

**Shannopin Mining Company and United Mine Workers of America.** Case 6-CA-22197

April 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On January 8, 1991, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a limited cross-exception, a supporting memorandum, and an answering brief. The Charging Party filed both a declaration joining in the General Counsel's limited cross-exception and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shannopin Mining Company, Bobtown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

“(b) Remove from its files any reference to the unlawful refusal to hire Thomas E. Samek and notify him in writing that this has been done and that the refusal to hire him will not be used against him in any way.”

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

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>We find merit in the cross-exception to the failure of the judge to recommend that the Respondent remove from its records any reference to its unlawful refusal to hire Thomas E. Samek. See *Sterling Sugars*, 261 NLRB 472 (1981). We shall modify the recommended Order and substitute a new notice adding the appropriate remedial expunction language.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discourage membership in and support for, or activities on behalf of United Mine Workers of America, or any other labor organization, by discriminating in any manner against any of our employees in regard to their hire and tenure of employment or any term or condition of employment because of their union membership, sympathies, or activities.

WE WILL NOT coercively interrogate job applicants about their union membership, sympathies, or activity.

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

WE WILL offer immediate employment to Thomas E. Samek as an inside miner at our Shannopin mine or, if such position does not exist, to a substantially equivalent position, discharging, if necessary, any employee hired in his stead on or after September 7, 1989.

WE WILL make Thomas E. Samek whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him, plus interest.

WE WILL notify Thomas E. Samek that we have removed from our files any reference to our refusal to hire him and that such refusal will not be used against him in any way.

SHANNOPIN MINING COMPANY

*Stephanie Brown, Esq.*, for the General Counsel.  
*Joseph Mack, III, Esq. (Thorp, Reed, Armstrong)*, of Pittsburgh, Pennsylvania, for the Respondent.  
*Paul Girdany, Esq.*, of Washington, Pennsylvania, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on May 16 and 23, 1990. The charge and an amended charge were filed by the Union, United Mine Workers of America, on October 24, 1989, and January 12, 1990, respectively.<sup>1</sup> A second amended charge was filed on April 17, 1990. The complaint was issued on December 29. An amendment to the complaint was issued on April 20, 1990. The complaint, as amended, alleged that the Respondent, Shannopin Mining Company (Company), had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.) (the Act), by questioning job applicants about "their union membership, activities and sympathies" and by refusing to hire Thomas E. Samek. The Company filed a timely answer, and an amended answer, denying that it had committed the alleged unfair labor practices.

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

## FINDINGS OF FACT

## I. JURISDICTION

The Company, a Pennsylvania corporation, mines, and sells at nonretail, coal, at its facility in Bobtown, Pennsylvania, where, during the 12 months ending September 30, in the course of its business, it sold and shipped products, goods and materials valued at more than \$50,000, directly to points outside of the Commonwealth of Pennsylvania. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Company employs approximately 200 employees in the operation of its underground coal mine located at Bobtown, Pennsylvania. The Union has represented the Company's employees since 1980. In that year, the Company was incorporated and acquired the mine.

Since 1984, the Company and the Pennsylvania Job Service, an agency of the Commonwealth of Pennsylvania, have been parties to a written, total placement agreement. Under that agreement, the Waynesburg, Pennsylvania, office of the Job Service is the source of the Company's clerical employees, security guards, and underground employees. The Job Service processes employment applications and assists the Company in the selection of qualified job applicants.

The Job Service normally accepts job applications for underground mine jobs for a short period each year. In 1989, the Job Service announced that it would accept such applications for 2 weeks in April. Persons seeking employment with the Company filed their applications at the Job Service's Waynesburg office, and were given a general validity test,

referred to as a "VG" test, which measures general aptitude. The Job Service maintains a file of job applications and VG test results.

Pennsylvania does not require the VG test as a prerequisite for employment as an underground miner in the State. Employers enjoy the option of using VG test results as a qualification for mine employment.<sup>2</sup> The Company uses VG test scores to screen job applicants.

When the Company seeks job applicants, it contacts the Job Service's Waynesburg office and sets forth the qualifications in terms of experience, skills, and the VG test. Based upon the Company's instructions, the Job Service writes a "job order" showing the number of jobs to be filled, and the required qualifications.

Shortly before June 2, the Company's mine superintendent, Alfred A. Smalara, asked the Job Service to arrange a schedule of a single afternoon's interviews for qualified job applicants. The Job Service's job order, dated June 2, showed that Smalara requested that applicants be at least 18 years old, and have a State miner's certificate, 5 years' mining experience, and the VG test. The Job Service sent to the Company a list of job applicants arranged in ascending order of VG test scores, and scheduled the top 13 applicants for interviews to be conducted on June 2, at the Waynesburg office. One of the persons to be interviewed was Thomas E. Samek, who had the third highest VG score on the Job Service's list of Company job applicants. Samek had worked at J. & L. Steel's Vesta Number 5 Mine from 1977 until March 1, 1982, when he was laid off. From 1983 until his layoff on December 31, 1988, the Union had employed him as an international representative.

On April 4, Samek saw a notice at the Job Service, announcing that it was accepting job applications for the Company. Samek filled out an application and, later in April, took the VG test. During the week after he took the test, the Union reinstated him as a temporary representative, and assigned him to the Pittston Coal strike, in southwest Virginia.

In the early spring, employee Leonard Novak, who is president of the Union's local at the Company's mine, conversed with the Company's president and part owner, Dominic Esposto, about the employees' insurance problems. Esposto asked Novak if he preferred a job with insurance or no job at all. Novak answered that considering the scarcity of jobs and his status as a union official, he doubted that any other mine would hire him, if he lost his current job. Esposto replied: "I don't blame any other company for not hiring union officials because I wouldn't either."<sup>3</sup>

<sup>2</sup>The Company's mine superintendent, Alfred A. Smalara, testified that the use of the VG test score was the Job Service's choice. However, later, on cross examination, after flatly denying that in 1989, the Company used the VG test scores as a criterion for accepting job applicants for underground mining employment, Smalara contradicted himself, and admitted that they were used "[a]s a screening tool." He did so, after counsel reminded him of the earlier testimony of Job Service employee Barbara L. Cole. Ms. Cole had testified that the VG test score was one of the requirements which the Company imposed on applicants for mining jobs, in 1989. Of the two, Cole was more forthright. She consistently testified in an objective manner. In contrast, under cross-examination, Smalara was, at times, evasive. Accordingly, where their testimony conflicted, I have credited Cole.

<sup>3</sup>My findings regarding Dominic Esposto's conversation with employee Novak, are based on the latter's uncontradicted testimony. That Novak was a candid witness, and was a Company employee at the time he testified, persuaded me to credit his testimony in this regard. I also noted that the Company neglected to call Dominic Esposto as a witness and to assert that he was un-

<sup>1</sup>All dates are in 1989, unless otherwise indicated.

In late May, the Union assigned Samek to conduct bathhouse meetings at the Company's mine and at other nearby coal mines. At these meetings, Samek spoke about the Pittston strike to mine employees, as they prepared for work or cleaned up after work. On the afternoon of June 1, Samek learned that on the afternoon of June 2, the Company was to interview him for a job. Somewhat reluctantly, Samek conducted a bathhouse meeting at the Company's mine on the afternoon of June 1.

On June 2, Samek appeared at the Job Service's Waynesburg office, in time for his scheduled interview. The receptionist tendered some forms to Samek, including a job application, which he filled out and returned to her. There were three applicants ahead of him. After approximately 45 minutes, it was Samek's turn to be interviewed.

The Company's mine superintendent, Alfred A. Smalara, and its assistant mine superintendent, Richard M. Esposto, interviewed Samek. Dominic Esposto, Richard's father is, and was at all times material to this case, the Company's president and one-fourth owner. Smalara and Samek knew each other from prior contacts. After introducing him to Richard Esposto, Smalara turned to Samek and remarked: "I see you're working for the Mine Workers Union again."

Samek answered that he was working for the Union on a temporary basis. He went on to ask how Smalara knew about his current employment by the Union, which had begun after Samek had filed his earlier application for employment by the Company. Smalara replied that he had noted Samek's comments regarding the Pittston strike in a newspaper.

Smalara asked about Samek's current work assignment from the Union. Samek explained that the Union had assigned him to the Pittston strike in southwest Virginia, where he was involved in paying and servicing benefits for Union members. Smalara asked how Samek thought the strike was proceeding. Samek sounded a pessimistic note, answering that it was "going to get ugly," and that the end of the strike was not in sight.

Samek did not assure Smalara that the Pittston strike would not impact upon the Company. When Smalara asked if the strike would spread, Samek pointed out that it had already spread into southwest Virginia. Samek added that he hoped it would not spread into the Company's area, but cautioned that he "wouldn't know for sure." Smalara said that the Company would be very appreciative, if Samek would see to it that the strike did not affect the Company. Samek said he was not in a decision-making position, but that when he returned to Virginia, he would convey Smalara's concerns to those who were directing the Pittston strike.

Smalara asked why Samek was not in Virginia, working on the Pittston strike. Samek revealed that he was conducting bathhouse meetings for the Union at local coal mines for the week. Esposto said that he and Smalara knew of Samek's activity, having seen him through their office window, on the day before, as he entered the Company's bathhouse. Samek learned from further discussion, that the Union's local had not afforded the Company advance notice of his visit. Samek apologized and promised to call Smalara prior to his next visit to the Company's premises on Union business. Smalara answered that instead of calling, Samek should stop at the

mine office before pursuing union business on the Company's property.

After a brief discussion of where Samek lived and why he needed a job closer to home, he said that the Company was one of the places he would prefer to work at. Samek complained that working away from home was a hardship for him and his family.

Esposto asked about Samek's mining experience at the Vesta Number 5 mine. Samek answered that he had worked there for approximately 5 years. He stated that he had worked as a general inside laborer with a DC electrician and a pipeman, and had operated a continuous miner, various types of roof bolters, a shuttle car and a scoop tractor. Samek boasted that he was "the best shuttle car operator in the world." He also asserted that he had been a conveyor belt mechanic, a first class welder, a washer mechanic, had worked alternate positions as dispatcher, control room operator, and had been on the move crew. Esposto asked Samek some questions about his conveyor belt experience at Vesta Number 5.

Esposto asked how Samek had gotten along at Vesta Number 5. Samek said he had gotten along very well. Esposto asked if Samek had processed grievances. Samek answered that he had not been a committeeman, but had filed two grievances for himself. Samek explained his grievances and their successful results. Esposto went on to inquire if Samek had held any local union office. Samek denied that he had sought or occupied any local union elective office. However, he volunteered that he had served on an audit committee to review the local's books, and had been on its election committee. Esposto went on to ask if Samek had worked for the Union's district. Samek answered that he had not had any political job in the district.

Finally, Esposto inquired about how Samek had obtained employment with the Union. Samek explained how the Union first employed him temporarily to help organize a coal mining company, then gave him a second temporary assignment, and finally employed him as an international representative, until December 31, 1988.

Smalara asked Samek how he felt about the Union, after it had gotten rid of him. Samek answered that if he did not have anything good to say, he would not comment.

Samek felt uncomfortable and wanted to talk about his attitude toward work. He said he had worked hard for his brother and the Union, and would do the same for the Company. Samek provided a list of references. Catching a glimpse of a list of VG test scores, Samek asked how he had done. Smalara answered that Samek had done well. When Samek pressed for more information, Smalara answered that he had scored 96-96, and that the highest score on the list was 98-96.

Smalara asked Samek, if he were offered a job, how soon could he report to work. Samek looked at his watch, said that it was "getting late" and added, "but if you want, I can be there for the afternoon shift." Smalara and Esposto agreed that it was getting late and that they might be finished. Changing the subject, Smalara suggested that Samek would be going to Carmichaels that evening. Samek said he did not understand Smalara's remark. Smalara informed Samek that the Union's President Trumka would be speaking at Carmichaels that evening, and suggested that Samek would be there to clap for him.

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available to do so. These omissions suggested that Esposto would not have contradicted Novak.

Samek shook hands with Smalara and Esposto and was moving toward the door. As he left the room, Samek said that he needed the job, would work hard if he got it, and, if notified early enough in the morning, would report to the Company's mine for the afternoon shift. The interview had taken about 45 minutes. I also find from Samek's testimony that Smalara's and Esposto's questions about his union activity took up most of the interview. The Company has never offered a job to Samek.<sup>4</sup>

The Company did not hire any of the thirteen job applicants it had interviewed on June 2, until September 7, when it hired Gary Morris, who had approximately 11 years' coal mining experience and had scored 92-94 on the VG test. The Company later hired applicant Gary Hazuga as a foreman.

In August, the Company sought a new group of job applicants through the Pennsylvania Job Service. The Company requested that applicants have at least 24 months of mining experience, and a high school education, be at least 18 years old, and pass a Company physical examination. VG test scores were also used to screen applicants. However, the record does not reveal the scores of the 25 applicants named on the job order. There were no interviews of these applicants. In September, the Company hired thirteen of them and Gary Morris.<sup>5</sup>

The Company hired 10 additional employees between February 19, 1990, and April 6, 1990, both dates inclusive. Among them were Samuel Hall and Clare Fraenzl, who were in the group of 13 interviewed on June 2. The Company

<sup>4</sup>Of the three participants in Samek's job interview, Samek impressed me as being the most candid in testifying about it. I also noted that Samek seemed to be providing his best recollection as if he were reliving the interview.

In contrast, cross-examination revealed that Esposto and Smalara were at times careless in presenting their recollections of the interview. Thus, Esposto claimed that he had looked at the front and reverse sides of Samek's job application, yet, on cross examination, he conceded that there was no reverse side in that application. Esposto testified that during the interview, Samek said he resided in Carmichaels. On cross-examination, after seeing Samek's application showing a Waynesburg address, Esposto conceded that Samek might have said he lived in Waynesburg.

Smalara testified that on June 2, he asked Samek about the Union's Camp Solidarity, which had been mentioned in the *Mine Worker Journal*. I find it unlikely that Smalara had even heard about that camp on or before that date. For, credited testimony of a Union international representative, and Samek, showed that Camp Solidarity opened on June 6, without any press release prior to that date, and that the *Mine Worker Journal* did not mention Camp Solidarity until August or September. Smalara also contradicted Esposto and Samek when he denied that Samek's interview on June 2, included any discussion of where he lived.

<sup>5</sup>I based my findings regarding the content of the Company's second request for job applicants from the Pennsylvania Job Service, upon Barbara Cole's testimony and the Service's job order. Cole was a careful witness, who seemed conscientious about searching her memory and articulating the full extent of her recollection objectively.

Smalara, testifying for the Company, asserted that since 1988, he has requested no less than 5 years' experience as a requirement for Company job applicants coming through the Pennsylvania Job Service. However, the manner in which he testified about the Job Service's August job order cast doubt upon his testimony regarding the 2-year requirement it contained. At first, Smalara seemed reluctant to testify that Barbara Cole and the Job Service had erred. He hedged, testifying that he did not remember "consciously ever asking for two years." Next, he testified that he did not know why the 2-year requirement was on the job order. After further reflection, and a third question on the same issue, Smalara flatly denied ever asking for a two year experience requirement, when recruiting mine employees for the Company, through the State Job Service.

Smalara's first two answers were evasive. It was not until he apparently had time to think, that he answered directly. As this episode cast serious doubt upon the reliability of Smalara's denial, I have rejected it and have credited Barbara Cole's contradictory testimony.

hired Clare Fraenzl and a second female applicant, Denise Hutchinson, on March 20, 1990, pursuant to the settlement of a sex discrimination case before the Equal Employment Opportunity Commission. The Company gave prehire interviews to the remaining seven employees in this group.

In October, Samek along with Ed Yankovich, who was a union district president, and International representatives Carl Petro, and Larry Pasquale, attended the opening of a new operation on the Company's premises. When the four union officials arrived, the Company issued to each of them, a name tag which had "UMWA" inscribed on it.

After the presentation and speeches, Samek met Dominic Esposto, who was circulating and shaking hands. Upon seeing Samek's name tag, Esposto said: "[O]h, I see who you are, you are one of them." Samek squeezed Esposto's hand and announced that he was "Tom Samek with the Mine Workers Union . . . ." Esposto "pulled his hand away and walked away from [Samek]."<sup>6</sup>

Samek next came upon Union Representative Petro conversing with Superintendent Smalara. Noting that he, Petro and Smalara had worked at the J. & L. coal mine, Samek asked if this conversation was a J. & L. alumni meeting. Smalara said it was. Smalara asked Samek if he had worked at the J. & L. Vesta mine. After saying he had, Samek asked Petro if he had worked at the Bobtown mine. Petro said he had. Smalara joined in the exchange, saying that he had not hired Petro. Samek looked at Smalara and said, "Well, you didn't hire me either." Smalara denied that he had refused to hire Samek and said that Rick Esposto had made that decision. Petro remarked that Smalara would not hire him presently. Smalara agreed and ended the conversation.<sup>7</sup>

### B. Analysis and Conclusions

The General Counsel and the Charging Party urge a finding that the Company discriminated against Thomas Samek by refusing to employ him because of his activity as a union representative, and thereby violated Section 8(a)(3) and (l) of the Act. It is also urged by the General Counsel and the Charging Party, that the Company violated Section 8(a)(1) of the Act, by questioning Samek about his union activity during the job interview on June 2. The Company contends that the General Counsel has failed to show that union activity played any part in the Company's decisions to hire other applicants in preference to Samek. Further, the Company contends that the questioning complained of was not unlawful, on the ground that it was not coercive. Contrary to the Company, I find that the General Counsel has, by ample proof, shown the alleged violations.

Section 8(a)(3) of the Act prohibits an employer from refusing to hire a job applicant because of his or her union activity or prounion sentiment. To establish such a violation here, the General Counsel was required to make a *Drima facie* showing sufficient to sustain the inference that union activity was a motivating factor in the Company's rejection

<sup>6</sup>I have credited Samek's uncontradicted testimony regarding his encounter with Dominic Esposto, who did not testify before me.

<sup>7</sup>I have credited Samek's and Petro's detailed testimony regard the remarks which passed between them and Smalara when they met at the Company's facility in in early October. Smalara testified that his discussion with Samek was "small talk" and he could not remember what they talked about. Smalara's quick treatment of this encounter after suggesting that the matter of Samek's rejection had come up, hinted that Smalara was reluctant to search his recollection about this incident.

of Samek's quest for employment at its mine. If the General Counsel satisfied that requirement, the refusal to hire Samek must be found unlawful unless the Company has shown, as an affirmative defense, that it would have rejected him even in the absence of his union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-403 (1983), affg. *Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). If the record shows that the business reasons advanced by the Company for rejecting Samek were pretextual—that is, that the reasons either do not exist or were not in fact relied upon—it necessarily follows that the Company has not met its burden and the inquiry is logically at an end. *Wright Line, Inc.*, 251 NLRB at 1084. Applying this formula, I am satisfied that the Company has resorted to pretext in its effort to keep a union activist off of its payroll.

Before Samek's job interview began, Superintendent Smalara and Assistant Superintendent Esposto knew that he was working for the Union as a temporary representative. They knew that he was assisting the Union in the conduct of the Pittston coal strike. These two bits of information they had gleaned from a newspaper. In addition, Samek's application showed that from February 1983 until December 31, 1988, the Union had employed him as an international representative.

Smalara was not satisfied with the information he had obtained from Samek's application and the newspaper item. He proceeded to ask Samek about his current assignment from the Union. Samek outlined his duties in support of the strike. Smalara wanted to know what Samek was up to in Pennsylvania. When Samek mentioned the previous day's bathhouse meeting at the Company's facility, Esposto revealed that he and Smalara knew about it.<sup>8</sup>

Following a discussion of where Samek lived and his mining experience, the questions reverted to Samek's union activity. Esposto asked about Samek's union activity during his employment at the J. & L. Vesta mine. Esposto wanted to know if Samek had processed grievances under a union contract, if he had held any local union office, and if he had worked for the Union's district office. Esposto asked Samek how he had obtained employment with the Union.

Smalara also expressed interest in Samek's sentiment toward the Union. Smalara asked Samek how he felt about the Union, after it had laid him off at the end of 1988. Samek answered that if he did not have anything good to say, he would withhold comment.

Smalara and Esposto revealed their preoccupation with Samek's activity as a union representative and his attitude toward the Union in the context of an interview for a job in the Company's mine. By this conduct, they also interfered with Samek's statutory right to engage in union activity and support a union. Indeed, the Board has recognized that an employer's questions regarding union activity or union sympathies "in the context of a job interview are inherently coercive and thus interfere with Section 7 rights." *Service Master All Cleaning Services*, 267 NLRB 875 (1983). Accordingly, I find that by questioning Samek during his job interview on June 2, about his activity on the Union's behalf,

<sup>8</sup>According to Smalara's testimony, he asked Samek about Camp Solidarity, on June 2, because the Pittston strike "was rather prominent in the news," and he was curious about the Union's new tactics in support of its strike.

and about his attitude toward the Union, the Company violated Section 8(a)(1) of the Act.

I also find ample evidence of the Company's hostility toward Samek's union activity. The Company's resort to unlawful interrogation during Samek's interview on June 2, was a manifestation of the Company's animus toward his activity as a union representative. A suggestion of the Company's attitude toward union officials surfaced earlier in the spring, when employee Novak conversed with Richard Esposto's father, Dominic. In the course of this discussion, Dominic Esposto, the Company's president and part owner, said he would not hire any union officials. In October, Dominic refused to finish a handshake with Samek, after learning that he was an employee of the Union.

Superintendent Smalara apparently shared Dominic Esposto's sentiment toward Union officials. In October, Smalara conceded that he would not hire Union Representative Carl Petro. At the time of this exchange, Petro was wearing a name badge reflecting his affiliation with the Union as a representative.

I find that at the time he participated in Samek's unlawful interrogation, and since, Richard Esposto had, and continues to have, the same hostility toward union officials that Dominic, his father, expressed in April, and later exhibited in October, when he came upon Samek. Richard worked at the Company's mine as an assistant superintendent. His father, Dominic was the Company's president and part owner, and thus was also Richard's boss. The family and business ties between the father, Dominic, and the son, Richard, provided ample opportunity for them to discuss an important concern, such as the Company's employment policy. In particular, Dominic certainly would have shared his opinion with Richard, regarding union officials and their suitability for employment as rank-and-file coal mine workers. Richard's questions to Samek suggested that he had the same opinion as did his father.

That the Company had hired a chairman of a union mine committee and a member of a union safety committeeman prior to its refusal to employ Samek, did not rebut the strong evidence of animus which I have recited above. For unlike Samek, there was no showing that either of these employees had been union International representatives prior to their employment by the Company, or that either had engaged in active support of a major strike, or had actively assisted in the organization of a mine. Nor was there any showing that the Company had ever hired a union International representative, or any other Union official, prior to or since Samek's application for employment at its mine.

Between June 2 and April 6, 1990, both dates inclusive, the Company hired 24 mine employees. Samek was not one of them. Richard Esposto conceded that Samek had as much experience as some of the applicants hired during that period; that Samek's interview of June 2 went well; that Samek said he very much wanted to work for the Company; and, that Samek had all the qualifications the Company wanted.

From the foregoing array of facts, I find that the General Counsel has made a prima facie showing that the Company refused, and continues to refuse, to employ Thomas Samek because of his activity on behalf of the Union. The timing of the Company's refusal, after Dominic Esposto's remark that he would not employ union officials, and after the extensive unlawful interrogation of Samek, in which he revealed

his union activity to Superintendent Smalara and Assistant Superintendent Richard Esposto, and Richard Esposto's admission that Samek was qualified for employment by the Company, provided strong support for the General Counsel's contention.

Smalara and Richard Esposto testified that all of the mine employees the Company hired after June 2 were better qualified than Samek. Thus, according to their testimony, Samek's qualifications, rather than his union activity deprived him of employment at the Company's mine. Some doubt is cast upon this explanation by the Company's failure to provide that explanation to Samek in early October, when he implied to Smalara that his employment as a Union representative was the reason Smalara had not hired him. Instead of offering any explanation, Smalara told him that it was Rick Esposto who had not hired Samek. Smalara's refusal to offer lack of experience in mining or any other deficiency in response to Samek's remarks, suggests that Company's defense before me was an afterthought.

The record belies the Company's excuse for not employing Samek. According to Smalara, Samek was "an unknown entity as far as we (the Company management) were concerned." Yet Clyde Burrie, whom the Company hired to start work on September 7, was known by the Company only as a guard. There was no showing that the Company had any information about the quality of his mining work. I also note that Burrie's application shows only that he worked as a miner from sometime in 1980 until an undisclosed date in 1983. Samek's application showed that he worked as a miner for almost five years. The Company did not even bother to interview Burrie to find out more about his mining career. Yet, based upon Burrie's work as a guard, and the sketchy information in his application, the Company hired him in preference to Samek, who was fully qualified, and had undergone a full interview which, according to Richard Esposto, "went well."

The Company hired Joseph Lucas, effective September 7, on the recommendation of its General Mine Foreman James G. Price and three hourly employees. However, all Price knew about Lucas was something about his family, and where he lived. According to Richard Esposto's testimony, he based his decision upon the recommendation of employee Bob Vance, who had worked for the Company for 8 months or a year and is "a real good worker," and who promised to quit if Lucas was not as good a worker as Vance was. Lucas' application shows that he worked for "Cumberland Mine" from "2-82" until December 19, 1986. Lucas's application recites that during that time he performed "both construction and production mining." In a space provided for "Special Skills and Qualifications" on his application, Lucas stated that he "can operate most underground equipment" and went on to detail his construction experience.

Bearing in mind that the Company did not interview Lucas, all it had to go on was the evaluations of three employees and his sketchy application. The application showed that Lucas had approximately 3 months' more experience than Samek had in mine work. However, Samek's experience was in production and maintenance and both his application and interview on June 2, provided a detailed account of the underground mining equipment he had operated. Clearly, Samek's application and interview provided more pertinent information to the Company than Lucas' did. Granted that

the three employees consulted by the Company might have provided more information regarding Lucas' experience, the Company has not introduced it into the record. This neglect suggests that the information would not have assisted the Company's defense. However, the evidence before me showed that Samek's experience gave him a substantial edge over Lucas.

The Company's employment of Michael Klamerus, effective April 6, 1990, again suggested that Samek's mining qualifications entitled him to employment at the Shannopin mine. According to Richard Esposto, from February 1990 until April 1990, the Company's selection of applicants for hire was based almost entirely upon interviews. However, the Company, again, did not supply the record with details of those interviews. Thus, I have looked at Klamerus's qualifications, only as shown on his application, and compared them with Samek's qualifications. Samek was more qualified.

Klamerus' application states that from February 1974 until 1980, he performed "various maintenance on mining machines," roof bolted and did general inside labor. From October 1980 until November 1982, Klamerus was responsible "for care and maintenance of various mining machinery i.e. mechanical, electrical, hydrolic." Klamerus' application did not disclose how much inside mining work he had performed prior to April 6, 1990. From January 1983 until May 1986, Klamerus had been a substitute teacher and had done some building and home remodeling.

In his application, Klamerus described his special skills and qualifications as follows:

I can organize and present material for instruction due to my teacher training and can comprehend material presented to me easier through organization due to my teaching disciplines.

Klamerus' mining experience did not equal or exceed Samek's. Nor did Klamerus's special skills equip him to operate mining equipment. In contrast, Samek's application showed that he could operate a shuttle car, a roof bolter, a continuous miner, and a motor. Samek's application also showed that he was a belt mechanic, a prep plant mechanic, and a welder.

Richard Esposto admittedly knew of Samek's experience and skill after interviewing him on June 2. Samek's application showed experience and qualifications which were superior to those on Klamerus's application. Samek's interview showed his familiarization with mining equipment. Yet the Company ignored Samek.

The Company's neglect to provide details of Klamerus' interview precluded me from learning what if any factors might have favored him over Samek. Here, again, the Company's omission deprived its defense of factual underpinning.

There are flaws in Richard Esposto's testimony which cast further doubt on the credibility of the Company's stated reason for not employing Samek. One such infirmity arose when Esposto was confronted with the fact that he had hired applicant Lucas, who had only 3 years' experience as a miner. Esposto answered, in substance, that experience was not important. Yet later in his testimony, Esposto insisted that experience was the only factor making Samek less qualified than the applicants which the Company had employed

on and after September 7. This assertion also contradicted Esposto's earlier testimony on cross-examination that Samek had as much experience as some of those same applicants. Esposto also testified that Samek fit all of the qualifications which the Company had sought in its applicants.

Smalara's testimony regarding Samek's interview also contributed to my rejection of the Company's defense of the alleged discrimination. According to Smalara, at his interview on June 2, Samek did not talk much about his familiarity with the continuous miner or the shuttle car. However, both Samek's and Esposto's testimony showed that Samek made considerable mention of his use of those machines. Indeed, Esposto was satisfied that Samek had ample experience using those devices. Given his hostility toward Samek's union activity, it is likely that Smalara was fashioning his testimony to support the Company's proffered defense.

In sum, I do not credit the Company's defense as expressed through Smalara's and Richard Esposto's testimony. For the record shows that their explanation that Samek was not as qualified as any of the applicants, whom the Company hired in September and during the period between February 1 and April 30, 1990, was pretextual. Indeed, the record shows that the Company avoided Samek and hired two applicants in September and one in April 1990, whose qualifications were demonstrably inferior to his.

That the Company did not offer employment to 8 of the 13 applicants interviewed with Samek on June 2, did not rebut the General Counsel's prima facie case. *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987). Indeed, given the evidence of union animus and the Company's pretextual explanation, its resort to a second list of applicants for new employees in September, suggested that it was avoiding the earlier list because Samek's name was on it.

According to Richard Esposto's testimony, the Company was "in a hurry to hire people." Yet the Company hired only one applicant off of the earlier list, in September, Gary Morris. Instead of calling in the interviewed applicants, the Company set up a new list of applicants and set about finding out about their reputations as miners. There was no showing that this procedure was quicker than calling up the remainder of the earlier list of applicants, who had already been interviewed. The Company left to conjecture the reason it ignored the remainder of the 13 applicants it had interviewed on June 2. Against the backdrop of union animus and its pretextual explanation of its refusal to hire Samek, it seems likely that the Company was using a new list to avoid hiring him.

I find from the foregoing that the Company failed to rebut the General Counsel's strong showing that Samek's activity as a Union official provoked it to deny him employment on and after September 7. Accordingly, I find that by this discrimination, the Company violated Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. By interrogating job applicant Thomas E. Samek regarding his union membership, activities, and sympathies, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By refusing to hire Thomas E. Samek on and after September 7, 1989, because he joined, supported, or assisted the

United Mine Workers of America, the Company violated Section 8(a)(3) and (1) of the Act.

#### REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company refused to hire Thomas E. Samek on and after September 7, 1989, it must offer him employment as a miner and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from that date to the date of a proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the findings of fact and conclusions of law and on the entire record, issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, Shannopin Mining, Bobtown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in and support for, or activities on behalf of United Mineworkers of America or any other labor organization, by discriminating in any manner against any of its employees in regard to their hire and tenure of employment or any term or condition of employment because of their union membership, sympathies or activities.

(b) Coercively interrogating job applicants about their union membership, activities, or sympathies.

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

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

(a) Offer immediate employment to Thomas E. Samek, as an inside miner, at its Shannopin Mine or, if such position does not exist, in a substantially equivalent position, discharging, if necessary, any employee hired in his stead on or after September 7, 1989, and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, in the manner described in the section of this decision entitled "The Remedy."

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

(c) Post at its facility at Bobtown, Pennsylvania, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized rep-

<sup>9</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>10</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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