

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

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

and

Case 9-CA-42057

UNITED MINE WORKERS OF AMERICA

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S**  
**REPLY BRIEF ON THE SINGLE EMPLOYER ISSUE**

Although Massey and Mammoth's status as a single employer was not specifically pled in the complaint, there was ample reason for Massey and Mammoth to comprehend the overarching fact that they were defending against a claim that they were liable for one another's actions. Paragraph 5(a) of the complaint alleged that Massey and Mammoth were agents of each other, acting for and on behalf of each other. The complaint in no way, shape or form purported to limit liability for one or the other entity to any specific violation. Indeed on page 13 of Massey's "Brief of Respondent Massey Energy Company in Response to National Labor Relations Board's Invitation Regarding the Single Employer Theory of Liability," it acknowledged that the General Counsel alleged that Mammoth and Massey were agents of one another and that "each was responsible for the other's conduct with respect to the issues in this case." Given this recognition that each entity was being alleged to be fully responsible for the actions of the other, it is difficult to comprehend how Massey or Mammoth would have tried this case any differently had single employer status been explicitly pled.

In *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993), the Board held that there was no requirement that the General Counsel file exceptions to an Administrative Law Judge's

decision regarding an employer's denial of access to union pickets where the Administrative Law Judge failed to consider the General Counsel's disparate treatment argument, but found a violation on another theory, i.e. an accommodation analysis. In the case at hand, the General Counsel did not file exceptions to an ALJ's decision finding that Massey and Mammoth were liable for one another's actions under a direct participation theory, rather than a single employer or agency theory. As in *Pay Less*, for all intents and purposes, both theories have been fully litigated. Although the parties may have introduced the evidence with an eye toward fitting it into the categories of an agency analysis rather than a single employer analysis, the simple truth is that the same evidence would have been introduced regardless. Ample evidence relevant to all issues in a single employer analysis was introduced as Mammoth and Massey attempted to prove that they were not agents of one another, including voluminous evidence on the most important of the factors in single employer analysis, central control of labor relations. See, *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-1284 (2001). Massey's argument that it would have introduced evidence that it restructured its organization in an effort to avoid single employer liability following a prior adverse determination rings hollow. The central issue for purposes of either a single employer analysis or an agency analysis is how the entities are structured – not the motivation for their structure.

Extensive evidence was produced which showed how Massey controlled Mammoth's labor relations functions. Michael Haynes, who was manager over the Stockton and 130 mines during the last 2 years that Horizon operated those mines, testified that he worked with Massey's Senior Vice-President of Group Operations H. Drexel Short, Jr. to offer interviews to non-unit employees while Horizon was still running the Cannelton operations. (Tr. 904-905) (See, G.C.

Ex. 11(a) at pp. 5 and 12, G.C. Ex. 11(b) at p. 16) <sup>1/</sup> Haynes testified that during the time that he was coordinating with Short with respect to making offers of interviews to the unrepresented Horizon employees regarding the staffing of the mine, Haynes had never even heard anything about Spartan Mining or Mammoth Coal operating the old Horizon facilities. (Tr. 918) Indeed, Short participated, at least initially, in the interviewing of unit employees for Mammoth. (Tr. 2871-2872)

According to Massey's Coal Services Director of External Affairs and Administration Jeff Gillenwater, the resource groups (of which Mammoth is one) are usually given a wage rate for a position which is set by senior managers and Massey's Board of Directors. (Tr. 2127, 2201) Gillenwater testified that the benefit package of employees is also set by senior managers and Massey's board of directors. (Tr. 2137, 2201) Gillenwater further testified that Blankenship or a compensation committee comprised of Massey's board members set benefits. (Tr. 2201-2202) Blankenship testified that reimbursement packages for the different Massey operations are made at Massey's level, apparently ultimately by him. (Tr. 1594-1595) Indeed, Blankenship appears to become personally involved in many details associated with the human resources functions, such as exploring a program involving driving mileage related to retention issues. (Tr. 2149-2150)

There was evidence that even in day-to-day operations, Massey controls Mammoth's labor relations. For example, Mammoth Human Resources Director Kevin Doss' notes indicate that on February 23, 2005, Massey's Drexel Short directed that each Mammoth employee involved in a safety-related shut down on part of the mine due to ventilation issues was to sign an agreement

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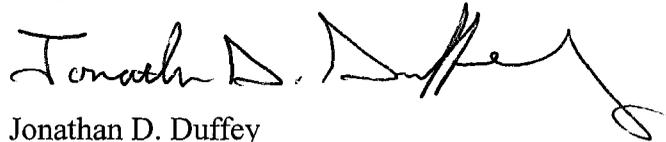
<sup>1/</sup> Although Massey's Coal Services Director of External Affairs and Administration Jeff Gillenwater described Short as working for Massey Coal Services, Short, with the title used by Gillenwater in describing him, is clearly listed among the officers of Respondent Massey in its annual reports. (G.C. Ex. 11(a), Form 10-K filing at page 11; G.C. Ex. 11(b), Form 10-K filing at page 16).

assenting to adherence of a roof control plan. Short further ordered Doss to make certain that a suspension letter went into each such employee's file. (Resp. Mammoth Ex. 65, under 2-23-05 date.) The record contains myriad facts such as these which support the conclusion that Massey and Mammoth are a single employer.

In sum, Massey and Mammoth essentially litigated the single employer issue by litigating the mutual agency issue. Any doubts that Massey or Mammoth may have had about whether they were litigating the single employer question were surely put to rest, at the latest, when they read Counsel for the General Counsel's Brief to the Administrative Law Judge. <sup>2/</sup> In any event, the Board has now provided both Respondents with ample opportunity to make whatever arguments they wish to make on the single employer issue. The Board can and should consider the single employer issue and the record evidence is more than adequate to do so.

Dated at Cincinnati, Ohio this 3rd day of May 2011.

Respectfully submitted,



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<sup>2/</sup> It should be noted that the original trial attorneys, Donald Becher and Engrid Vaughan, have retired from the Agency.

**CERTIFICATE OF SERVICE**

May 3, 2011

The undersigned hereby certifies that Counsel for the Acting General Counsel's Reply Brief on the Single Employer Issue was electronically filed and also served by electronic mail to the following persons:

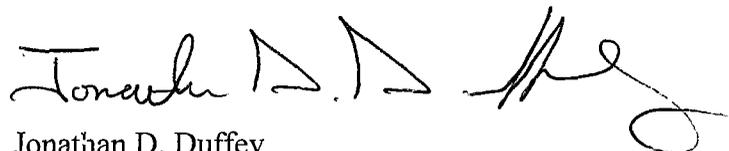
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