

UNITED STATES GOVERNMENT
National Labor Relations Board



Memorandum

TO : Emil Farkas, Director
Region 9

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: A. T. Massey Coal Co., Inc. et al.
Case 9-CA-21448-1 thru 9
9-CA-21449-1 thru 4
9-CA-21450-1 thru 9

DATE: April 23, 1985

These cases were submitted for advice as to (1) whether a parent corporation and certain of its subsidiary corporations constitute a single employer; (2) if so, whether they violated Section 8(a)(5) by refusing to acknowledge such single employer status in collective bargaining for a contract. In addition, and apart from the single employer issues, there are issues of (3) whether any of the companies violated Section 8(a)(5) by failing to provide information requested by the Union, and whether any of the companies unlawfully failed to bargain about the decision to close certain mines.

I. Background

A. T. Massey Coal Co. ("A.T. Massey") was a family held coal company purchased by St. Joe Minerals Corp. in 1974. In 1980 St. Joe Minerals and Scallop Coal Corp., a member of the Royal Dutch Shell group formed a joint venture which acquired A. T. Massey Coal Co. St. Joe contributed its coal assets and Scallop contributed \$680 million in cash and installments. 1/ A. T. Massey is the sole or majority owner of approximately 60 corporate subsidiaries, most of which are coal mines or coal processing facilities (referred to herein as operating companies). As will be detailed herein, these operating companies are organized into "Resource Groups," with an A.T. Massey company functioning as the head of each resource group. In addition, A.T. Massey also owns subsidiaries which provide services to all the subsidiaries. Among such service companies are Massey Coal Sales, Inc., a coal brokerage company which develops customers and negotiates contracts for the domestic sale of coal, 2/ and Massey Coal Services, Inc. which makes available professional services relating to engineering and the administration of benefits.

1/ St. Joe Minerals subsequently merged with Fluor Corp in 1981.

2/ Contracts negotiated by Massey Coal Sales, Inc. may be filled by coal produced by "non-Massey" mines. A.T. Massey asserts that approximately 35% of the coal sold by Massey Sales over the last several years has come from such mines.



For several years, the United Mine Workers of America (the "Union") has represented employees at at least 16 of the Massey operating companies in three or four Resource Groups. ^{3/} These companies were all signatories to the 1981-1984 National Bituminous Coal Wage Agreement ("NBCWA") negotiated by the Union and the Bituminous Coal Operators Association (the "BCOA"), a multiemployer association. Some of the A.T. Massey companies were members of the BCOA; others had individually agreed to be bound by the terms of that agreement. It is undisputed that each company was a separate signatory to the 1981 NBCWA and that each constitutes a separate appropriate bargaining unit.

In late 1983 and early 1984 those companies ^{4/} which were members of the BCOA timely withdrew from that association and all notified the Union of their desire to negotiate individually for a successor to the NBCWA which was to expire on September 30, 1984. In June, the companies began requesting the Union to schedule negotiating sessions. In July, the Union sent each of the companies a notice of termination of the NBCWA and an extensive request for information. The companies were informed that if they desired to sign a letter of intent to be bound by the 1984 NBCWA to be negotiated with the BCOA, it would not be necessary to provide the requested information. ^{5/} The companies declined to sign the letter of intent and responded to the information request. The Union does not allege any violations with respect to the companies' compliance with this request.

In early August, the Union appointed a single negotiating team for negotiating with all the Massey subsidiaries. The companies rejected a Union invitation to meet jointly on August 20. Accordingly, the Union has met

^{3/} In the "Wyomac" group the Union represents employees at Winston Coal Co., M & B Coal Co., Robinson Phillips Coal Co., Simron Fuel Co., Shannon Pocahontas Mining Co., Royalty Smokeless Coal Co./Trace Fork Coal Co. (two separate corporations which admit to being a single employer), and Big Bear Mining Co. In the "Rawl" group the Union represents employees at Sprouse Creek Processing Co., Big Bottom Coal Co., Tall Timber Coal Co., Pikco Mining Co. and Rocky Hollow Coal Co. In the "Pike County" group the Union represents employees at Joboner Coal Co., TCH Coal Co., and Hopkins Creek Coal Co. (Hopkins Creek signed the agreement negotiated by the Union and the BCOA in 1984 and is not the subject of any of the instant charges.) The Union also represents employees at Dehue Coal Corp. which may or may not be part of the Rawl Group. The Union also has collective bargaining relationships with a few additional subsidiaries in Pennsylvania, but the negotiations with these companies are not the subject of the instant charges.

^{4/} Hereinafter "the companies" refers to the fifteen signatory companies (excluding Hopkins Creek Coal Co.) listed in n. 3, supra.

^{5/} This letter was sent to all signatories of the 1981 NBCWA which had withdrawn from the BCOA and/or expressed a desire to negotiate individually; this group includes hundreds of companies not affiliated with A.T. Massey.

separately with each company. Negotiation sessions began on Thursday, August 16. Before the contract expired on September 30, the Union held meetings with 4 to 7 companies each week. 6/

The Union has insisted throughout the negotiations that the companies are part of a single employing entity comprised of the entities in the Resource Groups and A.T. Massey. While the Union does not dispute that each company comprises a separate bargaining unit, it has demanded that the head of each Resource Group and A.T. Massey acknowledge their single employer status at the bargaining table and that the companies bargain over certain proposals regarding transfer and job bidding (referred to herein as "panel rights" proposals) as a single employer. The Union has further submitted to the signatory companies, the Resource Group heads and to A.T. Massey requests for information regarding the relationship among all these companies. (This request is referred to herein as the "second" or "single employer" information request). The Union has filed charges alleging that all these companies violated Section 8(a)(5) by refusing to bargain as a single employer, specifically by refusing to bargain over panel rights as a single employer and by failing to supply the requested information. The Union further contends that certain of the operating companies have violated Section 8(a)(5) by refusing to supply financial information requested by the Union when they demanded concessions on the grounds that they were losing money. These companies are Winston, Big Bear, Shannon Pocahontas, Robinson Phillips, Simron and M & B. Finally, the Union contends that certain companies, which announced that they were closing their mines when the union rejected their concession proposals, violated Section 8(a)(5) by refusing to bargain over the decision to close.

The signatory companies all contend that they are separate employers and consequently have no authority or obligation to bargain about panel rights at other companies. A. T. Massey and the Resource Group heads deny that they are a single employer with the signatory companies and contend that they therefore have no obligation to bargain with the Union regarding these companies or to respond to the Union's information requests. 7/

All the respondent companies further argue that the extensiveness of the Union's information requests, its delays in scheduling negotiating sessions and its statements away from the bargaining table all demonstrate that the Union lacks a good faith intent to reach agreement and that its bargaining demands and information requests are made only to punish the companies for having withdrawn from the BCOA.

6/ During the week of September 24 only two sessions were held, both on Friday September 28. The Union cancelled sessions scheduled for Monday through Thursday because it was conducting a ratification vote on the proposed 1984 NBCWA which had just been negotiated with the BCOA.

7/ The signatory companies' defenses regarding the information request, based on relevance, compliance, and confidentiality, vary from company to company and will be detailed below.

II. Single Employer

A. Interrelation of Companies within the Resource Groups

1. Wyomac Group. This group is headed by Wyomac Coal Co., a non-signatory company and includes the following signatory companies: Robinson Phillips, Shannon Pocahontas, Big Bear, Winston, Simron, M & B, and Royalty Smokeless/Trace Fork. All companies are subsidiaries of A.T. Massey; Wyomac Coal Co. holds a partnership interest in M & B. Four of these companies--Robinson Phillips, Big Bear, Simron and M & B --share a common president, Norman Lester. In addition, W.B. Massey serves as Secretary and/or member of the Board of Directors for at least seven of the Wyomac signatory companies.

With respect to labor relations matters, managers of the individual companies direct the employees of those companies in the day-to-day performance of their duties and process grievances at the first and second step. Grievances at the third step are handled by Wyomac Human Resources Manager John Harsanyi. Arbitrations -- the fourth step -- are handled by Harsanyi or consultant Tom Woolwine. On occasion, employees of one subsidiary have been "loaned" to another. That is, the employee was paid by his original company but performed service for another company. Gary Hurd, a Robinson Phillips employee has accepted applications for employment at both Robinson Phillips and Simron. In separate negotiations, the companies have in the past granted employees limited panel rights to other companies within the group.

In the recent collective bargaining for a contract, Harsanyi has been a member of the negotiating teams for all the Wyomac group companies. In addition, Norman Lester has been the only other company representative for the four companies of which he is president. ^{8/} Finally, in late September Harsanyi, Todd Kiscaden an employee of Massey Services, and Knox Cline, superintendent of Winston met with employees at shift change and discussed the company's financial posture and its claim that it would not operate under the BCOA agreement.

With respect to the management and operation of the Wyomac companies, the operating companies assert that each mine president or superintendent (often the same person) is responsible for the operation of the mine. Wyomac admits that it was created to provide support services to the companies within the group. Specifically, it provides accounting, engineering and administrative services, including calculation of payroll, benefits and other costs, purchasing, surveying, applications for permits and in one instance a request for exemption for all the companies from government safety regulations. James Joyce, who was president of Wyomac until June 1984 allegedly stated that he spent most of his time at the various mines within the Wyomac group and that heads of resource groups like himself were "gods" within the group, having broad authority to run their operating companies as they saw fit. ^{9/}

^{8/} The third member of the team is a lawyer. Three Wyomac companies are represented by George J. Oliver. The other Wyomac companies are represented by another law firm.

^{9/} As noted infra, although Resource heads might be "gods" within each Resource group, they often take direction from Massey itself.

In the past Wyomac has announced policies that appear to be applicable to the other companies in the group. A 1979 memorandum, regarding use of Company vehicles, was issued by the Wyomac Director of Health and Safety. It applies to all persons assigned a company car or who are employees of Wyomac and/or any other company "under the contract" of Wyomac. The memorandum was distributed to all salaried personnel of Robinson Phillips, Simron and Winston. Similarly, an undated booklet, "Safety Practices, Rules, Regulations, and Procedures for Royalty Smokeless Employees" is also entitled "'Safety Practices,' 'Rules, Regulations and Procedures' for Employees of Wyomac Coal Co. and all Operations of the Wyomac Coal Company Divisions."

Those mines within the group which do not have processing facilities sell their coal to processing companies within the group, but the companies assert these sales are arms length transactions.

Robinson Phillips, Winston and Simron share a common office and office equipment in Marianni, W. Va., with an office staff which performs bookkeeping and personnel clerical functions. Each of these mines also maintains a separate mine office.

There is evidence that some supervisory personnel have moved from one of the companies to another. 10/ Supervisors of all these companies appear to be covered by the same pension plan and receive credit under the plan for prior service with other companies within the group. Similarly, there is evidence of interchange of equipment within the group. The companies contend, however, that free loans of equipment between arms'-length entities are common within the industry. It is thus not clear what, if any, significance should be attributed to the interchange of equipment.

2. Rawl Group. This group is headed by the non-signatory Rawl Sale & Processing, Inc. and includes signatory companies Sprouse Creek, Tall Timber, Rocky Hollow, Pikco and Big Bottom. All of these companies are wholly owned subsidiaries of A.T. Massey. W. B. Massey, Paul Barber (General Counsel of Massey Services) and Paul Sobolewski (an officer of A.T. Massey) sit on the Board of Directors of each company. 11/ Until recently Sidney Young III was president of Rawl and president or Board member of most of the operating companies in the group. (He now works for a company unrelated to A. T. Massey.)

With respect to labor relations, applicants for employment at any of the Rawl group facilities submit applications and are interviewed at the Rawl facility. Interviews for all companies are conducted by a panel consisting of Arch Runyon--who has been introduced to the Union as an employee of Blackberry Creek and is also referred to as Personnel Director of Rawl--, other Rawl personnel staff and one or more presidents of operating companies, selected on a rotating basis. There is some evidence that employees working for one company have been carried on another company's records. Employees have no panel rights within the group. Managers at the individual companies direct

10/ It may be that the "transfers" are accomplished by having these individuals formally terminate their employment at one company and become hired by the other.

11/ Sobolewski may not be a member of the Board of Pikco.

employees in day-to-day performance of their work and process grievances at the first and second step. Runyon handles grievances for all the companies at the third and fourth (arbitration) step. Runyon is also a member of the negotiating team of each company in the current negotiations.

With respect to integration of operations, the signatory companies are all "contract mines" for Rawl or for Blackberry Creek Coal Co., another A. T. Massey subsidiary in the group which employs no unit employees and has never been signatory to an agreement with the Union. In fact, Blackberry Creek seems to share some of the functions performed by the Resource Group head company. Rawl admits that it provides administrative and professional services such as engineering, bookkeeping, payroll and accounting and safety training to the operating companies in the group. Blackberry Creek provides engineering and bookkeeping services to the companies under contract to it. ^{12/} Rawl owns the coal processing facility operated by Sprouse Creek. It leases the facility and equipment to Sprouse Creek. Rawl also has one contract mining arrangement at the present time--with Rocky Hollow. ^{13/} Blackberry Creek owns or leases all the lands on which Tall Timber, Big Bottom and Pikco operate. ^{14/} It provides the equipment used at these mines. All or almost all of the coal mined by Rocky Hollow, Tall Timber, Big Bottom and Pikco is processed at Sprouse Creek. Tall Timber and Pikco told the Union that its coal is stockpiled at Blackberry Creek which arranges for its transport to Sprouse Creek and sales to customers.

The Union presented some evidence of interchange of equipment within the group. As with similar evidence regarding Wyomac, the significance of this evidence is not clear. (See supra p 5). Supervisory personnel have worked for more than one of the companies but the companies contend that each terminated his employment at one company before being newly hired at another.

3. Dehue. Dehue Coal Company was purchased by A. T. Massey in 1982 from Jones & Laughlin. ^{15/} Although Rawl Sales & Processing provides some services to Dehue, the company contends it is not considered part of the Rawl Resource Group. In the 1983 Keystone Coal Industry Manual, an industry publication, however, the Massey advertisement refers to Dehue as "Massey's newest acquisition in the Rawl Resource Group." Dehue president, Richard Zigman, was previously employed as a project engineer by Rawl Sales & Processing. Prior to Zigman the company president had been Sidney Young III (who had also been president of Rawl and other subsidiaries in the Rawl Group). As with all the other Massey subsidiaries, W. B. Massey is the Secretary of Dehue.

^{12/} Rawl charges the companies 10 cents per ton of coal for these services.

This charge apparently does not vary with the frequency of the use of services. There is no evidence regarding the financial arrangement between Blackberry Creek and its contract mines.

^{13/} In the past Rawl has entered into contract mining arrangements with other companies as well.

^{14/} Blackberry Creek also currently has contract mine arrangements with other companies, some of which are not A. T. Massey subsidiaries.

^{15/} When it was owned by Jones & Laughlin, Dehue was signatory to the 1981 NBCWA. It retained all the former employees after the purchase by A.T. Massey and remained a signatory to the 1981 NBCWA.

Zigman told the Union during negotiations that most of Dehue's coal is sold through Massey Sales. About half of its production goes to Jones & Laughlin pursuant to a long term contract negotiated by Young. The other half is sold on the spot market to customers developed by Massey Coal Sales. Proceeds for all sales go directly to a Richmond accounting firm retained by A.T. Massey to keep books and records for all its companies. Dehue's payroll records are kept at the Dehue offices but all other financial records are kept in Richmond.

Rawl provides engineering services to Dehue. Some equipment has also been purchased from Rawl but there is no indication this was not a bona fide arms length sale.

With respect to labor relations, although Rawl personnel director Arch Runyon handled some grievances for Dehue shortly after it was acquired by A. T. Massey, Dehue contends that all such matters are now handled by Dehue's personnel manager. The company retained the same insurance carrier which had provided health benefits when the company was owned by Jones & Laughlin. 16/ There is no evidence of employee interchange with other Massey subsidiaries and no evidence regarding the company's hiring practices. The negotiating team consists of Zigman, another Dehue manager and attorney Forest Roles of the Smith, Heenan firm.

4. Pike County Group. This group is headed by non-signatory Pike County Coal Co., Inc., and includes signatory companies, TCH, Joboner and Hopkins Creek. 17/ All of these companies are wholly owned subsidiaries of A.T. Massey. 18/ Until recently Scott Kiscaden was president of both Pike County Coal Co. and TCH and Charles Hibbits was president of both Joboner and Hopkins Creek.

Information regarding the operation of the companies has been obtained from depositions recently taken from: Scott Kiscaden, president of Pike County, Tommy Dales, president/superintendent of Joboner, 19/ Randy May, president/superintendent of TCH, and Jess Justice, president/superintendent of Hopkins Creek. 20/

With respect to labor relations, Dales of Joboner testified that he consults Roger Cantrell, Pike County Safety Director, when he has labor problems regarding safety; other grievances he resolves on his own. Justice of Hopkins Creek testified that although he is responsible for the final decision on labor relations problems, he will consult with Cantrell, May, Dales or Kiscaden if he is dealing with a matter he has not previously encountered.

16/ After the sale Dehue switched from a straight premium to a self insured program administered by the carrier.

17/ As noted at n. 3 supra, Hopkins Creek elected to remain in the BCOA in 1984 and is party to the 1984 NBCWA.

18/ In a deposition taken recently Scott Kiscaden, president of Pike County Coal testified that Sycamore Mining Co., an A.T. Massey subsidiary, holds the stock of Joboner.

19/ Dales' health insurance identification card states his employer is TCH.

20/ These depositions were taken by the Union in connection with a Section 303 suit filed by TCH against the Union.

Roger Cantrell handles step three grievances and arbitrations for all these companies. Justice further testified that he did not make the decision to give Hopkins Creek employees a vacation bonus and does not know who did. Justice did not make the 1983 decision to close a section of the mine and to layoff employees and does not know who did. ^{21/} Cantrell also conducts all safety training for employees of these companies. In the current negotiations, Cantrell is a member of the negotiating team for TCH and Joboner.

With respect to management and integration of operations, the companies assert that the president/superintendent of each mine is independently responsible for its operation. However, there is evidence that these officials are not independently responsible. May of TCH testified he had no idea as to his profit per ton of coal and could not recall the contract price per ton for coal sold or transferred nor could he recall the production cost per ton at TCH. May considers TCH "a Massey operation" and states "it is understood" he answers to Kiscaden. Dales of Joboner testified that all of Joboner's coal is transported to TCH, that he receives no check for proceeds of the sale of coal. He does not keep the company's books and does not know who does. He signs checks only for the company's payroll and does not know where the money for the payroll comes from. He does not know if the company maintains any other bank accounts and he has no access to funds other than the payroll account. He does not pay for supplies or equipment purchased for the mine and does not know who does. Kiscaden testified that Pike County tracks the weekly costs of Joboner and Hopkins Creek and gives each mine a monthly report. Dales testified he receives a weekly cost sheet from Buddy Glenn, the comptroller for Pike County, showing Joboner's expenses compared to its income. Jess Justice of Hopkins Creek testified that all of Hopkins Creek Coal is delivered to TCH. He does not know whether there is any contract written or oral, between Hopkins Creek and TCH regarding this arrangement. Hopkins Creek does not receive funds from TCH for this coal and Justice does not know from whom Hopkins Creek receives money. He does not know the price the mine receives for its coal or what the company's profit is. He knows the cost of producing coal from weekly cost sheets. He does not know who prepares them; he receives them from Randy May (president of TCH). Justice signs the paychecks for all employees of the company but he does not know who sets his salary or how it was determined that he would receive a raise. Similarly he does not know whether he is covered by a pension plan, life insurance or Workers Compensation and does not know whether the company's health insurance plan is a self insured program. He does not pay for purchase of equipment or supplies for the mine. Pike County admits that it provides engineering and accounting services to the companies in the group. The companies are charged a fee per ton.

21/ He was superintendent but not president of Hopkins Creek at that time.

5. Other evidence. The Massey Doctrine is a document prepared by E. Morgan Massey, president of A.T. Massey. It purports to be a statement of the "philosophy of Massey Coal Company," and a "planning framework for defining responsibilities in a manner designed to achieve its corporate objectives effectively and responsibly." The document articulates a management strategy based on resource units as the corporate operating unit. The document defines a "resource unit" as "a geographically contained pool of coal reserves, labor, capital and management" and further as "one or more coal properties within a reasonable proximity in a common labor market under a single management organization with a separately assigned or identified quantity of capital available." The management strategy recommended is to "organize Massey Coal Company into decentralized mining operations (resources units) with support functions, including engineering, accounting, purchasing and personnel, as close to the operation as is practical."

A.T. Massey admits that "The Massey Doctrine" was prepared by Morgan Massey but contends that it was merely a set of recommendations drafted in 1982 at the request of the partnership which had recently taken over A.T. Massey. 22/ It contends that the document was never adopted by the A.T. Massey Board of Directors. However, to the extent that the document purports to be descriptive of facts which exist, rather than prescriptive of policies that Morgan Massey recommends, the document is admissible as evidence of how the companies operate. Of course, as to prescriptive matters, there is a need to produce evidence that a particular recommendation in the Doctrine has been implemented. This matter is further discussed infra.

B. Relation of A.T. Massey with Resource Groups and Operating Companies

The Union alleges that A.T. Massey, in conjunction with its service subsidiaries Massey Services and Massey Coal Sales, constitute an integrated enterprise with the operating companies so as to be considered a single employer.

First, with respect to ownership and financial control, all of the companies share a common ownership in that A.T. Massey is owned by the St. Joe/Scallop joint venture and the remaining companies are subsidiaries of A.T. Massey. By virtue of its ownership of the operating companies, A.T. Massey appoints the officers and boards of directors of the companies. William Blair Massey, who is Secretary of the operating companies, also holds that office in A.T. Massey and Massey Coal Sales. Paul Barberly and Stanley Sobolewski, who as noted above, sit on the boards of several of the Rawl group companies, are respectively, Sr. Vice President/ General Counsel and Vice-President-Planning and Development/Treasurer of A.T. Massey.

With respect to integration of operations and management, as noted above, the companies contend the officials of each operating company have total responsibility for the operation of their companies. In contrast, the Massey Doctrine articulates a corporate strategy of management at the resource group level for the production of coal. The Doctrine also sets forth a sales strategy at still a higher level. In this regard, it describes a

22/ See p. 1, supra.

"regionalized" sales strategy for handling sales planning and direction and contract service and administration through the three Massey sales companies: Massey Coal Sales (for sales in the U.S. and Canada), Massey Coal Export Co. (for sales to all other countries) and Tennessee Consolidated Coal Co. (for sales of Tennessee-and Alabama-produced coal to all areas). Furthermore, the Doctrine acknowledges that a decentralization policy is limited by the need to coordinate the decentralized units in keeping with the "overall objectives, plans and controls [of] overall management." Accordingly, "a strong centralized policy making team is necessary to develop market planning, production, financial and human resource planning and control." Thus, the Doctrine assigns to "central staff" responsibility for "developing and implementing guidelines and developing overall strategies and action plans, predicting future sales needs and directing overall sales planning." And, it concludes:

The following responsibilities clearly belong to the central management team

* Corporate Planning

- Sales analysis and planning
- Financial analysis and planning
- Tax planning
- Human resource planning

* Financial Control

- Corporate reporting
- Internal audit

*Corporate and Legal Administration
*Resource Unit Development and Control

- Explorations
- Operations Control

*Public, Government, Partnership Relations
(emphasis added)

As noted above, A.T. Massey denies that the Massey Doctrine was ever adopted in its entirety. The following independent evidence in addition to the descriptions of the Resource Groups in Part A, supra, is relevant to show the implementation of the Doctrine's recommendation that A.T. Massey retain a central management function.

"The Massey Story II" a 1983 sales publication of A.T. Massey describes the operation of the "Massey organization." Under the heading "Massey Operating Headquarters" the document states "To effectively manage A.T. Massey's vast resources of coal, labor and capital, Massey provides direction and support to its Resource Groups through its executive offices in Richmond, Virginia and three regionally located operating service groups: Massey Coal Services in Beckley, West Virginia; Pennsylvania Mine Services in McMurray, Pennsylvania and Tennessee Consolidated Coal in Jasper, Tennessee."

Further evidence of central control by Massey is found in statements made by James Joyce, former president of Wyomac and since June 1984, a consultant to Wyomac. ^{23/} According to Joyce, ^{24/} Massey operates with a "centralized . . . policy team that plans virtually everything." The team included the Vice-President of Finance, John Smith who was formerly A.T. Massey Vice President of Mining and is now President of Massey Services, and E. Morgan Massey, himself. Joyce and other Resource Group heads attended regular monthly "operating" meetings with these A.T. Massey officials. Topics for discussion included the financial condition of companies, safety issues and labor relations. Joyce further stated that "division heads" [i.e. resource group heads] could be called into other "policy team" meetings when a matter under discussion affected their division or they had particular expertise. The division heads also participated in annual corporate level planning meetings. The division head would prepare a financial analysis for his company and would present five and ten year plans including financial forecasts for the division, expansion plans, need for capital outlay, total money needed for the division, anticipated return on investments and forecasts for the number of employees. These budgets were subject to approval and modification by Morgan Massey and Smith.

Joyce stated that division managers had broad authority to run their operating companies as they saw fit but on many occasions they would consult directly with Mr. Massey regarding a particular decision.

Scott Kiscaden, president of Pike County, corroborates Joyce in some respects. In a deposition in the TCH litigation Kiscaden testified that he answers primarily to John W. Smith, whom Kiscaden described as director of all mining operations.

In a related vein, John Smith testified regarding the function of Massey Services in an August 1983 deposition pursuant to litigation between Marrowbone Development Co., another Massey subsidiary, and the Union. At that time, Smith was the president of Marrowbone as well as the Vice President of Mining for A.T. Massey and a Vice President of Massey Coal Services. He testified that the function of Massey Services is to provide mining expertise services to the Massey companies. Specifically, Massey Services provides "mining consultation services, preparation services, some legal services, benefits administration services, geological services." When asked to name the companies he deals with as part of his job at Massey Services, Smith's response

23/ [FOIA Exemptions (b), 7(C)), and 7(D)]

24/ Wyomac asserted that it considered Joyce a company representative and refused to make him available for an interview by the Region. In view of this position and Joyce's continuing relationship to Wyomac, it was concluded that the report of his statements constitutes an admission within the meaning of Rule 801 (d)(2)(d) and is not hearsay. That is, even though Joyce was no longer president of Wyomac when he made the statement, the company asserts that he continues to be an agent of the company and it should be argued that his consultant relationship is based on his experience with the company and accordingly his statement comes within the scope of the agency he held at the time he made the statement.

included most of the companies involved in the instant case. ^{25/} Similarly, Bob Martin, Massey Services prep plant expert, frequently visited the Sprouse Creek prep plant and in mid-1984 discussed with the workers the need to replace the vibrator. After observing its operation, he said it could not be repaired and stated. "I'll see that there is a new one."

With respect to integrated marketing, the 1984 Keystone Manual lists Massey Coal Sales Co. as the sales agent for most of the companies in the instant charge. ^{26/} Moreover, there is some evidence that A.T. Massey or Massey Coal Sales ultimately controls these contracts, not the operating companies. Kiscaden testified that in March 1983 TCH lost a long term contract to supply coal to "Consumer Power." At around the same time Rawl entered into a written contract to supply coal to Consumer Power. TCH continued to supply coal, filling the Rawl contract after March 1983. Kiscaden testified that he never discussed this arrangement with Rawl, only with Consumer Power and with Ellis Dusenbury of Massey Coal Sales. To Kiscaden's knowledge, TCH does not compensate Rawl for its right to fill the Rawl contract.

Finally, in communications to investors, customers, employees and the public, Massey represents that it is a single enterprise with its subsidiaries. The 1984 Fluor Fact Book reports production and reserves of the A.T. Massey Coal Co. broken down by its "divisions." ^{27/} Similarly, a 1983 Fluor presentation to security analysts speaks of "Massey's" coal reserves and states "we", that is, St. Joe, "operat[ing] through A.T. Massey," mine "from 23 mines and we have 17 preparation plants" (emphasis added). The report goes on to distinguish Massey production from other coal brokered by Massey but produced by other firms. Similarly, A.T. Massey entries in the Keystone Manual call "Massey Coal" a "full service company" and refer to the "team effort" of Massey Coal Sales, Massey Coal Export Co., A.T. Massey and the "widespread coal production network." Another entry states "Massey subsidiaries collectively are now the second largest producer in the East." The operating subsidiaries display the Massey "Flaming M" logo on various official items such as company buildings, publications distributed to employees, badges, stickers, hats and other items distributed as safety awards or other incentives. The A.T. Massey company newsletter reports on activities of the operating companies and refers to individuals employed by the operating companies as A.T. Massey people.

With respect to control of labor relations, Joyce stated that Massey arranges for training in labor relations for supervisory and managerial employees in all the operating companies. He further stated that a Massey benefits committee consisting of John Smith, Paula Lowe, the A.T. Massey Vice President for Human Resources, an accountant and "someone from legal" would

^{25/} Specifically, the list included Rawl, Blackberry Creek, TCH, Pike County Coal, Sprouse Creek Processing, Rocky Hollow, Shannon Pocahontas, Big Bear, Robinson Phillips, Winston. The testimony does not seem to be an exhaustive list of the Massey companies which use Massey Services.

^{26/} In the Wyomac group: Big Bear, Robinson Phillips, Royalty Smokeless, Trace Fork, Shannon Pocahontas; in the Rawl group: Rawl Sales & Processing, Blackberry Creek, Sprouse Creek and Dehue; in the Pike County group: TCH.

^{27/} To the same effect is "The Massey Story" a sales document.

make decisions regarding benefits for all salaried employees and non-union wage employees in the Massey subsidiaries. Joyce further stated that although division heads are authorized to make decisions regarding layoffs, he would consult with Morgan Massey before implementing a layoff if it would affect the entire Massey operation. Joyce states that labor relations were among the topics covered in the monthly operating meetings.

With respect to collective bargaining, Joyce stated that the decision of the signatory companies to withdraw from the BCOA and negotiate independently was discussed at monthly operating meetings. He said that the plan "from the beginning was to go non-union." Joyce stated that he had been a prime advocate for that approach. He further stated there was no disagreement among the Resource Group heads about withdrawing from the BCOA. Morgan Massey attended these meetings and listened to the discussion but did not make the direct decision. He "supported the recommendations of the division heads." In addition, lawyers were brought into these meetings to "school" the participants as to how to conduct themselves in negotiations. When asked whether "Massey" hired the lawyers, Joyce replied, "I'm not sure he [Morgan] did. That would come under Mr. Barbery." Paul Barbery is a vice-president and General Counsel of A.T. Massey. ^{28/} Joyce also pointed out that these lawyers could then be hired by a division head to handle labor matters for his group.

Joyce also described preparation of negotiating demands. He and Wyomac Personnel Director Harsanyi met with the general managers of the operating companies, compiled a list, in rank order, of the 10 most important items for a contract and noted those that were strike issues. Joyce submitted these lists to David Smith of the Smith, Heenan law firm. Joyce said that the division heads had the responsibility to decide whether to offer to work under the old agreement but that they "would have talked with Mr. Massey personally" before making such a decision.

At the October 22 bargaining session with M & B, Union negotiator Phalen questioned who was calling the shots in the negotiations. ^{(e), 2(e), 1(d)} *[FOIA Exemptions]* Barbara Krause, attorney for M & B, replied that they may have to check with somebody to make decisions at the bargaining table but M & B was a separate company.

During the negotiations, copies of newspaper articles critical of the Union have been mailed to Robinson Phillips employees anonymously. The Region has concluded that these were mailed by Massey Services.

C. Analysis--Single Employer

As discussed above, all of the operating companies are owned by A.T. Massey; they are held out to the public as part of the Massey Coal operation; and they are significantly dependent on the Resource Group and Massey for financing, operational assistance, marketing, and development and implementation of labor relations policy. In these circumstances, A. T. Massey and the Resource Groups must be considered part of a single employing entity

^{28/} In 1982, Barbery circulated a memorandum to all the operating companies instructing them that it was company policy not to respond to a request for certain information from the Union pension fund.

with the signatory operating companies. Accordingly, complaint should issue, absent settlement, alleging that the signatory companies, the Resource Group heads and A. T. Massey violated Section 8(a)(5) by refusing to acknowledge their status as a single employer at the bargaining table and by refusing to bargain over panel rights as a single employer.

The legal standards for determining single employer are clear. Nominally separate corporations may be found to be a single employer where they constitute a single integrated enterprise. The controlling criteria to which the Board and courts look in determining this issue are whether the ostensibly separate entities share common ownership, common management, interrelation of operations and centralized control of labor relations. Radio & Broadcast Technicians Local 1264, IBEW v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965). Entities will not be found to be single employers merely because one has the potential power or authority to control the other. Los Angeles Newspaper Guild Local 69 (Hearst Corp.), 185 NLRB 303, 304 (1970), enf'd 443 F.2d 1173 (9th Cir. 1971) cert. denied, 404 U.S. 1018 (1972). But where there is "something more in the form of common control, . . . denoting an actual as distinct from a merely potential, integration of operations and management policies," the entities may be found to be a single employer. Miami Newspaper Pressman's Local No. 46 v. NLRB, 322 F.2d 405, 408 (D.C. Cir. 1963). Accord, Royal Typewriter Co., 209 NLRB 1006, 1009-1012 (1974), enf'd 533 F.2d 1030 (8th Cir. 1976); The Arundel Corp., 252 NLRB 397, 399 (1980); Overton Markets, 142 NLRB 615, 619 (1963). See also Teamsters Local 560 (Curtin Matheson Scientific, Inc.), 248 NLRB 1212, 1214 (1980).

Moreover, the fact that a local entity is accorded a degree of autonomy in control of day-to-day operations does not preclude a finding of single employer status among entities which are otherwise integrated. Sakrete of Northern California, Inc., 137 NLRB 1220, 1223-1224 (1962), enf'd. 332 F.2d 902 (9th Cir. 1964), cited with approval in Broadcast Service of Mobile, 380 U.S. at 256. Accord, Royal Typewriter, 209 NLRB at 1010. In sum, where the control exercised by one entity over another, ostensibly separate, entity is not characteristic of an arm's length relationship between unrelated companies it is appropriate to find a single employer relationship. Blumenfeld Theatres Circuit, 240 NLRB 206, 215 (1979), enf'd 626 F.2d 865 (9th Cir. 1980). Accord: Penntech Papers, Inc., 263 NLRB 264, 282 (1982), enf'd 706 F.2d 18 (1st Cir. 1983). See also Local 627, Int'l Union of Operating Engineers v. NLRB (Peter Kiewit Sons, Inc.), 518 F.2d 1040, 1046-1047 (D.C. Cir. 1975); aff'd. on this point 425 U.S. 800 (1976). NLRB v. Local 810, Teamsters (Sid Harvey, Inc.), 460 F.2d 1, 5-6 (2d Cir. 1972).

Applying these principles to the evidence set forth supra, we note initially the uncontradicted fact of common ownership. Although common ownership of these companies is not, in itself, sufficient to establish single employer status, it signifies a relationship and authority among entities that does not exist among separately owned companies and is therefore indicative of single employer status. This is particularly true in the instant case where A.T. Massey not only holds all the stock of the operating companies but also directly, or through the Resource Groups, provides the operating capital for many of the companies. Thus, in the Rawl Group neither Sprouse Creek nor the contract mine operations have made any investment in land or equipment.

Similarly, the testimony of the president/superintendents of the Pike County operating companies establishes that they do not arrange for the financing of purchases for their mines and, indeed, do not even know the source of the financing. 29/

Second, the operating companies can be viewed as parts of an integrated operation engaged in the production, sale and distribution of coal for A.T. Massey, and to that end these companies are subject to the direction and control from the Resource Groups and the Massey corporate level staff. Thus, Massey's public descriptions of its enterprise portray the operating companies as part of a single integrated operation. Further, it is clear that the individual operating companies do not function as self-contained entities even with respect to the operation of their respective mines. Employees have been interchanged within the Resource Groups. Operating mines within each Resource Group have no staff to perform engineering, accounting, bookkeeping and other administrative functions necessary to the operation of the mine. The evidence submitted shows that the Resource Groups and Massey Services were created for the purpose of performing, and do perform these functions for the operating companies. There is no evidence that individual mine superintendents have ever departed from these arrangements. Similarly, the superintendents do not independently arrange for the processing and sale of their coal but deliver it (or rely on other operating companies to deliver it) to Massey owned processing plants for processing and ultimate sale to customers developed by Massey Coal Sales. Again there is no evidence that mine superintendents exercise any independent decision making with respect to the processing or sale of the coal for their mines. Indeed, the example of the Consumer Power contract indicates that Massey Coal Sales will arrange for contracts to be filled from subsidiaries other than the contracting subsidiary without consulting the contracting subsidiary.

It further appears that although Resource Group heads have broad authority regarding the operation of their Group, they are themselves nevertheless subject to direction from the Massey corporate level. The evidence from "The Massey Story II", the statements of Pike County president Kiscaden and, most importantly, the statements attributed to former Wyomac president Joyce regarding the monthly operating meetings and the annual planning meetings all suggest the implementation of that portion of the Massey Doctrine which assigns to a central management staff responsibility for overall policy planning and control of operations.

There is evidence of common management in that officials of A.T. Massey serve as directors on the boards of the Resource Groups and the operating companies and that many of the companies within a particular Resource

29/] FOIA Exemption 5

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Group now share, or in the recent past have shared, common presidents. ^{30/} The president is the official that the company contends is responsible for operations.

Finally, there is ample evidence that the development and implementation of labor relations policy for the operating companies are subject to the direction and control of the Resource Groups and Massey corporate level staff. The Joyce statement indicates that benefits for salaried and non-union hourly employees are determined and administered on the Massey corporate level. The companies admit that managerial personnel in the Wyomac group are covered by the same pension plan and receive credit for prior service with Massey subsidiaries. There is further evidence that other, albeit not all, Massey subsidiaries participate in the plan. Further, Joyce's statement indicates that labor relations were among the topics discussed at the monthly operating meetings and that staff of A.T. Massey arrange for training in labor relations for managerial and supervisory personnel at all levels. This is consistent with the Massey Doctrine which reserves for central staff responsibility for human resources planning.

With respect to the unit employees in the operating companies, it is clear that processing applications for employment and hiring decisions are handled at the group level in the Rawl group and shared among operating companies in other groups as well. Within all groups there have been occasions in which employees ostensibly employed by one company have performed services for another company or have been carried on the books of another company. The statements of Joyce and Justice indicate that decisions to layoff are made above the operating company level, and, if significant, are made in consultation with the Massey level. Safety training is conducted by Resource Group personnel. Grievance processing at the third and fourth step is handled by Resource Group personnel.

Finally, with respect to the current contract negotiations, it would appear that the operating companies have not acted independently with respect to the decision to withdraw from the BCOA, the development of negotiation proposals, the conduct of negotiations or dealings with employees. According to Joyce, a joint strategy "to go non-union" ^{31/} was arrived at by the Resource Group heads at monthly operating meetings attended by Morgan Massey and other corporate staff. Lawyers were brought into these meetings by someone at the Massey level to instruct the Resource Group heads on how to conduct themselves in negotiations. Joyce further stated that Resource Group personnel were involved in the development of negotiating proposals and it is clear that the Resource Group personnel are participating as members of the negotiating team in the current negotiations. Moreover, both Joyce's statement that a proposal to extend the old agreement would have to be discussed with Morgan Massey before being offered to the Union and Krause's statement that M & B negotiators may have to check with somebody to make decisions at the bargaining table imply that the companies' positions at the bargaining table are subject to review by Massey level representatives. Similarly, as noted above pp. 4 and 13, Massey Services has been involved in communicating to unit employees the companies' bargaining positions.

^{30/} Lester in the Wyomac group, Young in Rawl, and Kiscaden and Hibbits in Pike County.

^{31/} We understand this to refer to the decision to withdraw from the BCOA.

Based on the foregoing, it was concluded that the operating companies the Resource Groups and A.T. Massey share common ownership, common management, common control of operations and common control over significant aspects of labor relations and accordingly must be viewed as a single employer. As such, Wyomac, Rawl, Blackberry Creek, Pike County and A.T. Massey are all obliged to recognize and bargain with the Union in the units in which the Union is recognized as the representative. For this reason it was concluded that the operating companies' insistence in negotiations that they are separate employers and the refusal by the Resource Group heads and A.T. Massey to acknowledge their single employer status in bargaining constitutes a refusal to bargain. 32/

Furthermore in view of the conclusion that all of these companies constitute a single employer, by taking the position that they do not have authority to bargain about panel rights at any but their own operating company, the operating companies have further violated Section 8(a)(5) by refusing to bargain over a mandatory subject of bargaining. Thus it should be argued that the Union's panel rights proposal seeks to insure continued employment of unit employees in the event of the closure of their facility and is therefore a term or condition of employment within the meaning of Section 8(d). See Royal Typewriter Corp., 209 NLRB at 1015; NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 and cases cited (9th Cir. 1967). Contrary to the companies' suggestion, Utility Workers Local 11, 203 NLRB 230 (1973) is inapposite. Here, unlike Utility Workers, the current evidence does not establish any insistence merging the bargaining units or conditioning agreement in one unit on obtaining agreement in all units. Rather, the Union agreed to the companies' demand to bargain separately. The Union has simply demanded, in each unit in which it is bargaining, that the employer agree that it will grant panel rights in all other units in the event of a closure. As noted above, however, this is a demand relating to the placement of unit employees in the event of a shut-down. The fact that the placement is to be outside the unit does not gainsay the essential point that it is a proposed benefit for unit employees. To be sure, the Union has made an identical demand in every unit in which it is bargaining and has indicated that panel rights are the central issue to these negotiations. But as the Board made clear in Utility Workers, a Union does not violate Section 8(b)(3) by engaging in pattern bargaining. 203 NLRB at 239. Further, the Union in that case was found to have acted unlawfully because it delayed and impeded negotiations and withheld settlement in some units in order to accomplish its aim of achieving a pattern agreement. That is not the case here. Indeed, because each operating company has refused to acknowledge that it has the authority, as part of a single employing entity, to grant panel rights in other units, for its employees, it has been the companies who have stifled the chances for an agreement in any unit.

Finally, we find unsupported the defense that the Union is not intent on reaching agreement but only on punishing the companies for having withdrawn from the BCOA. As discussed above, all of the proposals relate to mandatory subjects of bargaining in appropriate bargaining units. There is no independent evidence that the Union will not enter into a contract if its bargaining demands are met. And, at present, there is insufficient evidence to

32/ As the Union concedes, it cannot lawfully insist that any particular representative of A.T. Massey and the Resource Groups come to the bargaining table. These entities could meet their bargaining obligation by delegating to the operating companies full authority to bargain on their behalf.

establish that the Union's proposals are designed to be punitive. 33/
Consequently, the companies' defense must be rejected. 34/

III. Single Employer Information Request ("Second Information Request")

The Union presented its second information request during either its first or second meeting with each operating company. This request asked each company to identify: (1) the company's officers and directors and the names of other Massey-related companies in which they held similar positions; (2) the individuals who performed labor relations functions for the company and other Massey-related companies; (3) its customers who were then, or were formerly, customers of any other Massey-related company; (4) individuals who performed clerical, administrative, bookkeeping, managerial, engineering, sales, estimating and other services for the company and any other Massey-related company; (5) any common insurance carrier for the company and any other Massey related company; (6) any equipment transactions between the company and any other Massey-related company; (7) any employees, supervisors or managers who transferred between the company and any other Massey-related company; and (8) the entire hiring procedure used by the company.

Upon receipt of this request, each company responded that the information was not relevant to the ongoing collective bargaining. The Union replied that the information was necessary for several purposes: (1) to formulate bargaining proposals concerning panel rights, common committees to deal with health and safety, grievance and mine communication matters, common health benefits, and common job training; (2) to ascertain the identity of the employer with which it was bargaining; and (3) to determine which mines it could picket without incurring Section 303-8(b)(4)(B) liability.

The final responses of the operating companies varied; some provided none of the information requested, some provided some information; and some provided virtually all. All of the companies continued to question the relevance of the information and some asserted other justification for refusing to provide the information, such as compliance, confidentiality, the Union's alleged bad faith bargaining, and mootness because a company had closed.

33/ It was further concluded that the Union's delays in commencing negotiations and the lapse of time between bargaining sessions with each company did not constitute refusals to meet at reasonable times in view of the unusual demands on the Union's time created by massive defection from the BCOA and in view of the insistence of the individual companies in the instant case to meet separately.

34/ We reach this conclusion based on the evidence submitted by the companies in defense to the Section 8(a)(5) charge. Several of the companies recently filed Section 8(b)(3) charges raising similar allegations. It may be that these companies will adduce additional evidence on this point.

[FOIA Exemption 5

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On October 26, the Union served the same information requests upon A.T. Massey Coal Company and the operating companies heading each resource group. These companies have completely refused to provide any information, on the ground that they are not the employers of Union-represented employees.

We have concluded that the information requested was relevant to collective bargaining. An employer's duty to bargain in good faith includes the duty to provide the union with requested information that is relevant to the negotiation and administration of a collective bargaining agreement. 35/ In Associated General Contractors of California, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980), the Board emphasized that relevance is the key to the union's right to receive information and that relevance should be judged on a broad "discovery-type" standard to permit the union to evaluate for itself which claims to press in bargaining. In keeping with this view the Board has held that information concerning terms and conditions of employment within the bargaining unit is presumptively relevant. Information regarding matters outside the bargaining unit must be provided only upon an affirmative showing of relevance. 36/ Specifically, the Board has found information necessary to establish single employer status relevant to collective bargaining if the union can show an objective factual basis for its belief that such a status exists. 37/ In the instant case, the Union has already submitted substantial evidence that provides an objective factual basis that single employer status exists among Massey, the resource groups, and the operating companies. 38/ Further, since the Union's proposals for Massey-wide panel rights are a key issue in the negotiations, the information necessary to fully establish single employer status is particularly relevant in the instant case. For, the legitimacy and force of the Union's arguments in favor of panel rights are based on its single employer claim. 39/

Further, while events subsequent to an information request may make the request moot, 40/ the relevance of the information in the instant case is not mooted by the intervening decision of some companies to close. Although individual companies may close, evidence concerning the manner in which they operated while they were open will help to resolve how the entire Massey complex operates and thus such evidence will shed light on the single employer issue. Further, single employer status is relevant to proposals the Union might make during effects bargaining on such matters as seniority and transfer rights (i.e. panel rights) and the funds available for severance pay. 41/ It

35/ NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956); NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967).

36/ Ohio Power Company, 216 NLRB 987, 991 (1975).

37/ Leonard B. Hebert, Jr., 259 NLRB 881, 889 (1981); Bohemia, Inc., 272 NLRB No. 178 (1984), slip op. at p. 5..

38/ Most of the evidence supporting the conclusion in Section II was provided by the Union.

39/ The fact that the Union might use the information for non-bargaining purposes is not a valid basis for denying the information. Where the Union has a valid reason for obtaining the information, the fact that it may be used for other reasons does not negate the employer's obligation to provide it. E.I. DuPont de Nemours, 264 NLRB 48, 51 (1982).

40/ Glazers Wholesale Drug Co., 211 NLRB 1063.

41/ NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 (9th Cir. 1967).

is obviously necessary for the Union to know exactly whom it can look to for bargaining on these matters, particularly where the immediate employer (the operating company) is going out of business. Finally, as discussed infra, the closing itself was unlawful in one instance.

Accordingly, it was concluded that the requested single employer information was relevant to collective bargaining. Thus, the signatory operating companies were obligated to provide the information requested, absent any of the valid defenses articulated below. Further, because it has been established that A.T. Massey and the Resource Groups and their companies are single employers, it was concluded that they, too, had an obligation to provide the requested information, also absent any defenses discussed below.

Various companies allege that bad faith bargaining by the Union justifies their refusal to provide the information. However, as discussed supra, pp. 17-18, there is insufficient evidence at present to establish that the Union's intent was not to reach agreement but to punish the Massey companies for withdrawing from the BCOA. Accordingly, it was concluded that the assertion of bad faith bargaining is not a valid defense for any of the companies herein.

With respect to compliance, several of the operating companies have contended that at least some of them provided all or substantially all of the information and/or that the Union has expressed satisfaction with the scope of the information given. For those companies where this is true, this is a complete defense to this aspect of the charge. This principle is applied infra to individual companies.

With respect to confidentiality, several operating companies assert that at least some of the information requested was confidential, and that they asked the Union to agree to restrict the use of the information to collective bargaining and to return it after bargaining has ended. They contend that the Union's refusal to agree privileged their refusal to provide the information. It is well established that an employer's legitimate and substantial interest in keeping relevant information confidential may privilege its refusal to comply with the union's request. ^{42/} Whether the employer is so privileged turns on whether it has made a reasonable and good faith offer to accommodate its need for secrecy with the union's need for this relevant information. ^{43/} Where the employer has a legitimate interest in confidentiality of its business records, it may expect reasonable limitations to be placed upon the publicity and distribution of the documents provided. ^{44/} Further, while the demands for confidentiality in the instant case cover all the information requested, including some public information not normally considered confidential, other information such as customer lists might well be regarded as confidential. In these circumstances, it was concluded that the Union was obligated to respond to the companies' proposals on since bargaining between the parties could best

^{42/} Detroit Edison v. NLRB, 440 U.S. 301 (1979).

^{43/} See General Dynamics Corp., 268 NLRB 1432 (1984); General Counsel Memorandum 78-22, dated April 9, 1979, at p. 2.

^{44/} East Texas Fire Protection Co., 265 NLRB 173 (1982).

identify the valid confidentiality claims and enable the parties to reach an agreement to accommodate their respective interests. ^{45/} Thus, where the Union has refused to engage in bargaining over restriction on the use of the requested information, the company has a valid defense to a Section 8(a)(5) charge.

The foregoing principles will be applied to the conduct of each company as set forth below. Several companies are grouped together, where their conduct, and that of the Union, are similar. The Region should act according to the instructions given with respect to each company or group thereof:

1. TCH and Joboner Coal Companies. These companies have asserted that the information requested was irrelevant to collective bargaining. They also assert that the Union refused to agree that the information would not be provided to competitors or used for purposes other than collective bargaining and refused to agree that such information would be returned after bargaining was completed. ^{46/} The companies here noted that they were particularly concerned about releasing the customer list requested by the union. The companies offered to participate on a subcommittee to negotiate the confidentiality issues; the Union refused. While the claim of irrelevance is invalid, it was concluded that these two companies have a valid confidentiality defense. By offering to bargain about accommodating this confidentiality interest with the Union's interests in obtaining the information, the companies have attempted to make the accommodation contemplated by Detroit Edison. When the Union refused to bargain on this subject the companies were privileged to withhold the information. Thus, the Section 8(a)(5) charge concerning the second information request to TCH and Joboner should be dismissed, absent withdrawal.

2. Big Botton Coal Co., Sprouse Creek Processing Co., Pikco Mining Co., Tall Timber Coal Co., Rocky Hollow Coal Co. The operating companies here assert no defense other than that they have substantially complied with the Union's requests. ^{47/} While the Union claims that each of these companies failed to provide parts of the information requested, the companies argue only that they have provided all relevant information and that the remaining information had no relevance to assisting the Union to make its proposals. However, as concluded supra, relevance is not a valid defense in the instant case. Therefore, complaint should issue, absent settlement, alleging that these companies violated Section 8(a)(5) and (1) by refusing to provide all of the information requested by the Union.

3. Dehue Coal Corporation. In this case it appears that the company has provided only the information it believed was relevant to the panel rights issue. Since as discussed supra all the requested information was deemed

^{45/} Minnesota Mining & Manufacturing Co., 261 NLRB 27, 31-32 (1982), enfd. 111 LRRM 3078 (D.C. Cir. 1982) and 113 LRRM 3163 (D.C. Cir. 1983).

^{46/} The Union's attorney in negotiations excused himself from bargaining because he did not wish to see information at the bargaining table that he was attempting to obtain in a lawsuit concerning these companies.

^{47/} In the case of Rocky Hollow Coal Co., the Region notes that it was unclear whether the second information request was ever served. However, in its position statement, this Employer does not dispute that the request was served.

to be relevant to collective bargaining it would appear that the company has no compliance defense. The company asserts that it told the Union that it wished to negotiate a confidentiality agreement but that the Union refused, saying that while it would not intentionally disclose the information to competitors, it would use the information for any purpose that it wished. Thus, it appears that this Employer may have a valid confidentiality defense. [FOIA Exemption 5]

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4. Royalty Smokeless Coal Company. This company agreed to be bound by whatever contract is signed by M & B Coal Company; As to the information request, it asked for a confidentiality agreement and agreed to provide the information if the Union showed its relevance. The Region notes that the Union apparently did not follow up on this request. Because of the Union's apparent abandonment of its request, this aspect of the charge as to Royalty Smokeless should be dismissed, absent withdrawal.

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6. M & B Coal Company. This company asserts no defense other than that it would wait for an NLRB ruling on whether the information was relevant. Accordingly, complaint should issue as to this company, absent settlement.

7. Winston Coal Company, Simron Fuel Company. These companies have refused to provide any of the information requested, alleging that it is irrelevant and that the request became moot after their mines closed. As noted supra, these are not valid defenses. Accordingly, complaint should issue as to these companies, absent settlement.

8. Robinson-Phillips Coal Company. In this case, the company claimed that it substantially complied with the Union's second information request. However, it has failed to provide information on customers, common services and transfer of supervisors, informing the Union that it would not do so until the Board rules on relevance. In addition, the company claims that it asked the Union for assurances of confidentiality but that the Union refused. In response, the Union says that it suggested that a committee be formed to discuss confidentiality but that the company instead decided to wait for the Board's ruling. It appears that the Region credits the Union in this respect. Finally, the company asserts that its closure moots the information request. As noted supra, this is not the case. Thus, there are no valid defenses available to this company, so complaint should issue, absent settlement.

9. A.T. Massey and the Resource Groups. These companies raise no defenses other than that they are not parts of a single employer complex with the operating companies and, possibly, that the information request is irrelevant to collective bargaining. Because it has been concluded that their single employer claims have been refuted by the evidence, there is no valid defense available to Massey and the Resource Groups. Therefore, their refusal to provide the requested information violates Section 8(a)(5) and (1) and complaint should issue, absent settlement.

IV. The Decisions to Close and Requests for Financial Information

A. FACTS

Six of the companies in the Wyomac group sought concessions from the Union and when the Union rejected concessions, four of these companies announced their mines would close. The Union alleges that the companies violated Section 8(a)(5) by failing to bargain over the decisions to close and by failing to provide financial information requested by the Union. 48/

Winston-- On September 18 or 19, at the second negotiating session between Winston and the Union, company representatives announced that the mine would be closed effective September 30, 1984 due to the depletion of the reserves at the mine. The Union concedes that at the time of the announcement there were no more than four months of work left at the mine and the Region has concluded that the decision was based on lack of work.

The parties met on September 28, October 10, and October 23 to bargain over effects of the decision to close. During the October 23 session the Union presented a written proposal regarding effects and requested that the company open its books. The company refused, contending that the Union was not entitled to the information.

Big Bear-- On October 8, at the fourth negotiating session between the Union and Big Bear, the company made an extensive statement about its financial condition, asserting that the company was losing 1-1 1/2 million dollars per year and that the future of the company depended on the outcome of the negotiations. In response to a question from the company the Union asserted that its position was that it would not grant concessions. The company then made a wage benefit proposal with five alternative mixes of wage and benefits, all less than the existing agreement. Union representative Harless said the Union would want to see the company's books. Company representative Oliver responded that if the Union would agree in principle to negotiate concessions, the company would let the Union see the books. Harless replied that the Union had the right to see the books in order to make that decision. Before the meeting ended, the parties reiterated their positions--the company asserting it needed 25% concessions and the Union citing Union President Trumka's opposition to concessions. The parties adhered to these positions in the fifth session on October 24; the company specified monetary figures for its five alternatives; the Union rejected the company's proposals and asserted it would not negotiate a concession contract. The Union again asked to see the company's books and the company responded that it would open its books only if the Union first agreed to negotiate a contract along the lines of the proposals it had made.

48/ The Union also alleges that these closures were discriminatorily motivated. The Region finds no merit in this allegation and that issue was not submitted for Advice.

Shannon Pocahontas. At the fourth negotiating session between these parties on October 8, Company attorney Oliver stated that the company had lost \$3 1/2 million in the previous year, it saw no change in income in the future and it was going to propose concessions from the current contract. Union representative Phalen stated the Union would not accept a concessionary contract. The company offered to sell the mine to the Union at a price the Union considered unrealistic. Oliver stated that if the company did not get concessions it would close the mine. He asked if concessions would be made; Phalen responded that this was not likely. Oliver then made a proposal similar to that which he had made on behalf of Big Bear. Union attorney Harless asked to see the company books. The company responded that it would agree to open the books only if the Union agreed to negotiate a concessionary contract. Harless responded that the Union had a right to see the books so it could determine its course of action.

At the next bargaining session on October 24, the company repeated its assertion that it needed concessions; it asserted it did not intend to continue losing money. The parties again discussed a sale of the mine at terms the Union considered reasonable. The company then presented the same proposal that Big Bear had made to the Union, reiterating that it needed concessions. The Union rejected the company's proposals stating that it rejected any other concessionary proposals. The Union again asked to see the company books. The company responded it would open the books only if the Union would agree in principle to negotiate a concessionary contract along the lines of the company's proposal. When Phalen responded that it was the Union's position not to agree to a concessionary contract, Oliver announced that the company would close effective immediately.

Robinson Phillips. At the fifth negotiating session between the parties, on October 9, company attorney Krause stated that the company was losing money and that because of low market demand for the low volatility metalurgical coal produced at Robinson Phillips, the only way the company could survive was with concessions from the Union. She told the Union that the company would make concessionary proposals and asked if the union would agree to concessions. Union representative Phalen responded that the Union would not agree to concessions. Krause repeated her arguments that the company was losing money and needed concessions. Phalen again stated the Union would not agree to concessions. The company then took a short break; when it returned to the table it announced tht the mine was closing effective that day. The company offered to engage in effects bargaining. The Union concedes that it did not request to see the company's books at that meeting. There is no evidence that it asked to see the books in subsequent meetings.

Simron. At the third bargaining session between the parties, in the afternoon of October 9, company attorney Krause repeated the position she had taken that morning on behalf of Robinson Phillips, asserting that there would be jobs at Simron with lower wages and benefits or no jobs at all and unless the Union agreed to concessions the mine would close. The Union representatives took a short break; when they returned to the table Union representative Phalen stated the Union could not agree to any concessions. Krause responded that, in those circumstances, Simron had no alternative but to close immediately. [FAM Ex. 6, 7(c), 7(d)] does not reflect that at this meeting the Union asked the company to open its books.

The parties met again on October 22, to bargain over the effects of the closure. [FOIA Ex. 6, 7(c), 7(d)] at this meeting he again asked to see the company books. The company took the position that it had no obligation to produce the books.

M & B. At the third negotiating session between the parties, on October 10, the company asserted that it needed to reduce wages and benefits to be economically viable. Company attorney Krause presented proposals similar to the alternatives proposed by Big Bear. The Union rejected the proposals. The Union asked to see the books. Krause said the books would be made available if the Union first agreed to negotiate a contract along the lines of the company's proposal. Union attorney Harless responded that he believed the Union was entitled to see the books before making that decision.

B. Analysis-Decision to Close

In view of the conclusion that the companies which closed are but individual parts of a larger single employer, these closures were not tantamount to a total going out of business. Thus, the issue of whether there is a duty to bargain is governed by Otis Elevator, 269 NLRB No. 162 (1984). That is, whether the company was required to bargain about the decision depends upon whether the decision turned on labor costs and whether the decision was amenable to resolution through the collective bargaining process.

Applying these principles to the instant case it was concluded that, inasmuch as Winston's decision to close was based on the depletion of the reserves in its mine, this decision was not amenable to change through the collective bargaining process. See Otis Elevator, 269 NLRB No. 162 (1984). Accordingly, absent withdrawal, the Region should dismiss the allegation that Winston violated Section 8(a)(5) by refusing to bargain about this decision.

With respect to the decisions of Shannon-Pocahontas, Robinson Phillips and Simron, it was concluded that the companies' statements at the bargaining table detailed above, make clear that the decisions to close these facilities turned on whether the Union would agree to reductions in labor costs. Accordingly, under the Otis Elevator analysis these decisions were mandatory subjects of bargaining.

It was further concluded that Robinson Phillips and Simron fulfilled their duty to bargain over this decision. Thus, both companies sought concessions from the union and made clear that the company's survival depended on obtaining concessions. ^{49/} The Union rejected the company's proposals and made no further inquiries or proposals directed toward the company's announced

^{49/} Simron explicitly warned the Union that it would close absent concessions. Robinson Phillips told the Union that the only way the company could survive was with concessions. It was concluded that the Robinson Phillips statement was sufficient to put the Union on notice of the significance of the company's request.

intention. 50/ In these circumstances, it was concluded that these companies had no further obligation to bargain before implementing their decisions to close and the Region should dismiss these allegations, absent withdrawal.

It was concluded, however, that Shannon-Pocahontas has not satisfied its obligation to bargain about the decision to close its facility. In the negotiations with this company, the Union responded to the company's requests for concessions by requesting to see the company's books. Since, as detailed below, we have concluded that this information was relevant to the company's concessionary proposals, and the company itself tied the decision to close to the Union's acceptance or rejection of concessions, it could not satisfy its obligation to bargain about the decision to close without having afforded the Union an opportunity to review and evaluate the information relevant to the company's bargaining proposal. Accordingly, complaint should issue, absent settlement alleging that the Employer violated Section 8(a)(5) by refusing to bargain about its decision to close Shannon Pocahontas.

C. Anaylsis-Refusal to provide financial information

The Union asked five companies to open their books. 51/ Its requests to Big Bear, Shannon Pocahontas and M & B were made in response to these companies' assertions that they needed concessions because they were losing money. The Union's requests for financial information from Winston and Simron were made only after these companies announced their decisions to close and the parties had commenced effects bargaining. The companies contend that they had no duty to provide the information because the Union had taken the position that it would not grant concessions. In the companies' view, this position renders the companies' financial status irrelevant. Shannon Pocahontas, Winston and Simron further contend that the request was rendered moot as to those companies which closed, because contract concessions were no longer an issue in bargaining.

It is well established that when an employer pleads poverty or an inability to pay during collective bargaining negotiations, financial data substantiating its plea becomes relevant to bargaining and the employer has an obligation under Section 8(a)(5) to provide such information upon the Union's request. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-153 (1956). Clearly, in the instant case the companies' claims that they needed concessions because they were losing money rendered the financial records relevant.

The fact that the Union refused to abandon its no-concessions policy before receiving the companies financial information did not negate the relevance of the requested information. Under Truitt, such information is relevant in order to enable the Union to determine whether it should soften its

50/ As distinguished from its response to Shannon Pocahontas, the Union did not request financial information from Simron until after the company announced its decision to close and the parties had begun effects bargaining.

51/ In the absence of evidence that the Union requested Robinson Phillips to open its books, the allegation that that company refused to furnish financial information should be dismissed absent withdrawal.

demands. In the instant case, the companies sought to place the cart before the horse; they sought a commitment to concessions as a condition precedent for furnishing the information. Concededly, the disclosure of the information may not persuade the Union to alter its policy. On the other hand, it may do so. And, it is certain that the Union will not grant concessions absent the information. Thus, if the process of collective bargaining is to proceed with respect to the companies' proposals, the Union must be able knowledgeably to consider those proposals, to determine the extent to which it should urge employees to agree to the proposed concessions or to develop alternative proposals of its own. It cannot perform these functions without the information. Teleprompter Corp., 227 NLRB 705, 706-707 and cases cited therein (1977), enf'd 507 F.2d 4 (1st Cir. 1977). Accordingly, it was concluded that complaint should issue, absent settlement, alleging that Big Bear, Shannon Pocahontas and M & B violated Section 8(a)(5) by refusing to provide the requested information.

With respect to the Union's request for financial information from Winston and Simron, however, there is no evidence that these companies have claimed an inability to pay with respect to any effects bargaining proposals. Accordingly, these companies' financial status is not relevant to any matter about which the parties are bargaining. ^{52/} Accordingly, the allegation that these companies violated Section 8(a)(5) by refusing to provide information should be dismissed, absent withdrawal.



H.J.D.

^{52/} As noted above, Winston had no obligation to bargain about its decision to close and Simron fulfilled its obligation. Shannon Pocahontas' closure did not render the information irrelevant, however, because that company, by refusing to provide the information to support its concessions proposals, failed to fulfill its obligation to bargain over the decision.