Unique Nature of the Coal Mining Industry--Are the Labor Law Rules Determining When Two Employers Should Be Treated as One Different for the Coal Industry

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UNITED STATES OF THE COAL MINING INDUSTRY—ARE THE LABOR LAW RULES DETERMINING WHEN TWO EMPLOYERS SHOULD BE TREATED AS ONE DIFFERENT FOR THE COAL INDUSTRY?

FORREST H. ROLES*

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I. INTRODUCTION

Labor relations in the coal mining industry is in some ways unique among United States industries. Certainly no other industry has experienced the level of violent conflict that plagued the coal industry in the early part of this century.1 In recent years, however, while the disputes

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1. See HOWARD B. LEE, BLOODLETTING IN APPALACHIA (1969); LON SAVAGE, THUN-
have remained vigorous and violent, in other ways labor relations in the coal mining industry have not been different, in kind at least, from those in other industries.

Despite that, a recent decision of the Acting Regional Director of Region Nine of the National Labor Relations Board has indicated that, in deciding whether claims that two or more employers should be treated as one, the normal analysis can be disregarded because of "the unique nature of the coal mining industry." Cited to support this proposition is the Board's decision in *Clayton B. Metcalf* where the majority ruled two employers were to be treated as one "considering the realities of the coal mining industry." In like manner, the Administrative Law Judge in *Martiki Coal Corp.* noted the "conglomerates that tend to dominate the coal industry" use a "generalized practice of what has been called 'corporate paper shuffling.'"

The author participated in the *Mingo Logan* case and is familiar with both *Clayton B. Metcalf* and *Martiki Coal Corp.* In none of those cases was any evidence introduced concerning the general nature of business organizations and labor relations in the coal industry. No scholarly or other studies of the unique or different "nature" of the coal mining industry, its "realities" or "general practice" were cited to or by the decision-makers and research has disclosed none. These generalized statements without evidentiary or scholarly support are surprising.

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3. *Id.*, slip op. at 7.


5. *Id.* at 644.

6. 147 L.R.R.M. (BNA) 1208, 1994 WL 612208 (N.L.R.B.) (Oct. 31, 1994) (refusing to adopt the Administrative Law Judge's decision as to this point).

7. *Id.* at 19.
TREATING TWO EMPLOYERS AS ONE

The purpose of this article is to test the legitimacy of the apparent uniqueness finding of these three cases. It will first examine the business organization of the coal industry. Then the article will discuss the two labor law doctrines by which two or more employers are considered one—the single employer and joint employer—both as they have been generally applied and as applied in the coal industry. Finally, the article concludes that these recent cases, in which a different standard is proposed for the coal mining industry because of its "unique nature," are not only contrary to the generally applicable law, but are also without any basis in the facts or in the reasoning for application of these doctrines.

II. BUSINESS ORGANIZATION IN THE COAL MINING INDUSTRY

Research disclosed no scholarly study of the business organization of the United States coal mining industry. From the author’s experience and conversation with others, however, it clearly appears that no general pattern exists. Business owners from the largest multinational corporations to individual proprietorships mine coal in the United States. While they most often do so individually, there have been some joint ventures. However, almost all coal operators are corporations.

The primary reason for incorporation is the advantages the corporate form provides in the way of raising capital and limiting liability to the corporation. As one author explained:

The vast majority of American businesses are small sole proprietorships which do not enjoy limited liability. Coal mining and related operations, however, typically require relatively large amounts of capital and involve a significant risk of catastrophic loss. As a result, the coal mining industry makes pervasive use of the corporate form.9

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8. For the entirety of his more than twenty-five years in practice, the author has represented employers in the coal industry and advised them about their business organization and structure. This section is based primarily on what that experience has taught.

While most all coal operators use the corporate form, that does not mean that their business structures are alike. Quite to the contrary, some coal companies operate each of their mines and each aspect of their mining themselves, without the use of subsidiaries or contractors, while others make extensive use of both. It is in the latter case where single and joint employer issues arise.

These issues arise primarily in two circumstances. First, single employer issues occur when a coal operator structures itself into a parent holding and service company with separate operating subsidiaries to perform the actual mining. In this situation, the parent typically provides the sales and accounting services, but the remainder of the mine operations are conducted by the separate subsidiaries. Usually, there is a separate subsidiary for each logical mining unit, most often a preparation plant and one or more mines. The separate subsidiaries manage their own operations, establish and maintain their own labor relations policies and, except for major investment or capital expenditures, make their own financial decisions. The parent typically provides sales services through a sales department or separate sales subsidiary servicing all the operating subsidiaries and financial and accounting services.

Limiting catastrophic liabilities to the corporation suffering them is one motive for this structure. However, there are other motives. A principal motive is the belief that greater effort and productivity can be achieved through decentralized management. Some operators have found that smaller, self-directed units are more productive and efficient than large centrally controlled ones. They believe that employees work better when they are part of a smaller, more cohesive group, and that managers will be imaginative and innovative when given greater authority.

The second business structure raising issues of treating two or more employers as one in the coal mining industry arises from the use of contractors. Many coal land owners hire contractors to do a significant amount of the work of producing coal. Almost all operators use construction, trucking and engineering contractors. The joint employer
issue arises primarily, however, when operators employ mining contractors.

The practice of employing mining contractors is mixed. Many operators mine all the coal with their own employees and use no mining contractors. At some coal mining complexes, all the mining employers are contractors. The normal practice, however, is to employ some mining contractors, normally for a type of reserve that the owner does not wish to mine with its own employees.

Sometimes, the owner runs one or more deep mines and contracts out the surface reserves. In other instances, the opposite is true with the owner operating the surface mines and contracting out the underground ones. Normally, the owner conducts the larger, more capital intensive operation and contracts out the smaller blocks of reserves. In many instances, owners contract the mining of reserve blocks they cannot mine profitably. Thus, if they could not contract its mining, the block would not be mined.

There are significant differences in how major operators and contractors structure their businesses. The major coal operators today are almost always either subsidiaries of publicly traded corporations or publicly traded themselves. Mining contractors, on the other hand, are usually owned by an individual entrepreneur and his family. Major operators hire from the public; while contractors tend to hire members of the owner’s family, and the owner’s friends and neighbors. Major operators generally run capital intensive, large mines. Contractors’ operations tend to spend a greater proportion of their expenses on labor and rely on a homogenous, loyal workforce to mine the coal, which the larger coal owners cannot.

The legal relationship between operator and contractor has some standard features. Almost always, the owner retains ownership of the coal, paying the contractor a fee to mine it. The owner sells the contractors’ production, often after blending it with the owner’s own. To assure an efficient sequence of mining, the owner’s engineers prepare the contractor’s mining plan and inspect the contractor’s mine to assure compliance. The contractor controls its own labor relations, including setting wages and benefits, hiring and firing. Because of the uncertainty of mining smaller reserves, contract mining agreements
usually call for termination on completion of a specified reserve, but allow for earlier termination, usually on short notice by either party. Contracting is essential to the success of many mining complexes. Often, the coal in the smaller reserves mined by contractors is essential for the blended product the owner markets. Equally often, the contractor’s production is necessary to achieve the level of sales to make the complex profitable.

The profitability of contract mining is unpredictable. Generally, the smaller contracted reserves have not been fully explored prior to mining. Mining conditions may be much easier or more difficult than expected. The coal seam may be consistent or contain unexpected splits or even disappear. When matters are worse than expected, many contract miners fail. The incidence of bankruptcy among them is high. Many, however, succeed; some spectacularly.

III. THEORIES FOR TREATING TWO EMPLOYERS AS ONE

Labor law generally treats the relationship between employers on the one hand and their employees and the labor organization which represent them, on the other. Over years of labor law development, a number of circumstances have arisen when it is necessary to determine whether two nominally different employers should be treated as one.

Those circumstances are varied. Included among them are determinations of when the assets and business of two nominally separate employers should be combined to determine whether they are subject to the jurisdiction provisions of the National Labor Relations Act or similar laws; whether one corporation bears responsibility for the labor law obligations of another; whether the employees of the nominally separate companies should be placed in the same bargaining unit; and whether picketing or other strike activity against one nominally separate employer is secondary when the strikers’ dispute is with another.

In deciding these issues, the Board and Courts have developed two principal doctrines for making the determinations—that of “single em-
ployer” and “joint employer.” They are apparently applied the same way in all contexts. These doctrines are the subject of this article.

A. Single Employer

1. General Application

The Board and the Courts examine four criteria when determining the single employer status of ostensibly separate employer entities: (1) the interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership.

While both the courts and the Board rarely find any single factor controlling, they tend to stress the element of centralized control of labor relations, which the Board interprets as an indicator of operational integration. Common ownership, on the other hand, tends to be the least significant factor in determining single employee status. Ultimately, a finding of

10. There is a related doctrine of “alter ego” which determines whether two nominally separate companies are, in reality, only one as opposed to whether the two are so related to one another as to be treated as one—the purpose of the joint and single employer doctrines. Alter ego is generally used to determine whether a claimed new company operating a business is in reality the “disguised continuance” of the old company. Southport Petroleum Co. v. N.L.R.B., 315 U.S. 100, 106 (1942). Lately, the doctrine has also been applied to claims that double breasted companies (two commonly owned companies in the same business—one under a union contract and the other not) should be treated as the same. See N.L.R.B. v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 336 (6th Cir. 1990). The alter ego doctrine is outside the scope of this paper.


12. Radio & Television Broadcast Technicians Local Union 1264 I.B.E.W. v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam); Emark, Inc. v. N.L.R.B., 887 F.2d 739, 753 (7th Cir. 1989); N.L.R.B. v. Carson Cable TV, 795 F.2d 879, 881 (9th Cir. 1986); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 504 (5th Cir. 1982); Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1075 (1st Cir. 1981).


14. Food & Commercial Workers Local 1439 (Price Enterprises), 271 N.L.R.B. 754,
single employer status depends upon examination of all relevant factors to determine whether the entities under consideration are characterized by an absence of the "arm's length" status customarily found between unrelated companies.\(^5\)

Common control of labor relations generally means common control over day-to-day personnel decisions. Active or actual control, rather than potential control, over personnel matters is the critical factor.\(^6\) Thus, a parent company's imposed policy of refusal to recognize a union at its subsidiary's operation may be indicative of common control of labor relations where that decision sets a framework for day-to-day decisions over terms and conditions of employment.\(^7\) On the other hand, a parent company's decision to establish a non-union operating entity to complement its union operations will not be enough to establish common control of labor relations absent a showing of the parent company's actual involvement in the day-to-day personnel decisions of the non-union division.\(^8\) A significant degree of autonomy must be exercised by the separate companies in setting their own labor relations policies and practices and making personnel decisions in order to avoid finding that the two are actually a single employer.

Common management is a factor that turns on the degree of shared administrative functions as well as common supervisory and management personnel.\(^9\) Such factors as commonly prescribed accounting systems or operating rules, centralized budgeting procedures,

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19. N.L.R.B. v. Carson Cable TV, 795 F.2d 879, 882 (9th Cir. 1986); Penntech Papers Inc. v. N.L.R.B., 706 F.2d 18, 25-26 (1st Cir. 1983).
shared expenses, common supervisory or management personnel, and common lines of authority tend to demonstrate single employer status.\textsuperscript{20} These same factors are sometimes cited as the basis for finding that an interrelationship of operations exists, which is a separate single employer criterion.

Interrelation of operations principally turns on such factors as shared facilities or premises; combined bank accounts; sale of similar products through similar distribution systems and methods; interchange of employees; and common computerized payroll or accounting systems.\textsuperscript{21}

2. Coal Industry Application

The Board and the Courts have followed the standard rules in making single employer judgments in coal industry cases. Most of these cases deal with corporate structure of a non-mining parent and its mining subsidiaries. The cases address the traditional, well established criteria of common ownership and financial control, common management, integration of operations and centralized control of labor relations.\textsuperscript{22} Likewise, they adhere to the summary rule that:

[W]here the control exercised by one entity over another, ostensibly separate, entity is not characteristic of an arm's length relationship between unrelated companies it is appropriate to find a single employer relationship.\textsuperscript{23}

\textsuperscript{20} Carson Cable TV, 795 F.2d at 882; Penntech Papers, Inc. v. N.L.R.B., 706 F.2d 18, 25-26 (1st Cir. 1983).


The most interesting recent coal industry decisions are Mineworkers International (Boich Mining Co.),\textsuperscript{24} before the Board, and the Sixth Circuit's denial of enforcement Boich Mining Co. v. N.L.R.B.\textsuperscript{25} There, the issue was whether Boich Mining Company and its sister company Aloe Coal Company were a single employer for secondary boycott purposes. Each company was a wholly owned subsidiary of the same parent so the first factor—common ownership—favored single employer status. Separate management and control of labor relations, however, favored separate or neutral status. The amount of integration of operations spelled the difference in each decision.\textsuperscript{26}

The Board relied upon a few instances of equipment and parts exchange, some common usage of employees, and particularly the fact that "a significant amount of Boich's coal is sent on a regular basis to Aloe Coal's facility to be worked and blended with coal from the Aloe's Coal Mine..."\textsuperscript{27} to find single employer status in "a close case."\textsuperscript{28} The Sixth Circuit disagreed. It found the blending process, which involved only 5-6% of Aloe Coal's production, to constitute a "relatively small amount... based on a typical arm's length business transaction."\textsuperscript{29} The Sixth Circuit was particularly impressed with the fact that the transaction between Aloe and Boich was arm's length, typical of transactions with strangers.\textsuperscript{30}

The other single employer coal cases are not nearly so close or interesting. They, as opposed to Boich, emphasize the evidence of the common control of labor relations. They are perhaps best treated by their treatment of the relevant factors other than common ownership, which is present in all.

\textsuperscript{24} 301 N.L.R.B. 872 (1991).
\textsuperscript{25} 955 F.2d 431 (6th Cir. 1992).
\textsuperscript{26} See also supra notes 24, 25.
\textsuperscript{27} Boich Mining Co., 301 N.L.R.B. at 875. See also supra note 24.
\textsuperscript{28} Boich Mining Co., 301 N.L.R.B. at 875.
\textsuperscript{29} Boich Mining Co. v. N.L.R.B., 955 F.2d at 435. See also supra note 25.
\textsuperscript{30} Boich Mining Co., 955 F.2d at 435.
a. Common Management

Nearly all cases examine whether the same people manage the employers under consideration. Where the same people run or have a significant say in the operations of the two operators, common management is found. When the companies are managed by separate persons, acting independently (only Boich), the finding is an absence of common management.31

b. Integration of Operations

Several factors other than the blending of products for common sales relied upon in Boich have been cited from the decision as showing integrated operations. Centralized sales and marketing is a factor that tends to demonstrate interrelated operations, especially if common customers are involved.32 Interchange or sharing of non-management personnel is likewise considered,33 as is common use of equipment and facilities.34


32. For example, in Consolidation Coal Co., 307 N.L.R.B. 69 (1992), which involved a request by the UMWA for information concerning the relationship between Consolidation Coal Company ("Consolidation"), Consol Pennsylvania Coal Company ("CPCC") and Enlow Fork Mining Company ("Enlow Fork"), the Board found that the UMWA had a "reasonable basis" to believe that a single employer relationship existed and that, therefore, the Union was entitled to the requested information. In so finding, the ALJ stated:

In one issue of Consol News, B.R. Brown, in a message from the Chairman, enumerated the achievements of [Consolidation's] marketing department in cultivating customers for the coal from Bailey Mine [Enlow Fork's mine]. . . . Moreover, these entities [Consolidation, CPCC and Enlow Fork] were known to jointly sell the coal produced by the mines and it appeared that [Consolidation] and CPCC have jointly agreed to sell coal from Bailey Mine. 307 N.L.R.B. at 73. See also Bryar Constr. Co., 240 N.L.R.B. 102, 103 (1979).


c. Common Control of Labor Relations

Like common management, common control of labor relations is primarily found when the same individuals establish or carry out the labor relations policies of the entities.\(^5\) Other indicia are centralized control of labor relations functions such as training, benefit plan administration, payroll.\(^6\) In general, separate control is found when the employers prove the differences in critical labor policies between the companies and the independent establishment and maintenance of the policies.\(^3\)

B. Joint Employer

1. General Application

In contrast to single employer status, joint employer standing occurs not when two companies are shown to be a single, integrated enterprise according to the four elements discussed above, but rather when two otherwise separate companies jointly control the labor relations policies of their shared or combined employees.\(^3\) For a number of years, however, the two concepts were confused in the decisions of the courts and the Board. Single employer criteria, particularly those

35. Westmoreland Coal Co., 304 N.L.R.B. 528, 531 (1991); Hysota Fuel Co., 280 N.L.R.B. 763, 767 (1986). \textit{See also supra} note 31. (Owner of both companies solely responsible for labor relations). In Midwestern Mining, Inc. 277 N.L.R.B. 221 (1985), centralized control of labor relations was found when:

\textit{[T]he labor relations of both MMR and RSI are vested solely in the management officials of MMR. Ira Palmer, McCrate, and Brooks are the top MMR officials controlling the entire operation at the mining site and all of the employees, whether RSI or MMR, are subject to their overall control and supervision. The record also reveals that all employees working at the mine site, regardless of which company, are also subject to the direction and control of lower level supervisors working for either company.}

277 N.L.R.B. at 225.


dealing with common management and integration of operations were considered in joint employer decisions. That changed with the decision of the Third Circuit in *N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc. (B.F.I.)*[^39] and its acceptance by the Board.[^40]

The *B.F.I.* court acknowledged the court and Board decisions that merged the two doctrines.[^41] It disapproved of them based on the separate statements of standards in the United States Supreme Court decisions.[^42] Contrasting joint employer with single employer, the *B.F.I.* court said:

In contrast, the 'joint employer' concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather, a finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be'—independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'

In 'joint employer' situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in 'single employer' cases. As this Circuit has maintained since 1942, '[i]t is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers.' The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they

[^39]: 691 F.2d 1117 (3d Cir. 1982).
[^41]: *Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d at 1120. See also supra note 39.
[^42]: *Browning-Ferris Indus. of Pa., Inc.* 691 F.2d at 1119.
share or co-determine those matters governing the essential terms and conditions of employment.\(^{43}\)

In examining whether two companies share in co-determining essential terms and conditions of employment of a group of employees, the Board examines who effectively controls such matters as “hiring, firing, discipline, supervision and direction.”\(^{44}\) As indicated in the two cases discussed below, common supervision or direction alone is not sufficient.

For example, in *Chesapeake Foods*,\(^{45}\) the Board refused to find joint employer status even though Chesapeake scheduled work, provided instruction in certain aspects of its contractor’s operations, and set production quotas.\(^{46}\) The Board noted that it was the contractor who hired, fired and paid the employees, supplied equipment, handled discipline, and otherwise controlled the working conditions of his employees.\(^{47}\) Similarly, in *T.L.I., Inc.*,\(^{48}\) the Board found that limited and routine supervision by Crown Zellerbach over the employees of T.L.I. was insufficient to create joint employer status, in light of Crown’s failure to hire, fire, discipline, or otherwise determine the working conditions of T.L.I.’s workforce.\(^{49}\)

In *Flav-O-Rich, Inc.*,\(^{50}\) Job Shop provided temporary work to Flav-O-Rich for which it charged an hourly fee. Flav-O-Rich supervisors gave out daily work assignments.\(^{51}\) In one case, Flav-O-Rich required one of the Job Shop employees to keep his time on a Flav-O-Rich time card, required him to report at a specified time and take prescribed breaks and lunch periods in specified areas only, and complained to the employee about seeing him in a break area during work.

\(^{43}\) *Id.* at 1122-23 (citations omitted).
\(^{45}\) *Id.*
\(^{46}\) *Id.*
\(^{47}\) *Id.*
\(^{49}\) *Id.*
\(^{50}\) 309 N.L.R.B. 262 (1992).
\(^{51}\) *Id.*
time. In light of undisputed evidence that Job Shop determined the employees' essential terms and conditions of employment, the Board rejected a joint employer claim, finding that the direction and supervision exercised by Flav-O-Rich was limited and routine. Where, on the other hand, the companies share control over such factors as hiring, promotion, setting wage rates and hours, and determining holidays and other days off, the result is different.

2. Application To The Coal Industry

Like joint employer law generally, its application in the coal industry can be divided between those before and those after the decision in B.F.I. Before that decision delineated the appropriate difference between joint and single employer analysis, the cases mixed the criteria, considering single employer criteria—particularly integration of operations and common management—in the joint employer determination. Thereafter, the cases have followed the B.F.I. analysis.

The Board's recent Martiki Coal Corp. case dealing with relations between an owner-operator and its contractor is particularly instructive. The Administrative Law Judge found a joint employer relationship, relying upon evidence that the owner concerned itself in the contractor's scheduling and hiring work assignments and that the owner's supervisors directed the contractor's workforce. However, the Administrative Law Judge disregarded evidence of a change in the relationship between the two companies whereby the owner disengaged itself from decisions involving the contractor's labor relations. The ALJ

52. Id.
53. Id.
55. 691 F.2d at 1117.
58. 1994 WL 612208. See also supra note 57.
did so because the changes were not documented and testimony as to the date they were implemented was vague or inconsistent. The Board disagreed, holding that following implementation of the owner’s policy of leaving contractor labor relations alone (there was no change in managerial control), the joint employer relationship terminated.

IV. ANALYSIS OF COAL INDUSTRY CASES—DO THEY REFLECT UNIQUE FACTS OR LAW?

There is nothing in facts or legal reasoning of the single and joint employer cases that justifies a conclusion that the coal mining industry should be treated differently than any other industry. As the analysis above indicates, the cases apply the same standards used for other industries in the same way. Moreover, there are no distinctions in the way the coal industry is structured or how it uses contractors warranting special or different applications of the rules.

Indeed, the coal industry appears to be different only in a way which would favor continued application of traditional standards. Some have suggested changes in single and joint employer law because of the growing use in the United States labor market of what has become to be known as a “contingent workforce.” This “contingent workforce” is comprised of part-time and temporary workers who work alongside of and share the work of regular full-time employees. Contingent workers, however, receive less pay and fewer benefits, particularly medical insurance benefits. Some of the members of the contingent workforce are employees not of the company that employs their regular full-time colleagues or for whom they do the work, but of separate service companies denominated employment leasing companies.

60. Id.
61. Id.
The facts of the coal industry single and joint employer cases do not disclose any contingent workforce issues. That is confirmed by the authors’ experience. As reported in the coal mining industry cases, contractor employees are full-time permanent employees. They earn good wages. They have health care insurance. The changes in single and joint employer law being proposed to respond to the changed circumstances of the growing contingent workforce are not called for in the coal mining industry.

Nor does there exist any other factor warranting special, different single and joint employer rules for the coal mining industry. The suggestions in *Mingo Logan*, *Clayton Metcalf*, and *Martiki Coal* to the contrary\(^6\) are without cited or existing basis.

V. CONCLUSION

Modern United States labor law dates from the 1935 enactment of the Wagner Act.\(^6\) Its definition of “employer” has remained the same over the nearly sixty years of its application.\(^6\) The Courts and the Board have developed detailed criteria deciding when two or more employers should be considered one under that definition.\(^6\) Since the 1984 decision in *B.F.I.*, those criteria have been uniformly accepted and applied. There is nothing unique about the coal industry warranting a change or a different application of the criteria.

\(^{64}\) *See supra* notes 2-7 and accompanying text.


\(^{67}\) *See supra* note 12.