

Penn Hills Energy, Inc. and/or Penn Hills Energy, Inc., Debtor-in-Possession and United Mine Workers of America, District No. 5

Penn Hills Energy, Inc., and/or Allen Mark Weiss Company, and/or A.M.W.C., Inc., a Single Employer and United Mine Workers of America, District No. 5. Cases 6-CA-22558 and 6-CA-23138

November 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On May 7, 1992, Administrative Law Judge Hubert E. Lott issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed 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 and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to modify the remedy,² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative judge and orders that the Respondent, Penn Hills Energy, Inc., and/or Allen Mark Weiss Company, Penn Hills, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

¹ 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.

² We will modify the remedy to make whole all bargaining unit employees and the Union for losses as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

³ We have modified par. 1(a) and (b) of the recommended Order to more closely reflect the violations he found. The judge's notice listed only Penn Hills Energy, Inc. as the Employer in this case. We have amended the notice to also include the Allen Mark Weiss Company as the Employer in this case. We have also conformed the notice to the revised recommended Order to reflect the violations found by the judge.

The recommended Order requires that Respondent post at its facility in Monroeville, Pennsylvania, copies of the attached notice marked "Appendix." However, since the Respondent closed its Monroeville facility, we find it appropriate to order Respondent to mail copies of the notice to the last known addresses of its employees. We shall modify the recommended Order accordingly.

1. Substitute the following for paragraphs 1(a) and (b).

"(a) Repudiating and failing to abide by the terms of the contract and memorandum of understanding signed with the Union.

"(b) Bypassing the Union and dealing directly with employees over wages and hours."

2. Substitute the following for paragraph 2(d).

"(d) Mail a copy of the attached notice marked "Appendix"³ to each of its employees employed at Respondent's Monroeville facility. Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be mailed immediately upon receipt by the Respondent to all such employees at their last known addresses, and additional copies shall be posted by the Respondent upon receipt by the Respondent and maintained by it for 60 days in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered defaced, or covered by and other material."

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

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 repudiate and fail to abide by the terms of the contract and memorandum of understanding we signed with the Union.

WE WILL NOT bypass the Union and deal directly with employees over wages and hours.

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 whole, with interest, all bargaining unit employees and the Union for any loss of wages, benefits, dues, contributions, and penalties they may have suffered as a result of our repudiation of the 1988 National Bituminous Coal Wage Agreement as modified by the Memorandum of Understanding dated July 22, 1988. The unit is:

All production and maintenance employees employed by us at our Newfield Mine located in Penn Hills, Pennsylvania, excluding office clerical

employees, professional employees, guards, and supervisors as defined in the Act.

PENN HILLS ENERGY, INC., AND/OR
ALLEN MARK WEISS COMPANY

Jo Ann F. Dempler, Esq., for the General Counsel.
Allen Mark Weiss, of Monroeville, Pennsylvania, for the Respondents.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on August 21, 22, and 23, 1991. Charges and amended charges were filed on June 1, November 13 and December 11, 1990, and on March 26, 1991. The last consolidated amended complaint issued August 2, 1991.

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

FINDINGS OF FACT

I. JURISDICTION

The Penn Hills Energy Corporation (PHE) is a Pennsylvania corporation engaged in the business of coal mining. During the 12-month period ending February 28, 1990, Respondent, in the course and conduct of its business operations purchased and received at its Penn Hills, Pennsylvania facility products, goods, and materials valued in excess of \$50,000 directly from other enterprises located within the Commonwealth of Pennsylvania, each of which are themselves engaged in interstate commerce.

During the same period of time, PHE sold and shipped from its Penn Hills, Pennsylvania facility coal valued in excess of \$50,000 directly to WJM Coal Company, Inc., an enterprise located within the Commonwealth of Pennsylvania.

At all times material herein, WJM, a Pennsylvania corporation with an office and place of business in Shelocta, Pennsylvania, has been engaged in the purchase and nonretail resale of coal. During a 12-month period ending February 28, 1990, WJM purchased and received coal valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

The Company admits, and I find, that PHE 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Single Employer Issue*

AMWC and Allen Mark Weiss Company are the same entity, which is a Pennsylvania corporation engaged in commercial construction. It was incorporated in 1987 and had an office in Glassport, Pennsylvania. Allen Weiss held all the corporate stock and executive offices. He did all the hiring and negotiated labor agreements with the construction unions

for his 5 to 20 employees. Reporting directly to Weiss was Construction Foreman Bart Yeager. Betty Ann Betz handled the office clerical duties as office manager.

In December 1987, Weiss sought to acquire the Newfield Mine located in Verona, Pennsylvania. At that time the mine was owned by LTV Steel. In December 1986, LTV had ceased production and laid off all its 130 bargaining unit employees who were represented by the United Mine Workers of America, Local 6132 under the 1984 National Bituminous Coal Wage Agreement. The employees continued their membership in the Union by paying reduced union dues.

Weiss, in his efforts to acquire the mine, contacted Robert Black, who had been a longtime supervisor at the Newfield Mine. Black acted as a consultant for Weiss until his unemployment compensation expired in June 1988. Thereafter, Weiss hired Black as a laborer working for AMWC while he (Black) assisted in acquiring the mine.

As part of the acquisition process, Weiss, on July 22, 1988, signed the National Bituminous Coal Wage Agreement with District 5 of the United Mine Workers of America on behalf of AMWC. The agreement is effective from February 2, 1988, to February 2, 1993. At the same time the parties also signed a memorandum of understanding granting certain waivers of pension, benefit contributions, and vacation days.

From September 1988 to March 17, 1989, Black worked as a mine consultant at \$2500 per month paid by AMWC to assist in securing permitting and financing for the mine operation. He worked out of AMWC's Glassport office, using AMWC's clerical employees. He represented to others that he was acting on behalf of PHE and used AMWC's business address and telephone number when dealing with third parties. AMWC's letterhead includes the words, "Coal Mining."

Penn Hills Energy, Inc. was incorporated in Pennsylvania in April 1988 to operate the Newfield Mine. Weiss became president of the corporation and Black became vice president and secretary. Weiss was the sole shareholder.

On March 17, 1989, PHE acquired the Newfield Mine from LTV. Shortly thereafter, Weiss closed AMWC's Glassport office and moved the office furniture and equipment to the mine site. AMWC's files were also transferred to the mine office which became AMWC's business address for receiving mail and telephone calls. At this same time Weiss shut down AMWC's construction business so that he could devote full time to managing the mine.

Equipment used underground by PHE was the same as that utilized by LTV. However, the equipment used above ground was leased from AMWC. This equipment included a backhoe, dozer, loader, dump trucks, pickup trucks, flatbed trucks, car, compressors, crane, compactor and crane. Weiss admitted that AMWC did not bill PHE for the use of office space and there was no evidence offered that AMWC billed PHE for office equipment and furniture. Weiss and Betz testified that they had no knowledge about such matters.

Weiss further testified that AMWC leased the above ground equipment to PHE. No lease agreements were produced by Weiss nor for that matter were any pertinent subpoenaed documents produced by Weiss. Bankruptcy records indicate that PHE owed \$207,000 to AMWC apparently for equipment rental. Weiss testified that PHE paid AMWC only \$2000 or \$3000 during the entire time the mine operated.

After the mine opened, Weiss became manager and Black was mine superintendent. Bart Yeager became outside foreman and Betz was office manager.

As mine manager and owner, Weiss made all the final decisions relating to wages, hours, grievances, and collective bargaining. He represented PHE in all the above matters and in fact signed the same collective-bargaining agreement and memorandum of understanding with the United Mine Workers of America as president of PHE, backdating them to July 22, 1988, to satisfy the Union's Health and Welfare Fund's requirements that hours and contributions be credited to the correct account. He also made all corporate decisions. Black had no independent decision-making authority. Apparently no corporate meetings were held and no minutes were kept.

The mine initially began operations with five salaried employees and eventually reached a peak of 56 bargaining unit employees who were hired from the United Mine Workers recall panel. From February to May 1989, AMWC advanced \$27,200 to PHE and Allen Weiss advanced PHE \$14,000 to meet payroll. Black testified that his first two paychecks were drawn on AMWC's account.

On October 30, 1989, PHE filed a voluntary petition under Chapter 11 of the Bankruptcy Code. At that time PHE had the option of petitioning the court to cancel the collective-bargaining agreement which it did not exercise. On September 12, 1990, the Bankruptcy Court dismissed PHE's petition thus returning the mine to its former status. As Weiss testified, PHE returned to status quo ante.

On June 29, 1990, the mine closed. The heavy equipment was removed to a Weiss Brothers construction site in West Virginia. Weiss claims Weiss Brothers Construction Company, Inc. is now owned solely by his brother. Weiss testified that AMWC is still in business but that it has no contracts.

Analysis and Conclusions

On all critical elements of evidence, I discredit the testimony of Allen Weiss because he testified that he lacked knowledge of the financial affairs of AMWC and PHE when, in fact, he was the owner and manager of both companies. Furthermore, he failed to produce relevant subpoenaed documents which would have shed light on the single employer issue. Therefore, I will presume that had the documents been tendered, they would have supported General Counsel's allegation that AMWC and PHE corporation are a single employer. Moreover Weiss offered no rebuttal evidence other than general denials.

Relying on the evidence of General Counsel's witnesses, Weiss' admissions and bankruptcy documents, I find that AMWC and Penn Hills Energy Corporation are one and the same Employer. Both companies share common ownership and control. Both companies had common management and shared the same corporate office. Furthermore the labor relations policies and practices for both companies were controlled by the same person, Allen Weiss. In fact Weiss signed a collective-bargaining agreement for PHE as president of AMWC. Finally there was an interrelation of operations. Both companies shared the same common premises and both Weiss and Black, while attempting to acquire the mine operation were employed by AMWC. When the mine opened all the AMWC management personnel were employed by PHE and up until May 1989 were paid by

AMWC. It is also noteworthy that when the mine opened on March 17, 1989, AMWC ceased doing business and therefore had no employees. Under these circumstances, I find that both companies hired and employed the employees that worked in the mine and both companies engaged in coal mining. There is also evidence of interchange of equipment. When the mine opened all the AMWC construction equipment was transferred to PHE corporation with no lease agreement and at virtually no cost to PHE.

I further find that there was a total lack of arms length transactions between AMWC and PHE for "leased" equipment, office furniture and equipment and wages. I also find that both companies held themselves out to be a single employer through the AMWC letterhead and the collective-bargaining agreement signed by Allen Weiss.

Accordingly, I find that AMWC and PHE corporation are a single employer and as such are jointly and severally liable for any debts owed by either company.

B. Direct Dealing

Former mine employees Charles Hackenberry and Don Hecker testified that from December 1, 1989, to June 29, 1990, Weiss and Black periodically met with employees in an effort to negotiate wage and hour concessions. Hecker told Weiss he couldn't meet with employees over wages. United Mine Workers Representative Kenneth Horcicak testified that he told Weiss many times that he had no right to negotiate directly with the employees.

Robert Black admits that he and Weiss met with employees in an attempt to negotiate concessions on wages and hours and that these employee meetings were not discussed with the Union Mine Committee beforehand.

Analysis and Conclusions

Based on the evidence which is not denied, I find that Respondent bypassed the Union and dealt directly with employees over wages and hours in violation of Section 8(a)(5) and (1) of the Act.

C. Contractual Obligations

I find that when the mine closed on June 29, 1990, Respondents had a valid collective-bargaining agreement with the United Mine Workers of America. It is undisputed or admitted that Penn Hills energy corporation defaulted on the following contractual obligations:

1. Wages for the last two pay periods.
2. Overtime wages—employees had worked two hours of overtime, per day and had been assured of payment. This overtime is recorded on PHE records as accrued hours.¹
3. Clothing allowance—the clothing allowance for 1990 was \$180. Of that amount only \$10 was paid.
4. Health benefits

The collective-bargaining agreement required Respondent to provide a level of coverage equivalent to the United Mine

¹ After the mine closed, the Union requested and received from Respondent a summary of money owed to employees for wages, accrued hours, clothing allowance, and payment in lieu of health insurance (G.C. Exh. 23).

Workers benefit plans but permitted the employer to purchase its own coverage. Extended coverage was to be provided to employees after layoff based upon the number of hours worked before layoff.

From September to December 1989 PHE had coverage through Blue Cross/Blue Shield. This coverage was canceled for nonpayment of premiums and some employees were left with unpaid medical bills which Weiss assured would be paid but never were.

Beginning January 1, 1990, Respondent had a modified self-funded group health plan through Jefferson National Life Insurance Company and Diversified Group Administrators who received and processed employee claims. Effective July 1, 1990, both Jefferson and Diversified canceled their agreements with Respondent for nonpayment of premiums and the unpaid claims were returned to the employees for payment. After their layoff on June 29, 1990, employees had no extended coverage.

Those employees who chose not to participate in the Respondent's group health plan were paid \$100 per month. However, when the mine closed, the final monthly payment was not made.

5. Sick and Personal Leave—employees were not paid for unused sick or personal leave in accordance with the contract.

6. Regular Vacation—employees were not paid for regular vacation, including unused regular vacation in accordance with the contract.

7. Graduated Vacation—employees were not paid for graduated vacation in accordance with the contract as modified by the Memorandum of Understanding.

8. Floating Vacation—employees were not paid for floating vacation in accordance with the contract.

9. Dues—Although dues and assessments were withheld from employees pay, they were not remitted to the Union with the exception of the first months dues for new employees.

10. Pension and Retirement—Contributions to the Union's pension and retirement funds were never made in accordance with the contract provisions as modified by the Memorandum of Understanding. These contributions are limited to six months prior to filing the amended charge on June 1, 1990. Furthermore, the contractual penalty for cessation of operations was never paid to the Union.

CONCLUSIONS OF LAW

1. AMWC (Allen Mark Weiss Company) and Penn Hills Energy, Inc. are a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents violated Section 8(a)(5) and (1) of the Act by repudiating and failing to abide by the terms of the 1988 National Bituminous Coal Wage Agreement and the memorandum of understanding which were signed by the parties.

3. AMWC (Allen Mark Weiss Company) and Penn Hills Energy, Inc. are jointly and severally liable for all wages, benefits, dues contributions, and penalties due and owing under the 1988 National Bituminous Coal Wage Agreement and the memorandum of understanding signed by the parties.

4. United Mine Workers of America, District No. 5 is a labor organization within the meaning of Section 2(5) of the Act.

5. All production and maintenance employees employed by Respondents at their Newfield mine located in Penn Hills, Pennsylvania, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

6. Respondents violated Section 8(a)(5) and (1) of the Act by negotiating with its employees instead of the Union over bargainable issues.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent 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.

As a remedy, I shall recommend Respondents make whole all bargaining unit employees and the Union for any loss they may have suffered as a result of Respondents repudiation of the 1988 National Bituminous Coal Wage Agreement as modified by the memorandum of understanding dated July 22, 1988. This includes any loss of wages, benefits, dues contributions, and penalties with interest computed in accordance with current Board law.

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

ORDER

The Respondent, AMWC and Penn Hills Energy, Inc., Monroeville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to pay moneys owed under the 1988 National Bituminous Coal Wage Agreement as modified by the memorandum of understanding dated July 2, 1988.

(b) Negotiating directly with employees instead of the Union.

(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) Make whole, with interest in the manner set forth in the above section entitled the remedy, all bargaining unit employees and the Union for any loss of wages, benefits, dues, contributions, and penalties they may have suffered as a result of Respondent's repudiation of the 1988 National Bituminous Coal Wage Agreement as modified by the memorandum of understanding dated July 22, 1988.

(b) Negotiate only with the Union over wages, hours, and conditions of employment.

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.

(c) 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 and other payments due under the terms of this Order.

(d) Post at its facility in Monroeville, Pennsylvania (or any other facility maintained by Respondent), copies of the attached notice marked "Appendix."³ Copies of the notice, on

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

forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized 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.

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

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."