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

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

I. INTRODUCTION

Massey Energy Company ("Massey") files this Reply in Response to the Briefs (collectively "Briefs," individually "UMWA Brief" and "GC Brief") filed by the United Mine Workers of America ("UMWA") and the Counsel for the Acting General Counsel ("GC") pursuant to the National Labor Relations Board's ("NLRB" or "Board") "Revised Invitation to File Briefs" ("Invitation") dated March 15, 2011.[1] These Briefs fail to establish that any of the three questions posed in the Board's Invitation should be answered in the affirmative, and as such - the Board cannot and should not consider Massey and Mammoth Coal Company ("Mammoth") to constitute a single employer. Specifically:

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? (Invitation, p. 3)

[1] In the interest of expediency, this Reply is limited to the rebuttal of certain points raised in the Briefs. Massey hereby reaffirms and incorporates each of the arguments made in its Brief in Response dated April 19, 2011. In addition, Massey's failure to address a particular claim or assertion made in the Briefs in no way constitutes Massey's acquiescence, acknowledgement or admission to that assertion or claim.

No. The Board does not have the authority to consider whether Massey and Mammoth constitute a single employer because single employer liability was neither raised in any Complaint, nor was it fully litigated.

2. If so, should the Board exercise its authority? (Invitation, p. 3)

No. To do so would violate due process. The General Counsel chose not to raise the theory of single employer liability in the Complaint or at any time during the hearing, thereby robbing Massey of notice and the opportunity to present evidence in rebuttal of that theory. To charge Massey with the heightened scope of liability associated with single employer theory *years* after the record has been closed would be patently unfair.

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? (Invitation, p. 3)

No. Massey's defense to single employer liability and corresponding evidence is not "on the record" because that theory was neither timely raised nor litigated.

II. ARGUMENT

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

In order for the Board to consider an un-alleged theory, that theory must be *fully litigated* by the parties. *See e.g., S&F Market Healthcare*, 351 NLRB 975, 1006 (2006); *NLRB v. Quality CATV, Inc.,* 824 F.2d 542 (7th Cir. 1987; *McKenzie Engineering Co.,* 326 NLRB 473 (1998), enfd. 182 F.3d 622 (8th Cir. 1999); *Eagle Express Co.*, 273 NLRB 501, 503 (1984); *Graham's Trucking & Excavating, Inc.,* 2010 NLRB LEXIS 226. Recognizing this long-standing requirement, the UMWA and GC attempt to show that the alternate theory of single employer liability was fully litigated. It clearly wasn't.

The Briefs cite several cases in support of the contention that single employer liability was fully litigated. One such example, *Pergarment*, is cited in the GC Brief on page 2. *Pergarment United States*, 296 NLRB 333, 334-336 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990). In *Pergarment*, General Counsel pursued a Section 8(a)(3) complaint alleging that the Company

failed to hire several applicants in an attempt to discourage unionization. The Administrative Law Judge ("ALJ"), as affirmed by the Board, held that the Company failed to hire the applicants in retaliation for said applicants' pending unfair labor practice charges, a violation of Section 8(a)(4), which had not been alleged in the Complaint. In finding the 8(a)(4) violation, the ALJ noted that the 8(a)(4) claim had been *fully litigated*, as the "Respondents' own witness [Personnel Director] corroborated the General Counsel's witness and *admitted that the employees were not hired because of the pending unfair labor practice charges*." 296 NLRB 334 at 335 (emphasis added). The ALJ reasoned that *given the admission*, the Company's due process argument that "they would have called a rebuttal witness" was not compelling, and the 8(a)(4) allegation was "fully litigated."

Of course the instant case, neither the Massey "Personnel Director" nor the Mammoth "Personnel Director" testified that "Massey and Mammoth constitute a single employer." Indeed, the term "single employer" is completely absent from the hearing transcript.

The UMWA and GC Briefs both place great emphasis on a conclusory footnote ("Footnote 9") in the Decision in which Judge Bogas states in part, "... I conclude that Massey's involvement in, and potential liability for, *the alleged unfair labor practices* has been fully litigated." (Decision Ft. 9, emphasis added). Of course, the alleged unfair labor practices asserted involved an *agency* theory; "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)). Thus, the plain wording of "Footnote 9" merely posits that the *agency theory of liability* has been fully litigated - single employer liability is not raised in Footnote 9, nor elsewhere in the transcript or Decision.

The UMWA Brief takes the "Footnote 9" analysis a huge step further, arguing that Footnote 9 stands for the proposition that the ALJ "implicitly recognized, [that] the facts underlying the various theories of liability are essentially the same; by litigating one theory, the parties necessarily litigated the others." (UMWA BRIEF, p. 4). Of course, the facts underlying the theories of agency liability are not the same as the facts underlying single employer theory. As Massey pointed out in its Brief In Response (Pg. 7-8), agency liability is established by examining the facts surrounding a *particular transaction* between a "principal" and "agent," whereas 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). While it is, of course, true that *some* of the "facts underlying" the theories agency and single employer liability are the same, agency and single employer theories are clearly distinct – not only in the underlying facts required to establish them, but also in the potential scope of liability imposed.

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

The GC Brief concedes that "... *it is not necessary for the Board to decide the single employer issue* because the liability would flow under either the agency theory ... or the parent/subsidiary theory ..." (GC Brief, p. 5, emphasis added). The Board's Invitation does not solicit speculation as to the viability of agency liability or the so-called "parent/subsidiary theory." While Massey does not concede that either theory was proven, Massey certainly agrees that it is not necessary for the Board to decide the single employer issue. Indeed, Massey finds it

inexplicable that the Board would reach for an un-litigated alternate theory when the Counsel for the General Counsel's agency theory was the only theory specifically alleged.

To comply with the standards of due process, 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). 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). The UMWA and GC assert that Massey had notice of the single employer theory of liability, and as such it would not violate due process for the Board to find that Massey and Mammoth constituted a single employer. Massey did not have notice of General Counsel's belated single employer allegation.

To support their contention that Massey had notice of the allegation of single employer status, both Briefs refer to the testimony given during the first day of the lengthy hearing in which Counsel for the General Counsel referred to Massey and Mammoth as "**one big ball of wax**." (Tr. 159). Incredibly, according to the arguments set forth in the Briefs, this fleeting and ambiguous reference to "one big ball of wax" should have put Massey on notice that the Counsel for General Counsel was asserting single employer liability. According to the American Heritage Dictionary (Houghton Mifflin Harcourt Co., 2009), a "ball of wax" is slang for "An unspecified set of items or circumstances: *went shopping, had dinner, saw a play – the whole ball of wax.*" The phrase "one big ball of wax" cannot reasonably be construed to put Massey on notice that the Counsel for General Counsel was alleging a single employer theory of liability.

Finally, the Briefs note that at the close of the hearing, Counsel for General Counsel made an oral motion to "amend the Complaint to conform with the *evidence presented.*" (UMWA Brief, p. 4 emphasis added). Such an oral statement fails to place Massey on sufficient notice of the single employer theory because *Massey did not present evidence in defense of a single employer theory of liability*, simply because no such allegation was made at any time prior to the post hearing brief. The Briefs correctly note that Judge Bogas did not rule on this motion, further diluting the argument that this motion somehow gave Massey notice that a single employer theory had been alleged or litigated.

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.

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 theory was not fully litigated by the parties. The UMWA Brief extrapolates "evidence" of single employer status from the various statements made during the exhaustive hearings, arranging those statements, absent context, and under headings that incorporate the elements of single employer theory. (UMWA Brief, p. 6-7). As discussed in this Reply (and in more detail in Massey's Response dated April 19, 2011), liability based upon agency and liability based upon single employer status share some, *but not all* common elements and factual predicates, as they are separate and legally distinct theories. The transcript taken from this hearing reflects Massey's defense, and corresponding evidence, raised against an allegation of *agency* liability – but not the specific defense Massey would have put on if it had been faced with an allegation of single employer status. 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.[2]

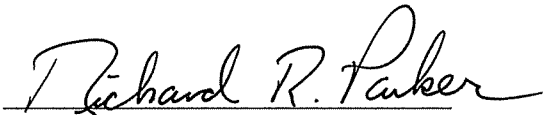
III. CONCLUSION

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 of the fundamental fairness prescribed by due process. Finally, the record in this case does not contain enough evidence for the Board to conclude that Massey and Mammoth constituted a single employer.

Dated this 3rd day of May 2011.

Respectfully Submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



Richard R. Parker
Jennifer S. Rusie
401 Commerce Street, Suite 1200
Nashville, Tennessee 37219
(615) 254-1900
(615) 254-1908 fax

Counsel for Massey Energy Company

[2] *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).

CERTIFICATE OF SERVICE

I, Richard R. Parker, do hereby certify that the foregoing document was served on the parties via email on the 3rd day of May 2011, and addressed as follows:

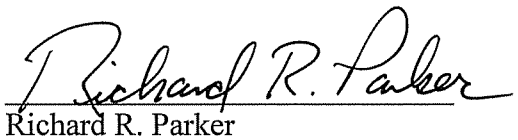
Gary Muffley, Regional Director
National Labor Relations Board
Region 9
John Weld Peck Federal Building
550 Main Street, Room 3003
Cincinnati, OH 45202-3271
Email: Gary.Muffley@nlrb.gov

Jonathan Duffey, Esq.
National Labor Relations Board
Region 9
John Weld Peck Federal Building
550 Main Street, Room 3003
Cincinnati, OH 45202-3271
Email: Jonathan.Duffey@nlrb.gov

Forrest H. Roles, Esq.
Dinsmore & Shohl, LLP
900 Lee Street
Huntington Square, Suite 600
Charleston, WV 25301
Email: FRoles@DINSLAW.COM

Charles F. Donnelly, Esq.
Senior Staff Attorney
United Mine Workers of America
1300 Kanawha Blvd, E.
Charleston, WV 25301
Email: CDonnelly@umwa.org

Judith Rivlin, Esq.
Associate General Counsel
United Mine Workers of America
18354 Quantico Gateway Drive
Triangle, VA 22172
Email: JRivlin@umwa.org



Richard R. Parker