The National Bituminous Coal Wage Agreement of 1993 and the Memorandum of Understanding Regarding Job Opportunities: Is "Double-Breasting" Dead?

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Synopsis

§ 5.01. Introduction.

In recent years, the coal industry has changed from a labor-intensive industry to a capital-intensive industry. As a result of technological advances in mining equipment, productivity has increased while the number of jobs has decreased. As the industry becomes more and more competitive, many employers have shifted to union-free operations in an attempt to decrease costs. Whether valid or not, there is a perception that union-free operations are more productive because they have fewer contractual restrictions and work rules that could hamper production.

When coal operators in the Eastern bituminous coal fields discovered that they could successfully operate their mines with a union-free workforce, they stopped the previous practice of automatically recognizing the United Mine Workers of America ("UMWA" or "Union"). They also began to organize their corporate structure so that some affiliates operated with union representation and others operated union-free, a

practice referred to as "double-breasting."

Consequently, the number of union-represented jobs in the coal industry declined dramatically, and the UMWA had trouble successfully organizing employees of union-free operations. Although job preservation has always been one of the Union's priorities, as the coal industry continues to change and make technological advances, the UMWA has been forced to go to greater lengths to protect jobs for its members in the face of a depleting job base.

Historically, the UMWA relied upon automatic recognition by operators to organize new operations. However, in 1980, the contractual basis for the automatic recognition was destroyed.(1)

Since that time, the UMWA has successfully enforced more narrow provisions, such as the "successorship clause," which applies the Wage Agreement to the signatory's successor. In addition, as part of the National Bituminous Coal Wage Agreement of 1988 (1988 Wage Agreement), the Union bargained for a JOBS provision,(2)

which granted preferential hiring rights to union-represented employees at any existing, new or newly-acquired operation of a signatory employer or with the lessee or licensee of a signatory employer.The Union took this idea one step further with the National Bituminous Coal Wage Agreement of 1993 ("1993 Wage Agreement"). The UMWA and the Bituminous Coal Operators Association (BCOA), the multi-employer bargaining agent for many of the larger coal operators, agreed to a Memorandum of Understanding Regarding Job Opportunities (MOU), which similarly extended preferential hiring rights to union-represented employees of signatory employers at the operations of the signatory employer's non-signatory parent corporation and all non-signatory coal mining subsidiaries of that parent. If valid, the MOU presents substantial problems for coal companies that have structured their subsidiaries as double-breasted operations: that is, operating one subsidiary with union representation and another without union representation.

This Chapter will explore the issue of whether the MOU, in effect, will end the practice of double-breasting in the coal industry. The chapter begins by outlining the MOU and its preferential hiring provisions and explains the structure of double-breasting and its emergence in the coal industry. In addition, the Chapter reviews union attempts to defeat double-breasting, then analyzes the MOU in the context of the *Saturn* decision,(3) which dealt with the legality of a preferential hiring agreement. Finally, the Chapter examines the legal implications of "anti-double-breasting" and "anti-dual-shop" clauses and discusses the question of whether the MOU violates the National Labor Relations Act ("NLRA" or "Act").

§ 5.02. The Memorandum of Understanding.

The MOU is a separate document from the 1993 Wage Agreement. If a signatory employer executes the MOU, it agrees to act as a limited agent for its parent corporation and any of the parent's nonunion subsidiaries for the sole purpose of binding those related companies to the terms of the MOU.(4)

The signatory employer must attach a list of non-signatory affiliated operations to the MOU. Those companies will be bound by the terms of the Memorandum of Understanding.(5)

The MOU obligates the covered non-signatory employers to fill three of five jobs at any existing, new or newly-acquired operation with employees currently employed at UMWA-represented operations or laid off from the signatory employer's UMWA-represented operations.(6)

In addition, the MOU requires the non-signatories to apply the preferential hiring provision to the non-