

**Magnet Coal, Inc. and Mutual Mining, Inc. and
United Mine Workers of America, District 31.¹**
Cases 9-CA-28075-2 and 9-CA-28075-3

August 31, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On March 12, 1993, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Charging Party filed exceptions and a supporting brief and the Respondents filed answering briefs.

The National Labor Relations 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, and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹We have modified the case caption to reflect the correct name of the Charging Party.

²In adopting the judge's findings and conclusions dismissing the complaint, we note that the General Counsel failed to establish that, during the period alleged in the complaint, the Respondents' testing of applicants was undertaken for unlawful discriminatory reasons or applied in a discriminatory fashion based on union status, activities, or membership.

Linda B. Finch, Esq., for the General Counsel.
L. Anthony George, Esq. (Jackson & Kelly), of Charleston, West Virginia, for the Respondent, Magnet Coal, Inc.
W. Jeffrey Scott, Esq., of Grayson, Kentucky, for the Respondent, Mutual Mining, Inc.
Jerry D. Miller, Vice President, United Mine Workers of America, District 31, of Fairmont, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried at Charleston, West Virginia, on October 16 and 17, 1991, and at St. Albans, West Virginia, on April 27-30 and on June 22-26, 1992. On charges filed by the Union, United Mine Workers of America, District 31, in Cases 9-CA-28075-2 and 9-CA-28075-3, respectively, on November 29, 1990,¹ the Acting Regional Director for Region 9 issued a consolidated complaint on January 17, 1991, alleging that the Respondents, Magnet Coal, Inc. and Mutual Mining, Inc. (Magnet and Mutual), had violated Section 8(a)(3) and (1) of the Act, by refusing to employ members of the Union. In their answers to the consolidated complaint, Magnet and Mutual have denied committing the alleged unfair labor practices.

¹All dates are in 1990, unless otherwise indicated.

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

FINDINGS OF FACT

I. JURISDICTION

Magnet, a corporation with a facility in Myrtle, West Virginia, has, at all times material to these cases, operated a surface coal mine. During the 12 months preceding the issuance of the consolidated complaint in these cases, Magnet, in the course and conduct of its coal mining, purchased and received at its Myrtle, West Virginia facility products, goods, and materials valued in excess of \$50,000 directly from outside the State of West Virginia. Magnet admits the foregoing data. I find that Magnet is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Mutual, a corporation with a facility in Holden, West Virginia, has, at all times material to these cases, operated a surface coal mine. During the 12 months preceding the issuance of the consolidated complaint in these cases, Mutual, in the course and conduct of its coal mining, purchased and received at its Holden, West Virginia facility products, goods, and materials valued in excess of \$50,000 directly from outside the State of West Virginia. Mutual admits the foregoing data. I find, that Mutual is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Mutual and Magnet admit, and I find that United Mine Workers of America, District 31 is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Since 1987, Magnet has been party to a mining agreement with Twin Branch Coal Company, a wholly owned subsidiary of Island Creek Coal Company, Inc. (Island Creek), pursuant to which Magnet has been operating a surface coal mine. Since 1989, Mutual has been party to, and has been operating a surface coal mine under, a similar agreement with Island Creek. At all times material to these cases, Island Creek, Mutual, and Magnet have been signatories to the National Bituminous Coal Wage Agreement with the Union's parent organization, United Mine Workers of America. That agreement required Magnet and Mutual to look first to the list or panel of laid-off Island Creek miners when hiring employees for their mining operations under their respective agreements with Island Creek. Both surface mines lie within the geographic jurisdiction of District 17 of United Mine Workers of America.

Other agreements have permitted Magnet and Mutual to employ miners from sources other than the panel of laid-off Island Creek employees. Thus, in 1987, United Mine Workers of America and its District 17 authorized Magnet to hire a core group of five employees, who were not on the Island Creek panel. Magnet added a sixth employee to that core group, and, prior to the period covered by the consolidated complaint, hired 11 more nonpanel miners. In a grievance settlement dated March 28, United Mine Workers of America authorized Magnet to retain these 17 nonpanel employees.

In 1989, Island Creek and District 17 authorized Mutual to hire approximately 25 temporary employees, who had worked for Elm Coal Company, Mutual's predecessor on the contract site. Mutual agreed to replace these 25 employees with laid-off Island Creek employees in accordance with the National Bituminous Coal Wage Agreement.

The consolidated complaint alleges that commencing on or about September, Magnet has violated Section 8(a)(3) and (1) of the Act by refusing to employ Rodney Butler, Gary Chenoweth, Donald Thayer, and other job applicants because they belonged to or supported the Union. Further, the complaint alleges that during the same period, Mutual has engaged in the same unlawful discrimination against Donald Thayer, George Bennett, and other applicants. The record shows the alleged refusals to hire the named individuals and other union members.

Where, as here, the complaint alleges that employers have discriminated against employees by failing to hire them because of their membership in, or activity on behalf of, a labor organization, the General Counsel has the burden of showing by a preponderance of the evidence that the employees' union membership or union activity was a motivating factor in the employers' decisions to withhold employment from them. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-403 (1983), affg. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

I have carefully considered the evidence before me and find that counsel for the General Counsel has not shown by a preponderance of the evidence that membership in, or activity on behalf of, the Union or the locals within its jurisdiction, was a motivating factor in the Respondents' failure and refusal to hire the alleged discriminatees. Absent from the consolidated complaint are any allegations that either Magnet or Mutual committed any independent violations of Section 8(a)(1) of the Act, directed at membership in, or activity on behalf of the Union or its constituent locals. Nor did the record disclose evidence suggesting that Magnet or Mutual were hostile to the Union, its locals, or its members. Thus, I find that counsel for the General Counsel has failed to establish a prima facie case showing that the Respondents denied employment to the alleged discriminatees because of their union affiliation. *Ramar Coal Co.*, 303 NLRB 604 (1991).

Counsel for the General Counsel urges me to heed the language in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967), in which the Court noted that some conduct "is so inherently destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive" and apply that principle here. However, I find that the record does not show that Respondents' treatment of the Union's members was in the "inherently destructive" category, or even close to it. For the record shows that during the period covered by the consolidated complaint, "September 1990 and continuing thereafter" the Respondents have hired employees from the panel of laid-off Island Creek employees, who were members of locals within the Union's jurisdiction. Indeed, I find from Union Vice Presi-

dent Jerry Miller's testimony, on direct examination by counsel for the General Counsel, that after June, Magnet and Mutual began sending out job notices "to a lot of members in District 31, and testing employees for various types jobs. And, in fact, they hired some—some members of District 31 who were laid off from Island Creek."

Mutual's treatment of job applicants does not support the contention that it discriminated against members of locals under the Union's jurisdiction. As of June 25, 1992, and since July 1989, Mutual had issued job notices to 33 laid-off Island Creek employees from union locals, tested their competence, and hired 14. Of the 14, 9 were working at the Mutual site on June 25, 1992. During the same period, Mutual tested the competence of seven District 17 individuals who had been on the Island Creek panel, and rejected all of them. I find from the testimony of Mutual's superintendent Allen Roe, who tested the applicants for Mutual, that during his employment he did not qualify any members of locals under District 17's jurisdiction. There was no evidence that the testing of the union applicants was more stringent than that accorded the seven disqualified District 17 applicants.

There was no showing that Magnet treated District 17 job applicants from the Island Creek panel better than it treated District 31 applicants from the same panel. Instead, the record shows that from August 21, until January 21, 1991, six of the eight applicants hired by Magnet during that period came from District 31's jurisdiction. The remaining two came from District 17.

In sum, I find that the General Counsel has not shown by a preponderance of the evidence that the Respondents discriminated against the individuals named in the complaint, and other similarly situated applicants in violation of Section 8(a)(3) and (1) of the Act. I shall, therefore, recommend dismissal of the consolidated complaint.

CONCLUSIONS OF LAW

1. Magnet Coal Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. United Mine Workers of America, District 31 is a labor organization within the meaning of Section 2(5) of the Act.

4. Neither Magnet Coal, Inc., nor Mutual Mining, Inc. have committed any of the unfair labor practices alleged in the consolidated complaint.

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

ORDER

The complaint is dismissed.

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.