

**Clayton B. Metcalf and C.B. Construction Co., Inc.
and United Mine Workers of America, Petitioner.
Case 28-RC-2901**

April 5, 1976

DECISION ON REVIEW

BY CHAIRMAN MURPHY AND MEMBERS FANNING
AND JENKINS

At issue in this proceeding is the eligibility of certain striking employees of Sundance Coal Co. (hereinafter Sundance), a former owner of certain mining rights and one of the operators of the mine involved herein. The Petitioner sought to represent a unit comprised of all production and maintenance employees, including truckdrivers, employed by Sundance and the Clayton B. Metcalf Construction Co., Inc., (hereinafter Metcalf), the latter being a contractor formerly engaged by Sundance to perform certain operations at the mine.

On November 14, 1975, the Regional Director for Region 28 issued a Decision and Direction of Election in the above-entitled proceeding¹ in which he found, contrary to the Petitioner's contention, that Metcalf and Sundance were, at the time of an economic stike at the Sundance Mine,² separate and distinct employers. Accordingly, he found the strikers of Metcalf to be eligible, and the strikers of Sundance to be ineligible, to vote in the election.³ Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision on the grounds, *inter alia*, that in finding the strikers of Sundance to be ineligible to vote in the election he departed from officially reported Board precedent. The Employer filed an opposition to the request for review.

In support of its position that the striking employees of Sundance are eligible to vote in the election,

¹ International Union of Operating Engineers, Local No. 953, AFL-CIO, was permitted to intervene in these proceedings; Amcoal, Inc., which purchased Sundance's mining rights was permitted to intervene as a party in interest.

² On December 5, 1974, the Mine Workers commenced an economic strike against Sundance and Metcalf involving employees of both companies.

³ The Regional Director found the following unit to be appropriate for the purpose of collective bargaining:

All production and maintenance employees employed by the Employer in connection with its mining operations at and in the vicinity of the Amcoal Mine, formerly known as the Sundance Mine, southeast of Gallup, New Mexico, including such employees involved in the hauling of coal to the rail site, the loading of coal at the rail site, the maintenance of roads leading to and from the mine and the reclamation of the mine; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Petitioner urged, *inter alia*, (1) that Metcalf is a successor employer to Sundance, and (2) that Sundance and Metcalf were joint employers of the employees employed at the mine. The Petitioner also contended that the Hearing Officer erroneously excluded certain relevant testimony regarding an agreement between Amcoal, Inc., and the Navajo Nation requiring Amcoal to locate and give preference in hiring to former Navajo employees of Sundance.

On December 4, 1975, the Board, by telegraphic order, granted the request for review and directed that the election proceed as scheduled⁴ except it ordered that all strikers, including the Sundance strikers, should be permitted to vote subject to challenge and that all ballots cast in the election be impounded pending the Board's disposition of the case.⁵

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review, including the briefs filed by the Employer and the Petitioner,⁶ and makes the following findings:

Sundance owned the mining rights to the Sundance Mine, involved herein, which is located near Gallup, New Mexico, from September 1973 until October 1, 1975. In August 1974, Sundance and Metcalf entered into an oral agreement whereby Metcalf was to remove the overburden from the coal deposit at the mine site.⁷ Under the terms of the agreement, Metcalf was to be compensated by Sundance on the basis of an hourly rate for equipment rental, which included the cost of renting the machinery plus the personnel necessary to operate it. In addition, Sundance rented fully operated and maintained equipment from Metcalf for purposes other than the removal of overburden. The actual mining, crushing, and processing of the coal was performed by Sundance personnel and equipment.

On December 5, 1974, the Mine Workers made a request of Sundance and Metcalf, as coemployers, for recognition as collective-bargaining agent for the employees employed at the mine site. On that same

⁴ The election herein was conducted on December 5, 1975.

⁵ The Board also ordered that upon completion of the election the Regional Director shall reopen the hearing for the purpose of taking evidence with respect to the present makeup of the bargaining unit; the agreement between the Navajo Nation and Amcoal, Inc.; the effect, if any, of that agreement on the composition of the bargaining unit and the resumption of operations; the successorship issue; and the effect of the above on the eligibility of the challenged voters. The reopened hearing was conducted on December 11, 12, and 15, 1975.

⁶ A brief was also filed by Amcoal, Inc., which was duly considered by the Board.

⁷ The strip mining operation herein involves several different steps: (1) overburden is removed to expose the coal veins, (2) coal is extracted, (3) coal is transported to a site for crushing, (4) processed coal is transported to railheads and loaded for shipping, (5) stripped land is reclaimed.

date, its request being refused, the Mine Workers commenced an economic strike against Sundance and Metcalf.⁸ On December 6, 1974, the instant petition was filed naming Metcalf and Sundance as coemployers. At the time of the filing of the petition herein, Metcalf employed approximately 17 to 19 employees and Sundance employed approximately 15 to 17 employees. As a result of the strike, Sundance closed all operations at the mine on December 25, 1974.

Thereafter, in February 1975, Sundance commenced negotiations with Amcoal, Inc., for the sale of the mine, which was consummated on October 1, 1975.⁹ After its purchase of the mine, Amcoal subcontracted the entire operation of the mine, including the removal of the overburden and the actual mining of the coal, to Metcalf.¹⁰ No employees of Sundance or Metcalf have been engaged in mining operations at the mine site since Sundance closed the mine. The strike has continued to date. Although Metcalf is presently under contract with Amcoal to operate the mine, it has not yet commenced such operations but has been limited to preparing machinery away from the site, to be later used at the mine.

Following the initial hearing on the petition, the Regional Director found that when the mine was in operation, Sundance and Metcalf were separate and distinct employers rather than joint employers as urged by the Petitioner. He therefore concluded that the continuing striking Metcalf employees were eligible to vote in the election but that the former Sundance employees who were striking were not eligible. Our review of the entire record in this matter, including the lengthy record on remand of the case, leads us to the conclusion that the two companies were jointly engaged in the operations of the mine up to the date of the strike and were joint employers of the employees employed at the mine. Consequently, for the reasons expressed herein, we find that the striking Sundance employees were eligible to vote in the election and that their impounded ballots should be opened and counted.

Thus, the record discloses that while Metcalf and Sundance were engaged in their respective operations at the mine Sundance's mine manager, Robert Holmberg, had the day-to-day responsibility for the overall operations of the mine. Reporting to Holm-

berg was his foreman, Charles Scrivner, as well as Clayton Metcalf. Reporting to Clayton Metcalf was his foreman, Wayne Smouse.¹¹ At the time of the strike, Sundance employed employees classified as truckdrivers, machine operators, and laborers. Metcalf employed truckdrivers, machine operators, and mechanics. Although Holmberg did not exercise direct supervisory authority over Metcalf's employees, as mine manager he had managerial authority over the contractors working at the mine site, including Metcalf.¹² Holmberg determined which areas Metcalf was to strip and how much stripping was to occur in accordance with the mining plan for the Sundance Mine.¹³ Holmberg also directed Metcalf to move his equipment and employees where they were needed to perform work other than the removal of overburden from the coal deposit.

Regarding his relationship with Holmberg, Clayton Metcalf testified that he was available to perform "anything that they [Sundance] wanted." In fact, he testified that approximately 30 percent of his duties at the mine involved tasks other than the removal of overburden. The record shows that three of Metcalf's trucks, comprising a substantial portion of the number of trucks being used at the mine, were consistently used to haul coal from the mine to the railheads, and one of Metcalf's trucks was occasionally used to haul coal from the pit to the crusher. In addition, Metcalf's equipment was also used to load coal onto railroad cars; Metcalf maintained a water truck driver on a regular basis to keep the roads free from dust; and Metcalf retained one employee to keep the roads in the pit smooth to facilitate the access of trucks.¹⁴

In addition to the regular utilization of Metcalf's employees and equipment by Sundance for purposes other than the removal of overburden, the record contains further evidence highlighting the degree of interdependence between the two companies in accomplishing the total mining operations. Thus, on

¹¹ The record reflects that Clayton Metcalf or his supervisor, Smouse, generally exercised immediate supervision over Metcalf employees, while Holmberg and his foreman supervised Sundance's employees. However, the record also shows that the crusher screen and conveyor belt were leased by Metcalf from the distributor, and operated by Sundance employees. Metcalf also leased other equipment to Sundance, and assigned some of his equipment and men to Scrivner unless he himself needed it. Metcalf testified that "Whenever I had stuff rented to them I didn't pay any attention to it, they supervised the people."

Thus, we cannot agree with our dissenting colleague's conclusion that Holmberg "did not exercise any supervisory authority over Metcalf's employees."

¹² In addition to Metcalf, other contractors occasionally hauled coal for Sundance.

¹³ Sundance's vice president testified that the mining plan regarding stripping and the extraction of coal was based on the need to mine a minimum of 100,000 tons of coal per year to keep leases with the Santa Fe railroad valid.

¹⁴ The record discloses that Sundance was charged on an hourly basis whenever Metcalf's equipment and personnel were used for any function other than the removal of the overburden.

⁸ It appears from the record that approximately 2 of the Metcalf employees and approximately 15 of the Sundance employees went out on strike.

⁹ Amcoal had no employees engaged in work at the mine site and has no plans to engage in mining operations there.

¹⁰ The record discloses that on October 1, 1975, Sundance sold to Amcoal, Inc., all of its surface mineral rights, rail trackage leases, some stating mining leases, and approximately one-half of the equipment at the mine. Sundance has no financial interest in Amcoal and there are no common corporate officers or common stock ownership between the two companies.

various occasions, presumably on an "as needed" basis, Metcalf's mechanic performed repairs on Sundance's equipment, and on at least two occasions Metcalf's loader was observed removing coal from the pit. Metcalf also had a loader stationed at the crusher taking coal and putting it into a feeder. Sundance Foreman Scrivner testified that Sundance utilized Metcalf's employees to assist them in accomplishing certain tasks. For example, Metcalf's employees were utilized when needed to stir up the coal to enable Sundance's front-end loader to operate and they would assist Sundance in various other ways.¹⁵ It appears from the record that at such times Sundance's supervisors were involved in directing Metcalf's employees. There is also testimony indicating that at various times Sundance's employees operated Metcalf's equipment and Metcalf's employees operated equipment owned by Sundance.

In view of the foregoing, and considering the realities of the coal mining industry, it appears clear that Sundance and Metcalf were jointly involved in the mining operations at the mine site. The record shows that in performing the work at the mine site there was a necessary integration and interdependence of operations for mining of the coal. Thus, as indicated, Sundance's mine manager had the day-to-day responsibility for the overall operation of the mine and all mining operations were performed in accordance with Sundance's mining plan. Metcalf's entire operation in removing the overburden, as well as other collateral duties performed by it, depended entirely on Sundance's decisions regarding the site for stripping and the amount of stripping which was to occur. As a result, Sundance exercised considerable control over the manner and means by which Metcalf performed its operations. It is also clear that employees of Metcalf and Sundance worked closely together in various aspects of the strip mining operation. Employees of both companies had similar job classifications, performed many of the same functions, and worked in close proximity to one another. Moreover, when necessary, Metcalf's employees assisted Sundance in the performance of tasks relating to the mining of the coal and shared a community of interest with them. It is, in a sense, consistent with the integration previously existing that when Amcoal purchased the mine it proceeded to turn over the entire operation, including that portion formerly performed by Sundance, to Metcalf.

In these circumstances and particularly recognizing the nature of mining operations, we find that any

¹⁵ Scrivner also testified as follows: "Well, we loaded the coal with our loaders from the mine and then brought it to the crusher. Sometimes Mr. Metcalf's men helped us with that and helped us with the loading. We worked closely together all the time as far as I could tell."

meaningful collective bargaining for the employees at the mine would have required the participation of both Sundance and Metcalf and we conclude that Sundance and Metcalf were in fact joint employers for the purpose of operating the mine.¹⁶

Inasmuch as the Sundance employees as well as the Metcalf employees struck at a time when the joint employer relationship existed and they continued to be on strike as of the date of the election, which was less than 1 year from the commencement of the economic strike, all of these strikers were therefore eligible to vote.

Accordingly, we shall remand the case to the Regional Director in order that he may open and count the ballots¹⁷ impounded by our order dated December 4, 1975, including the challenged ballots cast by the strikers of Sundance and Metcalf, pursuant to our Decision on Review, and take such further action as he deems necessary in accordance with the Board's Rules and Regulations.

MEMBER JENKINS, dissenting:

I would affirm the decision of the Regional Director finding Sundance and Metcalf to be separate and distinct employers. Therefore, like the Regional Director, I would find the economic strikers of Sundance ineligible to vote in the election directed among employees of Metcalf. The majority predicates its finding that Sundance and Metcalf were joint employers basically on the fact that they both participated in the operations of the mine and that Metcalf's operation in removing the overburden depended on Sundance's decisions. However, the mere fact that a contractor at a jobsite (as distinguished from its employees) receives instructions from a general contractor does not establish a joint employer relationship. In fact, the record as a whole overwhelmingly establishes that Sundance and Metcalf were separate employers.

During the relevant time, Sundance owned the mining rights to the Sundance Mine, performed certain mining operations, and subcontracted other operations to Metcalf and others. The record supports the Regional Director's finding that Metcalf and Sundance operated independently as separate autonomous enterprises under separate management direction and control. While it is true that Sundance's mine manager, Holmberg, was responsible for the overall operations of the mine and had authority

¹⁶ *Jewell Smokeless Coal Corporation and Subsidiaries*, 170 NLRB 392 (1968); cf. *Norma Mining Corporation, et al.*, 101 NLRB 944 (1952), enf. 206 F.2d 38 (C.A. 4, 1953). In view of our finding that Metcalf and Sundance were joint employers of the employees employed at the Sundance Mine, we find it unnecessary to reach the question of whether Metcalf is a successor employer to Sundance.

¹⁷ In the event the ballots of any of these strikers were also challenged for other reasons, the Regional Director shall resolve those issues in accordance with normal Board procedures.

over all the contractors working at the mine site, including Metcalf, he did not exercise any supervisory authority over Metcalf's employees, who received their instructions from Metcalf's own supervisors. Whenever Metcalf equipment and personnel were used by Sundance for any function other than the removal of the overburden, Sundance was charged on an hourly basis. The record establishes that Metcalf had no financial interest in Sundance.

Of great importance is the clear fact that Sundance and Metcalf had separate and independent labor relations policies and practices. Furthermore, there was no transfer of employees between companies and separate payroll records were maintained.

Based on the above considerations, I conclude that the Regional Director was correct in determining that the striking Sundance employees are ineligible to vote in the election directed among the Metcalf employees.