

Pittston Coal Group, Inc. and United Mine Workers of America, District 28. Case 11–CA–17702

July 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On September 14, 1998, Administrative Law Judge William N. Cates issued the attached Bench decision. The Respondent 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 only to the extent consistent with this Decision and Order.

The complaint alleges, and the judge found, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union, on request, with the names, hiring dates, and job titles of employees hired by C&O Mining, an independent contractor operating a mine for the Respondent. At the hearing, the Respondent offered to furnish the hiring dates and job titles of all the C&O employees doing work of the types covered by the collective-bargaining agreement between the Union and the Respondent, and the names of the C&O employees who had been hired from the Respondent's panel.¹ The Respondent has excepted only to the judge's finding that it unlawfully failed to furnish the Union with the names of the C&O employees who were not hired off of the Respondent's panel.² For the reasons discussed below, we agree with the Respondent.

The Respondent is in the coal mining business in Virginia, West Virginia, and Kentucky. The Respondent operates some of its mines itself and contracts the operations of other mines to independent contractors. The

¹ A panel is a list of employees who have been laid off because of a reduction in the work force and who have recall rights based on seniority. At the close of the General Counsel's case in chief, the Respondent's counsel made an "offer of judgment" concerning those items of information. She explained that, although the Respondent believed that it had provided the Union with that information, the Union contended otherwise. She expressed the Respondent's willingness to provide those items and to have judgment entered on those issues. Accordingly, the judge found that the Respondent had violated Sec. 8(a)(5) to the extent it had failed to provide that information and ordered the Respondent to provide it.

² In its brief in support of exceptions, the Respondent argues only that the judge erred in finding that it unlawfully failed to provide the Union with the names of C&O's employees who are not hired from the Respondent's panel. Thus, although the Respondent's brief ends by asking the Board to dismiss the complaint, we interpret that request as actually encompassing only the information the Respondent contends it was not required to produce.

Union represents a unit of employees who work in the mines operated by the Respondent.

The collective-bargaining agreement between the Union and the Respondent contains a number of provisions relating to the Respondent's practice of contracting out certain of its mining operations. Article II,I,B, of the contract provides, in pertinent part, that:

2. Subject to the provisions of paragraphs 4 and 11 hereof,³ after the effective date of this Agreement the PCG Companies shall not enter into any Contract Mining Agreement unless the Contractor agrees in writing that offers of employment for the first nineteen (19) out of every twenty (20) new job openings by such Contractor shall first be made to the PCG Companies' classified laid off employees on the PCG Companies' panels if such employment is for jobs of a nature covered by this Agreement, and if such Employees are qualified for such jobs.⁴

....

5. Selection of employees for these offers of employment shall be made from the senior Employee among the classified laid off Employees on the Employer's panels, who has the ability to step into and perform the work of the job at the time the job is filled.

....

7. Any disputes regarding this section shall be resolved between the Employer and the Employee under Article XXIII [concerning grievances] of this Agreement. The Employer agrees that it will reserve in any Contract Mining Agreement subject to this section the ability of the Employer to remedy any finding as to noncompliance of an Employee's right to be considered for employment opportunity as provided herein.

8. The Employer shall not be a guarantor or be liable for any breach of the Contractor of its hiring or bargaining obligations or the terms of any agreement between the Union and the Contractor.

....

10. The Union agrees that this section, or its implementation, shall in no manner operate to affect any bargaining unit determination and does not create a joint employer, single employer, alter ego, agency relationship or successor relationship between the Employer

³ The provisions of pars. 4 and 11 are not material to this case.

⁴ According to the testimony of Joseph Pendergast, the Respondent's industrial relations manager, the parties have interpreted this provision to mean that, without reference to the number of openings, the contractor must make employment offers to 19 eligible panel members before it may hire a nonpanel employee "off the street."

and the Contractor, which does not otherwise exist without reference to this section or its implementation.⁵

Joseph Pendergast, the Respondent's industrial relations manager, testified that the parties adopted a "protocol" to the 1990–1994 collective-bargaining agreement. The protocol provided that contractors under article II would be required to submit quarterly reports to a third party (an accounting firm), showing the names of employees hired, whether or not they were members of the panel, the jobs for which they were hired, and their hiring dates. That provision, according to Pendergast, was intended to enable the third party to determine whether the contractors were complying with the agreement while preserving the employees' privacy. However, Pendergast also testified that this system did not work and that it was not renewed when it expired in 1994.

In October 1995, one of the Respondent's companies, Sea B Mining Company, entered into a contract mining agreement with C&O Mining for C&O to operate one of the Respondent's mines near Tazewell, Virginia. The Union does not represent C&O's employees. The agreement provided, in pertinent part:

17. *Hiring, Labor Contract and Employee Benefit Fund Requirements.*

....
 (b) Contractor [C&O] hereby agrees that offers of employment for the first nineteen out of every twenty new job openings by the Contractor shall first be made to the PCG Companies' classified laid-off employees on the PCG Companies' panels if such employment is for jobs of a nature covered by the CBA, and if such employees are qualified for such jobs.

(c) Selection of employees for these offers of employment shall be made from the senior employee among the classified laid-off employees on the PCG Companies' panels, who has the ability to step into and perform the work of the job at the time the job is filled.

....
 (f) Each Reporting Contractor shall submit the following information, in writing, to the Third Party [an accounting firm]:

... (iii) A list of all employees performing work of a nature covered by the CBA who were employed by Contractor at mines or facilities operated pursuant to this Agreement at any time during the three calendar months immediately preceding the month

in which the report is to be made to the Third Party. Such list shall specify each employee who was hired from the PCG Companies' classified laid-off employees on the PCG Companies' panels.

(iv) . . . The information required pursuant to paragraphs (i), (ii) and (iii) shall be provided/updated on or before the 15th day of each January, April, July and October during the term hereof.⁶

(g) Owner reserves the right to remedy any finding as to noncompliance of an employee's right to be considered for employment opportunity as provided in the CBA, and any violation of the requirements set forth in Paragraph 17(f) hereof. Any failure to comply with the provisions of this Paragraph 17 shall be an event of default as such term is used in Paragraph 32 [sic; events of default are listed in Paragraph 29] hereof.

....
 29. *Events of Default.*

....
 (f) Failure of Contractor to perform or observe any covenant, provision, term, restriction or condition required to be performed or observed by Contractor under the terms of this Contract or imposed upon Contractor by operation of law.

30. *Remedies.* (a) If any event of default occurs or Contractor fails to abide by or perform an arbitration award within thirty (30) days after its entry, then in such event, Owner may, at its option, terminate this Contract.

....
 32. *General Provisions.*

....
 (h) Upon the written request of either Owner or Contractor, the other agrees to furnish such additional formal assurances or other written documents in proper and recordable form as may be reasonably necessary to carry out the intent, purposes and terms of this Contract.

On January 28, 1997,⁷ a grievance was filed alleging that C&O was "not recalling off the panel"—i.e., that it was not observing the provisions of article II of the collective-bargaining agreement in its hiring decisions. At a meeting on May 28, Union Representative Ken Lester told Pendergast that he had been told by employees of

⁵ The complaint does not allege, and the General Counsel did not argue, that any of those relationships exist between the Respondent and C&O.

⁶ This information is apparently similar, if not identical, to that which was required to be furnished to the third party under the protocol to the 1990–1994 collective-bargaining agreement. However, according to Pendergast, the protocol was not renewed in 1994.

⁷ Unless otherwise noted, all dates refer to 1997.

C&O that the contractor had hired several employees without first making offers to laid-off employees of the Respondent. Lester asked for a copy of the Respondent's panel, copies of all job offers made by C&O, and the names, hiring dates, and job titles of employees hired by C&O. On June 6 Lester repeated his request in a letter to Pendergast. Pendergast informed C&O of the Union's requests, and C&O supplied some of the information requested. It refused, however, to provide the names of its employees who had been hired "off the street" and not from the Respondent's panel. C&O contended that those names were not relevant to the Union's purposes. It also claimed that the employees did not want their names to be released and that its refusal was based on their privacy concerns.

Thus, the Respondent provided, or made available to the Union, the names of employees on its panel and copies of C&O's letters containing offers of employment. And, as stated, the Respondent at the hearing agreed to provide the hiring dates and job titles of all of C&O's employees, as well as the names of the employees hired by C&O from the Respondent's panel.⁸ However, it could not give the Union the names of C&O's nonpanel employees, because C&O refused to provide that information.

The judge found that the Union had demonstrated that the names of nonpanel C&O employees were necessary for it to determine whether C&O was complying with its contractual hiring obligations. He also rejected the Respondent's confidentiality contentions.⁹ Finally, he found no merit in the Respondent's argument that it cannot be faulted for not producing the names of those employees because it did not have access to them. He therefore found that the Respondent had violated Section 8(a)(5) by failing to provide the Union with the names of the C&O employees who had been hired "off the street" and not from the Respondent's panel. For the reasons set forth below, we reverse.

Under Section 8(a)(5) and 8(d) of the Act, an employer is required to furnish a union, on request, with sufficient relevant information to enable it to represent employees effectively in administering a collective-bargaining

⁸ C&O provided certain information that was apparently at least partially responsive to the Union's request, and the Respondent turned that information over to the Union. As stated, however, the Respondent's attorney conceded at the hearing that the information was insufficient, and the judge found that the Respondent had violated Sec. 8(a)(5) to the extent it had not fully complied with the Union's request for information other than the names of C&O's nonpanel employees.

⁹ In addition to its reliance on the privacy interests of C&O's employees, the Respondent argued that it had offered (2 weeks before the hearing) to accommodate those concerns by having the names given to the third party, but that the Union rejected this offer.

agreement.¹⁰ When the information sought concerns employees outside of the bargaining unit, the union must show the relevance and necessity of the information.¹¹ The union's burden, however, is not an exceptionally heavy one. The standard governing an employer's duty to provide information is akin to a liberal "discovery-type standard."¹² Thus, the union must show only a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."¹³

We find it unnecessary to decide whether the judge correctly found that the Union demonstrated the relevance of the names of C&O employees hired "off the street." As we discuss below, we find that even assuming the Union demonstrated the relevance, the Respondent made a good-faith effort to persuade C&O to provide those names to the Union, and that, under the circumstances, it was not required by Section 8(a)(5) to do anything more.¹⁴

The Respondent argued that it cannot be faulted for failing to produce information it does not possess and to which it does not have access. Rejecting that claim, the judge found that "when the Company herein sincerely and forcibly demands of its contractor and specifically C&O Mining . . . to do its bidding C&O Mining dutifully falls in line."¹⁵ He also reasoned that the Respondent is free to terminate its contract with C&O if C&O "fails to do its bidding."

We agree with the Respondent that it made a good-faith attempt to obtain the names of nonpanel member employees from C&O Mining, and that under the circumstances presented here, there was nothing more the Respondent could reasonably be required to do to satisfy its bargaining obligation. Pendergast asked C&O for the names, but C&O refused to provide them, citing both its concern for its employees' privacy and its belief that the information was not relevant.¹⁶ C&O communicated that

¹⁰ See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967).

¹¹ See, e.g., *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), *enfd.* 157 F.3d 222 (3d Cir. 1998).

¹² *NLRB v. Acme Industrial Co.*, 385 U.S. at 437.

¹³ *Id.*

¹⁴ Accordingly, we also find it unnecessary to address the Respondent's confidentiality arguments.

¹⁵ The judge apparently was referring to a 1996 grievance in which the Respondent encouraged C&O to settle the Union's claim that an individual on the Respondent's panel was improperly passed over in hiring by C&O. Pursuant to the settlement agreement, the employee was hired by C&O and awarded backpay.

¹⁶ At some point, Pendergast told James Simmons, C&O's labor relations consultant, that he agreed that the names of nonpanel employees were not relevant. There is no indication, however, that Pendergast expressed this view in such a way as to indicate to C&O that the Respondent was not serious in requesting that information on behalf of the Union. Indeed, Simmons testified that Pendergast expressed his opin-

decision directly to the Union, as well as to the Respondent.

In a number of cases, the Board has found that employers who did not possess information requested by unions violated Section 8(a)(5) by failing to show that they attempted to obtain the information from those who did have it and were refused.¹⁷ Here, however, it is clear that the Respondent did ask C&O to provide the disputed information and that C&O refused.

This was enough, under the circumstances. There is no contention that the Respondent and C&O have any relationship other than the one created by their contract mining agreement. It is not alleged that there is a single employer, joint employer, agency, or alter ego relationship between the two companies. The collective-bargaining agreement explicitly states that the Respondent “shall not be a guarantor or be liable for any breach of [C&O] of its hiring or bargaining obligations[.]” Thus, there is no apparent lawful means by which the Respondent could compel C&O to provide the information the Union requested, apart, perhaps, from threatening to terminate the contract. It is not clear, however, that the Respondent had a contractual right to terminate its contract with C&O because of the latter’s refusal to provide the requested information.¹⁸ In any case, we are aware of no decision in which the Board ordered an employer to threaten contract action, much less to carry out such a threat, if the other employer still proved to be recalcitrant.¹⁹

ion after C&O had told him that it would not supply the names; i.e., Simmons informed Pendergast of C&O’s reasons for not producing the names, and Pendergast agreed.

¹⁷ See *Pratt & Lambert*, 319 NLRB 529, 534 (1995); *Arch of West Virginia*, 304 NLRB 1089 fn. 1 (1991); *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991); *United Graphics*, 281 NLRB 463, 466 (1986).

¹⁸ At the hearing, the Respondent’s counsel indicated that the Respondent’s only remedy for C&O’s refusal would be to terminate the contract. But par. 17(f) of the contract explicitly requires C&O to provide such information only to the third party, not to either the Respondent or the Union. Par. 32(h) requires each party, on the other’s request, to provide “other written documents . . . as may be reasonably necessary to carry out the intent, purposes and terms of this Contract.” There was no testimony, however, concerning whether that provision would cover the Union’s information request or whether C&O’s refusal to provide the information would constitute an “event of default” that would allow the Respondent to terminate the contract.

¹⁹ Indeed, when the Board has found that employers violated Sec. 8(a)(5) by failing to try to obtain information that was not in their possession, it has fashioned remedies consistent with the duty to request information sought by unions. Thus, for example, in *United Graphics*, the Board found that the employer had not requested another company (a temp agency) to provide it with information the union had sought, and therefore that the employer had not demonstrated that the information was unavailable. To remedy that violation, the Board ordered the employer to “[m]ake a reasonable effort to secure [the information in question] and, if that information remains unavailable, explain or

We find nothing in the circumstances of this case that would warrant such a remedy, assuming it is available. C&O Mining’s employees are not represented by the Union. C&O has not been alleged or shown to have anything other than an arm’s-length business relationship with the Respondent. And it has not been demonstrated that C&O has, even implicitly, agreed to provide the Union the information it seeks as part of C&O’s contract with the Respondent. Ordinarily, then, we would not find that C&O had a duty to furnish *any* information to the Union, either directly or through the Respondent; and even if such a duty existed, we would be unable to order C&O to fulfill it because C&O is not a party to this case.

We also agree with the Respondent that the judge improperly ascribed economic leverage on its part vis-a-vis C&O Mining that is not demonstrated in the record. As the Respondent points out, whatever influence it may have brought to bear in inducing C&O to settle the 1996 grievance was exercised in the context of a violation of the hiring provisions of the collective-bargaining agreement and the contract mining agreement. By contrast here, C&O’s failure to provide information, as opposed to its earlier failure to make employment offers in the proper order, has not been shown to violate either contract. We therefore cannot conclude, as the judge evidently did, that the information would be forthcoming from C&O if the Respondent would simply use its economic power over it.

For the foregoing reasons, we find that the Respondent made a good-faith effort to obtain the names of nonpanel members who had been hired by C&O Mining, and therefore that its failure to obtain those names because of C&O’s refusal to release them did not violate Section 8(a)(5). We shall modify the judge’s recommended Order to delete the requirement that the Respondent furnish that information to the Union.

ORDER

The National Labor Relations Board orders that the Respondent, Pittston Coal Group, Inc., Lebanon, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide United Mine Workers of America, District 28 (the Union) with information that is relevant and necessary to the performance of its duties as the exclusive collective-bargaining representa-

document the reasons for its continued unavailability.” 281 NLRB at 466. In *New York Post Corp.*, 283 NLRB 430 fn. 2 (1987), the Board ordered the employer to provide information regarding personnel employed by a subcontractor “only to the extent it has access thereto.” In this case, the Respondent has done exactly what the employers in *United Graphics* and *New York Post* were ordered to do.

tive of employees in the following appropriate bargaining unit:

All employees engaged in the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail, not owned by the Company), repair and maintenance work normally performed at the mine site or at a central shop of the Company; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at the Company's mines and facilities; but excluding all office clerical employees, guards, and supervisors as defined in the Act.

(b) 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) Provide the Union with the names of members of the Respondent's panel employed by C&O Mining to do work of the types covered by the collective-bargaining agreement since August 26, 1996, and the dates of hire and job titles of all employees employed by C&O Mining since that date.

(b) Within 14 days after service by the Region, post at its Lebanon, Virginia facilities copies of the attached notice marked "Appendix."²⁰ 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 posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

²⁰ 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

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT fail and refuse to provide United Mine Workers of America, District 28, with information that is relevant and necessary to the performance of its duties as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

All employees engaged in the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail, not owned by the Company), repair and maintenance work normally performed at the mine site or at a central shop of the Company; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at the Company's mines and facilities; but excluding all office clerical employees, guards, and supervisors as defined in the Act.

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 provide the Union with the names of members of our panel employed by C&O Mining to do work of the types covered by the collective-bargaining agreement since August 26, 1996, and the dates of hire and job titles of all employees, employed by C&O Mining since that date.

PITTSTON COAL GROUP, INC.

Jasper Brown, Esq., for the General Counsel.
Anna M. Dailey and Lynn Rausch, Esqs. (Heenon, Althen & Roles), for the Company.

BENCH DECISION
STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a refusal to provide information case. At the close of a 2-day trial in Abington, Virginia, on August 19 and 20, 1998, I rendered a Bench Decision in favor of the General Counsel (the Government) thereby finding a violation of 29 U.S.C. § 158(a)(5) and (1). This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (Exceptions) to the National Labor Relations Board. I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Pittston Coal Group, Inc. (the Company), I found the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), when, on and after June 6, 1997, it refused to provide United Mine Workers of America, District 28 (the Union) the names, hire dates, and job titles of the employees at C&O Mining, a contractor mining operator of the Company. I concluded the Union demonstrated the relevancy of the requested "outside-the-unit" information to its representative function.

I certify the accuracy of the portion of the transcript, as corrected,¹ pages 188–201, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above, and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

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

Having found the Company unlawfully refused to provide the Union with certain requested information, I recommend it be required to furnish the Union the names, hire dates, and job titles, from August 26, 1996, until the present, of the employees at C&O Mining, a contractor mining operator of the Company. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post at its Lebanon, Virginia, facility, copies of the attached notice marked "Appendix B."²

¹ I have corrected the transcript by making physical inserts, cross-outs, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

² 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 Na-

[Recommended Order omitted from publication.]

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APPENDIX A

(Off the record.)
(A short recess ensued.)

JUDGE CATES: On the record.

This is my decision.

First, let me state that it has been a pleasure to be in Abingdon, Virginia and the fine people of Virginia have lived up to their reputation as being a very hospitable group. If you see any of the Court personnel that have provided the facility to us, please thank them.

Again, let me state that it has been a genuine pleasure to hear this case because Counsel came in fully prepared to present the case and did so. If you reflect back over the proceeding I have asked few if any questions at all. I have been called upon to make very few rulings in this case because Counsel for both sides came to the proceeding fully prepared and conducted the trial in an outstanding manner and both Counsel are to be commended for their performance here.

DECISION

The charge in this case was filed by the United Mine Workers of America District 28 on October 3, 1997. Amended on February 12, 1998 and timely served on the Company herein. Pittston Coal Group, Inc. is a Virginia corporation with an office and place of business located in Lebanon, Virginia where it is engaged in the mining and processing of bituminous coal. It has facilities in Virginia, Kentucky, and West

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Virginia.

During the twelve months preceding the issuance of the Complaint herein, which Complaint issued on February 24, 1998, the Company purchased and received at its Lebanon, Virginia facility goods and materials valued in excess of \$50,000.00 directly from points outside the Commonwealth of Virginia.

The evidence establishes, the Parties admit, and I find the Company is an Employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the National Labor Relations Act, as amended.

United Mine Workers of America District 28 is a labor organization within the meaning of Section 2(5) of the Act. The evidence establishes and I find that Joseph P. Pendergast is now, and at all times material herein has been, a supervisor of the Company within the meaning of Section 2(11) of the Act.

The following employees of the Company constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees engaged in the removal of over burden and coal waste; preparation, processing, and cleaning of coal; and transportation of coal except by water way or rail not owned by the Company; repair and

ational 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."

maintenance work normally performed at the mine site or at a central shop of the Company; and maintenance of—tiles and mine roads and work of the type customarily related to all of the above at the Company's mines and facilities; but, excluding

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all office clerical employees, guards, and supervisors as defined in the Act.

At all times material herein and continuing to this date the Union has been and is the representative for the purpose of collective bargaining of the employees that I just described in the unit and by virtue of Section 9(a) of the Act is now the exclusive representative of the employees in that group for the purpose of collective bargaining with respect to wages, hours of employment, and other terms and conditions of employment.

The Company herein in mining and processing bituminous coal not only operates mines of its own but has wholly owned subsidiaries such as Clinchfield Coal Company that performs the same services of mining and processing coal.

Also, the Company contracts with independent persons referred to as independent contract mining operators to mine and process coal for the Company. It is that latter category of relationships between this Company and other companies that forms part of the back drop for the issues herein.

C&O Mining is a contractor that has a relationship with the Company herein. I will herein after deal in somewhat more detail what that relationship constitutes as it relates to the issues herein.

The Company and the Union have a collective bargaining agreement currently in effect that went into effect on June

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21, 1994 and continues by its terms until December 31, 1998. The Union represents the employees of the Company herein in the unit that I previously described.

The collective bargaining agreement between the Company and the Union provides for, among other things, a grievance mechanism or procedure, and in early 1997 perhaps January 28th of 1997 the Union filed what it labeled as a class action grievance with the Company in which it speaks to the Company not recalling employees according to the panel.

At a meeting in May of 1997 the testimony herein through Mr. Lester indicates that the Union had information from an individual either speaking or testifying at the May 28th meeting about the hiring practices of C&O Mining and that it was that individual's belief or understanding that C&O Mining was not complying with its hiring obligation.

At that meeting the Union asked for the names, hire dates, and job titles of the employees at C&O Mining from a period I believe Mr. Lester testified starting in August 26th of 1996. This request that was made orally was thereafter reduced to writing on or about June 6, 1997.

In the written request the Union asked for three numbered paragraphs of information. The Union, Government, and Company all state, acknowledge, and concede that the items in the June 6th written request outlined in Paragraphs 1 and 3 of the request have either been provided or it has been agreed that they

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will be provided.

It is the Government's and the Union's contention that the names, hire dates, and job titles of all employees hired at the C&O mine has not been provided. The basis for which the Union makes its request is outlined in pertinent part in the Parties' collective bargaining agreement at Article II which is captioned job opportunity and benefit security (jobs).

At sub-paragraph b expanded job opportunity and further at sub-paragraph 2 thereof the collective bargaining agreement states: Subject to the provisions of Paragraphs 4 and 11 hereof after the effective date of this agreement the PCG Company shall not enter into any contract mining agreement unless the contractor agrees in writing that offers of employment for the first nineteen out of every twenty new job openings by such contractor shall first be made to the PCG Company's classified laid off employees on the PCG Company's panel if such employment is for jobs of a nature covered by this agreement and if such employees are qualified for such jobs.

A further portion of Article II reads as follows at sub-paragraph 10 thereof: The Union agrees that this section or its implementation shall in no manner operate to affect any bargaining unit determination and does not create a joint employer, single employer, alter ego, agency relationship, or successor relationship between the Employer and the contractor

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which does otherwise exist without reference to this section or its implementation.

Mr. Lester testified—Mr. Lester being the Union representative at the time—that he needed the requested information to ascertain if C&O Mining was offering the first nineteen out of twenty job offers to individuals that were on the Company's out of work panel.

When first orally requested the evidence establishes the Company responded they would look into the matter and get back with the Union and specifically with Mr. Lester.

Mr. Pendergast, the Company's representative, testified he raised the matter with a Mr. Simmons of a Company that is responsible for labor relations for the contractor C&O Mining.

Mr. Pendergast testified he was told by Mr. Simmons that the contractor, C&O Mining, was not going to provide the names because they didn't feel they needed to nor was the information relevant.

Further on Mr. Pendergast testified he was advised by Mr. Simmons that the contractor, C&O Mining, considered the information to be confidential, was private and did not need to be revealed to the Union.

Mr. Simmons testified, as the representative for labor relations for the contractor, C&O Mining, that the Company, C&O Mining, didn't want the names of their employees given out because the names of the employees were "dear to the owner's

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heart". That he only employed approximately eight employees which probably included family members and/or close acquaintances.

Mr. Simmons indicated that the principal owner of the contractor, C&O Mining, was very adamant he would not provide the names of his employees to the Union. The principal owner's name I believe was referred to as a Mr. Calloway.

During the trial and at the conclusion of the Government's case, as the record will reflect, the Company indicated it agreed that the hire dates and job titles of all employees hired at the contractor, C&O Mining, during the applicable times was relevant and producible and the Company moved that judgment be entered accordingly, and I did so.

The Company believed it had provided the job titles and hire dates of all employees hired at C&O Mining during the applicable time herein. The Company objects strenuously to providing the names of the employees at the contractor for various reasons.

That may be categorized in perhaps three categories. One, that the production of the names are not relevant. Secondly, that there is a confidentiality and privacy matter; and, thirdly, that the Company does not have access to the names and has no meaningful way to require the contractor to produce the names.

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I indicated earlier in the record when I addressed the Company's Motion with respect to that information they contended they had already provided or was willing to immediately provide certain applicable legal principles. I ask the Parties' indulgence that I restate those basic principles that I will be applying in reaching a conclusion herein.

The applicable legal principles are not in dispute in this case although one or the other of the Parties may ask that more emphasis be placed on certain cases than others the basic underlying principles all agree on.

It is well established that an employer must provide a union with requested information if there is a probability that such data is relevant and will be of use to the Union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative. *Associated General Contractors of California* 242 NLRB 891 at 893, 1997 enforced 633 Fed. 2nd 766 Ninth Circuit, 1980.

Also, *NLRB v. Acme Industrial Company* 385 U.S. 432, 1967. The Board uses a liberal discovery type standard to determine whether information is relevant or potentially relevant to require its production. *NLRB v. Truett Manufacturing Company* 351 U.S. 149, 1956.

Information about terms and conditions of employment of employees actually represented by a union is presumptively

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relevant and necessary and is required to be produced. *Ohio Power Company* 216 NLRB 987, 1975 enforced 531 Fed. 2nd 1381 Sixth Circuit, 1976.

Information necessary for processing grievances under a collective bargaining agreement including that necessary to decide whether to proceed with a grievance or arbitration must be provided as it falls within the ambit of the parties' duty to bargain. *NLRB v. Acme Industrial*. Also see *Bricker Staff Clay Products* 266 NLRB 983, 1983.

However, when a Union's request for information concerns data about employees or operations other than those represented by the union or data on even financial sales or other information there is no presumption that the information is necessary and relevant to the union's representation of employees. Rather the union is under the burden to establish the relevancy of such information. See generally *Ohemia, O-h-e-m-i-a, Inc.* 272 NLRB 1128, 1984.

But the burden on the Union in these circumstances is not great. Rather here, as elsewhere, the standard of relevancy is still a liberal discovery type standard. The Board has held as noted by Counsel just a few moments ago that erosion or diversion of bargaining unit work is a matter of obvious concern to a union in its representative role and the Board has even held that it would be expected that a union would seek information of that sort.

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Here, however, the information sought deals with job offers at an employer that the evidence herein establishes is a non-Union employer.

I don't think there is any dispute among any of the Parties and based on the Company's moving for judgment on certain portions of this case that the obligation to provide information extends to information required by the Union to process a grievance. I don't think there is any issue about that.

The Board's only function in such a 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 responsibility.

This case, when reduced to its simplest form, involves whether or not the Company is obligated to produce the names of the employees hired by the contracting company, C&O Mining.

The Company concedes and I find that it is obligated to supply the hire dates and the job titles of the employees at C&O Mining. I am persuaded based upon the Board's liberal approach to what constitutes relevant information even at matters outside the bargaining unit that the names in this case are names that need to be supplied by the Company and I direct that it do so and find that it is in violation of Section 8(a)(5) of the Act for failing to do so.

I am persuaded that Mr. Lester in his testimony met the

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bear minimum requirements of establishing the relevancy of the information sought. The request for the information came about as a result of a grievance or information provided at a grievance.

The information is needed for the Union to ascertain if the contracting company is complying with its requirement to offer nineteen out of twenty jobs, new jobs to individuals of the panel, and that those names are necessary in order to compare and see if the Company is in fact complying with its obligation.

Secondly, I reject the Company's contention of confidentiality for a number of reasons. First, if a company such as C&O Mining inextricably intertwines itself with a company that has a bargaining relationship with a union and it agrees to provide

job offer opportunities for those bargaining unit employees at the Company that it is inextricably intertwined with that Employer, in this case C&O Mining, may be deemed to have waived its right to claim confidentiality as a statutory defense to a Union's request for information particularly where as here the contracting Employer, C&O Mining, is attempting or possibly attempting simply to shield from revealing family members or close acquaintances employed at its Company.

I am persuaded the confidentiality claim of the Company does not in fact rise to the level of a statutory

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defense and, therefore, I need not apply the testimony related to the Union's refusal to negotiate in good faith alternative means of arriving at the information it seeks while at the same time protecting the privacy or confidentiality of the names that it seeks.

But even if I were required to apply the balancing principles outlined in Detroit Addison I would find that the need for the Union to police its contract with the Company meaning Pittston would far out weigh any sensitivity the employees might have of C&O Mining to having their names revealed.

Also, I find of no benefit to the Company its belated offer at the trial herein to try to create an alternative means of resolving the confidentiality issue specifically related to its offer to pay the costs of having the names submitted to a third independent party.

The Company's contention that it cannot be required to produce what it does not have and that it does not have access to the information requested is in my opinion at best a spurious defense. It appears that when the Company herein sincerely and forcibly demands of its contractors and specifically C&O Mining in this case to do its bidding C&O Mining dutifully falls in line.

The Company herein has a pretty powerful weapon to compel compliance from its contractor C&O Mining in that it is free

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to terminate the contract it has with C&O Mining if C&O Mining fails to do its bidding in this respect.

The Company makes the argument that supposing we do ask them to produce in good faith and they decline and we sever the contract and therefore the information is never produced and

cannot be produced. Therefore, that should be found a valid defense.

I'm not persuaded at all by that argument because if the Company does carry out its threat not to provide the information to the Company herein and the relationship between this Company and C&O Mining is severed then at that point the Union no longer needs to police the agreement of that particular Employer so they don't need the information at that point so I find that argument to have no persuasive bearing.

In sum I find the Union properly requested relevant information in its request of June 6, 1997. I find the Company's refusal to provide the names, hire dates, and job titles of all employees hired at C&O Mining since August of 1996 violates Section 8(a)(5) of the Act and continues to do so until such time as it complies.

I order that it produce such information forthwith. That it post a notice that I shall prepare and attach to the certification of my decision.

It is my understanding that in approximately ten days the

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Court Reporter will provide me a copy of the transcript of this Proceeding and I soon thereafter will after making corrections on the transcript certify those pages of the transcript that speaks to my decision to the Board and it is my understanding that it is from that time that the appeals period for taking exceptions commences to run.

However, I invite you to take note of the Board's Rules and Regulations rather than relying on my understanding of it because the Board will go by their rules rather than my assessment of their rules.

In making corrections on the transcript I do literally that instead of retyping the transcript. If I line something out and write above I leave it so that any party or person can see what was originally there and what I corrected it to be and I do that intentionally so that the original record and as corrected is available to anyone for reviewing at the time.

With that again let me say that it has been a pleasure being here and hearing the case and the record is closed. (Off the record.)

(Whereupon, the hearing in the above entitled matter was closed at 10:40 a.m.)