

JAMES SPUR, INC., ET AL.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 93! 633

Decided July 26, 1995

Appeal from a decision by Administrative Law Judge David Torbett dissolving an ownership or control link under the Applicant/Violator System. AVS PA 92! 01.

Affirmed as modified.

1. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Decisions--Rules of Practice: Hearings--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings

While parties are free to waive post-hearing briefs, an Administrative Law Judge must make detailed findings and conclusions on the record. When parties wish to shorten the time for filing an appeal and the Administrative Law Judge is willing to issue an oral decision, he must nevertheless fully and clearly present his findings of fact and conclusions of law for the record.

2. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Decisions--Rules of Practice: Hearings--Rules of Practice: Appeals: Hearings--Surface

Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings

An Administrative Law Judge is not limited to deciding issues of fact under 43 CFR 4.1286. An Administrative Law Judge is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. If the Board wishes to limit the scope of a hearing, it may so state in the order of referral.

3. Evidence: Presumptions--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Generally

Where contracts between an applicant or other party seeking to have an ownership or control link dissolved and an operator which has unabated violations of SMCRA and outstanding unpaid civil penalties contain provisions stating that the applicant owned rights to the coal to be mined and requiring the other party to deliver minimum quantities of coal, the requirements established under 30 CFR 773.5(b)(6) (1994) for a rebuttable presumption of ownership or control have been met. The question is whether the applicant rebutted the presumption by establishing by a preponderance of the evidence, as contained in the record as a whole, that it did not have "authority directly or indirectly to determine the manner in which" the operator conducted its surface mining operations under 30 CFR 773.5(b) (1994).

4. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Generally

Where contracts between an applicant seeking to have an ownership or control link dissolved and an operator which has unabated violations of SMCRA and outstanding unpaid civil penalties contain provisions stating that the applicant secured mining permits to be used by the operator, the applicant "controls" the operator. However, where the operator's mining operations did not result in any violations that remained unabated, and there are no unpaid civil penalties arising from any of the mining operations under those contracts, those contracts do not provide a basis for establishing an ownership or control link under the AVS.

5. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Generally

Under 30 CFR 773.5(b) (1994), one entity may "control" another where it has "authority" to determine the manner in which mining operations are conducted. It is not required that such authority actually have been exercised.

6. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Generally

An ownership or control link is properly dissolved where the evidence as a whole fails to demonstrate either (1) that an applicant had direct authority via oral or written contract to supervise or oversee the operator's mining operations, that the operator was obliged by any contractual provisions to obey directions by the applicant or its officer/directors concerning the manner in which it mined coal, or that the applicant (or its representative) actually supervised or oversaw mining operations; or (2) that the applicant had indirect authority via oral or written contract to compel or coerce the operator to take specific steps in its operations. Although indirect authority may also be established by inference from the relationship between the applicant and the operator, no basis for finding indirect authority exists where the applicant has offered credible explanations demonstrating legitimate purposes (apart from an interest or intention to influence the conduct of operations) for elements of its relationship with the operator.

APPEARANCES: John Austin, Esq., Office of the Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for appellant Office of Surface Mining Reclamation and Enforcement; Joseph N. Clarke, Jr., Esq., Knoxville, Tennessee, for applicants/appellees James Spur, Inc., et al.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed a July 23, 1993, decision by Administrative Law Judge David Torbett dissolving an ownership or control link between B&J Excavating Company, Inc. (B&J), and certain applicants. ^{1/} OSM had established that link under its Applicant/Violator System (AVS).

The AVS is a computerized system maintained by OSM to identify ownership and control links involving permit applicants, permittees, and persons cited in violation notices. See 30 CFR 773.5 (59 FR 54352 (Oct. 28, 1994)). The AVS includes information about past and current holders of surface mining permits, their owners, operators, and corporate directors and officers. It allows information about permit applicants to be reviewed to find relationships to entities that have unresolved problems under the surface mining laws, including unabated violations, unreclaimed areas, delinquent civil penalties, and unpaid abandoned mine land fees. See generally The Pittston Co. v. Lujan, 798 F. Supp. 344, 345-47 (W.D. Va.

^{1/} Applicants are B&J, James Spur, Inc. (Spur), and Mountain, Inc. (Mountain), and the following individuals, who are directors and officers of Spur and Mountain: John P. Baugues, Sr., John P. Baugues, Jr., Richard L. Pilkay, Lindsay Young, Gerald E. Stuart, David G. Byrd, John B. Long, and Armistead M. Long (Exhs. A! 8 and A! 9; Tr. 464). These parties are applicants for permits or other persons shown in the Applicant/Violator System in an ownership or control link. See 30 CFR 773.24(a)(1) (59 FR 54354 (Oct. 28, 1994)). For the sake of simplicity, we shall refer to them as "applicants." They appear before this Board as appellees in OSM's appeal.

1992). The word "link" is used within the AVS to indicate a connection between two parties. ^{2/}

REVIEW OF GOVERNING LAW

A review of the governing statute and regulations will provide a background to understand the AVS link prior to setting forth the procedural history and facts of the case. Section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires an applicant for a surface coal mining operation permit to file

a schedule listing any and all notices of violations of this chapter and any law, rule, or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three-year period prior to the date of application. The schedule shall also indicate the final resolution of any such notice of violation. Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or such other laws referred to [in] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department

^{2/} Under the current regulations, the term "ownership or control link" is defined very generally to "mean any relationship included in the definition of 'owned or controlled' or 'owns or controls'" in 30 CFR 773.5 or in the violations review provisions of 30 CFR 773.15(b). 30 CFR 773.5 (59 FR 54352 (Oct. 28, 1994)).

or agency which has jurisdiction over such violation. [Emphasis supplied.]

30 U.S.C. § 1260(c) (1988). ^{3/}

Under 30 CFR 773.15(b)(1) (1994), the version of the regulation in effect for this case, a regulatory authority reviewing a permit application "shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of [SMCRA] or any other law, rule or regulation referred to" in that paragraph. The paragraph contains a reference to "delinquent civil penalties issued pursuant to section 518 of" SMCRA. Thus, being linked to a party with outstanding violations or delinquent civil penalties prevents an entity from receiving any new surface coal mining permits. In this way, the AVS attempts to gain compliance with SMCRA by denying additional permits to parties in control of entities that remain in violation of SMCRA and other laws. ^{4/}

^{3/} See also 30 U.S.C. §§ 1257(b)(4) (requiring, in some circumstances, a permit applicant that is a partnership, corporation, association, or other business entity, to identify any person "owning" stock) and 1257(b)(5) (1988) (requiring a statement of whether persons "controlled by or under common control with the applicant" have held a permit that has been suspended or revoked or had a mining bond forfeited in the 5! year period before the permit application was suspended).

^{4/} An OSM representative testified that the effect of these provisions is to require an applicant to assume responsibility for unresolved violations committed by an entity that the applicant "owns or controls," or to take steps to satisfy the regulatory authority that the violations are being corrected, before a permit can be issued to that applicant (Tr. 9-10, 12). Applicants who are denied permits are said to be "blocked" (Tr. 13).

As will be set out in greater detail below, OSM asserts that, at the time of the hearing, B&J had unresolved violations and unpaid civil penalties, including principal and interest. Applicants have been linked to B&J under the AVS and seek to have those links dissolved. The links have had a direct impact on some applicants. For example, on June 22, 1993, the Kentucky Department for Surface Mining Reclamation and Enforcement notified Balmont Corporation (Balmont) and its officers, directors, and owners of 10 percent or more of voting stock that two of its permits were being suspended because of the ownership and control link between its officers and directors and B&J (Exh. A! 11). Applicant John P. Baugues, Jr., president of Balmont, testified that Balmont was unable to get permit amendments, renewals, or successor-in-interest applications approved in Kentucky because it is listed on the AVS. It is listed on the AVS because Balmont and Spur (linked by OSM to B&J) have common officers and directors (Tr. 352-53).

Departmental regulations promulgated in 1988 govern the present case. See 53 FR 38868 (Oct. 3, 1988). 5/ They do not define "control"

fn. 4 (continued)

According to the OSM representative, "it's left * * * for the person who is blocked to resolve the violation" (Tr. 14). He added that OSM finds an outstanding violation and identifies the permit it was on, and then gathers documentation as to who was the operator, who was the permittee, and who "owned and controlled the permittee," in order to "determine who was actually the owner and controller of that site when those violations occurred" (Tr. 15). The purpose is to collect outstanding penalties and cure environmental problems (Tr. 82).

5/ Those regulations appear in the 1994 edition of the Code of Federal Regulations. Citations are therefore made to that edition.

and "ownership" as separate terms, but provide a joint definition. ^{6/} Specific circumstances in which relationships are deemed to constitute "ownership or control" are listed:

Owned or controlled and owns or controls mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition! -

(a)(1) Being a permittee of a surface coal mining operation; (2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity; or (3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations. [Emphasis supplied.]

30 CFR 773.5 (1994). It is thus apparent that, even in the absence of the circumstances specified in (a)(1) and (2), an applicant nevertheless "owns or controls" an entity if the applicant possesses "authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations." 30 CFR 773.5(a)(3) (1994).

^{6/} Pursuant to the Court's order in Save Our Cumberland Mountains Inc. v. Clark, 22 E.R.C. 1217 (D.D.C. 1985), OSM published proposed definitions of the terms "control" and "ownership" and also a regulation requiring regulatory agencies to make a finding that an applicant does not own or control a surface coal mining and reclamation operation which is in violation of the law. 50 FR 13724, 13727 (Apr. 5, 1985). The proposal received considerable attention and the comment period was reopened and extended a number of times as OSM identified several possible options. 52 FR 37164 (Oct. 5, 1987); 52 FR 16275 (May 4, 1987); 51 FR 25900 (July 17, 1986); 51 FR 23085 (June 25, 1986); 51 FR 12879 (Apr. 16, 1986); 50 FR 24122 (June 7, 1985). Four public hearings were held. 53 FR 38868 (Oct. 3, 1988).

In 1993, OSM proposed to change the definition along with other portions of the regulations. 58 FR 34652, 34665-66 (June 28, 1993). We are unaware that such rule has been promulgated, and, in any event, the proposed rule is intended to apply only prospectively. 58 FR at 34665.

In prescribed circumstances, the regulations also create a rebuttable presumption that an applicant "owns or controls" an entity:

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

- (1) Being an officer or director of an entity;
- (2) Being the operator of a surface coal mining operation;
- (3) Having the ability to commit the financial or real property assets or working resources of an entity;
- (4) Being a general partner in a partnership;
- (5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or
- (6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation. [Emphasis supplied.]

30 CFR 773.5(b) (1994).

As shown below, Spur had the right, via numerous contracts, to receive coal mined by B&J. As a result, under 30 CFR 773.5(b)(6) (1994), ownership or control of B&J by Spur is presumed unless Spur can demonstrate that it "did not in fact have the authority directly or indirectly to determine the

manner in which" B&J's surface coal mining operation was conducted. ^{7/} The central issue thus becomes whether applicants have so demonstrated.

PROCEDURAL HISTORY

Notification by OSM of AVS Link

By letter dated June 19, 1991, OSM's Chief of the AVS Field Investigations Branch notified the applicants that its research had disclosed that each was, as defined by 30 CFR 773.5 (1994), an "owner or controller" of B&J, an entity with unabated violations and unpaid civil penalties (AR 14; Tr. 70). ^{8/} OSM stated that the parties were allowed to provide information to refute or rebut OSM's proposed determination that they were owners/controllers of the violator. OSM advised that, if a party were determined to be an owner/controller, its name, title, and period of responsibility would be entered into the nationwide AVS (AR 14).

J. B. Brewer (president of B&J) responded, requesting that the other applicants' names be removed, as only he and Jimmy Jones (his partner in B&J) had been owners or controllers of B&J, and the other applicants had not controlled the company (AR 13). The other applicants also responded,

^{7/} Other elements, 30 CFR 773.5(b)(1) and (5) (1994), govern whether the applicants other than Spur are properly presumed to have owned or controlled B&J.

^{8/} References to the Administrative Record, which OSM placed into evidence at the hearing, are to "AR" followed by the tab number of the document.

through counsel, denying they were owners or controllers of B&J and requesting information about the basis of OSM's determination, as well as about B&J's unabated violations and unpaid penalties (AR 12; Tr. 70).

OSM responded on August 12, 1991, sending copies of a contract dated July 26, 1982, between Spur and B&J, a check by Spur dated April 20, 1982, payable to the State of Tennessee for \$800 bearing the notation "Permit & Acreage fee! - B&J Excavating Area #4," and portions of an OSM "Reclamation Fee Compliance Audit" of Spur for the years 1984-89. OSM also provided a list of unabated violations and civil penalties owed by B&J (AR 10; Tr. 71). OSM did not provide its entire record related to the reclamation fee compliance audit (Tr. 71).

After receiving these documents, on September 10, 1991, applicants submitted an affidavit by Brewer stating that Spur had not controlled B&J and copies of January 1989 letters of resignation of John B. Long and Armistead Long as directors and officers of the corporations (AR 8, 9; Tr. 71-72). The applicants also raised a number of arguments concerning the validity of OSM's regulations, procedures, and proposed findings.

By letter dated March 23, 1993, the OSM Director informed the applicants that he had determined that under 30 CFR 773.5 (1994) the "record supports a presumption" that Spur is "linked by ownership or control to" B&J, and that the documents submitted by the applicants were

"not sufficient to rebut the presumed ownership or control link between" Spur and B&J (AR 6 at 2; Tr. 72, 74). In support, he noted that the July 26, 1982, contract between Spur and B&J required B&J to deliver all coal mined to tipples owned by Spur with payment at a set price, that Spur owned the coal to be mined by B&J, and that Spur had the right to receive the coal (AR 6 at 3). The Director went on to state:

Further, [Spur] obtained the permit for B&J and retained the right to assume the permit (Item 10 of the agreement) if B&J defaulted. These facts indicate that [Spur] exercised control over the operation. In effect, [Spur] was an active participant in seeing that the operation was properly permitted and that mining would continue in the event that B&J failed to perform.

(AR 6 at 3-4).

The Director found that the presumption of ownership or control also applied to Mountain because it was Spur's sole stockholder, and that, under 30 CFR 773.5(b)(1) and (5) (1994), the individual applicants were presumed to own or control B&J because they were officers, directors, or shareholders of Mountain (AR 6 at 4). Accordingly, he concluded that Spur and Mountain were "responsible for certain unabated violations of SMCRA issued to" B&J, and that their officers, directors and stockholders were "responsible as owners and controllers for Federal violations of SMCRA issued to

[B&J] during the tenures of their offices or periods of ownership" (AR 6 at 5). Applicants appealed the Director's decision, and their appeals were ultimately consolidated for hearing before Judge Torbett. ^{9/}

Hearing Before Administrative Law Judge

Judge Torbett issued the ruling presently under appeal from the bench at the end of a hearing held July 21-23, 1993, in Knoxville, Tennessee. He appeared to rule that a mine operator must be in effect either a "front" or a co-conspirator to be found to "own or control" a violator under 30 CFR 773.5 (Tr. 249, 455-56). He rejected the idea that the existence of economic authority alone was sufficient to support a finding of control, concluding that parties "became owners or controllers

^{9/} Pursuant to instructions provided in OSM's decision, all applicants initially filed appeals with the Privacy Act Officer of the Office of the Assistant Secretary--Policy, Management & Budget (PMB) (PA 92! 02) (AR 4). See 53 FR 22575 (June 16, 1988), 52 FR 29570 (Aug. 10, 1987). They also requested review by the Hearings Division, Office of Hearings and Appeals (OHA), under regulations proposed at 56 FR 45806 (Sept. 6, 1991) (AR 3). However, by letter dated Aug. 28, 1992, the OSM Director modified his decision to clarify that an appeal to the Assistant Secretary--PMB was not available to corporations, but that they could instead appeal to this Board under 43 CFR 4.1280 through 4.1286 (AR 2).

By letter dated Sept. 18, 1992, the corporate applicants, Spur and Mountain filed a notice of appeal which was docketed as IBLA 93! 63. By order dated Dec. 21, 1992, the matter was referred to the Hearings Division for assignment to an Administrative Law Judge.

The joint appeal of the individual applicants remained temporarily before the Assistant Secretary--PMB. However, by memorandum dated Jan. 15, 1993, authority over Privacy Act appeals brought by individuals arising from the AVS was delegated to OHA. The individuals' appeal was therefore forwarded to OHA and docketed before this Board (IBLA 93! 146). By order dated Feb. 25, 1993, the case was also referred to the Hearings Division. Upon motion by the applicants and with OSM's consent, the two appeals, involving both corporate and individual applicants, were consolidated for hearing.

of this mining operation" only on "the day they exercised" that economic authority (Tr. 457-58), that is, in this case, never.

Judge Torbett understood the evidence to present "a fairly clean cut case" in which "the only damaging testimony to the Applicants" concerned Michael Paynter's activities (Tr. 459) (discussed in detail below). He concluded that under "the total facts and circumstances of the case" the applicants had satisfactorily explained that Paynter had acted to protect the lessor's interests (Tr. 459-60; see Tr. 22, 28-32). The effect of the ruling was to terminate the link between the applicants and B&J, which OSM had established under the AVS, and which, as provided by 30 U.S.C. § 1260(c) (1988), barred approving pending permit applications. OSM appealed.

[1] Before discussing the evidence presented in this case, we address the adequacy of the action taken by the Administrative Law Judge. The parties had discussed with Judge Torbett the need for a preliminary ruling due to pending applications to amend and renew permits, as well as possible suspension of a permit (Tr. 352-55, 435-37, 452-53). Judge Torbett initially discussed the law and the evidence for the purpose of giving the parties a preliminary ruling, anticipating that a written decision would follow after the parties had provided him with briefs (Tr. 453). However, during an off-the-record discussion, the parties agreed to waive post-hearing briefs and accept Judge Torbett's preliminary ruling as his final

ruling (Tr. 461-65; Notice of Appeal at 2 n.1). Judge Torbett found that the witnesses had been credible and made his decision final (Tr. 463-64). He issued no formal, written decision.

Although it is clear from the hearing transcript that Judge Torbett dissolved the link, the legal and factual basis for that conclusion is not fully set out. The ruling we now review lacks the orderly identification of issues, findings of fact, and conclusions of law ordinarily provided by a written decision. The lack of a formal decision presents difficulties in reviewing the appeal, placing the burden on this Board, in effect, to issue an initial decision setting out findings of fact and applying governing law.

While parties are free to waive post-hearing briefs, an Administrative Law Judge must make detailed findings and conclusions on the record. 43 CFR 4.1127; see Dean Trucking Co., 1 IBSMA 105, 112-13, 86 I.D. 201, 204-05 (1979). When parties wish to shorten the time for filing an appeal, as appears to have been the motivation in this case, and the Administrative Law Judge is willing to issue an oral decision, he must nevertheless fully and clearly present his findings of fact and conclusions of law for the record. Delight Coal Corp., 1 IBSMA 186, 194-96, 86 I.D. 321, 324-26 (1979).

[2] We expressly reject OSM's assertion that, under 43 CFR 4.1286, an Administrative Law Judge "is limited to deciding issues of fact"

(Statement of Reasons for Appeal (SOR) at 13-14). The regulation provides that, when an appeal has been filed with the IBLA from a decision of the Director of OSM, either party may request a hearing on an issue of fact or the Board may, on its own motion, refer a case for a hearing. The regulation does not limit the scope of an Administrative Law Judge's authority. An Administrative Law Judge is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. See 43 CFR 4.1126, 4.1127. If the Board wishes to limit the scope of a hearing, it may so state in the order of referral.

FACTS OF THE CASE

Creation of Spur

According to John P. Baugues, Sr. (Baugues), in 1972, Junior Thacker was operating James Spur Coal Company (JSCC) 10/ at Valley Creek in eastern Tennessee. Also, Fred and Mary Waters had a company, the Waters Coal Company (Waters), and in 1972 they bought JSCC from Thacker (Tr. 266, 329).

In 1975, the Alabama Electric Coop (AEC) acquired Waters and JSCC from Fred and Mary Waters (Tr. 260, 262-63, 266, 329) in the form of two active _____
10/ JSCC is not the same as applicant Spur. "James Spur" is not a person's name, but instead a reference to a geographical feature, a "spur" of a mountain known as the "James Spur" (Tr. 260-61).

mines, as well as leases in the Valley Creek community in eastern Tennessee covering 2 million tons of surface mineable coal, to provide coal for a new coal-fired electric power plant (Tr. 267 and 269).

AEC asked Baugues, who was an employee of Champion International (Champion) and a registered mining engineer, if Champion would run the operations (Waters and JSCC) for it, in return for a management fee (Tr. 265, 268, 273, 330). Champion formed Spur 11/ to operate and manage both the Waters and JSCC mines and coal leases (Exh. R! 28 at 13; 12/ Tr. 261, 266-67, 330). Spur managed these mines for AEC under Champion's ownership from 1975 to 1980 (Tr. 261-62, 268). Baugues served as president of Spur (Tr. 262). Baugues' involvement from 1975 to 1980 was as "president of a management company"; he was employed by Champion during this time (Tr. 320-21). 13/

Spur is an applicant in this proceeding, and its relationship with other parties is central to the dispute. Spur had no subsidiaries (Exh. A! 15 at 27).

11/ Despite the similarity in name, JSCC was a "different and distinct corporation from" Spur (Tr. 260).

12/ Exhibit R! 28 is a deposition of Brewer taken on July 9, 1993, in Knoxville, Tennessee. Attorneys for OSM and applicants participated.

13/ At times Baugues also acted as agent for AEC (Tr. 258, 262, 273, 320-21). That gave him the right to sign permit applications on behalf of AEC, and to take certain actions in its name (Tr. 262, 320).

At the same time, Baugues served as "president of the Pathfork Harlan Coal Company in Harlan County, Kentucky" (Tr. 321, 330).

Creation of B&J

In 1976, when mining in the area became uneconomic, AEC closed its coal operations at Waters and JSCC, laid off employees, and sold "a big part" of its equipment (Tr. 269). AEC left some equipment at the site and retained its permits (Tr. 269).

In 1977, Brewer and his nephew Jones formed B&J (Exh. R! 28 at 8-9, 42-43; Tr. 358, 377). They had previously worked for JSCC and Waters until sometime in 1977 (Exh. R! 28 at 10; Tr. 83-84, 269-70) and then were unemployed for 7 or 8 months (Exh. R! 28 at 9-10; Tr. 270).

Baugues knew Brewer when Brewer worked for Waters (Tr. 84, 269-70). Brewer contacted Baugues in November 1977 and asked to buy the equipment AEC had left and to let him mine on Waters' leases and permits in Kentucky, which were still in effect (Exh. R! 28 at 12-13; Tr. 269-70). Baugues in turn approached AEC with the proposal, cautioning that AEC would "have to buy the coal because I can't sell" it (Tr. 270). AEC agreed to allow B&J to mine and agreed to "buy some of the coal" (Exh. R! 28 at 12; Tr. 269-71, 330). Baugues explained the arrangement: "This was [AEC's] mine. They had some minimum royalties. They had some costs of maintaining it. They were paying a fee to Champion[,] so during that process [AEC] sold [Brewer and Jones] some equipment and let them come on to [mine] some coal" (Tr. 270).

Although Baugues apparently made AEC aware of Brewer's interest in buying the equipment, AEC sold it directly to B&J (Tr. 331). B&J purchased some of its equipment from AEC; the only parties to the purchase were Brewer, Jones, and AEC (Tr. 367).

There followed a series of contracts between B&J and Waters and/or Spur covering the period from 1977 to "the late part of 1984" (Exh. R! 28 at 40). These contracts are discussed in detail below. Some of these contracts overlapped for several months, but they were generally consecutive.

With the exception of one or two loads, B&J sold the coal mined under the contracts to Spur (Exhs. R! 28 at 50 and A! 15 at 47-48). Spur in turn sold the coal to AEC from 1977 to 1980 (Tr. 330). During that time, Spur also purchased coal from many other contractors (Exh. A! 15 at 52).

Creation of Mountain and Its Acquisition of Spur

In 1980, Champion terminated its management agreement with AEC, leaving Baugues "out of a job" (Tr. 262, 275). Baugues, John B. Long, and members of their families ^{14/} formed Mountain for the purpose of purchasing Spur from Champion (AR 38, 55; Tr. 262-63, 268, 275-76).

^{14/} Armistead Long clarified that, although his father, John B. Long, became associated with Mountain/Spur in 1980, he did not until 1981 (Exh. A! 15 at 54-55).

Mountain agreed to buy from AEC "some buildings and some equipment around the loading facility" and the rights to work on Waters' and JSCC's permits (Tr. 276-77). Spur agreed to pay AEC for rights to the coal, which was reflected as the "AEC royalty" in subsequent contracts between Spur and B&J (Tr. 277). It was a "timed pay out" (Tr. 276).

Mountain received the right to utilize leases from Huber Land Company (Huber) and Junior Thacker, Waters or JSCC had previously held those leases (Tr. 334). ^{15/} The agreement between Mountain and AEC gave Mountain the right to have other people come on the Waters' leases and do contract mining (Tr. 277). Soon after that, JSCC "was rolled into" Waters and "disappeared," and it became "only Waters" (Tr. 276). Thus, in 1980 Spur became a subsidiary of Mountain under the control of Baugues and Long (Tr. 280). Mountain, through Spur, managed the Waters operations. Baugues testified that he "had to look after [AEC's] interest in those leases" (Tr. 334).

Mountain/Spur later acquired additional coal rights from Consolidation Coal Company (Consolidation Coal) that adjoined the coal that Waters had (Tr. 335). Mountain also purchased other properties from Blue Diamond Coal Company (Tr. 278).

From 1980 forward, Mountain/Spur "was the only company [in the area] that was buying coal or taking coal" (Tr. 332-33). In 1980, Champion

^{15/} Other references in the record are to "J. M. Huber Corp."

agreed via sales contracts to buy coal from Mountain/Spur (Tr. 333). AEC also continued to buy coal from it (Tr. 333), and Mountain/Spur also sold to General Shale Brick Plant and to Consolidation Coal (Tr. 334). Although amounts varied (Tr. 337), sales by Mountain/Spur approached 750,000 tons per year (Tr. 333, 338). ^{16/} Under agreements with AEC and Champion, Mountain/Spur was required to deliver a certain amount of tonnage per month (Tr. 335). Absent force majeure conditions, Mountain/Spur was "expected to deliver * * * close to" the agreed amount (Tr. 336).

In 1980, Mountain agreed to "pick up all the reclamation that Waters had" in Tennessee and Kentucky (Tr. 277-78). Baugues explained that his and Long's enterprise "became not only the land holding but a reclamation company that did reclamation on the permits at Mountain" (Tr. 279). He added that, "we got the permits then through Mountain Land and Reclamation when it was [Spur's] permitting and then normally those were taken up to the point of first reclamation to get the first release and then Mountain Reclamation took them over from there" (Tr. 279). Armistead Long generally corroborated that testimony (Exh. A! 15 at 29). As discussed below, Mountain Reclamation also provided B&J some assistance in reclamation on certain permit areas (Exh. A! 15 at 30).

^{16/} Not all of that coal was produced by B&J. Up to three quarters of it came from other sources (Tr. 339); some of it was purchased by Mountain/ Spur and resold (Tr. 338). As sales increased, B&J's percentage decreased (Tr. 339).

The officers and directors of Mountain Reclamation were the same as Spur's and Mountain's: Armistead Long, John Long, Baugues, and Baugues, Jr. (Exh. A! 15 at 6, 31).

Baugues and Long also formed Balmont, which operated a loading facility in Kentucky for the supply of coal in the southeastern markets. The officers and directors were the same group of four (Exh. A! 15 at 30-31). Baugues and Long also formed Mo! Coal (which sold coal) (Tr. 279-80). Both corporations were subsidiaries of Mountain (Exh. A! 15 at 31).

Sale of Mountain to Garland Coal Company; Change of Directors

In January 1989, part of Mountain was sold to Garland Coal Company (Garland). Baugues, John Long, and Armistead Long sold their stock to Garland (Exh. A! 15 at 31); Baugues, Jr., kept his stock (Tr. 264). John and Armistead Long resigned as officers and directors of Spur and Mountain in January 1989 (Exhs. A! 8, A! 9, and A! 15 at 6-10).

Baugues had a contract to continue operating for Garland (Tr. 264), apparently as an employee of Mountain (Tr. 265). It appears that Baugues continued to serve as president of Mountain, Spur, Mountain Reclamation, and Mo! Coal until April 5, 1991 (Tr. 265, 281-84). Baugues, Jr., evidently remained a director and officer of all four corporations (Exhs. A! 8, A! 9, and A! 15 at 7; Tr. 281-84). Baugues, Jr., was president of Mountain and Balmont as of the date of the hearing (Tr. 350).

Directors and officers of Garland became directors and officers of Mountain as a result of Garland's purchase of Mountain (Exhs. A! 8 and A! 9; Tr. 430, 432.)

B&J's Cessation of Activities

B&J ceased mining operations sometime late in 1984 due to financial difficulties and disposed of its equipment (Tr. 339, 405; Exh. R! 28 at 7, 40, 44). Its authority to conduct business in Tennessee was revoked February 1, 1985 (AR 21). Its permits, however, remained in effect at the time of the hearing (Tr. 140-41). As discussed below, reclamation is incomplete on Area 5 and civil penalties remain unpaid.

Contracts Between Spur and B&J

Brewer testified that he "worked for" Spur from 1977 through 1984, but that he was not employed by Spur; instead, B&J was his employer (Exh. R! 28 at 7). Brewer added that B&J selected its own trucking company (Exh. R! 28 at 14). Coal was delivered to the Valley Creek tipple (Exhs. R! 3 and R! 28 at 14; Tr. 91-92), and from 1980 or 1981, to the Pruden tipple in Kentucky (Exh. R! 28 at 16, 39).

Spur dealt with a large number of contract miners, not just B&J (AR 10! 4g; Tr. 166, 233). Brewer testified that he had "another lease for another man" besides Baugues (Exh. R! 28 at 38).

The December 9, 1977 Contract

The first contract in the record is between Spur and Waters jointly and B&J and is dated December 9, 1977 (Exhs. R! 4 and R! 28 at 13; Tr. 86, 89, 93, 270). The contract covers coal located in Kentucky and owned by Junior Thacker, who had transferred his leases to Waters. The area mined was not given a formal designation (Exh. R! 28 at 17-19; Tr. 86, 90).

The December 1977 contract stipulated that the coal had to be mined "by the strip mining method" and that B&J agreed "to abide by state and federal laws and regulations concerning strip mining." Spur and Waters agreed "to obtain the necessary mining permits for all coal to be mined" by B&J. B&J agreed to furnish its own equipment, and the parties stipulated that B&J was "an independent contractor in its operations" and that Spur and Waters would "have no control over its employment or labor policies." B&J agreed to indemnify Spur and Waters for all claims, including liability for claims for reclamation, workmen's compensation claims, general liability and property damage. B&J agreed "to deliver a minimum of 2,000 tons [of minimum 12,500 BTU coal] per month," at "an even weekly flow insofar as possible." B&J agreed to be "responsible for all reclamation work required by its mining operations except seeding, which work" would be performed by Spur/Waters. ^{17/} The specified rights of Spur

^{17/} Brewer testified that he did not remember Spur/Waters doing any seeding or reclamation on the site (Tr. 92-92).

and Waters on default were limited to "the right to purchase, at its depreciated value * * * all of the equipment used by [B&J] in its operations on the property."

Spur/Waters agreed to purchase coal from B&J, paying \$18.50 per ton for the coal delivered (Exh. R! 4), the price to be reviewed by the parties every 12 months. Baugues explained that, from 1977 to 1980, AEC was taking coal from the Waters and JSCC leases for use in its power plant. Baugues was managing JSCC and Waters for AEC via the entities known as Champion and Spur. He added that he "had to" agree in the operating contract to buy the coal, because B&J would not have been able to sell it elsewhere, and its lack of funds and credit would have prevented it from being able to buy fuel or explosives to sustain operations (Tr. 271-72). Champion/Spur paid B&J weekly for coal to provide B&J money for fuel and explosives (Tr. 234, 271).

At first B&J made direct payments to AEC for the equipment it had purchased (Tr. 87, 332). It appears that it was doing so during the time of the first contract.

Champion/Spur "worked on Waters' permits," but also "purchased coal from others who did mining in the area on their own permits and land, and * * * as the tonnage progressed, purchased a screening plant so we could make a stoker" (Tr. 273-74). Spur was selling about 20,000 tons per month

at that time, of which B&J's production accounted for 3 to 4 thousand tons per month (Tr. 272). After screening, stoker coal was purchased by Champion, and other coal (along with the fines) was shipped to AEC (Tr. 274 and 333). Brewer delivered coal to the Valley Creek tippie (Tr. 88, 272). Baugues' testimony summed up the arrangement: B&J "mined on permits that were controlled * * * by AEC through Waters" (Tr. 285).

**The February 10, 1981, Amendment
to the December 9, 1977, Contract**

Although Brewer (Exh. R! 28 at 19) and Baugues (Tr. 274) both testified that the area covered by the 1977 contract was mined from 1977 to 1980, an amendment to the 1977 contract, dated February 10, 1981, indicates that mining continued at least into 1981 (Exh. R! 27). The amendment changed the amount paid to B&J for coal and provided that Spur would deduct \$0.60 per ton from the purchase price "to be transmitted to [AEC] until such time as the equipment purchased by [B&J from Waters] has been paid" (Exh. R! 27A; Tr. 87-88). Baugues explained that, as B&J "didn't have any money" or credit, it "had to assure AEC that [it] would pay" for the equipment it bought from AEC (Tr. 271, 332). That arrangement was evidently in lieu of B&J making direct payments to AEC for the equipment. Brewer and Jones agreed that the deductions were simply "cut out of [B&J's] check" from Spur and passed along by Spur to AEC on B&J's behalf (Tr. 368, 386).

Starting in late 1980, in addition to amending the December 1977 contract, B&J and Spur (which was now owned by Mountain instead of Champion) entered into a series of consecutive contracts governing mining of coal lands managed by Spur (Tr. 285). From the November 1980 contract (discussed below) until the January 18, 1983, contract, Spur deducted \$0.60 per ton from the amount it paid B&J for the coal and passed that amount to AEC to reimburse it for the cost of the equipment B&J had purchased from AEC (Exhs. R! 5, R! 6, R! 7, R! 27A, and R! 28 at 23-24; Tr. 98, 230). Brewer stated that "it was easier for us" to have Spur make the payment (Tr. 88). Bauges testified that Spur collected it and sent it down to AEC (Tr. 304, 332), and that the arrangement was "strictly between [AEC] and B&J" (Tr. 304-05).

Bauges testified generally that Spur did not receive any benefits from any of these, or subsequent, deductions, made from amounts due to B&J under the contracts:

That was a pass through that whoever mined coal and went through there, that was part of the costs. Tennessee severance tax was twenty cents a ton. * * * Black lung was * * * just a straight pass through. The reclamation tax was a pass through. These were made as a convenience for [B&J].

(Tr. 303). The reclamation tax was, in Bauges' opinion, also "a tax like the black lung tax" and "since we had the actual lease on the property or controlled the actual lease on the coal, * * * it would be better for us" to go ahead and pay it (Tr. 303-04).

The November 1980 Contract

The second contract between Spur and B&J was dated in November 1980 and concerned coal rights in Campbell County, Tennessee, acquired by lease by Spur from Wynn Claiborne (Exh. R! 5). Ernest Reynolds had secured a permit, but did not mine it. The permit was issued to Johnson Coal. It appears that Spur acquired the permit and contracted with B&J to conduct mining operations on it. B&J mined the permit and paid Reynolds royalty, but the permit was never assigned to B&J (Exh. R! 28 at 22-23). The contract indicates that the permit was actually held by Spur, which apparently purchased it from Reynolds for \$5,000 (Exh. R! 5 at 2). B&J agreed to pay \$0.25 per ton to Johnson Coal and \$0.25 to Spur "until the [\$5,000] plus interest which was paid to Ernest Reynolds for assigning said permit to [Spur] has been repaid." 18/

B&J agreed to deliver a minimum of 4,000 tons per month, and Spur agreed to purchase same unless unable to accept delivery. Other terms were generally comparable to the 1977 contract. 19/ The contract called

18/ It is not clear how Johnson Coal entered into the arrangement.

19/ The contract required B&J to deliver "all the coal mined" to tipples owned by Spur for payment at \$25 per ton with a slightly higher price for coal of higher quality. The contract allowed deductions for (1) a royalty payment; (2) an overriding royalty to be paid to Johnson Coal Company; (3) an overriding royalty paid to Spur for the amount "paid Ernest Reynolds for assigning said permit to" Spur; (4) "Black Lung Tax and Reclamation Fees"; (5) Tennessee severance tax; (6) \$1 per ton "for bonding and reclamation" to be "used to purchase certificates of deposit in the name of [B&J] to reduce the bond provided by" Spur; and (7) "Sixty Cents (\$.60) per ton to be paid to Alabama Electric Cooperative to pay for the equipment purchased from" AEC.

for Spur to "obtain the necessary mining permits" and made B&J "responsible for all reclamation work required by its mining operations, including seeding." Like the 1977 contract, Spur's rights in the case of default were limited to purchasing equipment used on the property.

Brewer testified at the hearing that B&J never mined under the November 1980 contract (Tr. 94-95), contradicting his earlier statement in is deposition (Exh. R! 28 at 23, 25-26).

In both the December 1977 and November 1980 contracts, Spur obtained mining permits for B&J. Baugues testified that B&J "mined on permits that were controlled either by AEC through Waters or later permits of [Spur] that [were] controlled through Mountain and [Spur]" (Tr. 285). Those permits were permitted in the name of Waters (Tr. 286) and then later, of "Mountain Reclamation Services or Reclamation Services, however it was" (Tr. 285, 403). Baugues agreed that his corporations got the permits and selected the mining plan (Tr. 285). He acknowledged that "through [Spur] we controlled what [B&J] did. * * * We had the plan to mine. They mined by the plan and when the mining was over * * * we had the contract -- I mean we had the obligation to get that permit reclaimed and get it released" (Tr. 290). Baugues testified that, in this arrangement, there was a deduction from the amount paid to B&J for reclamation, "a sum that was deducted to guarantee that the reclamation would be done" (Tr. 347). No deduction was taken for civil penalties (Tr. 347).

Baugues testified that, in situations where Spur held the permits and admittedly controlled the jobs, there had been no outstanding penalties or outstanding liabilities (Tr. 290, 292). Nothing in the record indicates that there were unabated notices of violation (NOV), cessation orders (CO), or unpaid civil penalties associated with B&J's activities on areas covered by the December 1977 or November 1980 contracts.

Brewer confirmed that some of the permits were "their" (Mountain's/ Spur's) permits and some were "our" (B&J's) permits (Tr. 359). The remaining contracts on which evidence was received (discussed below) are of the latter variety. As to those contracts, Brewer testified, he and Jones determined what areas to mine and when, what engineers to hire, how mining was to be conducted (including the manner in making cuts), how to respond to and how to deal with NOV's, CO's, and civil penalties (Tr. 359-60). Jones corroborated that testimony (Tr. 378-79).

Baugues also corroborated that testimony, noting that, as the need arose to replace mining equipment, B&J wanted to acquire permits in its own name, in order to be able to borrow money from financial institutions (Tr. 286-88). Where B&J held its own permits, they hired their own engineer (Tr. 293-94), decided on what the permit would specify (Tr. 294), and had their own equipment and were responsible for reclamation (Tr. 296) and securing releases. Although Spur owned the underlying leases, B&J picked the areas that they wanted to mine (Tr. 293) and made arrangements to

secure financing, etc. (Tr. 291). Armistead Long testified that he was present at discussions between Baugues and Brewer where Brewer "would discuss different areas that he intended to permit to mine" (Exh. A! 15 at 57, 59). Baugues agreed that B&J controlled all aspects of the mining that was carried out on B&J permits (Tr. 295). Where B&J had "their own" permits, no "sum" for reclamation was deducted (Tr. 347). B&J repaid all funds advanced by Spur/Mountain to B&J in full (Tr. 403).

Baugues testified that B&J "hired the engineer and laid it out and submitted it to the regulatory personnel" (Tr. 294). After B&J "got their permit, they followed their permit or if they wanted changes in it, they had their engineer get changes for them but they made the decisions" (Tr. 294).

The January 27, 1981, Contract

The first contract in evidence of the type where B&J agreed to secure its own permit is dated January 27, 1981 (Exh. R! 6). It concerns coal leases in Claiborne County, Tennessee, that Spur had acquired from Waters. B&J agreed in that contract "to obtain the necessary mining permits for all coal" to be mined by B&J. Brewer agreed in his deposition that the contract dealt with a permit acquired in the name of B&J (Exh. R! 28 at 29).

Baugues explained the reason B&J secured its own permits. B&J needed money to buy additional equipment: "some large drills, larger dozers,

larger end loaders" (Tr. 286). Again, in order to borrow money to get that equipment, B&J needed permits in its own name, in order to show business stability (Tr. 287-88).

Another important change in the January 1981 contract (carried forward to subsequent contracts) is that Spur had the right, if B&J did "not mine any or all of the coal covered by the obtained permits, * * * to assume control of the permits" (Exh. R! 6). Baugues explained that provision:

The only reason for putting in there, taking over, we depended on the coal and we sold coal based on what we were able to acquire through the contractors or purchase. * * * That was put in there because [Spur] sold a certain amount of coal a month and they depended on coal coming in and if something would happen, this permit would be partially mined and the coal would still remain there and [if] something happened to B&J, [if] they'd take bankruptcy or go out of business for some reason and were unable to finish it, then [Spur] would have the right to go in and with the regulatory agency's approval pick up the permit * * * or get somebody else to pick up the permit and mine it.

(Tr. 300-301).

The January 1981 contract (and subsequent contracts) also made B&J responsible for reclamation work (Exh. R! 6). B&J purchased reclamation supplies, seed and fertilizer, as well as use of a hydro-seeder from Spur (Tr. 301, 366, 380). Baugues testified that Mountain took "the hydro-seeder up there and [Brewer] would pay for it but there was no control. * * * We didn't decide when to seed or anything. That was up to him"

(Tr. 302). Brewer acknowledged that he had purchased seed, hay, and hydro-seeding services from Mountain Land and Reclamation and had paid for those services. He denied that this arrangement had given Spur or other applicants the right to control operations (Tr. 366).

Under the January 1981 contract, B&J was to mine coal and deliver it to Spur's tipple for payment "at the price per ton being paid to other suppliers for coal of similar quality," with rates as of January 5, 1981, identified by an attached schedule. Deductions were to be made for (1) a royalty payment; (2) \$0.50 per ton "for engineering work"; (3) \$1 per ton for certificates of deposit for "the surface mining permit bond until bond is replaced by B&J"; (4) \$0.60 per ton "for equipment use, payable to Alabama Electric Cooperative, Inc."; (5) Federal reclamation tax; (6) Federal black lung tax; and (7) Tennessee severance tax. The contract provided that B&J "shall be responsible for all reclamation work required by its mining operations, including seeding, and will be responsible for all penalties and fines which may be assessed by government agencies."

Spur bought the coal, which was delivered to the Valley Creek tipple (Exh. R! 28 at 29). Baugues explained that the reason Spur agreed to buy the coal was to demonstrate B&J's business stability to the people it bought equipment from (Tr. 288).

In this and subsequent contracts, B&J agreed to reimburse Spur \$0.50 per ton for engineering work that Spur had previously done and for

permit fees and other costs for which Spur had advanced monies (Tr. 230-31, 297). Baugues testified:

From time to time we would advance [B&J] money for getting the permit, and they got their own bonding situation. But they worked through a surety company and the surety company * * * if, say the bond were fifty thousand, they'd want a certain percentage of it as a letter of credit or a CD that would be available to them if B&J * * * would default and they'd have to come in and do the reclamation. So we from time to time advanced them or went on a letter of credit or obtained a letter of credit for them until they had enough money paid in to give a CD and then release the letter of credit. * * * They were bound by the contract [to pay the monies back] and as far as I know, we had the promissory notes as well.

(Tr. 297-98). 20/

Although Baugues and Brewer both testified that B&J hired the engineer to get the permits (Tr. 291), the details of the engineering work are not clear from the record. Brewer testified that B&J had different engineering firms, according to "who could do it the cheapest and do that type work" (Exh. R! 28 at 33). Although Spur, through Baugues, paid engineering fees for acquiring the permit, B&J repaid him (Exh. R! 28 at 32, 33). Baugues instructed the engineers to bill B&J directly "for any work beyond obtaining [B&J's] permits" (Exh. R! 28 at 32). Armistead Long testified that he

20/ Spur's accountant testified that, in some cases, instead of agreeing to allow deductions by contract, B&J signed promissory notes for amounts advanced by Spur (Tr. 236-37). However, the record contains promissory notes dating from the time when the contracts were being signed, suggesting that B&J signed both agreements authorizing deductions and promissory notes (Exh. R! 26).

had, on occasion, made payments of engineering bills to Sehorn and Kennedy, which were repaid by B&J (Exh. A! 15 at 19).

Brewer explained that Baugues paid for engineering permit fees initially because B&J

never could get enough money ahead to keep afoot. * * * [Baugues] didn't, what you say, advance it. We would have part of it, and then he would finish up and he would pay the engineering firm. When they handed us the permit, then we'd start paying him back as we hauled the coal.

(Exh. R! 28 at 33! 34).

Spur also deducted reclamation fees and paid them to OSM and filed Coal Production and Reclamation Fee Reports (OSM! 1 Forms) on B&J's behalf and paid reclamation fees to OSM for production from B&J permits (Exhs. 20 through 23; Tr. 209-15, 231). Armistead Long testified that Spur "considered it to be worthwhile" to prepare the forms, "to the extent that if those fees had gone unpaid, it might have created a problem for" Spur (Exh. R! 15 at 37). Michael Holman, Spur's/Mountain's accountant or controller, testified that it prepared OSM! 1 forms for "probably more than twenty" contract miners (Tr. 233).

Baugues noted that the loans had all been paid back with interest, at a rate comparable to a bank's (Tr. 298). Armistead Long corroborated that testimony, noting that the terms of the loan were set out in a promissory note (Exh. A! 15 at 21, 32).

Brewer testified that no deductions were ever made by Spur at the tipple for payment of civil penalties for surface mining violations (Tr. 100).

Brewer agreed that it was necessary for B&J to receive money from Baugues, and that, without it, B&J would not have been in the mining business (Exh. R! 28 at 35).

Brewer testified that the January 1981 contract covered "Area 2" (Exh. R-28 at 28) or "the second part of 21088" (Exh. R! 28 at 29). 21/ The latter is a reference to State permit No. 2183088, which appears on numerous NOV's and CO's issued to B&J concerning operations on Area No. 2 (Exh. R! 14; Tr. 359). An OSM official confirmed that permit No. 2183088 was B&J's Area No. 2 (Tr. 142). He explained that B&J had different mine sites in Claiborne County that were designated as different "areas" (Tr. 143-44). Area 2 is depicted in a topographical map that evidently accompanied B&J's March 31, 1983, permit application (Exh. R! 2, Tr. 92-93). 22/

The record contains NOV's and a failure-to-abate CO issued by OSM as a result of B&J's operations on Area 2 (Exh. R! 14), including an NOV for

21/ Exhibit "A" to the contract, which evidently described the property affected and would clarify the question, is not included in the copy of the contract placed into evidence by OSM.

22/ The disparity between the contract date and the date on the map probably resulted from the fact that B&J "had to repermit Area 2" (Exh. R! 28 at 28).

failure to completely remove a highwall (Exh. R! 14! 6). 23/ It appears that the highwall on Area 2 was eventually reclaimed, as OSM representatives did not refer to it in describing the state of reclamation at B&J's sites (Exh. R! 18! 4a; Tr. 141, 164).

The July 26, 1982, Contract

The fourth contract, dated July 26, 1982, authorized B&J to mine coal on leases Spur had acquired from Waters "concerning certain mining rights in Claiborne County, Tennessee," more specifically, the "Jellico and Rich

23/ On Sept. 21, 1984, OSM issued NOV No. 84! 91! 161! 007 to B&J for failure to completely eliminate a highwall on Area 2, permit No. 2183088 (Exh. R-14-6). On Oct. 24, 1984, OSM issued CO No. 84! 91! 161! 002 for failure to abate that NOV, and B&J applied for temporary relief. The matter came before this Board on appeal by OSM from a decision by Judge Torbett granting B&J temporary relief from the CO.

The record in that case described the situation as follows:

"B&J's Area No. 2 is located in Claiborne County, Tennessee, in an area that has been mined previously. This previous mining left a highwall ranging in height from 35 to 45 feet at various 'cuts' along the coal seam. B&J commenced remaining operations there in 1982, and the last work on the site was done in the summer of 1984. Its mining permit required the elimination of highwalls at the site. During its remaining operations, B&J greatly enlarged the preexisting highwall, creating a new highwall ranging from 75 to 100 feet at the various cuts. Subsequently, it partially reclaimed the area, but left portions of the enlarged highwall at several of the cuts."

B&J Excavating Co. v. OSM, 89 IBLA 129, 131 (1985) (citations omitted). The case record also indicated that B&J had sought a variance and proposed a revision to the backfilling and grading plan for Area No. 2 because there was insufficient spoil to completely eliminate the highwall. Id. In vacating the decision granting temporary relief, the Board held that B&J "could not argue its entitlement to a variance as a defense to the enforcement action because it has been consistently held that an operator must obtain a variance before engaging in conduct that would otherwise violate surface mining regulations." Id. at 135.

Mountain seams, designated as Area #4, and covered under Tennessee Permit No. 82! 126" (Exhs. R! 7 and R! 28 at 29; Tr. 103, 127, 359). Baugues and Brewer, in testimony, both stated that the contract was typical of those where B&J, rather than Spur, was the permittee (Exh. R! 28 at 30; Tr. 292). The contract called for B&J to deliver the coal to Spur's Valley Creek tipple, and Brewer testified that it did so (Tr. 101). Payment was based on a schedule reflecting the coal's ash and sulfur content, less deductions for a 4-percent royalty, an "AEC Royalty," Tennessee severance tax, black lung tax, reclamation tax, and a \$0.60 per ton deduction for "AEC [Equipment]."

In the contract, Spur agreed "to advance funds for account of [B&J] for engineering and other mining permit related expenses and obtain the permit in [B&J's] name" (Exh. R! 7 at 2). The expenses were to be repaid by deducting \$1.50 per ton, \$1 of which was to be used to obtain a certificate of deposit in B&J's name to replace Spur's letter of credit.

Like the January 1981 contract, the July 1982 contract made B&J responsible for reclamation work and gave Spur "the right, at its option, to assume the permit" if B&J defaulted (Exh. R! 26).

Brewer testified that he and Jones decided where the boundaries of the permit area were, explaining: "We would go in and tell [Baugues] what we wanted to mine and he would say, 'Well, get the engineers up there and get some analysis of the coal and go do it'" (Exh. R! 28 at 31-32).

The coal being mined under the July 1982 contract was evidently owned by Waters or J. M. Huber Corp. (Tr. 104). Area 4 is depicted on a topographical map dated April 2, 1982, that was evidently submitted in support of B&J's permit application (Exh. R! 3; Tr. 93). Area 4 is on B&J's permit No. 82! 126 (Tr. 142).

The record contains numerous NOV's and CO's issued by OSM for B&J's failure to reclaim Area 4, permit No. 82! 126, including CO's issued for failure to eliminate highwalls, failure to establish vegetative cover, and failure to pass surface drainage through a sedimentation pond (Exh. R! 15). OSM representatives testified that there were unabated violations on the permit concerning breached ponds (Tr. 141, 164). 24/

The January 18, 1983, Contract

A fifth contract between B&J and Spur, dated January 18, 1983, pertained to leases Spur had acquired "from Consolidation Coal Company concerning certain mining rights in Claiborne County, Tennessee * * * designated as Area #5, and covered under Tennessee Permit No. 83C! 002" (Exhs. R-8 and R! 28 at 35-36; Tr. 108, 142, 359). That contract required mining to "begin within thirty (30) days after permit has been received" and after Spur notified B&J "that mining can begin." It also provided

24/ The record indicates that the highwall on "Area 4" was eliminated as of bond release inspection evaluation on Dec. 4, 1985 (Exh. R! 18! 4a). This may have been a reference to the highwall on Area 2.

that, if B&J was unable to initiate operations within 60 days, Spur would have "the option of mining the permit using a different operator [and] * * * all rights afforded the permit," and that it would "assume reclamation liability by re-bonding with the State."

The AEC equipment deduction had been included, but was struck out (Exh. R! 8 at 2). Brewer explained that he had paid off the equipment B&J had purchased from AEC by that time (Tr. 108).

As under other contracts, B&J was to deliver coal to Spur's tipples for payment based upon its ash and sulfur content less deductions for (1) a 10-percent royalty; (2) a \$0.50 per ton "AEC Royalty"; (3) Tennessee severance tax; (4) black lung tax; and (5) reclamation tax. Also, Spur was to advance funds "for engineering and other mining permit related expenses and obtain the permit" in B&J's name. Repayment was to be made at the rate of \$1.50 per ton, with Spur using a portion of the funds to obtain a certificate of deposit in B&J's name to replace Spur's letter of credit. B&J signed a promissory note for the money advanced (Exh. R! 26). The contract made B&J responsible for reclamation work, including seeding, and for penalties and fines. 25/

25/ In addition to the five contracts admitted as exhibits R! 4 through R! 8, exhibit R! 27 contains three contracts which were not addressed in testimony at the hearing or in depositions. One dated Mar. 21, 1984, was to govern mining "on a certain portion of the property consisting of the Mason seam of coal, designated as Area #6." Although signed by both parties, several spaces calling for information, including a permit number, are blank, and the record does not indicate that mining operations were conducted under the contract.

The coal being mined was evidently owned by Consolidation Coal Company (Tr. 108-09).

As with the July 26, 1982, contract, the contract provides that Spur would advance funds for the account of B&J and "obtain the permit in [B&J's] name" (Exh. R! 8 at 2).

The record contains numerous NOV's issued by OSM for B&J's failure to reclaim Area 5 (Exh. R! 16). OSM representatives testified that the only outstanding violation on the permit was failure to maintain liability insurance (Tr. 141, 164).

Status of Lands Mined by B&J:

Status of Civil Penalties Associated with B&J's Mining Activities

OSM presented testimony and evidence concerning the status of reclamation on B&J sites. An OSM official familiar with the status of reclamation testified:

They're basically reclaimed[,] all but 82! 126 permit [Area 4] which has three ponds that have been breached and the embankments not pushed back in. There's an outstanding NOV and CO

fn. 25 (continued)

A second contract is unsigned and bears only the typed date of July 1982. The property description suggests it may have been an earlier version of exhibit R! 8 executed on Jan. 18, 1983.

The third contract is dated Aug. 21, 1981, and signed by both parties. The record does not include any information about it.

on that violation and Permit 83! C! 002 [Area 5] has a violation, NOV and CO, for liability insurance.

(Tr. 141).

OSM also presented evidence establishing that B&J had numerous unpaid civil penalties resulting from NOV's and CO's issued against B&J (Exhs. 13-16; AR 16).

Participation by Spur Employee Michael Paynter
in B&J's Operations

OSM also introduced documents and testimony to show the role of Michael Paynter in B&J's operations. Paynter was Spur's employee, serving as project engineer and reclamation specialist (Tr. 110-11, 312, 343-44, 406, 420-21). He testified that he worked for Spur from 1981 to 1990 "as a reclamation specialist with side duties of looking after the lease responsibilities," adding that he was in charge of their reclamation program (Tr. 406). He had an office in the area of the Valley Creek community, at the Spur tipple/warehouse/scale house, which, he testified, "was very centrally located to a lot of the activity in that area" (Tr. 407).

Baugues confirmed that Paynter "was employed in 1981 by [Spur] as the Project Engineer and also in charge of the reclamation. He actually directed the reclamation services after he came and he was on all of the

Spur permits and when the State people would come * * * they normally would have certain permits that they checked out," and that "while they were up there" they would come to Paynter and check out B&J's at the same time, because "some of them were in the same general area" (Tr. 295-96). However, Baugues acknowledged that Paynter did work on "getting permits and getting permits reclaimed" (Tr. 344).

Brewer testified that Paynter "took care of all the measurements and stuff for the land company" and "helped him argue a lot of" violations (Tr. 111). He acknowledged that Paynter had assisted him at conferences and accompanied him on pre-mine inspections (Tr. 111), after which B&J was able to get permits (Tr. 112).

Jones testified that, when B&J was in coal production, "if we asked him to help us out on something, he would," evidently referring to problems B&J experienced with State or Federal inspectors (Tr. 383).

The record shows, and Paynter conceded, that he was involved with B&J sites both during production and reclamation activities (Tr. 420).

Paynter surveyed coal pits to determine how much coal had been mined, where required by lease to ensure that the coal delivered matched the coal mined. He specified that he had done so on the Consolidation Coal leases (Tr. 422, 424-25), that is, those mined by B&J under the January 1983 contract with Spur.

Paynter testified that,

[j]ust as a matter of convenience [the] state inspectors might come by [Spur's] tipple because it was so centrally located and ask us to contact a contractor or * * * they were checking out [Spur] permits, so they had occasion to come see me for that. But they would take care of numerous ones at that location, just passing along stuff. It was a kind of a central dropping point. * * * They would stop and leave things as a matter of convenience. It was a central location.

(Tr. 414-15). He agreed that it was used as a drop/ship point, and that he would forward messages as a go-between (Tr. 416).

B&J used the warehouse at Spur's tipple as "a convenient place to ship parts to rather than having to haul it up a muddy road. A lot of times parts or deliveries would be drop shipped there for his later pickup" (Exh. A! 15 at 58).

Paynter also agreed that he was required (presumably by Spur/Mountain) to go on permit sites regardless of whether they were Spur's/Mountain's or other company sites, like B&J. He stated that he did so "to kind of watch and see what was proposed for the site and how the post-mining language might come out in those proposed areas" (Tr. 408).

Paynter testified that he was "occasionally" on B&J's permits (Tr. 412). He admitted that "on occasion [Brewer] might ask me to come up for an inspection or some other – something like that. I was just there at his request, generally"

(Tr. 412). He added:

Both sides, Mr. Brewer had come to me and asked if I would attend a meeting that he was scheduled to have with an OSM inspector in order to kind of interpret or help him interpret what was being requested of him or what was being said. Then in other instances the OSM inspectors would come and ask me to attend so that I could help when they talked to [Brewer].

(Tr. 412).

Paynter also testified that he helped Brewer "occasionally" and "just as a favor" (Tr. 413). For example, he did surveying for him on a pond so that he would not have to go to his engineers, because that would "take them awhile" (Tr. 413). ^{26/} He acknowledged that, if Brewer asked him, he would "do something like" write a letter about the pond situation or something like that to enforcement personnel (Tr. 413). Brewer acknowledged that he called upon Paynter to help him communicate with various regulatory authorities on an "occasional basis," just three, four, or five times over 4 or 5 years (Tr. 368-69). Jones remembered that "occasionally he would come by" their job site (Tr. 382).

Baugues testified generally that "there was very little [engineering assistance] because [Paynter] had a lot of duties and all of the permits that [Spur] was responsible for, as well as reclaiming the permits that had already been mined" (Tr. 317). He admitted that Brewer "from time to time * * * would come to [Paynter] and ask him to explain something to him that

^{26/} It is not clear whether this pond is one of the ponds that were not in compliance at the time of the hearing.

the State or Federal [authorities] wanted," and that he (Baugues) authorized Paynter to do that, "as long as it was just occasionally" (Tr. 318). He acknowledged that Paynter would tell him about problems such as the highwall or the problem with the road (Tr. 319).

Baugues testified that Paynter approached him about contacts he had had with Brewer concerning inspectors, and he instructed Paynter to help him "as long as it's in the area you're in on [Spur] time and as long as it's just occasional," cautioning that "we're not going to do his engineering for him" (Tr. 315). Paynter's testimony corroborates that (Tr. 413). That occurred before the time B&J was experiencing problems with its reclamation (Tr. 348-49). Baugues testified that he had no knowledge that B&J was experiencing problems (Tr. 349).

An OSM inspector testified that most of OSM's documents reveal that OSM inspectors dealt with Brewer, Jones, or with their engineers (Tr. 180). Paynter's name is encountered only "occasionally" (Tr. 182).

Paynter's Involvement in the Highwall on Area 2

Brewer agreed that Paynter had dealt with the State of Tennessee Division of Surface Mining and Reclamation (TDSMR) about a highwall variance (Tr. 112, 127). ^{27/} He testified that Paynter had not helped B&J do

^{27/} Brewer referred to Area 4, permit No. 82! 126. Documents in the record place that highwall in Area 2, permit No. 2183088 (Exh. R! 19; Tr. 160).

engineering to come up with material to backfill the highwall, but that he had "worked some" with the engineers (Tr. 112).

Paynter's role in the highwall in Area 2 is clarified by a November 16, 1984, OSM memorandum to the file, which states:

A minesite hearing was held November 14, 1984, on Cessation Order 84! 91! 161! 002 issued October 22, 1984, for failure to abate Notice of Violation 84! 91! 161! 007 issued September 19, 1984, [28/ for failure to eliminate all highwalls. CO 84! 91! 161! 002 was correctly issued and remains valid.

Present at the hearing were Marty Atkins and Stephen Weber representing OSM; Mike Paynter, Jimmy Jones and J. B. Brewer representing B&J Excavating; Hewie Osborne representing the Mine Safety and Health Administration. The company representatives stated that they were unable to completely eliminate the highwall because of the steepness of the slope made it unsafe for men and equipment. Hewie Osborne of MSHA confirmed this and in fact had red-tagged the area in July 1984 ceasing the company from continuing work to eliminate the highwall. Mr. Paynter showed copies of plans submitted for permit revision that if approved would allow the company to leave the site as is. I explained that OSM would not approve a plan that allowed highwall to remain exposed. Mr. Paynter stated that 30 CFR 816.106 applied since this was a previously mined area. This section of the regulations allows for highwall to remain if certain criteria are met, Mr. Atkins explained that these determinations must be made at the beginning of the permitting process and not after mining is essentially completed. I asked Mr. Osborne what criteria he used to determine that the company was working in an unsafe manner. He stated that slopes were considered too steep if a piece of equipment could not be backed up the slope. We asked if he would provide OSM copies of any MSHA policy or directives he used to make his decision. He stated that what he had already given the company was all he was going to provide. I stated that OSM regulations required that the highwall be completely eliminated and that any

28/ The NOV, which is in the record, was actually issued on Sept. 21, 1984. The inspection occurred on Sept. 19, 1984 (Exh. R! 14! 6).

relief from that requirement could be pursued through the administrative hearings and appeals process. [29/] [Emphasis supplied.]

(Exh. R! 19). As an OSM employee testified, a minesite hearing affords an operator the opportunity to "give his side as to why the violation was there or was not there and basically argue back and forth on whether or not the NOV or CO should have been written. Paynter is identified as appearing on behalf of B&J. Brewer testified that he asked Paynter to come to the hearing (Tr. 370).

Paynter's involvement in the effort to get a variance for Area 4 is confirmed by an August 9, 1982, letter from TDSMR to Paynter: "We appreciate your input concerning the situation on [B&J Excavating, Area #2]. [30/] In your letter of May 28, 1982 you address many factors which affect the feasibility of highwall elimination on this site" (Exh. R! 17! 1a). The letter appears to be in response to Paynter's May 28, 1982, letter or telephone call (not in the record) requesting a highwall

29/ As noted above, the matter was litigated, resulting in our opinion in B&J Excavating Co. v. OSM, supra. See note 23, supra.

30/ The heading of the Aug. 9, 1982, letter states that it concerns "B&J Excavating Area #2/DSM Permit #82! 126." As permit No. 82! 126 was issued for Area 4, the reference to Area 2 appears to be a mistake (Tr. 154), but the record suggests that there may have been a relation between Areas 2 and 4. Baugues recalled that Area 2 "later became" Area 4 (Tr. 341).

However, it seems unlikely that Area 2 would have been cited if it had been re-permitted (Exhs. R! 13 and R! 19). Further, maps introduced at the hearing show Area 2 and Area 4 to be entirely different (Exhs. R! 2 and R! 3). At the time of his deposition Brewer thought the Jan. 27, 1981, contract might have been a continuation of Area 2 because it had to be re-permitted (Exh. R! 28 at 28-29), but at the hearing he was uncertain whether it was for Area 2 or Area 3 (Tr. 97).

elimination variance. TDSMR advised Paynter that it was unable to grant such variance to B&J. It proceeded to outline the options that were available to B&J and invited Paynter to renew contact.

Paynter explained the August 9, 1982, letter: "This concerns a highwall elimination variance and this would have affected [Spur's] responsibilities under our leases. And therefore I had to [have] some concern with that" (Tr. 410).

The record also contains a TDSMR inspection report documenting an inspection meeting with Paynter on July 19, 1985, to discuss problems with the highwall (and a haulroad, discussed below) that had been cited in an NOV (Exh. R! 17! 2c). The report indicates that Paynter took an active role in the meeting, indicating that work would begin to terminate the violations, but arguing that the road was a county road, and that the highwall was existing and, therefore, not the responsibility of B&J: "Mr. Paynter stated that work would begin to terminate the violations, but stipulated that the company contends that 1). It is a county road, and 2). The highwall was existing and therefore, not the responsibility of [B&J]." Id.

Baugues pointed out that Paynter's involvement in the highwall question came at a time when production was finished, and that Spur had no interest in ensuring that B&J would maintain production levels (Tr. 341).

Paynter's Involvement in B&J's Area 4

The record contains a TDSMR memorandum dated June 4, 1982 (Exh. R! 17! 2) concerning a pre-mine inspection of "B&J Excavating Area #4" on May 25, 1982. Paynter is listed as attending as "consultant." He testified that he attended the inspection as Spur's representative (Tr. 418).

Baugues explained that Paynter participated in pre-mine inspections

because he had to know what [B&J's] plan were so [Spur would] know what the final outcome would be * * * , what the final land use would be. Because the different land companies wanted different things. Sometimes they wanted forest; sometimes they wanted trees on the outslope; sometimes they wanted pasture. He would go see what they were doing.

(Tr. 313). Paynter kept "the land company informed" about "problems" that "needed to be straightened out" (Tr. 313, 342).

Paynter explained his role in pre-mining inspections:

[Spur] was the leaseholder on various Permitted areas or proposed Permitted areas. And I was a representative for [Spur] just to
– as an overview of what's going on with the permit. Especially with respect to post-mining land use. But in no way was I there to offer any – as a matter of control therein.

(Tr. 410). He added that B&J had Sehorn and Kennedy (B&J's engineering firm) attend those inspections (Tr. 410).

An OSM inspector testified that it was not unusual for a person who controls a lease to have a representative at a pre-mine inspection or something that would affect the post-mining use of the property (Tr. 174).

Paynter's Involvement in B&J's Area 5

Brewer acknowledged that Paynter participated in solving a problem with a county road "that had slid off of the mountain and blocked the whole road" at Area 5 (Permit No. 83! C! 002) (Tr. 115-16, 369). Brewer testified that Paynter "was the one that was doing the calling and getting the permission to move the road over" (Tr. 116). 31/

A letter from J. M. Huber Corp. to Paynter dated March 11, 1982, responded to his submission of access road plans by letter of February 16, 1982, thus indicating that Paynter was preparing plans for the site (AR 48; Tr. 409). A letter dated August 2, 1983, from TDSMR to Paynter stated that it had reviewed a proposal, presumably from Paynter, and could find no objections to it, provided certain conditions concerning construction of a new road around the slide were met (Exh. R! 9).

B&J and the reclamation company associated with Spur executed a maintenance agreement assigning responsibility to B&J for a 375! foot section

31/ Brewer also described Paynter as "the go-between between the county and OSM" (Tr. 115). OSM's role in the road problem is not set out in the record.

of the Valley Creek county road up to B&J's job (Exh. R! 12; Tr. 121-24, 410-11). Paynter's testimony explained that the agreement concerned

a road that services a Mountain Land and Reclamation Services permit and the B&J permit was going to be mining and using this road. This was a maintenance agreement because there was dual use of this road. This agreement worked up that B&J would be responsible for that section – maintaining that section that they used.

(Tr. 411). Paynter testified that he was involved because the road served both B&J's permit and another permit held by Spur's reclamation company (Tr. 409, 418).

Paynter's testimony also described the circumstances surrounding the March 11, 1982, letter:

On occasion the consulting engineering firm there, [Sehom] and Kennedy, may have requested of me to contact J. M. Huber since they were located locally, also. To ask them to expedite something, if they could, as it affects whatever they were working on. And I would – I was personally acquainted with these – the Huber people. I would call them and say, they're in need of this. Apparently they wrote me back, whatever – this one looks like a retention of a haul road in post mining land use.

(Tr. 409).

Brewer testified that he did not remember Paynter doing anything for him concerning Area 5 (Tr. 112-13). David K. Beverly, engineer for Sehom

and Kennedy (B&J's engineering firm), did the engineering on Area 5 (Tr. 113). Brewer acknowledged that Paynter was present with representatives from Sehom and Kennedy during inspections to certify construction of a sedimentation pond in Area 5 (Tr. 113, 117), and that Paynter dealt with that engineering firm "on occasion" (Tr. 118). He denied that Paynter ever arranged any revisions for B&J on Area 5 (Tr. 113). Brewer testified that Paynter never dealt on behalf of B&J about cut sequences on Area 5 (Tr. 113).

Paynter did attend the pre-mine inspection of Area 5 (Exh. R! 11). Brewer testified that it was Baugues who had "sent [Paynter] out there," and that B&J had its own engineers who attended the meeting and prepared "a complete engineering package" (Tr. 131). Brewer also attended (Tr. 119), and Tom Herzell attended as B&J's engineer (Tr. 131). The December 17, 1982, TDSMR memorandum describing the inspection corroborates this explanation, indicating that Paynter was associated with "J. Spur, Inc.," and that a representative of Sehom and Kennedy was present. Brewer is described as "operator" (Exh. R! 11).

On October 17, 1983, Paynter wrote to TDSMR as follows:

As per our meeting on Oct. 11, 1983 I am sending the water analysis results for ponds already existing on the above mentioned permit. These ponds are not presently discharging so the grab samples were taken in the pond at the inlet and outlet locations. Note that both samples are within the required limits

and both improve from inlet to outlet location. Similar results in all probability will be achieved on Inc. 4. Please let me know immediately what the bond amount will be on this increment as a result of these water analysis results and our meeting. If you have any questions please contact me * * * .

(Exh. R-18! 3). The record contains a TDSMR sedimentation control structures certification report dated December 19, 1983, for Pond 5 on Area 5 indicating that four inspections were conducted in November and December 1983 by Mike Paynter, Tom Herzell, and Bryn Howze (Exh. R! 10 at 2). The information on that report is not specific. Paynter's role is not described. Herzell is listed as the professional engineer's ("P. E.'s") representative (Exh. R! 10 at 2) and is an employee of Sehorn and Kennedy (Tr. 119).

OSM placed into evidence a letter dated December 6, 1982, bearing Spur's address on the top, from Paynter to TDSMR stating:

As per our telephone conversation on Dec. 6, 1982, I am notifying you of B&J Excavating's intent to mine their Area 5 permit by the following incremental sequence:

- 1) Increment 3
- 2) Increment 4
- 3) Increment 1
- 4) Increment 2

Since these increments are separate land parcels I foresee no problems mining the permit with this sequence.

(Exh. R! 18-1). In a letter dated August 18, 1983, Paynter advised TDSMR: "As per Tennessee DSM regulations I am notifying you 60 days in advance

of B&J Excavating's intent to mine Increment 4 of" permit "TN #83! C! 002" (Exh. 18! 2).

At the hearing, Brewer denied any knowledge of those letters (Tr. 125). Earlier, he had testified that Spur "didn't tell [B&J] where to make cuts"; instead, Brewer, Jones, and the engineer made the decision (Exh. R! 28 at 49).

Paynter explained this document only by stating that "these are letters of the type where [Brewer] would ask my assistance" (Tr. 419).

Role of Various Applicants

The record contains information establishing the roles of the various applicants in the matter. The parties had originally agreed to hold a second phase of the hearing on the question of links between applicants other than Spur (SOR at 13). In view of Judge Torbett's ruling dissolving the link between Spur and B&J, that hearing was not held. As we hold that there was no link between Spur and B&J, it is unnecessary to set out those relationships or consider them in any detail: If there is no link between Spur and B&J, there cannot be any link between Spur's officers/directors and B&J.

DISCUSSION AND CONCLUSIONS

[3] As noted above, the contracts between Spur and B&J contain provisions stating that Spur owned rights to the coal to be mined and requiring B&J to deliver minimum quantities of coal. Each, therefore, meets the requirements established by 30 CFR 773.5(b)(6) (1994) (quoted above) for a rebuttable presumption of ownership or control. The question is whether Spur rebutted the presumption by showing that it did not have "authority directly or indirectly to determine the manner in which" B&J conducted its surface mining operations. 30 CFR 773.5(b) (1994). 32/

In answering this question, we apply the preponderance of the evidence standard. That is, applicants should prevail if they can show by a preponderance of the evidence that they did not have authority to determine the manner in which B&J conducted its surface mining operations. See Bender v.

32/ Applicants argue that subsection (a)(3) does not apply, as this case concerns contract mining under subsection (b)(6). They point out that OSM stated in the preamble to the regulations that 30 CFR 773.5(a)(3) (1994) applies only to "contract mining situations not covered by paragraph (b)(6)" (Reply at 15 n.4, quoting 53 FR 38868, 38870 (Oct. 3, 1988)).

Where OSM relies upon a contract to invoke the presumption created by 30 CFR 773.5(b)(6) (1994) and the party subject to the presumption presents evidence to rebut it, the question is whether there was "authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." 30 CFR 773.5(b) (1994). This is the same standard set forth in 30 CFR 773.5(a)(3) (1994). The difference between the two subsections lies only in the effect of the presumption on the presentation of evidence, not the evidence required to sustain a finding of ownership or control. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); Fed. R. Evid. 301.

Clark, 744 F.2d 1424, 1429 (10th Cir. 1984); Powderhorn Coal Co. v. OSM (On Reconsideration), 132 IBLA 36, 40 n.2 (1995). In determining whether applicants have preponderated, we consider the record as a whole.

[4] It is undenied that applicant Spur exercised direct control over B&J's operations via contracts dated December 9, 1977, and November 1980. Spur acquired the permits that B&J mined under, thus establishing the functional details of the mining.

However, it is also undenied that those contracts did not result in any violations that remained unabated and that there are no unpaid civil penalties arising from any of B&J's mining operations under those contracts.

We see the purpose of denying permits to applicants because of the misfeasance of the companies they control as in part curative, to bring pressure to bear on the offenders, via the applicants, to come into compliance with the law. That can only be done where the applicant controls the offending entity. By the same token, if there is no misfeasance directly relating to a contract (even one granting the applicant complete control over the offender), an applicant can hardly use that contract to pressure the offender. In other words, if the mining company is in full compliance with the terms of the contract, the applicant would have no right to attempt to alter the mining company's actions.

Similarly, the fact that, at one time, an applicant may have controlled the mining operations of a mining company does not mean that it retains that control for all time. Although the December 1977 and November 1980 contracts clearly gave Spur control over B&J's mining activities, that control extended only to the operations named in those contracts and expired along with those contracts. As nothing in the record shows that B&J's mining activities under those contracts resulted in any unabated violations or unpaid civil penalties, they are simply irrelevant to whether Spur influenced the manner in which B&J conducted the activities that did result in unabated violations and/or unpaid civil penalties.

The December 1977 and November 1980 contracts might be seen as establishing a pattern and practice of control by Spur over B&J's activities. Vestiges of Spur's control over B&J remained, most notably demonstrated by Paynter's actions. The record strongly suggests that Brewer relied on Paynter to take care of problems arising from Federal and State regulation of his mining operations, possibly dating from the time when Spur, Paynter's employer, had direct control over B&J. However, Spur formally broke away from that situation by changing the terms of its contracts with B&J, thus ending any direct authority Spur might have had to influence its activities (via Paynter or otherwise). Further, as discussed below, nothing shows that Paynter continued to direct the manner in which B&J did its mining, even though he admittedly continued in direct contact with B&J.

[5] B&J's operations under the remaining contracts resulted in numerous unpaid civil penalties, and at least one unabated violation of SMCRA. The central question becomes whether the remaining contracts granted Spur "authority directly or indirectly to determine the manner in which" B&J conducted its surface mining operations under those contracts. See 30 CFR 773.5(b) (1994).

We reject applicants' assertion that authority to determine the manner in which mining operations were conducted must have been exercised in order for there to have been "control." The regulation is clear that it is enough that the party have "authority" to take such action. It is not required that such authority actually have been exercised. Thus, we agree with OSM that Judge Torbett applied an incorrect standard of law by requiring it to show that the applicants actually exercised control over B&J's operations. In this respect, Judge Torbett's decision is expressly modified. 33/

33/ Judge Torbett dissolved the link in part because he believed the effect of allowing the link in circumstances such as these would be to outlaw contract mining:

"[H]as Congress and the Regulation writer, have they declared this practice that they were engaged in [(contract mining)] is illegal? If they declared it by the passage of the Act, that is that this arrangement which was used by thousands and thousands of mines, wherein the holding company leased to a multitude of contract miners at one time. Later on, Permittees. Did Congress declare that this type of procedure was now illegal? In other words, this close sort of situation where you got paid by the ton and they deducted things like they did in this case."

(Tr. 458-59). He concluded that Congress and the regulations did not "declare this type of operation illegal," indicating that this was a good case "to determine whether this type of operation is illegal" (Tr. 460).

OSM responds that it never intended to outlaw or eliminate contract mining as a business practice in the coal industry (53 FR 37776 and 37778 (Oct. 3, 1988)).

[6] We consider first whether the evidence establishes that Spur, or any other applicant, had direct authority to determine the manner in which B&J conducted its surface mining operations. Direct authority, in the form of power to supervise or oversee mining operations, would likely be explicitly defined in articles of incorporation, bylaws, contracts, job descriptions, or other documents which identify an entity's or person's authority and/or duties.

No documentary evidence establishing direct authority has been presented. We are aware of no contracts after November 1980 giving Spur or other applicant authority to direct B&J's operations. Further, the evidence fails to establish that there were any oral contracts establishing direct authority. The record as a whole demonstrates that B&J was not obliged by any contractual provisions to obey directions by Spur or its officers/directors concerning the manner in which it mined coal.

Alternatively, the fact that Spur had direct authority could be established by evidence that it actually supervised mining operations.

fn. 33 (continued)

We share Judge Torbett's concern that, if purchasing coal from an operator, by itself, established a link in all cases, contract mining situations would frequently create AVS links, thus calling into question the desirability of contract mining from the coal owner's viewpoint. Nevertheless, the statute and regulations may well directly affect contract mining by establishing AVS links based on authority granted by contract. Therefore, our affirmance of Judge Torbett's decision should not be regarded as a ruling that contract mining is generally exempt from regulation under AVS. To the contrary, it is clear that a party owning coal interests who contracts out the right to mine may well be linked to his operator if that party does control the conduct of the operations and the operation results in unabated permit violations.

Thus, the evidence concerning Paynter's activities must be scrutinized to determine whether it shows that he, acting on behalf of his employer Spur, supervised or oversaw B&J's activities. We conclude that it does not.

It is evident that Paynter acted as an intermediary between B&J and Spur, as well as (on occasion) between B&J and Federal and State regulatory officials. The latter arrangement appears to have been an accommodation both to Brewer and inspectors, to smooth over the process of regulating B&J's activities. Paynter admittedly communicated information concerning operational details of B&J's mining activities about the highwall on Area 4 and the cut sequences on Area 5. However, nothing shows that Paynter either dictated B&J's operations insofar as they created (or enlarged) that highwall or decided what those cut sequences should be. Testimony in the record is to the contrary, that all operational decisions were made by B&J and its engineers. The fact that Paynter took an active role in communicating B&J's intentions (even going so far as negotiating for variances on its behalf) does not indicate that he made the decisions in question. Thus, it cannot be said that Spur controlled B&J's operations via Paynter.

Applicants explain Paynter's actions by noting that he was attempting, on Spur's behalf, to protect the underlying property interests of the lessors who had leased the mineral rights. Some of his actions may be explained in this way. For example, Spur's obligations to its lessor would justify Paynter insisting on a mining plan providing for adequate

reclamation or advocating a large bond to assure reclamation. It is also credible that he would attend a pre-mine inspection in order simply to keep abreast of what was being planned and anticipate any difficulties that Spur might face as a result of the mining.

Other of his actions were plainly undertaken to protect Spur's own interests. For example, his involvement in the haul road at Area 5 can be seen as an effort to coordinate responsibility for a road that served not only B&J's operations, but others in which Spur had concerns.

The remainder of Paynter's actions are amply explained by the fact that he was serving as an unofficial intermediary between Spur and Brewer and between Federal and State officials and Brewer. Nothing in the record indicates that Paynter ever put pressure on Brewer or Jones to alter B&J's mining operations.

In the absence of such evidence, we accept the consistent testimony of applicants' witnesses that Brewer acted independently and that Paynter merely assisted him occasionally in communicating with B&J's engineers, Spur, and Federal and State officials. By assisting in obtaining permits and helping resolve violations and problems with TDSMR, Paynter met Spur's and B&J's mutual need to get production underway and have it continue uninterrupted. Mere facilitation of operations does not constitute control of operations.

It remains to determine whether Spur had authority "indirectly to determine the manner in which" B&J's mining operations were conducted. Persons with indirect authority would not have authority by virtue of their position, title, or duties.

The prefatory comments to 30 CFR 773.5 explain:

OSMRE intends that under paragraph (a)(3) the regulatory authority can examine any relationships and the facts surrounding them, such as informal agreements, personal relationships, and the mining history of the parties in question to determine if the relationship results in control over a surface coal mining operation. The regulatory authority may also consider any of the circumstances surrounding a surface coal mining operation to determine control. Such circumstances might include, for example, the fact that a person has financed the operation, or owns the equipment or the rights to the coal, or directs on-site operations.

(53 FR 38868, 38870 (Oct. 3, 1988)). Thus, "indirect authority" was included in the regulation to recognize that a variety of relationships may allow one party "to determine the manner in which" another conducts mining operations even though there is not direct authority to do so. The definition was selected over other options "because it focuses on those relationships which allow one person to compel action by another person." 53 FR 38868, 38869 (Oct. 3, 1988). 34/

34/ We reject applicants' equation of the term "actual authority" (referred to in the preamble (53 FR 38868, 38870 (Oct. 3, 1988)) as central to the concept of control) with lawful or delegated authority (whether express or implied) to require compliance with instructions. As indicated above, the regulation was drafted to recognize that a person may have indirect authority over the actions of another even though there is not a legal basis, such as ownership or employment, for directing the other to act. In such a case there is, in an important sense, "actual authority" because there is sufficient power to compel the other to act and thereby "to determine the manner in which" mining operations are conducted. Equating

OSM points to a number of features of the relevant mining agreements as showing that Spur had authority "indirectly to determine the manner in which" B&J conducted its surface mining operations. B&J was required to remove coal by strip mining. Spur was given power to determine the price per ton and the right to assume the permits or purchase equipment at depreciated value upon default. Further, Spur was able to require B&J to deliver a fixed quantity of coal, thus limiting its ability to sell to other parties. To this list, we add the facts (duly reflected in the contracts) that Spur owned the rights to the coal and plainly financed B&J's operations. Further, OSM argues that evidence connecting Paynter to B&J's mining operations shows that he "(a) facilitated coal removal, (b) protected the Applicants' collateral, and (c) helped enforce the mining agreements, which were the very instruments of control over B&J" (SOR at 34).

The most conclusive method of establishing that an applicant had indirect authority would be evidence of instances in which it exercised control over operations by compelling or coercing the operator to take specific steps. Where the evidence as a whole does not show that a party compelled or coerced decisions about the manner in which operations were conducted, a finding of indirect authority might still be made by inference from facts about the relationship between the parties and events _____
 fn. 34 (continued)
 authority with legal authority, as urged by applicants, would leave the portion of the regulation which includes indirect authority without application.

which occurred. However, in view of the potentially serious consequences accompanying creation of an AVS link, it is critical that inferences not be replaced by innuendo. We therefore look to whether applicants have offered credible explanations demonstrating legitimate purposes (apart from an interest or intention to influence the conduct of operations) for elements of their relationship with the operator. We conclude that they have done so.

Contrary to OSM's assertion, Spur did not effectively set the price of the coal it purchased from B&J. Most of the contracts established a set price per ton, subject to adjustment "in accordance with the mutual agreement of the parties"; price lists were attached to most of the contracts (Exhs. R! 4, R! 5, R! 7, and R! 8). Another contract called for payment "at the price per ton being paid to other suppliers for coal of similar quality"; a list of prevailing prices as of the date of the agreement was attached (Exh. R! 6). Market prices were presumably readily ascertainable and thus not manipulable, and we do not see that their use constituted an unfair advantage to Spur or provided leverage to compel B&J to take specific action.

The requirement that B&J mine the coal by the strip mining method provided a very basic limitation on its activities, but did nothing to control the manner in which it conducted its surface mining activities. The provision could be regarded as a protection for B&J, which presumably

(as a surface mining concern) was not able to supply any other type of mining service. Again, we do not regard that provision as giving Spur any leverage against B&J.

Spur admittedly loaned B&J money, but was repaid in full with reasonable interest, via deductions from the amount Spur paid B&J for production.^{35/} The fact that B&J was repaying its loans in coal rather than in cash helps explain (and justify) the contract provision requiring B&J to meet minimum monthly production requirements. In the absence of production, Spur would not have been reimbursed for the moneys it had advanced to B&J. The contract establishes the equivalent of an arm's-length loan arrangement. As the terms of the loans were established by contract and contained no unilateral right in Spur to call the debt in, we perceive no means by which Spur could influence B&J's activities via the loans.

Nor is there any obvious reason why the provisions for deductions for royalties, severance taxes, abandoned mined lands (AML) fees, and other payments would give Spur indirect authority over B&J's operations. The

^{35/} The record shows that, in three notes, B&J paid interest "at 2 $\frac{1}{4}$ % in excess of the prime rate of interest" in effect at a local bank (Exh. R! 26! A, 26! B, and 26! D). No interest is specified in a fourth note, which refers to a letter of credit, which may have included interest (Exh. R! 26! C). The notes contain "boilerplate" language addressing the parties' rights in the event of default, including the holder's right to declare the entire amount due in the event of default. However, those rights appear subservient to the mining agreements, which effectively established an installment payment schedule. Further, as with other default clauses, the holder of the note would not be able to effect any changes in mining operations. In the event of a default, it would have received only a judgment for the amount due.

deductions for equipment payments seem little more than a service to AEC, with whom Spur had a long history, and a convenience for B&J to assure that its payments were made (Exh. R! 28 at 24; Tr. 88, 386-87). Presumably, Spur was responsible for paying royalties and, had it not deducted the amounts, would have paid B&J less for the coal delivered. Although perhaps not contemplated at the time (Exh. A! 15 at 37; Tr. 303-04), the deductions for severance taxes and AML fees were a prudent means of assuring that B&J made payments that companies in Spur's position have been held responsible for when not paid by the operator (Tr. 226). To the extent such rulings have been based upon public policy, it would be contrary to that policy to find ownership or control based upon collection of the payments and preparation of OSM! 1 forms or other reports. See P. B. Dirtmovers, Inc. v. United States, 30 Fed. Cl. 474, 477-78 (1994).

Further, the amounts involved in this specific case also appear too inconsequential to have allowed Spur to control B&J. Under the July 26, 1982, contract Spur advanced \$15,400 for a letter of credit and \$4,655 in fees and engineering expenses. Deductions from payments were to be made at the rate of \$1 per ton for the letter of credit and \$0.50 per ton for expenses. Assuming B&J delivered the required 4,000 tons per month, without calculating interest due under the promissory notes, the expenses were paid in the third month and the letter of credit in the fourth month. Less money was advanced under the January 18, 1983, contract and the repayment was quicker, as the contract called for 6,000 tons of coal to be

delivered per month. There is no basis to find that the debt allowed Spur to control B&J for the duration of the operation.

The contracts provided that "[i]n the event that prior to the expiration of the term [of the contract, B&J] shall default in the performance of any of its obligations under this agreement, [Spur] shall have the right, at its option, to assume the permit." ^{36/} Further, B&J agreed to "abide by state and federal laws and regulations concerning strip mining," and, in two contracts, to provide a minimum amount of coal per month. The contracts continued into effect only "until all coal has been mined from the permitted areas."

These minimum production and default provisions gave Spur some measure of potential indirect control over B&J. Spur needed coal to meet its obligations under its coal sales contracts with third parties. If B&J failed to produce the required minimum during the term of the contract, Spur could have protected itself by suing to have the contract declared in default. If it prevailed, it presumably could have "assumed" the permits and found a new contractor to mine the coal. In lieu of suing to seize the permits, Spur might have demanded that B&J implement a mining alternative under which production could continue, and B&J might have had good reason to accept, in lieu of losing its permits. Similarly, B&J's agreement to comply with strip mining laws created the possibility that Spur could

^{36/} Spur also had the right "to assume control of the permits" if B&J did "not mine any or all of the coal covered by the obtained permits."

influence B&J's mining activities. Violations of surface mining laws would also threaten Spur's supply of coal, as unabated violations might lead to an order requiring cessation of operations. It would certainly have been in Spur's interests to demand that B&J avoid NOV's and CO's, at least during coal production, and the threat of a breach of contract action and loss of permits might also have influenced B&J to alter its operations. 37/

However, the possibility that Spur could actually have influenced B&J's mining as a result of the contract clauses is highly speculative. It is equally possible that B&J would simply have refused to change its mining operations, even if doing so resulted in default and eventual loss of the permits following litigation. Under this hypothesis, Spur could have taken over the permits without ever forcing B&J to take any action to correct violations. In any event, there is no testimony or other evidence that Spur ever advised Brewer or Jones that Spur would seek to repossess the permits (or purchase B&J's equipment) if they did not increase production or did not comply with regulations, or that B&J ever took specific action in order to avoid a breach of contract action.

The other provision of the July 26, 1982, and January 18, 1983, contracts which raises concern is that stating that Spur was to "obtain the

37/ Applicants point out that the CO's in question here arose not during production, but during reclamation, when Spur's interest in maintaining production levels was no longer an issue.

permit in [B&J's] name" (Exhs. R! 7 at 2 and R! 8 at 2). Although there is some evidence that Spur was involved in the permit process, the record as a whole does not support the conclusion that Spur indirectly determined the manner in which B&J's mining operations were conducted. 38/

Despite that clause, Brewer testified that B&J "got that permit," paid for the engineering, and (with Jones) decided on where the boundaries of the permit were (Exh. R! 28 at 30). Spur did not tell B&J "where to make cuts"; Brewer, Jones, and B&J's engineers did that (Exh. R-28 at 49-50).

Significantly, nothing in the record indicates the extent of Spur's involvement in obtaining the permit. Although Spur was involved in the permit process to some degree, there is no evidence that it prepared the

38/ Work on the permit application for Area 4 began before the contract was signed on July 26, 1982, retroactively effective to June 1, giving B&J rights to mine the site. A letter from J. M. Huber Corp. to Paynter dated Mar, 11, 1982, responding to his submission of access road plans by letter of Feb. 16, 1982, indicates that plans for the site were being prepared (AR 48; Tr. 409). Spur's check for payment for the permit application was written on Apr. 20, 1982, the application was filed on Apr. 26, 1982, and the pre-mine inspection at which Paynter was present occurred on May 25, 1982, apparently leading to Paynter's letter of May 28, 1982, requesting a variance for the orphan highwall (Exh. R! 17; AR 46, 47). The performance bond was arranged and issued to B&J on June 11, 1982, and the permit was issued to B&J on June 14, 1982 (AR 43, 45).

The record does not include documentation pertaining to issuance of the permit for Area 5, but Paynter attended the pre-mine inspection almost 3 months before the contract with B&J was signed on Jan. 18, 1983 (Exh. R! 11). Also, prior to the execution of the contract, Paynter notified the TDSMR of the sequence in which B&J intended to mine the area (Exh. R! 18).

Although work on the permit was underway before the contracts were signed, B&J could have controlled the input as to the details of mining, as it had an ongoing relationship with Spur and its engineers.

permit application, decided upon its contents, or chose the mining plan carried out under the permit. The letter from J. M. Huber Corp. addresses its desires concerning the reclamation of roads (AR 48). The inspection reports show that Paynter was present but do not describe the role he played. Only the first and last pages of the permit application are part of the record (AR 47), and there is no specific testimony about the origin of the mining plan and permit application. Spur wrote the check for the permit application fees and may have directly paid other expenses (Exh. R! 28 at 32-33; Tr. 230-31), but there is no evidence that the bills were incurred by Spur. Instead, it appears that Spur paid the engineering fees for B&J because B&J lacked the funds to do so itself until it mined coal.

Although some documents show that Paynter communicated directly with the TDSMR, as discussed above, there is no evidence that he originated rather than merely relayed the information.

Of particular significance is the absence of testimony by members of B&J's engineering firm or TDSMR. Testimony that Spur, through Paynter or otherwise, either specified (at any point during the permit process) to the engineers how the lands should be mined or reclaimed could have established that Spur indirectly determined the manner in which B&J conducted its mining operations. Testimony that Spur, through Paynter or otherwise, agreed to permit modifications could also have done so.

Consequently, the weight of the evidence is that, contrary to the contract clauses, B&J hired the engineering firm and worked with it in deciding upon the manner of operations and the content of the permit application. The record contains nothing showing that the engineers were influenced by Spur or any other applicant other than B&J. In these circumstances, we cannot conclude that the contracts gave Spur the ability to determine the manner in which B&J conducted its surface mining operations.

Where a link is established, the justification for withholding a permit is that the applicant could have, but failed to, require compliance with the surface mining laws so that violations would not have occurred or outstanding violations would have been corrected. We are not convinced these clauses put Spur in a position either to prevent violations or to have outstanding violations corrected (see 53 FR 38868, 38869 (Oct. 3, 1988)).

In closing, we consider two cases cited by both OSM and applicants in their briefs. In S&M Coal Co. & Jewell Smokeless Coal Co. v. OSMRE, 79 IBLA 350, 91 I.D. 159 (1984), the Board ruled that Jewell was responsible for violations on a site operated by S&M. In that case, the coal being mined was owned by Jewell, the coal was being mined by S&M pursuant to an oral lease, and there was no currently valid permit with respect to the operation at the time of the inspection. 79 IBLA at 356, 91 I.D. at 160. The Board held that "when a coal mining operation is conducted pursuant to an oral lease, the parties have chosen to exercise joint

control over the operation." 79 IBLA at 358, 91 I.D. at 163. The rationale for the ruling was that, without a written contract protecting the lessee, "[t]he lessor maintains the right to exercise control over the operations by virtue of the ability to terminate the lease without cause if the lessor, for any reason, no longer desires to have the lessee do the actual mining of the coal." Id. The result was that "[s]ince either party could be considered to be capable of the exercise of control over the operations, both parties are to be considered 'permittees' under the Surface Mining Act, assuming that the mine operation is subject to regulation." Id., 91 I.D. at 163-64.

OSM correctly points out that, in S&M, the Board found control to exist without a factual showing that it was exercised. We hold above that it is possible to establish an AVS link by showing that one party had indirect authority over another, but conclude that the facts do not support that conclusion here. We find no further relevance in the case. Unlike S&M, the case before us involves a series of written contracts, and OSM has not proven that the relationship between the applicants and B&J was additionally governed by any oral agreement. In any event, the regulations governing AVS links between parties supersede the guidance provided by the Board's adjudication of the comparable question of parties' joint responsibility for violations. The AVS regulations use one of the same factors cited in S&M, i.e., whether the coal being mined by one party is owned by the other. However, the AVS regulations allow applicants to overcome any presumptions arising from that fact, and they have done so here.

In United States v. Rapoca Energy Co., 613 F. Supp. 1161 (D. Va. 1985), OSM sued Rapoca to collect unpaid abandoned mine land reclamation fees under 30 U.S.C. § 1232(a) (1988). The issue was whether Rapoca, which had contracted with independent contract miners to mine coal owned or leased by Rapoca, was an "operator" as defined at 30 U.S.C. § 1291(13) (1988). 613 F. Supp. at 1163. The court found Rapoca to be an operator, and therefore liable for the reclamation fees, on three separate grounds.

First, it examined the relationship between Rapoca and its contract miners under the Virginia law of agency. After finding that the work done had been "on the business of" Rapoca or for its benefit (because the coal was owned by Rapoca and the contractors were required to deliver it to Rapoca), the court turned to the question whether Rapoca had "the right to control the work done by the mining companies and the manner in which they perform it." 613 F. Supp. at 1164:

Here, Rapoca's method of developing and maintaining the coal reserves indicates such a degree of control. Rapoca surveys its mineral holdings to determine what locations are suitable for coal mining operations. It then performs all preliminary engineering work for the site, including engineering work required for a surface mining permit. In addition, Rapoca begins the actual site development work, which includes building or improving access roads, constructing sedimentation ponds, and facing up the coal seam.

During the course of the mining operations, Rapoca provides all engineering and mapping services for the contractors. The contractors follow Rapoca's engineers' directions relative to the placement and method of driving entries, the pulling of mine pillars, the location and use of haulings inside the mines, and any other matter pertaining to the protection of the mine and the securing of the greatest amount of coal possible.

Id. The court also noted that the companies were paid a fixed amount for every ton of coal delivered which did "not change with day-to-day fluctuations in the market price that Rapoca is receiving for its coal." Id. It concluded:

Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the corresponding lack of freedom regarding the mining companies' ability to sell to anyone other than Rapoca, this court must conclude that the "independent contractors" are no more than Rapoca's agents. Thus, it is Rapoca Energy Company that is liable for payment of the reclamation fees.

Id.

The court found Rapoca to be an "operator" responsible for payment of AML fees under 30 U.S.C. § 1232(a) (1988) because it found sufficient basis to conclude that the "independent contractors" are "no more than Rapoca's agents." 613 F. Supp. at 1164; see McWane Coal Co., 95 IBLA 1, 8-9, 93 I.D. 460, 464-65 (1986). It is clear that the court viewed Rapoca's ownership of coal as important in light of other circumstances, such as Rapoca's control of all preliminary engineering work for the site and its completion of actual site development work and all engineering and mapping services for the contractors. Similar circumstances have not been proven here.

OSM does not argue that B&J was Spur's agent, and 30 CFR 773.5 (1994) does not condition a finding of ownership or control on a conclusion that one party was the agent of another. Instead, the regulations define "owned or controlled" without regard to whether parties were principals, agents, or independent contractors for other purposes.

The second basis on which the court found Rapoca liable for the reclamation fees was the seven factors identified in Parsons v. Smith, 359 U.S. 215, 225 (1959). 613 F. Supp. at 1164-65. ^{39/} After discussing the factors, the court concluded that Rapoca was liable for the payment of the reclamation fees because it was "the only entity that has an economic interest in the coal in place," and "the independent contractors enjoy no more than an economic advantage in the mineral deposits." 613 F. Supp. at 1166.

Finally, the court adopted the reasoning of Ohio, Kentucky, and Alabama cases which found companies liable for severance taxes, concluding that

just as in cases involving payment of state severance taxes by the "person who actually removes the natural resources from the soil", the legislature intended that ultimate liability should rest with the entity that owns the right to extract the coal. Here, the "independent contractors" owned no economic interest

^{39/} In Parsons, ownership of an "economic" or "legal" interest in coal dictated whether the entity conducting mining operations qualified to take a depletion allowance. 359 U.S. at 216; see United States v. Swank, 451 U.S. 571, 583 (1981); Paragon Jewel Coal Co. v. Commissioner of Internal Revenue, 380 U.S. 624 (1965).

in the coal in place. Rather, they enjoyed a mere "economic advantage" derived from production, through a contractual relation to the owner[,] and were in fact no more than the tools by which Rapoca was able to extract its coal. Rapoca Energy Company is liable for payment of the reclamation fees.

613 F. Supp. at 1167.

Neither of the latter two rationales is applicable to the AVS. Under a strict reading of Parsons, if the party mining coal did not have an economic interest in the coal, the party owning the right to mine would automatically be found to own or control the operator. As the applicants argue, that would convert the rebuttable presumption set forth in the AVS regulations into an irrebuttable presumption having the effect of a rule of law. Authority, whether direct or indirect, "to determine the manner in which" mining operations were conducted would be irrelevant. Indeed, it would not matter whether there was also "the right to receive such coal after mining" as required by 30 CFR 773.5(b)(6) (1994). Such a test would be immiscible with the language of the regulation. See 53 FR 38868, 38871 (Oct. 3, 1988).

Although ownership of an economic interest in coal might be a proper basis to define "owned or controlled" under 30 U.S.C. § 1260(c) (1988) via regulations, OSM has not done so. Consequently, to the extent Rapoca relies on an economic interest test, it is inapplicable to the present case. For this reason we reject OSM's contention that Judge Torbett erred

to the extent that he might be seen to have equated the contracts between Spur and B&J with leases (Tr. 457-58; SOR at 35-37). 40/

OSM also argues that, by regulation, persons who control operations through their economic power over a coal mine are "controllers" under 30 CFR 773.5(a)(3) and (b)(6) (1994) (SOR at 27-28). Mineral ownership, financing, and the ownership of equipment are indeed matters OSM should investigate to determine whether one party held indirect authority over mining operations, because there may be instances in which they are used as the means to compel an operator to comply with instructions. If so, the parties are indeed "controllers" and their "actual authority" can be established by evidence of instances in which they exercised authority over operations or that, along with other features of the relationship, their economic interest was sufficient to compel compliance with instructions. Such matters, however, do not inherently give indirect authority over mining operations and cannot be deemed to themselves constitute control of operations. As discussed above, these circumstances have been adequately explained in the present case.

To the extent not specifically addressed herein, the parties' arguments have been considered and rejected.

40/ Our review of Judge Torbett's ruling does not indicate that he did so.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

David L. Hughes
Administrative Judge

I concur.

Gail M. Frazier
Administrative

