and properties of Horizon, a company that had filed for bankruptcy. Among the assets that Massey acquired were a Horizon coal mining operation known as Cannelton Industries, Inc. (Cannelton) and Cannelton's subsidiary, Dunn Coal and Dock Company (Dunn), which operated on the Cannelton property. Massey created a new subsidiary, Mammoth, for the purpose of operating what had been Cannelton/Dunn. Coal mining employees at Cannelton/Dunn had, since at least 1969, been represented by the Union, Local 8843. Recently, officials of Cannelton and Dunn had signed memoranda of understanding adopting the National Bituminous Coal Wage Agreement of 2002 (2002 National Coal Agreement) as their base agreement with the Union. That agreement had not expired at the time the Respondents took over Cannelton/Dunn, but has since reached its stated expiration date of December 31, 2006.

The Respondents assumed control of Horizon's Cannelton/Dunn operation on September 24 or 25, 2004. At that time, the Respondents did not continue the employment of any of the bargaining unit employees represented by the Union. However, prior to taking control of the operation, the Respondents' officials offered employment interviews and/or continued employment to every one of the nonbargaining unit employees of Cannelton/Dunn. The Respondents offered this opportunity not only to supervisory staff, but also to nonsupervisory employees who were not in the bargaining unit. For example, the Respondents offered pretakeover employment interviews and/or employment to Cannelton/Dunn's secretaries, maintenance clerk,

payroll clerk, accounts payable clerk, benefits clerk, shipping clerk, warehouse clerk, CAD operator who made maps, and human resources employee. The Respondents also offered employment interviews and/or employment to the laboratory staff working as contractors at Cannelton/Dunn. As a result of these interviews, many nonbargaining unit workers were hired and continued their employment uninterrupted when the Respondents took over the Cannelton/Dunn operation. However, every one of the over 200 Cannelton/Dunn bargaining unit employees lost their jobs at the facility when the Respondents took it over in September 2004. Between 19 and 22 of those Cannelton/Dunn unit employees eventually found employment with the Respondents at the facility.

On November 18, 2004, William Willis,¹ the president of the Union's Local 8843, which represented the Cannelton/Dunn unit employees, wrote to Respondent Massey's chief executive officer, Don L. Blankenship, and stated that the approximately 250 former Cannelton/Dunn workers represented by the Union were "ready, willing and able to return to work at a moment's notice." Many of those employees, including almost all of the alleged discriminatees, obtained applications from the union hall and applied to work at the former Cannelton/Dunn facility, now known as Mammoth. Former Cannelton/Dunn unit employees also sought work at Mammoth by going to Massey offices and to Massey job fairs. On December 3, 2004, the Respondents began employing individuals to perform the work of the former bargaining unit employees, and the record provides information on the individuals hired by the Respondents from that time until May 1, 2006. That information shows that the Respondents hired approximately 219 individuals to perform the types of work that had been done by bargaining unit employees at Cannelton/Dunn,² but hired no more than 22 of the over 200 former Cannelton/Dunn unit employees. The former Cannelton/Dunn employees that the Respondents hired to work at Mammoth did not include a single one of the approximately 11 individuals who had been union officials or union committee members at Cannelton/Dunn when the operation changed hands.³ Since the Respondents began operating

¹ This individual is often referred to in the record by his nickname, (Bolts)—a reference to his past work as a roof bolter in the mines.

² I have included the approximately 15 persons hired by the Respondents into "utility" classifications (utility, outside utility, plant utility, and surface utility) among the total of approximately 219 who were assigned to perform what had been bargaining unit work at Cannelton/Dunn. At trial, there was discussion of a contention by Respondent Mammoth that the utility employees' work would not have been considered bargaining unit work under the 2002 National Coal Agreement. It is not clear that Mammoth is continuing to press this point. At any rate, one of Mammoth's own witnesses, Jennifer Chandler, who was in charge of human resources matters for Mammoth during significant periods of time, testified that the utility workers were doing the work that, at Cannelton, had been done by "miner helpers," a category of positions that are covered by the 2002 Agreement. Transcript (Tr.) 1630-1631; General Counsel's Exhibit (GC Ex.) 14(a) at pp. 64-66, 317, 318, 320, 325, 326, and 332.

³ The Cannelton/Dunn unit members who had been union officers or committee members during the period leading up to the transfer of ownership are: David Crawford, Ronald Gray, Harry T. Jerrell, Robert McKnight Jr., Gregory Nuckols, Ronald Payne, Kenneth Price, Michael

the facility, Mammoth has refused to recognize and bargain with the Union as the collective-bargaining representative of any of its employees.

According to Respondent Mammoth, it was simply attempting to hire the most qualified work force. Mammoth contends that the rejected former Cannelton/Dunn employees either received poor references from their former supervisors, were not recommended by interviewers, were not qualified for the positions that they were seeking or that were available, or had failed to make adequate efforts in pursuit of employment. The record shows that instead of retaining or hiring the Cannelton/Dunn unit employees, the Respondents filled many of the open positions by moving employees from other Massey subsidiary mines to Mammoth even though the other subsidiary mines were facing serious shortages of experienced miners and were, in many cases, located where recruitment was more difficult than at Mammoth. The record shows that, early on, the Respondent also filled many positions by hiring inexperienced trainee miners. A number of these individuals had no prior employment at all with a mining operation.

III. THE MASSEY ORGANIZATION

Respondent Massey, a holding company, is the largest coal company in central Appalachia, with operations in West Virginia, Kentucky, Tennessee, and Virginia. Among Massey's holdings are at least 22 subsidiary coal mining operations, which Massey refers to as "resource groups." These Massey-owned mining operations usually consist of several coal mines, a preparation plant to which coal from those mines is brought for processing, and a shipping facility at which the processed coal is loaded for transportation to customers. Mammoth is one such subsidiary operation. A.T. Massey, another wholly owned subsidiary of Respondent Massey, is described by Massey as the "operating entity" for the Massey enterprise. Massey Coal Services, also a wholly owned Massey subsidiary, serves as an internal consulting group for Massey companies. The staff of Massey Coal Services, inter alia, assists subsidiary coal mines by providing advice on human resources matters and sometimes by performing the human resources functions for those subsidiaries. According to the testimony of Blankenship (Respondent Massey's CEO), all of the subsidiaries in the Massey corporate family "funnel up" to Respondent Massey.

Respondent Massey argues that it had no meaningful involvement in the operations of Mammoth and bears no responsibility for the actions that give rise to the alleged unfair labor practices in this case. Counsel for Massey strains to characterize Massey narrowly to include only the Company's existence as an entity listed on the stock exchange that interacts with investors. That characterization is contrary to the evidence in this case, which amply demonstrates that the Massey corporate family, including its subsidiary mining operations such as Mammoth, is highly interrelated and that its labor policy is

coordinated by officials of Massey. For example, the wage rates and benefits offered by the individual mining subsidiaries are not set by the management of those subsidiaries, but rather by Massey's board of directors and/or Massey's chairman. Similarly, Massey dictates whether or not a particular subsidiary will offer retention incentives for experienced miners. Massey also tells the human resources directors at the subsidiary mines when they must hire trainee miners and place them with experienced mentors. (Tr. 2658.) According to a mine superintendent at Mammoth, who has been a manager at five different Massey subsidiary mines, policies and procedures are the same from one Massey-owned mine to another. (Tr. 2759.)

In some practical respects, Massey treats the employees of its subsidiary mines as members of the greater Massey corporate family. For example, if an employee at one Massey subsidiary mine wishes to leave for work at another Massey subsidiary mine it is not enough that the prospective employer agrees to hire him or her. Approval must also be sought from the first employer and the employee will generally not be permitted to transfer if it means that the first employer will be "stripped" of a needed employee. Employees at subsidiary mines participate in a corporatwide pension plan, and their pension status is not affected when they move from one subsidiary to another. The Massey organization places help wanted advertisements stating that Respondent Massey is seeking experienced miners, even though miners hired through such efforts will work at the subsidiary mining companies.

The highly interrelated, integrated, character of the Massey corporate family is underscored by the fact that officials have corporate positions with multiple entities within it. For example, Don L. Blankenship is Respondent Massey's chief executive officer (CEO), chairman and president, but he is also CEO, chairman, and president of A.T. Massey. Drexel Short is Respondent Massey's senior vice president for group operations, and also holds the position of chairman of Massey Coal Services. (Tr. 1558-1559 and 2164); General Counsel's Exhibit 11a (Respondent Massey's 2005 Annual Report) at pages 5 and 20. Jennifer Chandler, while employed as the regional human resources director for Massey Coal Services, also served as the human resources official for Massey subsidiaries Mammoth, Alex Energy, Green Valley Coal, Nicholas Energy, and Power Mountain. Susan Carr, the benefits coordinator for Respondent Mammoth is also the benefits coordinator at two other subsidiary mines, and is actually employed by Massey Coal Services.

The evidence shows that Respondent Massey's control over its subsidiaries, and in particular over the labor relations policy of its subsidiaries, extends to Mammoth. Although Mammoth has its own president—David Hughart, who was selected for that position by Massey's CEO, Blankenship—it was Massey officials, not the leadership at Mammoth, who decided what wages and benefits could be offered to prospective Mammoth employees. Therefore, those Massey officials directly participated in the decision to unilaterally change the terms of employment from the ones Cannelton/Dunn had offered prior to Massey's acquisition of the operation. Similarly, it was Massey that dictated when Mammoth had to hire trainee miners, and that established any preferences for transferees from other Massey mines. Indeed, in its brief, Mammoth argues that

Ryan, Dwight Siemiaczko, William Willis, and Gary Wolfe. Charles Treadway, another alleged discriminatee, had been a union committee member, but it is not clear how recent that experience was. Jackie Tanner, who had been a union committee member until 2000, was also not hired.

Massey policies on, inter alia, trainees and transferees explain the failure to hire the former Cannelton/Dunn unit members to fill openings at Mammoth.

In addition, Drexel Short, Respondent Massey's senior vice president for group operations, interviewed prospective Mammoth staff, including at least one individual, James Fitzwater, who was being considered for work that had been performed by the union-represented Cannelton/Dunn unit employees. Short's office was also involved with coordinating job interviews during the period when the Respondents chose to offer pre-takeover interviews to the nonunion/nonunit Cannelton/Dunn incumbents, but not to the union/unit incumbents. Another Massey official, Chris Adkins, Massey's senior vice president and chief operating officer, also interviewed prospective Mammoth staff.

In addition to Short's own role interviewing and coordinating interviews, he was also responsible for assigning Jeff Gillenwater, a Massey Coal Services official, to conduct interviews of prospective Mammoth employees. Gillenwater, in turn, not only conducted interviews, but oversaw aspects of the effort to staff Mammoth. For example, Gillenwater provided Kevin Doss⁴ (Mammoth's human resources officer from December 2004 until August 2005) with a spreadsheet that set forth the approximate "union time" of each of the former Cannelton/Dunn bargaining unit employees and directed Doss to ascertain the status of each of these union employees in the application/hiring process and report that information back to Gillenwater.⁵ In addition, Gillenwater gave Doss the names of former Cannelton/Dunn employees who had signed a letter to the State Department of Environment Protection (DEP) questioning permits used by a Massey subsidiary. According to Susan Carr, Mammoth's benefits coordinator, Hughart had to obtain Gillenwater's approval before hiring individuals at Mammoth who did not have a high school degree or GED. Gillenwater and Doss discussed how to recruit Mammoth staff—specifically, the possibility of placing help-wanted advertisements. During the period when they were staffing Mammoth, Gillenwater instructed Doss to watch a film that discussed, among other subjects, how union recognition could be triggered based on the percentage of union supporters who completed union cards.

Officials of Massey directly supervised officials at Mammoth in personnel matters other than staffing, and employee wages and benefits. For example, Short, a Massey senior vice

president, told Doss how to discipline Mammoth employees involved in a safety infraction that occurred shortly after the Respondents began operating the former Cannelton/Dunn facility. Similarly, John Poma, Massey's vice president for human resources, was the direct supervisor of Chandler, the Massey Coal Services employee who handled human resources duties at Mammoth during two stretches in the relevant time period.

Supervisory personnel at Mammoth made statements recognizing that labor policy at Mammoth was not entirely in the hands of the leadership at Mammoth, but rather was controlled in significant respects by Massey. Jon Adamson, the superintendent of Mammoth's preparation plant and a person heavily involved with selecting employees for Mammoth, testified that Massey officials made known to him that Mammoth was to be operated "union free." (Tr. 3020–3021.) Moreover, Adamson explained that interviewees were asked whether they were willing to work nonunion because "[i]t was pretty common knowledge that Massey would operate that operation union free." (Tr. 2992.) Similarly, when employee Terry Abbott suggested to Keith Stevens,⁶ a Mammoth supervisor, that the shortage of experienced miners at Mammoth could be addressed by hiring more of the displaced Cannelton/Dunn unit employees, Stevens dismissed the suggestion, replying, "Don Blankenship's⁷ a smart man, he's not going to let the numbers go against him." (Tr. 664.)⁸ Stevens had been a supervisor at Cannelton/Dunn and according to Respondent Mammoth would, therefore, have participated in the hiring process at Mammoth by making recommendations about whether to hire employees who had worked at Cannelton/Dunn.

Respondent Massey's attempt in this proceeding to characterize itself narrowly to include only its existence as an entity on the stock exchange that is not actually involved with the Mammoth mining operation is inconsistent not only with the activities and evidence discussed immediately above, but also with the way Massey presents itself in annual reports and promotional materials. In annual reports for 2005 and 2004, Respondent Massey described itself as a company that mines, process, and sells coal, and repeatedly referred to the coal miners at subsidiaries such as Mammoth as Massey's "members"—the term Massey uses for employees. Similarly, a document that was distributed to applicants for employment at Mammoth states that "*Massey Energy* is pleased to be able to offer employment opportunities at Mammoth Coal Company." (GC Exh. 23, emphasis added.) It is also telling that, while Massey now claims it was not sufficiently involved in Mammoth's

⁴ The last name of this individual is sometimes misspelled in the transcript as "Dawes."

⁵ Gillenwater claimed that he did not know why "union time" was included on this spreadsheet, and stated that he used the spreadsheet only because it had been sent to him by Michael Haynes, the Cannelton/Dunn mine superintendent, via e-mail. Haynes, who is neither an alleged discriminatee nor an official of the Respondents, testified that he did not provide this spreadsheet to the Respondents, that he did not possess the information included on it, and that he could not have sent it to Gillenwater by e-mail since the Horizon e-mail system was "closed" and only allowed him to contact persons inside Horizon. Based on the demeanor of the witnesses, the testimony, and the record as a whole, I found Haynes' testimony on this subject more credible than Gillenwater's.

⁶ In the record, his last name is often misspelled "Stephens."

⁷ As discussed above, Blankenship is the CEO, president, and chairman of Massey.

⁸ I credit Terry Abbott's clear and certain testimony that Stevens made this statement to him. Stevens testified that he did not recall making the statement to Abbott, but he did not testify that he recalled that he had *not* done so. Stevens conceded that if he had made the statement recounted by Abbott, he would not necessarily remember it. Tr. 2752–2753. In addition, Abbott is not an alleged discriminatee and has nothing obvious to gain by falsely claiming that Stevens made such a statement. Although Abbott had been a union officer in the past, he had not held such a post since 1979, and since that time had worked at coal mines in non-unit positions as a salaried employee.

operations to be held responsible for harm caused by any unfair labor practices at the former Cannelton/Dunn facility, it took the position in a lawsuit filed in Virginia Circuit Court on June 15, 2005, that Massey (not Mammoth) was entitled to recover damages from the Union for alleged harm to the effort to resume the Cannelton operation. (GC Exh. 19.)

To restate the obvious, the record shows that the Massey corporate family, including Mammoth, is highly interrelated and that its labor and human resources policy is controlled in significant respects by officials of Respondent Massey. The integrated nature of the Massey enterprise has been recognized by the United States Court of Appeals for the Fourth Circuit. In *A.T. Massey Coal Co. v. Massanari*, the Fourth Circuit stated that the Massey corporate family, including its subsidiary mining operations, function as “a single production entity with sales, transportation and distribution coordinated from Massey’s Richmond headquarters.” 305 F.3d 226, 233 (2002), citing *A.T. Massey Coal Co. v. Mine Workers*, 799 F.2d 142, 144 (4th Cir. 1986), cert. denied 481 U.S. 1033 (1987). The evidence discussed above confirms the validity of that conclusion. Moreover, the involvement of Massey officials in the personnel functions of its subsidiary Mammoth, and indeed its direct participation and key causal role in the actions alleged to be unlawful in this proceeding, satisfy the Board’s standard for holding a parent company liable for the unfair labor practices of a subsidiary. See *Smithfield Foods*, 347 NLRB 122, 122 fn. 2 (2006) (parent corporation is liable for subsidiary’s unfair labor practices on a direct participation theory where parent was directly responsible for several violations, and one of its officials was involved in the antiunion campaign from which the full panoply of violations arose); *Condado Plaza Hotel & Casino*, 330 NLRB 691, 693 (2000), enf. sub nom. *Posadas de Puerto Rico Associates, Inc. v. NLRB*, 243 F.3d 87 (1st Cir. 2001) (parent corporation is liable for the unfair labor practice by a subsidiary where parent is shown to have participated directly in the unfair labor practice); *Esmark, Inc.*, 315 NLRB 763, 767 (1994) (parent corporation liable for unfair labor practice of subsidiary where parent through its “vigorous and detailed exercise of its right of ownership” played a “key causal role” in the unfair labor practice, even though no direct participation was shown).⁹

⁹ Massey argues that these legal standards for parent company liability were not set forth in the amended complaint. The amended complaint, however, alleges that Mammoth is a subsidiary of Massey, that Massey performs various administrative services for its subsidiaries, that Massey and Mammoth have been “acting for and on behalf of each other,” and are “agents of each other” and that both Respondents committed unfair labor practices that affect commerce. On the first day of the trial, counsel for the General Counsel took the position that Massey and Mammoth were both part of “one big ball of wax.” Tr. 159. At any rate, in its brief, Massey discusses the legal standard for parent company liability, but cites to no types of evidence regarding its interrelation with Mammoth, or involvement in the alleged unfair labor practices, that it did not introduce, but would have, if the complaint had been precise about the applicable legal standard. Br. R. Massey at p.10. Based on my review of the entire record, I conclude that Massey’s involvement in, and potential liability for, the alleged unfair labor practices has been fully litigated.

IV. RESPONDENTS’ CULTURE OF ANIMOSITY TOWARDS UNIONS AND UNION ACTIVITY

As Adamson testified, Massey officials had declared that they would operate Mammoth union-free even before the Respondents selected the employees who would perform the work of the former Cannelton/Dunn unit members. Massey’s decision to operate Mammoth without a union was communicated not just to managers like Adamson, but also to individuals who were seeking work at Mammoth. Indeed a document that the Respondents’ officials distributed to applicants flatly stated that “the mine is nonunion.” (GC Exh. 23; Tr. 2172–2173.) According to Ray Hall, a Mammoth mine superintendent, the same point was made while interviewing applicants. (Tr. 2785.) This was confirmed by several prospective employees. During an interview on November 30, 2004, applicant Michael Armstrong was told that the operation at Cannelton was “a nonunion mine now, it wasn’t no longer be union.” At the interview, Armstrong was asked whether he knew the mine was non-union and “would [he] mind?” (Tr. 3354.) Similarly, applicant Leo Cogar was advised during his interview of January 28, 2005, that Mammoth would be operated union free. (Tr. 1072.) During his interview for work at Mammoth, Randy Kincaid was asked how he “felt” about working nonunion (Tr. 1695–1696), and when Adamson discussed the possibility of employment at Mammoth with applicant Joe Brown, Adamson questioned Brown about his willingness to work nonunion. (Tr. 1916–1917.)

In addition, Adamson testified that one of the main things that influenced his unwillingness to hire Willis—president of the Union’s local—was Willis’ statement of intent to organize on behalf of the Union if hired. (Tr. 2934.) Similarly, Doss testified that he evaluated Dwight Siemiaczko as a poor candidate for employment in part because Siemiaczko had stated that if hired he would “make every effort to organize.” (Tr. 3054–3055.) The interviewers also asked many of the applicants whether they would cross union picket lines or whether the picket lines would be a problem for them.¹⁰ Applicants who the interviewers questioned about the picket lines included alleged discriminatees Tilman Cole, Russell Cooper, Willis, and Fred Wright.

Adamson did not state specifically which Massey officials made it known to him that Mammoth would be operated union free. The record contains evidence, however, that in addition to whatever Massey officials may have communicated directly to Adamson, a number of persons representing Massey publicly stated that Mammoth would be a nonunion operation. Shane Harvey, a Massey Coal Services attorney who was designated to appear on Massey CEO Blankenship’s behalf¹¹ at a Commu-

¹⁰ At the time of the interviews, the Union had begun informational picketing at multiple entrances to the Mammoth location. The purpose of this picketing was not to keep the Union’s members from entering the facility. To the contrary, the Union encouraged the former Cannelton/Dunn unit members to become employed at Mammoth.

¹¹ By letter dated October 29, 2004, Randy White, a West Virginia State senator who served as chairman of the CIB, invited Blankenship to attend a CIB hearing regarding Massey’s purchase of Cannelton. Harvey appeared at the hearing instead of Blankenship, and informed the CIB that he was appearing on Blankenship’s behalf. Tr. 944–947;

nity Impact Board (CIB) meeting, told the CIB that Respondent Massey's "philosophy" was one of "nonunion," and that "Massey intended to operate without a union to start with" at Mammoth, although "the miners would then have the right to petition for a union if they wanted to do so." While being interviewed by a newspaper reporter in October 2004, Katherine Kenny, who was Respondent Massey's director of investor relations, stated, in regards to Mammoth, that "it was Massey's policy to maintain a nonunion operation."¹²

Although the record does not show that Blankenship was among those Massey officials who told Adamson that Mammoth would be operated nonunion, or who publicly identified Mammoth as union free, the record does show that Blankenship made public comments that suggested an intent to operate all of Massey's mines union free. In one published account, for example, Blankenship was quoted as saying that "[n]o operator in their right mind would go union." At trial, Blankenship testified that he generally agreed with the statements that were attributed to him in that account. Blankenship has also stated that he is "ready to be killed" in his battle against the Union, and has characterized that conflict as not "any different" than "the World Wars." He opined that "[the Union] tried to kill us on several occasions."¹³ In 1982, when Blankenship first began working with a Massey company, its operations were 70- to 75-percent unionized. By 2005, Massey operations were 97-percent nonunion and none of its underground miners were represented by a union. The 10-K form that Massey filed with the Securities and Exchange Commission for 2005, and which Blankenship signed, characterizes the possibility of unioniza-

tion at its mines as one of the "Risk Factors" that threaten Massey's income. The report states: "Massey has experienced some union organizing campaigns at some of its open shop facilities within the past five years. If some or all of Massey's current open shop operations were to become union represented, Massey could be subject to additional risk of work stoppages and higher labor costs, which could adversely affect the stability of production and reduce the Company's net income." (GC Exh. 11(a) at p. 22.)

In multiple presentations to investors, Blankenship boasted that its operations were 97-percent union free, and his enthusiasm for operating union free is echoed by Mammoth officials. For example, Mammoth's president, Hughart, testified that he agreed with Blankenship's management philosophy and viewed it as a positive thing for Massey that its coal mining operations were 97-percent union free. The interview reports that the Respondents' officials prepared, record that Doss (Mammoth's human resource's officer) told an applicant that Massey was 97-percent union free and had intentions of operating Mammoth union free. (GC Exh. 8(o), interview record by Jim Nottingham, p. 2.) When one employee suggested to Stevens, a Mammoth supervisor, that the Company could address the shortage of experienced miners at Mammoth by hiring more of the displaced Cannelton/Dunn unit employees, Stevens dismissed the suggestion, replying that "Don Blankenship's a smart man, he's not going to let the numbers go against him." Although the evidence did not show that Blankenship was directly involved in selecting particular miners at Mammoth, the evidence indicates that Massey fostered a culture of anti-unionism that discouraged the hiring of union/unit employees from Cannelton/Dunn. Moreover, as the CEO, chairman, and president of Massey, Blankenship had involvement in the decisions to give preferences to trainees and transferees at Mammoth—decisions that limited the opportunities for Cannelton/Dunn's unit employees to find continued employment there.

V. SHORTAGE OF MINERS AT MASSEY OPERATIONS

The record shows that at the same time the Respondents declined to retain the predecessor's bargaining unit miners, Massey was experiencing significant problems recruiting experienced miners for its mining subsidiaries. In Massey publications, and in presentations by CEO Blankenship, the shortage of experienced miners is mentioned again and again as one of the most significant obstacles to the Massey's optimization of production and profits at its mining operations. In a July 2005 newspaper interview, Katherine Kenny (Massey's director of investor relations) acknowledged that Massey had a shortage of miners in much of central Appalachia, and stated that "[w]e're always two to three hundred miners short of where we want to be." (Tr. 751; GC Exh. 38.) The testimony indicated that this problem is more pronounced at some Massey subsidiaries, such as those referred to as the "route 3" mines, but that Massey's difficulty hiring experienced miners extends to all subsidiary mines in West Virginia. During the time period relevant to the allegations in the complaint, Respondent Massey ran numerous newspaper and billboard advertisements in the general vicinity of Mammoth seeking experienced miners, and even had air-

GC Exhs. 53 and 54; see also *Cablevision Industries*, 283 NLRB 22, 29 (1987) (Agent has apparent authority to speak for a principal when the principal does something, or permits the agent to do something, which reasonably leads another to believe that the agent had the authority he purported to have.").

¹² This statement by Kenny was testified to by James Dao, the New York Times reporter to whom it was made, and was not specifically denied by Kenny. The General Counsel would have me credit another statement, this one recounted in an October 24, 2004, article written by Dao, in which Dao reported that a Massey spokesperson had stated that Massey "w[ould] hire only nonunion workers" when it reopened the Cannelton operation. Dao testified that the source for this was Kenny, but he did not testify that he currently remembered Kenny specifically making the statement that Massey would hire only nonunion workers. Kenny denied making the statement. Given Kenny's denial, and Dao's failure to specifically recount the statement while testifying, I find that the evidence is insufficient to establish that the statement was made.

¹³ In determining how much weight to assign to Blankenship's statements that he is ready to be killed in his fight with the Union and that it was like "the World Wars," I considered the fact that those statements were made approximately 18 years prior to the first of the alleged violations in this case. I also considered that during his testimony in this proceeding, Blankenship acknowledged that he made those statements and did not assert that his views had changed. Indeed, Blankenship testified that he continues to oppose the Union's influence and believes operating its mines union-free is important to Massey's success. I give Blankenship's temporally distant statements far less weight than I would if they were more recent utterances. Nevertheless, the earlier statements, when considered together with the other record evidence, help contribute to an accurate understanding of Massey's stance with respect to the Union.

planes pull banners with help-wanted announcements above Myrtle Beach, South Carolina—a popular vacation destination for miners who live in West Virginia.

Mammoth argues that while Massey had severe problems hiring and retaining experienced miners, it was somehow spared this problem when seeking to hire miners to staff an entire mining operation at the former Cannelton/Dunn facility. The evidence leads me to conclude that, contrary to this representation, Massey's difficulty hiring experienced miners extended to staffing Mammoth. Respondent Massey and Blankenship said as much in a lawsuit they filed in Virginia Circuit Court on June 15, 2005, alleging, *inter alia*, that they had experienced delays in restarting operations at the Cannelton location because of difficulties in attracting and retaining qualified workers. On August 26, 2005, the Respondents ran a newspaper help-wanted advertisement explicitly stating that they were seeking experienced underground coal miners to work at Mammoth. Gillenwater, a Massey Coal Services official who had human resources responsibilities and was involved in staffing Mammoth for the Respondents, testified that although Massey's difficulty hiring miners was greater at some locations than others, the difficulty extended to *all* Massey mines in West Virginia. The assertion that Massey's general problem hiring experienced miners bypassed its Mammoth operation is also belied by evidence that, during the initial staffing of Mammoth, the Respondents resorted to hiring many miners who either had no experience working in mines, or lacked the 6 months' experience necessary to qualify as other than a trainee miner. In West Virginia, such inexperienced miners are required to work within the sight and sound of experienced miners and must be mentored by experienced individuals. At work, the trainee miners are required to wear a red-colored hardhat, rather than the standard black-colored one,¹⁴ in order to alert other miners to the safety hazards they pose.¹⁵

The General Counsel suggests that, against this background, the Respondents' explanations for declining to employ the vast majority of the experienced miners at Cannelton/Dunn ring hollow. The record does, in fact, show that despite the profound problems that Massey subsidiary mines face hiring miners in West Virginia, the Respondents did not retain a single one of the over 200 incumbent bargaining unit members at Cannelton/Dunn when they took over that operation in September 2004, and that the Respondents declined to offer employment to the overwhelming majority of those union miners during subsequent hiring. The Respondents did this despite the fact that, before assuming control of the operation, they offered

¹⁴ For this reason, trainee miners are often referred to in the record as "red hats."

¹⁵ Of the 130 or so persons the Respondents hired for bargaining unit work between December 2004 and August 2005 there were at least 19 who were either hired by the Respondents as trainee miners or whose applications indicate that they lacked the 6 months' mining experience necessary to avoid such classification. The inexperienced miners included: Joshua Accord, Jeremiah Adkins, David Buford, Christopher Burgess, Jeremy Campbell, Derrick Easterday, Darrell Elks, Mark Fitzpatrick, Johnny Fox, Steve Goodwin, Raymond Peterson, Chad Rogers, Jack Rose, Thomas Sanford, Christopher Sargent, Larry Lee Sargent, Paul Lawrence Scott, John Toney, and Michael Upton.

pre-takeover interviews and/or employment to the numerous nonunit individuals who were working at Cannelton/Dunn operation as clerks, secretaries, and laboratory workers—categories of employees who Massey was not shown to have had trouble recruiting.

Blankenship himself testified that experienced miners are generally more productive than inexperienced miners, and Hughart conceded that it was sometimes helpful to hire miners who were experienced at the particular facility where they would be assigned. Not surprisingly, the fact that the Respondents employed so few miners who had prior experience at the facility, and so many trainee miners, appears to have created challenges for that operation. Indeed, in January 2005, a Mammoth supervisor, Donnie Rutherford, complained to a former coworker about the use of trainees and said he needed "some good experienced coal miners." Three other Mammoth supervisors—Keith Stevens, Mickey Sizemore, and Dennis Roat—complained that the Respondents' heavy reliance on inexperienced miners was interfering with production. These comments find support in the documentary evidence. The record shows that in 2005 and 2006 Mammoth was mining less efficiently, as measured by tons of coal produced per employee per day, than had been the case when the experienced Cannelton unit work force was in place in 2003. The record also shows that Mammoth fell short of its production goal for 2006, the first year it set such a goal after taking over the operation from Cannelton/Dunn.¹⁶

Mammoth's claim that the miner shortage did not extend to the former Cannelton location is also belied by evidence that the Respondents filled the greatest portion of the miner positions by moving miners from other Massey subsidiary mines, including from its route 3 mining operations, especially Elk Run Coal. Of the first 24 miners that Mammoth hired, 13 came from other Massey mines, including seven from Elk Run. (Tr. 2506–2511.) As alluded to above, the difficulty finding miners was particularly pronounced at Massey's route 3 operations. By taking employees from other Massey operations to fill positions at Mammoth, the Respondents were not only "robbing Peter to Paul," but were in some instances satisfying its needs at Mammoth by creating vacancies at locations where the problems filling positions were particularly acute. Chandler, a witness for Mammoth, testified that transferring a miner from another Massey subsidiary to Mammoth would adversely affect the transferring company. Yet his was done to fill positions at the former Cannelton/Dunn location where there was already an experienced incumbent workforce available to select from.

VI. HISTORY OF CANNELTON/DUNN

Cannelton conducted underground coal mining operations in Kanawha County, West Virginia, for many years prior to when the Massey organization acquired the operation from Horizon

¹⁶ Mammoth's production goal for 2006 was 1,500,000 tons of coal and it fell 30,000 to 40,000 tons short of that. In 2003, the last complete year that the operation was run by Cannelton/Dunn, the mines were producing 35.07 tons of coal per employee per day. In 2005, the first complete year that the mines were operated by Mammoth, that figure dropped to 24.53 tons per employee per day. In 2006, production was 23.40 tons of coal per employee per day.

in 2004. Although the precise number of years that Cannelton operated is not revealed by the record, some idea is provided by the fact that a number of the alleged discriminatees were second and third generation Cannelton miners. Over the years Cannelton had mined coal at numerous sites on the property. When one mine site was depleted to such an extent that Cannelton decided to cease work at that location, the miners would generally be moved to an active mine on the property and their employment with Cannelton would continue. In addition to the mine sites themselves, Cannelton operated a preparation plant where coal was separated from impurities, a river loadout facility where coal was loaded into river barges for shipment, and a refuse impoundment where the impurities resulting from coal processing were dumped.¹⁷ The preparation plant received coal primarily from the mines operated by Cannelton, but also received coal from other mines. Cannelton did not own the rights to the coal in the property where it was operating. Even before Massey purchased Cannelton, the coal rights there were owned by a Massey subsidiary, to which Cannelton paid royalties.

Immediately prior to when Massey acquired the operation, Cannelton was mining coal exclusively at a site on the property known as the Stockton mine. Cannelton mined this site using the “room and pillar” technique—which means that miners made cuts at right angles across the same underground “seam” of coal, so that pillars were left to hold the ceiling or “top” up. The coal was cut by employees using “continuous miner” machines that extracted the coal and moved it to the rear of the machines where it was dumped onto shuttle cars. Shuttle cars then moved the coal to belts that transported it above ground. At Cannelton, belts and off-road trucks were then used to take the coal to the preparation plant. Cannelton was mining four sections of the Stockton mine and employees used one continuous miner machine at each of these sections. Cannelton was operating three shifts a day—two production shifts, and one maintenance shift. Some of the main employee classifications in the underground mine at Cannelton were continuous miner operator, shuttle car operator, beltman (cleans, splices, and does other work to belts), electrician, brattice man (puts up the controls that help direct fresh air through the mine), roof bolter (places bolts in unsupported ceiling areas to secure them), and fire boss (checks safety of walks, airways, escapeways). Work classifications at the preparation plant and loadout facility included plant operator, assistant plant operator, loadout operator, mechanic, and electrician. There was also bargaining unit work above-ground for mobile equipment operators, “greasers” who serviced equipment, and refuse impoundment workers.

Cannelton’s subsidiary Dunn was originally created to operate as a surface mine—also referred to in the record as a “strip” mine—on the same property where Cannelton was performing underground mining operations. However, the surface mine operation was essentially abandoned after December 31, 1999. The number of individuals employed by Dunn had previously

been as high as 113, but, since December 31, 1999, that number has been reduced to between 7 and 12. During the period immediately before Mammoth took over Dunn, the Dunn employees were no longer engaged in the surface mining of coal, at least not to any significant extent. Rather, they worked in support of Cannelton’s underground mining operation. For example, the Dunn employees maintained the road between Cannelton underground mines and the preparation plant and also built a storage bin at the Stockton mine. In addition, the Dunn employees were engaged in government-mandated “reclamation” activities that were aimed at restoring the landscape to its condition prior to the surface mining activity.

Cannelton and Dunn both signed memoranda of understanding with the Union in which they agreed to follow the 2002 National Coal Agreement. The memoranda stated an effective period from January 1, 2002, until December 31, 2006,—the same term stated by the 2002 National Coal Agreement. Those memoranda also set forth, or referenced, certain additional terms, but none of those additions have been alleged to contradict any term of the 2002 Agreement that is germane here. The 2002 National Coal Agreement describes unit work as: “The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above.” (GC Exh. 14(a) at p. 3 (art. IA).) The appendices to the 2002 Agreement set forth job classifications for employees doing this covered work, including, inter alia: continuous mining machine operator; electrician (underground, strip mines, and preparation plant); mechanic (underground, strip mines, and preparation plant); fireboss; roof bolter; dispatcher (underground); loading machine operator (underground); welder, first class (underground, strip mines, and preparation plant); general inside repairman and welder (underground, strip mines, and preparation plant); shuttle car operator (underground); motorman (underground); beltman (underground); brattice man; general inside labor; trackman; labor-unskilled (underground, strip mines, and preparation plant); coal loading shovel operator; overburden stripping machine operator; shovel and drag line oiler; groundman; mobile equipment operator (strip mines and preparation plant); tippie attendant; utility man; stationary equipment operator (including, inter alia, processing plant operator, loading point operator, river loading equipment operator, river tippie operator, and tippie operator); tippie attendant; truckdriver, service; preparation plant utility man; surface utility man. Id. pages 316 to 335.

VII. MASSEY TAKES OVER CANNELTON/DUNN

On August 17, 2004, A.T. Massey and Horizon executed a purchase agreement that was approved by the bankruptcy judge on September 16, 2004, and under which Horizon’s Cannelton/Dunn operation became the property of the Massey organization. After the parties executed the purchase agreement, Cannelton/Dunn continued running the operation for about 5 weeks—employing the same unit workers and providing the same terms and conditions of employment to them as it had

¹⁷ In the record, the preparation plant operation is sometimes construed to include the river loadout facility. These portions of the facility are also referred to as “Lady Dunn” and the “tippie.” The refuse impoundment is referred to by a variety of other names, including the “gob pile,” the “slurry,” and the “dump.”

before it was purchased. The last day that Cannelton/Dunn operated the facility was September 24, 2004, at which time control was turned over to the Respondents. Since taking over the facility, the Respondents have refused to recognize the Union as the collective-bargaining representative of any of the employees at Mammoth.

Prior to September 24, Massey Senior Vice President Drexel Short coordinated with Cannelton/Dunn's underground mine superintendent, Michael Haynes, to arrange interviews and/or employment for all of Cannelton/Dunn's supervisory and management employees. Many of these individuals were hired by the Respondents prior to the change in control of the facility, and their employment at the operation continued without interruption through the transition from Cannelton/Dunn to Mammoth. Similarly, the Respondents arranged pretakeover interviews and/or employment for Cannelton/Dunn's nonunit rank-in-file workers—including secretaries, clerks, and laboratory workers. The only group of Cannelton/Dunn employees to whom the Respondents did not offer these opportunities were the union-represented unit incumbents. Consequently, all of the more than 200 Cannelton/Dunn employees who were represented by the Union lost their jobs when the operation changed hands. Blankenship and Gillenwater indicated in their testimonies that the objective was to have the Mammoth management/supervisory team in place first, and to let that team hire the rank-and-file employees. They did not explain, however, why the new management team would not have wanted to hire some union incumbents prior to the Respondents' takeover of the operation, or why the nonunit rank-and-file employees were offered pretakeover interviews or employment.

Not only did the Respondents fail at that time to offer interviews or employment to any of the over 200 union-represented incumbent employees, but the Respondents did not even provide the unit employees with information about how to go about seeking employment at the facility where many had worked for decades. Ascertaining how to apply was more difficult than one might at first imagine since human resources functions for the new operation were initially neither based at the Mammoth production facility itself, nor handled by officials employed directly by Mammoth. The first human resources official was Chandler—a Massey Coal Services employee who was not based at Mammoth. She passed the human resources responsibility to Doss—who testified that Massey moved him to the Massey Coal Services office in Charleston when he assumed human resources responsibilities at Mammoth. Even through much of the hearing, there were lingering questions about what locations constituted offices of Mammoth, and these were resolved only after the General Counsel presented records, such as facsimile communications, that would not have been available to the Cannelton/Dunn miners. In addition, although officials of the Respondents testified that they made applications available at Mammoth's guard station, the record indicated that this was not generally communicated to the union-represented individuals. Indeed, a union-represented, former Cannelton/Dunn, employee who approached the guard station and inquired about employment was not given an application.

The record does not substantiate any credible, nondiscriminatory, explanation for the Respondents' decision to offer pre-

takeover interviews and/or employment to the unrepresented nonsupervisory incumbents, at the same time that they declined to offer union-represented unit employees interviews, employment, or even information about applying. Nor did the company witnesses offer a credible explanation for why, if the objective was to allow a Mammoth management/supervisory team to hire its own rank-in-file employees, it was Short and a Cannelton/Dunn superintendent, not Mammoth managers and supervisors, who scheduled the interviews for the *nonunit* rank-and-file incumbents and why those interviews were conducted at essentially the same time as the new Mammoth managers and supervisors were themselves being interviewed.

In its brief, Mammoth suggests that the reason the Respondents offered pretakeover interviews and employment to the unrepresented rank-and-file incumbents, but not to the union-represented incumbents, was that Horizon had made a request that interviews be offered to the salaried workers. I have examined this contention in light of the testimony by Gillenwater that Mammoth relies upon to support it. (Tr. 2165–2166.) A review of that testimony indicates that Gillenwater was explaining the decision to grant *supervisors* pretakeover interviews and employment, not a reason why unrepresented clerks, secretaries, laboratory workers and other nonsupervisory, nonunit, personnel were offered that opportunity as well. Even at that, Gillenwater's reference to this subject was passing and vague. He said that it was his "understanding" that Horizon had made a request that supervisors be interviewed pretakeover, not that he had personal knowledge of either the request or the Respondents' response to the request. He did not disclose how he came to his "understanding" or identify any official of the Respondents who made a decision to honor the request. Gillenwater's passing and vague mention of his "understanding" is not persuasive evidence that a request from Horizon accounts for the startling disparity in treatment between the represented and non-represented incumbents.

In its brief, Mammoth also hints that the Respondents decided not to offer pretakeover interviews/hiring to the union-represented incumbents because Cannelton/Dunn had been unable to operate profitably with those employees. However, Mammoth does not explain why the Respondents would hold Cannelton/Dunn's financial problems against every single one of the union-represented incumbent miners, and therefore deny those individuals pretakeover interviews and/or employment, and at the same time offer such opportunities to all the managers, supervisors, secretaries, clerks, laboratory workers, and other nonunit incumbents.

Within a few weeks of when the union-represented Cannelton/Dunn employees lost their employment, the Union initiated picketing outside the entrances to the employees' former workplace. The Respondents contracted with security personnel who took approximately 1000 hours of videotape and hundreds of photographs of the picket activity. With few exceptions, the alleged discriminatees in this case participated in that picket activity, which included distributing literature critical of Massey.¹⁸ This picketing continued daily for over a year until

¹⁸ On one occasion, approximately 10 to 12 individuals—including the president of the Union local (Willis), and the international president

early 2006. The Union's purpose in picketing was not to stop the former Cannelton/Dunn unit members from entering the facility, and the evidence establishes that, to the contrary, the union actively encouraged former unit members to work for Mammoth. That encouragement included: making numerous copies of a blank application from another Massey subsidiary and providing copies to unit employees; attempting to hand deliver completed applications for employment at Mammoth to company officials; mailing copies of the completed applications to the offices of officials who were selecting staff for Mammoth; and telling union members that it was permissible to work at Mammoth while the picket activity continued. Many of the over 200 Cannelton/Dunn unit employees submitted applications for work with Mammoth, including all but a few of the 85 alleged discriminatees in this case.¹⁹ Some former unit employees also sought employment by participating in the efforts to hand deliver applications, attending Massey job fairs, or inquiring at the Mammoth guard shack.

The Respondents began interviewing potential employees for bargaining unit work in late November 2004, and hired the first of these employees on December 3. By the end of December, the Respondents had hired about 30 employees to perform the types of work that had been bargaining unit work at Cannelton/Dunn. This hiring continued, with about 16 such employees hired in January 2005; 26 hired in February 2005; and others hired in every month through at least May 2006. As of May 1, 2006, the Respondent had hired a total of approximately 219 employees to perform the types of work that had previously been performed by the union-represented employees. These employees were not provided with the wages and other terms of employment that were in effect at Cannelton/Dunn immediately prior to the Respondents' taking over the operation. Instead, the Respondents provided the employees with other terms, including, in general, lower wages. The wage rate parameters and a number of other terms of employment that Mammoth officials offered were not set by the leadership at Mammoth, but rather were decided upon by Massey officials. The Respondents did not give the Union prior notice, or an

of the Union (Cecil Roberts)—were arrested while engaging in a protest on a highway adjacent to Mammoth. At trial, counsel for Respondent Mammoth elicited testimony regarding these arrests, but was unclear about whether Mammoth planned to claim that the arrests were the basis upon which any of the alleged discriminatees were rejected. Tr. 170–172. A review of the record evidence shows that the Respondents did not offer testimony or other evidence showing that any of the alleged discriminatees were rejected because they had been arrested in the highway protest, and no such argument was made in the Respondents' briefs.

¹⁹ A number of these applications were not submitted at the Mammoth operation, but rather at the offices of two Massey subsidiaries—Massey Coal Services and Nicholas Energy—which shared human resources functions and/or human resources officials with Mammoth. The record shows, moreover, that Kevin Doss, a Mammoth human resources official, took possession of the applications that the former Cannelton/Dunn employees mailed to Nicholas Energy. At least some other applications were mailed to a location in Leivasy, West Virginia, which served as an office of Mammoth, as well as of another Massey subsidiary, Alex Energy.

opportunity to bargain, regarding these changes in the terms and conditions of employment.

Of the approximately 219 employees hired by the Respondents to perform bargaining unit work, no more than 22 had been among the at least 211 Cannelton/Dunn unit employees who lost their jobs when the Respondents took over the facility in September 2004.²⁰ As discussed above, for its initial staffing the Respondents relied heavily on experienced miners who it moved from other Massey subsidiary mines, including from "route 3" subsidiaries where Massey was already starved for experienced miners. Information provided by Respondent Mammoth shows that, as of May 20, 2005, transfers accounted for 38 of the 89 miner positions filled at Mammoth. Of those 38 transferred employees, 17 came from the Massey's route 3 subsidiaries.²¹

The Respondents' early staffing also relied to a significant extent on the use of trainee miners and other inexperienced individuals, of whom it hired approximately 19. According to a Mammoth mine supervisor, Donnie Rutherford, the Company stopped using trainees as of June or July 2006²² because by that time the operation was "staffed up" and there was no need to

²⁰ Respondent Mammoth suggests that it did not hire more former Cannelton/Dunn unit employees, in part, because the Union discouraged those individuals from working at Mammoth. On its face this claim is implausible given the evidence of the Union's extensive efforts to help such individuals seek employment at Mammoth. Moreover, Willis credibly testified that he and Cecil Roberts (International president of the Union), made a decision to encourage the unit members to obtain employment with Mammoth both because those individuals needed the jobs, and because the Union wanted to establish itself as the bargaining representative. Several former Cannelton/Dunn employees testified that union officials verbally encouraged them to work at Mammoth. In an effort to substantiate the contention that threats from the Union or union members had been responsible for keeping former Cannelton/Dunn employees from accepting employment, Mammoth presented the testimony of James Fitzwater—a former Cannelton/Dunn employee who refused employment at Mammoth. However, when questioned by Mammoth's counsel, Fitzwater emphatically denied that he had a basis for believing that he had been threatened by the Union or its members. He stated that he decided not to work for Mammoth because the Respondents tried to pay him a lower wage than they had promised him, and because he was disturbed that the Respondents were denying employment to other qualified Cannelton/Dunn employees. Mammoth also claims that Gregory Moore, another former Cannelton/Dunn employee, turned down a job because the president of the Union local (Willis) had told Moore that by going to work for Mammoth he could lose his son's private health coverage. Both Moore and Willis denied that Willis had made such a statement, and Moore further testified that his son's healthcare needs were covered by Medicaid and that he did not use, or need, the private health insurance. The record does not substantiate the Respondents' contentions that the Union discouraged former Cannelton/Dunn employees from working for Mammoth, or that the Respondents would have hired significantly more Cannelton/Dunn employees if not for the supposed interference.

²¹ These figures are based on GC Exhs. 26(a)(1), (b)(1), and (c)(1), the compilation charts included by Respondent Mammoth and the General Counsel in their briefs, and the portions of the record underlying those compilations. See Br. of R. Mammoth at pp. 20 to 31, and Br. of GC at pp. 78 to 82.

²² Rutherford's testimony on February 27, 2007, was that Mammoth had not used trainee miners ("red hats") for 8 months.

hire somebody who was not experienced. The Respondents also recruited a significant number of miners by soliciting applications from employees of a non-Massey operation—Kanawha Eagle. The Kanawha Eagle miners had not sought employment at Mammoth, but had worked with an individual that the Respondents hired as a mine supervisor for Mammoth.

On December 6, 2004, the Respondents began operations at the Stockton mine and the preparation plant. In January 2005, the Respondents loaded coal at the river barge facility for the first time after taking over the operation from Cannelton/Dunn. Initially, the Respondents operated one production shift at one section of the Stockton mine. In March 2005, the Respondents added a second production shift, and began mining at a second section in the Stockton mine. The Respondents also added a maintenance shift. The work was performed using continuous miner machines, shuttle cars, belt lines, preparation plant, and other equipment that had been in operation at Cannelton/Dunn prior to the change in ownership. As at Cannelton/Dunn, the Respondents utilized the “room and pillar” mining method—one of several underground mining methods used in West Virginia. The production work that was necessary was basically unchanged. As at Cannelton/Dunn, the Respondents had employees at Mammoth who performed the work of continuous miner operators, shuttle car operators, beltmen, electricians, brattice men,²³ roof bolters, fire bosses, loadout operators, mechanics, electricians, plant operators (at Mammoth called “control room operators”), and assistant plant operators (at Mammoth called “floor operators”). According to Adamson and Chandler, Mammoth’s miners were performing essentially the same tasks as the Cannelton/Dunn miners had performed, and the coal itself underwent the same process. Mammoth’s customers, like those of Cannelton/Dunn, were electrical power generating companies. Both before and after the transition from Cannelton/Dunn to Mammoth the operation’s short list of major customers included American Electric Power (AEP).

The Respondents did make some adjustments to how the operation was run. Most notably, instead of using one continuous miner for each of four sections in the mine, the Respondents began using two continuous miners in each of two “dual” sections. In addition, a few job duties were re-distributed among the job classifications and, initially, fewer employees were employed than had been the case under Cannelton/Dunn. For example the work of Cannelton/Dunn’s “miner helpers” was done at Mammoth by employees in “utility” classifications. Cannelton/Dunn had three employees working at the refuse impoundment, but Mammoth assigned two employees to do that work. The Respondents employed electricians, but, unlike Cannelton/Dunn, it did not station one of the electricians at the river loadout facility.

In July and August 2005, the Respondents began shutting down the Stockton mine work after concluding that mining there was no longer practical. In July, the Respondents relocated equipment and staff to the “130 mine”—another site on the same property—and began operating in one section there.

²³ Mammoth had employees who performed the brattice man functions, Tr. 2393, but apparently no longer used “brattice man” as a job title, Tr.2802.

In August, the Respondents moved other equipment and staff from the Stockton mine to the “Winifrede mine,” where the Respondents began operating in one section for two production shifts a day. As of the time of trial, the Mammoth plant and loadout were being used to process and load coal from the 130 mine and the Winifrede mine, as well as from Massey mines that were not part of the Mammoth operation. The Winifrede mine is on the same property as the Stockton mine and 130 mine, but the Respondents use highway trucks, rather than belt lines or off-road trucks, to haul coal from the Winifrede mine to the preparation plant. The Respondents hired over-the-road truck drivers to operate the highway trucks and, as of the time of trial, employed 10 of these drivers. Cannelton/Dunn had not used over-the-road drivers or operated its own highway trucks, but it apparently did receive coal at the preparation plant that came from outside the property. In January 2006, the Respondents discontinued the use of the off-road trucks at Mammoth, but have continued the use of the highway trucks.

In addition to the coal reserves on the former Cannelton/Dunn property, Massey owns coal reserves in an adjacent area referred to as the Kanawha Energy property. Mammoth’s president, Hughart, testified that Mammoth was developing the mining capability on the Kanawha Energy property and expected to begin production there later in 2007.

VIII. BANKRUPTCY COURT RULING REGARDING ASSUMPTION OF COLLECTIVE-BARGAINING AGREEMENT

As alluded to earlier, Horizon was bankrupt at the time it sold the Cannelton/Dunn operation to the Massey organization. In bankruptcy proceedings,²⁴ certain issues related to Cannelton’s and Dunn’s collective-bargaining agreements—the 2002 National Coal Agreement—with the Union were addressed. That agreement included a provision, referred to by the bankruptcy judge as a “successorship clause,” which stated that the employer could not sell its operation “without first securing the agreement of the successor to assume the Employer’s obligations under this Agreement.” (GC Exh. 14(a) at pp. 1 to 2 (art. I).) Prior to the Horizon sale, a number of the individual debtors, including Cannelton and Dunn, filed a motion with the bankruptcy court in which they sought an order permitting them to “reject certain collective-bargaining agreements pursuant to section 1113 of the Bankruptcy Code.” The bankruptcy judge stated that the order sought by the debtors would “authoriz[e] the sale of the debtors’ assets free and clear of all liens, claims, encumbrances, and other interests, apparently including successor liability under collective-bargaining agreements and under the Coal Industry Retiree Health Benefit Act of 1992.” Respondent Mammoth’s Exhibit (Mammoth Exh.) 75(c). On August 6, 2004, the bankruptcy judge issued an opinion and orders granting the debtors’ requests for authority to reject the collective-bargaining agreements, including the successorship provision. *Id.*²⁵ The bankruptcy judge acknowledged the hardship this decision would cause employees, but, in weighing the

²⁴ Case 02-14261, United States Bankruptcy Court for the Eastern District of Kentucky, Ashland Division.

²⁵ The procedural history before the bankruptcy judge is also discussed in *United Mine Workers v. Midwest Coal Corp.*, 2005 Westlaw 1972592 (E. D. Ky.)

terms and conditions in effect at Cannelton/Dunn had been altered after the bankruptcy judge authorized rejection of the collective-bargaining agreement, the Respondents would only be required to honor the terms and conditions that were actually in effect, not those set forth in the 2002 agreement. Third, given the bankruptcy judge's order, it was not a foregone conclusion that Mammoth would be a legal successor or that the Respondents would be obligated to honor the existing terms and conditions of employment pending bargaining. Rather, the Respondents brought those obligations upon themselves when, subsequent to acquisition of Horizon's Cannelton/Dunn operation, they unlawfully discriminated against the predecessor's unit employees and announced to employees that Mammoth would be operated union free.

For the reasons discussed above, the Respondents have violated Section 8(a)(5) and (1) since December 3, 2004, by failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the unit, and by unilaterally imposing new terms and conditions of employment for the unit employees. *E. S. Sutton Realty Co.*, 336 NLRB 405, 408 (2001).

CONCLUSIONS OF LAW

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

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

3. Respondent Mammoth is a subsidiary of Respondent Massey, and Respondent Massey directly participated in, and played a key causal role in, the unfair labor practices found in this decision.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Respondent Mammoth constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees engaged in the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail, not owned by Respondent Mammoth), repair and maintenance work normally performed at the mine site or at the central shop of Respondent Mammoth; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at Respondent Mammoth's mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

6. The Union is the collective-bargaining representative of the above-described unit employees.

7. Respondent Mammoth is the successor employer of employees of Horizon's Cannelton/Dunn operation in the above-described unit.

8. Since December 3, 2004, the Respondents have violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing

to hire former employees of Horizon's Cannelton/Dunn operation for positions in the Mammoth bargaining unit.⁷⁰

9. Since December 3, 2004, the Respondents have violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union and by unilaterally changing the terms and conditions of employment that had been in effect for bargaining unit employees prior to the transfer of control and ownership of Horizon's Cannelton/Dunn operation to the Respondents.

10. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.⁷¹ Having found that the Respondents discriminatorily refused to hire former Cannelton/Dunn unit employees to work at Mammoth, I recommend that the Respondents be ordered to immediately offer to the individuals listed below employment in the positions for which they would have been hired, absent the Respondents' unlawful discrimination, or if those positions no longer exist, to substantially equivalent positions, discharging if necessary any employees hired to fill those positions. The employees listed below shall be made whole for any loss of earnings they may have suffered due to the discrimination against them. The backpay is to be calculated in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondents unlawfully refused to bargain collectively with the Union, I shall also recommend that the Respondents be ordered to recognize and bargain with

⁷⁰ The 8(a)(3) and (1) violation is found with respect to the following individuals listed in the exhibit to the complaint, as amended during these proceedings: Michael Armstrong, Charles Bennett, Randel Bowen, Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danberry, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion (Pete) Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker Jr., Larry Vassil, Thomas Ward, James Whittington Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, and Fred Wright.

⁷¹ For reasons discussed earlier, Respondent Massey's liability in this case extends to the unfair labor practices committed at its subsidiary, Respondent Mammoth. See sec. III, supra.

the Union concerning wages, hours, benefits, and other terms and conditions of employment of bargaining unit employees at Mammoth, upon request by the Union. In addition, and in order to remedy the Respondents' unlawful unilateral changes to wages, benefits, and terms and conditions of employment that went into effect when they began to employ individuals to perform unit work at Mammoth on December 3, 2004, I shall recommend that the Respondents be ordered to rescind the unilateral changes and make the employees whole by remitting all wages and benefits that would have been paid absent the Respondents' unlawful conduct, until the Respondents negotiate in good faith with the Union to agreement or to impasse, subject to the Respondents' demonstration in a compliance hearing that had lawful bargaining taken place, less favorable terms than had existed under Cannelton/Dunn would have been lawfully imposed. *Planned Building Services*, 347 NLRB 670, 674-676. This remedial measure is intended to prevent the Respondents from taking advantage of their wrongdoing to the detriment of the employees and to restore the status quo ante thereby allowing the bargaining process to proceed. *U.S. Marine Corp.*, 944 F.2d 1305, 1322-1323 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). Employees shall be made whole in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizon for the Retarded*, supra. The Respondents shall make whole the unit employees by paying any and all delinquent employee benefit fund contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondents shall reimburse unit employees for any expenses ensuing from the failure to make required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷²

ORDER

Respondent Massey Energy Company (Massey), Richmond, Virginia, its officers, agents, successors and assigns, and Massey's subsidiary, Respondent Spartan Mining Company d/b/a Mammoth Coal Company, Leivasy, West Virginia, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of Horizon's Cannelton/Dunn operation (the predecessor employer) because of their union-represented status in the predecessor's operation, or because they were active on behalf of the Union, or otherwise discriminating against these employees to avoid having to recognize and bargain with the United Mine Workers of America (the Union).

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of Respondent Mammoth's employees in the following appropriate unit:

All employees engaged in the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail, not owned by Respondent Mammoth), repair and maintenance work normally performed at the mine site or at the central shop of Respondent Mammoth; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at Respondent Mammoth's mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(c) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

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

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

(a) Notify the Union in writing that they recognize the Union as the exclusive representative of the bargaining unit employees under Section 9(a) of the Act and that they will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate unit.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) At the request of the Union, rescind any departures from the terms and conditions of employment of unit employees that existed immediately prior to the Respondents' takeover of the predecessor employer, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until the Respondents negotiate in good faith with the Union to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of this decision, the unit employees for losses caused by the Respondents' failure to apply the terms and conditions of employment that existed immediately prior to their takeover of the predecessor employer.

(e) Within 14 days of this Order, offer employment to the following named former employees of the predecessor employer in their former positions or, if such positions no longer exist, in substantially equivalent positions at Mammoth, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

Michael Armstrong, Charles Bennett, Randel Bowen Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danberry, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards,

⁷² 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.

Stanley Elkins, William Fair Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion (Pete) Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker Jr., Larry Vassil, Thomas Ward, James Whittington Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, and Fred Wright.

(f) Make the employees referred to in the preceding paragraph 2(e) whole for any loss of earnings and other benefits they may have suffered by reason of the Respondents' unlawful refusal to hire them, in the manner set forth in the remedy section of this decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the employees named in the preceding paragraph 2(e) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

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

(i) Within 14 days after service by the Region, post at the Mammoth facilities in and around Kanawha County, West Virginia, copies of the attached notice marked "Appendix."⁷³ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by authorized representatives of the Respondents, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a

⁷³ 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."

copy of the notice to all current employees and former employees employed by the Respondents at the Mammoth facilities at any time since December 3, 2004.

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

Dated, Washington, D.C., November 21, 2007.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire bargaining unit employees of Horizon's Cannelton/Dunn operation, the predecessor employer, because of their union-represented status in the predecessor's operation, or because they were active on behalf of the Union, or otherwise discriminate against these employees to avoid having to recognize and bargain with the United Mine Workers of America (the Union).

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of Respondent Mammoth's employees in the following appropriate unit:

All employees engaged in the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail, not owned by Respondent Mammoth), repair and maintenance work normally performed at the mine site or at the central shop of Respondent Mammoth; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at Respondent Mammoth's mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours and other terms and conditions of employment of employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

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

WE WILL notify the Union in writing that we recognize it as the exclusive representative of our unit employees under Section 9(a) of the Act and that we will bargain with it concerning

terms and conditions of employment for employees in the above-described appropriate unit.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, at the request of the Union rescind, any departures from terms and conditions of employment that existed immediately prior to our takeover of Horizon's Cannelton/Dunn operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of Horizon's Cannelton/Dunn operation.

WE WILL, within 14 days of this Order, offer employment to the following named former employees of Horizon's Cannelton/Dunn operation, the predecessor employer, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

Michael Armstrong, Charles Bennett, Randel Bowen Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danberry, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb,

Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion (Pete) Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker Jr., Larry Vassil, Thomas Ward, James Whittington Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, and Fred Wright.

WE WILL make the above-named employees whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days, from the date of this Order, remove from our files any reference to the unlawful refusal to hire the above-named employees and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

MASSEY ENERGY COMPANY

SPARTAN MINING COMPANY D/B/A MAMMOTH COAL COMPANY