

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COBALT COAL, LTD.,
WESTCHESTER COAL, L.P.,
AND COBALT COAL CORP.
MINING INC., A SINGLE EMPLOYER

and

Case 9-CA-112146

UNITED MINE WORKERS
OF AMERICA, AFL-CIO

Daniel A. Goode, Esq.,
for the General Counsel.

Doreen S. Davis, Esq.,
(*Jones Day*), New York, NY,
for the Respondents.

Charles F. Donnelly, Esq.,
Charleston, WV,
for the Charging Party.

DECISION¹

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. The hearing in this case was held in Beaver, West Virginia, on February 12, 2014. The United Mine Workers of America, AFL-CIO, (the Union or the Charging Party) filed the charge on August 27, 2013. The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on December 10, 2013, and an amendment to the complaint on February 3, 2014. The complaint alleges that Cobalt Coal, Ltd., Westchester Coal, L.P., and Cobalt Coal Corp. Mining Inc. (referred to collectively as the Respondents) are a single employer, and violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively with the exclusive collective-bargaining representative of bargaining unit employees, and violated Section 8(a)(3) and (1) of the Act by discriminating against employees for selecting the Union as their collective bargaining representative.

At the start of the hearing, I granted the Respondents' unopposed motion to withdraw the Respondents' answer and amended answer to the complaint. No evidence was presented at the hearing. I informed the parties that I would wait until at least February 26, 2014, before

¹ With the agreement of all parties, the Respondents' counsel appeared at the hearing, and participated, by telephone.

proceeding further with this matter in order to allow time for additional settlement discussions. As of the time of this decision, a settlement has not been reached.

Based on the allegations in the complaint, which, given the absence of an answer, are deemed to be admitted as true, see section 102.20 of the Board's Rules and Regulation, and after considering the briefs filed by the General Counsel and the Charging Party,² I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondents mine coal at the Westchester Mine facility in Hensley, West Virginia (the Westchester facility). In conducting their operations during the 12-month period ending November 7, 2012, the Respondents sold and shipped from the Westchester facility goods valued in excess of \$50,000 directly to a coal preparation plant in West Virginia that was itself directly engaged in interstate commerce and has shipped goods valued in excess of \$50,000 directly to points outside West Virginia. At all material times, the Respondents have been a single-integrated enterprise and a single employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

On about November 7, 2012, the Respondents ceased their coal mining operation at the Westchester facility and laid off the employees there. Shortly thereafter, on November 15, 2012, the Board certified the Union as the collective bargaining representative of a unit of production and maintenance employees at the Westchester facility.³ Since that time the Respondents have not directly operated the Westchester facility. However, on about May 29, 2013, the Respondents contracted to have another entity, W.F. Coals Sales, Inc., operate that location and perform the work that had been performed by the unit employees prior to the November 7, 2012, layoff. As a result of entering into this contract, the Respondents failed to recall 23 unit employees to work.⁴ Prior to deciding to take these actions, the Respondents did not notify the Union or give it an opportunity to bargain. The Respondents decided to contract with a third party to perform work previously performed by the bargaining unit employees, rather than recall the unit employees, because the unit employees had chosen to be represented by the Union for collective bargaining purposes and had engaged in concerted activities, and in order to discourage employees from such activities.

² Posthearing briefs were due on March 6, 2014. The Respondents did not file a brief as of that date, or thereafter. During off-the-record discussions with all parties, counsel for the Respondents indicated that she would not be filing a brief in this matter.

³ The bargaining unit is described as:

All full-time and regular part-time production and maintenance employees employed by the [Respondents] at [their] Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

⁴ The 23 unit members are: William Addair, Raymond Aragon, Lance Barbour, Phillip Barker, Daniel Aaron Beavers, Bruce Blankenship, James Bowles, Eddie Branch Sr., Lonnie Christian Jr., Frederick Coleman, Bryan Harlow, William Hydon, Wendell Kennely, Brandon Scott Lowell, James Mitchem, William Mullins, Joseph Pack, Johnny Simms, Steven Simpson, Danny Smith, Mickle Thomas, Bobby Thompson, and Richard Toler.

Beginning on about March 1, 2013, and continuing until June 20, 2013, Mike Crowder – the chief executive officer of Cobalt Coal Ltd. and the vice-president of Cobalt Coal Corp. Mining, Inc. – met with the Union, ostensibly for the purpose of negotiating an initial collective-bargaining agreement covering the bargaining unit employees. During that period, Crowder engaged in a course of conduct intended to frustrate the collective bargaining process with no intention of reaching agreement. These actions included, inter alia: canceling and rescheduling bargaining sessions; failing and refusing to provide relevant information requested by the Union; failing and refusing to respond to union proposals; insisting on proposals that were predictably unacceptable to the Union; refusing, since June 20, 2013, to identify future dates for bargaining; and contracting out the bargaining unit’s work instead of recalling the unit employees.

During the period when bargaining meetings were being held, and thereafter, the Union presented the Respondents with multiple written requests for information. These included written requests, addressed to Crowder, that are dated March 21, June 26, July 22 and July 25, 2013, and which are attached as exhibits to the complaint that issued on December 10, 2013. See General Counsel’s Exhibit Number (GC Exh.) 1(c), Attachments. These requests seek information that is relevant to, and necessary for, the Union’s representation of the bargaining unit employees. The Respondents have failed and refused to supply the Union with the information sought in those requests.

CONCLUSIONS OF LAW⁵

1. At all material times, the Respondents Cobalt Coal, LTD., Westchester Coal, L.P., and Cobalt Coal Corp. Mining Inc., have constituted a single-integrated business enterprise and single employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents’ decision to, on May 29, 2013, contract out the work that the bargaining unit employees had performed prior to the November 7, 2012, layoff, rather than recall the bargaining unit employees to perform that work, related to terms and conditions of employment and was a mandatory subject of bargaining.

4. The Respondents have failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act by failing to give the Union notice and an opportunity to bargain before deciding to, on May 29, 2013, contract out the work that the bargaining unit employees had performed prior to the November 7, 2012, layoff, rather than recall the bargaining unit employees to perform that work.

5. The Respondents have failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the information that the Union requested in its March 21, June 26, July 22, and July 25, 2013, information requests.

6. The Respondents have failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act by: meeting with the Union for the ostensible purpose of collective bargaining but with no intention of reaching agreement; canceling and rescheduling bargaining sessions; failing and refusing to provide relevant information as described in the preceding paragraph; failing and refusing to provide the Union with future dates of availability for bargaining; failing and refusing

⁵ These conclusions of law are based on those set forth in the complaint, which, pursuant to section 102.20 of the Board’s Rules and Regulation, are deemed to be admitted given the absence of an answer to the complaint,

to respond to union proposals; insisting on proposals that were predictably unacceptable to the Union; accusing the Union of inconveniencing the Respondents by insisting on meeting; telling the Union that the Respondents did not need a union to deal with their employees; contracting out bargaining unit work; and engaging in a course of conduct intended to frustrate the bargaining process.

7. The Respondents discriminated in violation of Section 8(a)(3) and (1) of the Act when, because the unit employees had engaged in protected concerted and union activity and in order to discourage such activity, the Respondents, on May 29, 2013, contracted out the work that the bargaining unit employees had performed prior to the November 7, 2012, layoff, rather than recall the bargaining unit employees to perform that work.

8. By this unlawful conduct the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5), (3) and (1) and Section (6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition to the typical remedies, the General Counsel seeks a number of extraordinary remedies which bear some discussion.

The General Counsel requests that in addition to ordering the Respondents to bargain in good faith with the Union, I require it to, upon request, adhere to a schedule of bargaining sessions consisting of a minimum of 24 hours per month for at least 6 hours per bargaining session. In a number of recent cases, the Board has ordered the imposition of such bargaining schedule requirements in order to help ensure that employers that are resistant to bargaining in good faith will do so. See, e.g., *Camelot Terrace*, 357 NLRB No. 161, slip op. at 9 (2011) (Board orders the employer to meet with the union not less than 24 hours per month for at least 6 hours per session), *All Seasons Climate Control, Inc.*, 357 NLRB No. 70, slip op. at 1 (2011) (requiring employer to bargain with union for a minimum of 15 hours per week), enf. 540 Fed. Appx. 484 (6th Cir. 2013), *Gimrock Construction, Inc.*, 356 NLRB No. 83 (2011) (Board orders the employer to bargain with the union for 16 hours a week), enf. denied in part 695 F.3d 1188 (11th Cir. 2012). In *Camelot Terrace*, supra, slip op. at 7 and 9, the Board imposed a bargaining schedule where, inter alia, the employer had restricted the dates and length of bargaining sessions, repeatedly canceled and shortened scheduled bargaining sessions, unreasonably stated that it would not bargain for more than 4 hours per session, reneged on tentative agreements without good cause, and refused to bargain over economic subjects or make economic proposals. In *All Seasons Climate Control*, supra, slip op. at 17 and 1, fn. 2, the Board agreed with the administrative law judge that ordering a bargaining schedule was appropriate given the employer's "egregious misconduct," which included withdrawing recognition from the union, refusing to supply necessary and relevant information, and soliciting and encouraging employees to circulate petitions to decertify the Union. In *Gimrock*, supra, the Board ordered the employer to bargain with the union for 16 hours per week where the employer had refused to comply with a Board bargaining order that had been enforced by the Court of Appeals. This is not to say that the Board has placed no limits on the availability of this type of remedy. In *Universal Fuel*, the Board declined to order a bargaining schedule where the parties had met and reached tentative agreements and the evidence did not show that the employer "dragged its feet in scheduling bargaining sessions, canceled sessions without valid reasons, agreed to meet only for brief periods of time, failed to send representatives with authority to conclude agreements, or engaged in any other kinds of dilatory tactics." *Universal Fuel*, 358 NLRB No. 159, slip op. at 2 (2012).

I conclude that under the circumstances present here it is appropriate to order the Respondents to adhere to the bargaining requirements that have been suggested by the General Counsel. Prior to this decision, the Respondents dragged their feet and engaged in dilatory tactics in negotiations by, inter alia, canceling bargaining sessions, refusing to provide the Union with future dates of availability for bargaining, insisting on proposals that were predictably unacceptable to the Union, and refusing to respond to Union proposals. In addition, the Respondents engaged in egregious misconduct when, because the bargaining unit employees engaged in protected concerted and union activity, the Respondents discriminatorily refused to reinstate those employees and instead contracted a third party to perform the work that the unit employees had performed prior to the November 7, 2012, layoff. Under these circumstances, I believe it is necessary to have a bargaining schedule that provides some objective indication of whether the Respondents are complying with their bargaining obligations under the Act. The schedule sought by the General Counsel is not, on its face, unduly burdensome, and the Respondents have not attempted to show that it is.

In addition to a bargaining schedule, the General Counsel seeks a second extraordinary remedy – an award of bargaining costs and expenses to the Union and of wages lost while bargaining to employee-negotiators. In *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), the Board discussed the standards to be applied in deciding whether to grant an award of bargaining expenses. The Board stated that for the “vast majority” of bad-faith bargaining violations it will suffice to rely on a bargaining order accompanied by the usual cease-and-desist order and posting of notice. *Id.* at 859. It is necessary to go further than that, and award bargaining expenses, the Board stated, “where it may fairly be said that respondent’s substantial unfair labor practices have infected the core of a bargaining process to such an extent that their ‘effects cannot be eliminated by the application of traditional remedies.’” *Ibid.*, quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

The limited facts before me in this case do not take this case outside the “vast majority” of bad-faith bargaining cases, referred to by the Board, that can be satisfactorily remedied without the unusual remedy of an award of bargaining expenses. See *Frontier Hotel & Casino*, supra. I am, given the posture of the case, left to consider the request for this remedy without the benefit of facts regarding, inter alia, the number of bargaining sessions, the frequency of the Respondents’ bad faith activities, any progress made, and the reasonableness of the actions taken in bargaining by the Union and employee-negotiators. Especially given the other relief recommended by this decision, including the extraordinary remedy that the Respondents adhere to a bargaining schedule, I do not find a basis for concluding that the “effects [of the employer’s bad faith bargaining] cannot be eliminated” without requiring the Respondents to make the bargaining-related restitution proposed by the General Counsel.

The General Counsel also asks that I extend the certification year and require the Respondents to bargain with the Union in good faith for a period of 12 months after good faith negotiations commence. The Board has held that “absent unusual circumstances, an employer will be required to honor a certification for a period of one year.” *Mar-Jac Poultry Co.*, 136 NLRB 785, 786 (1962). When an employer refuses to bargain in good faith with the elected bargaining representative during all or part of the year immediately following certification, the Board has ruled that the employer “has ‘taken from the Union’” the opportunity to bargain during “the period when Unions are generally at their greatest strength.” *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enf. 156 Fed. Appx. 331 (D.C. Cir. 2005), quoting *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), enf. 939 F.2d 402 (6th Cir. 1991). In determining the length of time that the certification year will be extended the Board considers a number of

factors including, “the nature of the violations, the number, extent, and dates of the collective-bargaining sessions, the impact of the unfair labor practices on the bargaining process, and the conduct of the union during negotiations.” *Northwest Graphics*, supra. In this case, while an extension of the certification period is appropriate, I conclude that the limited facts before me do not justify ordering the maximum 12-month extension. The Union was certified as the collective bargaining representative of the bargaining unit on November 15, 2012, and the first unfair labor practice shown on this record did not occur until the period starting on March 1, 2013. Thus there was a period of more than 3 months during which the Union had the benefit of the certification and there was no established unlawful interference from the Respondents. The limited factual record before me does not show what, if anything, was happening during those 3 months with respect to bargaining, but I find no basis for concluding that any “opportunity” to bargain during that time was “taken from the Union” by the Respondents. *Northwest Graphics*, supra. On the other hand, from March 1, 2013, onward the Respondents engaged in a course of conduct intended to frustrate the bargaining process and acted with no intention of reaching an agreement with the Union. Given these circumstances, I find that it is appropriate to extend the certification period for 9 months – i.e., for the 12 month period the Union was guaranteed the right to negotiate, minus the approximately 3-month period that the Union was not shown to have been denied that right. This 9-month period will commence when the Respondents begin to bargain in good faith with the Union.

As remedies for the violations of Section 8(a)(3) and Section 8(a)(5) that the Respondents committed when they unlawfully contracted out the work that the bargaining unit employees had performed prior to the November 7, 2012, layoff, rather than recall the laid-off unit employees, the General Counsel seeks an order requiring the Respondents to: (1) rescind their coal mining contract with W.F. Coal Sales, Inc; (2) restore the operations at the Westchester mine as they existed prior to laying off their workforce; and (3) offer, in writing, immediate reinstatement to the laid-off employees, see, supra, footnote 4, to their former positions and previous wages and working conditions and to make them whole for their loss of wages and benefits.

Where an employer is shown to have made an unlawful change the standard remedies include rescission of that change and restoration of the status quo ante. See, e.g., *San Luis Trucking, Inc.*, 352 NLRB 211, 237 (2008);⁶ *Cub Branch Mining, Inc.*, 300 NLRB 57, 61 (1990); *N.C. Coastal Motor Lines, Inc.*, 219 NLRB 1009, 1009-1010 (1975), enfd. 542 F.2d 637 (4th Cir. 1976). In this case that standard remedy requires that the Respondents rescind the contract with W.F. Coal Sales for the bargaining unit’s work and restore their operations at the Westchester facility. I hesitate to order that remedy because the General Counsel has not provided facts or legal analysis showing that it is within the Respondents’ power to rescind the contract that it has with an entity – W.F. Coal Sales – that is not a party to this proceeding. I order that remedy only because the General Counsel agrees that the Respondents would be allowed to obtain a modification of those portions of the order if, during the compliance stage of the proceeding, rescission and restoration are shown to be unduly burdensome. Brief of General Counsel at Page 7. Subject to that qualification, I conclude that the Respondents should be bound by the standard remedy of rescission and restoration of the status quo ante.

⁶ This decision was remanded to the Board by the Court of Appeals for further proceedings consistent with the intervening decision of the United States Supreme Court in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Thereafter, the Board issued a second decision, 356 NLRB No. 36 (2010), that adopted the relevant portions of its pre-remand decision and the second decision was enforced by the Court of Appeals, see 479 Fed. Appx. 743 (9th Cir. 2012).

In addition, I will recommend that the Respondents be required to reinstate the 23 named discriminatees and make them whole for any loss of earnings and other benefits they suffered as a result of the Respondents' unlawful failure to recall them. The dates when these discriminatees would have been reinstated absent the Respondents' unlawful action and the dates when their backpay would begin to accrue is a matter that must be determined during the compliance portion of this case.⁷ Any "[u]ncertainty about the amount of work that would have been available to be performed by the discriminatees during the backpay period is the result of [the Respondents'] unlawful actions and such uncertainty should therefore be construed in favor of the innocent victims of those unlawful actions." *Weldun Intern., Inc.*, 340 NLRB 666, 673 (2003), citing *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), *enfd.* 48 F.3d 1232 (10th Cir. 1995) and *WHLI Radio*, 233 NLRB 326, 330-331 (1977). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondents shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

The discriminatees in this case have been unlawfully denied recall to work with the Respondents and therefore are unlikely to see a notice posted at the Respondents' facilities. To ensure that the discriminatees will all be informed of the Respondents' violations and the nature of their rights under the Act it is permissible and necessary that the Respondents be ordered to mail copies of the notice to the discriminatees. *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 145, slip op. at 1-2 (2011), *enfd.* 468 Fed. Appx. 1 (D.C. Cir. 2012); *Embarq Corp.*, 356 NLRB No. 125, slip op. at 13 (2011); *Technology Service Solutions*, 334 NLRB 116, 117 (2001).

The General Counsel seeks two additional extraordinary remedies – a requirement that a management official read the notice to its employees, including those who it unlawfully failed to recall, and the imposition of a broad cease-and-desist order. I conclude that the record does not show that the traditional and special remedies recommended above will be inadequate to remedy the violations found and therefore find that these two additional extraordinary remedies are not warranted. See *Postal Service*, 360 NLRB No. 35, slip op. at 5 (2014) (broad cease-and-desist order not granted unless "the employer has an extensive history of violations or a history of noncompliance with cease-and-desist orders") and *Chinese Daily News*, 346 NLRB 906, 909 (2006), *enfd.* 224 Fed. Appx. 6 (D.C. Cir. 2007) (extraordinary remedy of requiring that a responsible official read the notice to employees is not warranted where other remedies ordered were not shown to be insufficient).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended order.⁸

⁷ The Respondents are deemed to have admitted that they failed to recall the named individuals "as a result" of entering into the unlawful contract with W.F. Coal Sales on May 29, 2013. However, while those facts establish that the Respondents would have recalled the named individuals absent its unlawful action, they do not establish the dates on which those individuals would have been recalled if not for the unlawful action.

⁸ 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.

ORDER

5 The Respondents, Cobalt Coal Ltd., Westchester Coal, L.P. and Cobalt Coal Corp.
Mining Inc., a Single Employer, Hensley, West Virginia, its officers, agents, successors, and
assigns, shall

1. Cease and desist from

10 (a) Bargaining in bad faith with the United Mine Workers of America, AFL-CIO, (the
Union).

(b) Meeting with the Union's representatives for bargaining sessions with no intention of
reaching an agreement.

15 (c) Engaging in a course of conduct intended to frustrate the bargaining process.

(d) Failing and refusing to provide the Union, as the exclusive collective-bargaining
representative of bargaining unit employees, with requested information that is relevant and
20 necessary to bargaining.

(e) Contracting out the coal mining operations previously performed by unit employees
at the Westchester Mine, and failing to recall the unit employees from layoff to perform that work
because those employees engaged in protected concerted and/or union activities and to
discourage such activities.

(f) Contracting out the coal mining operations previously performed by unit employees at
the Westchester Mine, and failing to recall the unit employees from layoff to perform that work
without first notifying the Union and giving the Union an opportunity to bargain about those
30 decisions, and their effects.

(g) 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.

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

(a) On request, bargain with the Union as the exclusive representative of the employees
in the following appropriate unit concerning terms and conditions of employment and, if an
understanding is reached, embody the understanding in a signed agreement:

40 All full-time and regular part-time production and maintenance employees
employed by the Respondents at their Route 7, Hensley, West Virginia,
Westchester Mine facility, but excluding all contract employees, all office clerical
employees, and all professional employees, guards and supervisors as defined
45 in the Act.

(b) Upon commencement of bargaining, extend the period of certification and recognition
of the Union as the exclusive collective-bargaining representative of the unit employees for 9
months from the date that the Respondents commence bargaining pursuant to this Order, as if
50 the initial year of certification had not expired.

(c) On request, bargain with the Union for a minimum of 24 hours per month and at least 6 hours per session until an agreement or unlawful impasse is reached or until the parties agree to a respite in bargaining.

5 (d) Within 14 days of the Board's Order, furnish the Union with the information it requested in its March 21, 2013, June 26, 2013, July 22, 2013, and July 25, 2013, information requests.

10 (e) Rescind the coal mining contract with W.F. Coal Sales that the Respondents signed on about May 29, 2013, and restore the bargaining unit work at the Westchester Mine as it existed prior to November 7, 2012.

15 (f) Within 14 days from the date of the Board's Order, offer the following employees, in writing, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed: William Addair, Raymond Aragon, Lance Barbour, Phillip Barker, Daniel Aaron Beavers, Bruce Blankenship, James Bowles, Eddie Branch Sr., Lonnie Christian Jr., Frederick Coleman, Bryan Harlow, William Hydon, Wendell Kennely, Brandon Scott Lowell, James Mitchem, William Mullins, Joseph Pack, Johnny Simms, Steven Simpson, Danny Smith, 20 Mickle Thomas, Bobby Thompson, and Richard Toler.

25 (g) Make the employees listed in the preceding paragraph whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them, in the manner set forth in the remedy section of the decision.

30 (h) Within 14 days from the date of the Board's Order, remove from the files of the employees listed above any reference to their unlawful loss of employment as a result of the decision to contract out the bargaining unit work, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful loss of employment will not be used against them in any way.

35 (i) 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.

40 (j) Within 14 days after service by the Region, post at their facility in Hensley, West Virginia copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region Nine, after being signed by the Respondents' authorized representative, 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. In addition to physical posting of paper notices, the notices shall be 45 distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices

⁹ 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."

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 copy of the notice to all current employees and former employees employed by the Respondents at any time since March 1, 2013.

(k) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,¹⁰ at its own expense, to the 23 employees named above. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondents' authorized representative.

(l) 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 Respondents have taken to comply.

Dated, Washington, D.C. March 28, 2014.

Paul Bogas
Administrative Law Judge

¹⁰ See, supra, footnote 9.

APPENDIX

NOTICE TO MEMBERS

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 on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT bargain in bad faith with the United Mine Workers of America, AFL-CIO, (the Union).

WE WILL NOT meet with the Union's representatives for bargaining sessions with no intention of reaching an agreement.

WE WILL NOT engage in a course of conduct intended to frustrate the collective bargaining process.

WE WILL NOT fail and refuse to provide the Union, as the exclusive collective-bargaining representative of bargaining unit employees, with requested information that is relevant and necessary to bargaining.

WE WILL NOT contract out the coal mining operations previously performed by you at the Westchester Mine, and fail to recall you from layoff to perform that work because of your protected concerted and/or union activities, and to discourage such activities.

WE WILL NOT contract out the coal mining operations previously performed by you at the Westchester Mine, and fail to recall you from layoff to perform that work without first notifying the Union and giving the Union an opportunity to bargain about those decisions, and their effects.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees employed by Cobalt Coal Ltd., Westchester Coal, L.P. and/or Cobalt Coal Corp. Mining Inc., at their Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees for no less than 9 months from the date that we commence such bargaining as if the initial year of certification had not expired.

WE WILL, on request, bargain with the Union for a minimum of 24 hours per month and at least 6 hours per session until an agreement or unlawful impasse is reached or until the parties agree to a respite in bargaining.

WE WILL, within 14 days of the Board's Order, furnish the Union with the information it requested in its March 21, 2013, June 26, 2013, July 22, 2013, and July 25, 2013, information requests.

WE WILL rescind the coal mining contract with W.F. Coal Sales that we signed on about May 29, 2013, and restore the bargaining unit work at the Westchester Mine as it existed prior to November 7, 2012.

WE WILL, within 14 days from the date of the Board's Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed: William Addair, Raymond Aragon, Lance Barbour, Phillip Barker, Daniel Aaron Beavers, Bruce Blankenship, James Bowles, Eddie Branch Sr., Lonnie Christian Jr., Frederick Coleman, Bryan Harlow, William Hydon, Wendell Kennely, Brandon Scott Lowell, James Mitchem, William Mullins, Joseph Pack, Johnny Simms, Steven Simpson, Danny Smith, Mickle Thomas, Bobby Thompson, and Richard Toler.

WE WILL make the employees listed in the previous paragraph whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate the employees identified above for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

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

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (513) 684-3750.