

West Virginia jury deliberates in trial of former Massey CEO Don Blankenship

By Clement Daly
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Jurors completed their fifth day of deliberations on Monday without having reached a verdict in the trial of former Massey Energy CEO Don Blankenship, accused of three counts of conspiring to willfully violate federal mine health and safety laws, obstructing and defrauding the US Mine Safety and Health Administration (MSHA), and making false statement to the US Securities and Exchange Commission (SEC) and investors.

When the prosecution rested its case on November 16, after 24 days of testimony and 27 witnesses, the defense surprisingly rested the same day without calling a single witness of its own. Blankenship's defense had initially planned on calling up to 140 witnesses, but was persuaded from such a course likely because of the favorable testimony it was able to gain out of key government witnesses on cross-examination.

Blankenship was CEO at Massey when a massive coal-dust explosion ripped through the company's Upper Big Branch (UBB) mine on April 5, 2010, killing 29 West Virginia miners in the nation's worst mining disaster in nearly 40 years. Despite his position of responsibility, US District Judge Irene C. Berger instructed the jury that the government "has not charged the defendant with causing that explosion and the defendant is not on trial for the explosion. In fact, neither the cause of nor the responsibility for the explosion is at issue in this case."

Berger told the jurors, "Generally speaking, the indictment charges that between January 1, 2008, and April 5, 2010, the defendant, Donald L. Blankenship, conspired to willfully violate mandatory health and safety standards and willfully made false statements." If convicted, the 65-year-old Blankenship faces up to 30 years in prison.

During its deliberations, the jury sent out notes to Judge Berger making requests. Last Wednesday, they requested access to a series of phone recordings of Blankenship played by the prosecution. They also requested clarification of the words "strive" and "condone" which are contained in the company statements issued by Massey in the aftermath of the UBB disaster which federal prosecutors allege are false and misleading.

On Thursday, Judge Berger received a note from jurors saying, "How long do we deliberate? We cannot agree."

Blankenship's defense team immediately seized on the language of the note to argue for a mistrial, but Judge Berger rejected the motion and ordered the jury to continue deliberating.

"The defendant, Don Blankenship, ran a massive, massive criminal conspiracy," US Attorney Booth Goodwin claimed in opening the prosecution's closing arguments last Tuesday. "The goal of [Blankenship's] conspiracy was to violate the mine health and safety laws in order to run more coal." This was accomplished, he explained, through a "relentless campaign of obstruction" and carried out through a "group of 'yes' men."

According to Goodwin's summary, the campaign of obstruction included the institutionalized system of providing advance warning to underground miners of impending federal inspections; cheating on coal dust samples aimed at preventing deadly explosions and protecting miners from the debilitating occupational disease known as black lung; keeping secret and confidential the ominous warnings of Massey safety expert Bill Ross; requiring and perpetuating a "code of silence where members weren't allowed to talk to mine inspectors"; and using "flashy things" dressed up as safety innovations "to distract from the perpetual law-breaking in which the defendant and his conspiracy engaged."

"The defendant conspired with others not to just violate the law a couple of times or even a dozen times," Goodwin explained, "but hundreds upon hundreds of times at UBB, thousands upon thousands of times at Massey."

Goodwin reviewed the contents of the memo which expressed safety expert Bill Ross' concerns about Massey's operations. "The attitude at Massey operations is if you can get the footage, we can pay the fines," Goodwin summarized. "Foremen are continually forced to operate with skeleton crews. If they need nine men, they're given five and they're still expected to produce big footage. We are told to run, run, run until we get caught. Then we will fix it."

In explaining the prosecution's conspiracy charges, Goodwin compared Blankenship to a drug kingpin. Just as the drug kingpin doesn't need to know the details about every drug sale made by his dealers or about the police lookouts posted outside the drug house, Blankenship didn't need to know the

particulars about every safety violation committed or the precise workings of the system of advanced warning to be guilty of conspiracy, Goodwin explained.

Goodwin reminded the jury of the testimony given by Chris Blanchard, president of Massey subsidiary and UBB operator Performance Coal, that “there was an understanding, and Blankenship was a party to that understanding, to run coal and pay the fines. Break the law and pay the fines.” Of the 836 federal health and safety violations the UBB was cited for during the alleged conspiracy period, Goodwin said, “Virtually everyone you’ve heard from, including Blanchard, told you the vast majority of those could have been prevented with adequate staff and sufficient time away from production to do the things necessary to comply with the law.”

After recounting the appalling working conditions a parade of former UBB miners testified about, Goodwin noted that Blankenship made almost \$18 million in 2009 and “could have personally paid...for one more person per mining section and still had more than \$10 million left over that year.” Moreover, for Blankenship’s salary, “Massey could have hired 275 coal miners at \$65,000 a year.”

For his part, lead defense attorney Bill Taylor emphasized the lack of testimonial evidence against Blankenship in his closing arguments. “It’s truly astonishing,” Taylor claimed, noting that after more than five years of investigation and a trial in which the prosecution called 27 witnesses, there was no testimony from an MSHA inspector that observed a willful violation of mine regulations at UBB or that the agency was defrauded; no testimony from the author of the alleged false company statements; no testimony by a shareholder that was deceived or defrauded; and no testimony from anybody at the SEC that they even read the Massey document and were deceived.

“When you get a speeding ticket, the policeman has to show up,” Taylor claimed. “If they don’t you can’t be convicted.”

Taylor also recounted some of the surprising cross-examination of Chris Blanchard. The Performance Coal president had reached an immunity deal with the prosecution and supplied key testimony to the grand jury which indicted Blankenship about one year ago.

Blanchard had testified for the prosecution that he believed an understanding existed at Massey, including Blankenship, that it was cheaper to incur and pay fines for MSHA violations rather than preventing them. However, when cross-examined by the defense, Blanchard answered in the negative when asked if he “conspire[d] with Mr. Blankenship to commit willful violations of the mine safety regulations” and if he “participate[d] or conspire[d] with Mr. Blankenship to defraud MSHA inspectors.” He also denied for the defense that there was any agreement or understanding, even unspoken, with Blankenship to willfully violate mine safety laws.

Upon re-direct examination by the prosecution, Blanchard again affirmed that the understanding to violate federal safety laws existed, the confusion apparently rested on the definition

of “conspiracy.” However, the damage to the prosecution’s case had been done.

As for Bill Ross, whose safety concerns formed the basis of some of the prosecution’s strongest arguments, he is “Exhibit A that Donald Blankenship is innocent,” Taylor claimed. “If you have a conspiracy going on, do you hire a 30-year MSHA employee and...put his office right next to the co-conspirator [Blanchard]? Do you 18 months into the conspiracy invite him to meet with a member of the board and urge him to be as candid as possible, to be as critical as possible of your mines?”

In the prosecution’s rebuttal to Taylor’s closing arguments, Assistant US Attorney Steve Ruby compared UBB to a “runaway train” for which Blankenship had “all the power in the world to put a stop to it.” However, instead of hitting the brakes, Blankenship “pushed his foot as far on the gas as it would go,” Ruby claimed.

According to the *Charleston Gazette*, family members of the victims of the UBB disaster present at the trial began crying when Ruby began describing conditions at UBB and asking jurors to put themselves in the miners’ shoes. “Picture mining day in and day out, eight or ten hours a shift, while you are literally choking on the coal dust in the air around you,” Ruby said.

The early signs of indecision and division in the jury reveal the real possibility of a mistrial or a verdict of not guilty. The responsibility for such an outcome would rest with the Obama administration and its decision not to charge Blankenship with the mass murder he oversaw at UBB.

As the *World Socialist Web Site* noted at the start of the trial: “The tangential character of the charges brought against Blankenship flow from the need of the Obama administration to shield MSHA from scrutiny, prevent a full accounting of the agency’s role in abetting Massey, and thereby continue its general whitewashing of the dangers facing coal miners. Federal prosecutors seek to use the weight of the UBB tragedy to secure a guilty verdict without actually charging Blankenship with the crime itself.”

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