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 No. 9-CA-42057**

UNITED MINE WORKERS OF AMERICA

BRIEF OF RESPONDENT MASSEY ENERGY COMPANY IN RESPONSE TO NATIONAL LABOR RELATIONS BOARD'S INVITATION REGARDING THE SINGLE EMPLOYER THEORY OF LIABILITY

Respectfully Submitted,

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I. INTRODUCTION

Massey Energy Company ("Massey") files this Brief in Response to the National Labor Relations Board's ("NLRB" or "Board") "Revised Invitation to File Briefs" dated March 15, 2011. In its "Invitation" the Board requested that the parties specifically address the following issues:

1. Given the procedural circumstances of this case, does the Board have the authority to consider whether Massey and Mammoth constitute a single employer under existing Board Law?

2. If so, should the Board exercise its authority?

3. If the Board can and should consider the single-employer theory of liability, does the existing record in fact establish that Massey and Mammoth constitute a single employer?

(Revised Invitation to File Briefs, p. 3)

II. SUMMARY OF THE ARGUMENT

A. The Board Does Not Have Authority To Consider The Single Employer Issue Given The Procedural History Of This Case.

The Board does not have the authority to consider whether Massey and Mammoth Coal Company ("Mammoth") constituted a single employer because the issue of single employer liability was not part of the Amended Complaint, nor was it litigated by the parties. Unlike the issue presented in *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993) ("*Pay Less*"), Counsel for the General Counsel ("General Counsel") did not seek to *preserve* a *fully litigated* alternate theory of liability. Rather, General Counsel *introduced* a new and *un-litigated* theory of liability in his post hearing brief to Administrative Law Judge Paul Bogus ("ALJ").

It is well-established that the Board does not have the authority to decide material issues that have not been fairly tried. In this case, General Counsel alleges in his Amended Complaint that Massey and Mammoth share liability for a series of unfair labor practices because "at all

material times, Respondent Massey and Respondent Mammoth have been agents of each other, acting for and on behalf of each other." (Amended Complaint, 5(a)). General Counsel did not allege any other theory of liability regarding Massey until after the hearing, in his post hearing brief. During the entire course of this litigation, Massey's main defense consisted of evidence intended to negate the elements of agency – elements that are distinct from the elements of "single employer status." Importantly, Massey did not address single employer status as part of its Answer, during the hearing, or in its post hearing brief, because single employer status had not been alleged - not even as an alternate theory of liability. Instead of alleging that Massey and Mammoth constituted a "single employer," General Counsel chose to rely upon a theory of agency, a theory that is distinct from single employer liability theory both in its elements of proof, and in its scope of potential liability to Massey. The ALJ did not find that Massey and Mammoth constituted a single employer, even after his consideration of General Counsel's post-hearing brief, which raised the single employer theory for the first and only time.

B. Consideration Of The Single Employer Issue At This Stage Of The Proceeding Would Amount To A Denial Of Due Process.

Even if the Board had the authority to consider a material issue that had not been fully litigated (and it does not), it would be patently unfair for the Board to do so in this case. Due process requires that parties to an action receive proper notice of an allegation, and an opportunity to respond. Because General Counsel did not choose to allege a single employer theory until the post hearing brief, Massey had neither notice nor the opportunity to respond. Additionally, single employer theory would expose Massey to a potential liability greatly in excess of any liability contemplated and defended against based upon the Amended Complaint. Under an agency theory, the General Counsel bears the burden of proving the requisite elements of agency for *each* alleged unfair labor practice set before the Board. However, under a single

employer theory, once the General Counsel proves the elements of single employer status, Massey becomes liable for *any* and *all* actions of Mammoth.[1] This level of potential liability dramatically exceeds the liability contemplated and defended by Massey based upon the allegation made in the Amended Complaint, and as such, clearly violates due process. Region 9 has extensive background and experience dealing with the single employer theory – both in the mining industry as a whole - and specifically related to Massey and its subsidiaries. In spite of this extensive history and experience, General Counsel chose not to pursue the theory of single employer in his Complaint or during the trial. It would work great injustice on Massey for the Board to allow General Counsel to rely upon that un-litigated theory at this juncture, given the procedural circumstances of this case.

C. The Existing Record Is Insufficient To Support A Finding Of Single Employer.

Finally, even if the Board could and should consider the single employer liability theory, the existing record cannot possibly be sufficient to establish single employer status between Massey and Mammoth because that issue was neither timely raised, nor fully litigated.

III. BACKGROUND OF THE CASE

On October 6, 2006, General Counsel filed an Amended Complaint naming Massey as an individual party in this case. Importantly, the Amended Complaint ***did not allege that Massey and Mammoth constituted a single employer.*** Instead, the Amended Complaint alleged that Massey and Mammoth were "agents for each other, acting on behalf of each other." (Amended Complaint, 5(a)). According to the General Counsel's theory, Mammoth and Massey, while acting as agents for each other, had violated the Act by failing to hire "union" employees as part of an alleged successorship, and then again by failing to recognize and bargain with that same

[1] For as long as Massey and Mammoth were deemed to be a single employer.

Union. All of this based upon a charge that had been filed by the United Mine Workers of America ("Union") against Mammoth on June 2, 2005. Massey filed its Answer on October 27, 2006, denying all allegations of unlawful conduct.

The ALJ conducted a hearing on the Amended Complaint beginning in January 2007. Because the General Counsel had not alleged that Mammoth and Massey constituted a single employer, neither Massey nor Mammoth put on evidence relating to that issue. The hearing consisted of sixteen days of taking evidence over a twelve week period. After the hearing, all parties submitted post hearing briefs, and it was ***in General Counsel's post hearing brief that the theory of single employer liability was raised for the first and only time.*** The ALJ issued a recommended Decision and Order dated November 21, 2007, determining that Massey was liable on a direct participation theory. The ALJ did not rule on the agency theory; or on the single employer theory. All parties filed Exceptions to the Decision and Order on January 22, 2008. Of note, the General Counsel's cross-exceptions did not challenge the ALJ's failure to rule on the single employer theory.

On September 30, 2009, the two member Board issued a decision against Mammoth, but severed the allegations against Massey for a decision at a later time. *Massey Energy Company and its subsidiary, Spartan Mining Company, d/b/a Mammoth Coal Company and United Mine Workers of America,* 354 NLRB 83 (2009). On June 17, 2010, the United States Supreme Court held that, under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a group of at least three members must be maintained. *New Process Steel, L.P. v. NLRB,* 130 S.Ct. 36 (2010). Thus, the Supreme Court vacated the Board's decision in *Massey, et al,* and remanded the case to the Board, where it now stands for decision.

IV. ARGUMENTS AND AUTHORITIES

A. The Board Does Not Have The Authority To Consider Whether Massey And Mammoth Constituted A Single Employer Because That Allegation Was Not Part Of Any Complaint, Nor Was It Fully Litigated By The Parties.

It is well-established that the Board does not have the authority to consider an alternative theory that was neither part of any complaint, nor fully litigated by the parties. See, *Georgia, Florida, Alabama Transportation Co.*, 219 NLRB (1975). Board and Circuit Court decisions are replete with examples in which the Board (or the court) has held that the absence of a claim or theory in the Complaint was fatal to the subsequent introduction of that claim or theory ***unless that claim or theory had been fully litigated***. *See e.g., S&F Market Healthcare*, 351 NLRB 975, 1006 (2006) (Discrimination not alleged in complaint was not properly before the Board, in spite of General Counsel's post hearing argument that it had been fully litigated); *NLRB v. Quality CATV, Inc.,* 824 F.2d 542 (7th Cir. 1987) (Board's decision to rule on an alternative theory that was absent from the complaint violated due process and deprived the respondent employer of the opportunity to explore different facts and/or arguments during the hearing); *McKenzie Engineering Co.,* 326 NLRB 473 (1998), enfd. 182 F.3d 622 (8th Cir. 1999) (Violation not found even when respondent effectively admits or does not challenge evidence showing some sort of violation of the Act when that violation was not alleged in a complaint); *Eagle Express Co.*, 273 NLRB 501, 503 (1984)(Complaint defective for failing to mention a claim, noting that the lack of notice of an alternative theory precluded a full and fair litigation of the issue); *Graham's Trucking & Excavating, Inc.,* 2010 NLRB LEXIS 226 (ALJ refused to rule on the General Counsel's belated alternative theory of liability, even though some relevant questions were asked of witnesses during the hearing).

The above holdings reflect the Board's incorporation of the principles of due process; that the respondent must be afforded with proper notice and an opportunity to be heard. *Mullane*

v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The Board is bound by the principles of due process, specifically that "persons entitled to notice of an agency hearing shall be timely informed of…the matters of fact and law asserted." 5 U.S.C. § 554(b). Not surprisingly, the Board has defined "fully litigated" as "litigated in such a way that the respondent is given adequate and timely notice of the allegation against which it is required to defend itself in the adversarial process." *Plastic Film Products Corp.,* 238 NLRB 135, 149 (1978).

In this case, Massey did not receive notice of the allegation of the single employer theory until it received a copy of General Counsel's post hearing brief. As such, Massey had no opportunity to put on evidence, or mount a defense against that allegation. Instead, Massey defended against the allegation that was made in the Amended Complaint, that allegation being that Massey and Mammoth had acted as agents of one another in the commission of the specifically articulated unfair labor practices. Interestingly, the ALJ did not find liability on an agency, or a single employer theory - instead he found liability based upon a "direct participation theory." *Massey, et al* at 14. The direct participation theory is akin to agency theory (which was litigated) because under both "direct participation" and "agency theory" liability theories, Massey's liability is limited to specific instances in which the *participation* of Massey has been proven (either directly or through an agent). Of course, the ALJ's "direct participation" finding did not put Massey on notice that it should mount a defense for the potentially sweeping liability associated with single employer status.

1. *Pay Less* Is Factually Distinguishable From This Case.

The holding in *Pay Less*, cited in the Board's Revised Invitation to File Briefs, is not applicable to this case because the key factual underpinning of *Pay Less*, namely, that the alternative theory had been fully litigated, is absent from the present case. In *Pay Less*, the Board

found that the General Counsel's *fully litigated* alternative theory was preserved when the administrative law judge failed to rule on that alternate theory – even though General Counsel failed to file an exception. In so holding, the Board noted that the alternative theory was presented at the hearing, evidence was adduced - and then the theory was addressed in the post-hearing briefs and argued "vigorously" by both parties in supplemental briefs. *Pay Less Drugs*, 312 NLRB 972, 973 (1993). In *Pay Less*, the Board also noted that the judge found that it was "unnecessary to rule" on that theory, and such a "non-ruling" did not fall under the ambit of Section 142(b)(2) of the Board's Rules.[2]

Pay Less is distinguishable from the present case because here, the General Counsel's alternative theory was *not* litigated, thus, it could not have been "preserved" – even if the General Counsel had filed an exception (which he didn't). Indeed, in this case the General Counsel's theory of single employer liability was not mentioned at all until after the hearing, as part of the General Counsel's post hearing brief. (Revised Invitation to File Briefs, p. 2). Unlike *Pay Less*, where both parties fully argued the alternative theory, in this case Massey did not mount a defense to single employer liability because that alternative theory was first raised as part of the General Counsel's post hearing brief.

2. The Theories Of Agency Liability And Single Employer Liability Are Clearly Distinguishable.

Agency liability, the theory against which Massey defended, is clearly distinguishable from the theory of single employer liability. As such the answer, witness testimony, exhibits, briefs, and other evidence put forth by Massey to defend against agency liability were not the same as the defense Massey would have put on if faced with an allegation of single employer

[2] Section 142(b)(2) of the Board's Rules states "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived."

liability. Agency theory is based upon three elements: (1) principal manifests that the agent act for it, (2) the agent accepts the undertaking, and (3) an understanding between parties that the principal is to be in control of the undertaking. *In re Rubin Bros. Footware, Inc.*, 119 B.R. 416, 422 (S.D.N.Y. 1990). These elements are typically proven by putting forth evidence on (1) consent, (2) fiduciary duty, (3) absence of gain or risk to the agent, (4) control by principal; (5) power of the agent to alter the legal relations between the principal and third persons and between the principal and himself. *Exxon Corp. v. Central Gulf Lines*, 717 F.Supp 1029, 1031 (S.D.N.Y. 1989). The existence of agency most often turns on the level of direct control that the principal exerts over the agent relative to the *specific* situation in question. As such it is possible for agency to exist in one transaction between parties, but not the next transaction between those same parties – all depending upon the facts surrounding the specific transaction. By contrast, single employer liability is not determined by examining the facts of a particular transaction between a "principal" and "agent." Instead, single employer liability turns on the overarching relationship between two entities, particularly determinative are: (1) common ownership and financial control; (2) common management; (3) interrelations of operations; and (4) integrated control of labor relations. *See, e.g. South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1967); *Flat Dog Prods.*, 347 NLRB 1180, 1181-1182 (2006).

Massey put forth substantial evidence in defense of the claim of agency as made by General Counsel in the Amended Complaint. (Massey Energy's Post Hearing Brief, pp. 9-18). Aside from pointing out that single employer status was distinct from agency status, and noting that the General Counsel had *not* made any allegation of single employer status, Massey did not reference, much less defend against an allegation of single employer status. As such, not only was the issue of single employer liability "not fully litigated" - it wasn't litigated at all.

B. Even If The Board Had The Authority To Find That Massey And Mammoth Constituted A Single Employer, To Do So Would Be Fundamentally Unfair.

Fairness and equity dictate that even if the Board had the authority to apply single employer status to Massey and Mammoth, it should not do so. In this case, General Counsel's failure to timely assert his alternative theory deprived Massey of notice and the opportunity to respond. Compounding this breach of due process is the fact that the untimely allegation of single employer status imposes a much broader liability than the agency theory that was litigated. Additionally, the unique history between the parties involving single employer liability theory weighs heavily against the Board permitting the General Counsel to cure his failure to allege single employer theory at this juncture.

1. The Principles Of Due Process Require That Parties Receive Proper Notice And An Opportunity To Respond To Allegations, And Massey Received Neither.

As discussed above, the principles of due process exist to preserve fairness and equity by ensuring that the parties receive proper notice of any allegations, and an opportunity to respond to those allegations. And, by failing to include the theory of single employer liability in the Amended Complaint, or at any point prior to or during the hearing, the General Counsel deprived Massey of this notice. Absent notice, Massey did not have any reason to present evidence addressing single employer liability, thus Massey was not "heard" on that subject. Of course, the General Counsel could have easily included single employer liability in his initial Complaint, the Amended Complaint, or at any time point during the lengthy trial of this matter. For whatever reason, he chose not to do so – and now the record is closed.

In addition to the due process concerns, converting an "agency theory" case to a "single employer" case at this juncture is tantamount to an unfair "bait-and-switch." As discussed above, agency (and "direct action") are both theories that apply liability to situations based solely on the

circumstances attendant to those issues, whereas single employer liability could establish liability for *any* actions taken by "either" company. Here, Massey evaluated its exposure to liability, and then planned and executed its defense based upon the allegations contained in the Amended Complaint. Specifically, that Massey could be found liable under an *agency theory* for several *specific* unfair labor practice allegations as set forth in the Amended Complaint. In stark contrast, if Massey and Mammoth were found to constitute a "single employer," Massey would potentially be liable for *any and all* of Mammoth's actions for so long as Massey and Mammoth were considered to be a single entity. Nothing in the Amended Complaint, or the subsequent litigation, put Massey on notice that it could be held liable for "any and all" of Mammoth's (or any other company's) actions. As such, it would violate the fundamental fairness required by due process for the Board to apply the non-litigated and far broader theory of single employer liability at this juncture.

2. The Unique History Involving Massey, Region 9, And The United Mine Workers Union Strongly Weighs Against Allowing General Counsel To Now Cure His Failure To Allege A Single Employer Theory.

For Massey and Region 9 of the National Labor Relations Board, the present matter was not the first serious case turning upon the relationship between Massey and its operating subsidiaries. There has been a series of critical unfair labor practice cases arising from Massey's relationship with the United Mine Workers of America ("UMWA"). It began in 1984.

In the fall of that year, the UMWA terminated the collective bargaining agreements to which a number of Massey subsidiaries were signatory. As of October 1, 1984, twenty-one of those subsidiaries had withdrawn from the then BCOA multi-employer bargaining group which negotiated with the UMWA for a standard collective bargaining agreement applicable nationwide. Each of those operating subsidiaries had decided that it could not operate

successfully under the terms of the standard BCOA Agreement and each sought to bargain for a separate agreement applicable to its particular operations. Those decisions were made on a subsidiary basis, but Massey remained active in the bargaining. On October 1, 1985, the UMWA took approximately 2,000 of its members out on strike at these operating subsidiaries.

Early on in the negotiations, the UMWA filed information requests; and, based upon the results of the information received, in early 1985, filed unfair labor practice charges claiming that Massey and the subsidiaries failed to bargain in good faith because they constituted a single employer and Massey was obligated to participate in the bargaining of each and to be bound to every ultimate agreement. The investigation of the charges, totaling twenty-two, were assigned to Region 9, which conducted a long and involved investigation. Multiple facts and documents were provided. Because of the importance and difficulty of the issues, Region 9 submitted them to the Division of Advice for a determination of whether or not it had probable cause to assert Massey was a single employer with its subsidiaries.

On April 23, 1985, a twenty-seven page Advice Memorandum was issued by the Division of Advice authored by its then Associate General Counsel, Harold J. Datz. *See Memoranda from the Office of the Associate General Counsel, Division of Advice: A.T. Massey Coal Co. et al.*, Case 9-CA-21448-1 et al. (April 23, 1985). In great detail, the Advice Memorandum examined the law of single employer and its applicability under the facts to the detriment of the relationship between Massey and its operating subsidiaries. Of course, evidence of Massey's structure, organizational control, and participation and direction of the collective bargaining it was involved in was also considered.

That Advice Memorandum remains the single most extensive and authoritative treatment of the issue of single employer between parents and operating subsidiaries in the coal industry.

It comprehensively outlined the law, unchanged since its writing, of the grounds upon which a parent like Massey is a single employer with an operating subsidiary, like Mammoth, in the coal industry.

As a result of that determination, Massey negotiated and signed a settlement agreement promising to bargain with its operating subsidiaries and to treat itself as a single employer with them for purposes of that bargaining. Upon the settlement in December of 1985, the UMWA ended the strike - which had begun in October of 1984. In that strike, at least one replacement was killed. It involved considerable other violence and resulted in an adjudication of the UMWA contempt of previous orders preventing violent conduct directed at employees who were working despite the UMWA's direction to go on strike. *See, Thiebolt, Haggard and Northrup: Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB*, George Mason University John M. Olin Institute for Employment Practice and Policy (*rev. ed.* 1999), pp. 93-101; *National Labor Relations Board v. UMWA and District 17, UMWA et al.*, Case Nos. 80-1680, 82-1998, 83-1463, 84-2307 and *see specifically*, Case No. 85-1003.

That determination of single employer status, thus, had a huge affect upon the conduct of the strike and its result.

As a result of this history, both Massey and Region 9 are well informed of the doctrine of single employer status as applied in the coal industry between parents and subsidiaries. They had not forgotten when in October of 2006, the General Counsel amended its Complaint to name Massey as an additional respondent in this case. In this instance, Counsel for the General Counsel from Region 9, who controlled the litigation in this case, chose not to allege Massey was a single employer with Mammoth. Rather, the General Counsel alleged that Massey was an

agent of Mammoth and Mammoth an agent of Massey, and, on that basis, each was responsible for the other's conduct with respect to the issues in this case.

As the Datz Advice Memorandum shows, there are a myriad of factual issues in determining the existence or non-existence of a single employer relationship between a coal mining parent and its operating subsidiaries. Among the significant ones are financial relations and control. Another factor is integration of operations – the extent to which the several operating subsidiaries and Massey conduct their mining and sales in a coordinated way to help each other. The most important factor is the structure of labor relations and the decision of policy setting and control among Massey and the subsidiaries. Finally, a thorough look at how management occurs is required. Few, if any, of these relevant facts were explored at the lengthy trial of this case.

Since the Datz Advice Memorandum, Massey has restructured itself. It did so with the issue of single employer in mind, abandoning "The Massey Doctrine," for instance. It no longer has "resource groups" or "regional officers." Post restructuring, Massey Coal Services plays a fundamentally different role relative to its subsidiaries. For example, decision making is no longer centralized in the Richmond, Virginia office. As a result, Massey played no part in the individual hiring decisions challenged in this case. None of the evidence of those changes or its new structure were presented in the case below. Why? That reason is simple – no allegation of single employer was made. Massey had no idea that the issue of single employer existed in the case and thus put on no proof of the new facts.

Thus, the decision of the General Counsel in this case not to allege single employer and seek a finding of single employer only after the record was closed and with no notice was more than knowing and intentional. The result of his decision not to do so was that neither the

Respondent Massey nor, for that matter, Mammoth, litigated the issue or presented any evidence about it. Given the experience of the General Counsel and Massey in the 1984-85 strike, it is the height of unfairness to permit the General Counsel now to litigate this issue after the record had been closed and the possibility of the admission of relevant evidence the parties possessed foreclosed.

C. The Existing Record Cannot Establish That Massey And Mammoth Constituted A Single Employer Because The Existing Record Does Not Reflect Massey's (Or Mammoth's) Defense To That Allegation.

As discussed above, the record reflects Massey's defense against an allegation of liability based upon agency theory, it does *not* reflect Massey's defense against an allegation that Massey and Mammoth constituted a single employer. As such, and for all of the reasons stated above it is not possible that the record is sufficient to make any determination whatsoever regarding single employer status between parties. Of course, *the burden of proving single employer status rests with the General Counsel, and since the record, which is closed, does not contain sufficient evidence to prove that Massey and Mammoth constituted a single employer, the Board should not find that they are.*[3]

V. CONCLUSION

As set forth above, the Board does not have the authority to address single employer status based upon the record of this case because that theory was absent from the Amended Complaint and was not litigated by the parties. Even if the Board had the authority to "impute" single employer status, it should not do so, as this would deprive Massey (and Mammoth) of the fundamental fairness prescribed by due process. Finally, the record in this case does not contain

[3] *See e.g., Diverse Steel*, 349 NLRB 946, 955 (2007) (Holding that the burden of proof and persuasion rest with the General Counsel to establish all necessary criteria to prove single employer status).

enough evidence for the Board to conclude that Massey and Mammoth constituted a single employer.

Dated this 19th day of April 2011.

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CERTIFICATE OF SERVICE

I, Richard R. Parker, do hereby certify that the foregoing document was served on the parties via email on the 19th day of April 2011, and addressed as follows:

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