Massey Energy Company and its subsidiary, Spartan Mining Company d/b/a Mammoth Coal Company *and* United Mine Workers of America. Case 09–CA–042057

September 28, 2012

DECISION AND ORDER[1]

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

The principal issue in this case is whether the Respondents, Massey Energy Company (Massey) and its wholly-owned subsidiary Spartan Mining Company d/b/a Mammoth Coal Company (Mammoth), unlawfully refused to hire union-represented employees of the predecessor employer, refused to recognize and bargain with the Union as the representative of employees in the bargaining unit, and unilaterally changed terms and conditions of employment for those employees. For the reasons discussed below, we agree with the judge that the Respondents committed each of the alleged violations.[2]

Background

For many years, Horizon Natural Resources Company (Horizon) owned and operated the Cannelton/Dunn coal-mining operation in Kanawha County, West Virginia. The Union had represented Horizon's mining employees since at least 1969.

In 2004,[3] Horizon filed for bankruptcy. In August, Massey, through its operating subsidiary A. T. Massey Company, acquired certain of Horizon's assets, including the Cannelton/Dunn operations.[4] Massey created a new subsidiary, Mammoth, to operate the mine; mine operations began in late September.

Before assuming control, Mammoth began offering either continued employment or employment interviews to every one of the *unrepresented* employees, supervisors and nonsupervisors alike, who had worked at the Cannelton/Dunn facility. Consequently, many of those individuals continued their employment without a break after Mammoth began to operate the facility.

Mammoth's treatment of Horizon's former union-represented employees was markedly different. Mammoth began hiring to fill former bargaining unit positions on December 3.[5] Previously, by letter dated November 18, the Union had informed Mammoth that 250 of the mine employees were willing to return to work. Yet Mammoth did not offer all those employees employment or employment interviews, as it had done with the former nonunit, nonunion employees. To the contrary, as the judge found, "the Respondents did not even provide the unit employees with information about how to go about seeking employment at the facility where many had worked for decades." Indeed, it appears that Mammoth's only effort (if it can be called that) to recruit the former Horizon miners consisted of leaving application forms at the facility's guard station—without generally informing the former unit employees of that fact. Meanwhile, Massey ran newspaper and billboard advertisements in the area seeking experienced underground miners for the Mammoth operation. As the judge found, Massey "even had airplanes pull banners with help-wanted advertisements above Myrtle Beach, South Carolina," which is a popular vacation spot for West Virginia miners. Mam-

[1] This Decision and Order supersedes the Board's previous decision, *Mammoth Coal Co.*, 354 NLRB 687 (2009), which was issued by a two-member Board that lacked a legal quorum. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

[2] On November 21, 2007, Administrative Law Judge Paul Bogas issued the attached decision. Massey and Mammoth filed separate exceptions and supporting briefs; the General Counsel and the Charging Party Union filed answering briefs; and Mammoth filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief; the Respondents filed answering briefs; and the General Counsel filed a reply 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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we shall modify the judge's remedy by requiring that backpay and/or other monetary awards shall be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. Finally, at the General Counsel's request, we have corrected the judge's inadvertent error in the description of the collective-bargaining unit contained in his recommended Order and notice.

The Union has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of Mammoth's exceptions allege or imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that those contentions are without merit.

[3] All dates refer to 2004, unless otherwise indicated.

[4] Massey is a holding company. It owns, either directly or indirectly, numerous subsidiary corporations that are involved in the mining, processing, and sale of coal. The relationships among and between Massey and its subsidiaries are discussed in detail below.

[5] On taking over the Cannelton/Dunn operation, Mammoth suspended mining operations and did not begin hiring for former bargaining unit positions for more than 2 months. We assume, for purposes of this decision, that those actions were legitimate business decisions.

moth also actively solicited miners at other Massey-owned mines to transfer to Mammoth.[6]

Undeterred by the Respondents' studied lack of interest in them, many former Horizon unit employees obtained application forms from the union hall and applied for employment with Mammoth. Mammoth, however, ultimately hired only 19 of those employees (none of whom had been union officers or union committee members at the time ownership was transferred) out of a total of 219 persons hired to perform bargaining unit work. During the application process, Mammoth officials had monitored the status of the former Horizon unit employees using a spreadsheet showing the approximate "union time" of each unit employee.

Instead of employing experienced former Horizon miners, Mammoth hired numerous inexperienced trainees. It also hired many experienced miners who transferred from other Massey subsidiaries, even though some of those subsidiaries were having difficulty finding a sufficient number of skilled miners for their own operations. Having hired only a small fraction of its production work force from among Horizon's former unit employees, Mammoth declined to recognize the Union and implemented new terms and conditions of employment, including lower wage rates than Horizon had paid.

The complaint alleges that Mammoth and Massey violated Section 8(a)(3) and (1) of the Act by refusing to hire the union-represented former mine employees in order to avoid incurring a statutory bargaining obligation, and violated Section 8(a)(5) and (1) by refusing to recognize the Union and by unilaterally changing the employees' terms and conditions of employment. The complaint alleges that "[a]t all material times, Respondent Massey and Respondent Mammoth have been agents of each other, acting for and on behalf of each other," and therefore that both Massey and Mammoth are liable for the alleged misconduct. In his posthearing brief to the administrative law judge, the General Counsel argued, among other points, that Massey and Mammoth are a "single employer" under the Act and Board precedent and that Massey should be found liable on that basis.

The judge found that the Respondents had violated the Act as alleged, but he did not find Massey liable for the violations under an agency theory. Instead, the judge found that "the record shows that the Massey corporate family, including Mammoth, is highly interrelated and that its labor and human resources policy is controlled in significant respects by officials of Respondent Massey." The judge also found that "the involvement of Massey officials in the personnel functions of its subsidiary Mammoth, and indeed its direct participation and key causal role in the actions alleged to be unlawful in this proceeding, satisfy the Board's standard for holding a parent company liable for the unfair labor practices of a subsidiary." Accordingly, the judge concluded that "Massey's involvement in, and potential liability for, the alleged unfair labor practices has been fully litigated."

In his conclusions of law, the judge found Massey liable because it "directly participated in, and played a key causal role in, the unfair labor practices found in this decision." Although the judge did not explicitly address whether the two Respondents constitute a single employer, we find, for the reasons set forth below, that the judge's findings support a conclusion that Massey is liable based on a single employer theory.

Discussion

To begin, we agree with the judge that Mammoth violated Section 8(a)(3) by refusing to hire the discriminatees in order to avoid incurring a statutory bargaining obligation. In this regard, we reject the Respondents' contention that the General Counsel was required to establish, pursuant to *Toering Electric*, 351 NLRB 225 (2007), that the discriminatees were genuine applicants for positions with Mammoth. We also agree with the judge that Mammoth violated Section 8(a)(5) by refusing to recognize the Union and by unilaterally changing the terms and conditions of employment of its mining employees.

In addition, we agree with the judge that Massey is liable for the unfair labor practices at issue because it was a direct participant in the unlawful conduct. Finally, we find that Massey and Mammoth constitute a single employer and that Massey also is liable on that basis for the violations found here.

I. MAMMOTH'S UNFAIR LABOR PRACTICES

A. Refusal to Hire Unit Members

1. The refusal to hire was unlawful

We adopt the judge's conclusion that Mammoth unlawfully discriminated on the basis of union status when it refused to hire former Horizon employees based on their membership in the predecessor's bargaining unit and their prounion sentiments.[7] Our finding is based on

[6] Mammoth says that it solicited transfers from other Massey mines because "the first step was to get workers to apply."

[7] Mammoth has excepted to the judge's finding that it unlawfully refused to hire applicant Lawson Shaffer, an employee on injured status at the time it took over the operation and who later applied for and received Social Security disability insurance benefits. In adopting the judge's conclusion that the Respondent discriminated against Shaffer, we do not rely on the judge's finding that Shaffer would not have quit his job upon qualifying for disability benefits from the Social Security Administration. We will leave to the compliance stage of the proceed-

Mammoth's own conduct, which we find sufficient to impose liability on Mammoth, independent of any consideration of the actions of Massey.

The statements, actions, and testimony of Mammoth's managers and supervisors leave little doubt that Mammoth's refusal to hire the discriminatees was unlawfully motivated. Indeed, the evidence shows that the Mammoth managers in charge of hiring were acutely aware of the need to keep track of how many members of the Horizon bargaining unit they hired, so as to ensure that Mammoth did not incur a bargaining obligation. During the staffing process, Mammoth's human resource manager, Kevin Doss, used a spreadsheet supplied by another Massey subsidiary indicating the approximate "union time" of each unit employee, information that was—or should have been—completely irrelevant to the hiring process. When employee Terry Abbott suggested to Mammoth Supervisor Keith Stevens that the Company could alleviate its shortage of experienced miners by hiring more former Horizon employees, Stevens responded, "[Massey president, chairman, and CEO] Don Blankenship's a smart man, he's not going to let the numbers go against him."[8] Stevens' statement establishes that Mammoth's management team was acutely aware of the imperative not to hire a majority of its miners from the ranks of the former Horizon miners.

Although the Board most frequently must rely on circumstantial and indirect evidence to establish motive in unlawful refusal-to-hire cases, that is not the case here; Mammoth's managers testified that their antiunion bias tainted their decisions not to hire certain discriminatees. Mammoth's prep plant superintendent, John Adamson, testified that one of the main factors that made him unwilling to hire Local Union President William Willis was Willis' statement that he intended to organize on behalf of the Union if hired. Similarly, Mammoth's president, Dave Hughart, testified that he considered Dwight Siemiaczko to be a poor candidate for employment in part because he had said that, if hired, he would "make every effort to organize."[9]

In addition to this direct evidence of unlawful motivation, the numerous pretextual reasons proffered by Mammoth in defense of its hiring decisions provide further convincing evidence of its unlawful motives.[10] As the judge discussed at length in his decision, Mammoth's asserted reasons for not hiring the discriminatees, while ostensibly nondiscriminatory, in practice proved to be anything but. Indeed, Mammoth's hiring criteria can be best understood as mechanisms to screen out miners with an established connection to the Union, such as the Horizon miners.

Mammoth argues generally that its hiring decisions were based on a desire to attract the most qualified possible work force. Despite having a readily available pool of experienced (but union-represented) miners, however, Mammoth chose instead to employ 19 inexperienced trainees.[11] Although Mammoth attempts to defend its hiring of trainees based on an alleged policy of preferring to hire inexperienced individuals whom it can train to follow its own practices and become productive miners in the long run, there is no documentary evidence of any such policy. Moreover, Mammoth Supervisor Donnie Rutherford testified that once the operation was "staffed up," Mammoth stopped using trainees since there was no longer a need to hire inexperienced employees. It follows that, as the judge concluded, "the trainee miners were not being hired at Mammoth because of a desire to provide training, but rather were being hired in order to fill positions until the Respondents could hire enough experienced miners." Such a stopgap measure might well have been unnecessary had Mammoth been willing

ing the issue of whether to toll the backpay period because Shaffer's physical condition had rendered him unavailable for work when he qualified for disability benefits. See, e.g., *Aero Ambulance Service*, 349 NLRB 1314, 1314–1316 (2007); *Performance Friction Corp*., 335 NLRB 1117, 1119–1120 (2001).

The judge inadvertently listed discriminatee Dewey Dorsey with several other applicants who declined a job offer from Mammoth or chose not to proceed further in the hiring process. In fact, because the judge credited Dorsey's testimony that he did not turn down a job offer, Dorsey does not belong on the list.

[8] The judge found that Stevens, as a former Cannelton/Dunn supervisor, would have participated in the hiring process at Mammoth by making recommendations as to whether to hire former bargaining unit employees of Horizon. Massey argues that the judge's finding was unsupported speculation. Mammoth, which is in a better position than Massey to know whether Stevens made such recommendations (as some former Horizon supervisors did), makes no such argument. It contends only that the judge erred in crediting Abbott's testimony that Stevens made the statement over Stevens' denial and that, even if made, Stevens' statement was inadmissible hearsay.

As stated above, we have found no reason to overturn the judge's credibility determinations. Contrary to Mammoth's contention, Stevens' statement is not inadmissible hearsay because we are not considering it for the truth of the matter asserted. Cf. Fed.R.Evid. 801(c). Rather, we rely on the statement as an indication that Mammoth's supervisors believed, rightly or wrongly, that Blankenship did not want Mammoth to have to recognize the Union, and that Mammoth would tailor its hiring practices accordingly by discriminating, if necessary, against former Horizon employees. Stevens' belief is probative of Mammoth's intent whether or not he participated in the hiring process.

[9] The judge inadvertently ascribed this testimony to Kevin Doss, Mammoth's human resource manager. We correct the error.

[10] It is well established that pretextual reasons for an employer's personnel actions can constitute evidence of discriminatory motive. See, e.g., *Rood Trucking Co.*, 342 NLRB 895, 897 (2004).

[11] Subsequently, the mine failed to meet its production goals, and productivity per employee dropped below the levels achieved before the mine changed hands.

to hire the experienced former Horizon miners, a sufficient number of whom were eager to get their old jobs back.

Mammoth also contends that its failure to hire former Horizon unit employees was due in part to its adherence to a corporatewide Massey policy of giving preference in hiring to employees of other Massey subsidiaries who wish to work closer to their homes. As the judge found, however,

> there is a complete lack of documentary evidence to support the claims of the Respondents' officials that such a policy existed. No written policy was produced, and the Respondents cite to no document referencing the existence of such a policy, describing how it works, or recording the use of the policy to prefer another applicant over a specific alleged discriminatee.

In addition, there was contradictory testimony concerning how this alleged policy worked. Indeed, Mammoth's mine superintendent, Ray Hall, testified that employees from other Massey mines received no special consideration in the hiring process. In any event, there is no evidence that any of the transferees from other Massey mines actually reduced their commutes by working at Mammoth. Moreover, as the judge observed, "Massey and its subsidiaries could not find enough experienced miners and [] many of the employees who the Respondents transferred to Mammoth came from Massey's 'route 3' locations where the shortage of miners was particularly acute." That Mammoth would draw experienced employees away from other Massey companies in these circumstances, when there was an abundant supply of experienced former Horizon miners actively seeking work at the Mammoth facility, is additional evidence that Mammoth affirmatively discriminated against former bargaining unit members.

Finally, Mammoth advances a variety of reasons for rejecting many of the individual discriminatees, such as purportedly failing to file (or filing deficient) applications, applying for nonexistent positions, and turning down job offers. As the judge appropriately found, none of these reasons withstands scrutiny, as they either lack evidentiary support or are actually contradicted by Mammoth's own records. A case in point is Mammoth's contention that it rejected 16 of the discriminatees because they did not meet the Company's requirement of having a high school education or General Equivalency Diploma (GED). Yet again, there is no documentary evidence of this policy; in fact, the only evidence that it existed at all was the testimony of a manager who later admitted that some individuals were hired to work at Mammoth who had neither a high school diploma nor a GED. Indeed, applications of 59 non-Horizon applicants who were hired indicate that 13, or 22 percent, lacked either credential. Moreover, uncontradicted evidence indicates that three of the discriminatees who were purportedly rejected for not meeting this asserted education requirement actually did have either a high school education or a GED.

For the foregoing reasons, we find that the statements, actions, and testimony of Mammoth's officials, as well as Mammoth's pretextual reasons for its hiring decisions, establish that Mammoth failed and refused to hire the discriminatees in order to avoid having to recognize the Union as their bargaining representative.[12] And because its asserted nondiscriminatory reasons for its actions have been found to be pretextual, Mammoth has failed to prove that it would have taken those actions even in the absence of the discriminatees' protected conduct.[13] Accordingly, we affirm the judge's conclusion that Mammoth violated Section 8(a)(3) and (5) as alleged.

2. *Toering Electric* does not require a different result

We reject the Respondents' contention that the Board's decision in *Toering Electric*, 351 NLRB 225, 233 (2007), which the judge declined to apply, dictates a different result. *Toering* does not apply in a successorship case. Furthermore, even if *Toering* did apply, we would find that the General Counsel met the evidentiary burdens set forth therein.[14]

a. Toering does not apply in the successorship context

Toering did not arise in the context of a successor's discriminatory refusal to hire the employees of its predecessor. It was a "salting" case, i.e., one in which a union sends a member or members to obtain employment with a nonunion employer and then to organize that employer's employees. Id. at 225, 225 fn. 3. The *Toering* decision was based on a concern that, in some instances, union "salts" may submit applications, not in an actual attempt to obtain employment, but "solely to create a basis for unfair labor practice charges and thereby to inflict substantial litigation costs on the targeted employer." Id.

[12] In this regard, it is irrelevant whether the motivation for Mammoth's unlawful conduct arose from independent antiunion animus on Mammoth's part or from a desire to effectuate Massey's perceived desire that Mammoth operate on a nonunion basis. Either way, the General Counsel has carried his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See generally *Black Magic Resources*, 312 NLRB 667, 668 (1993).

[13] See *Austal USA, LLC*, 356 NLRB 363, 364 (2010) (if proffered reason for discharge is pretextual, employer necessarily fails to establish *Wright Line* defense); accord: *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

[14] Members Block and Griffin recognize that *Toering* represents existing Board law. They find no reason at this time to determine whether it was correctly decided.

at 225. To address that concern, the Board modified the standard set forth in *FES*[15] for proving unlawful discrimination in hiring by requiring the General Counsel, in order to show that an applicant for employment was an employee protected by Section 2(3) of the Act, to establish that the applicant was genuinely interested in seeking to establish an employment relationship with the employer. Id. at 225, 233.

Because this is not a salting case governed by *FES*, we hold that the Board's analysis in *Toering* does not apply here. Instead, we are guided by *Planned Building Services*, 347 NLRB 670 (2006), decided before *Toering*, where the Board held that elements of the General Counsel's initial burden of proof under *FES* do not apply where (as in this case) a successor employer has discriminated in hiring against its predecessor's employees in order to avoid a bargaining obligation. Id. at 673–674. The Board found that such a case is "analogous to a discriminatory discharge situation, *where FES has no application*." Id. at 673 (emphasis added). As pertinent here, the Board reasoned that it serves no purpose in a successorship case, where an incumbent work force has been performing the jobs in question, to require the General Counsel to prove that the existing employees have relevant training and experience.

For similar reasons, we find it inappropriate to impose *Toering's* evidentiary requirements in successorship cases. Just as it serves no purpose to require proof that incumbent employees have the training and experience to do the jobs they are already doing, so too does it serve no purpose to require proof that incumbent employees who are simply trying to keep their jobs with the successor employer are genuinely interested in doing so. To the contrary, it is reasonable to presume that these individuals, many of whom have been doing those jobs for years, are genuinely interested in keeping them.[16]

Our reasoning in this regard is consistent with Board precedent. As noted above, the Board in *Planned Building Services* reasoned that a discriminatory refusal to hire in a successorship context is analogous to a discriminatory discharge. 347 NLRB at 673. In a discriminatory discharge case, the discriminatees' interest in continued employment is assumed. *R. Sabee Co., LLC*, 351 NLRB 1350, 1351 fn. 7 (2007). Accordingly, we shall not require, as a condition for finding 2(3) employee status in a successorship case, an affirmative showing that former employees of the predecessor are genuinely interested in employment with the successor. Instead, we adhere to the Board's central holding in *Planned Building Services*: that, to establish a discriminatory refusal to hire in the successorship context the General Counsel is required *only* " . . . to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus." 347 NLRB at 673.[17] The judge found, and we agree, that the General Counsel made that showing in this case.

b. The discriminatees were genuine applicants

Even assuming that *Toering* did apply to cases in which a successor employer has attempted to avoid a bargaining obligation by refusing to hire the employees of its predecessor, we would find that the General Counsel has shown that the discriminatees here were genuine applicants protected by the Act.

Under *Toering*, the General Counsel initially must show that the discriminatees applied for employment. The General Counsel made that showing with room to spare. The union president personally submitted 53 applications on behalf of unit members, and many individual unit members applied directly to Mammoth through Massey job fairs or by handing in an application to Mammoth supervisors or other Mammoth employees. In any event, as the judge found, Mammoth routinely hired employees who failed to submit formal applications.[18]

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[15] 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). Under *FES*, the General Counsel must prove (1) that the employer in question was either hiring or had concrete plans to hire, at the time of the alleged unlawful conduct, and (2) (with exceptions not relevant here) that the applicant(s) had experience or training relevant to the announced or generally known requirements of the positions for hire. 331 NLRB at 12.

[16] Cf. *Smucker Co.*, 341 NLRB 35, 35 (2004) (where applicant had sought employment with other contractors on the same project as the respondent employer, and actually worked for several of those contractors, the Board found that the applicant "truly wanted to work for the [r]espondent[.]"), enfd. 130 Fed. Appx. 596 (3d Cir. 2005).

[17] At one point in *Toering*, the Board stated that the General Counsel has the burden to show that an alleged discriminatee was genuinely interested in establishing an employment relationship with the employer "in *all* hiring discrimination cases." 351 NLRB at 233 (emphasis added). This was obviously an unintentional overstatement, in light of the Board's express holding the year before in *Planned Building Services* that the *FES* framework does *not* apply in successorship refusal to hire cases. Neither the Board majority nor the dissent in *Toering* even mentioned *Planned Building Services*, and the majority certainly said nothing that would otherwise cast doubt on that case's continued viability. Moreover, *Toering* repeatedly states that the "genuine applicant" requirement is part of an *FES* analysis. See, e.g., id. at 225 ("we address [the issue of applicants who have no real interest in employment] *under the standard adopted by the Board in FES* for determining *whether there has been a discriminatory refusal to hire* or consider for hire" and "we impose on the General Counsel the burden of proving *under FES* that an alleged discriminatee [is a genuine applicant]"); id. at 234 ("[P]roof of an applicant's genuine job interest is an element of the General Counsel's prima facie case *under FES*.") (emphasis added in each instance).

[18] The judge noted that the Respondent recruited, interviewed, and hired many of the nonunit employees of its predecessor without requiring them to submit formal applications.

We also find that Mammoth has not identified any evidence that might call into question any of the discriminatees' actual interest in employment. The former Horizon employees were attempting to retain the jobs they had been performing at the same location where Mammoth planned to resume mining. Union officials as well as individual employees repeatedly informed the Respondent that the predecessor work force was ready, able, and willing to fill any and all available mining positions.

Contrary to Mammoth's contention, picketing to protest Massey's takeover of the Cannelton/Dunn operation did not indicate a lack of interest in employment; in fact, as the judge found, the pickets encouraged union members to apply for work with Mammoth.[19]

Mammoth's contention that the submission of applications *in bulk* indicates a lack of genuine interest in employment also fails. It appears that the Union resorted to batched applications because of the obstacles to application imposed by Mammoth and the lack of success encountered by individual applicants. In any case, the Board specifically held in *Toering* that "[t]he fact that applications may be submitted in a batch is not, in and of itself, sufficient to destroy genuine applicant status, provided that the submitter of the batched applications has the requisite authority from the individual applicants." 351 NLRB at 233, 233 fn. 51. That was the situation here: the individual applicants filled out the applications themselves, signed them, and gave them to the Union to convey to Mammoth. Thus, even if the Union's act of submitting the applications could be characterized as "applying on their behalf," the applicants clearly authorized the Union to do so by giving it their completed and signed applications. Accordingly, even if *Toering* were to apply in this case, we would find that the General Counsel has proved that the individual discriminatees qualified as genuine applicants entitled to the Act's protection.

B. Unlawful Refusal to Recognize and Bargain with the Union and Unilateral Changes

We also agree with the judge that Mammoth is the statutory successor to Horizon at its Cannelton/Dunn operation because: (1) Mammoth conducted essentially the same business at the same location as Horizon, and (2) the majority of the newly constituted bargaining unit employees would have consisted of former employees of the predecessor, absent Mammoth's unlawful discrimination.[20] See *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB,* 640 F.2d 1094 (9th Cir. 1981). Consequently, we agree that Mammoth was obligated to recognize and bargain with the Union as the unit employees' exclusive bargaining representative. See *Love's Barbeque*, 245 NLRB at 82; accord: *NLRB v. Burns Security Services*, 406 U.S. 272, 280–281 (1972).

We also adopt the judge's finding that Mammoth's discriminatory refusal to hire unit employees, and its announcement to applicants that its operation would be nonunion, disqualified it from setting initial terms and conditions of employment.[21] See *Advanced Stretchforming International*, 323 NLRB 529, 530–531 (1997) (statement to prospective employees that operation would be nonunion precludes successor from unilaterally setting initial employment terms), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001); *Love's Barbeque*, 245 NLRB at 82 (discriminatory refusal to hire unit majority of predecessor's employees precludes employer from unilaterally setting initial employment terms). Accordingly, we adopt the judge's conclusion that Mammoth violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union

[19] Even assuming, as Mammoth asserts, that alleged threats to employees who crossed the picket line were made, because the threats were not linked to any individual picketer they would not disqualify any of the applicants. See *Beaird Industries*, 311 NLRB 768, 769 (1993) (picket-line misconduct does not disqualify individual strikers from rehire unless they are linked to specific misconduct).

[20] In finding that Mammoth conducted essentially the same business as Horizon had at the Cannelton/Dunn operation, the judge referred to Mammoth's posttakeover relocation of equipment and the use of highway trucks to move coal as unilateral changes made without regard to its bargaining obligation. We need not address whether these unilateral changes were subject to mandatory bargaining because we agree with the judge's central finding that these and other changes did not alter the essential nature of the business at the Cannelton/Dunn operation: the mining and processing of coal.

[21] The judge correctly rejected Mammoth's contention that requiring it to bargain with the Union over the employees' initial terms and conditions of employment would negate the bankruptcy court's order setting aside the collective-bargaining agreement. In agreeing with the judge, we do not rely on his statement that the Respondents would have been obligated to honor the existing terms and conditions of employment for the life of the collective-bargaining agreement if the bankruptcy court had not rejected the successorship provision in the agreement.

A successor that acts lawfully is not legally obligated to accept a predecessor's collective-bargaining agreement, but rather is only required to bargain with the majority representative of its employees. *Burns*, 406 U.S. at 284. Indeed, unless the "perfectly clear" exception applies, a successor may set initial employment terms without bargaining. Id. at 294–295.

Here, however, Mammoth's own postsale conduct—its continuation of Horizon's business, its discriminatory refusal to hire the predecessor's employees, and its announcement to prospective employees that Mammoth would be nonunion—triggered an obligation to bargain over the employees' initial terms and conditions of employment. See *Advanced Stretchforming International*, 323 NLRB 529, 530–531 (1997), enfd. in relevant part 233 F.2d 1176 (9th Cir. 2000); *Love's Barbeque*, supra.

and by unilaterally imposing new terms and conditions of employment on the bargaining unit.

II. MASSEY'S LIABILITY

We turn now to the question of Massey's liability for the unfair labor practices alleged in this case. As stated above, the General Counsel's complaint alleges that Massey and Mammoth are liable as agents of each other. The judge found Massey liable, but under a "direct participation" theory rather than an agency theory. The Board has solicited the parties' views as to whether it can and should find Massey liable under a single employer theory. For the reasons discussed below, we find that Massey is liable both because it participated directly in the unlawful conduct and because it is a single employer with Mammoth.

A. Direct Participation

We agree with the judge's finding that Massey is liable, as a direct participant in the unlawful conduct, for the violations found here.[22] Initially,we find that Massey is liable, along with Mammoth, for the unlawful failure to hire the discriminatees. When one employer prevails on another with which it has business dealings to discriminate against employees because of their union activities, both employers violate Section 8(a)(3).[23] That is what happened here. Mammoth's preparation plant superintendent, Jon Adamson, who was heavily involved in selecting Mammoth employees, testified that Massey made it known that Mammoth would be operated "union free."[24] Thus, Massey made clear to the managers and supervisors making the hiring decisions for Mammoth that Massey would not accept a union in that operation. There is no direct evidence that Massey officials explicitly instructed Mammoth personnel to discriminate in hiring against former Horizon employees, but in our view that is irrelevant. The Board may draw reasonable inferences from evidence in the record,[25] and we do so here. Massey is the ultimate owner of the entire Massey enterprise, including Mammoth, and, as discussed below, it played an active role in directing its subsidiaries' affairs. In these circumstances, we infer that those in charge of hiring at Mammoth considered Massey's wish ("Don Blankenship's a smart man, he's not going to let the numbers go against him") to be their command. We therefore find that Massey violated Section 8(a)(3) by, in effect, directing Mammoth officials not to hire the discriminatees in order to avoid incurring a statutory bargaining obligation.[26]

There is no equivalent record evidence that Massey also directed Mammoth not to recognize the Union. However, the evident overriding purpose of the Respondents' conduct with regard to staffing the Mammoth operation was to avoid incurring a bargaining obligation. Thus, Mammoth's unlawful refusal to recognize was the direct and intended result of Massey's direction not to hire the discriminatees. Accordingly, we find that Massey directly participated in Mammoth's refusal to recognize the Union, in violation of Section 8(a)(5).

Finally, as the judge found, Massey officials set the wages and benefits of Mammoth employees. Accordingly, Massey was directly responsible for unilaterally changing the unit employees' initial terms and conditions of employment, in violation of Section 8(a)(5). In this regard, we stress that we are not finding Massey derivatively liable for this unlawful conduct; rather, we find that Massey is liable as the party that actually committed the violation.

B. Single Employer

The final major issue in this case is whether Massey and Mammoth constitute a single employer. For the reasons discussed below, we find that they do and, therefore, that Massey is liable for Mammoth's unlawful conduct on that basis.

Two or more ostensibly separate entities may be found to constitute a single employer where they constitute a single-integrated enterprise. In determining whether such a relationship exists, the Board and courts consider four factors: common ownership, common management,

[22] Massey argues that the judge erred in finding that it violated the Act under a direct participation theory, asserting that the theory was not alleged in the complaint and was not fully and fairly litigated. But as the judge remarked in fn. 9 of his decision, Massey has not cited any additional evidence that it would have produced if a direct participation theory had been alleged, nor does it claim that it would have litigated the case differently in any other respect. In this regard, Massey contends only that it did not participate directly, or play a "key causal role," in the unfair labor practices found here (which contention we reject for the reasons discussed in text above). Accordingly, we agree with the judge that Massey's liability under a direct participation theory has been fully and fairly litigated.

[23] See, e.g., *Black Magic Resources*, 312 NLRB 667, 668 (1993) (citing *Dews Construction Corp.*, 231 NLRB 182, 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978)).

[24] Katherine Kenny, Massey's director of investor relations, told a newspaper reporter in October 2004 that "it was Massey's policy to maintain a nonunion operation" at Mammoth. The record does not reflect whether this statement was communicated to Mammoth hiring personnel.

[25] See, e.g., *Hunter Douglas, Inc. v. NLRB,* 804 F.2d 808, 813 (3d Cir. 1986).

[26] In reaching this conclusion, we do not rely on statements by Massey or by Blankenship generally indicating a dislike for unions or a preference for operating union-free. We rely solely on testimony that Massey conveyed to Mammoth what amounted to a marching order to do what was necessary to operate union-free.

interrelated operations, and centralized control of labor relations.[27]

Although the complaint does not specifically allege that Mammoth and Massey were a single employer, the General Counsel did allege a theory of Massey's broad, encompassing liability for Mammoth's conduct, which he described as the parties acting as agents of each other regarding all relevant conduct. Accordingly, considerable evidence was introduced at the hearing concerning the relationships between and among Massey, Mammoth, and other Massey subsidiaries. Moreover, the General Counsel argued a single-employer theory in his posthearing brief to the judge.

On March 11, 2011, in light of the state of the record and the broad but ambiguous nature of the General Counsel's theory of the case, the Board invited the parties to file supplemental briefs addressing the following questions:

> (1) Given the procedural circumstances of this case, does the Board have the authority to consider whether Massey and Mammoth constitute a single employer under existing Board law?
>
> (2) If so, should the Board exercise its authority?
>
> (3) If the Board can and should consider the single-employer theory of liability, does the existing record in fact establish that Massey and Mammoth constitute a single employer?

All parties filed supplemental briefs, and the Acting General Counsel and the Respondents filed answering briefs. The Acting General Counsel and the Union contend that the Respondents constitute a single employer and that there is no procedural impediment to the Board's making such a finding. The Respondents assert that the Board's consideration of a single employer theory would deprive Massey of due process and that, in any event, the record would not support a finding that Massey and Mammoth are a single employer. We agree with the Acting General Counsel and the Union.

1. The single-employer issue was fully and fairly litigated

The record in this case is replete with evidence supporting a finding that Massey and Mammoth are a single employer, such as Massey's direct or indirect ownership of its subsidiaries, including Mammoth; the common management and interrelated operations of Massey and its subsidiaries; and Massey's control of its subsidiaries' labor relations. The Respondents do not contend that any of that evidence was inappropriately admitted into the record.[28]

The Respondents argue, however, that the record on the single-employer issue is incomplete because Massey did not know that it would have to defend against a single-employer contention and thus did not present such a defense at the hearing. They contend that it would be unfair to Massey to decide the case on an unalleged theory under these circumstances. Our dissenting colleague takes the same view.

We are not persuaded. In contrast with the cases cited in the dissent and in the Respondents' briefs, we have not simply reviewed the record made at the hearing and applied the single-employer doctrine. Instead, we expressly asked the parties to address whether it was appropriate for the Board to decide this case on a single-employer theory. Clearly implicit in that request was an opportunity for the Respondents to identify any relevant evidence, not already in the record, that might be introduced, or any cognizable defense, not already presented, that might be raised, were the Board to proceed under such a theory. Had either Respondent done so, the Board could have ordered that the record be reopened to receive and consider the proffered evidence and/or defenses.[29] Yet neither Respondent made such a proffer, or asked that the

[27] *Radio Local 1264 IBEW v. Broadcast Service of Mobile,* 380 U.S. 255, 256 (1965) (per curiam). None of the four factors is controlling, and not all factors need be present to support a single-employer finding. Rather, single-employer status depends on all the circumstances and is characterized by the absence of an arm's-length relationship between unintegrated companies. *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1181–1182 (2006) (citations omitted).

[28] The Respondents and the dissent stress the General Counsel's failure to allege a single-employer relationship despite the existence of a memorandum, issued by the General Counsel's Division of Advice in 1985, that concluded that A.T. Massey Coal Co. and its operating subsidiaries constituted a single employer. *A.T. Massey Coal Co.,* , Cases 09–CA–021448, et al. The implicit suggestion seems to be that the General Counsel must have thought that the relationships between and among the various Massey entities had changed so significantly in the intervening years that a single-employer theory was no longer tenable. It is unnecessary for us to enter that thicket, because our findings on the merits of the single-employer issue are based on the record made at the hearing in this case, not on the facts or conclusions contained in the memorandum. In any event, Massey Energy was not the owner of A.T. Massey and its subsidiaries in 1985, and the Division of Advice did not consider whether the then-owner was a single employer with any of the Massey subsidiaries. Thus, the memorandum would be of only limited relevance in this proceeding even if the facts as set forth were unchanged since 1985.

[29] Cf. *Roundy's Inc.*, 356 NLRB 126 (2010), enfd. 674 F.3d 638 (7th Cir. 2012), in which the General Counsel contended for the first time in his posthearing brief that the respondent employer had failed to demonstrate an exclusionary property interest in the premises at which the charging union attempted to engage in protected handbilling. The Board, with court approval, remanded the proceeding to the administrative law judge so that the employer could introduce evidence concerning that issue.

record be reopened. Massey contends only that it would have introduced evidence of the changes in its conglomerate structure since 1985. But that evidence is irrelevant to these proceedings: as stated above, we are deciding the single-employer issue based on the relationships between and among the various Massey entities that existed in 2004–2005, not on whatever the situation may have been in 1985 or whatever changes in those relationships may have been effected in the intervening 20-odd years. Massey's contention, however, shows that Massey, at least, understood that it could not sustain a due process argument with an unsupported claim of hypothetical prejudice.[30]

In sum, neither Respondent has identified any evidence that might have been introduced, or any defense Massey might have raised, had they been aware that the Board might find Massey and Mammoth to constitute a single employer. Neither has requested that the record be reopened to allow the introduction of any such evidence, should the Board find it appropriate to consider the single-employer theory. Both Respondents were afforded the opportunity to, and did, file supplemental briefs on the merits of the single employer issue. Accordingly, we cannot find that Massey would be prejudiced if we decide the case under a single-employer theory.[31]

[30] Two cases cited in the dissent illustrate this point. In *Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971), the court of appeals vacated the agency's order finding that a corporate acquisition constituted an antitrust violation based on a "toehold" theory, when the case had been litigated on an "internal expansion" theory. In so doing, the court observed that Bendix had explained in detail, with specific examples, how it would have litigated the case differently had the agency proceeded on a "toehold" theory. Id. at 541–542. Accordingly, the court remanded the case to the agency to allow the parties to present evidence pertaining to the toehold theory and any related defenses. Id. at 542. By contrast, in *George Banta Co. v. NLRB*, 686 F.2d 10, 21 (D.C. Cir. 1982), cert. denied 460 U.S. 1082 (1983), the court of appeals enforced the Board's finding of a violation on a theory that had been *explicitly disavowed* by counsel for the General Counsel at trial (i.e., that Banta unlawfully discriminated against returning strikers only if the strike was an unfair labor practice strike). In rejecting the employer's argument that the change in theories violated its due process rights, the court observed that "Banta has not suggested any claims or evidence that it would have presented to the ALJ but for NLRB counsel's emphasis on unfair labor practices[.]" 686 F.2d at 21. Because the Respondents have similarly failed to identify any relevant evidence they would have presented if a single-employer relationship had been alleged, their due process contentions must fail as well.

[31] Massey also contends that it would be unfair to find it liable under a single-employer theory because the scope of its liability would be greater than under the theory of the General Counsel's complaint. Specifically, Massey argues that under the complaint's theory, the General Counsel would have to prove that Mammoth was Massey's agent *for each individual unlawful transaction*, whereas under a single-employer theory, each Respondent is liable for the other's unlawful conduct, without any such particularized showing. This argument lacks merit. Under either theory, Massey was potentially liable for all of the allegedly unlawful acts.

In the face of all of the foregoing considerations—the broad theory of liability alleged from the outset in the complaint, the extensive relevant evidence admitted at the hearing, the lack of any additional evidence identified as relevant or necessary, and the opportunities provided to the Respondents to brief the single-employer issue—and despite Massey's having known from the beginning of these proceedings that it was alleged to have committed all of the violations alleged in the complaint, the Respondents and the dissent nevertheless contend that it is improper for the Board to decide this case under a single-employer theory. In effect, their only remaining argument is that simply because the complaint does not contain the specific words "single employer," we cannot hold Massey liable for its unlawful acts. We find no merit in that contention.

Section 102.15 of the Board's Rules and Regulations sets forth the pleading requirements for complaints before the Board. It requires only (as relevant here) that the complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices." As the Sixth Circuit stated long ago, "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." *NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552, 557 (6th Cir. 1940), quoted in *Artesia Ready Mix Concrete, Inc.*, 339 NLRB 1224, 1226 (2003). The complaint in this case meets that requirement: it alleges that the Respondents violated Section 8(a)(3) by failing and refusing to hire the discriminatees and to recognize the Union, and violated Section 8(a)(5) by unilaterally changing the terms and conditions of bargaining unit employees. In short, Massey had unequivocal notice of the conduct on its part that was alleged to be unlawful and an opportunity to be heard.[32]

It is undisputed that the complaint does not specifically allege that Massey and Mammoth constitute a single employer. However, its language implies that something more than a garden-variety agency relationship is alleged. For example, the complaint alleges that the Respondents are agents *of each other* (an unusual contention in itself). The complaint's further allegation that the Respondents "[a]t all material times . . . [were] acting for and on behalf of each other" seems, if anything, closer to a single employer theory than to an agency theory, the latter of which requires a showing that an agency relationship exists for each transaction or series of transac-

[32] For the same reasons, the complaint meets the Administrative Procedure Act's requirement that parties be given notice of the "matters of facts and law asserted." 5 U.S.C. § 554(b)(3).

tions. See generally Restatement 2d, *Agency*, 3.[33] Overall, Massey's claim that it was unaware that single-employer issues might be raised is dubious. In any event, the Board may apply a legally appropriate theory even when the General Counsel fails to articulate it clearly. See *Urban Laboratories*, 308 NLRB 816, 816 fn. 4 (1992).

Moreover, we are not breaking new ground in addressing Massey's alleged liability under a single-employer theory. The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint.[34] As the Board stated in *W. E. Carlson Corp.*, "It is well settled that even where the General Counsel has not excepted to an administrative law judge's analysis, the Board 'is not compelled to act as a mere rubber stamp' but rather is 'free to use its own reasoning.'"[35] As in *W. E. Carlson*, the issue here is not whether to find an unalleged *violation*, but whether to find an alleged violation on a *theory* not alleged in the complaint.[36] We find it appropriate to do so here.

For all the foregoing reasons, we find no procedural impediment to addressing the single-employer issue. In affirming the judge's decision on that additional theory, as we do below, we are simply confirming that, on the record made in this case, considered in light of Board law and due process, Massey's unfair labor practice liability has been properly established.[37]

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[33] On the first day of the hearing, counsel for the General Counsel argued that Massey "generally is intertwined with Respondent Mammoth's operations," and opined that Massey and Mammoth were parts of "one big ball of wax." Those admittedly nontechnical remarks sound closer to a single-employer theory than a theory of agency.

[34] See, e.g., *Pepsi America, Inc.*, 339 NLRB 986 (2003); *Jefferson Electric Co.*, 274 NLRB 750, 750–751 (1985), enfd. 783 F.2d 679 (6th Cir. 1986). Indeed, at least one court has suggested that the Board has the authority to find a violation even when the administrative law judge has failed to do so and the General Counsel has not excepted. *Hedstrom Co. v. NLRB*, 629 F.2d 305, 315 (3d Cir. 1980) (en banc) (even if General Counsel's generalized exception did not comply with Board's rules concerning exceptions, "this would not preclude the Board from reviewing the issue raised. It would simply permit the Board, in its discretion, to disregard the matter"), cert. denied 450 U.S. 996 (1981).

The Respondents contend, correctly, that *Pay Less Drug Stores Northwest*, 312 NLRB 972, 972–973 (1993), enf. mem. denied on other grounds 57 F.3d 1077 (9th Cir. 1995), is distinguishable in some respects from this case. The differences, however, are not significant. In *Pay Less*, as here, the General Counsel argued an alternative theory to the administrative law judge; when the judge failed to rule on that theory, the General Counsel did not file exceptions but argued the alternative theory to the Board. In both cases, the respondents had ample opportunity to address the merits of the alternative theory. Accordingly, *Pay Less* supports our finding that due process considerations do not preclude us from addressing the single-employer issue. In any event, as the decisions cited above make clear, the Board's authority to consider an alternative theory is not confined to the metes and bounds of *Pay Less*.

[35] 346 NLRB 431, 434 (2006), quoting *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959); see also *NLRB v. Duncan Foundry & Machine Works*, 435 F.2d 612, 620 (7th Cir. 1970).

[36] Accord: *George Banta Co.*, 686 F.2d at 21–22 ("This is not a situation in which violations of the Act were found that had not been alleged in the Complaint, and the cases on which [the employer] relies are entirely distinguishable on this basis alone."). Likewise, the following cases cited by the Respondent are inapposite, insofar as the issue in each case was whether finding an unalleged *violation* would deprive the respondent of due process: *NLRB v. Quality CATV, Inc.*, 824 F.2d 542 (7th Cir. 1987); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 542–544 (6th Cir. 1984); *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 1001 fn. 28 (2007); *McKenzie Engineering*, 326 NLRB 473 (1998); *Eagle Express Co.*, 273 NLRB 501, 503 (1984); *Mine Workers District 29*, 308 NLRB 1155, 1157–1158 (1992); *Plastic Film Products Corp.*, 238 NLRB 135, 149 (1978); and *Georgia, Alabama, Florida Transportation Co.*, 219 NLRB 894 (1975). (The Board in *Eagle Express* did refer to alternative *theories*, but the issue clearly was whether to find an unalleged *violation*.) *Graham's Trucking & Excavating, Inc.*, JD–43–10 (2010), also cited by the Respondents, is an administrative law judge's decision that was not excepted to and therefore is not binding on the Board. Moreover, all but one of the unalleged issues that the judge declined to address in that case involved additional *violations*. The only arguably unalleged *theory* at issue (of constructive discharge) hinged on finding the unalleged violations. Finally, the judge found the constructive discharge violation on the grounds alleged in the complaint; thus, the unalleged theory was moot.

The dissent relies on similarly inapposite cases. In *Stokely-Van Camp v. NLRB*, 722 F.2d 1324 (7th Cir. 1983), and *NLRB v. Pepsi-Cola*, 613 F.2d 267 (10th Cir. 1980), courts refused to enforce Board decisions finding unalleged violations. In *Lamar Advertising of Hartford*, 343 NLRB 261 (2004), the Board refused to find that the respondent employer unlawfully discharged an employee for engaging in conduct that was not mentioned in the complaint; in *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992), the court denied enforcement of the agency's decision for the same reason. *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968), and *Bendix Corp. v. FTC,* above, did involve agency decisions based on unalleged theories, rather than unalleged conduct. In those cases, however, and in *Yellow Freight System*, above, the courts did not simply reverse the agencies' decisions, but instead remanded the proceedings to the agencies to take evidence concerning the unalleged theories. As explained above, had the Respondents given the Board good reason to do so, a remand might well have been appropriate here. See supra at pp. 8-9 and fn. 29.

[37] Our approach here reflects the same policy of adjudicative economy that the Federal appellate courts apply in following the rule that a reviewing court *must* affirm a lower court's decision if the decision is correct, even though the lower court may have relied on a wrong ground or given an erroneous reason for its action. E.g., *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). See *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."). Indeed, because the Board itself makes both findings of fact and conclusions of law in cases brought to it, the Board would seem to have even greater flexibility to reach the same result as the judge did, but on an alternative ground. See generally Act, Sec. 10(c).

2. Massey and Mammoth constitute a single employer

We turn now to the merits of the single-employer issue. On the basis of the extensive evidence concerning the relationships between and among Massey, Mammoth, and Massey's other subsidiaries, we find that Massey and Mammoth constitute a single employer. We base that finding on the presence of common ownership, interrelated operations, and centralized control of labor relations.

Common ownership. Massey is a holding company. It does not mine, process, or market coal. Rather, it owns, either directly or indirectly, all of the stock of numerous operating subsidiary corporations that perform those functions. In particular, Massey owns the stock of A.T. Massey Co., which owns the stock of Elk Run Coal Company, which owns the stock of Mammoth. Accordingly, the factor of common ownership has been established.[38]

Interrelated operations. As the judge found, the operations of the various components of the Massey enterprise are highly interrelated. Many of Massey's subsidiary corporations, such as Mammoth, are engaged directly in mining operations. Those are organized in 22 "resource groups," each consisting of several coal mines, a preparation plant for processing coal, and a shipping facility where processed coal is loaded and shipped to customers. Massey subsidiary A.T. Massey Co. is the "operating entity" for the overall Massey enterprise. Massey Coal Services, another Massey subsidiary, provides human resources services to the operating subsidiaries. In fact, two of Massey Coal Services' managers also served as human resources officials for Mammoth (see below). Yet another subsidiary, Massey Coal Sales, handles the sale of finished coal to customers.[39]

With regard to interrelated operations, there are certain facts that make this case somewhat unusual. The Respondents point out (as have we) that Massey itself has no "operations," in the sense that it does not mine, process, or sell coal. Also, Massey does not provide services to Mammoth and the other mining subsidiaries except indirectly, through Massey Coal Services and Massey Coal Sales, and we are not considering whether those subsidiaries constitute a single employer along with Massey and Mammoth. But we find neither of these facts significant in the circumstances of this case. A holding company and its subsidiary may be found to constitute a single employer if the other attributes of single employer status are present to a sufficient degree.[40] Further, although Massey and its various operating subsidiaries are separately incorporated, Massey's operations would not be materially different if it were set up as a single corporation with operating divisions (mining, administrative services, marketing, etc.). We would not hesitate to find the operations of such an employer and one of its divisions to be interrelated, even though the employer arranged for services to that division to be provided through other divisions rather than directly by the employer. It would elevate form over substance to reach a different result here.

Common management. Mammoth has its own officers and managers, most of whom operate independently of Massey and the other Massey subsidiaries. There are a few exceptions. Although Mammoth employed its work force, Jennifer Chandler, regional human resources director for Massey Coal Services, also served as the human resources official for Mammoth and several other subsidiaries. Chandler's direct supervisor was John Poma, Massey's vice president for human resources. Susan Carr, who is also employed by Massey Coal Services, is the benefits coordinator for Mammoth and two other subsidiary mines. Thus, the element of common management exists, but only to a limited extent.

Centralized control of labor relations. The Board has generally held that centralized control of labor relations is the most critical factor in the single-employer analysis.[41] In the present case, Massey's control of Mammoth's labor relations is pervasive. The wages and benefits paid by Massey's mining subsidiaries, including Mammoth, are set not by those companies' officers, but by the Massey board of directors or its chairman, Don Blankenship.[42] Similarly, Massey determines whether a particular subsidiary will offer retention incentives to experienced miners. Employees of Mammoth and the other mining subsidiaries participate in Massey's corporatewide pension plan; their pension status is not affected when they move from one Massey subsidiary to another.

[38] See, e.g., *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983), cert. denied 464 U.S. 892 (1983). Moreover, as we explain below, Massey is anything but the passive investor/owner portrayed by the Respondents; to the contrary, it took an active part in controlling Mammoth's affairs.

[39] Cf. *Parma Industries*, 292 NLRB 90, 97 (1988) (parent and subsidiary corporation found to be functionally integrated where the parent company performed clerical accounting, engineering, sales, and marketing functions for its subsidiary).

[40] See *Canterbury Educational Services*, 308 NLRB 506, 509–510 (1992); *Shortway Suburban Lines*, 286 NLRB 323, 323 fn. 4, 332 (1987), enfd. mem. 862 F.2d 309 (3d Cir. 1988).

[41] See, e.g., *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001).

[42] See, e.g., *Masland Industries*, 311 NLRB 184, 186–187 (1993) (common control of labor relations established where, inter alia, parent corporation's vice president for human resources controlled subsidiary corporation's labor relations, including negotiating contracts concerning wages and working conditions of subsidiary's employees, despite having no official position with subsidiary).

The subsidiaries, it seems, typically make their own hiring decisions. Here, however, two of Massey's senior vice presidents, Drexel Short and Chris Adkins, interviewed prospective Mammoth staff. Moreover, the subsidiaries' hiring decisions are constrained by certain Massey policies. Thus, for example, an employee who wants to transfer to another subsidiary must first obtain the approval of his current employer, which approval may be denied if the transfer would strip that employer of a needed employee. Massey also tells the mining subsidiaries when they must hire trainees.[43]

In keeping with the established division of labor within the Massey organization, Massey Coal Services also played an important role in the recruiting and hiring process at Mammoth. At Drexel Short's behest, Jeff Gillenwater, a Massey Coal Services official, conducted interviews of potential Mammoth employees.[44] As described above, Kevin Doss, Mammoth's human resources director during that period, used a spreadsheet showing the "union time" of the former Horizon unit employees; that spreadsheet was furnished by Gillenwater. Gillenwater also instructed Doss to ascertain the status of each of those individuals in the hiring process and report that information to Gillenwater. In addition, Gillenwater gave Doss a list of former Horizon employees who had signed a letter to the West Virginia Department of Environmental Protection questioning certain permits used by a Massey subsidiary.

In sum, we find that the factors of common ownership, interrelated operations, and centralized control of labor relations amply support the conclusion that Massey Energy and Mammoth Coal constitute a single employer. Although the two companies are separately incorporated and Massey has no "operations" other than as a holding company, the factors of interrelated operations and centralized control of labor relations establish the absence of an arm's-length relationship between Massey and Mammoth. Accordingly, we find that Massey is accountable, along with Mammoth, for the unfair labor practices found here.[45]

[43] As we have already discussed, Mammoth relies on another purported Massey hiring policy, preference for transfers from other Massey operations, for which the judge and we have found little credible support. Nevertheless, Mammoth's contention that it is constrained by this policy is further evidence that Massey effectively controls Mammoth's labor relations.

[44] Short is chairman of Massey Coal Services as well as Massey's senior vice president for group operations. The record does not disclose whether, when, or how these two official capacities were distinguished in practice.

[45] In reaching this conclusion, unlike the judge, we do not rely on the description of the Massey corporate family in *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226 (4th Cir. 2002), and *A.T. Massey Coal Co. v. Mine Workers*, 799 F.2d 142 (4th Cir. 1986), as "a single production entity." Massey Energy was not a party to either case, neither of which turned on whether the Massey subsidiaries that were parties constituted a single employer within the meaning of the Act.

ORDER

The National Labor Relations Board orders that the Respondents, Massey Energy Company, Richmond, Virginia, and its subsidiary Spartan Mining Company d/b/a Mammoth Coal Company, Leivasy, West Virginia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of Horizon Natural Resources Company's Cannelton/Dunn operation (the predecessor employer) because of their union-represented status in the predecessor's operation, or because of their union activities, or otherwise discriminating against these employees to avoid having to recognize and bargain with the United Mine Workers of America (the Union).

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All employees engaged in the production of coal, including 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 Respondent), repair and maintenance work normally performed at the mine site or at the Respondent's central shop; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at the Respondent's mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(c) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that they recognize the Union as the exclusive representative of the bargaining unit employees under Section 9(a) of the Act and that they will bargain with the Union concerning terms and conditions of employment for the unit employees.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the unit employees

concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) At the request of the Union, rescind any departures from the terms and conditions of employment of unit employees that existed immediately prior to the Respondents' takeover of the predecessor employer, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until the Respondents negotiate in good faith with the Union to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of the judge's decision, as modified in this decision, the unit employees for losses caused by the Respondents' failure to apply the terms and conditions of employment that existed immediately prior to their takeover of the predecessor employer.

(e) Within 14 days from the date of this Order, offer employment to the following named former employees of the predecessor employer in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

> Michael Armstrong, Charles Bennett, Randel Bowen Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danbury, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion (Pete) Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker Jr., Larry Vassil, Thomas Ward, James Whittington Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, and Fred Wright.

(f) Make the employees referred to in the preceding paragraph 2(e) whole for any loss of earnings and other benefits they may have suffered by reason of the Respondents' unlawful refusal to hire them, in the manner set forth in the remedy section of the judge's decision, as modified in this decision.

(g) Within 14 days from the date of this Order, remove from their files any reference to the unlawful refusal to hire the employees named in the preceding paragraph 2(e) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at Mammoth's facilities in and around Kanawha County, West Virginia, and Massey's Richmond, Virginia facility copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent in question customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If either Respondent has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by that Respondent at its facilities at any time since December 3, 2004.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official of each respective Respondent on a

[46] 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."

form provided by the Region attesting to the steps that that Respondent has taken to comply.

MEMBER HAYES, dissenting in part.

When F. Scott Fitzgerald said "there are no second acts in American life," he obviously did not contemplate litigation before the National Labor Relations Board. Today, 8 years after the events giving rise to this case, and nearly 3 years after the Fourth Circuit returned this case to the Board's jurisdiction, my colleagues have created a second act in the life of this case. They should instead be bringing down the curtain by deciding only those issues actually alleged and litigated.

Although the Supreme Court's *New Process*[1] decision warrants de novo review of all unfair labor practice allegations here, a key question remains whether Respondent Massey Energy should have liability for any unlawful conduct of its corporate subsidiary, Respondent Mammoth Coal. The General Counsel's complaint specifically alleged an agency theory of liability, i.e., that Massey and Mammoth were agents of each other. The parties presented evidence and argument relevant to that theory in litigation before an administrative law judge. However, the General Counsel's posthearing brief to the judge for the first time also argued that Massey and Mammoth were a single employer, a theory not alleged or litigated. The judge did not address this theory in his decision. He found liability on a nonagency, "direct participation" theory, also not alleged or litigated.

Respondent Massey filed exceptions and a brief specifically contesting the judge's reliance on and application of the "direct participation" theory, as well as the judge's failure to find that Massey was not liable under the agency theory of the complaint. The General Counsel filed cross-exceptions but did not contest the judge's failure to consider the single-employer theory. Further, neither the brief filed by the General Counsel in support of cross-exceptions nor the answering brief filed with respect to the Respondents' exceptions even mentions this theory, much less presents argument in support of it.

In spite of the foregoing procedural history, which clearly demonstrates that the General Counsel did not litigate a theory of single employer liability, a Board panel majority invited the parties to file supplemental briefs addressing questions whether the Board could and should determine whether Massey could be found liable for Mammoth's unfair labor practices under the single-employer theory. I dissented, expressing the view that the Board should have decided the case based on the record as it stood, rather than giving the Acting General Counsel an opportunity to make an argument to the Board that his representatives chose not to make in cross-exceptions or in answering Massey's exceptions. Not surprisingly, the Acting General Counsel jumped at the second opportunity to contend that Massey should be held liable under the single-employer theory. Now, in this decision, my colleagues go the Acting General Counsel one better, finding that Massey is liable under both the single-liability theory and the judge's direct participation theory.

I agree with my colleagues' conclusions that Mammoth violated Section 8(a)(3) by discriminatorily refusing to hire union-represented employees of predecessor Horizon and 8(a)(5) by refusing to recognize and bargain with the Union.[2] However, I vehemently oppose their imposition of liability on Massey under theories neither alleged in the complaint nor fully and fairly litigated at hearing.[3] In their collective zeal to hold Massey liable—for the obvious reason that it is far more likely than Mammoth to have funds to meet backpay obligations—the Acting General Counsel and my colleagues have trampled due process.

My colleagues fault Massey for not identifying additional evidence that it would have produced or defenses that it would have raised had either of these theories been pled.[4] They find no procedural bar to considering these

[1] *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), holding that under Sec. 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. The prior Board decision in the present case was issued by the only two sitting members of the Board.

[2] I agree with former Board Member Schaumber's view in the prior two-member decision that lawful antiunion statements by Massey's chief executive should not be relied on as evidence of Mammoth's animus. 354 NLRB 687, 687 fn. 2 (2009). I also express no view as to whether the Board precedent holding that Mammoth was liable to bargain with the Union about employees' initial terms and conditions of employment was correctly decided, but I agree to apply that precedent here for institutional reasons.

[3] As I would not find that either theory was fully litigated, I express no view concerning the merits of either theory based on the record evidence.

[4] In fact, Massey asserts that it would have introduced evidence demonstrating that it has restructured and implemented operating changes since the 1985 Advice Memorandum (discussed infra) so as to avoid future single-employer liability. My colleagues claim such evidence is irrelevant because they are deciding the single-employer issue based on the relationships between the various Massey entities that existed in 2004–2005, not as they may have existed earlier. But their claim highlights the problem—the record was developed with an eye toward deciding whether there was an *agency relationship* between Mammoth and Massey in 2004–2005, not whether there was a *single-employer relationship* then. The latter relationship was not litigated before the judge, and operating changes made since 1985 are certainly relevant to that relationship. In *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542 (7th Cir. 1987), the Seventh Circuit found that the Board violated the respondent's due process rights where the complaint alleged that respondent violated 8(a)(1) by discharging two employees because they had concertedly refused to perform *unsafe* work, but the Board found the 8(a)(1) violation on a theory that the employees had

theories because, in their view, the complaint alleged a "broad but ambiguous" theory of liability, the record contains "extensive relevant evidence," and the Revised Invitation to File Briefs cures any potential prejudice.[5] Specifically, as to the single-employer theory, my colleagues apparently expect Massey—from the "unusual" language of the complaint, which they say "*implies* . . . something more than a garden-variety agency relationship" and "*seems* . . . closer to a single employer than to an agency theory" (emphasis added), and from the General Counsel's reference to Massey and Mammoth as "one big ball of wax"—to have somehow divined the outer reaches of the alleged liability.[6]

They expect far too much. The majority's view that notice pleading before the Board requires only an assertion of "acts" ignores the Administrative Procedure Act's requirement, rooted in fundamental due process principles, that parties be given notice of "the matters of fact *and law* asserted" (emphasis added).[7] The Board has previously found an issue not to have been fully and fairly litigated where the General Counsel had not timely raised an alternative theory of a violation;[8] similarly, the Board has found matters not fully and fairly litigated where a respondent, despite ostensibly having an opportunity to cross-examine the General Counsel's witnesses, had no reason to know such was necessary given the claim alleged in the complaint.[9] Certainly, the courts have not embraced the expansive view now espoused by the majority; rather, courts have held that an administrative agency must give the charged party a clear statement of the theory on which it will proceed[10] and have barred an agency from changing theories midstream without giving respondents reasonable notice of the change.[11] Even conceding that some evidence was introduced regarding Massey's and Mammoth's relationship, and even conceding further that there is some evidentiary overlap between proving agency and proving single employer and/or direct participation, such is not equivalent to putting Massey on notice that the General Counsel intended to hold Massey liable in its own right on one or more alternative theories, each of which rest on distinct factual predicates.[12] Indeed, not only does the majority seek to ascribe liability to Massey on unpled theories, but it also seeks to link Massey to Mammoth through evidence related to two *other* Massey subsidiaries, A.T. Massey Coal Company and Massey Coal Services, *neither of which were named as respondents*.[13]

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protested *uncomfortable* work. The court concluded that the respondent was not given fair notice of the discomfort claim, and noted that a party may reasonably choose not to introduce evidence or emphasize arguments in defense of claims of which it has not been informed. Id. at 545–546. The court, accepting that respondent's counsel may have taken a "different approach," did not, as the majority implicitly does here, require some detailed inventory of evidence not offered; rather, the court refused to speculate whether additional relevant evidence existed where the lack of notice "entirely disabled [respondent's] counsel from taking any steps at the evidentiary hearing to defend against the unannounced claim." Id. at 548. Similarly, here, I would not require the Respondents to specify in more detail what they might have done differently. And I certainly would not dare to decide whether a single-employer relationship existed on a record developed on an agency theory.

[5] Citing *Roundy's, Inc.,* 356 NLRB 126 (2010), enfd. 674 F.3d 638 (7th Cir. 2012), the majority argues that, had the Respondents been more detailed about what evidence they would have put on, the "Board could have ordered that the record be reopened." In *Roundy's*, a case dealing with union access issues, the Board did not, before remanding, require that the respondent detail exactly what evidence it would have put on; rather, the Board recognized that the respondent had not had an opportunity to prove an exclusionary property interest because there, like here, the General Counsel had not argued the property interest issue until filing its posthearing brief. Under the majority's view of applicable procedure, there is nothing to stop them from remanding now (as the Board did in *Roundy's*) to allow the parties to fully litigate the single employer issue. Indeed, the majority attempts to distinguish certain precedent I rely upon on by noting that the courts did not simply reverse agency findings, but instead remanded for additional evidence on the unlitigated issue. The majority's failure to remand here reinforces my view that the Revised Invitation to File Briefs was little more than a transparent attempt to give due process credence to a result-oriented outcome.

[6] Cf. *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283 (2001) (reversing a judge's single-employer finding; judge had characterized entities as being so interrelated as to constitute "one ball of wax"). I note that the counsel for the General Counsel made the "ball of wax" comment in this case in the context of arguing for admission of a photograph of a Massey billboard advertising for experienced coal miners.

[7] 5 U.S.C. § 554(b). The majority's claim that the Respondents were notified of the law asserted by virtue of the amended complaint's generalized reference to respondents and citation to sections of the Act contravenes the spirit of the APA. "By substituting an issue. . . . for the one framed by the pleadings, the [majority] has deprived [the Respondents] of both notice and hearing on the substituted issue." *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1257 (D.C. Cir. 1968).

[8] *Eagle Express Co.*, 273 NLRB 501, 503 (1984) (lack of notice of alternative theory precluded full and fair litigation; although the General Counsel is entitled to rely on alternative theories, the respondent is also entitled to notice that this is being done); *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (General Counsel impermissibly "expands the *theory* of the violation beyond what was alleged in the complaint and litigated at the hearing") (emphasis added); *Quality C.A.T.V.*, 289 NLRB 648, 648 fn. 3 (1988) (on remand from 7th Cir.), 824 F.2d 542 (1987).

[9] *United Mine Workers District 29*, 308 NLRB 1155, 1158 (1992).

[10] *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971).

[11] Id., quoting *Rodale Press, Inc. v. FTC*, above, 407 F.2d at 1256; accord: *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); *Donald v. Wilson,* 847 F.2d 1191, 1198 (6th Cir. 1988).

[12] *NLRB v. Quality C.A.T.V., Inc.*, above, 824 F.2d at 547 ("simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated,'" citing *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267, 274 (10th Cir. 1980)).

[13] A.T. Massey Coal Company purchased the assets involved here; Massey Coal Services provides human resources, engineering, public

Pay Less Drug Stores Northwest,[14] cited in the Board's Revised Invitation to File Briefs, does not help the majority. My colleagues concede that *Pay Less* is distinguishable, although they mistakenly claim that the differences are insignificant. In *Pay Less*, the Board found that the General Counsel's *fully litigated* alternative theory was preserved when the judge failed to rule on that alternative theory—despite the General Counsel's failure to file an exception on that point. In so holding, the Board noted that the alternative theory was presented at the hearing and evidence was adduced, and then the theory was addressed in the posthearing briefs and argued "vigorously" in supplemental briefs.[15] *Pay Less* is thus fundamentally different from this case because, here, the General Counsel's alternative theory was not litigated; thus, it could not have been "preserved."

The majority attempts to justify its actions (and to distinguish cases relied upon by the Respondents) on the basis that, here, they are not finding an unalleged *violation*, but merely applying their "own reasoning." They pluck this language from *W. E. Carlson Corp.*,[16] inappropriately expanding that decision, itself divided, without regard to context. In *W. E. Carlson*, the majority found an employer violated Section 8(a)(3) of the Act where the General Counsel showed the employer had knowledge of an organizing campaign and thereafter denied an employee a customary wage increase, telling him that wages were frozen until after the union election. Despite the General Counsel not showing employer knowledge of specific protected activity of that employee, the majority reasoned that the "wording of the complaint was not limited to any particular 8(a)(3) theory" and that the "facts and circumstances of the wage increase denial were fully litigated at the hearing." Here, in contrast, the complaint *did allege a particular theory* for holding Massey liable for the violations, i.e., agency; moreover, the facts and circumstances surrounding any alternate theory (single employer or direct participation) were not fully litigated. As the dissent in *W. E. Carlson* aptly observed, "whether the variation is in the facts or in the theory of violation, a respondent is denied due process by not being apprised of what it must defend against."[17]

The General Counsel is the master of the complaint. It was the General Counsel's responsibility to apprise the respondents of what they needed to defend against. The complaint fell short. The original complaint named only Mammoth as a respondent. The amended complaint individually names Massey Energy Company and its subsidiary, Spartan Mining Company d/b/a Mammoth Coal Company, "collectively called Respondents," but does not particularly allege that Massey committed any violations of the Act. Rather, paragraph 6 alleges "*Mammoth* has refused to hire"; paragraph 9 alleges that "*Mammoth* has failed and refused to recognize and bargain . . . and has unilaterally established mandatory terms and conditions of employment"; paragraph 10 alleges "*Mammoth* has been discriminating"; and paragraph 11 alleges that "*Mammoth* have [sic] been failing and refusing to bargain collectively. . . ." Far from a model of clarity, paragraph 5 alleges that Massey and Mammoth were "agents of each other"; paragraph 12 refers to "unfair labor practices of Respondent*s* described above"; and the requested remedy vacillates between the singular and plural, requesting the Board to order "Respondent*s*" to rescind terms and conditions of employment *it* established at the time *it* commenced *its* operations . . . until *it* bargains with the Union . . . and makes unit employees whole from any losses resulting from *its* unlawful conduct" (emphasis added). Significantly, the complaint at no point alleges that Massey and Mammoth constitute a single employer,[18] nor does it allege that Massey directly participated in any of the actions listed in core paragraphs 6, 9, 10, or 11. Indeed, the General Counsel raised the single-employer theory for the first (and only) time in his posthearing brief to the judge, and his cross-exceptions did not challenge the judge's failure to rule on that theory.[19] This is simply too little, too late.[20]

relations, and legal support to Massey operating subsidiaries. Massey, the holding company, has no employees.

[14] 312 NLRB 972 (1993), enf. mem. denied on other grounds 57 F.3d 1077 (9th Cir. 1995).

[15] Id. at 973. The Board noted that the judge had found it "unnecessary to rule" on the alternative theory; such a "non-ruling" did not fall within Sec. 102.46(b)(2) of the Board's Rules.

[16] 346 NLRB 431 (2006).

[17] Id. at 439. See also *NLRB v. Homemaker Shops, Inc.,* 724 F.2d 535 (6th Cir. 1984), which also demonstrates that the boundaries between alleged violations and theories are not as tidy as the majority suggests. There, the complaint alleged that the employer had unlawfully *assisted* the union; the Board found the employer unlawfully *dominated* the union. Although the charges were related and arose under the same section of the Act, the Sixth Circuit refused to enforce the Board's order, stating: "The fundamental fairness inherent in administrative due process cannot permit the General Counsel to plead a certain charge . . . and then raise a related, but more onerous charge only after the hearing record is closed." Id. at 544.

[18] Nor does it even reference the four component factual elements examined to determine single-employer status.

[19] Indeed, in his opening statement at hearing, the General Counsel referenced even the *agency* theory as nothing more than a "tangential issue."

[20] See *Stokely-Van Camp, Inc. v. NLRB*, 722 F.2d 1324, 1331 (7th Cir. 1983) (clear violation of due process where notice was first given in the General Counsel's posthearing brief to the judge). Even if it could be argued that the General Counsel's posthearing brief gave the Respondents notice, they would have been justified in assuming that

As the Respondents argue, all parties to this proceeding were familiar with the controversy surrounding application of the single-employer doctrine to the coal industry. Certainly, Region 9 and the General Counsel, based on experience and on a 1985 Advice Memorandum, knew how to investigate and plead single employer, had they been so inclined (see Memorandum from the Office of the Associate General Counsel, Division of Advice: *A.T. Massey Coal Co.*, Case 9–CA–21448–1 et al. (April 23, 1985)). The failure to allege, or to even refer to single-employer status during a 16-day hearing, is telling. Indeed, Massey suggests that the General Counsel's omission was a knowing and intentional strategy aimed at depriving the Respondents of the opportunity to defend themselves.

It is no answer to say, as the majority now does, that the Respondents did not object to the introduction of evidence that was arguably relevant to single-employer status. Courts have been quick to reject similar implied-consent-to-litigate arguments.[21] As the Sixth Circuit has cautioned:

> [An] agency may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue. *MBI Motor Co.*, 506 F.2d at 711. Also, evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case. *Wesco Mfg., Inc. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987).

Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 358 (6th Cir. 1992).

Although the Board has an obligation to decide material issues which have been fairly tried by the parties even where not specifically pled,[22] here the majority, having given the Acting General Counsel a second bite at the apple, reaches too far to find liability premised on theories rooted in different operative facts. The Respondents quite reasonably assert that the evidence they introduced to defend against agency was not the same as that they would have introduced to defend against single-employer liability, as the theories differ both in their elements and their potential scope of liability.[23] As the Respondents emphasize, to prove agency status, the General Counsel must show more than a parent-subsidiary relationship,[24] and common law agency principles ground agency status on a factual finding that the alleged principal has and exercises control over the alleged agent relative to specific actions.[25] To prove single-employer status, the Board looks to all of the circumstances, but focuses on four factors (common ownership, interrelation of operations, common management, and centralized control of labor relations), with centralized control of labor relations being "of particular importance."[26] The concepts of agency and single employer are distinguishable, and it cannot be assumed that a defense mounted against an allegation of agency would parallel one mounted against an allegation of single employer. Indeed, on at least one occasion, a court has determined that a subsidiary of A.T. Massey could not bind its parent or affiliate under ordinary agency principles, even though that court had determined that A.T. Massey and the subsidiary were a "single employer."[27] Thus, it should come as no surprise that Massey, facing a mutual agency allegation, would neither tailor its defense nor put on evidence to rebut a single-employer (or a direct participation) theory.

In sum, "the test is one of fairness under the circumstances of each case—whether the employer knew what conduct was in issue and had an opportunity to present his defense."[28] Under the circumstances presented here, the Acting General Counsel and my colleagues have

the General Counsel had abandoned this claim when he failed to make this argument in his exceptions brief.

[21] Similarly, the General Counsel's motion to conform the pleadings to the proof is insufficient to put Massey on notice that the General Counsel would change course from an agency theory to a single employer theory. The Respondents objected to the motion on the basis that it should be "more specific." The judge, after inviting the General Counsel to be more specific and receiving a vague answer suggesting only transcript errors, deferred ruling absent "specific things." The judge neglected to rule on the motion in his decision.

[22] *George Banta Co. v. NLRB*, 686 F.2d 10, 23 fn. 17 (D.C. Cir. 1982), cert. denied 460 U.S. 1082 (1983).

[23] See *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267, 273–274 (10th Cir. 1980) (due process not satisfied where complaint alleged 8(a)(3) violation on theory of refusal to reinstate strikers but Board found violation based on refusal to hire theory not espoused at hearing; court, denying enforcement in relevant part, noted that theories had different elements).

[24] *Zurick American Insurance Co. v. Watts Industries,* 417 F.3d 682, 688 (7th Cir. 2005).

[25] Restatement 2d, *Agency*, § 14 (1958). While the General Counsel may have introduced some evidence of Massey's control over Mammoth, he does not claim that Mammoth controlled Massey; accordingly, Mammoth could not be bound, under an agency theory, by the actions and statements of Massey's agents.

[26] *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995).

[27] *A.T. Massey Coal Co. v. Mine Workers*, 799 F.2d 142, 146–147 (4th Cir. 1986), cert. denied 481 U.S. 1033 (1987).

[28] *George Banta Co. v. NLRB*, above, 686 F.2d at 23 fn. 17, quoting *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981).

failed that test. Massey has not been afforded the requisite procedural due process to defend against any allegation of liability for Mammoth's unfair labor practices under other than an agency theory.[29] My colleagues do not contend that liability can be imposed on that basis. The complaint against Massey should therefore be dismissed.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire bargaining unit employees of Horizon Natural Resources Company's Cannelton/Dunn operation, the predecessor employer, because of their union-represented status in the predecessor's operation, or because of their union activities, or otherwise discriminate against these employees to avoid having to recognize and bargain with the United Mine Workers of America (the Union).

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All employees engaged in the production of coal, including 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 us), repair and maintenance work normally performed at the mine site or at our central shop; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at our mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL notify the Union in writing that we recognize it as the exclusive representative of our unit employees and that we will bargain with it concerning terms and conditions of employment for unit employees.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, at the request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of Horizon's Cannelton/Dunn operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of Horizon's Cannelton/Dunn operation.

WE WILL, within 14 days from the date of the Board's Order, offer employment to the following named former employees of Horizon's Cannelton/Dunn operation, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

> Michael Armstrong, Charles Bennett, Randel Bowen Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danbury, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion (Pete) Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight Jr., Ricky Miles, James

[29] This case is not unlike *Parexel International*, 356 NLRB 516 (2011), from which I dissented. There, like here, the respondent had "no notice that it would have to marshal a legal defense to a theory that the General Counsel did not urge before or during the hearing," and the majority violated the respondent's due process rights by finding liability on a different theory.

Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker Jr., Larry Vassil, Thomas Ward, James Whittington Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, Fred Wright.

WE WILL make the above-named employees whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire the above-named employees and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

MASSEY ENERGY COMPANY AND ITS SUBSIDIARY, SPARTAN MINING COMPANY D/B/A/ MAMMOTH COAL COMPANY

Engrid Emerson Vaughan, Esq., Donald A. Becher, Esq., and *Linda B. Finch, Esq.,* for the General Counsel.

Richard R. Parker, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), of Nashville, Tennessee, for Respondent Massey Energy Company.

Forrest H. Roles, Esq. and *Brace R. Mullett, Esq. (Dinsmore & Shohl L.L.P.),* of Charleston, West Virginia, for Respondent Spartan Mining Company d/b/a Mammoth Coal Company.

Charles F. Donnelly, Esq., of Charleston, West Virginia, and *Judith Rivlin, Esq.,* of Fairfax, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Montgomery, West Virginia, on 16 days commencing on January 22 and concluding on March 15, 2007. The United Mine Workers of America (the Union) filed the original charge on June 2, 2005, and amended charges on June 28 and July 22, 2005, and June 22, 2006. The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on August 18, 2006, and an amended complaint and notice of hearing on October 6, 2006 (the complaint).

The complaint alleges that the Respondents—Massey Energy Company (Massey) and its subsidiary, Spartan Mining Company d/b/a Mammoth Coal Company (Mammoth)—violated the National Labor Relations Act (the Act) when they began staffing and operating Mammoth as a successor to Horizon Natural Resources Company (Horizon). More specifically, the complaint alleges that since about December 3, 2004, Mammoth violated Section 8(a)(3) and (1) when it refused to employ bargaining unit employees of Horizon in order to avoid an obligation to recognize and bargain with the Union as a successor, and also because those individuals were union members and engaged in protected activities. If not for that discrimination, the complaint avers, the majority of Mammoth's work force would have been comprised of individuals previously employed by Horizon, and a responsibility to recognize and bargain with the Union would have been triggered. The complaint alleges that Mammoth violated Section 8(a)(5) and (1) of the Act when it failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and unilaterally established mandatory terms and conditions of employment for employees in the bargaining unit. In addition, the complaint alleges that the unfair labor practices of the Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act. Both Respondents filed timely answers in which they denied having committed any of the violations alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Mammoth, a corporation, with an office in Leivasy, West Virginia, is engaged in the mining, processing, and shipping of coal at various facilities in and around Kanawha County, West Virginia. In conducting these activities during the 12 months preceding issuance of the complaint, Mammoth purchased and received at its Kanawha County, West Virginia facilities, goods valued in excess of $50,000 directly from points outside the State of West Virginia. I find that Mammoth is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Massey, a corporation, with its principle office in Richmond, Virginia, performs various administrative services for its subsidiaries and operations, and satisfies the Board's direct outflow and/or direct inflow nonretail jurisdictional standards. Massey, through its subsidiaries and operations, annually mines and ships out of the State of West Virginia, coal worth more than $50,000. I find that Massey is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. OVERVIEW

In August 2004, Respondent Massey, through its operating subsidiary, A.T. Massey Company (A.T. Massey), bought certain assets and properties of Horizon, a company that had filed for bankruptcy. Among the assets that Massey acquired were a Horizon coal mining operation known as Cannelton Industries, Inc. (Cannelton) and Cannelton's subsidiary, Dunn Coal and

Dock Company (Dunn), which operated on the Cannelton property. Massey created a new subsidiary, Mammoth, for the purpose of operating what had been Cannelton/Dunn. Coal mining employees at Cannelton/Dunn had, since at least 1969, been represented by the Union, Local 8843. Recently, officials of Cannelton and Dunn had signed memoranda of understanding adopting the National Bituminous Coal Wage Agreement of 2002 (2002 National Coal Agreement) as their base agreement with the Union. That agreement had not expired at the time the Respondents took over Cannelton/Dunn, but has since reached its stated expiration date of December 31, 2006.

The Respondents assumed control of Horizon's Cannelton/Dunn operation on September 24 or 25, 2004. At that time, the Respondents did not continue the employment of any of the bargaining unit employees represented by the Union. However, prior to taking control of the operation, the Respondents' officials offered employment interviews and/or continued employment to every one of the nonbargaining unit employees of Cannelton/Dunn. The Respondents offered this opportunity not only to supervisory staff, but also to nonsupervisory employees who were not in the bargaining unit. For example, the Respondents offered pretakeover employment interviews and/or employment to Cannelton/Dunn's secretaries, maintenance clerk, payroll clerk, accounts payable clerk, benefits clerk, shipping clerk, warehouse clerk, CAD operator who made maps, and human resources employee. The Respondents also offered employment interviews and/or employment to the laboratory staff working as contractors at Cannelton/Dunn. As a result of these interviews, many nonbargaining unit workers were hired and continued their employment uninterrupted when the Respondents took over the Cannelton/Dunn operation. However, every one of the over 200 Cannelton/Dunn bargaining unit employees lost their jobs at the facility when the Respondents took it over in September 2004. Between 19 and 22 of those Cannelton/Dunn unit employees eventually found employment with the Respondents at the facility.

On November 18, 2004, William Willis,[1] the president of the Union's Local 8843, which represented the Cannelton/Dunn unit employees, wrote to Respondent Massey's chief executive officer, Don L. Blankenship, and stated that the approximately 250 former Cannelton/Dunn workers represented by the Union were "ready, willing and able to return to work at a moment's notice." Many of those employees, including almost all of the alleged discriminatees, obtained applications from the union hall and applied to work at the former Cannelton/Dunn facility, now known as Mammoth. Former Cannelton/Dunn unit employees also sought work at Mammoth by going to Massey offices and to Massey job fairs. On December 3, 2004, the Respondents began employing individuals to perform the work of the former bargaining unit employees, and the record provides information on the individuals hired by the Respondents from that time until May 1, 2006. That information shows that the Respondents hired approximately 219 individuals to perform the types of work that had been done by bargaining unit employees at Cannelton/Dunn,[2] but hired no more than 22 of the over 200 former Cannelton/Dunn unit employees. The former Cannelton/Dunn employees that the Respondents hired to work at Mammoth did not include a single one of the approximately 11 individuals who had been union officials or union committee members at Cannelton/Dunn when the operation changed hands.[3] Since the Respondents began operating the facility, Mammoth has refused to recognize and bargain with the Union as the collective-bargaining representative of any of its employees.

According to Respondent Mammoth, it was simply attempting to hire the most qualified work force. Mammoth contends that the rejected former Cannelton/Dunn employees either received poor references from their former supervisors, were not recommended by interviewers, were not qualified for the positions that they were seeking or that were available, or had failed to make adequate efforts in pursuit of employment. The record shows that instead of retaining or hiring the Cannelton/Dunn unit employees, the Respondents filled many of the open positions by moving employees from other Massey subsidiary mines to Mammoth even though the other subsidiary mines were facing serious shortages of experienced miners and were, in many cases, located where recruitment was more difficult than at Mammoth. The record shows that, early on, the Respondent also filled many positions by hiring inexperienced trainee miners. A number of these individuals had no prior employment at all with a mining operation.

III. THE MASSEY ORGANIZATION

Respondent Massey, a holding company, is the largest coal company in central Appalachia, with operations in West Virginia, Kentucky, Tennessee, and Virginia. Among Massey's holdings are at least 22 subsidiary coal mining operations, which Massey refers to as "resource groups." These Massey-owned mining operations usually consist of several coal mines, a preparation plant to which coal from those mines is brought

[1] This individual is often referred to in the record by his nickname, (Bolts)—a reference to his past work as a roof bolter in the mines.

[2] I have included the approximately 15 persons hired by the Respondents into "utility" classifications (utility, outside utility, plant utility, and surface utility) among the total of approximately 219 who were assigned to perform what had been bargaining unit work at Cannelton/Dunn. At trial, there was discussion of a contention by Respondent Mammoth that the utility employees' work would not have been considered bargaining unit work under the 2002 National Coal Agreement. It is not clear that Mammoth is continuing to press this point. At any rate, one of Mammoth's own witnesses, Jennifer Chandler, who was in charge of human resources matters for Mammoth during significant periods of time, testified that the utility workers were doing the work that, at Cannelton, had been done by "miner helpers," a category of positions that are covered by the 2002 Agreement. Transcript (Tr.) 1630–1631; General Counsel's Exhibit (GC Exh.) 14(a) at pp. 64–66, 317, 318, 320, 325, 326, and 332.

[3] The Cannelton/Dunn unit members who had been union officers or committee members during the period leading up to the transfer of ownership are: David Crawford, Ronald Gray, Harry T. Jerrell, Robert McKnight Jr., Gregory Nuckols, Ronald Payne, Kenneth Price, Michael Ryan, Dwight Siemiaczko, William Willis, and Gary Wolfe. Charles Treadway, another alleged discriminatee, had been a union committee member, but it is not clear how recent that experience was. Jackie Tanner, who had been a union committee member until 2000, was also not hired.

for processing, and a shipping facility at which the processed coal is loaded for transportation to customers. Mammoth is one such subsidiary operation. A.T. Massey, another wholly owned subsidiary of Respondent Massey, is described by Massey as the "operating entity" for the Massey enterprise. Massey Coal Services, also a wholly owned Massey subsidiary, serves as an internal consulting group for Massey companies. The staff of Massey Coal Services, inter alia, assists subsidiary coal mines by providing advice on human resources matters and sometimes by performing the human resources functions for those subsidiaries. According to the testimony of Blankenship (Respondent Massey's CEO), all of the subsidiaries in the Massey corporate family "funnel up" to Respondent Massey.

Respondent Massey argues that it had no meaningful involvement in the operations of Mammoth and bears no responsibility for the actions that give rise to the alleged unfair labor practices in this case. Counsel for Massey strains to characterize Massey narrowly to include only the Company's existence as an entity listed on the stock exchange that interacts with investors. That characterization is contrary to the evidence in this case, which amply demonstrates that the Massey corporate family, including its subsidiary mining operations such as Mammoth, is highly interrelated and that its labor policy is coordinated by officials of Massey. For example, the wage rates and benefits offered by the individual mining subsidiaries are not set by the management of those subsidiaries, but rather by Massey's board of directors and/or Massey's chairman. Similarly, Massey dictates whether or not a particular subsidiary will offer retention incentives for experienced miners. Massey also tells the human resources directors at the subsidiary mines when they must hire trainee miners and place them with experienced mentors. (Tr. 2658.) According to a mine superintendent at Mammoth, who has been a manager at five different Massey subsidiary mines, policies and procedures are the same from one Massey-owned mine to another. (Tr. 2759.)

In some practical respects, Massey treats the employees of its subsidiary mines as members of the greater Massey corporate family. For example, if an employee at one Massey subsidiary mine wishes to leave for work at another Massey subsidiary mine it is not enough that the prospective employer agrees to hire him or her. Approval must also be sought from the first employer and the employee will generally not be permitted to transfer if it means that the first employer will be "stripped" of a needed employee. Employees at subsidiary mines participate in a corporatewide pension plan, and their pension status is not affected when they move from one subsidiary to another. The Massey organization places help wanted advertisements stating that Respondent Massey is seeking experienced miners, even though miners hired through such efforts will work at the subsidiary mining companies.

The highly interrelated, integrated, character of the Massey corporate family is underscored by the fact that officials have positions with multiple entities within it. For example, Don L. Blankenship is Respondent Massey's chief executive officer (CEO), chairman, and president, but he is also CEO, chairman, and president of A.T. Massey. Drexel Short is Respondent Massey's senior vice president for group operations, and also holds the position of chairman of Massey Coal Services. (Tr. 1558–1559 and 2164); General Counsel's Exhibit 11a (Respondent Massey's 2005 Annual Report) at pages 5 and 20. Jennifer Chandler, while employed as the regional human resources director for Massey Coal Services, also served as the human resources official for Massey subsidiaries Mammoth, Alex Energy, Green Valley Coal, Nicholas Energy, and Power Mountain. Susan Carr, the benefits coordinator for Respondent Mammoth is also the benefits coordinator at two other subsidiary mines, and is actually employed by Massey Coal Services.

The evidence shows that Respondent Massey's control over its subsidiaries, and in particular over the labor relations policy of its subsidiaries, extends to Mammoth. Although Mammoth has its own president—David Hughart, who was selected for that position by Massey's CEO, Blankenship—it was Massey officials, not the leadership at Mammoth, who decided what wages and benefits could be offered to prospective Mammoth employees. Therefore, those Massey officials directly participated in the decision to unilaterally change the terms of employment from the ones Cannelton/Dunn had offered prior to Massey's acquisition of the operation. Similarly, it was Massey that dictated when Mammoth had to hire trainee miners, and that established any preferences for transferees from other Massey mines. Indeed, in its brief, Mammoth argues that Massey policies on, inter alia, trainees and transferees explain the failure to hire the former Cannelton/Dunn unit members to fill openings at Mammoth.

In addition, Drexel Short, Respondent Massey's senior vice president for group operations, interviewed prospective Mammoth staff, including at least one individual, James Fitzwater, who was being considered for work that had been performed by the union-represented Cannelton/Dunn unit employees. Short's office was also involved with coordinating job interviewers during the period when the Respondents chose to offer pretakeover interviews to the nonunion/nonunit Cannelton/Dunn incumbents, but not to the union/unit incumbents. Another Massey official, Chris Adkins, Massey's senior vice president and chief operating officer, also interviewed prospective Mammoth staff.

In addition to Short's own role interviewing and coordinating interviews, he was also responsible for assigning Jeff Gillenwater, a Massey Coal Services official, to conduct interviews of prospective Mammoth employees. Gillenwater, in turn, not only conducted interviews, but oversaw aspects of the effort to staff Mammoth. For example, Gillenwater provided Kevin Doss[4] (Mammoth's human resources officer from December 2004 until August 2005) with a spreadsheet that set forth the approximate "union time" of each of the former Cannelton/Dunn bargaining unit employees and directed Doss to ascertain the status of each of these union employees in the application/hiring process and report that information back to Gillenwater.[5] In addition, Gillenwater gave Doss the names of

[4] The last name of this individual is sometimes misspelled in the transcript as "Dawes."

[5] Gillenwater claimed that he did not know why "union time" was included on this spreadsheet, and stated that he used the spreadsheet only because it had been sent to him by Michael Haynes, the Cannelton/Dunn mine superintendent, via email. Haynes, who is neither an alleged discriminatee nor an official of the Respondents, testified that

former Cannelton/Dunn employees who had signed a letter to the State Department of Environment Protection (DEP) questioning permits used by a Massey subsidiary. According to Susan Carr, Mammoth's benefits coordinator, Hughart had to obtain Gillenwater's approval before hiring individuals at Mammoth who did not have a high school degree or GED. Gillenwater and Doss discussed how to recruit Mammoth staff—specifically, the possibility of placing help-wanted advertisements. During the period when they were staffing Mammoth, Gillenwater instructed Doss to watch a film that discussed, among other subjects, how union recognition could be triggered based on the percentage of union supporters who completed union cards.

Officials of Massey directly supervised officials at Mammoth in personnel matters other than staffing, and employee wages and benefits. For example, Short, a Massey senior vice president, told Doss how to discipline Mammoth employees involved in a safety infraction that occurred shortly after the Respondents began operating the former Cannelton/Dunn facility. Similarly, John Poma, Massey's vice president for human resources, was the direct supervisor of Chandler, the Massey Coal Services employee who handled human resources duties at Mammoth during two stretches in the relevant time period.

Supervisory personnel at Mammoth made statements recognizing that labor policy at Mammoth was not entirely in the hands of the leadership at Mammoth, but rather was controlled in significant respects by Massey. Jon Adamson, the superintendent of Mammoth's preparation plant and a person heavily involved with selecting employees for Mammoth, testified that Massey officials made known to him that Mammoth was to be operated "union free." (Tr. 3020–3021.) Moreover, Adamson explained that interviewees were asked whether they were willing to work nonunion because "[i]t was pretty common knowledge that Massey would operate that operation union free." (Tr. 2992.) Similarly, when employee Terry Abbott suggested to Keith Stevens,[6] a Mammoth supervisor, that the shortage of experienced miners at Mammoth could be addressed by hiring more of the displaced Cannelton/Dunn unit employees, Stevens dismissed the suggestion, replying, "Don Blankenship's[7] a smart man, he's not going to let the numbers go against him." (Tr. 664.)[8] Stevens had been a supervisor at Cannelton/Dunn and according to Respondent Mammoth would, therefore, have participated in the hiring process at Mammoth by making recommendations about whether to hire employees who had worked at Cannelton/Dunn.

Respondent Massey's attempt in this proceeding to characterize itself narrowly to include only its existence as an entity on the stock exchange that is not actually involved with the Mammoth mining operation is inconsistent not only with the activities and evidence discussed immediately above, but also with the way Massey presents itself in annual reports and promotional materials. In annual reports for 2005 and 2004, Respondent Massey described itself as a company that mines, process, and sells coal, and repeatedly referred to the coal miners at subsidiaries such as Mammoth as Massey's "members"—the term Massey uses for employees. Similarly, a document that was distributed to applicants for employment at Mammoth states that "*Massey Energy* is pleased to be able to offer employment opportunities at Mammoth Coal Company." (GC Exh. 23, emphasis added.) It is also telling that, while Massey now claims it was not sufficiently involved in Mammoth's operations to be held responsible for harm caused by any unfair labor practices at the former Cannelton/Dunn facility, it took the position in a lawsuit filed in Virginia Circuit Court on June 15, 2005, that Massey (not Mammoth) was entitled to recover damages from the Union for alleged harm to the effort to resume the Cannelton operation. (GC Exh. 19.)

To restate the obvious, the record shows that the Massey corporate family, including Mammoth, is highly interrelated and that its labor and human resources policy is controlled in significant respects by officials of Respondent Massey. The integrated nature of the Massey enterprise has been recognized by the United States Court of Appeals for the Fourth Circuit. In *A.T. Massey Coal Co. v. Massanari*, the Fourth Circuit stated that the Massey corporate family, including its subsidiary mining operations, function as "a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters." 305 F.3d 226, 233 (2002), citing *A.T. Massey Coal Co. v. Mine Workers,* 799 F.2d 142, 144 (4th Cir. 1986), cert. denied 481 U.S. 1033 (1987). The evidence discussed above confirms the validity of that conclusion. Moreover, the involvement of Massey officials in the personnel functions of its subsidiary Mammoth, and indeed its direct participation and key causal role in the actions alleged to be unlawful in this proceeding, satisfy the Board's standard for holding a parent company liable for the unfair labor practices of a subsidiary. See *Smithfield Foods,* 347 NLRB 122, 122 fn. 2 (2006) (parent corporation is liable for subsidiary's unfair labor practices on a direct participation theory where parent was directly responsible for several violations, and one of its officials was involved in the antiunion campaign from which the full panoply of violations arose); *Condado Plaza Hotel & Casino*, 330 NLRB 691, 693 (2000), enfd. sub nom. *Posadas de Puerto Rico Associates, Inc. v. NLRB*, 243 F.3d 87 (1st Cir. 2001) (parent corporation is liable for the unfair labor practice by a subsidiary where parent is shown to have participated directly

he did not provide this spreadsheet to the Respondents, that he did not possess the information included on it, and that he could not have sent it to Gillenwater by email since the Horizon email system was "closed" and only allowed him to contact persons inside Horizon. Based on the demeanor of the witnesses, the testimony, and the record as a whole, I found Haynes' testimony on this subject more credible than Gillenwater's.

[6] In the record, his last name is often misspelled "Stephens."

[7] As discussed above, Blankenship is the CEO, president, and chairman of Massey.

[8] I credit Terry Abbott's clear and certain testimony that Stevens made this statement to him. Stevens testified that he did not recall making the statement to Abbott, but he did not testify that he recalled that he had *not* done so. Stevens conceded that if he had made the statement recounted by Abbott, he would not necessarily remember it. Tr. 2752–2753. In addition, Abbott is not an alleged discriminatee and has nothing obvious to gain by falsely claiming that Stevens made such a statement. Although Abbott had been a union officer in the past, he had not held such a post since 1979, and since that time had worked at coal mines in non-unit positions as a salaried employee.

in the unfair labor practice); *Esmark, Inc.*, 315 NLRB 763, 767 (1994) (parent corporation liable for unfair labor practice of subsidiary where parent through its "vigorous and detailed exercise of its right of ownership" played a "key causal role" in the unfair labor practice, even though no direct participation was shown).[9]

IV. RESPONDENTS' CULTURE OF ANIMOSITY TOWARDS UNIONS AND UNION ACTIVITY

As Adamson testified, Massey officials had declared that they would operate Mammoth union-free even before the Respondents selected the employees who would perform the work of the former Cannelton/Dunn unit members. Massey's decision to operate Mammoth without a union was communicated not just to managers like Adamson, but also to individuals who were seeking work at Mammoth. Indeed a document that the Respondents' officials distributed to applicants flatly stated that "the mine is nonunion." (GC Exh. 23; Tr. 2172–2173.) According to Ray Hall, a Mammoth mine superintendent, the same point was made while interviewing applicants. (Tr. 2785.) This was confirmed by several prospective employees. During an interview on November 30, 2004, applicant Michael Armstrong was told that the operation at Cannelton was "a nonunion mine now, it wasn't no longer be union." At the interview, Armstrong was asked whether he knew the mine was non-union and "would [he] mind?" (Tr. 3354.) Similarly, applicant Leo Cogar was advised during his interview of January 28, 2005, that Mammoth would be operated union free. (Tr. 1072.) During his interview for work at Mammoth, Randy Kincaid was asked how he "felt" about working nonunion (Tr. 1695–1696), and when Adamson discussed the possibility of employment at Mammoth with applicant Joe Brown, Adamson questioned Brown about his willingness to work nonunion. (Tr. 1916–1917.)

In addition, Adamson testified that one of the main things that influenced his unwillingness to hire Willis—president of the Union's local—was Willis' statement of intent to organize on behalf of the Union if hired. (Tr. 2934.) Similarly, Doss testified that he evaluated Dwight Siemiaczko as a poor candidate for employment in part because Siemiaczko had stated that if hired he would "make every effort to organize." (Tr. 3054–3055.) The interviewers also asked many of the applicants whether they would cross union picket lines or whether the picket lines would be a problem for them.[10] Applicants who the interviewers questioned about the picket lines included alleged discriminatees Tilman Cole, Russell Cooper, Willis, and Fred Wright.

Adamson did not state specifically which Massey officials made it known to him that Mammoth would be operated union free. The record contains evidence, however, that in addition to whatever Massey officials may have communicated directly to Adamson, a number of persons representing Massey publicly stated that Mammoth would be a nonunion operation. Shane Harvey, a Massey Coal Services attorney who was designated to appear on Massey CEO Blankenship's behalf[11] at a Community Impact Board (CIB) meeting, told the CIB that Respondent Massey's "philosophy" was one of "nonunion," and that "Massey intended to operate without a union to start with" at Mammoth, although "the miners would then have the right to petition for a union if they wanted to do so." While being interviewed by a newspaper reporter in October 2004, Katherine Kenny, who was Respondent Massey's director of investor relations, stated, in regards to Mammoth, that "it was Massey's policy to maintain a nonunion operation."[12]

Although the record does not show that Blankenship was among those Massey officials who told Adamson that Mammoth would be operated nonunion, or who publicly identified Mammoth as union free, the record does show that Blankenship made public comments that suggested an intent to operate all of Massey's mines union free. In one published account, for example, Blankenship was quoted as saying that "[n]o operator in their right mind would go union." At trial, Blankenship testified that he generally agreed with the statements that were attributed to him in that account. Blankenship has also stated that he is "ready to be killed" in his battle against the Union, and

[9] Massey argues that these legal standards for parent company liability were not set forth in the amended complaint. The amended complaint, however, alleges that Mammoth is a subsidiary of Massey, that Massey performs various administrative services for its subsidiaries, that Massey and Mammoth have been "acting for and on behalf of each other," and are "agents of each other" and that both Respondents committed unfair labor practices that affect commerce. On the first day of the trial, counsel for the General Counsel took the position that Massey and Mammoth were both part of "one big ball of wax." Tr. 159. At any rate, in its brief, Massey discusses the legal standard for parent company liability, but cites to no types of evidence regarding its interrelation with Mammoth, or involvement in the alleged unfair labor practices, that it did not introduce, but would have, if the complaint had been precise about the applicable legal standard. Br. R. Massey at p.10. Based on my review of the entire record, I conclude that Massey's involvement in, and potential liability for, the alleged unfair labor practices has been fully litigated.

[10] At the time of the interviews, the Union had begun informational picketing at multiple entrances to the Mammoth location. The purpose of this picketing was not to keep the Union's members from entering the facility. To the contrary, the Union encouraged the former Cannelton/Dunn unit members to become employed at Mammoth.

[11] By letter dated October 29, 2004, Randy White, a West Virginia State senator who served as chairman of the CIB, invited Blankenship to attend a CIB hearing regarding Massey's purchase of Cannelton. Harvey appeared at the hearing instead of Blankenship, and informed the CIB that he was appearing on Blankenship's behalf. Tr. 944–947; GC Exhs. 53 and 54; see also *Cablevision Industries*, 283 NLRB 22, 29 (1987) (Agent has apparent authority to speak for a principal when the principal does something, or permits the agent to do something, which reasonably leads another to believe that the agent had the authority he purported to have.").

[12] This statement by Kenny was testified to by James Dao, the New York Times reporter to whom it was made, and was not specifically denied by Kenny. The General Counsel would have me credit another statement, this one recounted in an October 24, 2004 article written by Dao, in which Dao reported that a Massey spokesperson had stated that Massey "w[ould] hire only nonunion workers" when it reopened the Cannelton operation. Dao testified that the source for this was Kenny, but he did not testify that he currently remembered Kenny specifically making the statement that Massey would hire only nonunion workers. Kenny denied making the statement. Given Kenny's denial, and Dao's failure to specifically recount the statement while testifying, I find that the evidence is insufficient to establish that the statement was made.

has characterized that conflict as not "any different" than "the World Wars." He opined that "[the Union] tried to kill us on several occasions."[13] In 1982, when Blankenship first began working with a Massey company, its operations were 70- to 75-percent unionized. By 2005, Massey operations were 97-percent *nonunion* and none of its underground miners were represented by a union. The 10-K form that Massey filed with the Securities and Exchange Commission for 2005, and which Blankenship signed, characterizes the possibility of unionization at its mines as one of the "Risk Factors" that threaten Massey's income. The report states: "Massey has experienced some union organizing campaigns at some of its open shop facilities within the past five years. If some or all of Massey's current open shop operations were to become union represented, Massey could be subject to additional risk of work stoppages and higher labor costs, which could adversely affect the stability of production and reduce the Company's net income." (GC Exh. 11(a) at p. 22.)

In multiple presentations to investors, Blankenship boasted that its operations were 97-percent union free, and his enthusiasm for operating union free is echoed by Mammoth officials. For example, Mammoth's president, Hughart, testified that he agreed with Blankenship's management philosophy and viewed it as a positive thing for Massey that its coal mining operations were 97-percent union free. The interview reports that the Respondents' officials prepared, record that Doss (Mammoth's human resource's officer) told an applicant that Massey was 97-percent union free and had intentions of operating Mammoth union free. (GC Exh. 8(o), interview record by Jim Nottingham, p. 2.) When one employee suggested to Stevens, a Mammoth supervisor, that the Company could address the shortage of experienced miners at Mammoth by hiring more of the displaced Cannelton/Dunn unit employees, Stevens dismissed the suggestion, replying that "Don Blankenship's a smart man, he's not going to let the numbers go against him." Although the evidence did not show that Blankenship was directly involved in selecting particular miners at Mammoth, the evidence indicates that Massey fostered a culture of anti-unionism that discouraged the hiring of union/unit employees from Cannelton/Dunn. Moreover, as the CEO, chairman, and president of Massey, Blankenship had involvement in the decisions to give preferences to trainees and transferees at Mammoth—decisions that limited the opportunities for Cannelton/Dunn's unit employees to find continued employment there.

V. SHORTAGE OF MINERS AT MASSEY OPERATIONS

The record shows that at the same time the Respondents declined to retain the predecessor's bargaining unit miners, Massey was experiencing significant problems recruiting experienced miners for its mining subsidiaries. In Massey publications, and in presentations by CEO Blankenship, the shortage of experienced miners is mentioned again and again as one of the most significant obstacles to the Massey's optimization of production and profits at its mining operations. In a July 2005 newspaper interview, Katherine Kenny (Massey's director of investor relations) acknowledged that Massey had a shortage of miners in much of central Appalachia, and stated that "[w]e're always two to three hundred miners short of where we want to be." (Tr. 751; GC Exh. 38.) The testimony indicated that this problem is more pronounced at some Massey subsidiaries, such as those referred to as the "route 3" mines, but that Massey's difficulty hiring experienced miners extends to all subsidiary mines in West Virginia . During the time period relevant to the allegations in the complaint, Respondent Massey ran numerous newspaper and billboard advertisements in the general vicinity of Mammoth seeking experienced miners, and even had airplanes pull banners with help-wanted announcements above Myrtle Beach, South Carolina—a popular vacation destination for miners who live in West Virginia.

Mammoth argues that while Massey had severe problems hiring and retaining experienced miners, it was somehow spared this problem when seeking to hire miners to staff an entire mining operation at the former Cannelton/Dunn facility. The evidence leads me to conclude that, contrary to this representation, Massey's difficulty hiring experienced miners extended to staffing Mammoth. Respondent Massey and Blankenship said as much in a lawsuit they filed in Virginia Circuit Court on June 15, 2005, alleging, inter alia, that they had experienced delays in restarting operations at the Cannelton location because of difficulties in attracting and retaining qualified workers. On August 26, 2005, the Respondents ran a newspaper help-wanted advertisement explicitly stating that they were seeking experienced underground coal miners to work at Mammoth. Gillenwater, a Massey Coal Services official who had human resources responsibilities and was involved in staffing Mammoth for the Respondents, testified that although Massey's difficulty hiring miners was greater at some locations than others, the difficulty extended to *all* Massey mines in West Virginia. The assertion that Massey's general problem hiring experienced miners bypassed its Mammoth operation is also belied by evidence that, during the initial staffing of Mammoth, the Respondents resorted to hiring many miners who either had no experience working in mines, or lacked the 6 months' experience necessary to qualify as other than a trainee miner. In West Virginia, such inexperienced miners are required to work within the sight and sound of experienced miners and must be mentored by experienced individuals. At work, the trainee miners are required to wear a red-colored hardhat, rather than

[13] In determining how much weight to assign to Blankenship's statements that he is ready to be killed in his fight with the Union and that it was like "the World Wars," I considered the fact that those statements were made approximately 18 years prior to the first of the alleged violations in this case. I also considered that during his testimony in this proceeding, Blankenship acknowledged that he made those statements and did not assert that his views had changed. Indeed, Blankenship testified that he continues to oppose the Union's influence and believes operating its mines union-free is important to Massey's success. I give Blankenship's temporally distant statements far less weight than I would if they were more recent utterances. Nevertheless, the earlier statements, when considered together with the other record evidence, help contribute to an accurate understanding of Massey's stance with respect to the Union.

the standard black-colored one,[14] in order to alert other miners to the safety hazards they pose.[15]

The General Counsel suggests that, against this background, the Respondents' explanations for declining to employ the vast majority of the experienced miners at Cannelton/Dunn ring hollow. The record does, in fact, show that despite the profound problems that Massey subsidiary mines face hiring miners in West Virginia, the Respondents did not retain a single one of the over 200 incumbent bargaining unit members at Cannelton/Dunn when they took over that operation in September 2004, and that the Respondents declined to offer employment to the overwhelming majority of those union miners during subsequent hiring. The Respondents did this despite the fact that, before assuming control of the operation, they offered pre-takeover interviews and/or employment to the numerous nonunit individuals who were working at Cannelton/Dunn operation as clerks, secretaries, and laboratory workers—categories of employees who Massey was not shown to have had trouble recruiting.

Blankenship himself testified that experienced miners are generally more productive than inexperienced miners, and Hughart conceded that it was sometimes helpful to hire miners who were experienced at the particular facility where they would be assigned. Not surprisingly, the fact that the Respondents employed so few miners who had prior experience at the facility, and so many trainee miners, appears to have created challenges for that operation. Indeed, in January 2005, a Mammoth supervisor, Donnie Rutherford, complained to a former coworker about the use of trainees and said he needed "some good experienced coal miners." Three other Mammoth supervisors—Keith Stevens, Mickey Sizemore, and Dennis Roat—complained that the Respondents' heavy reliance on inexperienced miners was interfering with production. These comments find support in the documentary evidence. The record shows that in 2005 and 2006 Mammoth was mining less efficiently, as measured by tons of coal produced per employee per day, than had been the case when the experienced Cannelton unit work force was in place in 2003. The record also shows that Mammoth fell short of its production goal for 2006, the first year it set such a goal after taking over the operation from Cannelton/Dunn.[16]

Mammoth's claim that the miner shortage did not extend to the former Cannelton location is also belied by evidence that the Respondents filled the greatest portion of the miner positions by moving miners from other Massey subsidiary mines, including from its route 3 mining operations, especially Elk Run Coal. Of the first 24 miners that Mammoth hired, 13 came from other Massey mines, including seven from Elk Run. (Tr. 2506–2511.) As alluded to above, the difficulty finding miners was particularly pronounced at Massey's route 3 operations. By taking employees from other Massey operations to fill positions at Mammoth, the Respondents were not only "robbing Peter to Paul," but were in some instances satisfying its needs at Mammoth by creating vacancies at locations where the problems filling positions were particularly acute. Chandler, a witness for Mammoth, testified that transferring a miner from another Massey subsidiary to Mammoth would adversely affect the transferring company. Yet his was done to fill positions at the former Cannelton/Dunn location where there was already an experienced incumbent workforce available to select from.

VI. HISTORY OF CANNELTON/DUNN

Cannelton conducted underground coal mining operations in Kanawha County, West Virginia, for many years prior to when the Massey organization acquired the operation from Horizon in 2004. Although the precise number of years that Cannelton operated is not revealed by the record, some idea is provided by the fact that a number of the alleged discriminatees were second and third generation Cannelton miners. Over the years Cannelton had mined coal at numerous sites on the property. When one mine site was depleted to such an extent that Cannelton decided to cease work at that location, the miners would generally be moved to an active mine on the property and their employment with Cannelton would continue. In addition to the mine sites themselves, Cannelton operated a preparation plant where coal was separated from impurities, a river loadout facility where coal was loaded into river barges for shipment, and a refuse impoundment where the impurities resulting from coal processing were dumped.[17] The preparation plant received coal primarily from the mines operated by Cannelton, but also received coal from other mines. Cannelton did not own the rights to the coal in the property where it was operating. Even before Massey purchased Cannelton, the coal rights there were owned by a Massey subsidiary, to which Cannelton paid royalties.

Immediately prior to when Massey acquired the operation, Cannelton was mining coal exclusively at a site on the property known as the Stockton mine. Cannelton mined this site using the "room and pillar" technique—which means that miners made cuts at right angles across the same underground "seam" of coal, so that pillars were left to hold the ceiling or "top" up. The coal was cut by employees using "continuous miner" machines that extracted the coal and moved it to the rear of the

[14] For this reason, trainee miners are often referred to in the record as "red hats."

[15] Of the 130 or so persons the Respondents hired for bargaining unit work between December 2004 and August 2005 there were at least 19 who were either hired by the Respondents as trainee miners or whose applications indicate that they lacked the 6 months' mining experience necessary to avoid such classification. The inexperienced miners included: Joshua Accord, Jeremiah Adkins, David Buford, Christopher Burgess, Jeremy Campbell, Derrick Easterday, Darrell Elks, Mark Fitzpatrick, Johnny Fox, Steve Goodwin, Raymond Peterson, Chad Rogers, Jack Rose, Thomas Sanford, Christopher Sargent, Larry Lee Sargent, Paul Lawrence Scott, John Toney, and Michael Upton.

[16] Mammoth's production goal for 2006 was 1,500,000 tons of coal and it fell 30,000 to 40,000 tons short of that. In 2003, the last complete year that the operation was run by Cannelton/Dunn, the mines were producing 35.07 tons of coal per employee per day. In 2005, the first complete year that the mines were operated by Mammoth, that figure dropped to 24.53 tons per employee per day. In 2006, production was 23.40 tons of coal per employee per day.

[17] In the record, the preparation plant operation is sometimes construed to include the river loadout facility. These portions of the facility are also referred to as "Lady Dunn" and the "tipple." The refuse impoundment is referred to by a variety of other names, including the "gob pile," the "slurry," and the "dump."

machines where it was dumped onto shuttle cars. Shuttle cars then moved the coal to belts that transported it above ground. At Cannelton, belts and off-road trucks were then used to take the coal to the preparation plant. Cannelton was mining four sections of the Stockton mine and employees used one continuous miner machine at each of these sections. Cannelton was operating three shifts a day—two production shifts, and one maintenance shift. Some of the main employee classifications in the underground mine at Cannelton were continuous miner operator, shuttle car operator, beltman (cleans, splices, and does other work to belts), electrician, brattice man (puts up the controls that help direct fresh air through the mine), roof bolter (places bolts in unsupported ceiling areas to secure them), and fire boss (checks safety of walks, airways, escapeways). Work classifications at the preparation plant and loadout facility included plant operator, assistant plant operator, loadout operator, mechanic, and electrician. There was also bargaining unit work above-ground for mobile equipment operators, "greasers" who serviced equipment, and refuse impoundment workers.

Cannelton's subsidiary Dunn was originally created to operate as a surface mine—also referred to in the record as a "strip" mine—on the same property where Cannelton was performing underground mining operations. However, the surface mine operation was essentially abandoned after December 31, 1999. The number of individuals employed by Dunn had previously been as high as 113, but, since December 31, 1999, that number has been reduced to between 7 and 12. During the period immediately before Mammoth took over Dunn, the Dunn employees were no longer engaged in the surface mining of coal, at least not to any significant extent. Rather, they worked in support of Cannelton's underground mining operation. For example, the Dunn employees maintained the road between Cannelton underground mines and the preparation plant and also built a storage bin at the Stockton mine. In addition, the Dunn employees were engaged in government-mandated "reclamation" activities that were aimed at restoring the landscape to its condition prior to the surface mining activity.

Cannelton and Dunn both signed memoranda of understanding with the Union in which they agreed to follow the 2002 National Coal Agreement. The memoranda stated an effective period from January 1, 2002, until December 31, 2006,—the same term stated by the 2002 National Coal Agreement. Those memoranda also set forth, or referenced, certain additional terms, but none of those additions have been alleged to contradict any term of the 2002 Agreement that is germane here. The 2002 National Coal Agreement describes unit work as: "The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above." (GC Exh. 14(a) at p. 3 (art. IA).) The appendices to the 2002 Agreement set forth job classifications for employees doing this covered work, including, inter alia: continuous mining machine operator; electrician (underground, strip mines, and preparation plant); mechanic (underground, strip mines, and preparation plant); fireboss; roof bolter; dispatcher (underground); loading machine operator (underground); welder, first class (underground, strip mines, and preparation plant); general inside repairman and welder (underground, strip mines, and preparation plant); shuttle car operator(underground); motorman (underground); beltman (underground); brattice man; general inside labor; trackman; labor-unskilled (underground, strip mines, and preparation plant); coal loading shovel operator; overburden stripping machine operator; shovel and drag line oiler; groundman; mobile equipment operator (strip mines and preparation plant); tipple attendant; utility man; stationary equipment operator (including, inter alia, processing plan operator, loading point operator, river loading equipment operator, river tipple operator, and tipple operator); tipple attendant; truckdriver, service; preparation plant utility man; surface utility man. Id. pages 316 to 335.

VII. MASSEY TAKES OVER CANNELTON/DUNN

On August 17, 2004, A.T. Massey and Horizon executed a purchase agreement that was approved by the bankruptcy judge on September 16, 2004, and under which Horizon's Cannelton/Dunn operation became the property of the Massey organization. After the parties executed the purchase agreement, Cannelton/Dunn continued running the operation for about 5 weeks—employing the same unit workers and providing the same terms and conditions of employment to them as it had before it was purchased. The last day that Cannelton/Dunn operated the facility was September 24, 2004, at which time control was turned over to the Respondents. Since taking over the facility, the Respondents have refused to recognize the Union as the collective-bargaining representative of any of the employees at Mammoth.

Prior to September 24, Massey Senior Vice President Drexel Short coordinated with Cannelton/Dunn's underground mine superintendent, Michael Haynes, to arrange interviews and/or employment for all of Cannelton/Dunn's supervisory and management employees. Many of these individuals were hired by the Respondents prior to the change in control of the facility, and their employment at the operation continued without interruption through the transition from Cannelton/Dunn to Mammoth. Similarly, the Respondents arranged pretakeover interviews and/or employment for Cannelton/Dunn's nonunit rank-in-file workers—including secretaries, clerks, and laboratory workers. The only group of Cannelton/Dunn employees to whom the Respondents did not offer these opportunities were the union-represented unit incumbents. Consequently, all of the more than 200 Cannelton/Dunn employees who were represented by the Union lost their jobs when the operation changed hands. Blankenship and Gillenwater indicated in their testimonies that the objective was to have the Mammoth management/supervisory team in place first, and to let that team hire the rank-and-file employees. They did not explain, however, why the new management team would not have wanted to hire some union incumbents prior to the Respondents' takeover of the operation, or why the nonunit rank-and-file employees were offered pretakeover interviews or employment.

Not only did the Respondents fail at that time to offer interviews or employment to any of the over 200 union-represented incumbent employees, but the Respondents did not even pro-

vide the unit employees with information about how to go about seeking employment at the facility where many had worked for decades. Ascertaining how to apply was more difficult than one might at first imagine since human resources functions for the new operation were initially neither based at the Mammoth production facility itself, nor handled by officials employed directly by Mammoth. The first human resources official was Chandler—a Massey Coal Services employee who was not based at Mammoth. She passed the human resources responsibility to Doss—who testified that Massey moved him to the Massey Coal Services office in Charleston when he assumed human resources responsibilities at Mammoth. Even through much of the hearing, there were lingering questions about what locations constituted offices of Mammoth, and these were resolved only after the General Counsel presented records, such as facsimile communications, that would not have been available to the Cannelton/Dunn miners. In addition, although officials of the Respondents testified that they made applications available at Mammoth's guard station, the record indicated that this was not generally communicated to the union-represented individuals. Indeed, a union-represented, former Cannelton/Dunn, employee who approached the guard station and inquired about employment was not given an application.

The record does not substantiate any credible, nondiscriminatory, explanation for the Respondents' decision to offer pretakeover interviews and/or employment to the unrepresented nonsupervisory incumbents, at the same time that they declined to offer union-represented unit employees interviews, employment, or even information about applying. Nor did the company witnesses offer a credible explanation for why, if the objective was to allow a Mammoth management/supervisory team to hire its own rank-in-file employees, it was Short and a Cannelton/Dunn superintendent, not Mammoth managers and supervisors, who scheduled the interviews for the *nonunit* rank-and-file incumbents and why those interviews were conducted at essentially the same time as the new Mammoth managers and supervisors were themselves being interviewed.

In its brief, Mammoth suggests that the reason the Respondents offered pretakeover interviews and employment to the unrepresented rank-and-file incumbents, but not to the union-represented incumbents, was that Horizon had made a request that interviews be offered to the salaried workers. I have examined this contention in light of the testimony by Gillenwater that Mammoth relies upon to support it. (Tr. 2165–2166.) A review of that testimony indicates that Gillenwater was explaining the decision to grant *supervisors* pretakeover interviews and employment, not a reason why unrepresented clerks, secretaries, laboratory workers and other nonsupervisory, nonunit, personnel were offered that opportunity as well. Even at that, Gillenwater's reference to this subject was passing and vague. He said that it was his "understanding" that Horizon had made a request that supervisors be interviewed pretakeover, not that he had personal knowledge of either the request or the Respondents' response to the request. He did not disclose how he came to his "understanding" or identify any official of the Respondents who made a decision to honor the request. Gillenwater's passing and vague mention of his "understanding" is not persuasive evidence that a request from Horizon accounts for the startling disparity in treatment between the represented and nonrepresented incumbents.

In its brief, Mammoth also hints that the Respondents decided not to offer pretakeover interviews/hiring to the union-represented incumbents because Cannelton/Dunn had been unable to operate profitably with those employees. However, Mammoth does not explain why the Respondents would hold Cannelton/Dunn's financial problems against every single one of the union-represented incumbent miners, and therefore deny those individuals pretakeover interviews and/or employment, and at the same time offer such opportunities to all the managers, supervisors, secretaries, clerks, laboratory workers, and other nonunit incumbents.

Within a few weeks of when the union-represented Cannelton/Dunn employees lost their employment, the Union initiated picketing outside the entrances to the employees' former workplace. The Respondents contracted with security personnel who took approximately 1000 hours of videotape and hundreds of photographs of the picket activity. With few exceptions, the alleged discriminatees in this case participated in that picket activity, which included distributing literature critical of Massey.[18] This picketing continued daily for over a year until early 2006. The Union's purpose in picketing was not to stop the former Cannelton/Dunn unit members from entering the facility, and the evidence establishes that, to the contrary, the union actively encouraged former unit members to work for Mammoth. That encouragement included: making numerous copies of a blank application from another Massey subsidiary and providing copies to unit employees; attempting to hand deliver completed applications for employment at Mammoth to company officials; mailing copies of the completed applications to the offices of officials who were selecting staff for Mammoth; and telling union members that it was permissible to work at Mammoth while the picket activity continued. Many of the over 200 Cannelton/Dunn unit employees submitted applications for work with Mammoth, including all but a few of the 85 alleged discriminatees in this case.[19] Some former unit em-

[18] On one occasion, approximately 10 to 12 individuals—including the president of the Union local (Willis), and the international president of the Union (Cecil Roberts)—were arrested while engaging in a protest on a highway adjacent to Mammoth. At trial, counsel for Respondent Mammoth elicited testimony regarding these arrests, but was unclear about whether Mammoth planned to claim that the arrests were the basis upon which any of the alleged discriminatees were rejected. Tr. 170–172. A review of the record evidence shows that the Respondents did not offer testimony or other evidence showing that any of the alleged discriminatees were rejected because they had been arrested in the highway protest, and no such argument was made in the Respondents' briefs.

[19] A number of these applications were not submitted at the Mammoth operation, but rather at the offices of two Massey subsidiaries—Massey Coal Services and Nicholas Energy—which shared human resources functions and/or human resources officials with Mammoth. The record shows, moreover, that Kevin Doss, a Mammoth human resources official, took possession of the applications that the former Cannelton/Dunn employees mailed to Nicholas Energy. At least some other applications were mailed to a location in Leivasy, West Virginia, which served as an office of Mammoth, as well as of another Massey subsidiary, Alex Energy.

ployees also sought employment by participating in the efforts to hand deliver applications, attending Massey job fairs, or inquiring at the Mammoth guard shack.

The Respondents began interviewing potential employees for bargaining unit work in late November 2004, and hired the first of these employees on December 3. By the end of December, the Respondents had hired about 30 employees to perform the types of work that had been bargaining unit work at Cannelton/Dunn. This hiring continued, with about 16 such employees hired in January 2005; 26 hired in February 2005; and others hired in every month through at least May 2006. As of May 1, 2006, the Respondent had hired a total of approximately 219 employees to perform the types of work that had previously been performed by the union-represented employees. These employees were not provided with the wages and other terms of employment that were in effect at Cannelton/Dunn immediately prior to the Respondents' taking over the operation. Instead, the Respondents provided the employees with other terms, including, in general, lower wages. The wage rate parameters and a number of other terms of employment that Mammoth officials offered were not set by the leadership at Mammoth, but rather were decided upon by Massey officials. The Respondents did not give the Union prior notice, or an opportunity to bargain, regarding these changes in the terms and conditions of employment.

Of the approximately 219 employees hired by the Respondents to perform bargaining unit work, no more than 22 had been among the at least 211 Cannelton/Dunn unit employees who lost their jobs when the Respondents took over the facility in September 2004.[20] As discussed above, for its initial staffing the Respondents relied heavily on experienced miners who it moved from other Massey subsidiary mines, including from "route 3" subsidiaries where Massey was already starved for experienced miners. Information provided by Respondent Mammoth shows that, as of May 20, 2005, transfers accounted for 38 of the 89 miner positions filled at Mammoth. Of those 38 transferred employees, 17 came from the Massey's route 3 subsidiaries.[21]

The Respondents' early staffing also relied to a significant extent on the use of trainee miners and other inexperienced individuals, of whom it hired approximately 19. According to a Mammoth mine supervisor, Donnie Rutherford, the Company stopped using trainees as of June or July 2006[22] because by that time the operation was "staffed up" and there was no need to hire somebody who was not experienced. The Respondents also recruited a significant number of miners by soliciting applications from employees of a non-Massey operation—Kanawha Eagle. The Kanawha Eagle miners had not sought employment at Mammoth, but had worked with an individual that the Respondents hired as a mine supervisor for Mammoth.

On December 6, 2004, the Respondents began operations at the Stockton mine and the preparation plant. In January 2005, the Respondents loaded coal at the river barge facility for the first time after taking over the operation from Cannelton/Dunn. Initially, the Respondents operated one production shift at one section of the Stockton mine. In March 2005, the Respondents added a second production shift, and began mining at a second section in the Stockton mine. The Respondents also added a maintenance shift. The work was performed using continuous miner machines, shuttle cars, belt lines, preparation plant, and other equipment that had been in operation at Cannelton/Dunn prior to the change in ownership. As at Cannelton/Dunn, the Respondents utilized the "room and pillar" mining method—one of several underground mining methods used in West Virginia. The production work that was necessary was basically unchanged. As at Cannelton/Dunn, the Respondents had employees at Mammoth who performed the work of continuous miner operators, shuttle car operators, beltmen, electricians, brattice men,[23] roof bolters, fire bosses, loadout operators, mechanics, electricians, plant operators (at Mammoth called "control room operators"), and assistant plant operators (at Mammoth called "floor operators"). According to Adamson and Chandler, Mammoth's miners were performing essentially the same tasks as the Cannelton/Dunn miners had performed, and the coal itself underwent the same process. Mammoth's cus-

[20] Respondent Mammoth suggests that it did not hire more former Cannelton/Dunn unit employees, in part, because the Union discouraged those individuals from working at Mammoth. On its face this claim is implausible given the evidence of the Union's extensive efforts to help such individuals seek employment at Mammoth. Moreover, Willis credibly testified that he and Cecil Roberts (International president of the Union), made a decision to encourage the unit members to obtain employment with Mammoth both because those individuals needed the jobs, and because the Union wanted to establish itself as the bargaining representative. Several former Cannelton/Dunn employees testified that union officials verbally encouraged them to work at Mammoth. In an effort to substantiate the contention that threats from the Union or union members had been responsible for keeping former Cannelton/Dunn employees from accepting employment, Mammoth presented the testimony of James Fitzwater—a former Cannelton/Dunn employee who refused employment at Mammoth. However, when questioned by Mammoth's counsel, Fitzwater emphatically denied that he had a basis for believing that he had been threatened by the Union or its members. He stated that he decided not to work for Mammoth because the Respondents tried to pay him a lower wage than they had promised him, and because he was disturbed that the Respondents were denying employment to other qualified Cannelton/Dunn employees. Mammoth also claims that Gregory Moore, another former Cannelton/Dunn employee, turned down a job because the president of the Union local (Willis) had told Moore that by going to work for Mammoth he could lose his son's private health coverage. Both Moore and Willis denied that Willis had made such a statement, and Moore further testified that his son's healthcare needs were covered by Medicaid and that he did not use, or need, the private health insurance. The record does not substantiate the Respondents' contentions that the Union discouraged former Cannelton/Dunn employees from working for Mammoth, or that the Respondents would have hired significantly more Cannelton/Dunn employees if not for the supposed interference.

[21] These figures are based on GC Exhs. 26(a)(1), (b)(1), and (c)(1), the compilation charts included by Respondent Mammoth and the General Counsel in their briefs, and the portions of the record underlying those compilations. See Br. of R. Mammoth at pp. 20 to 31, and Br. of GC at pp. 78 to 82.

[22] Rutherford's testimony on February 27, 2007, was that Mammoth had not used trainee miners ("red hats") for 8 months.

[23] Mammoth had employees who performed the brattice man functions, Tr. 2393, but apparently no longer used "brattice man" as a job title, Tr.2802.

tomers, like those of Cannelton/Dunn, were electrical power generating companies. Both before and after the transition from Cannelton/Dunn to Mammoth the operation's short list of major customers included American Electric Power (AEP).

The Respondents did make some adjustments to how the operation was run. Most notably, instead of using one continuous miner for each of four sections in the mine, the Respondents began using two continuous miners in each of two "dual" sections. In addition, a few job duties were re-distributed among the job classifications and, initially, fewer employees were employed than had been the case under Cannelton/Dunn. For example the work of Cannelton/Dunn's "miner helpers" was done at Mammoth by employees in "utility" classifications. Cannelton/Dunn had three employees working at the refuse impoundment, but Mammoth assigned two employees to do that work. The Respondents employed electricians, but, unlike Cannelton/Dunn, it did not station one of the electricians at the river loadout facility.

In July and August 2005, the Respondents began shutting down the Stockton mine work after concluding that mining there was no longer practical. In July, the Respondents relocated equipment and staff to the "130 mine"—another site on the same property—and began operating in one section there. In August, the Respondents moved other equipment and staff from the Stockton mine to the "Winifrede mine," where the Respondents began operating in one section for two production shifts a day. As of the time of trial, the Mammoth plant and loadout were being used to process and load coal from the 130 mine and the Winifrede mine, as well as from Massey mines that were not part of the Mammoth operation. The Winifrede mine is on the same property as the Stockton mine and 130 mine, but the Respondents use highway trucks, rather than belt lines or off-road trucks, to haul coal from the Winifrede mine to the preparation plant. The Respondents hired over-the-road truck drivers to operate the highway trucks and, as of the time of trial, employed 10 of these drivers. Cannelton/Dunn had not used over-the-road drivers or operated its own highway trucks, but it apparently did receive coal at the preparation plant that came from outside the property. In January 2006, the Respondents discontinued the use of the off-road trucks at Mammoth, but have continued the use of the highway trucks.

In addition to the coal reserves on the former Cannelton/Dunn property, Massey owns coal reserves in an adjacent area referred to as the Kanawha Energy property. Mammoth's president, Hughart, testified that Mammoth was developing the mining capability on the Kanawha Energy property and expected to begin production there later in 2007.

VIII. BANKRUPTCY COURT RULING REGARDING ASSUMPTION OF COLLECTIVE-BARGAINING AGREEMENT

As alluded to earlier, Horizon was bankrupt at the time it sold the Cannelton/Dunn operation to the Massey organization. In bankruptcy proceedings,[24] certain issues related to Cannelton's and Dunn's collective-bargaining agreements—the 2002 National Coal Agreement—with the Union were addressed. That agreement included a provision, referred to by the bankruptcy judge as a "successorship clause," which stated that the employer could not sell its operation "without first securing the agreement of the successor to assume the Employer's obligations under this Agreement." (GC Exh. 14(a) at pp. 1 to 2 (art. I).) Prior to the Horizon sale, a number of the individual debtors, including Cannelton and Dunn, filed a motion with the bankruptcy court in which they sought an order permitting them to "reject certain collective-bargaining agreements pursuant to section 1113 of the Bankruptcy Code." The bankruptcy judge stated that the order sought by the debtors would "authoriz[e] the sale of the debtors' assets free and clear of all liens, claims, encumbrances, and other interests, apparently including successor liability under collective-bargaining agreements and under the Coal Industry Retiree Health Benefit Act of 1992." Respondent Mammoth's Exhibit (Mammoth Exh.) 75(c). On August 6, 2004, the bankruptcy judge issued an opinion and orders granting the debtors' requests for authority to reject the collective-bargaining agreements, including the successorship provision. Id.[25] The bankruptcy judge acknowledged the hardship this decision would cause employees, but, in weighing the equities of the situation, the judge reasoned that if he did not authorize the sale "free and clear of . . . successor liability under the collective bargaining agreements" then the debtors' operations would be idled and job loss would ensue, whereas if the "operations are sold as going concerns, there is no reason to believe that the miners' employment would suffer any interruption." Id. at 24. After the bankruptcy judge issued the August 6 opinion and orders, Cannelton/Dunn continued to apply the existing terms and conditions of employment through September 24, 2004, at which time it surrendered control of the operation to the Respondents.

IX. THE 8(A)(3) ALLEGATIONS

A. Legal Standard

The complaint alleges that since about December 3, 2004, and continuing, Respondent Mammoth has violated Section 8(a)(3) and (1) by discriminatorily refusing to hire unit employees of the predecessor employer in order to avoid an obligation to recognize and bargain with the Union, and because those unit employees were members of the Union and had engaged in concerted activities, and to discourage employees from engaging in such activities.

As the new owner of Horizon's Cannelton/Dunn operation, the Respondents were not obligated to hire any of the predecessor's employees, but they were not free to refuse employment to the predecessor's employees because those employees were represented by a union or in order to avoid having to recognize and bargain with the Union. *Howard Johnson's v. Detroit Local Joint Executive Board*, 417 U.S. 249, 262 fn. 8 (1974); *NLRB v. Burns Security Services*, 406 U.S. 272, 280–281 fn. 5 (1972); *Planned Building Services,* 347 NLRB 670, 707 (2006); *U.S. Marine Corp.,* 293 NLRB 669, 670 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936

[24] Case 02-14261, United States Bankruptcy Court for the Eastern District of Kentucky, Ashland Division.

[25] The procedural history before the bankruptcy judge is also discussed in *Mine Workers v. Midwest Coal Corp.*, 2005 Westlaw 1972592 (E. D. Ky.).

(1992); *Kessel Food Markets*, 287 NLRB 426, 429 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989). In *Planned Building Services*, supra at 672 , the Board held that the applicable framework for determining whether a successor employer has violated Section 8(a)(3) and (1) by refusing to hire employees of its predecessor in order to avoid a bargaining obligation is that set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *W & M Properties of Connecticut,* 348 NLRB 162, 163 (2006) (same). The Board stated that, under *Wright Line*, a violation of Section 8(a)(3) and (1) is established where the General Counsel proves that the successor "failed to hire employees of its predecessor and was motivated by antiunion animus." *Planned Building Services*, supra at 673. The Board rejected the idea that the General Counsel had to prove either that the predecessors' employees met the successor's qualifications for hire, or that the successor was hiring or planning to hire. The Board reasoned that such proof was superfluous because "if hired by the successor, [the predecessor's employees] ordinarily would continue to perform essentially the same type of work as they did for the predecessor" and because it is clear that a "successor employer must fill vacant positions in starting up its business." Ibid.[26]

Under *Planned Building Services*, supra, if the General Counsel meets its burden of showing that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, "the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive." *Planned Building Services*, supra at 673–674. The employer may attempt to establish this defense with evidence "that it did not hire particular employees because they were not qualified for the available jobs, and that that it would not have hired them for that reason even in the absence of the unlawful considerations." Id. It is not enough to show that a legitimate explanation exists for the Respondents' decision not hire an individual; rather the Respondents must show by a preponderance of the evidence that the same decision would have been made absent the antiunion motivation. *Briar Crest Nursing Home*, 333 NLRB 935, 937 fn. 9 (2001); *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991) ("A judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on this reason alone.").

B. The General Counsel's Evidence of Discrimination

1. Failure to hire employees of predecessor

In this case, there is no question that the alleged discriminatees had been union-represented, bargaining unit, employees of Mammoth's predecessor, and that the Respondents were aware of this. Indeed, while they were staffing Mammoth, Doss and Gillenwater monitored the hiring/interview status of the predecessor's unit employees using a spreadsheet that stated the approximate "union time" of each unit employee. It is also clear that the Respondents were aware of the union activities of many of the predecessor's employees. The Respondents' security personnel took approximately 1000 hours of videotape and hundreds of photographs of the picketing employees. The vast majority of the alleged discriminatees who testified stated, without contradiction, that they participated in those activities. In addition, former Cannelton/Dunn manager and supervisors who were hired by Mammoth, and participated in the evaluation of candidates for employment, knew which of the alleged discriminatees held office with the Union and/or were members of the Union's mine and safety committees at Cannelton/Dunn.

The General Counsel has also met its burden of showing that the Respondents "failed to hire employees of its predecessor." Indeed, when it initially took over the predecessor's operation the Respondent failed to hire *any* of the 211 or more bargaining unit employees. During subsequent staffing, when the Respondents hired approximately 219 persons to perform bargaining unit work, the Respondents hired only 22 of the at least 211 employees who had been performing that work at Cannelton/Dunn.

2. Antiunion motivation

Direct evidence establishes the Respondents' antiunion motivation in this case. The testimony of Adamson, the superintendent of Mammoth's preparation plant, showed that during the initial hiring at Mammoth, Massey officials made it known to Mammoth officials that the operation would be "union free." In addition, during the hiring process, the Respondents gave applicants a document which matter-of-factly stated that "the mine is nonunion." The Respondents' officials communicated the same information verbally to applicants during their employment interviews—informing prospective employees that Mammoth was going to be a nonunion mine and asking many to reveal whether they were willing work nonunion. Harvey, a Massey Coal Services lawyer who appeared on Massey CEO Blankenship's behalf at a community forum, stated on that occasion that "Massey intended to operate without a union to start with" at Mammoth, although "the miners would then have the right to petition for a union if they wanted to do so."

At first blush, the Respondents' statements declaring Mammoth a union free operation might appear somewhat benign since, arguably, all those statements indicated was that Mammoth was going to initially operate nonunion, not that employees would be prevented from later choosing union representation. However, as the Board recognized in *Eldorado, Inc.*, 335 NLRB 952 (2001), such statements are anything but benign.

[26] In *Planned Building Services*, supra, the full Board unanimously held that the analysis set forth in *FES*, 331 NLRB 9 (2000), does not apply to cases where unlawful refusal to hire the predecessor's employees is alleged in a successorship avoidance context, and that the elements that the Board added to the General Counsel's burden in *FES* were inapplicable to successor hiring cases. Thus the Board's decision in *Toering Electric Co.*, 351 NLRB 225 (2007), which concerns the General Counsel's burden in "salting" cases governed by *FES* is not relevant to the analysis of the hiring violations alleged in the instant successorship case. See also *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007) (*FES* standard requiring the General Counsel to show that union "salts" were interested in employment of indefinite duration is not applicable in refusal-to-hire cases that do not involve "salts" because job applicants normally seek employment of indefinite duration). For this reason, I deny Respondent Massey's October 8, 2007 motion for supplemental briefing to address the *Toering Electric*, supra., decision.

In *Eldorado*, the successor's president told employees that the new business was starting out as a nonunion company, but that if the employees wanted a union it was up to them. The Board found that the statement violated Section 8(a)(1), and explained:

> [P]rior to making its hiring decisions, a successor employer does not know whether it will have a duty to recognize and bargain because it does not know whether it will hire a majority of the predecessor's employees. Therefore, when a successor employer "tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against [the predecessor's] employees to ensure its nonunion status."

Id. at 953, quoting *Kessel Food Markets*, 287 NLRB at 429. Following this reasoning, the Board held in *Eldorado,* supra, and *Kessel Food*, supra, that successor employers violated Section 8(a)(1) when, like the Respondents here, they told applicants that the new company would be nonunion. More recently, in *W & M Properties of Connecticut,* supra at 163, the Board unanimously held that a successor employer's statement to a prospective employee that it "would not be a union job and that the [employer's] owners did not want a union," showed antiunion motivation in hiring. In the instant case, the Respondents' similar, but far more numerous, verbal and written pronouncements that Mammoth would operate nonunion easily satisfy the General Counsel's burden.

The direct evidence of antiunion motivation in this case does not end with the Respondents' pronouncements that Mammoth would operate union free. As discussed above, Adamson and Doss—two Mammoth officials who helped select employees—admitted that when applicants Willis and Siemiaczko stated an intent to work to organize the Mammoth work force on behalf of the Union, those remarks were held against them in the hiring process. In addition, when an employee suggested to Stevens, a Mammoth supervisor, that the company could address the shortage of experienced miners at Mammoth by hiring more of the displaced Cannelton/Dunn unit employees, Stevens dismissed the suggestion, replying that "Don Blankenship's a smart man, he's not going to let the numbers go against him." Stevens had been a supervisor at Cannelton/Dunn, and according to the Respondent Mammoth would, therefore, have participated in the hiring process by making recommendations about whether to hire employees he had worked with at Cannelton/Dunn.

The Respondents also asked a number of the alleged discriminatees whether they would cross the picket lines. In *Planned Building Services*, antiunion motivation for a successor's refusal to hire its predecessor's employees was demonstrated, in part, by the evidence that the new owner asked an incumbent employee if he would cross an expected picket line. 347 NLRB 677, 677 and 707. As noted there, an employee's willingness to cross a picket line is an "impermissible consideration for hiring, since it penalizes employees for their intention to engage in protected concerted activities." *Planned Building Services*, supra at 707–708; see also *Fremont Ford*, 289 NLRB 1290 fn. 6 (1988) (employer violates the Act by asking prospective employees if they intended to honor picket line). This rule extends to cases, like the instant one, in which the picket line is already in existence. In *Spencer Foods*, for example, the Board held that a successor employer violated the Act when it asked an applicant whether he would cross an existing picket line. 268 NLRB 1483, 1503 (1984), affd. in relevant part sub nom. *Food & Commercial Workers Local 152 v. NLRB,* 768 F.2d 1463 (D.C. Cir. 1985).

Additional evidence that antiunion animus played a part in the Respondents' hiring decisions is provided by the spreadsheet that Gillenwater and Doss used to monitor where former Cannelton/Dunn miners stood in the hiring process. That spreadsheet explicitly set forth the approximate "union time" of each prospective employee. Aside from "union time," this spreadsheet included only minimal information about the Cannelton/Dunn unit employees—prior work location, seniority date, job title, and age. The Respondents have failed to establish any plausible, nondiscriminatory, reason for noting each applicant's years in the union among the few bits of information deemed significant enough to include on the spreadsheet that was used to monitor the interview/hiring status of the former Cannelton/Dunn unit employees.

The above-direct evidence is more than adequate to satisfy the General Counsel's burden of showing that antiunion motivation played a part in the Respondents' refusal to hire the union-represented, unit, employees of Mammoth's predecessor. Additional perspective is, however, provided by the statements of Respondent Massey's CEO, Don Blankenship. Blankenship has a history of making unusually venomous antiunion statements. For example, he has stated that he sees his fight against the Union as no different than that of the soldiers who fought in the World Wars and has declared his willingness to die fighting against the Union. In a report that Blankenship signed, and Massey filed with the Securities and Exchange Commission, the possibility of unionization at Massey-owned coal mines was discussed as a "risk factor" that threatened Massey's net income. Blankenship boasted to investor groups that Massey's once largely unionized mines had become 97-percent "union free." Although the evidence does not show that Blankenship made decisions about whether to hire particular miners at Mammoth, the evidence does show that Blankenship and Respondent Massey were directly involved with personnel decisions at Mammoth. By his own account, Blankenship, either alone or as a member Massey's Board, decided on the wages that would be offered to miners at Mammoth. Therefore, it is clear that Blankenship participated in making at least some of the changes to terms and conditions of employment that the General Counsel alleges were unlawful. Other Massey officials—for example, Short (Massey senior vice president for operations) and Chris Adkins (Massey senior vice president and chief operating officer)—took part in interviewing applicants and/or staffing Mammoth. Gillenwater and Chandler, both of whom had extensive hands-on involvement in the hiring of miners at Mammoth, were each directly supervised by an official of Respondent Massey—Gillenwater by Short, and Chandler by Poma (vice president for human resources). A number of the staffing decisions at Mammoth—such as the granting of preferences to trainee miners and transferees—that led to the Cannelton/Dunn unit employees being refused employment

were dictated by Massey. Moreover, the evidence indicates that one or more Mammoth officials who were involved in recommending or selecting miners were aware of Blankenship's antiunion views and were influenced by those views. Thus when an employee suggested to Stevens, a Mammoth supervisor, that more of the experienced former Cannelton/Dunn miners should be hired, Stevens rejected the suggestion out-of-hand, stating that "Don Blankenship's a smart man, he's not going to let the numbers go against him." Hughart, the official that Blankenship appointed Mammoth's president, stated that he was aware of, and agreed with, Blankenship's management philosophy. During the interview of a prospective employee, Doss echoed Blankenship's boast that Respondent Massey was 97-percent union free, and stated, further, that Massey intended to operate Mammoth union free.[27]

In conclusion, the evidence demonstrates the existence of an undisguised culture of animosity towards the Union and union activity at Mammoth and Massey, and shows that this antiunion animus influenced hiring decisions at Mammoth.

Respondent Mammoth contends that it would be improper to conclude that antiunion motivation played a part in its hiring process since the Company has hired 19 union miners from the Cannelton/Dunn unit, and has tried to hire 10 others who either refused job offers or declined further consideration.[28] The Respondents' hiring of a small percentage of the over 200 former Cannelton/Dunn unit members when filling 219 openings at Mammoth does not undercut the clear evidence of the Respondents' antiunion motive. It was not necessary for the Respondents to deny employment at Mammoth to all of the Cannelton/Dunn unit members to meet the objective of unlawfully avoiding a successor's bargaining obligation. As the Board has repeatedly recognized, a successor can meet that objective by hiring some of the predecessor's employees, but stopping short of allowing those employees to constitute a majority of the new work force. For example, in *MSK Cargo/King Express*, 348 NLRB 1096 (2006), the Board affirmed the administrative law judge's conclusion that the successor employer had refused to hire 9 of the predecessor's employees in order to avoid a successor collective-bargaining obligation, even though the successor employer included 8 of the predecessor's employees among the 21 employees it hired. Similarly, in *Daufuskie Island Club & Resort*, 328 NLRB 415 (1999), enfd. mem. sub nom. *Operating Engineers Local 465 v. NLRB,* 221 F.3d 196 (D.C. Cir. 2000), the Board found that an employer who had purposely hired 48.5 percent of the predecessor's employees had violated the Act. In the instant case, the Respondents, by hiring 19 to 22 of Cannelton/Dunn's over 200 unit employees when filling 219 positions created no risk that a majority of the Mammoth work force would come from Cannelton/Dunn, or that a successor bargaining obligation would be triggered by such a majority. Moreover, by refusing employment to the Cannelton/Dunn employees, such as Willis and Siemiaczko, because those individuals intended to spearhead a union organizing effort at Mammoth, the Respondents dramatically reduced the likelihood that the former Cannelton/Dunn employees on its work force would elect to create a new bargaining obligation.

C. Respondents' Burden of Showing Nondiscriminatory Reasons

For the reasons discussed above, I conclude that the General Counsel has met its burden of showing that the Respondents failed to hire unit employees of the predecessor employer and were motivated by antiunion animus. Therefore, under *Planned Building Services* supra, and *Wright Line*, supra, the burden shifts to the Respondents to prove that they would not have hired the predecessors' employees even in the absence of the unlawful motive.

1. Seeking most qualified work force

In the most general terms, Mammoth's defense is that it denied employment to former unit employees of Cannelton/Dunn because it was seeking the most qualified possible work force. Mammoth offers an array of reasons for finding alleged discriminatees insufficiently qualified, and I will discuss those reasons below. Putting aside specific explanations for Massey/Mammoth's individual posttakeover hiring decisions, the Respondents have offered no plausible explanation for the decision to completely exclude Cannelton/Dunn's union-represented miners from the hiring that it did prior to taking over the operation in September 2004. If the Respondents truly wanted to find the 219 most qualified individuals for the mining positions they filled, one would think they would have recruited from among the experienced Cannelton/Dunn employees who were already doing the work and were familiar with the facility. Indeed, the Respondents reached out in just that way to all the nonunion, nonunit, employees at Cannelton/Dunn—including secretaries, clerks, laboratory workers and others. Many of those nonunion/nonunit employees of Cannelton/Dunn were hired and continued working without interruption when the Respondents began operating the facility, whereas the union-represented unit employees, to a person, were let go when the operation changed hands. No plausible reason was established for the blatant disparity between how

[27] The Respondents assert that Blankenship's antiunion statements cannot be considered in this case because those statements are protected by Sec. 8(c) of the Act. I note, at the outset, that the other direct evidence of antiunion animus, standing alone, is sufficient to meet the General Counsel's initial burden. At any rate, the Respondents' broad reading of Sec. 8(c) has been rejected by the Board, which has held that antiunion statements, even if not themselves alleged to be violations of the Act, are nevertheless evidence of antiunion animus or motivation. *Overnite Transportation Co.,* 335 NLRB 372, 375 fn. 15 (2001) (employer statements in employee handbooks indicating that the employer values union free working conditions are indicative of union animus); *Stoody Co.*, 312 NLRB 1175, 1182 (1993) (animus can be based on unalleged conduct, and on conduct that is not necessarily violative of the Act); *Gencorp*, 294 NLRB 717 fn. 1 (1989) (the 8(c) argument rejected because "Board has consistently held that conduct that may not be found violative of the Act may still be used to show antiunion animus").

[28] Based on my review of the record evidence, I conclude that 4 of these 10 individuals never refused job offers or further consideration. Those four are Tilman Cole, Rodney Leake, Gregory Moore, and Donald Stevens. The record supports Mammoth's contention that the other six—Dewey Dorsey, Fred Hale, Danny Morris, Robert Moore, and Joe Rader—either declined a job offer of some sort, or chose not to proceed further in the hiring process. Of these six, only Dorsey is an alleged discriminatee in this case.

the Respondents treated the nonunion incumbents and how they treated the union/unit incumbents.

The Respondents not only failed to seek the most qualified workers by reaching out to Cannelton/Dunn's union-represented employees prior to taking over the operation, but the evidence indicates that they went further by avoiding forms of recruitment that were likely to alert the majority of unit members to employment opportunities posttakeover. Prior to taking over the operation, the Respondents' officials did not make any public announcements about how interested unit employees could obtain and submit applications or otherwise seek continued employment. After taking over the operation, Massey placed help-wanted announcements for experienced miners in the vicinity of Mammoth, but those announcements generally did not reveal whether the work was at Mammoth, or some other Massey mine. Shortly after the Respondents took over the operation, the president of the union local notified Massey's CEO, Blankenship, that the former unit members were available to fill positions at Mammoth, but the Respondents did not respond by informing either the Union, or the vast majority of the unit members, how to apply. Generally, the unit members were reduced to applying for work at Mammoth by using union-provided copies of applications from other Massey subsidiaries. Although Mammoth claims that it made applications available at its guard shack, the Respondents' officials did not make a general announcement to the Cannelton/Dunn employees about this. Moreover, when a former Cannelton/Dunn unit employee inquired about work at the guard shack, he was not offered an application. Given that Massey was having difficulty recruiting experienced miners at its subsidiary mines, including Mammoth, the Respondents' unwillingness to make use of the resource provided by Cannelton/Dunn's more than 200 experienced incumbent miners, indeed its apparent avoidance of that resource, is very telling and rebuts Mammoth's claim that it was seeking to assemble the most qualified possible work force.

Mammoth's contention that the Respondents were simply seeking the most qualified individuals is also undercut by the fact that they filled many of the openings with inexperienced trainee/red hat miners. Approximately 19 of the first 130 employees that the Respondents hired to perform the work of the former bargaining unit were not qualified to work underground at Mammoth as other than trainees. This is approximately the same number as the Respondents hired from among the pool of highly experienced Cannelton/Dunn miners. Even according to Massey's CEO, experienced miners would generally have been more productive than these inexperienced trainees, and several Mammoth supervisors complained that the Respondents' relied too heavily on trainees. During the period that the Respondents were using a large number of trainees at the facility, they failed to meet Mammoth's overall production goal, and saw Mammoth's peremployee productivity drop significantly from the levels that had been achieved at Cannelton/Dunn prior to the change in ownership.

Respondent Mammoth attempts to explain its reliance on trainees by stating that those individuals were hired pursuant to a Massey policy of preferring inexperienced miners who it could train in its own practices and who, hopefully, would constitute a future supply of well-trained miners. The Respondents introduced no evidence showing that such a policy existed in written form or was consistently applied. "Unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination." *Dunning v. National Industries*, 720 F.Sup. 924, 931 (M.D. Ala. 1989); see also *Planned Building Services*, 347 NLRB 670, 708 (the fact that a putative policy is unwritten, and not strictly adhered to, lends support to a finding that it is pretextual); *Norman King Electric,* 334 NLRB 154, 161 (2001) (policy on which union applicants were rejected is pretextual where, inter alia, policy was unwritten); *Sioux City Foundry*, 241 NLRB 481, 484 (1979) (alleged policy relied on to reject applicants who were strikers from other employers "is a mere pretext" where, inter alia, "this 'policy' was not written down anywhere").[29] Indeed, the evidence here indicates that the unwritten trainee/red hat preference was intermittently, rather than strictly, applied at Massey subsidiaries. *Clock Electric, Inc.,* 323 NLRB 1226, 1232 (1997) ("The inconsistent application of the unwritten rule supports the view that this reason for the refusal to hire was pretextual."), enfd. in part and remanded 162 F.3d 907 (6th Cir. 1998). Doss, the former human resources director at Mammoth, explained that the way the preference worked was that "we would be instructed as HR managers to hire some red hats, put them with mentors in the mine, and train them to be equipment operators or just different labor positions." (Tr. 2658.) The evidence did not show why the newly acquired Mammoth operation was selected as a location to train such individuals. Facially, such training would be more appropriate at established Massey mining operations where there was an experienced workforce in place to provide mentoring.

At any rate, the testimony of Rutherford, a Mammoth supervisor who helped interview and select staff, supports the view that a desire to train the next generation of Massey miners was not the reason that the Respondents chose to fill openings at Mammoth with trainee miners. Rutherford testified that the Respondents stopped using trainee miners at Mammoth once the operation was "staffed up" since at that time there was no longer any need to hire inexperienced individuals. In other words, the trainee miners were not being hired at Mammoth because of a desire to provide training, but rather were being hired in order to fill positions until the Respondents could hire enough experienced miners.

Mammoth claims that it rejected multiple alleged discriminatees because supervisors who had worked with those appli-

[29] As is discussed through the course of this decision, the Respondents repeatedly failed to introduce documents demonstrating the existence of purported personnel policies that Mammoth argues account for the refusal to employ the former Cannelton/Dunn employees. On several occasions, the General Counsel objected to testimony regarding these policies on the grounds that the "best evidence" of the policies would be documents setting forth the policies. Although I overruled those objections, I do consider it highly suspicious that the Respondents failed, again and again, to introduce documentary evidence showing that such policies existed, much less showing that they accounted for the challenged hiring decisions. Given the size of the Massey enterprise, it would be surprising if such personnel policies had been established, but not reduced to writing or otherwise documented.

cants at Cannelton/Dunn gave them negative recommendations. (R. Br. at 61–65.)[30] Although Mammoth titles this argument "Negative recommendations from former Cannelton *supervisors,*" it only discusses the assessments made by one such supervisor, Rutherford. Mammoth claims that it relied on the recommendations from Cannelton/Dunn supervisors who became Mammoth supervisors, but, curiously, it fails to discuss the recommendations of Terry Buckner, Shay Couch, Jimmy Nottingham, and Keith Stevens—all of whom were Mammoth supervisors who, like Rutherford, had also been supervisors at Cannelton/Dunn. Moreover, Rutherford's testimony about his recommendations was so vague and so conclusory as to be of almost no persuasive value. In most instances, Rutherford simply opined that there were "better" workers than the former unit employee, without either providing specific instances of the unit applicant's supposed shortcomings or identifying who the "better" workers were. (See, e.g., Tr. 2804, 2805, 2806, 2808, 2814, 2815, 2816–2817, 2820.) In instances where Rutherford made specific negative assertions about particular Cannelton/Dunn employees, the credibility of those assertions was undermined by Rutherford's admission that he had never once written up the applicants for the supposed performance problems he now said disqualified them for work at Mammoth. (Tr. 2832, 2834–2835.) Mammoth's contention is weakened further by Rutherford's demeanor as a witness. He was palpably straining to conform his testimony to his current employer's litigation needs and there were numerous incongruities in his account.[31] Based on his demeanor and testimony, and the record as a whole, I conclude that Rutherford was not a credible witness.

Even assuming that Rutherford recommended against hiring some of the alleged discriminatees, the evidence does not show that those recommendations played a significant part in the hiring process. Rutherford did not document his recommendations to the Respondents' officials in any way,[32] and the Respondents do not point to any testimony by decisionmaking officials claiming to have rejected particular Cannelton/Dunn applicants because of the statements that Rutherford testified to having made about them. The record shows that alleged discriminate Randy Kincaid was rated a "good" employee by Rutherford, but the Respondents still declined to hire him. In conclusion, the Respondents have not shown that Rutherford made recommendations that played a significant part in the rejection of the alleged discriminatees, and certainly not that he made any recommendations that, absent the Respondents' antiunion motivation, would have caused the alleged discriminatees to be denied employment.

Mammoth also contends that a number of applicants were rejected because they performed poorly at their interviews.[33] I find that the evidence for this defense is lacking. Mammoth states, for example, that Fred Wright was rejected because he received a low recommendation from interviewers, but cites no evidence of such a recommendation. The evidence regarding Wright shows that in fact, one interviewer, Adamson, considered Wright an "everyday worker, hard worker" and a "good man" who was "equivalent" to those hired. (Tr. 2963.) Similarly, although Mammoth asserts that alleged discriminatee Bobby Preast was eliminated by the interview process, the record shows that interviewer Jimmy Nottingham rated Preast as a satisfactory employee who should be considered for hire. Nottingham was the only one of the interviewers who had worked at Cannelton/Dunn and would have had an opportunity to observe Preast's work there.[34] Mammoth's claim that it rejected Cannelton/Dunn employees because they received poor interview evaluations is further undermined by Mammoth's admission that some of those employees who it claims to have rejected for receiving "low ratings" had actually been rated "satisfactory"—the same rating received by other applicants who were offered employment. (Br. of R. Mammoth at 69.)

Even more telling is the direct evidence that the Respondents' evaluation of the qualifications of potential employees was tainted by antiunion bias. As discussed above, Adamson and Doss admitted to instances where they rated former Cannelton/Dunn employees as undesirable applicants because those employees had stated an intention to engage in union activity if hired. Moreover, during the interview process, company officials asked many applicants to declare their attitudes about working nonunion and about crossing picket lines. Similarly,

[30] The Cannelton/Dunn unit employees who Mammoth claims were rejected because they received poor recommendations are: Mark Cline, Crawford, Jackie Danbury, Robert Edwards, Lacy Flint, Harvey, Cheryl Holcomb, Alvin Justice, William McClure, Ricky Miles, Doyle Roat, Gary Roat, M. Roat, Paul Roat, Charles Rogers, Lawson Shaffer, Totten, Charles Treadway, and Ralph Wilson.

[31] For example, Rutherford tried to explain the rejection of certain Cannelton/Dunn unit employees by stating that they had been "brattice" men or "greasers" and that no such positions existed at Mammoth. Tr. 2802, 2820–2821. However, Rutherford later stated that, although those were no longer job classifications, the work of brattice men and greasers was still being done at Mammoth. Tr. 2825–2826, 2832; see also Tr. 2949 (Adamson testifies about hiring two "greaser" employees at Mammoth). At one point, Rutherford claimed that certain former Cannelton/Dunn employees had been rejected because the positions they had applied for or most recently performed had already been filled and applicants were not considered for other positions. Tr. 2799, 2825–2826. However, elsewhere in his testimony Rutherford discusses an alleged discriminatee who had most recently worked at the plant, and stated a preference for a job there, but who was instead considered for an underground position. Tr. 2802–2803. In addition, as alluded to earlier, Rutherford claimed that a number of the rejected Cannelton/Dunn applicants had performance or attendance deficiencies, but when pressed he admitted that he had never once written up any of those applicants for the supposed deficiencies.

[32] Rutherford apparently did make some notations about particular employees on a list that was in the possession of Cannelton/Dunn mine superintendent Haynes. Haynes was not an official of the Respondents and did not provide that list to any official who made hiring decisions at Mammoth.

[33] The Cannelton/Dunn unit employees who Mammoth claims were rejected for receiving low evaluations from interviewers are: Norman Brown, Leo Cogar, Paul Harvey, Randy Kincaid, Marion Lane, James Nichols, David Preast, Michael Roat, Melvin Seacrist Jr., Gary Totten, Larry Vassil, Willis, and Fred Wright.

[34] Hall, who had not worked with Preast, recommended against giving him further consideration. Hall's interview report provides no explanation for the negative recommendation, but does note that Preast obtained his application from the Union. GC Exh. 8(p).

the spreadsheet that the Respondents used to keep track of the Cannelton/Dunn employees' status in the hiring process, explicitly set forth each individual's approximate "union time." The Respondents have not shown that this union-related information had any lawful relevance to the evaluation of a candidate's qualifications, and have not satisfactorily explained why it was made part of the evaluation process documentation.

Finally, in considering Mammoth's claim that it rejected the alleged discriminatees based on qualifications, I observe that the Respondents ultimately found only 10 to 14 percent of the approximately 211 former unit members qualified enough to warrant offering them one of the 219 openings the Respondents filled between December 3, 2004, and May 1, 2006. On its face, those figures are hard to explain as the product of an effort to assemble the "most qualified" work force given that the majority of the former unit members had extensive experience as miners and that Massey was having serious problems recruiting enough experienced miners. Moreover, the small percentage of unit members who were hired is particularly telling when considered in light of the evidence, discussed above, of: the Respondents' disparate treatment of the Cannelton/Dunn's unit incumbents, as compared to the nonunit incumbents;[35] the Respondents' failure to offer the Cannelton/Dunn unit employees information about applying at Mammoth; the fact that Mammoth officials admitted that they evaluated certain Cannelton/Dunn unit members poorly because those individuals intended to support the Union if hired; and, the Respondents' failure to hire applicants who had been part of the Cannelton/Dunn bargaining unit even when those applicants were evaluated as highly as nonunit applicants who were hired.

2. Transferees from other Massey subsidiary mines

Respondent Mammoth also contends that the failure to hire the former Cannelton/Dunn unit employees is explained by adherence to a corporatewide Massey policy of giving a preference to current employees of Massey-owned mines who wished to transfer to a Massey mine closer to home. Mammoth does not clarify which of the alleged discriminatees were rejected because of the preference for transferees. At any rate, under circumstances similar to those present here, the Board has viewed a successor's reliance on transferees as *evidence of discrimination*, not evidence rebutting a prima facie showing of discrimination. In *Planned Building Services*, supra, at 709, the successor's decision to staff the new facility with transferees, rather than with the predecessor's unionized employees, was treated as evidence of discrimination because it left the successor with the problem of having to replace those workers at the facility that they came from. The *Planned Building Services* rationale applies even more strongly in the instant case given the evidence that Massey and its subsidiaries could not find enough experienced miners and that many of the employees who the Respondents transferred to Mammoth came from Massey's "route 3" locations where the shortage of miners was particularly acute. One of Mammoth's own witnesses, Human Resources Official Chandler, conceded that the use of transferees from other Massey mines could negatively impact the transferring mines because they would have to replace the employees sent to Mammoth. The Respondents took this extreme measure to find staff for Mammoth, even while offering positions to only 10 to 14 percent of the experienced union miners of its predecessor.

The Respondents do not address the discussion in *Planned Building Services* regarding a successors' reliance on transferred employees. They argue that the transferees were hired pursuant to an established Massey policy. I note, first, that there is a complete lack of documentary evidence to support the claims of the Respondents' officials that such a policy existed. No written policy was produced, and the Respondents cite to no document referencing the existence of such a policy, describing how it works, or recording the use of the policy to prefer another applicant over a specific alleged discriminatee. As discussed above, the Board has repeatedly recognized that unwritten policies are a ready means of discrimination and are suspect. *Planned Building Services*, supra; *Norman King Electric,* supra; *Clock Electric, Inc.,* supra; *Sioux City Foundry,* supra; *Dunning v. National Industries,* supra. Moreover, Mammoth's own mine superintendent, Ray Hall, contradicted Mammoth's claim that transferees from other mines were given a preference. Hall testified at length about transferees who were hired, but stated emphatically that employees from other Massey mines received *no edge or special consideration* for positions at Mammoth. (Tr. 2784.)

Witnesses who testified that a transferee preference existed, did not describe a preference policy that was fixed and reasonably well defined. Gillenwater testified that the policy only applied to Massey miners who were currently working at a mine over 50 miles from their homes, but other witnesses who testified about the policy did not state that there was a 50-mile requirement and Mammoth's position is that the policy was not limited by the 50-mile requirement described by Gillenwater. (Br. of R. Mammoth at p. 19 and fn. 12.)[36] None of the witnesses who testified about the supposed policy explained whether it was an absolute preference, or whether the alleged discriminatees could vie against the transferees for openings. Indeed, as noted above, one Mammoth official stated that there was no preference at all given to employees transferring from other Massey mines. The Respondents' putative policy on transferees is "conveniently vague" and this further supports a finding of pretext. *Norman King Electric*, 334 NLRB at 161.

[35] The blatant disparity between the Respondents' treatment of the incumbents in the bargaining unit and its treatment of the incumbents outside the bargaining unit, not only leads me to conclude that the Respondents failed to demonstrate that a desire to generate the most qualified work force explains the rejection of the Cannelton/Dunn unit employees, but also constitutes additional evidence that antiunion motivation led to the decisions. See *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998) ("blatant disparity is sufficient" for a prima facie case of unlawful motive); see also *Planned Building Services*, 347 NLRB 670, 674, quoting *U.S. Marine Corp.,* 293 NLRB 669 (1980) ("'[I]nconsistent hiring practices'" are among factors "that would establish that a new owner violated Section 8(a)(3) by refusing to hire the employees of the predecessor.").

[36] Mammoth cites to Gillenwater's testimony at p. 2147 of the transcript to support its contention that the 50-mile requirement had been eliminated from the policy, but that portion of the transcript does not support the proposition.

To the extent that Mammoth's witnesses testified about the way the putative transfer policy operated, that testimony conflicted with other evidence. Witnesses stated, for example, that employees had to volunteer for the transfer to Mammoth by placing their names on signup sheets posted at the Massey mines where they worked. However, Doss testified that the sign-up sheets that he used to select transferees did not arrive from other Massey mines until approximately 2 weeks after he started work at Mammoth—i.e., on about January 11, 2005,—by which time approximately 19 transferees had already been hired. Moreover, none of the signup sheets were introduced at trial to corroborate that the persons transferred had, in fact, volunteered. Nor were any of the transferees themselves called to testify that they had volunteered or that transferring to Mammoth had shortened their commutes. Indeed, the Respondents cite no evidence showing that particular, identified, transferees for miner positions had volunteered or reduced their commutes by coming to work at Mammoth.

Although the record does not show with any specificity how the Respondents' putative policy on transfers operated, it appears that, however it operated, it did not serve the purpose of minimizing the commutes of the Mammoth work force. The evidence showed that the transferees and other nonunion persons the Respondents hired to work at Mammoth lived, on average, approximately 33.76 miles from the Mammoth facility, whereas the union/unit applicants who the Respondents rejected lived, on average, only 15.11 miles away. (Tr. 3721–3723; CP Exhs. 2 and 3.) In other words, despite Mammoth's claim that minimizing commuting distances was the concern that drove the hiring of transferees, the evidence shows that the Respondents selected transferees and other nonunion individuals who lived relatively far from Mammoth, while rejecting former Cannelton/Dunn unit employees who tended to live much closer.

Based on the reasoning of the decision in *Planned Building Services*, and in view of the evidence discussed above, I conclude that the Respondents' reliance on transferees, rather than the predecessor's unionized employees, to staff Mammoth not only does not establish that the alleged discriminatees would have been denied employment absent antiunion motivation, but provides additional support for a finding of antiunion motivation.

3. Applications

Mammoth claims that it would not have employed nine of the alleged discriminatees, even absent antiunion motivation, because those individuals either failed to initiate the hiring process by filing applications, or because their filings were somehow deficient. The evidence shows, however, that the Respondents' application requirements, to the extent such requirements existed, were applied discriminatorily. While the Respondents' officials required the unit members from Cannelton/Dunn to file applications before contacting those individuals about potential employment at Mammoth, the Respondents' officials imposed no such requirement on many other individuals. For example, the Respondents' officials required no application before scheduling employment interviews for the nonunit/nonunion incumbents at Cannelton/Dunn. The Respondents could have recruited and retained the unit/union incumbents in the same manner—i.e., without awaiting applications—but chose not to do so. The Respondents' officials also recruited, and later hired, six nonunit employees from Kanawha Eagle (a non-Massey mine) even though those individuals had not filed applications prior to being contacted by the Respondents. Charles McCutcheon and Michael Upton—two nonunit individuals—were hired at Mammoth even though the Respondents do not have applications from them and there was no testimony that those employees had ever filed applications.[37] The Respondents' officials did require most prospective employees to fill out applications at some point in the process, but, except in the cases of the unit employees from Cannelton/Dunn, the Respondents' officials demonstrated a willingness to contact miners about employment at Mammoth before those applications were completed.

The disparate administration of the Respondents' supposed application requirement exposes that requirement as pretextual, and I find that such a requirement would not have led the Respondents to deny employment to the alleged discriminatees absent antiunion motivation. At any rate, the Respondents have failed to show that any of the alleged discriminatees were refused employment because they had not submitted applications. In its brief, Mammoth argues that the following 9 individuals—out of 85 alleged discriminatees—did not file applications: Joseph Brown, Norman Brown, Kenneth Dolin, William Fair, Clarence Huddleston, Jimmie Johnson, Danny Legg, Robert Nickoson, and Charles Nunley. In the cases of Norman Brown, Jimmie Johnson, and Danny Legg, the question of whether they initiated the hiring process by filing an application is essentially moot, because the evidence indicates that all three were interviewed regarding positions at Mammoth.[38] No official of the Respondents testified that any of those three individuals were rejected after being interviewed because they had not previously filed applications.

With respect to the other six individuals, the Respondents have failed to show that they did not file applications. The only evidence the Respondents offer is the testimony of Kyle Bane, the current human resources official at Mammoth. He testified that the Company's records contain no applications filed by five of those alleged discriminatees, and that the application submitted by the sixth individual was not filed until July 2006. This evidence is not compelling since Bane did not arrive at Mammoth, or become involved with human resources matters there, until November 2005. Thus he would not have direct knowledge of what the Respondents did with applications filed during the time period in late 2004 and the early part of 2005 when most of the alleged discriminatees applied. He did not claim to know that every application filed prior to his arrival had been retained in the Respondents' files. If anything, Bane's testimony indicated otherwise. He stated that when he

[37] The Respondents' personnel records contain resumes from these employees, but not application forms.

[38] See GC Exh. 8(c) (interview reports for Norman Brown); Tr. 1987–1980 (Jimmie Johnson testifies about discussing employment at Mammoth during interviews with officials of other Massey subsidiaries); Tr. 2603–2604 (Doss testifies about discussion with Danny Legg about employment at Mammoth).

arrived at Mammoth the hiring records were in "poor" shape and that he had "tried to organize them the best I could." Thus, one cannot infer that an alleged discriminatee had not filed an application based on Bane's testimony that such an application was not in the Respondents' "poor" records when he took over in November 2005.

Moreover, the six alleged discriminatees who Mammoth claims were not considered because they had failed to file applications, testified that, to the contrary, they had submitted applications to the Respondents. Joseph Brown testified that he mailed a completed application to the Massey Coal Services office in Charleston (Kanawha City) and also returned a completed application to Adamson (Mammoth's plant superintendent). (Tr. 1912, 1914–1915.) Similarly, Dolin testified that after personnel at the Massey Coal Services office in Charleston (Kanawha City) refused to accept his application, he submitted an application at the Mammoth guard shack. (Tr.1021–1025.) Fair testified that he submitted applications at two different Massey job fairs in West Virginia. (Tr. 677–680.) Huddleston stated that he mailed his application to either Mammoth or Massey, and also went to the Massey Coal Services office in Charleston (Kanawha City) for the purpose of hand delivering his application for work at Mammoth. (Tr. 2000–2002, 2008, 2015.) Robert Nickoson testified that he submitted an application to Jennifer Chandler at a Massey job fair, and that he was also one of a group of former Cannelton/Dunn unit members who attempted to hand deliver their applications for work at Mammoth to the Massey Coal Services office in Charleston (Kanawha City). In addition, evidence shows that Nickoson contacted Adamson to express interest in employment at Mammoth, and that Adamson responded by providing Nickoson's contact information to the human resources department at Mammoth. (Tr. 1375–1380, 2960–2962.) Nunley testified that he mailed an application for work at the former Cannelton facility to Mammoth or Massey, but never heard from the Respondents. (Tr. 1359–1361.) In some instances, the recollections of these six individuals were somewhat vague or confused. However, their testimony about submitting applications still outweighs the countervailing testimony of Bane, who, as discussed above, had no personal knowledge about whether the six individuals submitted applications prior to November 2005.

Respondent Mammoth claims that some alleged discriminatees who filed applications were not hired because their applications had omissions—for example, the evidence showed that the applicant had not completed one of several signature lines on the application or had not accounted for a gap in employment history. This argument is not factually supported and appears to be made only half-heartedly by Mammoth. The Respondents did not present testimony of hiring officials identifying alleged discriminatees who they declined to hire because of application omissions, and the Respondents' posthearing briefs do not specify which individuals supposedly were rejected on this basis. More importantly, Respondent Mammoth's own witness, Gillenwater, contradicted Mammoth's claim that such omissions would disqualify an applicant. Gillenwater, stated that the practice when an application was not complete was to ask the applicant to supply the omitted information, not to deny the applicant further consideration. (Tr. 2221–2222.)[39] The applications of non-Cannelton/Dunn individuals who the Respondents did hire include many applications with significant omissions. See generally General Counsel's Exhibit 6. Finally, Mammoth's claim that alleged discriminatees were rejected because of omissions on their applications does not ring true given that the Respondents' officials contacted numerous nonunit individuals about employment before receiving any applications at all from those individuals, and hired some for whom the Respondents apparently do not have any applications at all.

Mammoth also contends that employment was refused to alleged discriminatees Joseph Brown, Kenneth Dolin, and Clarence Huddleston, because those individuals filed their applications at the wrong location and that others were rejected because their applications had not been updated. Both of these contentions are suspect in light of the evidence that the Respondents contacted numerous individuals who had not submitted applications—updated or otherwise. At any rate, neither of these defenses is factually supported. Regarding the contention that alleged discriminatees were rejected because they filed applications at the wrong location, the testimony of the Respondents' own witness, Jennifer Chandler, is to the contrary. Chandler, a Massey Coal Services employee assigned to serve as Mammoth's first human resources officer, testified that when one Massey subsidiary "get[s] an application from anyplace, we send them to other sister resource groups, you know, if they can use those applicants." Chandler further stated that if she received resumes that were filed at another Massey subsidiary, but expressed interest in working at Mammoth, those resumes would be forwarded to Mammoth. (Tr.1654, 2560–2561.) The Respondents did not present other evidence rebutting Chandler's description of the Respondents' application-sharing practice.

The evidence did show that Joseph Brown, Dolin, and Huddleston all attempted, initially at least, to apply at Massey Coal Service's Charleston/Kanawha City office. That was the office where Gillenwater was stationed and, as discussed above, Gillenwater was responsible for helping to interview and select staff for Mammoth, as well as for monitoring the application status of the bargaining unit employees. Moreover, when Doss assumed Mammoth's human resources functions he moved to the Charleston/Kanawha City office. Chandler, who at times served as the human resources officer for Mammoth, was herself an employee of Massey Coal Services. Given that the Respondents did not inform the former unit employees from Cannelton/Dunn how to apply for work at Mammoth, they cannot fairly fault those individuals for applying at Massey Coal Services, where Doss and Gillenwater were stationed, and which employed Chandler. In light of the evidence discussed above, Mammoth's attempt to raise this as a basis for failing to hire the predecessor's unit employees, suggests an effort to obfuscate the application process in order to screen out those employees.

[39] Gillenwater indicated that in cases of suspected fraud applications would not be considered further, but the Respondents have not asserted that any of the alleged discriminatees who it failed to contact had omitted information from their applications for fraudulent reasons.

Also telling is the fact that in early 2005, after he attempted to apply at the Charleston/Kanawha City location, Joseph Brown filed a second application, this one at the Mammoth facility. The uncontradicted testimony was that Brown gave his application directly to Mammoth's plant superintendent, Adamson. After he filed this application, Brown was still not contacted by anyone from Mammoth or Massey. Similarly, in the summer of 2006, Dolin presented an application to personnel at one of Mammoth's security stations but like Brown he has not been hired by the Respondents. Thus, even assuming Brown's and Dolin's first applications were filed at the wrong location, that would not explain the Respondents' failure to hire Brown and Dolin on the basis of their subsequent applications.

Mammoth also claims that alleged discriminatees were rejected because their applications had become "stale" under Mammoth's "application consideration policy." This argument begs the question of why the alleged discriminatees were not hired during the period before their applications supposedly became stale when much of the hiring was taking place. Moreover, the claim that Cannelton/Dunn employees disqualified themselves by failing to update their applications is disingenuous given the credible evidence that many of those applicants repeatedly called officials of the Respondents after filing their applications, but were directed to a voicemail service or machine where they left messages that were never returned. At any rate, the evidence is wholly inadequate to show either that a policy on "stale" applications existed or that the alleged discriminatees were rejected pursuant to it. The Respondents do not reference any documentary evidence mentioning the existence of the policy, explaining how the policy operates, or discussing the policy's application to alleged discriminatees. As has been noted above, such unwritten policies are a ready means of discrimination and are suspect. See *Planned Building Services,* supra; *Norman King Electric,* supra; *Clock Electric,* supra; *Sioux City Foundry,* supra; *Dunning v. National Industries,* supra. The only record support for Mammoth's claim that such a policy existed was the testimony of Bane. The record shows that Bane assumed his duties at Mammoth in November 2005—over a year after the Respondents took over the Cannelton/Dunn facility, and at a time when the Respondents had already hired 166 employees to do bargaining unit work. None of the officials responsible for Mammoth's hiring prior to November 2005 claimed that a policy on stale applications was being applied during their tenure, nor did they state that such a policy was the reason they did not hire alleged discriminatees to fill any of the 166 openings. Moreover, Bane did not claim to know the reasons why the Respondents failed to hire the alleged discriminatees during the year-long period prior to his arrival. He did not even state how he learned about the Respondents' putative policy of disqualifying stale applications.

Mammoth's purported policy on stale applications is also conveniently vague. Bane did not state how long he would consider the applications of alleged discriminatees to be current. When asked whether a 6-month old application would be viable, he replied that such applications "generally" would be kept on file but not be considered; however, Bane never stated that applications *would* be considered viable for any specific period of time less than 6 months. Moreover, Bane's statement that a stale application "generally" would not be considered suggests that there were exceptions to the requirement, but he did not explain what those exceptions were. The evidence indicated, in fact, that it was not unusual for the Respondents to consider applications that were "stale" according to Bane's testimony. Indeed, Bane himself testified that after coming to Mammoth, he recruited a few of the former Cannelton/Dunn unit employees who had not filed new applications or updated their earlier applications before Bane contacted them.[40] The evidence also shows that the Respondents interviewed a number of other individuals—including Jeffrey Styers, Lawson Shaffer, and Melvin Seacrist—more than 6 months after they filed their original applications, even though the record does not show that those individuals had filed new applications or updated their existing applications. Moreover, the Respondents do not claim, and the evidence does not show, that the Respondents ever advised the union/unit applicants that they needed to update their applications after a period of time to remain in consideration. The fact that the putative policy was not revealed to the union applicants further supports the conclusion that the policy was pretextual. See *Beacon Electric*, Co., 350 NLRB 238, 241 (2007) (employer's claim that it refused consideration/hiring pursuant to unwritten policy is pretextual where, inter alia, the employer's policy was not disclosed to union applicants).

The putative "stale" application policy in this case is similar to a policy that was found pretextual in *Planned Building Services,* supra. In that case, the successor employer argued that it had denied consideration to its predecessor's unionized employees pursuant to a policy of contacting only those individuals who followed up their applications by continuing to call to express interest. 347 NLRB 670, 708–709. In reasoning affirmed by the Board, the administrative law judge rejected that defense, noting that the employer had contacted applicants who did not call first, and had "solicit[ed] inexperienced employees to apply for jobs, who had not even filed applications, and still did not use the applications of fully qualified experienced [predecessor] employees that [the employer] had sitting in its main office." Id. Similarly, in the instant case the evidence showed that the Respondents' officials allowed the applications of experienced Cannelton/Dunn employees to languish in Mammoth's offices, even while those officials: contacted individuals who had not updated their applications; hired many inexperienced employees; failed to inform the Cannelton/Dunn employees that they needed to update on their applications; and failed to return the messages of alleged discriminatees who attempted to followup their applications.

In its brief, Mammoth relies on *Vantage Petroleum Corp*., 247 NLRB 1492 (1980), for the general proposition that the failure of a predecessor's employees to file applications is a valid nondiscriminatory basis for the successor's failure to

[40] At the trial, Bane initially made a general statement that some of the former Cannelton/Dunn employees he recruited might have contacted him first. However, when he discussed those employees individually, Bane revealed that he had been the one to initiate contact in each case, usually after hearing about the individual from a current employee or applicant for employment. Tr. 2739–2741.

consider or hire them. However, unlike alleged discriminatees in the instant case, those in *Vantage Petroleum* failed to file applications even though the new employer *invited* them to file applications before it made any of its hiring decisions. The recent decision in *Planned Building Services*, distinguishes the *Vantage Petroleum* holding on precisely that basis. *Planned Building Services,* supra at 715 fn. 69 (unlike the employees rejected by *Planned Building Services,* the employees rejected in *Vantage Petroleum* "were advised by [*Vantage Petroleum*] *before* it made its hiring decision, that they could file applications"); see also *Vantage Petroleum*, 247 NLRB at 1494. The Respondents not only failed to advise the Cannelton/Dunn unit employees that they could file applications for work at Mammoth, but generally did not reveal how those persons could obtain applications or where they could submit them. During the initial hiring, Massey placed help-wanted announcements in the vicinity of Mammoth, but those advertisements did not identify Mammoth as the prospective employer.[41] In *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 81 fn. 10 (1979), (the Board held that a hiring violation extended to employees of the predecessor who did not file applications since such failure was "hardly surprising" where, inter alia, hiring was conducted "on the basis of advertisements which did not state the name of the [employer]"), enf. granted in part, denied in part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

Lastly, I note that to the extent the Respondents are claiming that they believed the alleged discriminatees who had not updated their applications by May 2005 were no longer interested in employment, that claim is not credible. Not only did many of these individuals leave followup phone messages for company officials, but in June 2005 the Union filed charges identifying all but one of the 85 alleged discriminatees and challenging the decision not to hire those individuals. (GC Exh. 1(a) and (g).)[42] This certainly would have given the Respondents an inkling that many of the alleged discriminatees were still trying to become employed at Mammoth.

For the reasons discussed above, I conclude that the Respondents have failed to show that, absent their antiunion motivation, they would refused to hire the alleged discriminatees because those individuals failed to file applications, or because their application filings were somehow deficient or stale.

4. High school diploma/GED

Mammoth argues that, absent antiunion motivation, it would have rejected 16 of the alleged discriminatees because they did not meet Mammoth's requirement of having a high school education or a general equivalency diploma (GED). As with its purported policies on applications, this policy was conveniently vague, was not consistently applied, and the Respondents introduced no evidence that it existed in writing.

The only evidence Mammoth cites for the existence of the high school education/GED requirement is the testimony of Susan Carr, a Massey Coal Services employee who served as Mammoth's benefits coordinator. However, based on Carr's own description of her responsibilities as benefits coordinator, those responsibilities did not extend to helping select applicants[43] and there was no evidence that she knew why the Respondents' officials actually decided not to hire any of the alleged discriminatees. Carr did not even reveal the basis for her understanding that Mammoth had the unwritten requirement. Moreover, she conceded that individuals were hired to work at Mammoth who had neither a high school diploma nor a GED. The Respondents point to no evidence showing that the officials who actually helped select Mammoth's employees rejected any of the alleged discriminatees because of a high school education/GED requirement, or even that those officials considered such credentials to be a significant factor in hiring decisions.

The record shows that information in the Respondents' possession indicated that at least three of the individuals identified by Mammoth as failing to meet the purported educational requirement actually had either a high school education or a GED. In its brief, Mammoth says that the requirement was not met by 16 alleged discriminatees, including Dewey Dorsey, Paul Harvey, and Gary Totten. However, the applications that Dorsey, Harvey, and Totten filed with the Respondents state that each had either a high school education or a GED. Mammoth's claim that it rejected Dorsey based on the educational requirement is also contradicted by the interview report that Hall completed for Dorsey, which notes that Dorsey met that requirement. (GC Exh. 8(g).) The Respondents do not point to any evidence contradicting the information in these documents.

Moreover, although Carr claimed that waivers of the education requirement were rare, and could only be approved by Gillenwater (not by Hughart or any other Mammoth official), a review of the applications shows that the Respondents frequently hired nonunit miners who did not have either a high school education or a GED. During the investigation of this matter, the Respondents produced the applications or resumes of 59 non-Cannelton/Dunn employees who they hired. (GC Exh. 6.) Thirteen of those hirees—about 22 percent—either indicated on their application materials that they had not completed high school or obtained a GED, or did not represent that they had done so.[44] Moreover, the Respondents do not point to any documentation showing why waivers were granted to these individuals, or even that waivers had in fact been obtained from Gillenwater or anyone else. Indeed, in its brief, Mammoth

[41] Later, in August 2005, the Respondents placed a help wanted advertisement that identified Mammoth as the prospective employer.

[42] The one alleged discriminatee who was not specifically identified in the attachment to the charge is Everett Lane.

[43] Carr testified that her responsibilities at Mammoth concerned such things as employees' healthcare benefits, dental and vision benefits, vacations, holidays, workers' compensation matters, and disability claims.

[44] See GC Exhs. 6d, m, t, u, w, kk, nn, qq, ss, uu, xx, yy, and bbb. In the tally, I include the nonunit/nonunion hirees who stated on their applications that they had completed 12 years of school, but who did not check the boxes indicating either that that they had graduated from high school or obtained a GED. My inclusion of these individuals is consistent with Mammoth's alleged practice. Several of the former Cannelton/Dunn employees who Mammoth claims did not meet the education requirement state on their applications that they completed 12 years of school, but not that they had graduated from high school or obtained a GED. These include alleged discriminatees Charles Bennett, Robert Edwards, and Mike Johnson.

states that, without first obtaining a waiver, it offered employment to an applicant who it now claims did not meet the educational requirement. (Br. of R. Mammoth at 60 fn. 25.) Similarly, David Lane testified that Doss offered him a job during the interview, even though Lane had revealed that he had neither a high school diploma nor a GED. (Tr.1281–1282, 3480–3481; GC Exh. 8(l).) The lack of documentation for the supposed waivers and the evidence that the Respondents inconsistently applied the purported waiver requirement further supports the conclusion that the educational policy is an after-the-fact rationalization. See *Planned Building Services*, 347 NLRB at 715; *Clock Electric,* 323 NLRB at 1232.

For the reasons discussed above, I conclude that the Respondents' purported policy requiring hirees to have a high school education or a GED is pretextual, and that, absent antiunion motivation, the Respondents would not have rejected any of the alleged discriminatees based on such a requirement.

5. Position did not exist

As stated above, Mammoth claims that Bennett was not hired because he did not have a high school diploma or GED. In another portion of its brief, Mammoth cites a different reason for not hiring Bennett—stating that he applied to work as a "general laborer" and that no such position existed at Mammoth. The record shows that's Bennett's application listed experience in a variety of contexts at Cannelton/Dunn, both underground (e.g., scoop operator at the mine face, miner helper) and above ground (e.g., cleaning the bathhouse and maintaining the driveway). His application materials also note that he possessed state certification to work as underground miner as well as a mine foreman.

To support its claim that Bennett was rejected because he applied for a position that did not exist at the new operation, Mammoth relies on Doss' testimony that he did not contact individuals whose applications showed that they were applying for positions at the plant or "on the surface," since the Company was "primarily . . . filling underground positions." That testimony is inadequate to support Mammoth's argument for a number of reasons, not the least of which is that it does not show that the term "general laborer" excludes underground assignments at Mammoth. Nor did Doss, or anyone else, testify that Bennett said he was unwilling to work in an underground position at the mine as he done in the past. Mammoth's asserted defense is also rebutted by evidence showing that the Respondent did not limit its consideration of applicants to the position they were seeking, but also considered them for other positions for which they were qualified. Doss himself testified that when initially staffing Mammoth he would "just look at the . . . person's qualifications . . . or past experience and try to best fit them in . . . the open positions that we had available." (Tr. 2676.) Indeed, Doss hired Guy Crist as a fire boss even though the positions Crist applied for were shuttle car operator, roof bolter, and scoop operator. (Tr. 963; GC Exh. 5(d).) At any rate, the record fails to a show a lawful reason why the Respondents filled so many of the above-ground positions before they afforded Bennett and other employees of the predecessor consideration for those positions.

Based on the above, I find that the claim that Bennett was rejected because the position he applied for did not exist at Mammoth, is pretextual, and would not have caused the Respondents to deny employment to him, absent antiunion animus.

6. Applicant did not want to work at Mammoth

Mammoth contends that absent antiunion animus it would not have hired a number of the alleged discriminatees because those individuals were not interested in continued employment at the Cannelton/Dunn facility once the Respondents took control of the operation. The alleged discriminatees who Mammoth claims disavowed an interest in employment are Tilman Cole, Dewey Dorsey, Thomas Dunn, Robert Edwards, Rodney Leake, Danny Legg, Gregory Moore, Michael Rosenbaum, Lawson Shaffer, and Donald Stevens.[45]

Tilman Cole: The evidence showed that Cole had worked at the Cannelton/Dunn facility, under various owners, for over 20 years. He lost his job there when the Respondents took over the operation in September 2004. During his years at Cannelton, Cole performed both underground and preparation plant assignments, set the individual 1-day production record for operating a continuous miner, and never had an unexcused absence. The Respondents did not offer Cole continued employment at the time they took over the operation. After the Respondents began operating the facility, Cole obtained an application at a Massey job fair and submitted it by mail. Subsequently, Cole called Adamson, who invited Cole to interview for a job at Mammoth. On November 30, 2004, Cole came for the interview which was conducted by Hall, Adamson, and Rutherford. Cole testified that, at the interview, Hall stated that Adamson wanted Cole to work at the preparation plant, but Rutherford wanted him to operate a continuous miner. Hall asked Cole which position he preferred, and Cole said he was not sure given the higher wage rate that was being offered for the underground job. According to Cole's testimony, Hall then said, "Well, I'll call you in a couple of days for a [pre-employment] physical and you can let us know then." Neither Hall, nor anyone else, contacted Cole regarding a physical examination or work at Mammoth. After about a week, Cole called Adamson to ask about the job, but Adamson said he did not know what the status was. Cole waited another week or two and then, while picketing, again asked Adamson if he had heard anything about the job, and again Adamson said that he did not know. On another occasion within about 3 or 4 weeks of the interview, Cole called Adamson to ask about working at Mammoth, but Adamson said he did not have any information about the subject. No one from the Respondents ever called Cole, or left him a message, about employment. Cole testified that the Respondents never offered him a job at Mammoth, or told him that he could have a job there. After applying at a variety of coal mines without success, Cole obtained employment with a construction company starting in August 2005.

[45] The discussions immediately below regarding specific applicants relate only to Mammoth's defense that the individuals did not want to work at Mammoth. Other defenses raised by Mammoth, including a number that are forwarded for these same individuals, are discussed elsewhere in this decision.

In its brief, Mammoth contends that Cole was offered a job, but turned it down. To support this contention, Mammoth relies on the testimony of Adamson who stated that Cole was offered a job during an interview, but that "[t]he job he was offered was back underground, and [Cole] said he didn't want to go back underground." After reviewing the record, I conclude that Cole's testimony that the Respondents did not offer him a job, was more credible than Adamson's contrary testimony. Cole was able to recall with confidence both what was said at the interview, and who said it. Moreover, his account was consistent with the interview reports completed by the Respondents' own officials—none of which mention a job offer being made to Cole. Adamson, by contrast, gave only a vague account of the interview. He did not recount the specifics of what was said, and was unsure who actually extended the supposed job offer to Cole. Moreover, Adamson did not deny Cole's credible testimony that, during the month after the interview, Cole contacted him on three occasions to check his status in the hiring process, but that in each instance Adamson answered that he did not know Cole's status. Neither Adamson nor the Respondents explain why Cole would contact Adamson to inquire about his application if Cole had already been offered, and turned down, employment. Nor do Adamson or the Respondents explain why Adamson would tell Cole that he did not know the status of Cole's application if Adamson knew that Cole had already rejected employment with Mammoth.

I conclude that the Respondents have failed to show that Cole was offered, or turned down, a job at Mammoth.

Thomas Dunn: Dunn started at Cannelton/Dunn in 1996 and lost his job when the Respondents took over the operation in September 2004. In its brief, Mammoth contends that Dunn told Doss that he was working at another coal company and was not interested in coming for an interview at Mammoth. This contention is not based on the recollection of any witness, but rather on Doss' notes of his contacts with employees. Those notes are informal and Doss' testimony indicated that they were something he prepared for his own use, not a formal business record that it was the regular practice of Mammoth or Massey to make.[46] Apparently they were made on a notepad, not on any type of form generally used by either Respondent, and are not signed by him. Doss concedes that he did not record every contact between himself and prospective employees in those notes. Moreover, Doss did not testify that he had a recollection of a conversation with Dunn, or that the notes refreshed his recollection of such a conversation. In fact, Doss indicated that his notes did not refresh his recollection as to specific contacts with applicants. (Tr. 2591–2592.) Under these circumstances I believe that Doss' notes are entitled to very little evidentiary weight.

For his part, Dunn testified that he talked by phone with someone from Mammoth or Massey about employment. Dunn testified that he had found another job, but that he was prepared to accept an offer with Mammoth if he had been offered employment pursuant to the existing terms and conditions of employment as set forth in the collective-bargaining agreement. (Tr. 1780–1783.) Based on Dunn's demeanor and testimony, I credit his sworn statement that he would have done so. I find that Dunn was contacted by a hiring official about employment with Mammoth, but that he declined to participate further in the hiring process because the Respondents were not offering to maintain the existing terms and conditions of employment.

The question then becomes whether the Respondents were entitled to set their own terms, and thus to decline to hire applicants who insisted on employment under the predecessor's terms and conditions of employment. A successor employer is generally not required to adopt the terms and conditions of employment in existence at the predecessor, but is "ordinarily free to set the initial terms on which it will hire the employees of a predecessor." *Smoke House Restaurant*, 347 NLRB 192, 204 (2006), quoting *NLRB v. Burns Security Services*, 406 U.S. at 294. However, the Board has held that, under certain circumstances, a successor forfeits that privilege. Those circumstances include when either: (1) the successor "informs the predecessor's employees that it will operate the successor business *sans* the Union," *Smoke House*, supra, quoting *Concrete Co.*, 336 NLRB 1311 (2001), and citing *Eldorado, Inc.*, 335 NLRB at 952–953; or (2) the successor "plans to retain all" of the predecessors employees, *Planned Building Services*, 347 NLRB 670, 674, citing *NLRB v. Burns Security Services*, 406 U.S. at 294–295. As is discussed below, the Respondents have forfeited the privilege of setting initial terms and conditions of employment for the predecessor's employees, including Dunn, under both of these rules.[47]

During the initial staffing at Mammoth, company officials distributed a document to applicants in which the Respondents stated that "the mine is nonunion." During the interview process the Respondents' officials told a number of the predecessor's employees that Mammoth would be a nonunion operation. In *Advanced Stretchforming, International,* the Board explained why a successor forfeits the entitlement to set initial terms and conditions of employment when it makes such statements to the predecessor's employees:

> A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It "block[s] the process by which the obligations and rights of such a successor are incurred."

[46] Under Fed.R.Evid. 803(6) a writing does not meet the business record exception to the hearsay rule unless it "was the regular practice of that business activity to make the memorandum, report, record, or data compilation." The Respondents did not submit similar notes from either Chandler or Bane—the officials who handled Mammoth's human resources functions before and after Doss' tenure.

[47] For reasons discussed elsewhere in this decision, I also conclude that Mammoth was the legal successor to Cannelton/Dunn.

Advanced Stretchforming International, 323 NLRB 529, 530–531 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001), quoting *State Distributing Co.*, 282 NLRB 1048, 1049 (1987).

The Respondents also forfeited the entitlement to set initial terms and conditions under the rule that applies to successors who plan to retain all of the predecessor's employees. Starting with its decision in *Love's Barbecue Restaurant No. 62*, supra, the Board has held that when an employer attempts to evade a bargaining obligation by discriminatorily refusing to hire the employees of the predecessor, the Board will assume that the employer would have hired employees of its predecessor to fill all unit positions if not for the discrimination. *Planned Building Services*, supra at 674, citing *Love's Barbeque Restaurant No. 62*, 245 NLRB 78.[48] The Board recently explained that "[a]lthough it cannot be said with certainty whether the successor would have retained all of the predecessor employees if it had not engaged in discrimination, the Board resolves the uncertainty against the wrongdoer and finds that, but for the discriminatory motive, the successor employer would have employed the predecessor employees in its unit positions." *Planned Building Services*, supra at 674. As I find below, the Respondents discriminated against the predecessor's unit employees and therefore I must assume that, but for the discrimination, the Respondents would have filled all of its unit positions with employees of the predecessor. Under *Love's Barbecue*, an employer who triggers this assumption forfeits the privilege to set initial terms and conditions of employment, and must maintain the existing terms and conditions pending bargaining. See *Planned Building Services*, supra.[49]

Since the reason Dunn declined to participate further in the selection process was that the Respondents were unlawfully refusing to maintain the existing terms and conditions of employment pending bargaining, Dunn's failure to participate further in the process does not constitute a legitimate, nondiscriminatory, basis for refusing to hire him.

Dewey Dorsey: Dorsey started at Cannelton/Dunn in 1996 and lost his job there when the Respondents took over the operation. During the last 2 years he had worked above-ground as bulldozer/mobile equipment operator, and before that he had worked as an underground electrician. As discussed above, Mammoth has claimed that Dorsey was refused employment because he did not meet minimum educational requirements. However, Mammoth contradicts that contention by also arguing that it offered Dorsey a job and that he turned the offer down.

To support the contention that Dorsey refused a job offer, Mammoth relies on Rutherford's testimony regarding Dorsey's November 30, 2004 interview. Rutherford testified that the interview had gone well and that Dorsey was offered a job as an underground electrician, but turned it down because he wanted an above-ground position at the plant. Dorsey contradicted Rutherford's account, stating that at the interview he told the Respondents that he was applying for the underground electrician position. Based on demeanor, I would find Rutherford's and Dorsey's testimonies to be equally credible.[50] However, consideration of the documentary evidence leads me to credit Dorsey's account. Rutherford's claim that Dorsey was offered an underground electrician position, but was only interested in a plant job, is contradicted by the "interview record" form completed by Rutherford, on which Rutherford reported that Dorsey desired the position of "Electrician Underground." (GC Exh. 8(g).) Likewise, Hall and Adamson note on their interview forms that Dorsey was seeking an underground electrician position. None of interviewers' report forms, including the one completed by Rutherford, state that Dorsey was offered a job of any kind. To the contrary, all of those reports recommend against interviewing Dorsey further, and Hall's report states, "Do not hire at this time."

For the reasons discussed above, I conclude that the Respondents have failed to show that, absent antiunion animus, Dorsey would not have been hired because he was offered a position as an underground electrician and turned it down.

Robert Edwards: Edwards worked at Cannelton/Dunn for 18 years, and once returned there when recalled after a layoff of over 10 years. Mammoth states that Edwards was not hired because he declined an offer to interview. This is one of a number of shifting explanations that Mammoth asserts for the failure to hire Edwards. Mammoth also claims that Edwards was not hired because he did not meet Mammoth's minimum educational requirements and that he was not hired because he was evaluated as an "average" employee by Rutherford. For reasons discussed above, I have concluded that Mammoth's claims that alleged discriminatees were rejected based on a Mammoth educational requirement and on Rutherford's recommendations are pretextual.[51] I reach the same conclusion regarding Mammoth's claim that Edwards refused to be interviewed. The Board has held that when, as here, an employer offers inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007), citing *Mt. Clemens General Hospital*, 344 NLRB 450, 458 (2005); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 (2005); and *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997). I find that such an inference is warranted regarding Mammoth's contention that Edwards refused to be interviewed.

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[48] The Respondents have not challenged the validity of the *Love's Barbecue* doctrine.

[49] Mammoth has argued that it employs a smaller, leaner, work force than Cannelton/Dunn employed. If this is true, it would not change the result here since the Board has held that a successor must maintain the existing terms and conditions of employment where it "did not plan to retain literally *all* of the predecessor employees, but rather, 'planned to employ a smaller work force consisting solely of predecessor employees.'" *Planned Building Services*, supra, 674 at fn. 17 (emphasis in original), quoting *Galloway School Lines, Inc.*, 321 NLRB 1422, 1427 (1996).

[50] For reasons discussed above, I considered Rutherford to be a less than fully reliable witness based on his demeanor and testimony. For his part, Dorsey was a surly and combative witness, especially during cross-examination, and his account of what transpired at the interview was at times self-contradictory.

[51] I also note that Rutherford conceded that while a supervisor at Cannelton/Dunn he had never disciplined Edwards, Tr. 2834, and had not even mentioned performance problems to him for a "long time," "probably" more than 5 years. Tr. 2836.

In addition, Mammoth's claim that Edwards was not hired because he refused to be interviewed is contrary to the evidence. The only testimony that Mammoth relies on is Edwards' own account. It is true that Edwards stated that he talked to Doss at one point and told him he wanted a job, but would not cross the picket line. However, Edwards also testified that after that conversation, he contacted the Union local about the picket line, and was told that he could cross it. Edwards testified that he then telephoned Doss repeatedly in an effort to arrange an interview, but was only able to reach Doss' answering machine/service. On three or four occasions, Edwards left phone messages telling Doss that he wanted to interview, but Doss never returned those messages. Neither Doss nor any other witness contradicted Edwards' testimony that he left messages asking to interview and that those messages were not returned by Doss. Moreover, after Doss failed to return those phone messages, Edwards followed up by asking Nottingham, a Mammoth supervisor, to check on the status of his application, but the Respondents still did not contact Edwards to interview. The Respondents provide no reason why I should credit Edwards' testimony that he initially told Doss that he would not cross the picket line for an interview, but not his unrebutted testimony that he subsequently left Doss repeated messages stating that he would cross the picket line to interview. Based on Edwards' demeanor I found all of that testimony equally credible.

In its brief, Mammoth asserts that Doss' notes show that Edwards never re-contacted human resources after the initial phone call. (Br. of R. Mammoth at p. 70.) Mammoth does not say where in Doss' notes this representation supposedly appears. Moreover, Doss admitted that his notes did not necessarily record every contact (Tr. 2672), and thus a failure of those notes to report Edwards' subsequent requests to be interviewed would not show that such requests had not been made. At any rate, Doss' notes were unsworn, and neither Doss, nor anyone else, gave testimony contradicting Edwards' sworn statement that he left repeated messages for Doss requesting to interview.

For the reasons discussed above, I conclude that Mammoth's contention that Edwards was not hired because he refused to be interviewed is not supported by the record.

George Rodney Leake: In a position statement given during the investigation, Mammoth took the position that Leake was not offered a job because he received a poor evaluation. (GC Exh. 12(c) at p. 4.) In its posthearing brief, Mammoth shifts its explanation—claiming that it actually tried to hire Leake, but that he turned down a job offer.

Leake started with Cannelton in April 1974 and last worked there in September 2004. His application listed the positions he was seeking as underground electrician and "tipple" plant electrician. After the Respondents took over the operation, Leake had an employment interview with Doss, Hall, and a Mammoth supervisor named Rick Burke. Leake testified that Burke asked him what job he was applying for. Leake responded, "[W]hat job do you have open?" Burke said, "[W]hatever you want," and Leake answered that he would "like to go back to the plant as the electrician." Burke told Leake that that job was not available and that all the openings were for underground work. Leake testified that he replied, "[T]hen I'm applying for an underground job." Burke asked how Leake got along with people and whether he had arguments with supervisors. Leake responded that he had not had any problems in that regard. Leake testified that the Respondents did not offer him a job during the interview, and did not contact him subsequently. When he did not hear from the Respondents, Leake asked two Mammoth employees to talk to Rutherford about his application, but Leake was still not contacted.

To support its claim that Leake rejected an offer of employment, Mammoth relies on Hall's testimony. Hall testified that "I think that was the one that we may have said something about going underground, but I don't think he was interested in that." I considered Hall's testimony regarding this matter far less reliable than Leake's. First, Hall testimony was, on its face, very uncertain—only that he "thinks" Leake was the one to whom "we *may* have said something about going underground," and that he does not "think" Leake was interested. Leake's testimony on this subject was far more detailed and certain than Hall's. Moreover, Leake's testimony that he expressed a willingness to work in an underground capacity is corroborated by his application, which specifically lists underground electrician as one of the jobs he was seeking.

The Respondent also relies on Adamson's testimony regarding Leake. Adamson stated that he asked Chandler to call Leake in for an interview, but that at the interview Leake "was offered a job and wouldn't take it." The record shows, however, that Adamson did not attend Leake's interview, and it is not clear how Adamson would have known what transpired during it.[52] At best, Adamson's testimony on the subject is hearsay. Moreover, Adamson's testimony, like Hall's, was far less specific than Leake's. I credit Leake's specific, certain, first-hand, testimony, over Adamson's vague hearsay account.

For these reasons I find that the Respondent has failed to show that Leake was offered a job at Mammoth but turned it down.

Danny Legg: Legg worked for Cannelton/Dunn for approximately 10 years and lost his job there when the Respondents took over the operation in September 2004. His most recent position was an underground assignment as a continuous miner operator. Legg testified that after the Respondents took over Cannelton/Dunn, he sought employment with Mammoth, as well as with Massey subsidiary mines Elk Run and Nicholas Energy. On January 1, 2005, Legg spoke to Doss by phone about possible employment. Doss did not claim to recall the conversation with Legg, but he did read a portion of his notes regarding that conversation into the trial record. Those notes state: "Danny Legg worked at Horizon—Interested in Elk Run. Says he has a bad name. Tried to fire him at Cannelton. Wants to stay away from Cannelton. Run in with the boss at Cannelton named George Ferrll [sic]. Not interested in Mammoth." (Tr. 2603; Mammoth Exh. 65.) Legg admitted that he talked to a company official by phone about his interest in employment

[52] Leake credibly testified that he was interviewed by Doss, Hall, and Burke, Tr. 3611, and he specifically denied that Adamson was present at the interview, Tr. 3618. Neither Adamson, nor any other witness, contradicted Leake's testimony that Adamson was not present.

at Elk Run,[53] but he denies that he ever told that official, or anyone else from Massey or Mammoth, that he was not willing to work at Mammoth. (Tr. 3587–3588.) Legg expressed his interest in working at Mammoth to Shay Couch, a supervisor who he knew there. Subsequent to the conversations with Doss and Couch, Legg was not contacted by the Respondents about employment at Mammoth, Elk Run, or Nicholas Energy.[54]

For reasons discussed earlier, I consider Doss' uncorroborated notes to be entitled to very little weight regarding disputed matters. Doss' notes were contradicted by the testimony of Legg, who admitted to expressing an interest in employment at Elk Run, but denied stating that he was not interested in employment at Mammoth. I considered Legg a somewhat less than forthcoming witness. For example, Legg initially testified that he had not had problems with his job or supervisors at Cannelton/Dunn, and only after some prodding stated that Farrell had attempted to discharge him. (See Tr. 1214 and 1229.) The evidence presented regarding Legg is thin at best, and is insufficient to allow me to find with any certainty that Legg did, or did not, disavow interest in employment at Mammoth. However, since the General Counsel has shown that antiunion animus played a part in the Respondents' refusal to hire the former Cannelton/Dunn employees, the burden at this stage of the analysis is on the Respondents. The Respondents have not met that burden with respect to Legg.

For these reasons I find that the Respondent has failed to show that Legg was offered a job at Mammoth but turned it down.

Gregory Moore: G. Moore began working at Cannelton in 1974 and his employment ended when the Respondents took over the operation in September 2004. On November 30, 2004, he was interviewed for a job with Mammoth. The interview was conducted by Adamson, Hall, Nottingham, and Rutherford. Mammoth states that G. Moore was offered a job at the preparation plant, but that he turned it down. G. Moore denies that he was ever offered a job with Mammoth, or that he ever turned down such a job.

To support its contention that G. Moore turned down a job offer, Mammoth relies exclusively on the testimony of Adamson. Adamson testified that, after the interview, he told Chandler to offer G. Moore a job in the plant. According to Adamson, G. Moore told him that he was turning down the offer because he had a "handicapped" child and was "afraid" that if he took the job the child would "lose his hospitalization." G. Moore denies this. He states that he was never offered a job at Mammoth, and that after his interview he was never contacted by the Respondents. After considering the evidence relating to this issue, I credit G. Moore's account over Adamson's. I note first that Adamson's account was not corroborated by any of the other company officials who attended the interview. Hall and Rutherford testified, but neither of them stated that a decision was made to hire G. Moore. Indeed, although Adamson's interview notes report that he recommended G. Moore for hire, none of the other interviewers' notes report such a recommendation. Nottingham gave G. Moore no rating and specifically recommended against interviewing him further. Similarly, Chandler testified, but did not corroborate Adamson's testimony that she offered G. Moore a position. G. Moore's testimony, on the other hand, was buttressed by that of James Fitzwater. Fitzwater had recommended G. Moore to Adamson and, after the interview, Fitzwater and G. Moore discussed work at Mammoth. G. Moore told Fitzwater that he had not been offered a job. (Tr. 2891.) Moreover, the suggestion that G. Moore turned down the job with Mammoth out of concern about losing the private medical coverage for his son was undercut by G. Moore's uncontradicted, and credible, testimony that he does not use that coverage because his son has superior medical insurance (no copay/no deductible) under Medicaid. G. Moore's testimony that he did not use the private coverage for his son was uncontradicted, and the Respondents do not explain why G. Moore would have turned down a job offer out of concern for losing a benefit that he did not even use.

For the reasons discussed above, I conclude that the Respondents have failed to show that G. Moore rejected an offer of employment at Mammoth.

Michael Rosenbaum: Rosenbaum began working at Cannelton/Dunn in 1976. His employment there ended when the Respondents took control of the facility. Rosenbaum filed an application to work at Mammoth, and Doss invited him for an interview. Rosenbaum was interviewed by Doss, Hall, and Burke on January 23, 2005. At the interview, Rosenbaum was first asked about his skills and his physical condition. Then Hall asked Rosenbaum what he thought about the picket shacks across the road. Rosenbaum responded: "I support them. The Union told us to go to work." Rosenbaum also testified that "I needed a job, and I wanted to work, that's why I was there." At the end of the interview, Doss stated, "We'll call you." Rosenbaum was never contacted by Doss.

It was not until approximately 8 months after his January 2005 interview that Rosenbaum was contacted by the Respondents. At that time Rosenbaum received a call from Chandler, who had assumed responsibility for Mammoth's human resources functions.[55] Chandler asked Rosenbaum whether he wanted to be interviewed for a position. In the interval between his January 2005 interview and Chandler's call, Rosenbaum had, on June 12, 2005, been granted social security disability benefits based on a request of March 29, 2005. Rosenbaum testified that he had psychological problems stemming from his job loss, and also had back problems. Rosenbaum informed Chandler that he was on social security disability. Rosenbaum and Chandler offered differing accounts of what was said next.

[53] Immediately, prior to assuming his responsibilities at Mammoth, Doss held human resources positions at a number of other Massey subsidiaries, including Elk Run, simultaneously. It is not clear whether Doss retained human resources responsibilities at Elk Run when he took on such responsibilities at Mammoth.

[54] In its brief, Mammoth asserts that Legg was hired at Elk Run, but it points to nothing in the record supporting that contention. Br. of R. Mammoth at p. 57 fn. 21 and p. 68. Mammoth's assertion is contradicted by Legg's testimony that he was not contacted by the Respondents about a job, much less hired. Tr. 1221. I credit Legg's testimony on this score.

[55] Chandler had human resources responsibilities at Mammoth during two periods. The first period was from September until December 17, 2004. The second was from August until late October 2005.

According to Rosenbaum's testimony, Chandler warned him that it could be difficult to revive his social security benefits if he passed Mammoth's preemployment physical and attempted to return to work there. She told Rosenbaum that her own father had this problem. Rosenbaum testified that he said he would have to "check" and think about whether he wanted to try to come back to work. After this conversation, Rosenbaum contacted the Social Security Administration, and was informed that he could work for a "trial period" without endangering his existing entitlement to disability benefits. Rosenbaum stated that he decided to try to return to work and repeatedly telephoned Chandler but was not able to reach her. On five occasions he left phone messages for Chandler stating that he wanted to talk about the job interview he had been offered, but Chandler never returned any of his messages.

According to Chandler's account, when she called Rosenbaum to offer him an interview, he answered that he was unable to do that because he was receiving social security disability benefits. She testified that Rosenbaum said he was unable to perform the functions of the job. As a result she put a note in his file that he was not interested in interviewing and did not consider him further.

Even if I were to accept that Rosenbaum turned down an offer of an interview during a conversation with Chandler in late 2005, that would not explain the Respondents' earlier failure to hire Rosenbaum following his January 2005 interview. Indeed, the Respondents offer no nondiscriminatory explanation for choosing not to hire him after his January interview. That interview occurred months before Rosenbaum had received or even applied for disability benefits. Rosenbaum credibly testified that at the time of his initial interview he believed that there were jobs he was capable of performing in the Mammoth mine and that he would have accepted a job offer. In addition, I note that the record does not provide a basis for believing that Rosenbaum would have quit his job upon receiving disability benefits on June 12, since his employment would have precluded him from qualifying for such benefits if they had not already been granted. See 20 CFR § 404.1520(b) (An individual who is engaging in substantial gainful activity will not be found to be disabled regardless of medical findings.). Moreover, Rosenbaum's testimony provides reason to believe that his eventual disability was the result, at least in part, of psychological difficulties stemming from his inability to obtain employment after the Respondents took over the Cannelton/Dunn facility.

At any rate, Chandler did not contradict Rosenbaum's credible testimony that, following their phone conversation, Rosenbaum repeatedly left phone messages for her stating that he wanted to interview for a job at Mammoth. Nor did Chandler contradict the testimony that she failed to respond to those messages. Neither Chandler, nor the Respondents, explain why Chandler did not return those messages, or schedule Rosenbaum for an interview based on them.

For these reasons, I conclude that the Respondents have failed to show that, absent antiunion animus, they would not have hired Rosenbaum because he declined to be interviewed.

Lawson Shaffer: Shaffer started at Cannelton/Dunn in 1974. Immediately before the Respondents took over the facility, Shaffer was still an employee of Cannelton/Dunn, but was on workers' compensation leave due to a work-related injury. He had surgery for the injury and his doctor released him to return to work on February 3, 2005. Prior to receiving the doctor's release, Shaffer applied for social security disability benefits. He was awarded those benefits in June or July 2005.

In December 2004—before being granted disability benefits—Shaffer applied for work at Mammoth. Shaffer was not contacted by the Respondents about his job application for over 10 months. He testified that he would have accepted a job offer with Mammoth during the period after his doctor released him to return to work and before he was granted disability benefits. That period commenced, at the latest, when his doctor released him to return to work on February 3, although it is reasonable to assume that Shaffer's doctor would at least have considered an earlier release date if Shaffer had a pending job offer.

On October 26, 2005—over a year after the Respondents took over the former Cannelton/Dunn operation—Chandler contacted Shaffer by phone and asked whether he was interested in a job interview with Mammoth at that operation. Shaffer replied, "[N]o." Shaffer credibly testified that the reason he rejected the offer of an interview was that, by that time, he was receiving social security disability benefits.

The Respondents cannot claim that Shaffer's October 26, 2005 refusal to interview would have caused it not to hire him during the approximately 10-month period prior to October 26 since there is no evidence that before that time the Respondents believed that Shaffer was not interested in employment. While it is probable that the Respondents were aware of Shaffer's workers' compensation injury, they do not contend that they declined to hire Shaffer because of that injury. Moreover, as in the case of Rosenbaum, there is no basis for believing that Shaffer would have quit a job with Mammoth upon qualifying for disability benefits, since that employment would have precluded him from qualifying for disability benefits that had not already been granted. See 20 CFR § 404.1520(b).

I conclude that the Respondents have failed to show that they would not have hired Shaffer, even absent antiunion animus, because he disavowed interest in working at Mammoth.

Donald Stevens: D. Stevens worked at Cannelton/Dunn for two periods totaling about 2 years and lost his job there when the Respondents took over the operation. The record indicates that D. Stevens was also employed by a different Cannelton division for approximately 12 years from 1974 to 1986. On January 31, 2005, D. Stevens had a job interview with Doss, Hall, Nottingham, and Rutherford. Since that time, Mammoth has offered shifting explanations for the failure to employ D. Stevens. In a proceeding before the West Virginia Human Rights Commission, Mammoth submitted a written response claiming that D. Stevens was not hired because he had not filed an application. During the investigation of the instant matter, Mammoth submitted a position statement claiming that D. Stevens was not hired because his qualifications were not sufficiently impressive. (GC Exhs. 12(c) at p. 4, 17(eee).) Now, in its posttrial brief, Mammoth concedes that D. Stevens applied, and even argues that his job qualifications were sufficiently impressive to earn him a job offer, but contends that D. Stevens turned down that job offer. As discussed above, when an employer offers inconsistent or shifting reasons for its actions, a

reasonable inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. I conclude that such an inference is warranted regarding Mammoth's contention that D. Stevens turned down a job offer.

Moreover, the record does not support Mammoth's claim that D. Stevens refused a job offer. D. Stevens gave detailed and confident testimony about his Mammoth job interview and denied he was offered a job at the interview or afterwards. (Tr. 1401–1405, 3157–3158.) D. Stevens testified that the interviewers told him about the benefits being offered and he responded that those "sounded good." At the end of the interview he was told that the company would be "in touch" with him, but he was never contacted. Based on his demeanor and testimony I considered D. Stevens a credible witness. Moreover, Mammoth's claim that D. Stevens refused an offer is inconsistent the interview reports completed by the officials who interviewed him—none of which mentions D. Stevens being offered, or turning down, a job. To the contrary, the notes suggest that D. Stevens was anxious to accept a job at Mammoth. The last line of Nottingham's interview report states that D. Stevens was asked, "How soon could you be available?" and that D. Stevens replied, "Today." (GC Exh. 8(t).)

To support its contention that D. Stevens rejected a job offer, Mammoth relies exclusively on the testimony of Rutherford. According to Rutherford, the interview went well, and D. Stevens was offered a job, but turned it down because he "didn't want to have any trouble between the pickets and going to work" and "didn't want to deal with the issues." For reasons discussed above, I found Rutherford to be a biased and unreliable witness. I am particularly unwilling to credit Rutherford's testimony in this instance since none of the other three interviewers (Doss, Hall, and Nottingham) corroborated his testimony about D. Stevens. Moreover, his testimony is inconsistent with the interview records created by the other interviewers. In conclusion, I found the evidence that D. Stevens did not reject a job offer far more compelling than Rutherford's contrary testimony.

For the reasons discussed above, I reject Mammoth's contention that absent antiunion animus it would not have employed D. Stevens because he refused an offer of employment.

7. Alleged failure to return Doss' attempts to contact

Mammoth asserts that Doss' notes show that 36 of the alleged discriminatees either did not provide adequate contact information or failed to respond to efforts that Doss might have made to contact them. As already discussed, Doss' notes regarding contacts with potential employees, are entitled to very little weight. Those notes did not refresh Doss' recollection about specific contacts, do not meet the standard for business records, were unsigned, and Doss conceded that the notes do not necessarily list all the contacts that were made or attempted. Under the circumstances, the notes are insufficiently probative to establish a defense under *Planned Building Services* and *Wright Line*. In fact, with regard to 21 of the 36 individuals for whom Mammoth makes this argument, Respondent points to nothing in Doss' notes mentioning either that Doss contacted the individuals, or that those individuals failed to respond to such contacts.[56] Without explicitly saying so, Mammoth asks me to adopt a double standard—when Doss' notes make no mention of a particular alleged discriminatee contacting Doss, I should leap to the conclusion that the individual did not do so, but when the same notes make no mention of Doss contacting the alleged discriminatee, I should assume that Doss simply neglected to record his attempted contact. The better course is to apply the same standard to both situations; I draw no inference from the fact that Doss' incomplete, unsigned, notes fail to report a contact.[57]

Doss' notes do report attempts to contact 15 of the alleged discriminatees.[58] Even if Doss attempted to contact these individuals, Mammoth's defense fails because it has not shown that those individuals failed to respond. As discussed above, Doss himself conceded that he did not necessarily make a record of contacts between himself and prospective employees, and therefore, the fact that Doss' notes do not memorialize a response from an individual does not show that the individual did not contract Doss. Moreover, Doss did not testify that he had any recollection of whether these individuals failed to respond to his contacts. Fourteen of these individuals gave sworn testimony that it was the Respondents who failed to contact or respond to them, not they who failed to respond to the Respondent.[59] Virtually all of these individuals testified that they provided accurate, current, contact information, and most of them stated that they possessed answering machines or services to record missed calls. Moreover, with respect to many of these individuals, the argument based on Doss' notes is only one of a number of shifting explanations offered by Mammoth.[60] In the

[56] These 21 alleged discriminatees are: Roger Bowles, Michael Cordle, Terry Cottrell, Stanley Elkins, Ronald Gray, Robert Hornsby, John Kauff, Chester Laing, James Mimms, William Nugent, John Nutter, Danny Price, Gary Robinson, Michael Ryan, Russell Shearer, Charles Smith, Roger Taylor, Byron Tucker Jr., Thomas Ward, Phillip Williams, and Gary Wolfe.

[57] At any rate, in many instances the sworn testimony of these individuals contradicts the assertion that they were contacted by Doss but did not respond. See, e.g., Tr. 995–996 (Cottrell); Tr. 802–803 (Elkins); Tr. 3798–3799 (Kauff); Tr. 395–396 (Ryan); and Tr. 617–618 (Tucker).

[58] Mark Cline, Robert Edwards, Lacy Flint, Cheryl Holcomb, Jeffrey Hughes, Alvin Justice, Barry Kidd, Everrett Lane, James Moschino, Ronald Payne, David Preast, Gary Roat, Shannon Roat, Jeffrey Styers, and Ralph Wilson

[59] See Tr. 1732 (Cline), Tr. 1425–1427 (Edwards), Tr. 1792 (Flint), Tr. 1870–1872 (Holcomb), Tr. 1941–1943 (Hughes), Tr. 3574–3575 (Justice), Tr. 779 (Kidd), Tr. 1812–1813 (Moschino), Tr. 454–455, 466–467 (Payne), Tr. 706–708 (Preast), Tr. 846–847 (G. Roat), Tr. 503–504 (S. Roat), Tr. 1456–1457 (Styers), and Tr. 1046 (Wilson).

[60] For example, in addition to claiming that Cline failed to respond to Doss' attempts to contact him about employment, Mammoth asserts that Cline was not hired because Rutherford gave a negative reference. Br. of R. Mammoth at 61. Mammoth has asserted that Edwards was not hired because he was not highly recommended and did not meet Mammoth's minimum educational requirements, but also claims that the company wanted to interview Edwards and was rebuffed by him. Br. of R. Mammoth at 60 and 70; GC Exh. 12(c) at p. 4. In addition to claiming that Justice was not employed because he failed to respond to Doss' attempts to contact him, Mammoth has contended that Justice was rejected because he did not meet a minimum educational require-

case of the final one these individuals, Everrett Lane, the notes, even if credited, do not show that Lane failed to respond to Doss' contact. To the contrary, those notes appear to report that, on March 3, 2005, Doss returned a call from Lane and that Lane told Doss he wanted to interview. (Mammoth Exh. 65.)

For the reasons discussed above, I conclude that the Respondents have failed to meet their burden of showing that, absent discrimination, they would have failed to hire alleged discriminatees because those individuals did not respond to contacts from Doss, or did not provide adequate contact information.

8. Preemployment physical

Mammoth states that it did not hire one of the alleged discriminatees, Michael Armstrong, because he failed his preemployment physical. To support this contention, Mammoth introduced the report of the physical examination results. (Mammoth Exh. 86.) However, the report submitted does not state that Armstrong failed the physical. That report sets forth three possible outcomes—"Passed," "Failed," and "Pending." The physician who completed the report of Armstrong's physical examination checked the box for "Pending," as opposed to "Passed" or "Failed." In the comments section of the report, the physician noted "Company to review Carbon Monoxide High." The report states that Armstrong's blood carbon monoxide level was 4.4 percent, and that the normal range is 0.0 to 1.9 percent. The evidence does not show any subsequent company review of these results. The Respondents have not shown what led them not to hire Armstrong after he received the "Pending" test result.

Mammoth also cites the testimony of Susan Carr, an employee of Massey Coal Services who worked at Mammoth as its benefits coordinator. Carr testified that the Company has a "guideline" range of 0.0 to 1.9 percent for carbon monoxide in the blood of prospective employees. (Tr. 3471, 3473–3475.) This evidence fails to meet the Respondents' burden for a number of reasons. First, Carr testified that there was a guideline range, but she did not state what happened to applicants whose results exceeded that range, and certainly never claimed that such applicants were disqualified from all employment at Mammoth. Thus, even if Carr is fully credited, an elevated result could simply mean, inter alia, that a follow-up test would have to be performed, that certain job assignments at the mine would not be recommended for the individual, or that the individual had to agree to stop using cigarettes or to sign a waiver. Indeed, the fact that the physician who completed the report did not check the "Failed" box lends support to the view that an elevated score did not mean automatic disqualification. Second, Carr's responsibilities do not extend to selecting employees. She did not claim to have played any part in the decision not to employ Armstrong. Nor did she claim to have been privy to deliberations of the officials who made that decision. Thus Carr's testimony cannot show that the officials who actually decided not to hire Armstrong considered the carbon monoxide result particularly significant, much less that they would have disqualified Armstrong on the basis of that result absent antiunion motivation. Third, Carr did not state that Mammoth had a written policy on carbon monoxide levels and the Respondents did not introduce any written company policy on the subject. As discussed above, unwritten policies are a ready means of discrimination and are suspect. See *Planned Building Services*, supra; *Norman King Electric,* supra; *Clock Electric., Inc*., supra; *Sioux City Foundry,* supra; *Dunning v. National Industries,* supra.

For the reasons discussed above, I conclude that the Respondents have failed to prove that, absent antiunion animus, they would have rejected Armstrong on the basis of the results of his physician examination.

9. Letter to West Virginia Department of Environmental Protection

In a letter dated January 24, 2005, a group of 17 individuals asked the West Virginia Department of Environmental Protection (the DEP) to conduct public hearings regarding a proposed change in the status of permits for Jack's Branch Coal Company—a mining company that is under the corporate umbrella of Independence Coal Company, a Massey company. Ten of the 17 individuals who signed the letter to the DEP are alleged discriminatees in this case—Randel Bowen, Jeffrey Hughes, Harry T. Jerrell, Mike Johnson, Chester Laing, Robert McKnight, Gary Roat, Siemiaczko, Jackie Tanner, and Willis. Hughart testified that he believed the Union was behind the letter, which raised concerns about the environmental impact of the permits. In its brief, Mammoth argues that it "legitimately refused to hire some of the discriminatees because they intended to jeopardize the permitting process of Jack's Branch Coal Company by writing and signing" the letter "petitioning the DEP for a public hearing."

If the record supported Mammoth's assertion that these individuals were denied employment based on the letter regarding state environmental permit proceedings, such action would likely be a basis for finding a violation, not a defense, since the Board has found such activity to be protected by the Act. In

ment and has also contended that he was rejected because he received a negative recommendation from Rutherford. Br. of R. Mammoth at 60 and 63. In regards to Preast, Mammoth asserts not only that he failed to respond to Doss' message regarding an interview, but contradicts that claim by arguing that Preast *did* interview and was rejected based on his poor interview performance. Id. at 69. Mammoth has offered a variety of other explanations for failing to hire G. Roat—he did not meet minimum educational requirements, Id. at 60, he got a poor recommendation from Rutherford, Id. at 64, and he sent a letter about Massey permits to the West Virginia Department of Environmental Protection, Id. at 73. During the investigation of Styers' Human Rights Commission complaint, Mammoth asserted that Styers was not considered because he had failed to submit an application. GC Exh. 17(fff). The documentary evidence introduced at trial disproved the claim that Styers did not submit an application, see GC Exhs. 4(kkk) and 79, so now Mammoth argues that it received the application and tried to contact Styers, but that he did not respond. Mammoth claims that Wilson was not hired because Doss tried unsuccessfully to contact him, but also asserts that Wilson was not hired because he received a negative recommendation from Rutherford. Br. of R. Mammoth at 65. When an employer offers inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. See *Inter-Disciplinary Advantage, Inc.*, supra; *Mt. Clemens General Hospital*, supra; *Holsum De Puerto Rico, Inc.*, supra; *GATX Logistics, Inc.*, supra.

Petrochem Insulation, Inc., the Board held that a union's participation in state environmental permit proceedings was protected by Section 7 inasmuch as it was a form of area-standards activity and also because the effort to address environmental concerns was in furtherance of the safety and health of all employees who would eventually be employed at the worksite. 330 NLRB 47, 49–50 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001).

At any rate, the record suggests that this supposed basis for rejecting alleged discriminatees is wholly the invention of Mammoth's counsel. I note, first, that the DEP letter was sent approximately 4 months after the Respondents' decision not to allow the incumbent unit employees to continue working uninterrupted when the Respondents took over the Cannelton/Dunn operation. Therefore, the letter does not explain the Respondents' decision not to initially retain incumbent unit members, even if might conceivably explain the Respondents' treatment of some of those individuals in the subsequent hiring process. Moreover, by February 3, 2005, when Mammoth's human resources official was told who had signed the letter, the Respondents had already hired 52 individuals to perform the work of the bargaining unit. The DEP letter, then, does not appear to be the reason why the 10 alleged discriminatees who signed it were not selected for those positions.

Mammoth does not cite to any record evidence showing that company officials considered the DEP letter when they refused employment to alleged discriminatees. My review of the record revealed only scant, and rather vague, reference to the DEP letter. Hughart testified about the subject, but opined that the signers had a legal right to file such a letter with the DEP (Tr. 2400), and he never claimed that it influenced hiring decisions. To the contrary, Hughart specifically denied that the DEP letter had any influence on the decision not to hire Willis, (Tr. 3053.) Doss testified that, on February 3, 2005, Gillenwater told him about the DEP letter and identified unit employees who had signed it.[61] When Doss was questioned regarding why that information was provided to him, he replied that he had "the obligation to—to take the best interest of the Company, and I felt like these guys were trying to shut us down." However, Doss did not reveal how, if at all, he used that information, and he never claimed that it was the reason why the Respondents refused employment to any of the applicants who signed the letter. (Tr. 2718–2720.) Thus even assuming that the DEP letter hypothetically could constitute a legitimate reason for rejecting applicants, the Respondents have not met their burden because they failed to show by a preponderance of the evidence that the letter would actually have caused them to reject any of the alleged discriminatees absent the antiunion motivation. See *Briar Crest Nursing Home*, 333 NLRB at 937 fn. 9 ("Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason" for taking the action in question; rather, it "must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.").

Not only have the Respondents failed to meet the burden of showing that the individuals who signed the DEP letter would have been disqualified for that reason, but with respect to a number of the individuals for whom this defense is raised, the record clearly establishes that the Respondents removed them from further consideration for reasons unrelated to the letter. Tanner and Willis were both interviewed by the Respondents on December 1, 2004, but the Respondents chose not to hire them even though the DEP letter would not be sent until almost 2 months later. Similarly, Hughes had contact with the Respondents about an interview in mid December 2004, but never heard back from the Respondents about a job or an interview. Obviously, the DEP letter cannot account for the Respondents' decisions not to hire individuals who were rejected before the letter was created. In Siemiaczko's case, the evidence indicates that the letter did not disqualify him from consideration since the Respondents invited him for a job interview on October 27, 2005, well after the letter was received by the Respondents. Moreover, the interview forms filled out by the six company officials who interviewed Siemiaczko make no mention of his involvement with the DEP letter. (GC Exh. 8(s).)

I also consider it significant that Mammoth did not make the argument based on the DEP letter until the time of trial. In the position statement it gave during the investigation of this matter, Mammoth asserts numerous reasons for not hiring the unit employees, but the DEP letter is not one of those reasons. If the DEP letter was, as Mammoth now claims, the reason why the Respondents rejected 10 of the alleged discriminatees, it is hard to understand why Mammoth would not have known and raised that defense prior to trial. At any rate, for many of the individuals for whom Mammoth now raises the DEP letter as a defense, that letter is only another in a procession of shifting explanations. This further supports the conclusion that the defense based on the DEP letter is an after-the-fact rationalization.

For the reasons discussed above, I conclude that the Respondents have failed to meet their burden of showing that any of the alleged discriminatees would have been refused employment, even absent antiunion animus, because those individuals signed the DEP letter.

10. William Willis and Dwight Siemiaczko

At trial and in the posttrial briefs, the parties focused particularly extensive attention on the Respondents' rejection of two of the alleged discriminates—William (Bolts) Willis and Dwight Siemiaczko. I discuss those two individuals below.

William Willis: Willis began working at Cannelton/Dunn in 1969. In 1980 he left for other employment—first as an international representative with the Union and later as an assistant commissioner of energy for the State of West Virginia. Willis returned to work at Cannelton in 1997 and lost his job there when the Respondents took over the operation in September 2004. His last position at Cannelton/Dunn was loadout operator. In that capacity he operated the equipment that loaded coal onto river barges. He also had responsibility for blending the

[61] Doss indicated that he never saw the DEP letter itself, but rather relied on Gillenwater's statements regarding who had signed it. Although Jerrell signed the letter, and is identified in Mammoth's brief as an individual who was denied employment for that reason, Doss' notes do not include Jerrell among those who Doss was told had signed. Obviously, Doss cannot have rejected Jerrell for signing the DEP letter if he did not even know that Jerrell had done so.

coal from different belts in order to create the mixes required by particular customers. In the past, Willis had held a number of other jobs at Cannelton/Dunn, including: heavy equipment operator at the preparation plant (bulldozers and end loaders), roof bolter, belt man, brattice man, electrician, and inside laborer. For 5 years his responsibilities included filling in for the plant operator on a daily basis. Shortly before the Respondents assumed control of the Cannelton/Dunn facility, Adamson awarded the job of plant operator to Willis, however, the record does not show that Willis had the opportunity to move to that position. During his employment at Cannelton/Dunn, Willis intermittently taught an evening course at the West Virginia University Institute of Technology.

During the 2 years preceding Mammoth's takeover of Cannelton/Dunn, Willis was the president of the Union local there. He was also a particularly active and visible participant in union activities that occurred around the time that Massey acquired the operation. He participated in picketing and protests and on more than one occasion attempted to hand deliver the applications of unit workers to company officials.

As with all the other incumbent bargaining unit employees, Willis was not retained by the Respondents when they took over the Cannelton/Dunn operation in late September 2004. On December 1, 2004, Willis was interviewed for employment at Mammoth by six company officials—Adamson, Chandler, Hall, Hughart, Nottingham, and Rutherford. At the interview, Willis stated that he would prefer the loadout operator job or another position at the plant, but that he was also willing to work in an underground position. The interviewers asked Willis a number of questions about his experience and history at Cannelton/Dunn. Then Hughart asked whether Willis had any problem coming to the interview or working for Massey given the presence of picket shacks outside the facility. Willis responded that he "was the one that had the picket shacks put there," but that he was there "to apply for a job and go to work." According to the interview report forms completed by several of the interviewers, Willis also stated that he wanted the job because he needed to provide for his family. One of the interviewers noted that Willis said that, if hired, he would have "no problems doing what he was told to do." During the interview, Willis also stated that, if hired, he "would do everything [he] could to make sure we were represented by the Union." (Tr. 148–150.)

The Respondents did not offer employment to Willis. In its response during the Board's investigation of this matter, Mammoth provided no reason for the decision not to employ Willis. (GC Exh. 12(c).) However, in its posttrial brief, Mammoth offers a variety of explanations for the decision. Mammoth states that Willis was rejected because: (1) he signed the January 24 letter to the DEP regarding permits held by a Massey subsidiary; (2) Adamson recommended against hiring him based on Willis' performance at Cannelton/Dunn; and (3) at the interview, Willis did not demonstrate an adequate understanding of how the preparation plant operated. At the hearing Adamson stated an additional reason for not wishing to hire Willis. Adamson specifically stated that he did not want to employ Willis at Mammoth because he was concerned that Willis would engage in union activities if hired.

The defense based on the DEP letter is wholly frivolous. I am surprised that Mammoth's counsel would assert that Willis was not hired because he signed the DEP letter since that letter was not even sent until February 24, 2005, well after Willis was refused employment. Indeed, Mammoth's president, Hughart, testified that the letter had nothing to do with the decision not to hire Willis.

I also conclude that Adamson's poor recommendation of Willis does not provide a credible, nondiscriminatory, reason for rejecting Willis. First, that recommendation itself was tainted by antiunion bias. When asked about the reasons why he recommended that Willis not be hired, Adamson responded that "the main thing that I could think of" was that during the interview Willis had stated that, if hired, he intended to work to organize the operation. (Tr. 2934.)[62] Mammoth attempts to minimize the significance of Adamson's admission by claiming that Adamson was only one of the decisionmakers. (Br. of R. Mammoth at 48.) However, Chandler, who was also one of Willis' interviewers, testified that the hiring decisions were effectively made by the company officials, such as Adamson, who would supervise the particular applicant's work. (Tr. 2502–2503, 2506.)

Adamson attempted to justify disqualifying Willis on the basis of his intended Section 7 activities by stating a generalized concern that Willis' attention to union organizing might distract him and pose a safety hazard for others. This generalized, vague, concern about the form that Willis' organizing activities *might* take, if he was hired for an *unspecified* position, cannot meet the Respondents' burden of establishing a defense to antiunion hiring discrimination. If it did, employers who discriminated against union organizers would have a nearly universal defense, and Section 7 would be rendered a nullity with respect a wide range of protected activities.

Adamson testified about two other reasons for his recommendation not to hire Willis. Adamson stated that during the time he oversaw Willis at Cannelton/Dunn: Willis used "union business" leave when he was, in fact, engaged in nonunion activities such as teaching a class at West Virginia University Technical Institute or attending sporting events; and that Willis was careless and, as a consequence, had a propensity to improperly load barges. Willis denied both allegations. As discussed below, I do not credit the nondiscriminatory reasons that Adamson gives for recommending against hiring Willis. I note first that Adamson gave contradictory testimony about the extent to which his negative recommendation was based on Willis' intended union activities. At one point Adamson denied that he gave any consideration at all to union sentiments or union activity, but elsewhere in his testimony he stated that

[62] Regarding the specific wording of Willis' statement of intent to engage in organizational activities, I credit the wording recounted by Willis during his detailed account of the interview, Tr. 149 (Willis "would do everything [he] could to make sure [employees] were represented by the Union"), over the wording recounted by Adamson during his less-detailed account, Tr. 2934 (Willis said that organizing would be his "main purpose"). I also note that Adamson's interview report form states that Willis said he "wants to organize the work force when hired," but not that such organizational activities would be his "main purpose." GC Exh. 8(v).

Willis' intent to engage in union activity was one of the "main" things that led to the recommendation against hiring Willis. Compare (Tr. 2934 and 2969). Indeed, Adamson's interview notes demonstrate a preoccupation with the union sentiments of applicants. (See, e.g., GC Exh. 8(a) (Anderson: "15 yr. Union")); (GC Exh. 8(g) (Dorsey: "will work non union")); (GC Exh. 8(q) (Rader: "will work non union)); (GC Exh. 8(u) (Vanmeter: "no problem working non union")); (GC Exh. 8(v) (Willis: "wants to organize the work force when hired").)

Not only does the evidence reflect an effort by Adamson to understate the role that union activity played in his assessment of Willis, but it also shows that Adamson overstated, or even fabricated, his criticisms about Willis' performance. With regard to Adamson's claim that Willis used union leave when he was teaching at West Virginia University Technical Institute, the uncontradicted evidence showed that Willis' shift at Cannelton/Dunn ended at 3 p.m., and that the class he taught did not begin until 6 p.m. The Technical Institute is only a few miles from the Cannelton/Dunn loadout facility and neither Adamson nor the Respondents explain how Willis would ever have been missing work in order to be present for a class that did not start until 3 hours after the end of his shift. This criticism of Willis is further undercut by Adamson's admission that he never disciplined, or issued a write-up of any kind to, Willis about the supposed misuse of union business leave.

Adamson also complains that as loadout operator at Cannelton/Dunn, Willis had a propensity to improperly load barges. According to Adamson, these problems ceased after Mammoth took over and hired new loadout operators. (Tr. 2997, 3883.) The record indicates that barge loading mishaps were relatively costly because the Respondents had to hire a crane company to remove or redistribute the coal on the barge. Willis did not claim that he had never misloaded a barge, but he testified that such incidents were rare and were not the result of poor performance. To the extent that such mishaps did occur, he stated that those incidents were unavoidable and happened to everyone who loaded barges due to the way the loading belts operated and the poor condition of some barges. Records introduced by Mammoth were consistent with Willis' testimony that such incidents were actually quite rare during the last period of his tenure as loadout operator. Cannelton/Dunn did not require the services of the crane company for misloaded barges at all in 2003, and only required those services on two occasions during the approximately 9 months in 2004 prior to when the Respondents took over the facility. (Mammoth Exh. 87.) The allegation that Willis had an unusual propensity to make expensive mistakes is also hard to square with Adamson's admission that he had never disciplined Willis for these supposed problems. Adamson's notes of Willis' interview make no mention of Willis' alleged performance problems. Rather, the *only* thing that Adamson wrote in the comments section of his interview report was that Willis "wants to organize the work force when hired." The interview forms completed by the other interviewers also fail to mention the alleged performance problems that Adamson now says affected his evaluation of Willis' application. None of the other interviewers even mentioned that Adamson had given Willis a poor recommendation, much less that such a recommendation was the reason Willis was rejected.

At trial, Mammoth attempted to buttress its contention that Willis had a propensity to improperly load barges by calling Brian McKnight, the owner of the crane company, to testify about the occurrence of such mishaps during various periods. However, B. McKnight directly contradicted Adamson's testimony that these problems had ceased once Willis was replaced. According to B. McKnight, his crane company had been called to Mammoth to remedy misloaded barges on approximately 5 occasions during the approximately 2-1/2 years between when Mammoth took over the facility in September 2004 and when B. McKnight testified in March 2007. (Tr. 3829.)[63]

The last reason forwarded by Mammoth for the refusal to hire Willis, is that, at his interview, Willis failed to demonstrate adequate knowledge of how the preparation plant operated. At trial, Hall stated that when Willis was asked how coal flows through the plant the question "was not answered very good." However, Hall did not state that this was the reason Willis was not hired and, in fact, Hall could not even recall whether or not the Respondents had offered Willis a job. (Tr. 2773.) Hughart also testified that "[w]hen I asked [Willis] to describe the—how the plant operates he really didn't do a very good definition, or

[63] Faced with B. McKnight's testimony, Mammoth attempts to revise Adamson's discredited claim that the barge loading problems ended with Willis' employment—instead arguing that such incidents were merely less frequent after Willis was replaced. The evidence put forward on this subject is wholly insufficient to meet the Respondents' burden. First, I note that Mammoth attempts to support this argument by comparing the number of crane company invoices received by Cannelton/Dunn before the Respondents took over with B. McKnight's *estimate* of the number of times the crane company was called to the operation during the period after the Respondents took over. Mammoth does not explain why it compares actual invoices for the earlier (Cannelton/Dunn) period with the crane contractor's estimate for the later (Mammoth) period. The invoices for the post-Cannelton/Dunn period were certainly available to Mammoth and the decision not to introduce both sets suggests that the documents for the later period do not support its argument. *Teddi of California*, 338 NLRB 1032, 1040 (2003) (adverse inference appropriate where employer's witnesses testified to timing of decision to layoff alleged discriminatee, but employer failed to introduce documentary evidence that "surely . . . must have existed" regarding that timing); *Galesburg Construction*, 267 NLRB 551, 552 (1983) (employer's failure to produce documents in its control that were vital to prove its defense justified inference that those records did not support the employer's position). Second, Willis was one of two or more loadout operators working at Cannelton/Dunn at any given time during the years leading up to the change in ownership. The invoices introduced by Mammoth do not identify the load-out operator who was on duty at the time the barges were improperly loaded, and therefore Mammoth has failed to show that those episodes are attributable to Willis, rather than a coworker. In addition, since one would expect that the number of barge loading mishaps would increase or decrease to some extent depending on the total number of barges being loaded, and since the record indicates that coal production at the operation varied substantially during the periods referenced by Mammoth, the comparisons are not necessarily meaningful. Lastly, even the flawed evidence introduced by Mammoth shows that the frequency of loading mishaps was no higher during 2003 and 2004 when Willis was a loadout operator, than during the period from late 2004 to early 2007 when new employees were doing the job.

could not describe the plant process at that plant." (Tr. 3052.) This was also mentioned in Hughart's notes of the interview. Hughart testified that although Willis had applied for the loadout operator position, not a position operating the plant, knowledge of the plant was necessary because everybody working at the plant and loadout facility had to be able to "multi-task" and "needs to know, you know, how the coal flows through the plant, what kind of screens it operates, the vessels, the cyclones." (Tr. 3052–3053.)

The record evidence rebuts Mammoth's contention that Willis was rejected for failing to demonstrate adequate knowledge of how the preparation plant operated. That evidence shows that, contrary to Hughart's claim, the Respondents did not consider prior knowledge of how the preparation plant operated to be a prerequisite for employment at the preparation plant itself, much less to employment at the loadout facility. James Crist, the nonunit/nonunion individual who the Respondents hired for the assistant plant operator position (at Mammoth known as "floor operator" (Tr. 1629)), had no prior experience at all with the operation of the preparation plant. Indeed, Adamson, testified that as far as he knew Crist had never operated *any* preparation plant. (Tr. 2983.) In addition, a few days after Willis' interview, the Respondents hired Rodney Thomas, a nonunit/nonunion worker, for the loadout operator job that Willis had applied for and previously held. Thomas' previous work experience at Cannelton/Dunn was as a laboratory supervisor and a barge guard. (Tr. 77 and 591.) On the face of it, neither of those positions would provide Thomas with any experience regarding the operation of the plant, and the Respondents offered no evidence to the contrary. In contrast, Willis had many years of experience both as loadout operator and filling-in for the plant operator. Moreover, it is uncontradicted that shortly before the Respondents took over the facility, Adamson had awarded Willis the position of plant operator—thus indicating that Willis was fully qualified to do the job. The fact that the Respondents hired Crist and Thomas, rather than Willis, for the positions of floor operator and loadout operator belies any suggestion that Willis was rejected because he was insufficiently familiar with the operation of the plant.

Second, even if the Respondents' claim that Willis did not qualify for a position at the plant were true, it would not explain why they did not hire him for a position working underground in the mine. Willis had held a number of underground positions at Cannelton/Dunn and during the interview he offered to return to such an assignment. The Respondents do not claim that knowledge of how the preparation plant operates is relevant to employment underground in the mine. Thus, the Respondents' assessment of Willis' knowledge regarding the preparation plant does not explain their failure to offer him a position working underground. The absence of such an explanation is particularly glaring given the fact that three underground supervisors—Hall, Nottingham, and Rutherford—were among Willis' interviewers. Thus, at the interview, the Respondents were in a position to consider Willis' application for an underground position.

To put it bluntly, the Respondents' nondiscriminatory explanations for Willis' rejection are wholly unworthy of credence. During the investigation, the Respondents offered no reason at all for rejecting Willis, and now it forwards a number of shifting, inadequate, and demonstrably false reasons for that decision. This in the face not only of generalized evidence of antiunion animus, but of Adamson's specific admission that Willis' intent to engage in organizational activities was one of the reasons that Willis was not recommended for hire.

I conclude that the Respondents' nondiscriminatory explanations for refusing employment to Willis are pretextual, and would not have caused the Respondents to reject him in the absence of the antiunion motivation.

Dwight Siemiaczko: Siemiaczko first began working at Cannelton/Dunn in 1974. He was laid off for a period in the early 1980s, but then returned to work there and was employed until the Respondents took over the facility in September 2004. His last position was working underground as a fire boss and belt examiner. In the past, Siemiaczko had worked at Cannelton/Dunn in other underground capacities, including roof bolter and shuttle car operator. At the time his employment ended, Siemiaczko was a member of the union safety committee. In that capacity he had, inter alia, filed complaints with the State Department of Miner's Health and Training and the Federal Mine Safety and Health Administration. Siemiaczko was active in union picketing and was arrested during a union protest concerning the bankruptcy sale of Cannelton/Dunn. Hughart was aware that Siemiaczko was active in the union picketing. Siemiaczko also signed the January 24, 2005 letter to the DEP regarding permits held by a Massey subsidiary. Hughart stated that when he saw that Siemiaczko signed the letter, it led him to believe that the Union was behind it.

Siemiaczko submitted an application for employment with Mammoth, listing belt examiner and fire boss as his desired positions. The Respondents received that application on December 15, 2004. The Respondents did not grant Siemiaczko employment, or even an interview, at that time. Approximately 10 months later, Siemiaczko received a phone call inviting him to interview for a job with Mammoth. Siemiaczko had been unemployed since the Respondents took over the Cannelton/Dunn operation. On October 25, 2005, Siemiaczko was interviewed by six individuals, including Hughart, Hall, Chandler, and Larry Ward (vice president at Mammoth). Siemiaczko told the interviewers that he preferred the positions of fireboss and belt examiner, but that he was capable of operating any equipment in the mine other than the continuous miner machine. He told the interviewers that he would take any job at the mine. According to notes of several of the interviewers, Siemiaczko stated his willingness to work any shift, including rotating shifts and weekends, and said that he could start work immediately. The interviewers asked Siemiaczko whether he had any discipline or unexcused absences, and he responded that he had not. One of the interviewers asked if Siemiaczko had any questions. Siemiaczko responded by asking whether the Respondents required the spouse of the potential employee to pass a physical. One of the interviewers told him that there was no such requirement. Siemiaczko said that he had heard that Massey will hire a person at a high rate of pay, and then cut the pay after the person started working. He asked the interviewers whether that was true. They responded, "no," and Siemiaczko said, "okay." Siemiaczko brought up the subject of

unions, and stated that he believed that "unions are good for companies and companies are good for unions because they keep each other in check." He stated that the Union had always been good to him and that he would support and participate in a organizing drive by the Union at the facility. He opined that the Union provided employees with a "voice," and that union mines with safety committees were safer than other mines. The Respondents did not offer Siemiaczko a job.

In its brief, Mammoth states that Siemiaczko was not hired because he signed the January 24, 2005 DEP letter, and because he displayed a bad attitude at the interview. For the reasons discussed above, I have concluded that Mammoth's defense based on the DEP letter is an after-the-fact rationalization and would not have caused the Respondents to reject Siemiaczko, or anyone else, absent antiunion animus. At any rate, Siemiaczko was called in for an interview subsequent to the Respondents' receipt of the DEP letter, so it is apparent that the letter did not disqualify him from employment. Not one of the six officials who interviewed Siemiaczko mentions the DEP letter in his or her interview report.

Mammoth also claims that Siemiaczko was not hired because he displayed a bad attitude during the interview. At the outset, I note that the interview took place over 10 months after Siemiaczko applied and at time when the Respondent had already hired approximately 165 individuals to perform the work of the Cannelton/Dunn bargaining unit employees. The Respondents' complaints about Siemiaczko's performance during the interview obviously cannot provide a defense to the Respondents' decision not to hire, or even interview, Siemiaczko during the earlier period when most of the hiring at Mammoth occurred.

To support its contention that Siemiaczko was lawfully excluded for employment in October 2005 based on his interview performance, Mammoth relies on the testimony of Hughart, one of the interviewers. Hughart testified, "I just didn't care for his attitude." The evidence shows, however, that Hughart's evaluation of Siemiaczko's attitude was itself tainted by antiunion animus. When explaining how Siemiaczko made a bad impression, Hughart admitted that this was due in part to Siemiaczko's statement that he intended to work to organize the Mammoth employees. Hughart stated, moreover, that Siemiaczko's statement of intention to organize had a negative impact on Siemiaczko's prospects for hire . (Tr. 3054–3055.)

Hughart also complained that Siemiaczko said he did not like the way Massey ran their operations. However, the evidence shows that Siemiaczko was expressing the view that it is better for workers and mine companies alike when mines are unionized, and that unionized mines are safer.[64] That is only an anti-Massey sentiment if one assumes, as Hughart apparently does, that Massey mines are necessarily union-free mines, and that supporting unions is therefore anti-Massey. I find that Siemiaczko's question about Massey's rumored wage practices would not have caused the Respondents to reject Siemiaczko absent the antiunion motivation. Siemiaczko was asked if he had any questions, and he answered by giving the interviewers an opportunity to respond to a negative rumor about Massey's practices. When the interviewers said that the rumor was false, Siemiaczko did not argue with them, but responded, "okay." Regardless of the wisdom of posing such a question during an employment interview, I am convinced that the question would not have led the interviewers to reject an otherwise qualified applicant who had no association with the unit or the Union.

Hughart also complained that Siemiaczko's bad attitude was demonstrated by his "only wanting to be a fire boss." (Tr. 3054–3055.) On the face of it, applying for a specific position is not evidence of bad attitude. Indeed, the record evidence reveals that in numerous instances the Respondents considered applicants for jobs other than the ones that they had stated a preference for. At any rate, the evidence shows that, contrary to Hughart's claim, Siemiaczko expressed flexibility about the positions he would accept. Siemiaczko credibly testified that, during the interview, he stated that he was willing to work in *any* position at the mine. Siemiaczko's account is supported by the interview form completed by Chandler—Mammoth's human resources official at the time. Those notes report that the positions Siemiaczko was seeking included not just fireboss, but also "Shuttle Car, R[oof] B[olter], SC—Belt." (GC Exh. 8(s).) Even Hughart admitted, when pressed, that Siemiaczko had simply said he would "prefer" the fire boss position, not that it was the only position he would accept. (Tr. 3100.) Based on the demeanor of the witnesses, the testimony, and the record as a whole, I credit Siemiaczko's testimony that he expressed a willingness to work in multiple positions.[65]

On this record, I conclude that when Hughart said that Siemiaczko had a "bad attitude," what he really meant was that Siemiaczko had an enthusiastically prounion attitude. Indeed, in Hughart's report on Siemiaczko's interview, his only comment regarding Siemiaczko's attitude reads: "Poor Attitude. Made comments on trying to organize if hired." (GC Exh. 8(s).) Nowhere in that report did Hughart make any mention of the other behaviors that Mammoth now claims demonstrated a bad attitude. This despite the fact that Hughart testified that his report included what he thought made a candidate desirable or undesirable. (Tr. 3078–3079.) The record suggests that the

[64] When asked by Mammoth's counsel to recount specifically what Siemiaczko had said about the Company, Hughart testified that, as he recalled it, Siemiaczko had "just made a statement that he didn't like the way Massey operates in general." To the extent that this account conflicts with Siemiaczko's own account of his statement, I credit Siemiaczko's version based on the demeanor and testimony of the witnesses. Siemiaczko testified more spontaneously and confidently about the specifics of what was said at the interview. Moreover, the interview record that Hughart completed is not supportive of any suggestion that Siemiaczko made a general criticism of Massey. To the contrary, Hughart's notation regarding Siemiaczko's attitude makes no mention of such a statement, but rather states simply "Poor Attitude. Made comments on trying to organize if hired." GC Exh. 8(s).

[65] The evidence showed that, while awaiting his interview, Siemiaczko had been attempting to repair a cassette recorder and that he had that visibly inoperative device with him during the interview. Mammoth now argues that this is evidence of the supposed attitude problem that led Hughart to reject Siemiaczko. This argument is directly contradicted by Hughart himself, who testified that the cassette recorder did not play any part at all in the decision not to hire Siemiaczko. Tr. 3103. Indeed, none of the interviewers so much as mentioned the cassette recorder in their interview reports regarding Siemiaczko.

long unemployed Siemiaczko was, in fact, an eager and accommodating applicant. He stated a willingness to work in multiple positions, on rotating shifts or Saturday shifts, and said he could start "immediately" if hired.

I conclude that the Respondents have failed to demonstrate that, in the absence of antiunion animus, Siemiaczko would have been rejected for employment because he signed the DEP letter and/or because of his poor attitude during the job interview.

11. Conclusion regarding hiring

The evidence establishes that since December 3, 2004, the Respondents discriminatorily denied employment to the predecessor's employees on the basis of their membership in the predecessor's bargaining unit and their prounion sentiments in an effort to avoid the Board's successorship doctrine, minimize the likelihood of a work force that would elect to create a new bargaining obligation, and discourage union activity. Mammoth offered a multitude of shifting, and often contradictory or inconsistently applied, reasons for rejecting the unit employees. None of those reasons are sufficiently supported by the record to meet the Respondents' rebuttal burden under *Planned Building Services* and *Wright Line*, and the record exposes that the vast majority of the reasons as simply false. I conclude that the Respondents violated Section 8(a)(3) and (1) when they discriminatorily refused to hire the unit employees.[66]

X. THE 8(A)(5) ALLEGATIONS

The complaint alleges that Respondent Mammoth would be the legal successor to Horizon's Cannelton/Dunn operation, but for the unlawful refusal to hire Cannelton/Dunn unit employees. The complaint further alleges that Mammoth has violated Section 8(a)(5) since about December 3, 2004, by failing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees and by unilaterally establishing mandatory terms and conditions of employment for the employees in the unit. The Respondents do not deny either that they failed to recognize and bargain with the Union or that they made unilateral changes, but argue that no bargaining obligation existed because Mammoth is not the legal successor to Horizon's Cannelton/Dunn operation.

The threshold test for determining successorship is: (1) whether the new employer conducts essentially the same business as the predecessor employer, and (2) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Security Services,* 406 U.S. at 279–281; *New Concept Solutions, LLC*, 349 NLRB 1136, 1156 (2007); *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995), enf. denied 82 F.3d 494 (D.C. Cir. 1996).

Regarding the question of whether Mammoth continued essentially the same business as Cannelton/Dunn, the evidence is clear that it did. When the Respondents took over the operation, Mammoth continued Cannelton/Dunn's business of mining and processing coal. Mammoth initially extracted coal at the same location on the property—the Stockton mine—where Cannelton/Dunn had most recently been mining coal, and both operations utilized the "room and pillar" mining technique. Mammoth transported the coal to the same preparation plant and loaded it onto river barges at the same river loadout facility as Cannelton/Dunn had. Continuous miner machines, shuttle cars, belt lines, and other equipment that had been in operation at Cannelton/Dunn were also used at Mammoth. Employees at Mammoth, like those at Cannelton/Dunn, performed the work of continuous miner operators, shuttle car operators, beltmen, electricians, brattice men (although there were no longer a position designated "brattice man"), roof bolters, fire bosses, loadout operators, mechanics, electricians, plant operators (called "control room operators" at Mammoth), and assistant plant operators (called "floor operators" at Mammoth). Adamson, who supervised work at the preparation plant under both Cannelton/Dunn and Mammoth, and Chandler, who was Mammoth's first human resources official, conceded that employees at Mammoth were performing essentially the same tasks as the employees at Cannelton/Dunn and that the coal underwent the same process. A number of the individuals who oversaw the work of unit employees at Cannelton/Dunn also oversaw the unit work at Mammoth. These individuals included Adamson, Terry Buckner, Couch, Nottingham, Rutherford, and Stevens. Both Cannelton/Dunn and Mammoth sold the coal they produced primarily to electrical power companies, and American Electric Power (AEP) was a major customer of each. These facts establish that the Respondents continued the business of Cannelton/Dunn without substantial change. See *Sierra Realty Corp.*, 317 NLRB at 835.[67]

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[66] The violation and remedy in this case extend to the 85 individuals listed as discriminatees in an exhibit to the trial complaint and the amendments to that list made during the course of the trial. The discriminatees are: Michael Armstrong, Charles Bennett, Randel Bowen Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danberry, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion (Pete) Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker Jr., Larry Vassil, Thomas Ward, James Whittington Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, and Fred Wright.

[67] In *Sierra Realty Corp.*, supra, the Board stated that to determine whether a predecessor's business has been continued by the new employer, the Board considers such factors as: "whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Sierra Realty Corp.*, 317 NLRB at 835, quoting *Fall River Dyeing*, 482 U.S. at 43.

Mammoth contends that it was not in the same essential business as Cannelton/Dunn because instead of using one continuous miner machine in each of four areas of the Stockton mine it used two continuous miner machines in each of two areas of the Stockton mine. This adjustment in how Mammoth organized its coal extraction effort is wholly inadequate to show a change in the essential nature of the business. The adjustment did not change the fact that Cannelton/Dunn and Mammoth were both in the coal mining and processing business, used the same "room and pillar" mining technique, used their employees to do the same work, operated the same equipment and plant/loadout facilities, processed coal in the same way, had many of the same supervisors, and sold to the same body of customers. In the face of the overwhelming evidence that the Respondents continued the business essentially unchanged, the adjustment cited by Mammoth is inconsequential. See *Fall River Dyeing*, 482 U.S. at 44 (successor's change in process, which bore only indirectly upon the employees' working conditions and relationship with the employer, was not sufficient to avoid the finding of a "substantial continuity" of business).

Mammoth also contends that its business was different because it operated using fewer employees than Cannelton/Dunn had. There's a very real possibility that any such change was dictated by an initial shortage of experienced miners at Mammoth that resulted from the Respondents' unlawful exclusion of Cannelton/Dunn's unit employees. Assuming that the Respondents were using fewer employees for reasons unrelated to unlawful discrimination, Mammoth's argument still fails under Board precedent. Where a buyer's remaining employees continue to perform the same type of work as those of the predecessor, the Board has found successorship despite greater reductions in workforce size than any involved here. For example, in *Tree-Free Fiber Co.*, 328 NLRB 389, 390 (1999), the Board found successorship where the new employer continued with a workforce of only 50 workers, as compared to the prepurchase complement of 500 workers. Similarly, in *Commercial Forgings Co.*, 315 NLRB 162, 165 (1994), enfd. mem. sub nom. *Forgings Forever v. NLRB*, 77 F.3d 482 (6th Cir. 1996), successorship was established where changes eliminated most of predecessor's unit jobs, but the jobs of bargaining unit employees who remained were not altered. See also *Planned Building Services*, 347 NLRB 670, 674 fn. 17 (successor bargaining obligation where the new employer planned to employ a smaller work force consisting solely of predecessor employees). Thus, the relatively modest reduction in the number of employees that Mammoth says it used to perform bargaining unit work does not rebut the overwhelming evidence that Mammoth's business was essentially unchanged from that of Cannelton/Dunn.

Mammoth also discusses changes that it made well after it began operating the former Cannelton/Dunn facility. More specifically, the record shows that in July and August 2005 the Respondents began relocating equipment and staff from the Stockton mine, where the coal reserves were largely exhausted, to other sites on the property. The record also shows that in January 2006, the Respondents discontinued a system that used belt lines in combination with off-road trucks to move coal out of the mine and to the preparation plant, and instituted a system that used belt lines in combination with *highway* trucks to do that work. The decision about whether an employer continues to have a bargaining obligation should be judged from the time that recognition was unlawfully withdrawn, not at a later date on the basis of unilateral changes that the employer has made without regard to its bargaining obligation. See *Comar, Inc.*, 349 NLRB 342, 356–359 (2007). Otherwise successors who wished to avoid a bargaining obligation could profit from their own unilateral changes by using such changes as a basis for denying the existence of a continuing bargaining obligation. Id. At any rate, neither the use of other mine sites on the property nor the change in how coal was transported to the preparation plant has altered the essential nature of the business—which is to mine and process coal. Indeed, the uncontradicted testimony was that, under Cannelton/Dunn, when one mine site became depleted the work would be moved to a fresh site on the property. Therefore, the Respondents' shifting of equipment and staff from the Stockton mine to fresh sites on the property not only did not change the operation's essential business of mining and processing coal, but did not even change the general practice of the operation. The change in the type of trucks used to bring coal to the preparation plant also has not altered the essence of the business. Incremental improvements to production techniques are commonplace in industry and generally do not justify withdrawal of recognition from a union that represents a longstanding, established, unit. See, e.g., *Comar Inc.*, supra at 361; *Leach Corp.,* 312 NLRB 990, 995 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995); *Allied Mills, Inc.*, 218 NLRB 281, 285 (1975), enfd. mem. 543 F.2d 417 (D.C. Cir. 1976), cert. denied 431 U.S. 937 (1977); *Columbia Tribune Publishing Co.*, 201 NLRB 538, 550 (1973), enfd. in relevant part 495 F.2d 1384 (8th Cir. 1974).

Regarding the second prong of the threshold test, where, as here, the employer has discriminatorily refused to hire its predecessor's employees in order to avoid the Board's successorship doctrine, the Board infers that those employees would have been employed absent the unlawful discrimination. *Love's Barbeque,* 245 NLRB at 82. As the Board recently explained, "[a]lthough it cannot be said with certainty whether the successor would have retained all of the predecessor employees if it had not engaged in discrimination, the Board resolves the uncertainty against the wrongdoer and finds that, but for the discriminatory motive, the successor would have employed the predecessor employees in the unit positions." *Planned Building Services*, 347 NLRB 670, 674, citing *Love's Barbeque,* 245 NLRB at 82. Thus, under Board precedent, it is presumed not only that, absent discrimination, the Respondents would have hired a majority of their employee complement from among Cannelton/Dunn's unit employees, but that they would have employed essentially all of Cannelton/Dunn's unit employees.[68] I find that the second prong of the successorship test has been met.

[68] The Board also presumes that the union's majority status would have continued. *New Concept Solutions, LLC*, 349 NLRB 1136, 1157, citing *State Distributing Co.*, 282 NLRB 1048.

Mammoth argues that successorship has not been established because the test is whether the alleged successor hired a majority of its employees from the predecessor *in an appropriate unit*, and, according to Mammoth, an appropriate unit has not been shown here. This contention is without merit. First, the Respondents cite no authority for the proposition that, when continuing majority status has been established based on the *Love's Barbeque* inference, the General Counsel must still make a separate showing that the existing unit is appropriate. At any rate, the evidence establishes that employees at Mammoth constitute an appropriate unit. The same unit was historically recognized and bargained with by the predecessor employer, and when the Respondents assumed control of the operation they continued to use employees to perform the same unit work. In *Ready Mix USA, Inc.*, a successorship case, the Board stated that "[i]t is well recognized that 'long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies.'" 340 NLRB 946, 947 (2003), quoting *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996). The Board "places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate." Id. "Indeed, 'compelling circumstances are required to overcome the significance of bargaining history.'" Id., quoting *Mayfield Holiday Inn*, 335 NLRB 38, 39 (2001). The Respondents have not shown any basis, must less a compelling basis, for concluding that the bargaining unit that was historically recognized and bargained with at Horizon's Cannelton/Dunn operation became "repugnant to the Act's policies" when the Respondents took over.

Mammoth argues that the bargaining unit description set forth in the complaint does not accurately reflect what employees at Mammoth do. Assuming for purposes of argument that the *Love's Barbeque* inference is not dispositive, I conclude that the existence of an appropriate unit at Mammoth for purposes of the successorship test is established by the fact that the duties of the Cannelton/Dunn employees in the recognized unit and the duties of Mammoth employees were the same. At any rate, the unit description, which tracks the language that was used at Cannelton/Dunn under the 2002 Agreement, plainly applies to the work being performed by the Respondents' coal production employees. Paragraph 7 of the amended complaint alleges the unit to be:

> 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 Respondent Mammoth), repair and maintenance work normally performed at the mine site or at the central shop of Respondent Mammoth; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at Respondent Mammoth's mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

The record shows that the Respondents' employees at Mammoth are engaged in the removal of coal waste, preparation, processing and cleaning of coal, transportation of coal, repair and maintenance work, maintenance of the gob pile (another term for the slurry, dump, refuge or impoundment), and maintenance of mine roads. Other types of coal mining work performed at Mammoth fall within the clause in the unit description that covers "all work customarily related to all" the other types of coal production work set forth in the definition. Although some of the wording of the unit description is vague, what is clear is that this unit description language has been used at Cannelton/Dunn and numerous other coal mines and has consistently and repeatedly been set forth in Board decisions to describe coal production work such as that which is at issue in this case. See, e.g., *Pittson Coal Group, Inc.*, 334 NLRB 690, 694 (2001); *Black Bear Mining, Inc.*, 325 NLRB 960 (1998); *Magnet Coal*, 307 NLRB 444, 448 (1992), enfd. mem. 8 F.3d 71 (D.C. Cir. 1993); *Arch of West Virginia, Inc.*, 304 NLRB 1089, 1093 (1991); *Chafin Coal Co.*, 304 NLRB 286, 290 (1991); *Rebb Energy*, 302 NLRB 886 (1991); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136, 1141 (1990), enfd. 942 F.2d 169 (3d Cir. 1991). The Respondents site to no cases in which this well-recognized unit description for the work of coal miners has been invalidated by the Board. I conclude that the Respondents have fallen far short of showing the "compelling circumstances" that are necessary to overcome bargaining history and invalidate the historical unit. *Ready Mix USA, Inc.*, supra.

For the reasons discussed above, I conclude that Respondent Mammoth is the legal successor to Horizon's Cannelton/Dunn operation.

Mammoth admits, and the record confirms, that since about December 3, 2004, it has unilaterally established terms and conditions of employment for its employees that are different from those that were in effect under Cannelton/Dunn. The complaint alleges that the Respondents violated Section 8(a)(5) and (1) by taking this action with respect to employees in the unit. I agree. As was discussed earlier, although a successor employer is generally entitled to set initial terms and condition of employment, the Respondents forfeited that right for two reasons. First, The Respondents discriminatorily refused to hire the predecessor's unit employees in an effort to avoid the Board's successorship doctrine. Under *Love's Barbeque*, 245 NLRB at 82, an employer who takes such unlawful action may not set the initial terms and conditions of employment. Second, the Respondents' officials distributed forms to prospective applicants stating that the Mammoth "mine is nonunion," and told interviewees that Mammoth would operate union free. As is discussed by the Board in *Advanced Stretchforming, International*, 323 NLRB at 530, when the successor to a unionized employer tells employees that there will be no union at the facility, it loses the right to unilaterally set initial terms and

conditions of employment. See also *Smoke House Restaurant*, 347 NLRB 192, 204 . Thus, the Respondents were under an obligation to continue the terms and conditions of employment that had been in effect for unit employees at Horizon's Cannelton/Dunn operation pending bargaining.

The Respondents argue that a duty to recognize and bargain with the Union was not triggered because the Union did not make a timely and sufficient demand for bargaining. However, under established Board law, no bargaining demand was necessary in this case because the Respondents' "unlawful refusal to hire . . . its predecessor's employees rendered any request for bargaining futile." *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997); see also *Planned Building Services*, 347 NLRB 670, 718 (2006); *Triple A Services*, 321 NLRB 873, 877 fn. 7 (1996); *Precision Industries*, 320 NLRB 661, 711 (1996). It would be incongruous to require the Union to ask the Respondents to recognize it when the work force the Respondents actually employed at Mammoth, by virtue of their discriminatory hiring process, included no more than 22 of the predecessor's unit employees among the approximately 219 persons hired to perform unit work. See *Smith & Johnson*, supra.

Mammoth also argues that it is insulated against successorship and a bargaining obligation on the basis of an order issued by the bankruptcy judge who oversaw the sale of Cannelton, Dunn, and other Horizon assets. As discussed above, on August 6, 2004, the bankruptcy judge authorized Cannelton and Dunn to reject the 2002 National Coal Agreement, and allowed the operation to be sold without regard to the successorship provision in that Agreement. However, such a bankruptcy sale order in no way insulates against the possibility that a buyer will take actions subsequent to the sale that give rise to a successorship bargaining obligation or require the buyer to maintain the existing terms and conditions of employment. In *Foodbasket Partners*, the Board held that the bankruptcy judge's order relieving a purchaser of successorship liability did not insulate that purchaser from subsequently triggering a successorship bargaining obligation based on the substantial continuity between the enterprises and the number of the predecessor employees hired. 344 NLRB 799, 800–801 (2005), enfd. sub nom. *Erica, Inc. v. NLRB*, 200 Fed. Appx. 344 (5th Cir. 2006); see also *NLRB v. Horizons Hotel*, 49 F.3d 795, 803 (1st Cir. 1995), enfg. 312 NLRB 1212 (1993). Similarly, in the instant case, the Respondents' status as legal successor and its responsibility to maintain the existing terms of employment during bargaining are not based on the 2002 National Coal Agreement or the successorship provision that the bankruptcy court voided presale, but on actions that the Respondents took post-sale. More specifically, post-sale, the Respondents continued the predecessor's essential business, discriminatorily refused to hire the predecessor's employees,[69] and announced to employees that there was no union at Mammoth—actions that under *Love's Barbeque*, supra, *Advanced Stretchforming*, supra, and related precedent, establish Mammoth as the legal successor and create an obligation to maintain the predecessor's terms and conditions of employment pending good-faith negotiations.

Mammoth suggests that application of the Board's decisions in *Love's Barbeque* and *Advanced Stretchforming* will negate the bankruptcy judge's authority to reject a collective-bargaining agreement. I disagree. First, the Respondents were not required to honor the existing terms and conditions for the life of the collective-bargaining agreement—as they would have been if the bankruptcy judge had not vitiated the successorship provision. Rather, under *Love's Barbeque* and *Advanced Stretchforming*, all the Respondents were required to do was honor the existing conditions long enough for good-faith negotiations to take place. Second, to the extent, if any, that the terms and conditions in effect at Cannelton/Dunn had been altered after the bankruptcy judge authorized rejection of the collective-bargaining agreement, the Respondents would only be required to honor the terms and conditions that were actually in effect, not those set forth in the 2002 agreement. Third, given the bankruptcy judge's order, it was not a foregone conclusion that Mammoth would be a legal successor or that the Respondents would be obligated to honor the existing terms and conditions of employment pending bargaining. Rather, the Respondents brought those obligations upon themselves when, subsequent to acquisition of Horizon's Cannelton/Dunn operation, they unlawfully discriminated against the predecessor's unit employees and announced to employees that Mammoth would be operated union free.

For the reasons discussed above, the Respondents have violated Section 8(a)(5) and (1) since December 3, 2004, by failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the unit, and by unilaterally imposing new terms and conditions of employment for the unit employees. *E. S. Sutton Realty Co.*, 336 NLRB 405, 408 (2001).

CONCLUSIONS OF LAW

1. Respondent Massey is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Respondent Mammoth is a subsidiary of Respondent Massey, and Respondent Massey directly participated in, and played a key causal role in, the unfair labor practices found in this decision.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Respondent Mammoth constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[69] Indeed it is clear that the bankruptcy judge not only did not anticipate that the Respondents would discriminatorily refuse to employ incumbent unit employees, but, to the contrary, based his decision on the expectation that the Respondents would continue the employment of the incumbents without interruption. In the August 6 opinion explaining his order, the bankruptcy judge reasoned that if he did not authorize the sale "free and clear of . . . successor liability under the collective bargaining agreements," job loss would ensue, whereas the requested order would permit the operations to be "sold as going concerns," in which case "there is no reason to believe that the miners' employment would suffer any interruption." R. Mammoth's Exh. (Mammoth Exh.) 75(c) at p. 24.

> 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 Respondent Mammoth), repair and maintenance work normally performed at the mine site or at the central shop of Respondent Mammoth; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above at Respondent Mammoth's mines and facilities; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

6. The Union is the collective-bargaining representative of the above-described unit employees.

7. Respondent Mammoth is the successor employer of employees of Horizon's Cannelton/Dunn operation in the above-described unit.

8. Since December 3, 2004, the Respondents have violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire former employees of Horizon's Cannelton/Dunn operation for positions in the Mammoth bargaining unit.[70]

9. Since December 3, 2004, the Respondents have violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union and by unilaterally changing the terms and conditions of employment that had been in effect for bargaining unit employees prior to the transfer of control and ownership of Horizon's Cannelton/Dunn operation to the Respondents.

10. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[71] Having found that the Respondents discriminatorily refused to hire former Cannelton/Dunn unit employees to work at Mammoth, I recommend that the Respondents be ordered to immediately offer to the individuals listed below employment in the positions for which they would have been hired, absent the Respondents' unlawful discrimination, or if those positions no longer exist, to substantially equivalent positions, discharging if necessary any employees hired to fill those positions. The employees listed below shall be made whole for any loss of earnings they may have suffered due to the discrimination against them. The backpay is to be calculated in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondents unlawfully refused to bargain collectively with the Union, I shall also recommend that the Respondents be ordered to recognize and bargain with the Union concerning wages, hours, benefits, and other terms and conditions of employment of bargaining unit employees at Mammoth, upon request by the Union. In addition, and in order to remedy the Respondents' unlawful unilateral changes to wages, benefits, and terms and conditions of employment that went into effect when they began to employ individuals to perform unit work at Mammoth on December 3, 2004, I shall recommend that the Respondents be ordered to rescind the unilateral changes and make the employees whole by remitting all wages and benefits that would have been paid absent the Respondents' unlawful conduct, until the Respondents negotiate in good faith with the Union to agreement or to impasse, subject to the Respondents' demonstration in a compliance hearing that had lawful bargaining taken place, less favorable terms than had existed under Cannelton/Dunn would have been lawfully imposed. *Planned Building Services*, 347 NLRB 670, 674–676. This remedial measure is intended to prevent the Respondents from taking advantage of their wrongdoing to the detriment of the employees and to restore the status quo ante thereby allowing the bargaining process to proceed. *U.S. Marine Corp.,* 944 F.2d 1305, 1322–1323 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). Employees shall be made whole in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizon,* supra. The Respondents shall make whole the unit employees by paying any and all delinquent employee benefit fund contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondents shall reimburse unit employees for any expenses ensuing from the failure to make required contributions, as set forth in *Kraft Plumbing & Heating,* 252 NLRB

[70] The 8(a)(3) and (1) violation is found with respect to the following individuals listed in the exhibit to the complaint, as amended during these proceedings: Michael Armstrong, Charles Bennett, Randel Bowen Sr., Roger Bowles, Joseph Brown, Norman Brown, Mark Cline, Leo Cogar, Tilman Cole, Russell Cooper, Michael Cordle, Terry Cottrell, David Crawford, Jackie Danberry, Kenneth Dolin, Dewey Dorsey, Thomas Dunn, Robert Edwards, Stanley Elkins, William Fair Jr., Lacy Flint, Ronald Gray, James Hanshaw, Paul Harvey, Charles Hill, Cheryl Holcomb, Robert Hornsby, Clarence Huddleston, Jeffrey Hughes, Harry T. Jerrell, Jimmy Johnson, Mike Johnson, Alvin Justice, John Kauff, Tommie Keith, Barry Kidd, Randy Kincaid, Chester Laing, Everett Lane, Marion (Pete) Lane, Rodney George Leake, Danny Legg, William Larry McClure, Robert McKnight Jr., Ricky Miles, James Mimms, Gregory Moore, James Moschino, James Nichols, Robert Nickoson, William Nugent, Charles Nunley, John Nutter, Ronald Payne, David Preast, Danny Price, Doyle Roat, Gary Roat, Michael Roat, Paul Roat, Shannon Roat, Gary Robinson, Charles Rogers, Michael Rosenbaum, Michael Ryan, Melvin Seacrist, Lawson Shaffer, Russell Shearer, Dwight Siemiaczko, Charles Parker Smith, Donald Stevens, Jeffrey Styers, Jackie Tanner, Roger Taylor, Gary Totten, Charles Treadway, Byron Tucker Jr., Larry Vassil, Thomas Ward, James Whittington Jr., Philip Williams, William Willis, Ralph Wilson, Gary Wolfe, and Fred Wright.

[71] For reasons discussed earlier, Respondent Massey's liability in this case extends to the unfair labor practices committed at its subsidiary, Respondent Mammoth. See sec. III, supra.

891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service,* supra, with interest as prescribed in *New Horizons,* supra.

[Recommended Order omitted from publication.]