

**Mining Specialists, Inc. and its alter ego or successor Point Mining, Inc. and United Mine Workers of America, District 17.** Case 9-CA-30680

July 8, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND  
BROWNING

On January 26, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondents 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, and conclusions and to adopt the recommended Order.<sup>1</sup>

We agree with the judge, for the reasons he sets forth, that Respondent Point Mining, Inc. (PMI) is an alter ego of Respondent Mining Specialists, Inc. (MSI), and that PMI is therefore bound by the collective-bargaining agreement between MSI and the Union.<sup>2</sup>

We further agree with the judge, again for the reasons he sets forth, that the Respondents violated Section 8(a)(1) of the Act by telling laid-off MSI employees at the Witcher Creek mine that they could go to work for PMI at the Campbell's Creek mine, but that PMI was going to be a "union-free" company, that only those who wanted to work on such a "union-free" basis should sign up to work for PMI, and that if employees who went to work for PMI subsequently tried to become unionized, PMI would be shut down.

We also agree with the judge that the Respondents violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with the unit employees, withdrawing recognition of the Union, abrogating the collective-bargaining agreement between MSI and the Union, and refusing to provide the Union with requested information that is relevant and necessary for the Union's performance of its duties as the representative of the Respondents' unit employees.

The Respondents argue, *inter alia*, that even assuming that PMI is an alter ego of MSI, Campbell's Creek is a "new operation" within the meaning of article IA(f) of the collective-bargaining agreement, rather than a "relocation of an operation [i.e., Witcher Creek] already covered by the terms of [the] Agreement," within the meaning of the same article.<sup>3</sup>

<sup>1</sup> Backpay for wages lost as a result of the Respondents' failure to apply the National Bituminous Coal Wage Agreement of 1988 to unit employees of Respondent Point Mining, Inc. shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971).

<sup>2</sup> I.e., the National Bituminous Coal Wage Agreement of 1988.

<sup>3</sup> Art. I, A(f) states in full as follows:

The Respondents consequently argue that because the Campbell's Creek operation is a "new operation" under article I,A(f), (1) the Respondents were not obligated to apply the collective-bargaining agreement at Campbell's Creek unless the Union had independently obtained recognition, certification, or otherwise properly obtained bargaining rights for the employees at Campbell's Creek—which the Union has not done, and (2) the Respondents' only obligation at Campbell's Creek has been to comply with article II,A.1 of the collective-bargaining agreement by filling at least three out of every five vacancies with laid-off former Witcher Creek employees—which the Respondents have done.<sup>4</sup>

We reject the Respondents' argument that their Campbell's Creek operation is a "new operation" within the meaning of article IA(f) of the collective-bargaining agreement. Instead, based on our interpretation of the collective-bargaining agreement in light of the record evidence,<sup>5</sup> we find that the Campbell's Creek operation is a "relocation of an operation already covered" by the collective-bargaining agreement—Witcher Creek. Consequently, we further find, pursuant to the express provisions of article I,A(f), that the terms of the collective-bargaining agreement were applicable to the Campbell's Creek operation without the Union having to become separately recognized or certified, or otherwise having to obtain separate bargaining rights at Campbell's Creek.

In contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight.<sup>6</sup> To determine the parties' intent, the

*Application of This Contract to the Employer's Coal Lands.*

As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement [i.e., February 1, 1988], or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. This section will immediately apply to any new operations upon the Union's recognition, certification, or otherwise properly obtaining bargaining rights. Notwithstanding the foregoing, the terms of this Agreement shall be applied without evidence of Union representation of the Employees involved to any relocation of an operation already covered by the terms of this Agreement.

<sup>4</sup> Art. II,A.1 of the agreement states in pertinent part as follows:  
*Non-Signatory Operations.*

[T]he first three out of every five new job openings for work of a nature covered by this Agreement at any existing, new, or newly acquired non-signatory bituminous coal operation of the Employer shall be filled by classified laid-off Employees on the panels of the Employer's operations covered by this Agreement.

<sup>5</sup> It is well settled that the Board has the authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases. E.g., *Redway Carriers*, 274 NLRB 1359, 1376 fn. 22 (1985); *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 425-426 (1984), *enfd.* 772 F.2d 571 (9th Cir. 1985).

<sup>6</sup> E.g., *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989).

Board normally looks to both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.<sup>7</sup>

In the instant case, however, the record does not contain extrinsic evidence of the parties' intent.<sup>8</sup> We must attempt, therefore, to determine the parties' intent regarding the implementation of article I,A(f) in the light of the ordinary meaning of the crucial terms of that article as applied to the instant facts.<sup>9</sup> This is not to say that the Board interprets collective-bargaining agreements in a vacuum, solely in accordance with "abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context." *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967). "Rather, collective bargaining agreements must be read in light of the realities of labor relations and considerations of federal labor policy . . . which make up the background against which such agreements are entered." *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir. 1986).

Like the collective-bargaining provision in issue here, Federal labor policy also distinguishes between a "relocation" on the one hand and a "new operation" on the other. If the employer's change in operations amounts to a "relocation," the parties' contract remains in effect,<sup>10</sup> just as article I,A(f) provides here. However, if the change results in the creation of "an entirely new operation," the employer may not have a duty to bargain with the union at the new facility.<sup>11</sup> Similarly, article I,A(f) significantly limits the Respondents' obligations in the case of a "new operation." Factors the Board uses to determine the category in which a case falls include the following: the products produced; the machinery used; the organization and nature of the work force; and the geographical separation between the two locations.<sup>12</sup>

Applying these factors by analogy here, we note that the Respondents had the same managers, and largely the same supervisors, running PMI's Campbell's Creek operation as they had running MSI's Witcher Creek operation only a week earlier. The two operations produced the same product (coal) for the same type of customers. All the Respondents' MSI employees at

Witcher Creek went directly to work as the Respondents' PMI employees at Campbell's Creek immediately after the shutdown of Witcher Creek a week earlier, and experienced no significant change in job duties. The Respondents used much of the same equipment at Campbell's Creek as they used at Witcher Creek—in some instances the same actual pieces of equipment, in other instances the same type of equipment. Some other equipment was owned by Catenary Coal Company, but was used free of charge to the Respondents, first at Witcher Creek and then at Campbell's Creek. Still other equipment from Witcher Creek was used briefly at Campbell's Creek and then replaced by newer pieces of equipment purchased for Campbell's Creek. Finally, the two operations were relatively close together (approximately 4 miles apart).

Thus, in the totality of the circumstances presented here, we find that the Respondents' operation at Campbell's Creek constituted a "relocation of an operation already covered by the terms" of the instant collective-bargaining agreement, rather than a "new operation." Accordingly, we find that the Respondents were obligated under article I,A(f) of the collective-bargaining agreement to recognize the Union and apply the collective-bargaining agreement to the Campbell's Creek operation, and that the Respondents violated Section 8(a)(5) and (1) of the Act by their failure to do so.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Mining Specialists, Inc. and Point Mining, Inc., both of Belle, West Virginia, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

*David L. Ness, Esq.*, for the General Counsel.  
*Michael Whitt and Dan Stickler, Esqs.*, for Respondents Mining Specialists, Inc. and Point Mining, Inc.

#### DECISION

##### STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Charleston, West Virginia, on November 18, 1993, pursuant to charges filed by the United Mine Workers of America, District 17 (the Union) on May 10, 1993, and complaint issued on June 22, 1993, alleging Respondents Mining Specialists, Inc. (MSI) and its alter ego or successor Point Mining, Inc. (PMI) have violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondents deny the commission of unfair labor practices and that the alleged alter ego or successorship relationship exists.

On the entire record, and after considering the demeanor of the witnesses and the posttrial briefs of the parties, I make the following

<sup>7</sup> See, e.g., *Johnson-Bateman Co.*, 295 NLRB 180, 184-188 (1989).

<sup>8</sup> The Respondents have attached to their brief in support of exceptions copies of three apparently unpublished arbitration awards, involving other employers. These awards, however, were not entered into evidence, and they are not part of the record.

<sup>9</sup> See *J.R.R. Realty Co.*, 301 NLRB 473, 474-475 (1991), *enfd.* per curiam mem. 955 F.2d 764 (D.C. Cir. 1992).

<sup>10</sup> E.g., *Rock Bottom Stores*, 312 NLRB 400 (1993).

<sup>11</sup> E.g., *General Electric Co.*, 170 NLRB 1272 (1968).

<sup>12</sup> *Central Soya Co.*, 281 NLRB 1308 (1986), *enfd.* 867 F.2d 1245 (10th Cir. 1988).

## FINDINGS OF FACT

## I. JURISDICTION

The complaint alleges, MSI admits, and I find that at all material times until January 29, 1993, when it ceased operations, it was a corporation with an office in Belle, West Virginia, was engaged in the operation of a coal mine at Witcher Creek in the vicinity of Cabin Creek, West Virginia, and in conducting these operations sold and shipped from its Witcher Creek mine goods valued in excess of \$50,000 directly to points outside the State of West Virginia, and at all material times has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It has also been alleged and admitted, and I find, that since about February 6, 1993, PMI has been a corporation with an office in Belle, West Virginia, has been engaged in the operation of a coal mine at Campbell's Creek 3 mine in the vicinity of Malden, West Virginia, and, based on a projection of its operations since about February 6, 1993, at which time PMI commenced its operations, PMI, in conducting these operations, will annually sell and ship from the Campbell's Creek 3 mine goods valued in excess of \$50,000 directly to points outside the State of West Virginia, and, therefore, at all material times PMI has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition to these pleadings, the parties entered into a joint stipulation providing as follows:

During calendar year 1992, respondent MSI purchased and received at its West Virginia facility goods valued in excess of \$50,000 directly from suppliers within the State of West Virginia, and those suppliers purchased and received such goods directly from points outside the State of West Virginia.

Since about February 6, 1993, respondent Point Mining purchased and received at its West Virginia facility goods valued in excess of \$50,000 directly from suppliers within the State of West Virginia, and those suppliers purchased and received such goods directly from points outside the State of West Virginia; and, at all material times, respondents have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

At all times material to this proceeding the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Allegations*

The complaint alleges the following conduct took place and therefore violated the Act:

About January 26, 1993, Respondents, by Rodney David Lucas, at the Witcher Creek mine office, threatened employees with discharge and mine closure if they engaged in union activities or selected the Union as their bargaining representative.

About February 6, 1993, Respondents, through the conduct of Respondent Point Mining, withdrew recogni-

tion of the Union as the exclusive collective-bargaining representative of the unit.

About January 26, 1993, Respondents, by James Roy Lucas . . . bypassed the Union and dealt directly with its employees in the Unit by offering them a wage increase and changes in their health insurance, pension benefits, holiday and vacation pay and other benefits if they agreed to work on a nonunion basis for Respondent Point Mining.

About late April 1993 or early May 1993, a more precise date being unknown to the General Counsel, Respondents, by James Roy Lucas at the Campbell's Creek No. 3 mine office, bypassed the Union and dealt directly with its employees in the Unit by informing them that Respondent Point Mining would be distributing a booklet setting forth their new wages and benefits.

About February 6, 1993, Respondents, failed to continue in effect all the terms and conditions of the agreement with the Union by failing to provide its employees the wage rates, health insurance coverage, pension benefits, holiday and vacation pay, personal days' and floating days' pay and other benefits as required by the agreement.

Since about April 7, 1993, the Union has requested the Respondents to furnish it with information necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of Respondents' employees.

B. *Chronology*

MSI was incorporated in West Virginia on March 24, 1988, by James Roy Lucas, president and sole owner of both MSI and PMI. He then signed a collective-bargaining agreement, on behalf of MSI, with the Union on April 26, 1988. MSI thereafter operated under the terms of that agreement which covered all of its nonsupervisory employees engaged in mining until it ceased operations on January 29, 1993, when it exhausted the coal seam it was mining as a contract miner for Catenary Coal Company which owned the minesite. The relationship between MSI and the Union was not entirely harmonious. On August 3, 1992, James Roy Lucas wrote to the Union complaining that the contractually required medical and pension benefits made it impossible for MSI to compete with nonunion companies. Prior to the writing of this letter there had been disputes between MSI and the Union concerning payment for these benefits, and at one point in 1991 MSI had changed the health plan from 100-percent coverage to an 80/20 plan and only returned to the 100-percent coverage under protest. MSI has not engaged in any mining operation since January 29, 1993, its closing date.

PMI was incorporated on February 10, 1992. From February 6, 1993, to the present, PMI has worked as a contract miner for Valley Coal Company at a location about 3 miles from the mine that MSI had worked until its January 1993 closing. The PMI work was secured via a bid made to Catenary Coal, who appears to have been acting on behalf of Valley Coal at the time, some time in October 1992. This was after James Roy Lucas and his certified public accountant Billy Cline, who worked closely with Lucas in incor-

porating and monitoring the financial details of both MSI and PMI, discovered in the late summer of 1992 that MSI was faced with financial disaster because it had run into hard rock obstructing access to the coal. Notwithstanding Cline's warning Lucas was getting himself into a very weak financial position by not immediately stopping work at the Catenary site, MSI continued mining that site with continuing losses until it was forced by these financial difficulties to cease operations. Cline estimates the decision to terminate operations was made in November 1992 or thereabouts.

On January 26, 1993, James Roy Lucas conducted an all-employee meeting in the MSI office trailer at the Catenary site. He gave no notice of this meeting to the Union. At the meeting he told the employees that PMI would operate union free and that those employees who wished to work for PMI on a "union-free basis" should sign a sheet of paper he passed around. At the bottom of the sheet, after the employees had signed, he wrote:

Meeting held & discussed opening of a new mine as MSI is closing [sic]. Explained as to a new company on a union free basis. Explained offer to men as Point Mining Inc. & the so-listed desired to be considered for employment.

In addition to James Roy Lucas' comments, his son Rodney David Lucas, the mine foreman at MSI and PMI and an admitted statutory supervisor and agent, told the employees that if they went to work for PMI and then tried to get a union in the mine would be shut down. I credit his father that Rodney Lucas further stated that "We had to bid on a union-free basis to be competitive." Because this testimony is not controverted and is consistent with James Roy Lucas' previous statements to the Union that MSI could not be competitive if it had to pay the health and pension benefits required by the collective-bargaining agreement.

At this meeting, Lucas Sr. also told the employees of the wages and other benefits they would receive as employees of PMI. Compared to those set forth in the contract with the Union, PMI wages were higher, health insurance coverage was lower, there were fewer paid vacation days, individual retirement accounts were substituted for the union pension plan, and an in-house grievance procedure with no arbitration or other independent tribunal to which to appeal replaced the contractual grievance procedure. At a later meeting with employees in April or May 1993, James Roy Lucas announced he would issue them a booklet setting forth the wages and other conditions of employment he had described to them on January 26, 1993. The union contract was simply abandoned by Lucas Sr. with the closing of MSI. PMI has always operated nonunion.

By a four-page letter to Roy Lucas as president of MSI, dated April 7, 1993 (Exh. A attached hereto as App. A), Robert Phalen, president of District 17, requested 16 sets of documents and posed 8 interrogatories relating to the relationship between PMI and MSI so that "the Union may properly perform its statutory duties as a certified collective-bargaining agent for your unionized employees, as well as monitor performance of important legal and contractual obligations" considering that "there are a number of problems which have been brought to my attention, including the non-provision of insurance benefits and payment of other wages

and benefits." The Union was not supplied with the requested information.

On July 22, 1993, James Roy Lucas wrote the International union that MSI was thereby notifying it that MSI's collective-bargaining agreement with the Union was terminated pursuant to article XXIX of that agreement. This was 1 month after the complaint in this case issued and is of no relevance to this proceeding.

### C. Discussion and Conclusions

#### 1. The alter ego issue<sup>1</sup>

The Board's longstanding position on the alter ego issue was set forth in *Fugazy Continental Corp.*,<sup>2</sup> as follows:

In determining whether [one employer] is the alter ego of [another], we must consider a number of factors, no one of which, taken alone, is the sine qua non of alter ego status. Among these factors are: common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market"; as well as the nature and extent of the negotiations and formalities surrounding the transaction. We must also consider whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.

Common management, ownership, and supervision of MSI and PMI exists in the persons of James Roy Lucas, his wife Betty, their son Rodney, and the supervisory staff under them. James Roy Lucas is the sole owner and president of both MSI and PMI, his wife is the secretary-treasurer of both, and his son Rodney served as the mine foreman for both. The ownership and control of both companies by the Lucas family is patently "substantially identical" for purposes of deciding alter ego status, *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Gerald Lucas has been the section foreman for both MSI and PMI, and Charles Riser serves both of them as maintenance foreman. James Roy Lucas is the overall manager of both entities, and Gerald and Rodney Lucas are statutory supervisors and agents of both entities as is Riser. PMI has two other supervisors: Charles Hanson, who worked only for PMI, and Thomas Dunlap, who worked for PMI and also as an hourly paid employee for MSI. Wesley Smith, now employed as an hourly paid worker for PMI, was a section foreman for MSI. The preponderance of identical supervision at both locations warrants a common supervision finding.

The coal mining operations of both MSI and PMI are quite similar in that they both utilize in considerable part the same equipment, producing the same product, coal, for the same type of customers. It might even be reasonably argued the customer for all intents and purposes was the same at both

<sup>1</sup> My disposition of the alter ego issue renders the disposition of the alternative theory of successorship unnecessary. *Mid-Hudson Leather Goods Co.*, 291 NLRB 449 fn. 2 (1988).

<sup>2</sup> 265 NLRB 1301 (1982), enf. 725 F.2d 1416 (D.C. Cir. 1984); and see also, e.g., *Advance Electric*, 268 NLRB 1001, 1002 (1984); *Iron Workers Local 15*, 306 NLRB 309, 312 (1992).

locations because Catenary Coal gave the work to MSI and obtained the work for PMI. In any event, MSI and PMI clearly engage in “the same business in the same market” with substantially the same equipment as well as the very same hourly paid employees, all of whom came to PMI from MSI. With respect to the nature and extent of negotiations and formalities between PMI and MSI, they amounted to nothing more than James Roy and Betty Lucas exchanging formalistic letters confirming the transfer and purported purchase of machinery from MSI by PMI. All that happened here is that James Roy Lucas transferred that which he owned from one location to another but 3 miles distant, without losing ownership or possession of that which he transferred, for, as agreed by the parties, he was the sole owner of both corporations. He was simply dealing with himself.

Although, as the Board stated in *Fugazy*, supra, the purpose behind the creation of an alleged alter ego must be considered, the Board has recently specifically reminded us that an alter ego finding does not require the existence of illegal motivation. *Johnstown Corp.*, 313 NLRB 170 (1993). Thus, the presence of such a motive is a factor to be considered, but is not a required support for an alter ego finding. I am persuaded there is sufficient evidence to infer an unlawful motive in the instant case.

As early as 1991, James Roy Lucas was unhappy with the costs connected with complying with the collective-bargaining agreement, and attempted to unilaterally change the health care plan. Although thwarted in this effort, it is obvious from his testimony and his letter to the Union that he continued to consider the costs of medical as well as pension benefits to be impediments to MSI’s competition with non-union firms. It may be that James Roy Lucas initially planned to operate PMI and MSI at the same time, but I doubt this was the case. I do not believe it was pure coincidence, given his antiunion contract posture, that after failing in his effort to unilaterally change benefits, he formed PMI in February 1992 when there appeared to have been neither a pressing need to do so nor any firm indication that work for PMI, which then had no employees, would soon be forthcoming. Moreover, even though James Roy Lucas knew at the time he bid for the new work on behalf of PMI that the operations at MSI could not long continue without ruinous financial losses, he made no effort to secure the work for MSI. There is nothing in the record that credibly explains why he did not bid on behalf of MSI and cut his losses.

The program for the January 26, 1993 meeting with employees, involving not only a notice of MSI closing but also a detailed explanation of the wages and other benefits to be conferred on employees of PMI and the adjuration that union support would not be tolerated, was not something conjured up on the spur of the moment. The Lucas pronouncements by father and son viewed in context with James Roy Lucas’ previous efforts to escape the contractual health insurance program and his pronouncements to the Union, and before me, concerning the impediments to competition posed by the collective-bargaining agreement, reflect a carefully thought-out plan to evade MSI’s statutory obligation to honor the existing collective-bargaining agreement. This, I am persuaded, was the true reason for the utilization of PMI rather than MSI to further the family contract mining business. It is well

settled that such a motivation supports an alter ego finding.<sup>3</sup> Moreover, it is clear that James Roy Lucas expected to obtain, and it was reasonably foreseeable that he would obtain, economic benefits consisting of less expensive employee benefits, freedom from the restrictions placed on him by the collective-bargaining agreement, and greater success in dealing with the competition by switching his operations from MSI to PMI. Although it is not as yet known whether better competitive success will result from this maneuver, the other expected benefits have been realized. The presence of these benefits achieved as a result of the work transfer to PMI (together with the other factors previously mentioned) meets the alter ego requirements of the United States Court of Appeals for the Fourth Circuit.<sup>4</sup>

For all the foregoing reasons I conclude and find PMI is an alter ego of MSI.

## 2. Direct dealing, withdrawal of recognition, and other conduct

As MSI’s alter ego PMI had a duty to honor the collective-bargaining agreement between MSI and the Union. PMI has not done so, and Respondents MSI and PMI have violated Section 8(a)(5) and (1) of the Act by failing to continue in effect the agreement with the Union, refusing to apply its terms and conditions, failing and refusing to provide employees with the wages and other benefits required by the agreement, bypassing the Union and bargaining directly with employees concerning wages and other benefits they would receive as employees under the PMI title, and refusing to bargain with the Union as the representative of PMI employees.<sup>5</sup>

By conditioning employment at PMI on employee agreement to forswear union representation, Respondent engaged in conduct reasonably tending to interfere with, restrain, and coerce employees in the exercise of rights guaranteed them by Section 7 of the Act<sup>6</sup> and therefore violated Section 8(a)(1) of the Act. Similarly, the conduct of Rodney David Lucas on January 26, 1993, in threatening employees with a shutdown of operations and thus loss of employment, had the same tendency and violated Section 8(a)(1) of the Act.

## 3. The refusal to furnish information

The Union had a valid and enforceable collective-bargaining agreement with MSI, and thus PMI, when the information was requested and denied. The Union has the responsibility of administering that contract. *Clinchfield Coal Co.*, 275 NLRB 1384 (1985). Respondents are statutorily obliged to furnish information relevant and reasonably necessary to the Union’s performance of those responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Phalen’s April 7, 1993 letter requests information for contract administration purposes. Respondent has refused to deliver it. The Board succinctly summarized the applicable law in *W-L Molding Co.*, 272 NLRB 1239, 1240 (1984), in the following terms:

<sup>3</sup> *Advance*, supra at 1004.

<sup>4</sup> See *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983).

<sup>5</sup> *Precision Builders*, 296 NLRB 105, 110 (1989).

<sup>6</sup> This has long been a test for alleged violations of Sec. 8(a)(1) of the Act. See, e.g., *G. H. Hess, Inc.*, 82 NLRB 463 fn. 3 (1949).

[A] broad discovery-type standard is applicable to requests for information relevant to a union's functions of negotiating and policing compliance with a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *General Motors v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983); *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). "[I]t is not the Board's function in this type case to pass on the merits of the Union's claim that Respondent breached the collective bargaining agreement or . . . committed an unfair labor practice." *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957. "Thus, the union need not demonstrate actual instances of contractual violations before the employer must supply information." *Boyers Construction Co.*, 267 NLRB 227, 229 (1983). "Nor must the bargaining agent show that the information which triggered its request is accurate, non-hearsay, or even ultimately reliable." *Ibid.* "The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957 quoting *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. Accord: *General Motors v. NLRB*, 700 F.2d at 1088. [Footnote omitted.]

The Board has had occasion to address requests for a great number of items relevant to a union's ability to perform its responsibilities as a collective-bargaining agent and has granted those requests.<sup>7</sup> Accordingly, inasmuch as the Union is entitled to the information sought and Respondents have refused to deliver it, I find such refusal violated Section 8(a)(5) and (1) of the Act.

In reaching the foregoing conclusions, I have considered Respondents' argument that the matters at issue should be deferred to arbitration and conclude this argument cannot prevail because the issue of an alter ego allegedly established to evade a collective-bargaining relationship is not something that can be resolved in the contractual grievance procedure,<sup>8</sup> and the Board is not required to defer to arbitration in any event. I am persuaded this case involves issues which should not be deferred, cannot be dealt with appropriately within the framework of the collective-bargaining grievance procedure, and involves egregious violations of the Act which require a remedy fashioned by the Board.

#### CONCLUSIONS OF LAW

1. Respondents PMI and MSI are alter egos and employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is the designated and recognized collective-bargaining representative of the Respondents' employees constituting a unit described in the collective-bargaining agreement between the Union and the Respondents which

<sup>7</sup>See, e.g., *George Koch & Sons, Inc.*, 295 NLRB 695 (1989), where the union sought and the employer was ordered to furnish responses to 89 items.

<sup>8</sup>See *Edward J. White, Inc.*, 237 NLRB 1020, 1026 (1978).

was entered into in 1988 and remains valid to date on its terms.

4. Respondents PMI and MSI have violated Section 8(a)(5) and (1) of the Act by failing to continue in effect the aforesaid collective-bargaining agreement, by refusing to apply its terms and conditions to PMI employees, by refusing to provide the employees with the wages and other benefits required by the agreement, by bargaining directly with employees concerning wages and other benefits they would receive as employees of PMI and by placing these wages and benefits in effect, and by failing and refusing to bargain with the Union as the representative of its employees.

5. By refusing to furnish the Union the requested information necessary and relevant to administration of the collective-bargaining agreement, the Respondent failed to bargain collectively and in good faith with the Union and has thereby engaged in unfair labor practices affecting commerce with the meaning of Section 8(a)(5) and (1) of the Act.

6. By conditioning employment at PMI on employee agreement to forswear union representation, Respondent violated Section 8(a)(1) of the Act.

7. By threatening employees with a shutdown of operations if they seek union representation, Respondent has violated Section 8(a)(1) of the Act.

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

#### THE REMEDY

Having found that MSI and PMI have violated Section 8(a)(5) and (1) of the Act, my recommended Order will require them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as PMI is the alter ego of MSI and the two continue to operate the same business, but have failed and refused to recognize the Union as the collective-bargaining representative of PMI employees or to apply the terms of the collective-bargaining agreement between MSI and the Union, I shall recommend PMI be ordered to recognize the Union as the representative of its employees and to honor and apply the terms of that agreement, and any subsequent agreement, to its employees. I shall also order MSI and PMI to make the contractually established payments due on and after January 26, 1993, to the various trust funds established by the collective-bargaining agreement, with interest in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and by reimbursing unit employees for any expenses they incurred as a result of the unlawful failure to make such required payments, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980). MSI and PMI are also ordered to make their employees whole for any loss of wages suffered by virtue of the failure to apply the collective-bargaining agreement to PMI employees with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>9</sup>

<sup>9</sup>Under *New Horizons*, interest on and after January 1, 1987, is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

ORDER

Respondents Mining Specialists, Inc. and its alter ego or successor Point Mining, Inc., Belle, West Virginia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit set forth in the National Bituminous Coal Wage Agreement of 1988 with respect to wages, hours, working conditions, or other terms or conditions of employment of the employees, and refusing to honor the collective-bargaining agreement applicable to those employees.

(b) Failing to bargain collectively and in good faith with the Union by refusing to furnish the Union with requested information relevant to administration of the collective-bargaining agreement between Respondent and the Union.

(c) Bargaining directly with employees represented by the Union concerning their wages, hours, and working conditions.

(d) Conditioning employment on the abandonment of union activity.

(e) Threatening employees with a shutdown of operations if they seek union representation.

(f) 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) Comply with the terms and conditions of the collective-bargaining agreement between the Union and MSI retroactively to January 26, 1993, and prospectively until such time as proper and timely notice of cancellation is given, in the manner set forth in the collective-bargaining agreement.

(b) On request, recognize and bargain with the Union as the exclusive representative of the employees in the unit covered by the agreement concerning terms and conditions of employment.

(c) Immediately furnish the Union with the information it requested by letter of April 7, 1993.

(d) Make whole the unit employees by transmitting the contributions owed to the Union's health and welfare, pension, and other funds pursuant to the terms of the collective-bargaining agreement with the Union, and by reimbursing unit employees for medical, dental, or any other expenses ensuing from its unlawful failure to make such required contributions.

(e) Make whole the unit employees for any wages lost as a result of its failure to comply with the terms of the collective-bargaining agreement.

(f) 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 amounts due under the terms of this Order.

(g) Post at their facility in Belle, West Virginia, and at their jobsites, copies of the attached notice marked "Appendix B."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

UNITED MINE WORKERS OF AMERICA

TELEPHONE (304) 346-0341

ROBERT E. PHALEN                      MAYNARD H. DANIEL  
PRESIDENT                                      SECRETARY-TREASURER

MIKE BROWNING                              HOWARD L. GREEN  
VICE PRESIDENT                                      INTERNATIONAL EXECUTIVE

UNITED MINE WORKERS BUILDING  
1300 KANAWHA BOULEVARD E.  
POST OFFICE BOX 1313  
CHARLESTON, WEST VIRGINIA 25325

April 7, 1993

Roy Lucas, President  
Mining Specialists, Inc.  
P. O. Box 197  
Belle, WV 25015

RE: UMWA Information Request

Dear Mr. Lucas:

It has just come to my attention that you have or are in the process of changing your corporate name and continuing operations as Point Mining, Inc., and operating as a joint/single employer with or successor to Mining Specialists, Inc.

Therefore, in order that the Union may properly perform its statutory duties as a certified collective bargaining agent for your unionized employees, as well as monitor performance of important legal and contractual obligations, I hereby request the below listed information for Mining Specialists, Inc. and Point Mining, Inc.

For your convenience, I have separated the information request into "Documentary Requests" and "Interrogatories."

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## I.

*DOCUMENTARY REQUESTS*

1. Copies of the leases, subleases and/or mining contracts for Mining Specialists, Inc. and Point Mining Inc. in effect from February 1, 1988 to present.

2. Copies of any leases, subleases and/or mining agreements presently in effect for both companies.

3. Copies of the legal identity reports filed with MSHA for the operations owned, leased, controlled by either of the above companies or in which any of the above companies has or held an interest.

4. Copies of all mining permits in existence presently and during the 1988 National Bituminous Coal Wage Agreement issued by state and/or federal regulatory agencies for both companies.

5. Copies of all "Annual Return Report of Employee Benefit Plan" Form 5500 (or any other similar report in connection with the payment of employee benefits filed with the Internal Revenue Service from 1988 to the present for both companies.

6. Copies of all notices given to the West Virginia Commissioner of Labor regarding any contract, sub-contract, lease or sublease for mining operations on any property owned, leased, controlled by either of your companies or in which either company has had or has an interest from 1988 to the present.

7. Copies of wage bonds posted for each company as well as all correspondence to and from the West Virginia Department of Labor concerning your wage bond for both companies.

8. Copies of any withdrawal liability notice and demand required by Section 219 of ERISA (29 U.S.C. Sec. 1399) or any opinions, documents and correspondence to or from the UMWA Health & Retirement Funds or anyone else concerning withdrawal liability for Mining Specialists, Inc.

9. Copies of all coal sales and processing contracts for or between Mining Specialists, Inc. and Point Mining, Inc. and the purchasers of your coal. Naturally, you may feel free to delete the actual price per ton of coal received and such other similar financial information.

10. Copies of both companies' corporate income tax returns (Form 1120). If you filed a consolidated return for Mining Specialists, Inc. and Point Mining, Inc., please designate with specificity.

11. An organizational or flow chart showing the structure and interrelationship of each of Mining Specialists, Inc. and Point Mining, Inc.

12. A copy of the health and life insurance policy in effect for your classified employees.

13. A list of the names, addresses and phone numbers for the employees of Mining Specialists, Inc. (since 1990) and Point Mining, Inc.

14. A list of all equipment and inventory loaned, leased, or sold by Mining Specialists, Inc. to Point Mining, Inc.

15. Copies of all MSHA Form 7000-2, "Quarterly Mine Employment and Coal Production Reports" filed by both companies since 1990.

16. Copies of all monthly coal mine reports filed by both companies as required by *W.Va. Code* § 22A-2-77 since July, 1992.

## II.

*INTERROGATORIES*

1. Identify the name, title(s) and company of any officer, director or any other management representative who held or holds a position with Mining Specialists, Inc. and Point Mining, Inc. In each case, also identify applicable time period.

2. Identify the name, job title(s), and present company affiliation of any person who held or holds a function related to labor relations in your company and Point Mining, Inc. In each case, also identify the applicable time period and the job duties of the individual in question.

3. Identify the customers of Point Mining, Inc. which are now or formerly customers of Mining Specialists, Inc. In each case, also identify the applicable time period and the specific company per customer.

4. Identify the name, job title and company of each individual who performed or performs any service, including clerical, administrative, bookkeeping, managerial, engineering, sales, estimating, or other services for Mining Specialists, Inc. and Point Mining, Inc. For each such person, also identify the time period, company and service in question.

5. Identify any common insurance carrier(s) used by Mining Specialists, Inc., and Point Mining, Inc. for every insurance related employment benefit, including health insurance. Please specify the exact benefit and company per item.

6. Identify any equipment exchanged, loaned, sold or leased between Mining Specialists, Inc. and Point Mining, Inc. Identify the appropriate date and parties involved in the arrangement.

7. Identify any employees, supervisory personnel and managers who have transferred from Mining Specialists, Inc. to Point Mining, Inc. For each such person, give job title, current company, and approximate date of transfer.

8. Identify the entire hiring procedure for each company and provide samples of the application forms utilized in processing the application.

As I indicated above, the requested information is essential to fulfillment of the Union's role as statutory collective bargaining agent for your unionized employees. As there are a number of problems which have been brought to my attention, including the nonprovision of insurance benefits and payment of other wages and benefits, I would appreciate your prompt response to this request.

Should you wish to discuss this matter, please feel free to contact me at your earliest convenience.

Sincerely,

/s/ Robert E. Phalen

REP: pw  
cc: Clifford Crum  
Mark March

#### APPENDIX B

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 refuse to recognize and bargain with United Mine Workers of America, District 17 as the exclusive bargaining representative of our employees in the unit described in the National Bituminous Coal Wage Agreement of 1988.

WE WILL NOT repudiate the collective-bargaining process by withdrawing recognition from the above-named Union as the exclusive collective-bargaining representative of our unit employees, and WE WILL NOT refuse to follow the collective-bargaining agreements applicable to our unit employees.

WE WILL NOT bargain directly with our unit employees over wages, hours, or any other conditions of employment.

WE WILL NOT refuse to furnish the Union with requested information relevant to the administration of our collective-bargaining agreement.

WE WILL NOT condition employment on the abandonment of union representation.

WE WILL NOT threaten our employees with operational shutdown if they engage in protected union activity.

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

WE WILL, on request, bargain with the above-named Union as the exclusive representative of all the employees in the appropriate unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment.

WE WILL comply with the terms and conditions of the collective-bargaining agreement between the Union and Mining Specialists, Inc., to which Mining Specialists, Inc. and Point Mining, Inc. are bound retroactively to January 26, 1993, and prospectively until such time as proper and timely notice of cancellation is given in the manner set forth in said agreement.

WE WILL make whole our unit employees by transmitting the contributions owed to the Union's health and welfare, pension, vacation and holiday, and other funds pursuant to the terms of our collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions.

WE WILL also make our employees whole for any wages lost as a result of our refusal to comply with the terms of the collective-bargaining agreement, with interest.

WE WILL promptly furnish the Union, on request, the previously requested information relevant to the administration of our collective-bargaining agreement.

MINING SPECIALISTS, INC. AND POINT MINING, INC.