June 1990

Article II of the National Bituminous Coal Wage Agreement of 1988: Contractual Antecedents and Current Issues

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ARTICLE II OF THE NATIONAL BITUMINOUS
COAL WAGE AGREEMENT OF 1988:
CONTRACTUAL ANTECEDENTS
AND CURRENT ISSUES

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I. INTRODUCTION

On February 1, 1988, the National Bituminous Coal Wage Agreement of 1988 went into effect. The most far reaching aspect of that Agreement is the Job Opportunity and Benefit Security (JOBS) provision contained in Article II. The Article II JOBS provision appears on its face to be a radical new concept in the preservation of job opportunities and benefits for the members of the United Mine Workers of America (hereinafter "UMWA"). Upon reflection, however, it is clear that the Article II JOBS provision is not so much a revolutionary event as it is the result of evolution driven by collective bargaining and case law developed over the past two decades. In order to fully understand and appreciate the Article II JOBS provision, it is necessary to understand this history. The tracing of this history, therefore, is one of the purposes of this article.

In spite of its evolutionary development, Article II is a lengthy, complex and detailed provision which will demand application in various factual contexts. At its inception numerous issues were identified which would affect the future scope and application of Article II. The passage of time has given rise to additional issues. A second purpose of this Article, therefore, will be to review and analyze those issues.

II. HISTORY AND BACKGROUND OF ARTICLE II

A. Background

The Article II JOBS provision may be characterized as the culmination of nearly two decades of activity by the UMWA directed at job preservation and job acquisition. To fully appreciate this history, two preliminary matters must be addressed. The first is that National Bituminous Coal Wage Agreements have been periodically


2. The restrictions on the contracting out of certain types of work (e.g., transportation of coal; repair of equipment) as opposed to the leasing, subleasing or licensing out of coal mines and coal reserves, is covered by different provisions of the National Bituminous Coal Wage Agreement, and is beyond the scope of this article. See, e.g., NLRB v. Int'l Union, UMWA, 727 F.2d 954 (10th Cir. 1984) (involving legality of Article I A(g)(2) of 1978 Agreement regarding contracting out of repair and maintenance work).
negotiated between the International Union, United Mine Workers of America and the Bituminous Coal Operators' Association ("BCOA"). In this article, the National Bituminous Coal Wage Agreements negotiated in 1971, 1974, 1978, 1981, 1984, and 1988, will be referred to.

The second preliminary matter is of greater than simply historical significance. It involves the distinction between coal mining operations and coal lands. Beyond certain obvious examples, no "bright line" test has developed which can be applied in every instance to determine whether a particular asset constitutes an "operation" or "coal lands." Generally speaking, and for purposes of this article, producing active coal mines, preparation plants and the like are considered "operations," and virgin coal reserves which have never been mined upon are considered "coal lands." It is within this analytical framework that the provisions of prior National Bituminous Coal Wage Agreements will be analyzed.

B. Prior National Agreements

1. The National Bituminous Coal Wage Agreement of 1971

Nearly twenty years ago the 1971 National Agreement contained only a single provision related to the protection or creation of job rights at new or newly acquired operations, or on coal lands held by a signatory Employer. This provision stated as follows:

As part of the consideration for this agreement, the Employers agree that this agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production or use. The Employers agree that they will not lease, license or contract

4. Numerous factors may be considered in determining whether a particular asset constitutes an "operation" or "coal lands" under the National Bituminous Coal Wage Agreement. The discussion of such issues is beyond the scope of this article.
out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof.6

This provision actually contained two different obligations. First, it contained a blanket requirement that any new or newly acquired operation be covered by the National Bituminous Coal Wage Agreement as soon as it was "put into production or use." As will be discussed below, this language was later deemed to be too broad to withstand legal challenge.

The second aspect of this provision of the 1971 Agreement is that it constitutes an attempt to control subsequent leasing, licensing and contracting out of coal lands or "coal producing or coal preparation facilities" (i.e., operations), by prohibiting such transactions when done for the purpose of avoiding the terms of the 1971 Agreement.

The 1971 Agreement contained no restrictions on an Employer's right to permanently transfer operations or coal lands; and it contained no provision regarding leasing, licensing, or contracting out engaged in for other than the purpose of avoiding the 1971 Agreement.

2. The National Bituminous Coal Wage Agreement of 1974

On December 6, 1974, the 1974 Agreement went into effect.7 It contained significant new provisions restricting the transfer, leasing, subleasing or licensing out of certain coal related assets.

a. The Successorship Clause

Perhaps the most significant provision added in the 1974 Agreement was the Article I Successorship Clause. It has continued to be in every National Bituminous Coal Wage Agreement since,8 and provides in pertinent part:

6. Id.
8. Language was added in the National Bituminous Coal Wage Agreement of 1984, requiring notice to the UMWA of transactions covered by the Successorship Clause.
In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. Provided that the Employer shall not be the guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement. 9

This provision was added primarily as a result of the development of a rule under federal labor law, that a labor contract, and even the duty to recognize and bargain with the Union, did not necessarily survive the transfer of the assets of a business from one owner to another. 10

There are a number of important aspects to the Successorship Clause. For purposes of this article, two are particularly important. First, by its own terms, the Successorship Clause applies only to the permanent disposition of an operation that is, a sales, conveyance, assignment or transfer. It does not apply to leases and licenses, which require an ongoing relationship. 11

The second important aspect to the Successorship Clause is that it applies to the permanent disposition of operations, not coal lands. 12 The purpose of the Successorship Clause is to protect the job rights of employees at an operation in the event of its disposition by their Employer. Thus, a transferror Employer must require its transferee to undertake the Employer's obligations under the National Bituminous Coal Wage Agreement at the transferred operation. However, where there are no employees, there is no "operation" subject to the Successorship Clause. 13

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11. Lone Star Steel Co. v. NLRB, 639 F.2d 545, 553 (10th Cir. 1980), cert. denied 101 S. Ct. 1349 (1981); see Amax Coal Co. v. NLRB, 614 F.2d 872, 885-86 (3d Cir. 1980) (assuming application of Successorship Clause to permanent dispositions).
13. Id.; UMWA v. U.S. Steel Mining Co., 636 F. Supp. 151 (D. Utah 1986), aff'd, 895 F.2d 698 (10th Cir. 1990); In re Chateaugay Corp., 891 F.2d 1034 (2d Cir. 1989); In re Kaiser Steel Corp., 106 Bankr. 669 (Bankr. D. Colo. 1989); see Amax Coal Co. v. NLRB, 614 F.2d at 886, n.12 (Successorship Clause cannot apply until coal lands are put into production by employees).
For the most part, the Successorship Clause has been applied to the disposition of active coal mines. More recently, however, questions have arisen as to whether it applies to the disposition of a permanently closed coal mine.\(^\text{14}\) And, as noted above, because the Successorship Clause applies only to operations, it is clear that it does not apply to the transfer of coal lands, nor does it apply to transactions other than permanent transfers.\(^\text{15}\) Thus, the Successorship Clause has no effect on either the transfer of coal lands, or on the leasing or licensing of coal lands.

b. Leasing and Licensing Out Clause

The Leasing and Licensing Out Clause contained in the 1974 Agreement provided as follows:

The Employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof.

Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work involved is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of Employees of the Employer: provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of this Agreement.\(^\text{16}\)

It will be recognized that the first paragraph of this new provision was taken almost verbatim from the Coal Lands Clause contained in the 1971 Agreement.\(^\text{17}\) The second paragraph Article IA(h) was


\(^{15}\) See supra note 12 and accompanying text.

\(^{16}\) 1974 Agreement, supra note 7, at 6.

\(^{17}\) The Coal Lands Clause of the 1971 Agreement continued in the 1974 Agreement, but without the last sentence which, with the change discussed below, now became first paragraph of Article II(h). The language used in the 1971 Agreement referred to leasing, licensing and contracting out. In the 1974 Agreement the language had been changed to refer to leasing, subleasing and licensing out. The change may reflect that in the 1974 Agreement there first appeared restrictions on contracting and subcontracting certain jobs generally performed in and around coal mines (e.g., transportation of coal; repair and maintenance of equipment). See n.2 above. The fact that this type of contracting was now (and continues to be) covered under a separate provision of the Agreement may explain the change. In any event, there is no controlling authority under the National Bituminous Coal Wage Agreement to suggest that the contracting out of coal mines or coal lands is not covered under the "licensing out" language.
entirely new, and restricted contracting out ("licensing out")\textsuperscript{18} of "coal mining operations" (emphasis added) to those contractors who employed members of the United Mine Workers of America, and who would make payments to certain pension and benefit trust funds which were also created by the 1974 Agreement. As discussed below, this language was also too broad to withstand later legal challenge.

The addition of the Successorship Clause and the Leasing and Licensing Out Clause attempted to cure the deficiencies which had been left open by the 1971 Agreement. Specifically, the Successorship Clause now provided for restrictions on the permanent disposition of coal mining operations, while the Leasing and Licensing Out Clause both continued the restrictions on the leasing and licensing out of coal lands and operations, where the purpose is to avoid the Agreement; and added restrictions on the licensing out of operations which resulted in the layoff of an Employer’s employees, and required the licensee to hire UMWA members and make payments to the UMWA funds. However, the 1974 Agreement still did not address the licensing out or the sale (or other permanent disposition) of coal lands.

3. Litigation During the Term of 1978 Agreement

Each of the noted provisions of the 1974 Agreement was continued into the National Bituminous Coal Wage Agreement of 1978. However, during the term of the 1978 Agreement, litigation ensued which forced a modification of the Coal Lands Clause, as well as the Leasing and Licensing Out Clause.

There were two cases arising during the term of the 1978 Agreement,\textsuperscript{19} resulting from independent bargaining engaged in by the UMWA and Amax Coal Company, and by the UMWA and Lone Star Steel Company. These two companies, in bargaining with the UMWA, raised protests against the UMWA’s bargaining proposals, including the Successorship Clause, the Leasing and Licensing Out Clause and the Coal Lands Clause.

\textsuperscript{18} See supra note 17.
\textsuperscript{19} Amax, 614 F.2d at 872; Lone Star, 639 F.2d at 545.
a. The Coal Lands Clause

In both *Amax* and *Lone Star*, the company contended that the Coal Lands Clause was a non-mandatory subject of bargaining and that, therefore, the Union could not strike or otherwise coerce the company in an effort to require collective bargaining over it. Under the National Labor Relations Act (hereinafter "NLRA"), an employer is only required to bargain with a union on behalf of "the employees in a unit appropriate for such purposes." The companies argued that the language of the Coal Lands Clause was so broad that it effectively constituted bargaining beyond the unit for which the UMWA was authorized to bargain. When the UMWA struck and otherwise insisted on such broad language, the companies argued, it violated Section 8(b)(3) of the NRLA which provides in pertinent part:

... It shall be an unfair labor practice for a labor organization or its agents... to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

Both the Third Circuit and the Tenth Circuit agreed with the position of the companies generally on the grounds that to compel bargaining over the Coal Lands Clause, which required the blanket application of the Agreement to operations newly acquired or initiated during its term, would require negotiations "on a basis broader than the certified unit." The UMWA had argued that this was necessary in order to discourage Employers from shifting production to newly developed or newly acquired operations, thereby avoiding the costs of the Agreement. Both of the Circuit Courts stated, in identical language, that the wording of the Coal Lands Clause was

21. National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (emphasis added). A bargaining unit is the term of art for the group of employees on whose behalf the union may be authorized to bargain. Simply put, a unit consists of a defined group of employees who share sufficient common interests so as to make their group representation by a union appropriate. Of course, a majority of the employees in a unit must have first freely chosen to be represented by a union.
22. *Id.* at § 158(b)(3). Section 8(b)(3).
23. *Amax*, 614 F.2d at 872.
24. *Lone Star*, 639 F.2d 545. The *Lone Star* decision did not address the Leasing and Licensing Out Clause.
25. *Amax*, 614 F.2d at 883.
“much broader than necessary to accomplish” this goal, because it required “the agreement to be put into effect in toto elsewhere, including the non-economic provisions that have no bearing on unit employees.”

b. The Leasing and Licensing Out Clause

In *Amax*, the company contended that the Leasing and Licensing Out Clause violated Section 8(e) of the NLRA, and that the UMWA violated Section 8(b)(3) by striking and otherwise insisting on this language.

Section 8(e) generally prohibits a union and an employer from entering into a contract which requires the employer to cease doing business with any other person. A clause which facially violates Section 8(e) may nevertheless be legal if it serves an interest of the unit employees, such as the preservation of unit work or maintenance of work standards. The Leasing and Licensing Out Clause would require the company not to do business, or to cease doing

26. *Id*; Lone Star, 639 F.2d at 558.
27. *Id*.
28. 29 U.S.C. § 158(e). Section 8(e) provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

29. *See supra* note 22 and accompanying text. In addition, Section 8(b)(4)(A) of the Act, provides in pertinent part:

. . . It shall be an unfair labor practice for a labor organization or its agents . . . (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) . . . .

29 U.S.C. § 158(A), specifically prohibits a union from engaging in strikes or other coercive activity in an effort to achieve a contract which violates 8(e). Section 8(b)(4)(A).

30. *Id*, e.g., National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612 (1967).
31. *Id*. 

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business, with any licensee which refused to hire, or continue to hire, UMWA members, and to make payments to the UMWA funds. There was no requirement that the licensee hire unit members, which perhaps would arguably preserve unit work or unit work standards.32 The company, therefore, argued that the proposed clause was in violation of Section 8(e).

The Third Circuit agreed. The requirement that any licensed out work be performed only by contractors which hired UMWA members and paid the UMWA funds served only the UMWA’s organizing interests, and the interests of UMWA members generally. The Third Circuit held that because the clause would require the company not to do business with a licensee which refused to comply with the hiring requirements, it violated Section 8(e).33

Eventually, the Amax and Lone Star decisions resulted in modification of the Coal Lands Clause and the Leasing and Licensing Out Clause as those provisions appeared in the National Bituminous Coal Wage Agreement of 1981.34


As a result of the Amax and Lone Star litigation, language in the Leasing and Licensing Out Clause, stating in effect that an employer could only use contractors who hired members of the UMWA, and requiring payments to the UMWA funds, was removed. The resulting Leasing and Licensing Out Clause, found at Article IA(h) of the 1981 Agreement, stated as follows:

The Employers agree they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof.

Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the licensing out does not cause or result in the layoff of Employees of the Employer.35

32. Amax, 614 F.2d at 887.
33. Id.
34. Because neither the Amax nor Lone Star decisions required its amendment, the Successorship Clause remained (and remains) in tact.
The other major result of the *Amax* and *Lone Star* cases was the removal of the language from the Coal Lands Clause, which had automatically applied the National Bituminous Coal Wage Agreement to any coal lands, coal producing or coal preparation facilities initiated or acquired and put into production or use during the term of an Agreement. Instead, the language was changed to read as follows (new language in italics):

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

Thus, the offending language in the Coal Lands Clause was cured by the addition of a requirement that the UMWA obtain bargaining rights as a precondition for applying the Agreement at any new or newly acquired operation, except where the new or acquired operation was actually the relocation of an existing operation which had been covered by the Agreement.

The deletion of the language from the Leasing and Licensing Out Clause, and the addition of the language to the Coal Lands Clause, severely restricted the UMWA’s ability to add to its membership rolls by the acquisition of work performed at any new or newly acquired coal mine, or at the operations initiated or licensed out to contractors. Indeed, a signatory Employer was now free to initiate a new coal mine without automatically applying the Agreement, and to license out operations to a contractor irrespective of whether it had an agreement with the UMWA or whether it employed UMWA members.

36. *Id.* at 4 (emphasis added).
37. A later challenge to the Coal Lands Clause of the 1978 Agreement, based on a claim that it violated section 8(e) of the Act (discussed above) was rejected on the grounds, *inter alia*, of the UMWA’s agreement in bargaining that such requirement was already *implied* in the language of the clause.
These changes in language, coupled with the decline of coal prices in the early 1980's, set the stage for a dramatic increase in the utilization of contractors. This is illustrated by two Fourth Circuit cases involving Clinchfield Coal Company. In those cases, the issue was whether the company was permitted under the language of the Leasing and Licensing Out Clause of the 1981 Agreement, to license out coal lands at the same time employees at company mines were on layoff.

In the wake of a downturn in demand, Clinchfield idled a number of its mines, and laid-off several hundred employees. It retained in service, however, a number of contractors to which it had licensed out coal lands. The Union claimed that the operations initiated by these contractors were providing coal which could have been provided by the idled company mines, and that the continued utilization of contractors while company mines were idle violated the prohibition of the portion of the Leasing and Licensing Out Clause which states that "[l]icensing out of coal mining operations . . . shall not be permitted unless the licensing out does not cause or result in the layoff of the Employees of the Employer." Essentially, the UMWA's argument was that to the extent contractors continued to provide coal to the company, the licensing out continued, and therefore "caused," the preexisting layoffs at the company mines which could have produced the coal. Therefore, the UMWA argued, the licensing out was forbidden under the second sentence of the Leasing and Licensing Out Clause.

The UMWA prosecuted grievances to this effect and the company responded with two arguments in each case. First, the company stated it had only licensed out coal lands, not operations, so that the second sentence of Leasing and Licensing Out Clause by its terms did not apply. Second, the company argued that the licensing out

39. Id.
40. Supra note 35.
41. The first sentence of the Leasing and Licensing Out Clause, which covered both coal lands as well as coal preparation and coal producing facilities, was not an issue in the Clinchfield cases.
42. Clinchfield, 567 F. Supp. at 1431.
of coal lands had occurred months, and in some cases years, before the 1982 layoffs. It therefore argued that the licensing out of the lands could not have proximately caused the layoffs, as required by the language of the Leasing and Licensing Out Clause.\textsuperscript{43}

The case was eventually decided on the basis of these two issues. The Fourth Circuit upheld the vacation of the two arbitration awards which had gone in favor of the Union, ruling first that the arbitrators had ignored the fact that the Clause's language at issue applied only to the term "operations," and had instead applied that provision to the contracting out of coal lands.\textsuperscript{44} Second, the court ruled the Clause only prohibits licensing out which is the proximate cause of a layoff, and that the layoffs had not been "proximately caused" by the licensing out.\textsuperscript{45} Thus, the Clinchfield litigation served to demonstrate the limits of the 1981 Agreement's job protection provisions.

5. The National Bituminous Coal Wage Agreement of 1984

As at least a partial response to the Amax, Lone Star and Clinchfield decisions, the UMWA and the BCOA added new requirements to the Leasing and Licensing Out Clause in the 1984 Agreement.\textsuperscript{46} It is these provisions, which are the antecedent of many of the provisions of the Article II JOBS provision in the 1988 Agreement.\textsuperscript{47}

\textsuperscript{43} Id.
\textsuperscript{44} Id. at 1433.
\textsuperscript{45} Id.
\textsuperscript{46} The National Bituminous Coal Wage Agreement of 1984, art. IA, § h at 8 (1984) [hereinafter 1984 Agreement].
\textsuperscript{47} Article IA(h)(2)-(7) provided:

(2) For purposes of lawfully preserving and protecting job opportunities for the Employees working or laid off from a particular operation covered by this Agreement, and to assure that work opportunities are not eliminated by lease or license arrangements, the Employer agrees that it will not lease, sublease, or license out coal mining operations which at any time were in operation by that Employer and covered by this Agreement, unless the conditions set forth in the following paragraph are satisfied:

Leasing, subleasing or licensing out of coal mining operations covered by this Agreement shall be permitted where the lessee-licensee agrees that all offers of employment by such lessee-licensee shall first be made (on the basis of mine seniority) to the Employer's classified and laid-off Employees at the mine who have not secured regular employment at any other operation of the Employer covered by this Agreement, if such employment at the leased,
Generally speaking, Article IA(h)(2)-(7) stated that an Employer could only lease, sublease or license certain operations if the lessee, sublessee or licensee agreed to make all offers of employment first to the Employer’s active and laid-off employees at that operation.\textsuperscript{48} Thus, unlike the prior Leasing and Licensing Out Clause deemed unlawful in \textit{Amax}, Article IA(h)(2)-(7) did not appear to be directed at benefiting the UMWA or UMWA members generally, but at protecting the jobs (or job opportunities) of unit employees, \textit{i.e.}, those persons actively employed at or laid-off from a particular operation of the Employer.\textsuperscript{49}

Article IA(h)(2)-(7) obviously provided a greater measure of protection with respect to the leasing and licensing out of coal mining operations, similar to that provided by the Successorship Clause. One very important difference, however, is that the Successorship...
Clause requires a successor to accept the Employer’s obligations under the Agreement, while Article IA(h)(2)-(7) only required the offering of jobs. However, neither the Successorship Clause nor Article IA(h)(2)-(7) applied to transactions involving coal lands.\(^{50}\)

The significance of this “gap” in coverage is highlighted by a case which arose during the term of the 1984 Agreement. The UMWA presented a series of grievances challenging the fact that the company had not included a Successorship Clause in the lease of certain coal lands to an independent operator. One arbitrator accepted UMWA’s argument that the Successorship Clause applies to the leasing of coal lands, despite the fact that the Successorship Clause only mentions operations, and despite the fact that the Successorship Clause applies to only permanent dispositions of operations, and not to leases.\(^{51}\)

BethEnergy filed an action in federal court to set aside the arbitrator’s award on the grounds that the arbitrator had ignored the plain language of the Successorship Clause.\(^{52}\) The court held that the arbitrator’s award failed to draw its essence from the 1984 Agreement because the arbitrator ignored the clear meaning of the term “operations” when he applied the Successorship Clause to the leasing of coal lands.\(^{53}\)


In the spring of 1987, the United Mine Workers of America and Island Creek Corporation announced the attainment of the 1987 Employment and Economic Security Pact (“the EESP”).\(^{54}\) The EESP contained job security provisions similar to those found in the Article II JOBS Provision. However, the EESP also contained a number of features not found in Article II. For example, under the

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\(^{50}\) Likewise, the Coal Lands Clause did not (and does not) apply to the Agreement to coal lands \textit{per se}, but to “the operation of . . . the coal lands.” \textit{See Amax}, 614 F.2d at 886 n.12.

\(^{51}\) BethEnergy Corp. and UMWA, Dist. 30, Local Union 5741, NO. 84-30-86-229 (November 24, 1986)(Render, Arb.)


\(^{53}\) \textit{Id.} at 261.

EESP, an employer was to hire first from its own laid off employees, and then hire from a "hiring hall" of UMWA members, whose names would be furnished to the employer by the UMWA.\textsuperscript{55} The dubious legality of this hiring hall concept was never tested.

In a manner reminiscent of the Coal Lands Clause prior to its modification after the 1978 Agreement, the EESP also sought to declare all new or newly acquired operations an "accretion" to the bargaining unit of an employer's existing mines.\textsuperscript{56} As a fallback position, in order to save the provision from the same type of illegality discussed in \textit{Amax}, the EESP contained a neutrality pledge. Essentially it required the Employer to declare its neutrality in any organizing campaign among the employees of any new or newly acquired operation which could not legally be accreted to the existing bargaining unit of the Employer.\textsuperscript{57}

The EESP also contained a provision requiring any lessee or licensee engaged by an Employer to have labor costs no less than those imposed under the EESP.\textsuperscript{58} This provision is also reminiscent of the Coal Lands Clause, in its attempt to remove any incentive that an employer might have to utilize sources of production rather than its existing, signatory coal mines. In both \textit{Amax} and \textit{Lone Star}, the Coal Lands Clause was found defective because of its requisite imposition of a entire collective bargaining agreement, including its non-economic terms, making the clause much broader than necessary for any legal purpose. In the EESP, the language was tailored to require only comparability in aggregate labor costs, thus avoiding the facial legal invalidity of the earlier Coal Lands Clause.

The EESP also contained a commitment to be bound by the successor national agreement reached in bargaining between the

\textsuperscript{55} EESP, para. (A)(4)(b) of Addendum A.
\textsuperscript{56} EESP, para. (A)(5) of Addendum A. The question of collective bargaining agreement provisions which "accrete" new or newly acquired facilities to an existing bargaining unit may present complex questions of not only contract construction, but federal labor policy. See, e.g., \textit{Pullman Indus., Inc.}, 159 NLRB 580 (1966); \textit{Commonwealth Gas Co.}, 218 NLRB 857 (1975).
\textsuperscript{57} EESP, para. (A)(6) of Addendum A.
\textsuperscript{58} EESP, para. (B)(2)(c) of Addendum A. Union standards clauses are designed to remove the incentive for contracting out bargaining unit work by requiring that the aggregate labor costs of the contractor are not less than those of the signatory employer. When limited to that purpose they generally are legal. \textit{E.g.}, \textit{Orange Belt Dist. Council of Painters No. 48 v. NLRB}, 328 F.2d 534 (D.C. Cir. 1964).
UMWA and the BCOA (i.e., the National Bituminous Coal Wage Agreement of 1988). However, at the UMWA’s option, the EESP job opportunity provisions would be carried forward and applicable during the term of the successor national agreement, irrespective of its contents. 59

Interestingly, in the prefatory language of the portion of the EESP relating to employment opportunity and job security, the parties identified a number of potential issues underlying their agreement. Included in that prefatory language were two clauses which were highly instructive:

WHEREAS, the mining and production of coal involves, by its very nature, the depletion of resources at one location and thus, the continual relocation of bargaining unit work to other locations; and

WHEREAS, the economic reality of today’s coal market has prompted consideration by the industry of a wide range of alternative mining arrangements which threaten the loss of bargaining unit jobs; . . . 60

In language that is less than direct, these two clauses admit of the UMWA’s concern regarding the non-coverage of coal lands under prior National Bituminous Coal Wage Agreements, and the “economic reality” which was forcing employers to utilize sources of production, such as new coal mines and contract mine operators, which were not covered by, or signatory to, UMWA collective bargaining agreements. 61

III. ARTICLE II JOBS PROVISION

The Article II JOBS provision covers a number of issues which relate more or less to employment opportunity. 62 Among other things, the Article II JOBS provision establishes a training and education fund. 63 This is a trust fund to which signatory Employers have con-

59. The EESP also contained a number of other provisions which are not immediately germane to an analysis of the history of the Article II JOBS provision (e.g., a most favored nations clause, an employer pledge not to reorganize its enterprise, etc.).
60. EESP at 3.
61. The prefatory language contained in the Article II JOBS provision reprises the “depletion of resources” language, but does not contain the “economic reality” language.
62. The full text of Article II is set out as an Appendix to this article.
tributed four cents an hour for each hour of classified work performed during the first two years of the 1988 Agreement, and will contribute five cents an hour during the last three years of the 1988 Agreement. The purpose of this trust fund is to provide financial assistance for training or education to unemployed UMWA members, and heir family dependents, who are seeking employment opportunities in the coal industry, in coal-related industries, or in any other vocation, trade or employment.64

Article II also establishes a skills training program at each mining facility covered by the 1988 Agreement.65 The purpose of the skills training program is to assist active employees by enhancing their existing skills, or by developing new skills, so that miners will be adapted to new machinery and to improved technology introduced at the mine.66 These training and education provisions of Article II are a positive and creative response to the very real needs of miners to broaden and improve their job skills.

By far the most comprehensive and well publicized provisions of Article II, however, are those that relate directly to job rights at nonsignatory operations, or at the operations of lessees and licensees. Of particular importance is that the requirements of Article II apply to both operations as well as the development of coal lands held by an Employer. It is these requirements of Article II upon which the remainder of this article will focus.

A. Basic Provisions of Article II

The Article II JOBS provision is lengthy and complex, covering nearly eight pages in the 1988 Agreement. Boiled down to its essence, however, the job opportunity provisions of Article II may be summarized as follows.

Article II(A)(1) provides as follows:

... [T]he first three out of every five new job openings for work of a nature covered by this Agreement at any existing, new, or newly acquired non-signatory
bituminous coal operation of the Employer shall be filled by classified laid-off Employees on the panels of the Employer's operations covered by this Agreement. 67

With respect to lessees and licensees, Article II(B)(2) provides:

Leasing, subleasing, or licensing out of [bituminous coal] lands or operations shall be permitted where the lessee-licensee agrees in writing that all offers of employment by such lessee-licensee shall first be made to the Employer's classified laid-off Employees on the Employer's panels of the Employer's operations covered by this Agreement, if such employment at the leased, subleased or licensed out location is for jobs of the nature covered by this Agreement, and if such Employees are qualified for such jobs. 68

As noted above, the Article II JOBS provision is lengthy and complex and contains detailed requirements with respect to its implementation and administration. The remainder of this Article will discuss some of the principal legal issues raised thus far under Article II.

B. Principal Issues Arising Under Article II

1. Who is an Employer?

The requirements of Article II relate to an "Employer." Where a signatory employer may have an affiliation with other signatory or nonsignatory operators, the breadth of the term "Employer" may be dispositive of the extent to which the Article II Jobs provision applies.

Historically, the National Bituminous Coal Wage Agreement has defined "Employer" as a signatory to the Agreement. 69 Thus, the first sentence in the 1988 Agreement, in the same manner as past National Bituminous Coal Wage Agreements, states: "This Agreement, made this 1st day of February, 1988 between the coal operators and associations signatory hereto, as parties of the first part (each coal operator which is a signatory hereto being called

67. Id.
68. Id. at 12.
"Employer") . . . .)"70 (Emphasis added.) Under this definition, the Employer is easily identified, and the entity of which obligations under the Article II JOBS provision apply is fairly straightforward. However, where a signatory Employer is affiliated with other signatory or nonsignatory companies, the UMWA may argue that a different definition of Employer applies.

That different definition is found in both Article XVII(h) and Article XVII(k) of the Agreement.71 In both of those provisions, the following language is found:

Signatory companies and coal producing divisions thereof and wholly owned and controlled coal producing subsidiaries and wholly-owned and controlled coal producing affiliates shall be treated as one and the same Employer for panel rights purposes.72

(Emphasis added.)

This language first appeared in the 1974 Agreement and has remained unchanged in subsequent Agreements, including the 1988 Agreement. If this provision were to apply in certain corporate settings, the term Employer could potentially be broadened beyond an individual’s signatory company.

There are numerous reasons why the Article XVII definition of Employer does not apply. First, it is becoming increasingly clear that the job offers required under Article II do not constitute panel rights within the meaning of Article XVII. Panel rights are preferential hiring rights offered to laid-off employees of an employer. Such laid-off employees are recalled to job openings in accordance with their seniority and their ability to step in and perform the work required by the vacant job. As discussed, the Article II jobs provision creates a job opportunity separate and distinct from panel rights. Indeed, in Johnstown Coal Co. and UMWA, District 17, Local Union 1766,73 one of the initial cases decided under the Article II JOBS Provision, the arbitrator stated: "Those clauses, i.e., the

70. Supra note 62, at 1.
71. 1988 Agreement, art. XVII, §§ h, k at 103, 111.
72. Id.
73. Case No. 88-17-88-213 (Nov. 17, 1988) (Feldman, Arb.)
present Art II(b) and the present Article XVII are mutually exclusive of one another, with the exception of the order of job offer. To say that all the clauses of Article XVII pertain to Article II(B) is improper. A number of other arbitrators have also recognized this distinction, and an arbitral consensus appears to be developing that Article XVII panel rights and Article II job opportunities are separate and distinct concepts.

Even if panel rights were involved under Article II, and the Article XVII definition were to apply, it would not apply to separate companies unless they were all owned by a signatory employer. A good illustration of this principle is found in *UMWA, District 23, Local Union 1605 and Arch-on-the-Green, Inc.* There, laid-off Union employees of Arch-on-the-Green sought panel rights at other subsidiaries of Arch Mineral Corporation, a nonsignatory company. The UMWA argued that Arch-on-the-Green and other subsidiaries of Arch Mineral Corporation were "one and the same employer for panel rights purposes" under the Article XVII language discussed above because they were all wholly-owned by Arch Mineral Corporation. The arbitrator held, consistent with past interpretation, that Article XVII required that the wholly-owning entity had to itself be a signatory, and that there was no proof that Arch-on-the-Green had been acting as the agent of its stock owner at the time it entered into the 1984 Agreement. Moreover, because Arch-on-the-Green and the other subsidiaries were "operated as completely separate companies, and one was not controlled by the other" the "controlled" portion of the Article XVII test was also not met.

74. *Id.* at 10.
76. *No. 84-23-87-37A (Sept. 18, 1987) (Phelan, Arb.).*
It has also been established that the Article XVII definition may not be used to amalgamate signatory and nonsignatory entities, even if they are wholly-owned by a signatory Employer. For example, in *Barnes and Tucker Company and District 2, Local Union 1269, UMWA*,\(^7\) the arbitrator held:

> The Union's claim for relief under Article XVII must also fail . . . since the overwhelming weight of arbitral authority seems to indicate that recall rights under Article XVII only apply to mines of a signatory employer covered by the Agreement. *In other words, one cannot have panel rights to a mine that is operated by a nonsignatory employer or to a mine not covered by the Agreement.*

(Emphasis added.)

> The construction of the Article XVII definition of Employer as only relating to signatory entities also best comports with the Article I definition of Employer discussed above and accommodates the differences between the Article I definition and Article XVII. It will be recalled that Article I defines “Employer” as a signatory to the 1988 Agreement. Under the construction outlined above, Article XVII would similarly be limited to the amalgamation of those signatory employers which are, in turn, wholly-owned and wholly-controlled by a signatory Employer.

2. Who Must Arbitrate Disputes Arising Under Article II?

Any disputes that arise under Article II, relating to an Employer’s obligations at its own new or newly acquired coal mines, are arbitrable under Article XXIII of the 1988 Agreement between the Employer and the UMWA.\(^7\) There is nothing remarkable about this.\(^7\) What is remarkable is the obligation of Article II(B)(5), re-

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\(^7\) No. 84-BT-2-2 (Nov. 30, 1987) (DiLauro, Arb.) at 19.

\(^7\) The 1988 Agreement, like past National Bituminous Coal Wage Agreements, contains in Article XXIII a four step grievance and arbitration procedure culminating in arbitration. Article II(A)(6) states that: “Any disputes that arise under this Section shall be resolved pursuant to the procedures set forth under Article XXIII of this Agreement.”

\(^7\) It is not remarkable that the parties would have seen fit to include disputes with respect to an Employer’s application of Article II at its own new or newly acquired operations, to the extent that such disputes involve the initial offer of employment. However, Article II(A)(6) could have unintended consequences, to the extent that there is an attempt to apply the “any disputes” language to cover other disputes arising out of the employment relationship at the new or newly acquired operations.
lating to Article II obligations of lessees and licensees. Article II(B)(5) provides:

Any disputes regarding this section shall be resolved between the prior Employer and the Employee under Article XXIII of this Agreement (the arbitration provisions). The Employer agrees that it will reserve in any lease, sublease or license subject to this section the ability of the Employer to remedy any finding as to noncompliance of an Employee’s right to be considered for employment opportunity as provided herein. If it chooses in its discretion to permit a sublease or sublicense, the Employer shall also require the lessee-licensee to convey this hiring obligation in any sublease or sublicense.80

The requirement that disputes as to the coverage of Article II be resolved in arbitration proceedings between the lessor-licensor employer and the affected laid-off employee may have severe consequences for lessees and licensees. First, no clearly defined procedure exists for permitting a lessee-licensee to be a party to such proceedings, although their rights are clearly at stake. Moreover, an Employer, faced with grievances from its laid-off employees requesting jobs with lessees and licensees, may have very little incentive to resist those grievances.81 Indeed, the lessor-licensor could conceivably settle such disputes prior to arbitration.82 Under the provisions of Article II(B)(5), the Employer is required to make the lessee-licensee accept the results of such proceedings.83

Where the dispute centers on a lessee-licensee’s purported failure to offer a job to a laid-off employee of the Employer in accordance

81. Under these circumstances, the utility of objecting to being a party to any arbitration proceeding arising out of such a grievance is called in question. To date, no procedures have been developed under which a lessee-licensee may become a party to the lessor-licensor Employer’s arbitration proceeding. The Stump Coal Co., Cannelton Indus. and Sang Branch cases, discussed below, involved highly peculiar factual circumstances.
82. 1988 Agreement, art. XXIII, §(h), at 228.
83. Article II(B)(5), on its face, would appear to make the lessor-licensor Employer responsible for requiring the lessee-licensee to implement the resolution of “any dispute” which might arise with respect to the lessee-licensee’s compliance with Article II. At first blush this may appear to be at odds with Article II(B)(6), which provides: “The prior Employer shall not be a guarantor or be held liable for any breach of the lessee-licensee of its hiring or bargaining obligations or the terms of any agreement between the Union and the lessee-licensee.” However, it appears that the latter provision is meant to save the lessor-licensor Employer from suffering any liability for back pay, benefits, and the like, based on a lessee or licensee’s failure to abide by its Article II obligations. The Article II(B)(5) provision, on the other hand, seems aimed at an Employer’s obligation to reserve in a lease or license the right to order a lessee or licensee to comply with the resolution of any dispute” under Article XXIII.
with Article II’s requirements, the employment relationship exists only between the Employer and the laid-off employee, not the lessee-licensee and the laid-off employee. In such circumstances, the laid-off employee “has no standing in a situation involved in an action against the licensee because that person is not an employee within the meaning of the language of either the grievance procedure or the work jurisdiction clauses under the terms of the contract.”

As was explained in *UMWA, District 17, Local Union 9619 and Donner Mining Company*:

> ...it is clear that what is being given to Employees on a panel is the right to a job offer from someone who leases or received a license from their Employer for the purpose of conducting some mining or mining related activity which is of the nature of work covered by the National Agreement.

* * * *

Since the right to a job offer from a lessee-licensee does not make the Employee with only that right an Employee of the lessee-licensor, the Employee must look to the lessor-licensor, the prior Employer, for enforcement of his employment rights.

* * * *

It is for that reason that Article IIB(5) directs the Employee to the prior Employer where there is a dispute over the obligation which the lessee-licensee owes to the Employer.

That situation may change where the lessee-licensee is a signatory. In *UMWA, District 17, Local Union 8843 and Cannelton Indus. Inc. and Penn Mining Co.*, however, the UMWA prosecuted a grievance against a licensor Employer and the licensee. The arbitrator noted that this was not inconsistent with the decision in *KMF Corporation*, which had dismissed a grievance because it was brought against the licensee and not the licensor or employer. The arbitrator stated “In the instant case the issue is entirely different. Here, the Union brings the claim against the primary employer and contests the action of the licensee within the body of the grievance.” The record does not indicate whether the licensee protested its party status, but it apparently did not.

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84. KMF Corp. and UMWA, Dist. 17, Local Union 9735, No. 88-17-88-168 (Dec. 30, 1988) (Feldman, Arb.) at p. 12.
86. No. 88-17-89-611 (Dec. 22, 1989) (Suster, Arb.).
87. Id. at 9.
88. See supra note 86.
Stump Coal Company and UMWA, District 30, Local Union 1416 also involved the application of Article II and permitted the assertion of the grievance against a signatory licensee alone, in a dispute over whether a laid-off employee of the licensee, or a laid-off employee of the licensor Employer, was entitled to a job offer. In that case, the laid-off employee of the licensee was asserting a panel right arising under Article XVII, while the laid-off employee of the licensor Employer was asserting a job offer right under Article II. Under the KMF Corporation and Cannelton Industries decisions discussed above, the Article II rights asserted by the employee of the licensor Employer should have been asserted under Article II(B)(5) against the licensor Employer, and not the licensee alone. Under the circumstances of Stump Coal, however, which included the fact that the licensee was signatory, and that initially the licensee had agreed to arbitrate the matter, the arbitrator allowed the grievance to be prosecuted against the licensee alone.90

Finally, it should be noted that once an Employer’s laid-off employee has been offered and has accepted employment with a lessee-licensee, subsequent questions with respect to the application of Article II rights with the lessee-licensee are subject to arbitration under the lessee-licensee’s collective bargaining agreement, if one exists.91 This would not, of course, be the case where the lessee-licensee remained a nonsignatory with no duty to arbitrate.

3. Must A Pre-existing Lessee-Licensee Apply Article II?

The language of Article II(B)(9) addresses the problem of lessees and licensees which are in existence as of the date that Article II becomes applicable.92 The obvious issue is that pre-existing business arrangements between an Employer and a lessee-licensee may not be amenable to revision to take account of the requirements of Article II. Article II purports to deal with this issue in Article II(B)(9), which states:

89. No. 88-30-89-35 (Mar. 31, 1989) (Beckman, Arb.).
90. Id.
91. Sang Branch Mining and UMWA, Dist. 17, Local Union 5922, No. 88-17-89-511 (Nov. 1, 1989) (Hewitt, Arb.).
Section B shall become effective immediately upon the effective date of this Agreement. For purposes of complying with this section, all hiring by any lessee-licensee for work of a nature covered by this Agreement after the effective date shall comply with this section. However, no lessee-licensee operating on the Employer's bituminous coal lands as of the effective date of this Agreement (hereinafter the "current lessee-licensee") shall be required to terminate or lay off any employee on its active payroll at such locations as of that date in order to comply with the foregoing hiring obligation. Furthermore, a current lessee-licensee shall not be required to comply with the foregoing hiring obligations at those locations until 90 days after the effective date of this Agreement, except if the lease, sublease license under which the current lessee-licensee is conducting those operation(s) expires, terminates or is extended with Employer prior to the 90 day deadline or except if such lease, sublease or license involves a former signatory operation of the Employer. In the case of these two latter exceptions, the foregoing hiring obligation shall become effective immediately.93

A major split in arbitral authority has developed over this provision.94 In Pennsylvania Mines Corporation and UMWA, District 2, Local Union 1609,95 a signatory employer had a pre-existing lease with a nonsignatory lessee, North Cambria Fuel Company ("Cambria"). The lease was for a term of ten years and had been entered on July 21, 1987, nearly six months prior to the effective date of Article II.

The Union maintained that Article II(B)(9) constituted an absolute promise to require pre-existing lessees to comply with Article II no later than 90 days following the effective date of Article II.96 The company argued that its lease with Cambria simply did not permit it to impose such an obligation.97 The arbitrator was thus faced with a severe conflict between the purported requirements of Article II, and the limitations of the pre-existing business arrangement.98 The arbitrator resolved the conflict in favor of the Employer. He held:

93. Id.
96. Id. at 6.
97. Id. at 8.
98. In discussing the case, the arbitrator noted the addition of "coal lands" to the requirements of Article IIB was intended to close a "loophole" which had existed under former Article IA(h)(2)-(7), which only covered leasing, subleasing or licensing out of "operations." Id. at 12.
The Employer's compliance with the labor contract in this instance should, therefore, be determined by reference to obligations existing under the 1984 Agreement and not by reference to utterly new terms introduced in 1988. It cannot reasonably be asserted that the Employer should be held accountable for a failure to anticipate its obligations under the 1988 Agreement and to assume those obligations even before the effective date of the Agreement. The Employer cannot be held accountable for a failure to incorporate assurance of panel-based hiring into its lease arrangement with Cambria when such an obligation simply did not exist under the Wage Agreement in effect at the time the lease was entered into. 26

Under such circumstances, the arbitrator continued:

[.]he most that can be expected from the Employer in keeping with the spirit of the JOBS provision is that it approached Cambria with a request to jointly amend the lease in order to incorporate the hiring procedures of Article II B. That, according to testimony, has already been attempted, without success.

* * * * *

Where the Employer has approached the lessee in an earnest effort to have the hiring obligations of II B incorporated into a pre-existing lease of coal lands and the attempt has proved unsuccessful, and the lease relationship affords no other practicable method by which the Employer can incorporate such obligations into the lease, no violation of II B will be found to have occurred. 103

Two other notable decisions immediately followed Pennsylvania Mines. First, in Cannelton Industries, Inc. and UMWA, District 17, Local Union 8843, 101 the employer had a lease with Terry Eagle Coal Company which pre-dated the effective date of the 1988 Agreement. 102 The arbitrator at first appeared to agree with the Pennsylvania Mine decision that an Employer's obligations with respect to a lease or a license must be determined as of the date the lease or license was entered into. 103 However, unlike the arbitrator in Pennsylvania Mines, the arbitrator in Cannelton in reality saw this result as being based on a "grandfathering" granted under Article II(B)(9), and not as an application of the principle that issues affecting a lease or license are to be adjudicated in accordance with the National Bituminous Coal Wage Agreement in effect at the time the lease or license was entered. 104 The arbitrator in the Cannelton

99. Id. at 14.
100. Id.
102. Id. at 2.
103. Id. ("The arbitrator agrees with the Company that the date of the occurrence determines which contract will be utilized to determine the substantive issue of the grievance.").
104. Id. at 8.
case thus held that the grandfathering of pre-1988 Agreement leases was dependent upon compliance with the notice requirement contained in Article II(B)(11). 105

In Cannelton, the company had admittedly (and mistakenly) failed to give notice of the Terry Eagle lease to the UMWA. 106 The arbitrator held that this failure to notify the UMWA in a timely manner with respect to the Terry Eagle lease forfeited the grandfathering granted by Article II for pre-existing lessees and required Cannelton to comply with Article II with respect to the Terry Eagle lease. 107

In a later case, Cannelton Industries, Penn Mining Company and UMWA, District 17, Local Union 8843, 108 the arbitrator addressed the issue of a licensee working under a year-to-year, renewable contract. There was no dispute in this case that Cannelton had given notice of the contract, which had first been entered into prior to the effective date of the 1988 Agreement. The company sought to establish, however, that because the initial term of the contract was entered into prior to the 1988 Agreement, that subsequent annual terms would not be subject to the 1988 Agreement's Article II provision. 109 The arbitrator rejected this reasoning, stating:

105. Id. Article II(B)(11) states: "Within thirty (30) days of the effective date of this Agreement, the Employer shall provide to the appropriate District President(s) a list of its lessee/licensees as of the effective date of this Agreement, with the same information as set forth in Section B(7)."

Article II(B)(7) requires such notices to "... disclose the identity of all parties to the transaction and the location and identity of the bituminous coal lands, operations and/or other facilities affected thereby including the relevant MSHA legal I.D. number."

106. Id. at 3.

107. The arbitrator did not explain how this was to be done, given the fact that Cannelton apparently did not have the legal ability to force Terry Eagle to comply with Article II. This could obviously lead to a dispute between the lessee and the lessor, resulting in a claim for damages if an attempt were made to nullify the lease. However, because the employer no longer "controlled" the work which the Union sought under the grievance, it having been apparently irrevocably leased to Terry Eagle prior to the advent of Article II, the award in the Cannelton case may very well violate Section 8(e) of the Act. See NLRB v. Int'l Longshoremen's Ass'n, 447 U.S. 490, 504 (1980) ("[t]he contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test... "). Indeed, the General Counsel of the NLRB has issued a complaint claiming that the award in the Cannelton case does violate section 8(e), and that the prosecution of a grievance and other actions taken in furtherance of the award violate section 8(b)(4)(A) of the Act. Dist. 17 United Mine Workers of America et al. (Cannelton Indus., Inc.), Case Nos. 9-CC-1373-1-2-3 and 9-CE-53-1-2-3 (Mar. 13, 1990).

108. 88-17-89-550 (Nov. 15, 1989) (Feldman, Arb.).

109. Id. at 5.

https://researchrepository.wvu.edu/wvlr/vol92/iss4/6
The Cannelton-Pen contract is not "grandfathered" as to those additional terms of contract that began after the advent of the 1988 Agreement. The 1988 Agreement and the extended panel rights indicated therein has application therefore to the "non-grandfathered" portion of the writing between Pen and Cannelton. The company complied with all of the conditions precedent for the portion contracted under the 1984 contract and there is no reason therefore, to allow the protest in this particular matter as to that portion of the multiple contracts. However, the 1988 Agreement does apply to all of those contracts between Pen and Cannelton beginning after the 1988 Agreement effective date.110

The foregoing developments, including notions such as "grandfathering" and its waiver for failure to give appropriate notice, as well as the general principle that leases and licenses would be governed by the provision of the National Bituminous Coal Wage Agreement in effect at the time they were entered, were swept aside in UMWA, Dist. 17, Local Union 9177 and Peabody Coal Company.111 There the arbitrator held:

While the [union's] claim obviously involves a contract mining agreement which was entered into under the term of the 1984 National Agreement, the claim is for a right contained in the 1988 National Agreement, and over a violation of that contractual right which occurred during the term of the 1988 National Agreement. It is therefore the 1988 National Agreement which is the governing contract in this case, and the one under which the claim is to be decided.112

The issue was stated as being "... whether an Employer who has already leased or licensed out coal lands prior to the effective date of the 1988 National Agreement is required to have the lessee-licensee operating under that old lease or license abide by the Article II(B) hiring obligations which were newly imposed by the 1988 National Agreement."113

Unlike the Arbitrator in Pennsylvania Mines, the arbitrator in Peabody Coal ruled that the pre-existing leases were subject to Article II(B), and specifically rejected the earlier decision.114 The Peabody Coal arbitrator held that the provisions of Article II - particularly Article II(B)(9), (10), and (11), demonstrated that the

110. Id. at 11.
111. No. 88-17-89-425 (April 23, 1990) (Phelan, Arb.).
112. Id. at 8.
113. Id. at 8-9.
114. Id. at 12, n.1.
negotiators of the 1988 Agreement clearly and unambiguously intended pre-existing leases and licenses to be covered by Article II(B).\textsuperscript{115}

When these three provisions are read together, it is clear that lessee-licensees who were operating on an Employer's coal lands pursuant to an existing lease or license on February 1, 1988 were intended to be covered by the new hiring obligations that Employers had to make a part of their leasing and licensing arrangements. The 1988 National Agreement did not deal with the question of how an Employer was to make those hiring obligations a part of an existing lease or license, but left that to the discretion of the Employer. The contractual obligation was to see that it was done within 90 days. No exception was made for a situation in which an Employer did not have any right under its arrangement with a lessee or licensee to make such a change.\textsuperscript{116}

As a remedy, the arbitrator ordered that Peabody, the licensor, was liable for wages lost by the grievant, to be measured by the amount paid by the licensee to the person who was actually employed by the licensee in the grievant's place.\textsuperscript{117}

Unless this split in arbitral interpretation is resolved, the obligations of a lessor-licensee employer will be left in extreme doubt with the potential for the accrual of significant liability where pre-existing leases and licenses are found to be subject to Article II(B).\textsuperscript{118}

4. Is Article II Legal?

Last, but most importantly, among the issues arising under Article II are questions regarding its legality. The Article II JOBS provision under certain circumstances, requires that an employer afford

\textsuperscript{115} Id. at 11. Article II(B)(9) provides, with certain exceptions, a 90-day delay for the applicability of Article II to existing lessees-licensees; Article II(B)(10) discusses the effect of Article II where an existing lessee-licensee has a collective bargaining obligation to recognize panel rights under a collective bargaining agreement with the UMWA or other union; and Article II(B)(11) requires the signatory to provide the UMWA with a list of existing lessees-licensees.

\textsuperscript{116} Id. at 12 (emphasis in original).

\textsuperscript{117} Id. at 13-14.

\textsuperscript{118} The Peabody Coal decision would appear to violate Sections 8(b)(4) and 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(b)(4), 158(e), in the same manner as the earlier Cannelton award, see n. 107 above. The Cannelton case before the NLRB may resolve this split if the General Counsel's complaint is successful.
a hiring preference to people who, by virtue of their past employment, are members of and represented by the UMWA over those who are not. Such preferences based upon union adherence, or the lack of it, are generally contrary to a basic principle of the NLRA, that employees are to be neither rewarded nor punished for their union adherence, membership, or activity.

The provisions of Article II requiring a signatory employer to provide a hiring preference for laid-off employees of the signatory with a lessee or licensee which is not closely tied to it are new in the coal industry. However, in industries where employment is characterized by a succession of temporary jobs of short duration, hiring is commonly done through such systems. The legality of such arrangements was initially resolved by the United States Supreme Court in Local 357, International Bro. of Team. Etc. v. NLRB. There, the Supreme Court approved the hiring hall procedure even though it no doubt encouraged union membership. It ruled, however, that the encouragement given to union membership was only permitted when the hiring hall was fairly conducted and referrals made without regard for union membership. Hence, the Court held the encouragement could not be "accomplished by discrimination." Since Teamsters, cases have approved a preference for hiring union members where the hiring is with the same employer, or where the hiring is with another member of a multiemployer bargaining group in which the employer is a member and the employees of which members all constitute a single appropriate bargaining unit.

119. 1988 Agreement, art. I, at 2 ("... as a condition of employment, all Employees at operations covered by this Agreement shall be, or become, members of the United Mine Workers of America to the extent and in the manner permitted by law. ... "). Such clauses, which are a type of union security clause, are permitted under certain circumstances under federal law, unless a state enacts a statute forbidding them in that state. National Labor Relations Act, as amended, §§ 8(a)(3), 14(b), 29 U.S.C. §§ 158(a)(3), 164(b).
122. Id. at 674-677.
123. Id. at 675.
124. NLRB General Counsel Advice Memorandum, General Motors Corp. Saturn Corp. (National Right to Work Committee), Case No. 7-CB-6582 (June 2, 1986).
125. Miller Brewing Co. v. Brewery Workers Local Union, No. 9, 739 F.2d 1159 (7th Cir. 1984).
However, when employees are given a hiring preference because of their previous work for a signatory employer which is not a member of the same multiemployer group, or whose employees do not otherwise constitute a single appropriate bargaining unit with employees of the hiring employer, then the arrangements may be held illegal. Employers abiding by such an illegal clause may violate Section 8(a)(3) of the National Labor Relations Act, as amended, by discriminating in favor of employees because of their union adherence, membership or activity. Unions enforcing such clauses may violate Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended, by similar discrimination and compelling employers to discriminate.

Although no cases have been brought to date challenging this aspect of Article II, there is some precedent that an individual may not be denied full seniority with an employer under the National Bituminous Coal Wage Agreement on the basis that all of his service was not at a union-represented operation. In Dist. 23, UMWA and Peabody Coal Co., the National Labor Relations Board found that the UMWA's giving effect to a contract requiring such discrimination constituted a violation of section 8(b)(2) of the NLRA. In the words of the Board, "Maintaining and enforcing a contractual provision which accords preference to employees based on union considerations can cause, or be an attempt to cause, discrimination within the meaning of Section 8(b)(2)." Thus, the Article II JOBS provision provides a basis for arguing that the protections granted thereunder constitute an impermissible preference based on "union considerations," and may, therefore, be subject to legal challenge.

126. See IATSE Local 659 (MPO-TV of California), 197 NLRB 1187, 1189 (1972, enforced), 477 F.2d 450 (D.C.C. 1973) (Table); New York Typographical Union No. 6 (Royal Composing Room), 242 NLRB 378, 379 (1979), enforcement denied in part sub nom., NLRB v. New York Typographical Union, 632 F.2d 171 (2d Cir. 1980); Director's Guild of Am., Inc. (Assoc. of Motion Picture & Television Producers, Inc.), 198 NLRB 707, 709 (1972).

127. 293 NLRB No. 7 (1989).

128. Id. at 4, citing Operating Engineers, Local 132 (National Engineering), 266 NLRB 977, 981 (1983).

129. It should also be noted that the Cannelton and Peabody Coal decisions discussed above, regarding the application of Article IIB to pre-existing leases and licenses, also present significant questions regarding the legality of Article II under Sections 8(b)(4) and 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) and 158(e). See pp. 969-972, supra. Indeed, these cases raise
IV. CONCLUSION

The Article II JOBS provision is the culmination of two decades of struggle by the UMWA to both protect the jobs of its members, as well as acquire additional work for them. The business plans of both employers and entities doing business with employers have been, and will undoubtedly continue to be, affected by the impact of Article II. Its provisions are complex and undoubtedly will continue to present grist for the arbitral mill. There is the possibility that significant litigation may ensue with respect to the legality of Article II. Future collective bargaining may very well hinge on an attempt to expand or modify the coverage of Article II. The resolution of the issues identified herein, and the others which are sure to arise, will require not only a thorough knowledge of Article II, but an understanding of how and why it came to be.

the possibility that Article II may be illegal per se to the extent that it purports to apply to the leasing of coal lands where the employer had never operated, and where the employer will receive none of the coal produced by the lessee. See International Organization of Masters, Mates and Pilots and Seatrain Lines, Inc., 220 NLRB 164, affirmed sub nom. Danielson v. Int'l Organization of Masters, Mates and Pilots, 521 F.2d 747 (2d Cir. 1975) (work on ship never operated by employer not part of unit work of crews of other ships operated by employer). See also Westmoreland Coal Company (United Mine Workers of America), Case No. 11-CA-13166 (March 31, 1989) (facial illegality of Article II asserted as defense to § 8(a)(5) complaint for purported failure of company to provide information to union regarding, inter alia, company's subsidiaries owning coal lands).
The parties hereto recognize and agree that the production of bituminous coal involves, by its very nature, the depletion of resources at work locations. The parties agree further that varied mining arrangements and technological advances can adversely impact on job security and that their mutual goals of mining coal safely and efficiently can best be achieved by the use of experienced miners who are knowledgeable of the Employer’s standards of operation.

As a result of the special nature of the bituminous coal mining industry and the parties’ desire to develop a relationship in which the Employees as well as the Employers gain from a growth in productivity, the parties agree to establish the Job Opportunity and Benefit Security (JOBS) Program. The JOBS Program is designed to achieve, to the fullest extent allowed by law, job security for classified employees through extended panel rights and new training opportunities. Nothing in the JOBS Program shall be construed to diminish any rights of the Employees or the Union established in any other provision of this Agreement including, but not limited to, the successorship clause, Article 1A(h) and Article XVII.

A. Non-Signatory Operations

1. Except as modified in Section C, the first three out of every five new job openings for work of a nature covered by this Agreement at any existing, new, or newly acquired non-signatory bituminous coal operation of the Employer shall be filled by classified laid-off Employees on the panels of the Employer’s operations covered by this Agreement. If the newly acquired or non-signatory operation has a panel of laid-off employees established pursuant to a valid collective bargaining agreement, those individuals shall first be recalled before this section applies.
2. Selection of employees for the above three out of every five new job openings shall be made from the senior Employee among the classified laid-off Employees on the Employer’s panels, who has the ability to step into and perform the work of the job at the time the job is filled. The order of selection of Article XVII shall also apply selecting first from Employees on the panels of the Employer’s operations covered by this Agreement within the district where the nonsignatory operation is located, next from Employees on the panels of the Employer’s operations covered by this Agreement within contiguous districts, and then from Employees on the panels of the Employer’s operations covered by this Agreement within non-contiguous districts. The Employer shall not be required to make more than one offer of employment per operation to each such Employee, provided that offer is for work of the type listed on his panel form and the Employee refuses or fails to respond to that offer or report for the job. The Employer may also consider its classified laid-off employees on its panels for the last two out of every five job openings, which are to be selected at the Employer’s sole discretion.

3. The filling of a position by an active employee at a nonsignatory operation as the result of his reassignment from one position at that operation to another position at that same operation does not constitute the filling of a new job opening for purposes of this section.

4. Offers of employment made to classified laid-off Employees on the Employer’s panels pursuant to this section, shall be made without regard to the listing of that particular operation on the Employee’s panel form.

5. Acceptance or rejection of an offer of employment under this section or any personnel action at the nonsignatory operation shall not affect such Employee’s other panel rights with the Employer as established by this Agreement.

6. Any disputes that arise under this Section shall be resolved pursuant to the procedures set forth under Article XXIII of this Agreement.

7. Nothing in this section shall operate to extend the bargaining unit as of the date of this Agreement nor expand the rights of the
Union with regard to the non-signatory operations, except for the job opportunities made available under this section.

8. Section A shall become effective immediately upon the effective date of this Agreement. No Employer shall be required to terminate or lay off any employee on its active payroll at said operations as of that date in order to comply with the foregoing hiring obligations. For purposes of complying with the foregoing, all hiring for jobs of a nature covered by this Agreement after the effective date shall be made in accordance with this section. Furthermore, except as modified by Section C, if the Employer has an existing UMWA panel obligation or other collective bargaining obligation at the operation, it shall first recognize such obligation.

B. Lessee-Licensee

1. For purposes of lawfully preserving and protecting job opportunities for the Employees covered by this Agreement, the Employer further agrees that it will not lease, sublease, or license out any bituminous coal lands, bituminous coal mining operations and other facilities of the Employer unless the conditions set forth in the following paragraphs are satisfied.

2. Leasing, subleasing, or licensing out of such lands or operations shall be permitted where the lessee-licensee agrees in writing that all offers of employment by such lessee-licensee shall first be made to the Employer’s classified laid-off Employees on the Employer’s panels of the Employer’s operations covered by this Agreement, if such employment at the leased, subleased or licensed out location is for jobs of the nature covered by this Agreement, and if such Employees are qualified for such jobs.

3. Selection of employees for these offers of employment shall be made from the senior Employee among the classified laid-off Employees on the Employer’s panels, who has the ability to step into and perform the work of the job at the time the job is filled. The order of selection of Article XVII also shall apply: selecting first from Employees on the panels of the Employer’s operations covered by this Agreement within the district where the lessee-licensee’s operation is located, next from Employees on the panels...
ARTICLE II

of the Employer’s operations covered by this Agreement from districts contiguous to the district where the lessee-licensee’s operation is located, and then from Employees on the panels of the Employer’s operations covered by this Agreement within non-contiguous districts. The lessee-licensee shall not be required to make more than one such offer of employment per operation to each such Employee, provided that offer is for work of the type listed on his panel form and the Employee refuses or fails to respond to that offer or report for the job.

4. Acceptance or rejection of such an offer of employment made by a lessee-licensee or any personnel action between the Employee and lessee-licensee shall not affect such Employee’s panel rights with the Employer as established by this Agreement.

5. Any disputes regarding this section shall be resolved between the prior Employer and the Employee under Article XXIII of this Agreement. The Employer agrees that it will reserve in any lease, sublease or license subject to this section the ability of the Employer to remedy any finding as to noncompliance of an Employee’s rights to be considered for employment opportunity as provided herein. If it chooses in its discretion to permit a sublease or sublicense, the Employer shall also require the lessee-licensee to convey this hiring obligation in any sublease or sublicense.

6. The prior Employer shall not be a guarantor or be held liable for any breach of the lessee-licensee of its hiring or bargaining obligations or the terms of any agreement between the Union and the lessee-licensee.

7. Within ten (10) days after the lease, sublease or licensing out of any bituminous coal lands, coal mining operations and/or other facilities, but in any event prior to the time that work of a nature covered by this Agreement commences, the Employer shall provide notice thereof to the appropriate District President. Such notice shall disclose the identity of all parties to the transaction and the location and identity of the bituminous coal lands, operations and/or other facilities affected thereby including the relevant MSHA legal I.D. number.

8. The Union agrees that this section, or its implementation, in no manner extends the bargaining unit of the Employer and does
not create a joint employer, single employer, alter ego, agency relationship or successor relationship between the Employer and the lessee-licensee, which does not otherwise exist without reference to this section or its implementation.

9. Section B shall become effective immediately upon the effective date of this Agreement. For purposes of complying with this section, all hiring by any lessee-licensee for work of a nature covered by this Agreement after the effective date shall comply with this section. However, no lessee-licensee operating on the Employer’s bituminous coal lands as of the effective date of this Agreement (hereinafter, the “current lessee-licensee”) shall be required to terminate or lay off any employee on its active payroll at such locations as of that date in order to comply with the foregoing hiring obligation. Furthermore, a current lessee-licensee shall not be required to comply with the foregoing hiring obligations at those locations until 90 days after the effective date of this Agreement, except if the lease, sublease or license under which the current lessee-licensee is conducting those operation(s) expires, terminates or is extended with the Employer prior to the 90 day deadline or except if such lease, sublease or license involves a former signatory operation of the Employer. In the case of these two latter exceptions, the foregoing hiring obligations shall become effective immediately.

10. In the event the current lessee-licensee has an existing UMWA panel obligation or other collective bargaining obligation at any location on the Employer’s bituminous coal lands, it shall first recognize such obligation except when its new operation was at any time a signatory operation of the Employer, in which case the Employer’s laid-off Employees must be given the first offers of employment as provided in Section B(2) and (3) above before any other individual is employed in work of a classified nature.

11. Within thirty (30) days of the effective date of this Agreement, the Employer shall provide to the appropriate District President(s) a list of its lessee-licensees as of the effective date of the Agreement, with the same information as set forth in Section B(7).

C. Coordination of Employment Obligations Under the JOBS Program
At those locations where the Employer hereto is the lessee-licensee of another employer which is also party to the obligations of Article II, the Employer hereto shall first honor the hiring obligations to which it should be bound as a result of lessor-licensor’s agreement with the Union. Thereafter, and at all other locations covered by this Article, the Employer hereto shall follow the requirements of Sections A and B above.

D. Employer-Wide Panel Rights to Signatory Operations

Each Employer also agrees to extend employer-wide panel rights to its signatory operations pursuant to Article XVII. Accordingly, within forty-five (45) days of the effective date of this Agreement, a laid-off employee may revise his panel form for any purpose, in addition to his annual right of revision under Article XVII(d).

E. UMWA-BCOA Training and Education Fund

Section 1. Establishment

The parties hereto recognize that unemployment currently exists in the various coalfields and that unemployment places burdens on UMWA miners, their families and communities. To lessen those burdens and to aid them in acquiring gainful employment, the parties hereby establish the UMWA-BCOA Training and Education Fund.

Section 2. Purpose

The UMWA-BCOA Training and Education Fund is established to provide financial assistance for training or education to unemployed UMWA miners, who have performed classified work under the National Bituminous Coal Wage Agreement of 1988 or any predecessor agreement thereto, and/or their family dependents who are seeking employment opportunities in the coal industry, in coal-related industries or in any other vocation, trade or employment opportunity of the applicant’s choosing. The decision to make an assistance grant to an eligible applicant, the form of the grant and the amount of each assistance grant shall be determined by the Fund’s
Trustees at their sole discretion. Grants may be renewed annually according to rules adopted by the Fund’s Trustees.

Section 3. Administration

The UMWA-BCOA Training and Education Fund shall be jointly administered by two Trustees, one of whom shall be appointed by the UMWA and one of whom shall be appointed by the BCOA. The Trustees shall be responsible for adopting all necessary rules for the distribution of training and education monies, establishing separate accounts, accounting for all monies owed to or received by the Fund, providing a full accounting of the Fund’s monies in May and November of each year to the Presidents of the UMWA and BCOA and all other action necessary for the proper and efficient operation of the Fund. The salaries and expenses of the Trustees and all administrative costs shall be the responsibility of the Fund. The parties intend that maximum funds be used for training and education purposes. The UMWA will supply, at no cost to the Fund, office space for the administration of the Fund. Nothing herein shall preclude receipt of monies from other sources for purposes consistent with the Fund.

Section 4. Funding

(a) Each signatory Employer shall contribute to the Fund referred to in this Article 4.0 cents per hour actually worked by each of the Employer’s Employees who perform classified work as defined by this Agreement in the first two years of this Agreement and 5.0 cents per hour actually worked commencing in the third year of this Agreement and continuing through the term of the Agreement.

(b) The obligation to make payments to the Fund specified in this Article shall become effective on the effective date of this Agreement, and the first payments are to be made on the 10th day of March 1988 (which will include payment form the effective date through the end of February, 1988) and thereafter continuously on the 10th day of each succeeding calendar month.

(c) It shall be the duty of each of the Employers signatory hereto to keep current said payments due to the Fund and to furnish to
the International Union, United Mine Workers of America, and to
the Trustees of the Fund, a monthly statement showing on a mine-
by-mine basis, the full amounts due hereunder and the hours worked
with respect to which the amounts are payable. Payments to the
Fund shall be made by check payable to the "UMWA-BCOA Train-
ing and Education Fund."

(d) Payments shall be delivered or mailed to the Office of the
UMWA-BCOA Training and Education Fund currently located at
900 15th Street, N.W., Washington, D.C. 20005 or as otherwise
designated by the Trustees of the Fund.

(e) Failure of any employer signatory hereto to make full and
prompt payments to the Fund specified in this article in the manner
and on the dates herein provided shall be deemed a violation of the
Agreement. This obligation of each Employer signatory hereto, which
is several and not joint, to so pay such sums shall be a direct and
continuing obligation of said Employer and it shall be deemed a
violation of this Agreement, if any mine, preparation plant or other
facility to which this Agreement is applicable shall be sold, leased,
subleased, assigned or otherwise disposed of for the purpose of
avoiding any of the obligations hereunder.

(f) Each Employer agrees to give proper notice to the President
of the appropriate local union by the 18th day of each month that
the Employer has made the required payment to the Fund for the
previous month, as required by this Article, or is delinquent in such
payment, such notice to set forth the amount paid to the Fund, or
the amount of delinquency and the hours worked with respect to
the mine or mines under the jurisdiction of such local union.

F. Skills Training

Section 1. General

The parties recognize that technological changes are now oc-
curring and may continue to occur in the coal industry. These tech-
nological changes may require new employee skills or the refinement
of existing employee skills in order for operations covered by this
Agreement to be safe and efficient. To keep pace with these tech-
nological changes, as required by the Employer, and to develop and increase the skills of the classified work force and to enhance job security the parties establish the UMWA-Employer Skills Training Program.

Section 2. Purpose

As a demonstrated need arises at a mine or facility covered by this Agreement, the Employer shall establish for such mine or facility a Skills Training Program. The Skills Training Program would be established to increase the efficiency of certain active classified Employees by enhancing or modifying existing skills or by developing the new skills necessary regarding new machinery or other equipment used in the course of the operation which has been modified or improved by technology or has not before been utilized at the mine or facility. Neither the program nor its implementation is in any way intended to expand or diminish any work jurisdiction express or implied under the Agreement. Neither will the program limit or restrict in any way any rights of the Employer or the Union under this Agreement.

Section 3. Skills Training Program

When new technology or improvements to existing technology are introduced at any operation covered by this Agreement and new skills are needed to utilize such new technology or improvements, the Employer shall provide the appropriate active classified Employees whom it deems necessary with the skills training necessary for the safe and efficient operation of the component, machine or equipment introduced. The skills training may be performed at the manufacturer’s facility, at the Employer’s training facility, on the job, or at any other site appropriate for such training.

Each training program shall emphasize health and safety in addition to the other requirements of the job. Appropriate local and district officials of the Union shall have the opportunity to review each training program and make comments and suggestions.

Employees shall be paid at their regular straight time classified rate for all time spent in skills training in accordance with the pro-
visions of this section, except when the overtime rate is required by statute. In those cases where travel away from the work place or overnight stay is required for the skill training the Employer and the Local Union shall meet and establish the amount and the manner in which expenses will be provided Employees for lodging and travel associated with the Training Program.