

Double A Coal Co., Inc., Double A Coal Co.—Partnership, and Zapp Mining, Inc. and United Mine Workers of America and District 28, United Mine Workers of America. Case 11–CA–13266

May 22, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On October 30, 1991, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent, Double A Coal Co., Inc., filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Double A Coal Co., Inc., Double A Coal Co.—Partnership, and Zapp Mining,

¹The 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.

In the last paragraph of the section of the judge's decision, entitled, "3 Employees of Double A," the judge inadvertently identified Double A, rather than the Union, as the exclusive bargaining representative of the unit employees.

²In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally changing its hiring practice of employing individuals on the contractual laid-off panel, we note that this bargaining obligation arose from the Respondent's pledge made directly to the Union before it hired any employees that it would honor the panel rights of laid-off employees of Jewell Ridge, the predecessor employer. This obligation did not arise from the terms of the Union's contract with Jewell Ridge. As a successor employer, the Respondent was not required to assume any of the terms of the predecessor's contract, but the Respondent did make a commitment to the Union that it would follow the substance of the contract term requiring hiring from the panel, and therefore made this rehiring procedure a condition of employment that would not be changed without bargaining with the Union.

³We agree with the judge, for the reasons he stated, that the Respondent Double A Coal Co., Inc. was the Employer of the miners who worked at the Double A mine 1 and 2 and find it unnecessary to pass on his alternative joint employer finding regarding Respondent and Double A Coal Co.—Partnership and Zapp Mining, Inc. We note that this modification has no effect on the judge's recommended Order, which is solely directed at Respondent Double A Coal Co., Inc.

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

Patricia L. Timmins, Esq., for the General Counsel.
Mr. James M. Ashby (Mark M. Lawson, Esq., of Bristol, Virginia, on the brief), for the Respondent.
James J. Vergara, Esq., of Hopewell, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Tazewell, Virginia, on January 17–18, 1991. The charge was filed on April 4, 1989¹ (amended June 28, 1989, and March 29, November 23, and December 11, 1990). The complaint was issued March 30, 1990, and amended January 3, 1991.

James Ashby, president of Double A Coal Co., Inc. (Double A), signed a contract to operate Pittston's closed 12A mine, promising to honor the recall rights of laid-off panel members and agreeing not to subcontract the mine without Pittston's written consent. Later, while negotiating with the Union for an agreement to cover the mine employees, Ashby took actions obviously designed to undercut the Union's majority status.

After hiring very few panel members, Ashby orally subcontracted both parts of the mine to his mine managers, without notifying the Union—yet continued the union negotiations. He retained control over the operations and continued reporting to the Labor Department the use of the assumed name, Double A Mining Inc., as the business' legal identity. This case arose (a) when the mine managers failed to employ any of the panel members except the five that Ashby directed to be employed and (b) when these five panel members were assigned fewer hours and, at Ashby's directions, paid lower wage rates than nonpanel employees, discouraging support for the Union.

The primary issues are whether Double A, the Respondent, through President Ashby's conduct, unlawfully discriminated against panel members and refused to bargain in good faith with the Union, violating Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent Double A, a corporation, mined coal near Whitewood, Virginia, where, during the 12-month period beginning August 1988, it mined and trucked coal valued over \$50,000 to Jewell Ridge Mining Corporation, which annually sells goods valued over \$50,000 directly outside the State. Double A admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7)

¹All dates are from April 6, 1988, to April 5, 1989, unless otherwise stated.

of the Act and that the Union (United Mine Workers of America and District 28, United Mine Workers of America) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Bargaining as Pittston's Successor

On April 6, 1988, James Ashby, as president and sole stockholder of Double A Coal Co., Inc. (Double A), signed a contract (G.C. Exh. 2) with Jewell Ridge Coal Corporation (a company in the Pittston Coal Group) for Double A to mine Pittston's coal in its closed 12A mine as an independent contractor (Tr. 48–50, 74). Ashby agreed in the contract (par. 34) that Double A, as a successor, would hire employees from the Jewell Ridge panel of employees laid off from the 12A mine. Ashby also agreed (par. 24) not to subcontract any part of the mine without Jewell Ridge's "written consent."

On May 31 Jewell Ridge gave written notice to the Union (C.P. Exh. 3) that the 12A mine had been contracted to Double A and that "This operator has agreed to be a successor" under the National Bituminous Coal Wage Agreement of 1984 (the BCOA agreement). Sometime in August, before opening the mine, Ashby—along with the Double A Labor Consultant Arville Sykes—met with the Union and began bargaining for a collective-bargaining agreement to cover the employment of production and maintenance employees at the 12A mine (Tr. 17–18, 148–149, 153, 233–238).

This bargaining, between Double A and the Union, continued until after the Union's strike against Pittston began on April 5 (Tr. 149, 152–155, 160, 168, 233). In none of the bargaining sessions did Ashby or Sykes give any indication that Ashby had subcontracted any part of the 12A mine (Tr. 154, 221).

B. Failure to Honor Panel Rights

1. Contractual provisions

Paragraph 34, "Successorship," of Double A's contract with Jewell Ridge (G.C. Exh. 2) provided that Double A "specifically agrees to hire from the panel in accordance with the expired provisions of Article IA(h)(2)–(6)" of the BCOA agreement (G.C. Exh. 5). That article 1A(h)(2) provides that Pittston's contractor or "lessee-licensee" (Double A) must make "offers of employment" to the senior qualified panel members. It also provides that "The lessee-licensee shall not be required to make more than one such offer of employment to each such Employee."

The contractual requirements for the offer of employment (or "notice of recall") are specified in article 17(e) of the BCOA agreement. The notice is to be sent by certified mail to the laid-off employee's last known address, giving the panel member "four calendar days after receipt" of the notice to accept the offer (Tr. 246). If "the Employee rejects a job which he has listed as one to which he wishes to be recalled or fails to respond within four calendar days after receipt of such notice or accepts but fails to report for work in a reasonable time his name shall be removed from the panel at that mine and he shall sacrifice his seniority rights at that mine." Article 17(e) also provides that "The super-

intendent of the mine and the Recording Secretary of the local union shall be joint custodians of the panel records."

2. Purported "recall" notices

The evidence clearly shows that President James Ashby had no intention of honoring the recall rights of all the laid-off panel members.

Although Ashby informed the Union that he was going to call the panel for employees, he failed to follow the established procedure for offering jobs to panel members. As Union Field Representative Donnie Lowe credibly testified, the lessee should get in touch with the local union recording secretary to review the panel forms and the available jobs." Both are involved with the recall of the senior qualified laid-off panel members. (Tr. 148–149, 153.)

Instead of following this procedure and sending recall notices to the senior qualified panel members for specific jobs, Ashby bypassed the local union and sent out letters notifying panel members of "recall" meetings.

On August 18, about 2 weeks before one portal of the 12A mine (called Double A mine 1, Tr. 13) was to open, Ashby sent out 18 purported "recall" letters. The letters stated that "some" of the 12A mine employees were being recalled and announced a meeting at 9 a.m., August 20, for those "accepting this RECALL." (R. Exh. 14.) These letters thus gave a maximum of 1 day—not the required 4 days—after their receipt for the panel members to "accept." They did not offer any particular job to accept.

The "recall" letters were sent to 17 of the 77 persons on the local union's copy of the panel (G.C. Exh. 6; R. Exh. 14). These 17 panel members were David Blankenship, Jerry Clark, Fulton Cole, Basel Cooper, Fred Hale, Bride Hess, Joshua Hicks, Roy Lawson, Clarence McGlothlin, Jimmie McGuire, Harold Mounts, Alex Mutter, Robert Pruitt, Arlin Russ, Larry Sizemore, James Ward, and Troy Wimmer. The 18th letter was sent to John Van Huss, who was not on the local union's copy, but was on Double A's copy of the panel, as discussed below.

Eight of the eighteen letters were received either on or after August 20, giving these panel members (Clark, Cole, Cooper, Hess, McGlothlin, McGuire, Mounts, Mutter, and Sizemore) no time to "accept" before the 9 a.m., August 20 meeting (R. Exh. 14).

On August 27 Double A sent a second group of purported "recall" letters, signed by Superintendent W. P. Corbett. This time the letters announced a meeting on August 31, giving a maximum of 3 days—not the required 4 days—after receipt for the panel members to "accept." The letters still were not recall letters to the senior qualified panel members, offering them particular jobs. They were sent to 3 of the same panel members (Cooper, Fred Hale, and McGlothlin) and to 12 others (James Atwell, Shannon Chapman, Donald Cochran, Donny Kinder, Douglas Lester, Bobby Mullins, James Reed, Richard Smith, Marvin Street, James Vance, Jerry Vance, and John Wilson). Three letters (to Atwell, Cooper, and Kinder) were received on or after the date of the 9 a.m., August 31 meeting. (R. Exh. 14.)

Double A employed only five of the panel employees when it began operating mine 1 about August 31 or September 1 (G.C. Exh. 3, p. 1; Tr. 174). They were Andy Brown, George Cantrell, Joshua Hicks, Roy Lawson, and Clarence McGlothlin (Tr. 18–19). Although Douglas Lester and Alex

Mutter checked “RECALLED ACCEPTED” on their notices (R. Exh. 14), neither of them was employed.

A total of 32 “recall” letters had been sent. Four of them (to Robert Pruitt, Reed, Wilson, and Woodward) were returned (R. Exh. 14). As found, five panel members (“the Five”) were hired to work in mine 1. None of the other panel members who were sent the August 18 or 27 letter has ever been sent a recall letter to a particular job, with the required 4-day notice.

On September 15 Ashby sent a third group of six purported “recall” letters, announcing a meeting on September 23. These letters (to William Bandy, Thomas Jackson, Lee Walters, Dallas Whited, Randall Whited, and Douglas Whitt) gave the required 4 days to respond, but still failed to offer particular jobs to the senior qualified panel members. One letter (to Bandy) was returned. (R. Exh. 14.) The only two of these panel members who were hired were Dallas Whited and Douglas Whitt. As discussed below, they were employed briefly in mine 1 before it was shut down, but were not recalled when it was reopened.

As revealed by the certified mail receipts in evidence (R. Exh. 14), no meeting notices were sent to the remaining 43 of the 81 panel members on Double A’s and the local union’s copies of the panel (see “Stipulated panel members,” below). These 43 panel members were Raymond Baldwin, Ralph Barnett, Lowell Batton, James Blakenship, Albert Byrd, Bert Clevenger, James Crockett, Charlie Dawson, Raymond Dawson, Virgil Deel, Jerry Elswick, James Hackworth, Paul Hale, Wesley Harlow, William Hicks, Paul Hill, Donnie Keen, Otis Keen, Dennis Kennedy, Darrell Lawson, Bennie Lester, James Lester, Edward Mabe, Winfred McGlothlin, Buford Mitchell, Ralph Mullins, Edward Newberry, Jeffrey Plaster, Billy Price, Timothy Pruett, Jeffrey Rapp, Kenneth Ray, Donald Reedy, Joe Rutter, Curtis Shrader, Barry Smith, Jeff Stiltner, Michael Stiltner, Alvie Street, Joe Vance, Leslie Vandyke, Bill Wimmer, and Troy Wimmer.

I note that Double A did not retain copies of most of the meeting notices, but that it introduced into evidence the certified mail receipts and the return receipts (many of them in multiple copies) showing when the notices were sent (R. Exh. 14).

Based on this evidence and all the circumstances, I find that Double A’s sending the purported “recall” notices was largely a pretense of honoring the recall rights of the laid-off panel employees.

3. Stipulated panel members

Meanwhile the Union was complaining to President Ashby in contract negotiations “that he wasn’t hiring off the panel.” Ashby’s response was that he felt “he had called off the panel.” In one negotiating session he asked if the Union “would furnish him a copy of all [the Union’s] panel sheets” and said “he would review them.” The Union gave him copies of the panel sheets, but to no avail. (Tr. 153–154, 257.) At the trial Ashby asserted that he used both the Union’s and Pittston’s copies of the panel sheets to “get the amount of people that worked there” at the mine (Tr. 258).

The panel that Double A used in the summer of 1988 is not in evidence. The 63-person panel that Double A introduced into evidence (R. Exh. 3) is Pittston’s January 1991 copy, reflecting changes made in the intervening 2 years (Tr.

240, 256, 291–296). I discredit Ashby’s claim (Tr. 262) that he had that panel in his possession since April 1988.

The parties stipulated (Tr. 264) that if this case goes to compliance, both copies of the panel (G.C. Exh. 6, the local union’s copy, and R. Exh. 3, Pittston’s 1991 copy) are to be used by the compliance officer in determining who have panel rights to the 12A mine. I find that two other panel members who were on the panel that Ashby used in 1988 should also be included.

They are John Van Huss, to whom Ashby sent the August 18 “recall” letter (R. Exh. 14) and Paul Hill. The complaint alleged that since December 1988, Double A has failed and refused to hire Hill and nine other panel members (David Blankenship, James Blankenship, Jerry Clark, Bert Clevenger, Basel Cooper, Fred Hale, Alex Mutter, Robert Pruitt, and Dallas Whited), as well as “others unknown at this time.” Ashby admitted at the trial (Tr. 260–261) that these 10 persons (including Hill) were persons “on the panel sheets I had” and that “they should have been considered for recall.”

I find that there was a total of 81 panel members: 77 on the local union’s copy of the panel (G.C. Exh. 6) and 4 additional panel members (Paul Hill and John Van Huss, discussed above, and James Hackworth and Kenneth Ray, who are on Pittston’s 1991 copy, R. Exh. 3, but not on the local union’s copy, G.C. Exh. 6).

4. Operation of Double A mine 1

a. *Separate payroll for panel members*

On August 3, about 4 weeks before Double A began operating Double A mine 1, Superintendent Corbett filed the required legal identity report (C.P. Exh. 1) with the U.S. Department of Labor’s Mine Safety and Health Administration (MSHA). As MSHA Inspector Supervisor Jim Franklin testified, this report is required by the Mine Act to be filed to show responsibility for operating the coal mine in compliance with MSHA regulations. It must be filed before the mine is opened and must be resubmitted to reflect the change “anytime they make any kind of modification.” (Tr. 121–123, 137.)

The August 3 legal identity report (C.P. Exh. 1) gave Double A Mining Inc. as the official business name of the mine 1 operator and named James Ashby as president of the corporation and W. P. Corbett as superintendent in charge of health and safety. There is no direct evidence why the official business name was incorrectly given as Double A Mining Inc. rather than Double A Coal Co., Inc., the Respondent Double A, whose president is James Ashby and which admittedly operated the mine when it opened.

From the date of opening until Double A temporarily shut down the mine about the third week in October, Double A placed “the Five” panel members on a separate Double A payroll (G.C. Exh. 3). Joshua Hicks was the miner operator on the first shift, Andy Brown and Clarence McGlothlin were the roof bolters, and George Cantrell and Roy Lawson were the shuttle car operators (Tr. 18–19). The other first-shift employees (including such maintenance employees as an electrician or mechanic, Tr. 15) and all the second-shift employees were presumably on a different payroll (not in evidence).

The five were being paid \$6.875 or \$7.50 and \$8.125 an hour (G.C. Exh. 3). These rates were about half the union wage rates and were substantially lower than the going non-union rates, as discussed later. The evidence does not disclose the wage rates that Double A was paying its mine 1 employees on its second payroll.

All the other production and maintenance employees on the first and second shifts were nonpanel employees, until sometime before the temporary closing of mine 1, when Double A hired two additional panel members. One was Dallas Whited, the miner operator on the second shift. His name appears on the payroll with the names of the five for the pay period ending October 29, showing that he worked 2 hours on the first shift before the closing. The other was electrician Douglas Whitt, who worked 80-1/2 regular hours and 8 overtime hours on the first shift during that last pay period. (Tr. 178; G.C. Exh. 3, p. 5.) I infer that he was hired to work on the power-unit problem, which left the mine equipment without any power (Tr. 30, 175).

Both Whited and Whitt were paid \$8.125 an hour (G.C. Exh. 3, p. 5). Neither of them was recalled after the shutdown (Tr. 178, 220).

At the time of the shutdown, a Double A foreman informed the five about the problem with the power unit, stated that the mine would be idle until further notice, and promised that "When they got the thing fixed, they would give us a call" (Tr. 175).

b. *Change in mine managers*

Around mid December, Double A mine 1 was reopened and the mining of coal was resumed (R. Exh. 7; G.C. Exh. 4, p. 3). By that time, Double A President Ashby had replaced Superintendent Corbett with Bobbie Cline. The MSHA legal identity report, effective December 13 (not in evidence), gave the same assumed name Double A Mining Inc. as the official business name of the operator (Tr. 127-128). On February 24 Cline filed an update (C.P. Exh. 2), again giving Double A Mining Inc. as the official business name. It named James Ashby as president of the corporation, Bobby Cline as superintendent in charge of health and safety, and (Foreman) Lewis Tramel also as operator. No additional legal identity report was filed until after April 16-30, 1989, when Superintendent Bobby Cline shut down mine 1 (but resumed production for about 2 weeks in June 1989, Tr. 120, 127; R. Exh. 7, pp. 9-11).

Despite Double A's promise to recall the five when the mine reopened, none of them was recalled to resume his job in mine 1. The mine was staffed entirely with nonpanel employees, who were on Double A's payroll and who were paid with Double A checks bearing Ashby's signature. (G.C. Exhs. 4 & 6; R. Exh. 12.)

I discredit Ashby's claim (Tr. 60, 78) that "I told [Bobby Cline] he would have to hire off the panel" and gave Cline "a copy of the panel sheet[s] to call from." I also discredit Ashby's claim (Tr. 78) that Cline asked "who worked for me that I had called off the panel" and that he gave Cline "their names and addresses where [Cline] could call these people back to work." Particularly in view of fact that none of the five and none of the other panel members was employed at mine 1 after it was reopened, I infer the opposite to be true—that Ashby directed Cline not to hire any of the

panel members. (By his demeanor on the stand, Ashby impressed me as a most untrustworthy witness who was willing to fabricate any testimony that might help Double A's cause.)

Having inferred that President Ashby directed Superintendent Bobby Cline not to hire any of the panel members at mine 1, I find that Ashby had no intention of honoring the panel members' recall rights since December 1988 at that mine.

5. Operation of Double A mine 2

Shortly after mine 1 was shut down in October, President Ashby selected Dean Baldwin to operate Double A mine 2, the part of the 12A mine with a portal on the other side of the mountain. Baldwin acted as superintendent of the mine and Donald (Jackie) Sparks as a foreman. (Tr. 13, 24, 74, 83, 185, 192-193, 208).

On November 3 Foreman Sparks filed the MSHA legal identity report (G.C. Exh. 7). It gave Double A Mining Inc. (the same name as the mine 1 operator) as the official business name of the mine 2 operator and James Ashby as the principal officer. It listed "Owner" James Ashby, Jackie Sparks, and Dean Baldwin as partners. On December 20 Sparks filed an update (G.C. Exh. 8), changing the official business name to Double A Mining Co. and omitting Ashby's name. On December 30 Sparks file a correcting legal identity report (R. Exh. 1), effective December 23, again giving Double A Mining Inc. as the official business name and adding James Baldwin as a partner (Tr. 137). No additional legal identity report was filed for mine 2 until after the April 5 strike began against Pittston.

Ashby gave incorrect testimony about the operation of mine 2. He claimed (Tr. 24) that at the time Baldwin began operating the mine, the five panel members transferred there. In fact, Baldwin began hiring employees at mine 2 on October 26 (G.C. Exh. 4, p. 9), and the five were not employed there until about 7 or 8 weeks later around mid December, several weeks after coal was being mined (R. Exh. 6, p. 1; G.C. Exh. 4, p. 1; Tr. 178, 216-218).

Ashby later claimed "I instructed Mr. Baldwin that he would have to follow the Pittston contract and hire off the panel" (Tr. 40, 60) and "I also furnished [Baldwin] a copy of the panel sheet to call from" (Tr. 78). In fact Baldwin, like Superintendent Bobby Cline at mine 1, hired nonpanel employees exclusively, except the five in December as Ashby directed on the urging of panel employee Cantrell (Tr. 176-177, 182, 191, 216-218).

Under these circumstances I infer that Ashby had not told Baldwin that he would have to hire from the panel, but that he had instead directed Baldwin—like Cline at mine 1—not to hire any panel members. Furthermore, because of Ashby's other conduct to discourage union support, I infer that Ashby's belated direction to employ the five at mine 2 was a defensive measure—not a change in his antiunion policy.

Having inferred that President Ashby directed Superintendent Dean Baldwin not to hire any of the panel members at mine 2 (excepting later the five), I find that Ashby had no intention of honoring panel members' recall rights since December 1988 at that mine.

C. Discouraging Union Support

The evidence is clear that when the five were finally employed at mine 2 in December, following their layoff from mine 1 in October, they were discriminated against both in the number of assigned hours and their wage rates.

Concerning assigned hours, panel member Cantrell credibly testified, “if something broke down or if for whatever reason they were going to send some people home, the five of us would always get sent home” (Tr. 179, 182–183). President Ashby admitted that some nonpanel employees had more hours assigned than the five (Tr. 69–70). His defense, “That was out of my control,” is discussed later.

Concerning wage rates, Ashby was meanwhile restricting the five’s wages to the top rates he had offering the Union in negotiations, \$7.50 and \$8.125 an hour (Tr. 18, 168), even though the going nonunion rates were higher. Double A’s own payroll records show that the minimum nonunion wage rate being paid nonpanel employees was \$10 an hour. At both mines 1 and 2 the rates were \$10, \$10.625, and \$12.50 an hour. The only exceptions in the record were \$13.75 paid electrician John Alley and \$7.50 briefly paid John Merrick before he was terminated January 7. (G.C. Exh. 4, pp. 4, 7, 11; Tr. 182.)

It is undisputed, as Cantrell credibly testified, that the five repeatedly asked the mine 2 managers about a raise. This was in the mine office when Superintendent Dean Baldwin, Foremen Jackie Sparks, and all the mine employees were present. The answer, usually given by Baldwin, was always the same, that “Mr. Ashby wouldn’t allow them to pay us any more.” (Tr. 185–186, 191, 213.) I discredit Ashby’s claim (Tr. 60) that he did not set any wages.

The five’s wage rates of \$7.50 and \$8.125 were never raised to the minimum nonunion wage being paid the nonpanel employees. This discrimination against panel employees, openly attributed to the directions of President Ashby, obviously discouraged support for the Union.

D. Oral Subcontracting

1. Initial action

At the time Double A temporarily shut down Double A mine 1, President Ashby and Labor Consultant Sykes were in negotiations with the Union for a collective-bargaining agreement to cover the employment of production and maintenance employees at the Pittston 12A mine (both mine 1 and mine 2). Yet, Ashby was undercutting the Union’s majority status by failing to fulfill his promise to honor the recall rights of the laid-off panel members.

As found, Ashby and Superintendent Corbett had sent out meeting notices to only 32 of the 81 panel members. Ashby had employed only the five (Andy Brown, George Cantrell, Joshua Hicks, Roy Lawson, and Clarence McGlothlin), plus two other panel members (Dallas Whited and Douglas Whitt) for a short time before the shutdown. The other employees on the first and second shifts at mine 1 had all been nonpanel employees.

The Union was contending in negotiations that Ashby was required under Double A’s contract with Pittston to pay the union scale—about twice the wage rates that Ashby was paying the panel employees (Tr. 157, 219). Of course if Ashby employed other union panel members, the Union would be

in a stronger position to negotiate an increase in the wage rates.

Ashby then ignored his contractual agreement with Pittston not to subcontract any part of the 12A mine without Pittston’s written consent. In late October he selected Dean Baldwin to operate Double A mine 2. He entered into an oral subcontract with him, agreeing to pay him for the tons of clean coal mined and permitting him to hire the mine employees and pay them from the tonnage revenue (Tr. 24–26, 40–42, 70, 108).

Ashby denied at the trial that he took this action to avoid honoring the laid-off employees’ panel rights. He testified as follows (Tr. 95):

Q. So, your way to beat this [Pittston] contract was merely to subcontract it out to someone else and then they were free to hire whoever they wanted and to heck with the panel rights, is that your testimony?

A. No, sir. I’m not trying to beat this contract.

Ashby claimed that honoring the panel rights was merely a matter between him and Pittston (Tr. 94):

Q. Do you have any written permission to sublet Double A Mine which written permission is required by this [Pittston] agreement?

A. No, I do not. May I reply to that? This is not up to this Court to decide about this contract. If Pittston doesn’t like the way that I’m operating my operation and abiding [by] my contract, it’s between Pittston and [me]. Let them tell me to remove myself from the premises and I’ll abide by their contract.

Contrary to the denial, I find that Ashby entered into the oral subcontract to avoid his written commitment and his promise to the Union in negotiations to employ laid-off panel employees, as well as to undercut the Union’s majority status.

2. Unsuccessful experiment

This initial subcontracting arrangement—under which Double A would make tonnage payments to Superintendent Baldwin, who would hire the mine 2 employees and paid them from the tonnage revenue—was not a satisfactory arrangement. Baldwin did not have sufficient financial resources for an independent operation.

Although Baldwin was paying nonunion wages (substantially below the union scale), he had to get a \$5200 loan from Double A, repaying it in installments on March 14 and 27 as deductions from his tonnage payments (R. Exh. 6, pp. 7–8). Also, while receiving the coal production checks from Double A, he failed to pay a total of \$19,941.12 to five mine employees for so-called “contract labor” in the mine. He gave these employees IOUs on January 31 and February 1 and 2 for the unpaid wages. Furthermore, as panel employee Cantrell credibly testified, “There were [nonpanel employees] that came and left” and “It was general knowledge around that they wasn’t getting paid.” (G.C. Exh. 4, pp. 9–13; Tr. 34–37, 218). President Ashby admitted that in a Department of Labor wage and hour suit in the U.S. district court, Double A was required to pay the IOUs and other unpaid wages at mine 2 (Tr. 38–39, 96–98).

Meanwhile, Baldwin was making purchases in Double A's name and not paying for them. When creditors contacted Double A bookkeeper Kay Willard, she "asked for copies of the invoices so I could see who signed them and it was Dean Baldwin." (Tr. 276, 287; R. Exh. 6, pp. 5-6.)

Experience proved this subcontracting experiment to be unsuccessful.

3. Employees of Double A

By the time Double A mine 1 was reopened in December, Double A President Ashby was orally subcontracting both mines 1 and 2, but exercising more control over the employees.

Under this new subcontracting arrangement, the mine employees were placed on Double A's payroll and compensated directly with Double A paychecks bearing President Ashby's signature (Tr. 34, 184, 336-338, 343; R. Exh. 12). Double A withheld Federal income taxes, paid Federal and state unemployment and other taxes, and paid the premiums for workmen's compensation, required under Double A's Pittston contract (Tr. 81, 322-323, 338; G.C. Exh. 2, par. 12A). At mine 2 as found, Ashby determined the wage rates of the panel employees, forbidding any increases above the wage rates offered the Union in negotiations. Ashby would visit the mine, and the mine managers would say that "Ashby won't let us do this or Ashby won't let us do that," demonstrating his control over the operation. Mine employees believed that Ashby was in charge. (Tr. 185-187, 190-192, 195, 208, 213).

On the second day of the strike (April 6, 1989), President Ashby treated the striking panel employees as "our employees," notifying them in writing that if they did not report to work by 7 a.m., April 10, they would be "permanently replaced" (G.C. Exh. 10).

When first questioned at the trial about his responsibility for the operation of the mines, Ashby testified as follows (Tr. 78-79):

A. I was responsible for the production, seeing the coal's produced. I was responsible for the mines being maintained and driven on project[ion] and I was responsible for the contract that Pittston had given me to see that this work was done.

Q. And, you were responsible for the total operation, were you not?

A. In one sense, yes.

Seventeen months earlier on August 4, 1989 (when Double A was seeking an injunction against the Union's picketing), Ashby had admitted in a state court proceeding: "I make one hundred percent (100%) of the decisions" (Tr. 105). When questioned about his state court testimony at the trial, Ashby testified, "I'm well aware of that testimony" (Tr. 81). He was prepared, however, to modify his earlier admission. He testified, "I do have total control," but added, "when it comes to production" (Tr. 106).

To the contrary I find that his control over the mines was not limited to production. The evidence shows that he determined where the panel employees would work (in mine 2, instead of mine 1 as they had been promised), as well as how much they could be paid. He testified that when he wanted a person hired, he would say to go and see a certain

person and "give me as a personal reference." He claimed, however, that "to tell any other person that they had to hire them, I couldn't do that. I couldn't tell them that they could be fired." (Tr. 60-61.)

Ashby was more candid in his state court testimony on August 25, 1989. He then testified (Tr. 87-88) that "if I have got a man I want hired, I send them to see [the superintendent and operator]." When asked in the state court, "Who decides when to fire people?" he answered "More or less" two individuals. He explained that if the person "is working at the face, the boss I have got hired for the face would fire him. If he is working belt lines or outside, probably [the superintendent] would fire him. Then they would inform me of it." Although there were new Double A subcontractors (not involved in this proceeding) at mines 1 and 2 at the time of his state court testimony, Ashby was then testifying how the mines had been operated.

At mine 1 the new arrangement proceeded as President Ashby had decided. All the production and maintenance employees were placed on Double A's payroll (G.C. Exh. 4) and paid with Ashby's Double A checks (R. Exh. 12). At mine 2 the five (the panel members Ashby directed to be employed) were likewise placed on Double A's payroll. Double A bookkeeper Kay Willard testified that she wrote the paychecks also for the other mine 2 employees "that Mr. Baldwin turned in" and would have written their paychecks if she had known of others (Tr. 314-315), but "we had great difficulty getting the information from Dean Baldwin" (Tr. 282). Finally, after the strike began, Ashby replaced Baldwin with another subcontractor.

I find it was not merely a matter of paying the employees directly to make sure the men and taxes were paid (Tr. 315) or, as bookkeeper Willard revealed (Tr. 349), of Bobby Cline at mine 1 and Dean Baldwin at mine 2 not having the money for workmen's compensation. Nor was it, as President Ashby claimed, that Cline "could not produce a down payment for workman compensation, so therefore, I told him it would be all right [for me] to pay his people" (Tr. 101). I find that Ashby was exercising greater control over the employees in his operation of the mines.

At one point on cross-examination, Ashby testified (Tr. 83): "I hired Dean Baldwin. I hired Bobby Cline." After weighing all the evidence I find this testimony to be literally true. Notwithstanding the manner of their compensation, I find that Ashby employed them as superintendents and that they managed the mines under his authority. I agree with the General Counsel that (contrary to the opinion of bookkeeper Willard, Tr. 280, 289) Double A was the employer of employees both at mines 1 and 2 and that it "exercised control over essential terms and conditions of employment of the employees." I find that at mine 1, under the new oral subcontracting arrangement, Double A was the employer of all the production and maintenance employees from December until June 16-30, 1989, when Superintendent Bobby Cline last managed the mine. I also find that at mine 2, from December until the April 5 strike, Double A was the employer of not only the five and other employees on the Double A payroll, but also the remaining production and maintenance employees whose names Superintendent Dean Baldwin failed to report to the Double A bookkeeper for inclusion on the payroll. Double A Mining Inc. remained the official business name of the operator and, as determined in the wage and

hour suit in the U.S. district court, Double A was responsible for paying their wages if Baldwin failed to pay them from his Double A tonnage payments.

I therefore find that at all material times, Double A was the exclusive collective-bargaining representative of employees in the following appropriate unit:

All production and maintenance employees of Double A Coal Co., Inc. at its Buchanan County, Virginia coal mines, but excluding all guards and supervisors as defined in the Act.

4. Production statements

a. *Terms of oral arrangements*

In the absence of written subcontracts, Double A placed the financial terms of the oral arrangements in the "Statement of Coal Produced," which Double A prepared for each mine after receipt of the mining fee from Pittston.

The coal from mines 1 and 2 was transported to the coal processing plant operated by Ramar Coal Co., which is a separate company owned by Ashby (Tr. 10). After the coal was processed, Double A delivered the clean coal to Pittston (Tr. 16), which deducted various mine expenses (such as power rental and engineering fees) from Pittston's mining fee and paid Double A the balance (R. Exhs. 6 & 7; Tr. 47). (All Pittston's dealings were with Double A and none with the unauthorized subcontractors.) Double A then prepared separate production statements for mines 1 and 2, computing its tonnage payment for the clean coal produced at the mines (Tr. 47).

Beginning with the semimonthly period December 15–31 (when the new subcontracting arrangement went into effect), "Gross Wages" (\$4467.66 for mine 1 that period and \$2555 for mine 2) were deducted by Double A from the tonnage payment on the production statements (R. Exh. 6, p. 3; R. Exh. 7, p. 1). (No deductions for wages had been made on the mine 2 production statements for November 16–30 and December 1–15, R. Exh. 6, pp. 1–2.)

At mine 1 until June 16–30, 1989, and at mine 2 until the April strike, deductions were made also for "Employers Share FICA," "Federal and State Unemployment," and "Workmen's Compensation." In addition, there were semimonthly deductions of \$625 for "Retainer Fee (\$1,250.00 Monthly)" to reimburse Double A for payments made to Labor Consultant Sykes (evidently for dealing with, or avoiding dealing with, the Union). (R. Exhs. 6 & 7, Tr. 338–339.)

Further deductions were made for the repayment of loans to Bobby Cline at mine 1 and Dean Baldwin at mine 2. At mine 1 for the periods January 16–31 and February 1–15, Double A deducted \$1575 and \$1500 as loan payments. Also for February 1–15, Double A began taking a semimonthly deduction of 50 cents a ton as loan payments. At mine 2, as found, Double A took deductions totaling \$5200 on March 14 and 27 (for the periods February 16–28 and March 1–15) as loan payments. Also at mine 2, Double A took deductions for Baldwin's purchases charged to Double A: \$420.30 for January 16–31 and \$290 for February 1–15.

I note that President Ashby claimed: "The original agreement was [that Cline and Baldwin] would work for me for a salary, but they wanted to change it and I saw no reason why not to change it, so they could be contractors" (Tr.

101). Yet he later testified that the subcontracting agreements were oral at first and "I wanted . . . a written contract signed with these people," but when "I had tried to get Dean Baldwin and the other people" to sign, "they always had an excuse" for not signing (Tr. 109).

b. *Operating names*

The production statements reveal the actual names that Bobby Cline was operating under at mine 1 and Dean Baldwin at mine 2. These names were not reported to the U.S. Department of Labor and they were concealed from the Union.

For mine 1, as discussed above, the August 3 legal identity report to the Labor Department (C.P. Exh. 1) gave the assumed name Double A Mining Inc. as the official business name of the operator and named James Ashby as president of the corporation and W. P. Corbett as superintendent in charge of health and safety. That official business name remained unchanged in the December 13 report (Tr. 127–128) and also in the February 24 update (C.P. Exh. 2), which named Ashby as president of the corporation, Bobby Cline as superintendent in charge of health and safety, and (Foreman) Lewis Tramel also as operator.

The production statements (R. Exh. 7), however, show that after mine 1 was reopened in December, Zapp Mining Inc. was the actual operating name. That name, to whom Double A made the coal production checks payable, was not displayed at the site and was not reported to the Labor Department or to the Union (Tr. 120, 154, 160, 186, 221). As found, the employees were on the Double A payroll and were paid with Double A checks bearing President Ashby's signature.

For mine 2, the same Double A Mining Inc. was given as the official business name of the operator on the November 3 legal identity report (G.C. Exh. 7). The report showed James Ashby to be the principal officer and listed "Owner" James Ashby, Jackie Sparks, and Dean Baldwin as partners. The December 20 update (G.C. Exh. 8) changed the official business name to Double A Mining Co. and omitted Ashby's name. The December 23 correcting legal identity report (R. Exh. 1) again gave Double A Mining Inc. as the official business name and listed Jackie Sparks, James Baldwin, and Gary (Dean) Baldwin as partners. This was the last report filed before the strike.

The production statements and the coal production checks show that until January 10, Double A's name was being used, with the mine number added. The production statements showed the name to be Double A Coal Company 2, and the checks were made payable to Double A Coal Co., Inc. 2. Beginning January 25 the name was D & R Coal Company. (R. Exh. 6, pp. 3–4; R. Exh. 13, p. 17.) None of these names was displayed at the site or reported to the Labor Department or to the Union (Tr. 120, 132, 154, 160, 186, 221; R. Exh. 1).

E. *Written Subcontracts*

1. When signed

The evidence is not clear when the written subcontracts were signed. President Ashby testified on August 4, 1989, in the state court that he had not "subcontracted any of these operations," that "I have hired other people to run these op-

erations for me,” but “no contract” had been signed (Tr. 116). Later on August 25, 1989, he testified that “a subcontract would require a written agreement . . . It is strictly against Pittston’s contract for me to subcontract.” (Tr. 115.)

At the trial he testified that “when we were preparing for this case,” he discovered that bookkeeper Willard had got the Zapp Mining Inc. subcontract (at mine 1) signed, “I don’t know when,” by telling “them that they had to sign it, before they got their payroll checks” (Tr. 86–87). (Double A’s first answer in this proceeding was filed April 12, 1990, G.C. Exh. 1(i).) The evidence does not reveal whether the subcontract (which was backdated to November 29, 1988, R. Exh. 15) was signed before or after Ashby’s August 1989 testimony in state court, when he denied that any contract had been signed. The last two coal production checks to Zapp Mining Inc. were dated July 12 and September 1, 1989 (R. Exh. 13, pp. 3, 7).

Concerning mine 2, there are two subcontracts in evidence, both dated October 24, 1988. The typing on one (R. Exh. 4), which Willard testified was the first one signed (Tr. 274), states that the agreement is between Double A and “Double A Coal Co.-Partnership (Jackie Sparks, Dean Baldwin and Raymond Baldwin).” A line is drawn through the name of Jackie Sparks, and James Gibson is interlined. Ashby admitted at the trial that “There never was a Double A Coal Company partnership” (Tr. 51). (As found, the actual operating names were Double A Coal Company 2 and Double A Coal Co., Inc. 2 until January 10 and D & R Coal Company after that date.)

Bookkeeper Willard testified (Tr. 274–275, 278) that Jackie Sparks had been a partner, but when this subcontract was signed, Dean Baldwin marked out Sparks’ name and wrote in James Gibson’s name and the date. Although Willard recalled (Tr. 317) that the subcontract was signed around that date, October 24, I find that she was in error. Sparks was still a purported partner at mine 2 (a) when he signed the November 3 MSHA legal identity report for Double A Mining Inc. (G.C. Exh. 7), (b) when he signed the December 20 report for Double A Mining Co. (G.C. Exh. 8), and (c) when he signed the December 30 correcting report for Double A Mining Inc. (R. Exh. 1). Moreover, his signature appears as an endorsement (along with Dean and Raymond Baldwin) on Ashby’s December 12 and 23 and January 10 Double A coal production checks to Double A Coal Co., Inc. 2 (R. Exh. 13, p. 17), showing how he was being compensated as foreman on those dates.

I therefore find that Ashby’s first subcontract with Superintendent Dean Baldwin—backdated to October 24—was signed sometime *after* January 10, whenever James Gibson replaced Jackie Sparks as a mine 2 foreman (Tr. 190).

Willard testified that Ashby’s second mine 2 subcontract (R. Exh. 5) “may have been” signed 2 or 3 months later (or it “could have been” 2 to 6 weeks later) and that Dean Baldwin also backdated it October 24 (Tr. 275–276). This contract was between Double A and “D & R Coal Company-Partnership (Dean Baldwin and Raymond Baldwin)” and was signed by Dean Baldwin, James Gibson, and Raymond Baldwin.

Despite Ashby’s testimony in the state court proceeding in August 1989 that there were only “mutual agreements,” no written contract (Tr. 108), he claimed at the trial that Dean

Baldwin signed the D & R subcontract “in my presence” after “I found out” Baldwin was operating the mine in the name of “Double A Coal Company” (Tr. 87). (Ashby’s first Double A check to D & R Coal Co., R. Exh. 13, p. 21, was dated January 27.) When later asked about his state court testimony, however, Ashby gave a different version. He testified (Tr. 109) that “There was a verbal contract first . . . Then it changed from a verbal to a signed agreement which I had tried to get Dean Baldwin and the other people . . . to sign and they always had an excuse, well, [Willard] told me that she would not give them their check until they signed it, so therefore, they signed it.”

Thus the contradictory evidence fails to show when the subcontract for mine 1 (dated November 29) and the two subcontracts for mine 2 (both dated October 24) were actually signed.

2. Sham contracts

Whenever the written subcontracts were finally signed, they did not reflect the actual subcontracting arrangements.

The documents (R. Exhs. 4, 5, & 15) are identical, except for names and dates. The “base price of \$___ for each ton of clean coal mined” in paragraph 7A is left blank in all three documents. The apparent reason is that before the contracts were signed, President Ashby had already agreed orally to increase the price he would pay his superintendents for mining the coal. The production statements show that at mine 1, he paid \$18.95 a ton for the period December 16–31, but raised it to \$19.25 for January 1–15 and again to \$19.75 for February 1–15. At mine 2, where the working conditions were “a whole lot rougher,” as panel employee Cantrell credibly testified (Tr. 179), Ashby began paying \$19.45 a ton for November 16–30 and raised it to \$19.75 for January 1–15, a month before paying that higher price at mine 1.

Paragraph 4 provides that the Contractor (subcontractor) shall “employ, direct, supervise, discharge and fix compensation and working conditions of its employees and shall be solely responsible of their payment,” holding Company (Double A) “harmless” from any and all related claims, and “shall exercise complete control over its employees.”

To the contrary, first, President Ashby claimed that he directed the subcontractors “to hire off the panel” (although, as found, he directed them *not* to hire any of the panel members, except the five at mine 2). Second, Ashby directed that the five be recalled and employed at mine 2, not at mine 1 as they had been promised when Double A temporarily shut down mine 1. Third, Ashby fixed the wage rates of the five at \$7.50 and \$8.125 an hour (the top rates offered the Union in negotiations) and prohibited any increase in their wage rates, although the nonpanel employees were being paid \$10, \$10.625, and \$12.50 an hour at both mines 1 and 2.

Fourth, as found, Double A “exercised control over essential terms and conditions of employment of the employees.” Fifth, all the mine 1 mining employees and a substantial number of the mine 2 employees were being kept on Double A’s payroll and paid directly with Ashby’s Double A paychecks. Sixth, President Ashby treated the striking panel employees as “our employees,” notifying them in writing that if they did not report to work, they would be permanently replaced. Seventh, the U.S. district court held Double A re-

sponsible for the payment of a large amount of unpaid wages at mine 2.

Paragraph 5 of the subcontracts provides that the subcontractor will hold Double A “completely harmless” for any fines or penalties—but President Ashby admitted paying mine 2’s MSHA fines (Tr. 51).

Paragraph 12 states that it is expressly agreed that the subcontractor “will perform the work . . . as independent contractors” and provides that the subcontractor “shall exercise exclusive control over its work force and direct the manner, method, and mode of work.” To the contrary, as found, Ashby admitted at the trial that he was “responsible for the production, seeing the coal’s produced,” and “for the contract that Pittston had given me to see that this work was done.” In the state court proceeding, he also admitted: “I make one hundred percent (100%) of the decisions.”

Furthermore, neither Superintendent Bobby Cline at mine 1 nor Superintendent Dean Baldwin at mine 2 had sufficient financial resources to operate as independent contractors. As found, Double A bookkeeper Willard revealed that neither Cline nor Baldwin had the money to provide the required workmen’s compensation for the mine employees.

The subcontract at mine 1 (R. Exh. 15) was between Double A and Zapp Mining Inc. and was signed by Bobby Cline. In the absence of Cline as a witness, there is no evidence whether the corporation had any assets and whether it was incorporated during the shutdown of mine 1, solely for this subcontracting. Bookkeeper Willard testified (Tr. 315) that she was told that Cline and (Foreman) Lewis Tramel were officers. The lack of corporate assets appears to be indicated by the inclusion of Superintendent Cline and Foremen Tramel and Glenn Fields on the Double A payroll (G.C. Exh. 4). They not only received an undisclosed amount of net compensation from Double A’s coal production checks to Zapp Mining Inc., but they also received biweekly salary checks (Cline \$1399.18, Tramel \$1353.81, and Fields \$1171.13) in compensation, as shown by the Double A paychecks in evidence (R. Exh. 12).

Concerning mine 2, the first written contract (R. Exh. 4) was between Double A and a purported partnership, “Double A Coal Co.-Partnership (James Gibson, Dean Baldwin, and Raymond Baldwin),” which President Ashby admitted did not exist, testifying (Tr. 51): “There never was a Double A Coal Company partnership.” As found, the official business name reported to the Labor Department was Double A Mining Inc. (an assumed name that Double A had used when operating mine 1). As shown by Double A’s coal production checks, Double A’s corporate name was being used at mine 2, with the mine number added (Double A Coal Co., Inc. 2).

I find that there was no formal partnership at mine 2, at least until the name D & R Coal Company was first used January 25, and that the name “Double A Coal.-Partnership” in the document was a mere afterthought.

After weighing all the evidence I find that the backdated subcontracts, belatedly signed after weeks or months of operations under oral understandings, were not intended to incorporate the actual terms of the arrangement. I find instead that they were a sham, devised by President Ashby as a defensive measure.

F. Concluding Findings

1. Pattern of deception

The deception began August 3 when Double A (Double A Coal Co., Inc.) adopted the assumed name Double A Mining Inc. for the official business name to report to the Department of Labor as the operator of mine 1, which Double A began operating about August 1 or September 1. Such a name, so similar to Double A’s actual corporate name, could be used without alerting the Union of any unauthorized subcontracting.

President Ashby next informed the Union in negotiations that he was going to call the panel for employees (as required in his contract to operate Pittston’s closed 12A mine). But he did not follow the established procedure for offering jobs to panel members. Instead, Ashby and his superintendent on August 18 and 27 and September 15 sent purported “recall” notices to a total of 32 of the 81 panel members. As found, this was largely a pretense of honoring the recall rights of the laid-off panel employees.

Ashby hired only five of the panel members, plus two others who were employed only a short time before the October shutdown of mine 1. When the Union repeatedly complained in negotiations that Ashby was not hiring from the panel, he responded that “he had called off the panel.”

While continuing to negotiate with the Union for an agreement to cover all the production and maintenance employees, Ashby kept mine 1 closed until he secretly entered into an oral subcontracting arrangement with Superintendent Bobby Cline. As found, Ashby did so to avoid his written commitment and his promise to the Union to employ laid-off panel employees, as well as to undercut the Union’s majority status. Also as found, Ashby directed Cline not to hire any panel members, kept all the employees on Double A’s payroll, and exercised control over the essential terms and conditions of their employment.

Meanwhile at mine 2, Ashby also entered into a secret oral subcontract with Superintendent Dean Baldwin and directed him not to hire any panel members. Around mid December, as a defensive measure, Ashby directed that the five panel members be employed there, instead of being recalled to mine 1 as promised. As at mine 1, Ashby exercised control over the essential terms and conditions of employment. To discourage support for the Union, he caused the five to be assigned fewer hours of work and paid lower wages than the nonpanel employees.

Ashby continued to negotiate with the Union until after the April 5 strike began, without giving the Union any indication that he would later contend that the production and maintenance employees were no longer Double A employees.

Finally, at some undetermined time, Ashby required Superintendents Bobby Cline and Dean Baldwin (along with their foremen) to sign backdated subcontracts, which are found to be a sham, devised as a defensive measure.

2. Violations found

Double A contends in its brief (at 13) that the “General Counsel failed to prove a prima facie case against the Employer [Double A Coal Co., Inc.] upon any of the issues raised in the Complaint.” It argues (at 7) that “Double A Coal Company-Partnership, and Zapp Mining, Inc. . . . were

solely responsible for all employment terms and conditions, including wages and hours, and the Employer was not.”

Double A contends (Tr. 8) that the “General Counsel did not prove that since December 1988 Employer failed and refused to hire [named panel members] because they joined, supported, or assisted the Union.” It also contends (at 12) that the “General Counsel did not prove that the Employer assigned less hours of work or paid lower wages to employees hired from the 12A panel.” It further contends (at 12) that the “General Counsel did not prove that the Employer refused to bargain collectively with the Union” by making unilateral changes.

As found above, I agree with the General Counsel that Double A was the employer at all material times.

Concerning the alleged failure and refusal since December 1988 to hire laid-off employees on the Pittston 12A mine panel, I find that the General Counsel has made a prima facie showing sufficient to support the following inferences. At Double A mine 1 (until Superintendent Bobby Cline last managed the mine about June 30, 1989) and at Double A mine 2 (until Superintendent Dean Baldwin last managed the mine in April), President Ashby’s determination to discourage membership in the Union was a motivating factor for his directing the superintendents not to hire the union-represented panel members. *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Having rejected Double A’s denials that it was responsible for hiring employees at the two mines, I find that it unlawfully discriminated against the qualified, senior panel members to undermine unionization of the mines, violating Section 8(a)(3) and (1) of the Act.

I also find that the General Counsel has made a prima facie showing sufficient to support the inference that since December 1988, Ashby’s determination to discourage membership in the Union was also a motivating factor for his causing fewer hours of work to be assigned and lower wage rates to be paid panel employees Andy Brown, George Cantrell, Joshua Hicks, Roy Lawson, and Clarence McGlothlin than nonpanel employees. Having rejected the denials of responsibility, I find that Double A discriminated against the panel employees, violating Section 8(a)(3) and (1).

The evidence shows that Double A, after promising the Union that it would honor the panel rights of laid-off Pittston employees, adopted a practice of hiring employees from the panel—by hiring panel members Andy Brown, George Cantrell, Joshua Hicks, Roy Lawson, and Clarence McGlothlin. I find that when Double A unilaterally changed this hiring practice by directing its mines 1 and 2 superintendents not to hire panel employees, it unlawfully refused to bargain in violation of Section 8(a)(5) and (1).

3. Alternate findings

The General Counsel contends in his brief (at 10) that Double A has been the employer of the mine employees at all material times, but “Alternatively, Double A and Baldwin, and Double A and Zapp, are, each, joint employers.” Double A contends in its brief (at 3) that “General Counsel did not prove Double A Coal Co.-Partnership and Zapp Mining, Inc. were joint employers of Double A Coal Co., Inc.”

As found, Double A was the employer of the production and maintenance employees at all material times. Also as

found, President Ashby employed Bobby Cline at mine 1 and Dean Baldwin at mine 2 as superintendents to manage the mines under his authority.

Both Zapp Mining, Inc. (at mine 1) and the purported “Double A Coal Co.-Partnership” (at mine 2) are alleged as respondents, but I consider them merely nominal respondents. I find that they were merely the vehicles through which Double A President Ashby sought to undermine unionization of the mines. With no apparent assets and no interest in the outcome of this proceeding, neither of them filed an answer and neither was represented at the trial. (Ashby asserted, Tr. 201, that Cline advised he could not appear because there was a warrant in Virginia for his arrest and that Baldwin advised he would not appear.)

In the alternative, however, I find that if Zapp Mining and the purported Double A partnership are found to have been employers of employees on Double A’s payroll, the same evidence that shows that Double A “exercised control over essential terms and conditions of employment of the employees” both at mines 1 and 2 would establish that (a) Double A and Zapp and (b) Double A and the purported Double A partnership were joint employers. *Schnabel’s Drivers for Lease*, 249 NLRB 1164 (1980).

CONCLUSIONS OF LAW

1. By failing and refusing to hire the qualified, senior employees on the Pittston 12A mine panel to discourage membership in the Union, Double A has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By assigning five panel employees fewer hours of work and paying them lower wage rates than nonpanel employees to discourage membership in the Union, Double A further violated Section 8(a)(3) and (1).

3. By unilaterally changing its hiring practice of employing panel members, Double A unlawfully refused to bargain with the Union as the recognized collective-bargaining representative of its production and maintenance employees.

REMEDY

Having found that Respondent Double A Coal Co., Inc. 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.

Respondent Double A having discriminatorily failed and refused to hire the qualified, senior panel members, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates in December 1988 of the failure and refusal to hire until the dates the subcontracting in issue ceased (June 30, 1989, at mine 1 and April 5, 1989, at mine 2), 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). As stipulated at the trial, the determination of the panel rights shall be made at the compliance stage of this proceeding.

Having assigned five panel employees fewer hours of work and paid them lower wage rates than nonpanel employees to discourage membership in the Union, Respondent Double A must make the panel employees whole for the lost

hours of work and the difference between their wages and the wages they would have been paid at the rates paid nonpanel employees, plus the interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Double A Coal Co., Inc., Whitewood, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to hire any employee on the Pittston 12A mine panel to discourage membership in the United Mine Workers of America.

(b) Assigning panel employees fewer hours of work or paying them lower wage rates than nonpanel employees to discourage membership in the Union.

(c) Unilaterally changing the hiring practice of employing panel members.

(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) Make the qualified, senior employees on the Pittston 12A mine panel whole for any loss of earnings and other benefits suffered as a result of its discriminatory failure and refusal to hire them, in the manner set forth in the remedy section of the decision.

(b) Make panel employees Andy Brown, George Cantrell, Joshua Hicks, Roy Lawson, and Clarence McGlothlin whole for losses suffered as a result of its assigning them fewer hours of work and paying them lower wage rates than nonpanel employees in the manner set forth in the remedy section.

(c) On request, bargain with the Union as the exclusive representative of any current 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:

All production and maintenance employees of Double A Coal Co., Inc. at its Buchanan County, Virginia coal mines, but excluding all guards and supervisors as defined in the Act.

(d) 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.

(e) Mail to each of the 81 panel members on the Pittston 12A mine 1988 panel and, if currently mining coal at that mine near Whitewood, Virginia post at the facility, copies of

²If 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.

the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be mailed to the panel members and, if applicable, 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 posted notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT fail or refuse to hire any employee on the Pittston 12A mine panel to discourage membership in the United Mine Workers of America.

WE WILL NOT assign panel employees fewer hours of work or pay them lower wage rates than nonpanel employees to discourage membership in the Union.

WE WILL NOT unilaterally change the hiring practice of employing panel members.

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 make the qualified, senior employees on the Pittston 12A mine panel whole for any loss of earnings and other benefits resulting from our failure and refusal to hire them, less any net interim earnings, plus interest.

WE WILL make panel employees Andy Brown, George Cantrell, Joshua Hicks, Roy Lawson, and Clarence McGlothlin whole for losses resulting from our assigning them fewer hours of work and paying them lower wage rates than nonpanel employees, plus interest.

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

All production and maintenance employees of Double A Coal Co., Inc. at its Buchanan County, Virginia coal

mines, but excluding all guards and supervisors as defined in the Act.

DOUBLE A COAL CO., INC.