U.S. Department of Justice

United States Attorney
Southern District of West Virginia

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March 16, 2011

Mary Lou Newberger
Federal Public Defender
300 Virginia Street, East
Charleston, West Virginia 25301

Re: United States v. Thomas Harrah

Dear Ms. Newberger:

This will confirm our conversations with regard to your client, Thomas Harrah (hereinafter "Mr. Harrah"). As a result of these conversations, it is agreed by and between the United States and Mr. Harrah as follows:

1. **CHARGING AGREEMENT**. Mr. Harrah agrees to waive his right pursuant to Rule 7 of the Federal Rules of Criminal Procedure to be charged by indictment and will consent to the filing of a two-count information to be filed in the United States District Court for the Southern District of West Virginia, a copy of which is attached hereto as "Plea Agreement Exhibit A."

2. **RESOLUTION OF CHARGES**. Mr. Harrah will plead guilty to a violation of 30 U.S.C. § 820(f) (false statement on MSHA document) and a violation of 18 U.S.C. §1001 (false statements to federal agents) as charged in said information.

3. **MAXIMUM POTENTIAL PENALTY**. The maximum penalty to which Mr. Harrah will be exposed by virtue of this guilty plea is as follows:

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Defendant's initials

Count One

(a) Imprisonment for a period of 5 years;

(b) A fine of $250,000, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from defendant's conduct, whichever is greater;

(c) A term of supervised release of 3 years;

(d) A mandatory special assessment of $100 pursuant to 18 U.S.C. § 3013; and

(e) An order of restitution pursuant to 18 U.S.C. §§ 3663 and 3664, or as otherwise set forth in this plea agreement.

COUNT TWO

(a) Imprisonment for a period of 5 years;

(b) A fine of $250,000, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from defendant's conduct, whichever is greater;

(c) A term of supervised release of 3 years;

(d) A mandatory special assessment of $100 pursuant to 18 U.S.C. § 3013; and

(e) An order of restitution pursuant to 18 U.S.C. §§ 3663 and 3664, or as otherwise set forth in this plea agreement.

Total Maximum Potential Penalty

(a) Imprisonment for a period of 10 years;

(b) A fine of $500,000, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from defendant's conduct, whichever is greater;

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(c) A term of supervised release of 3 years;

(d) A mandatory special assessment of $200 pursuant to 18 U.S.C. § 3013; and

(e) An order of restitution pursuant to 18 U.S.C. §§ 3663 and 3664, or as otherwise set forth in this plea agreement.

4. **SPECIAL ASSESSMENT.** Prior to the entry of a plea pursuant to this plea agreement, Mr. Harrah will tender a check or money order to the Clerk of the United States District Court for $200, which check or money order shall indicate on its face the name of defendant and the case number. The sum received by the Clerk will be applied toward the special assessment imposed by the Court at sentencing. Mr. Harrah will obtain a receipt of payment from the Clerk and will tender a copy of such receipt to the United States, to be filed with the Court as an attachment to this plea agreement. If Mr. Harrah fails to provide proof of payment of the special assessment prior to or at the plea proceeding, the United States will have the right to void this plea agreement. In the event this plea agreement becomes void after payment of the special assessment, such sum shall be promptly returned to Mr. Harrah.

5. **PAYMENT OF MONETARY PENALTIES.** Mr. Harrah agrees not to object to the District Court ordering all monetary penalties (including the special assessment, fine, court costs, and any restitution that does not exceed the amount set forth in this plea agreement) to be due and payable in full immediately and subject to immediate enforcement by the United States. So long as the monetary penalties are ordered to be due and payable in full immediately, Mr. Harrah further agrees not to object to the District Court imposing any schedule of payments as merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment.

6. **COOPERATION.** Mr. Harrah will be forthright and truthful with this office and other law enforcement agencies with regard to all inquiries made pursuant to this agreement, and will give signed, sworn statements and grand jury and trial testimony upon request of the United States. In complying with this provision,

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Defendant's
initials

Mr. Harrah may have counsel present except when appearing before a grand jury.

7. **USE IMMUNITY.** Unless this agreement becomes void due to a violation of any of its terms by Mr. Harrah, and except as expressly provided for in paragraph 9 below, nothing contained in any statement or testimony provided by Mr. Harrah, pursuant to this agreement, or any evidence developed therefrom, will be used against him, directly or indirectly, in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines.

8. **LIMITATIONS ON IMMUNITY.** Nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from any information and testimony provided pursuant to this agreement, in determining the applicable guideline range or in prosecuting Mr. Harrah for any violations of federal or state laws. The United States reserves the right to prosecute Mr. Harrah for perjury or false statement if such a situation should occur pursuant to this agreement.

9. **STIPULATION OF FACTS AND WAIVER OF FED. R. EVID. 410.** The United States and Mr. Harrah stipulate and agree that the facts comprising the offense of conviction and relevant conduct include the facts outlined in the "Stipulation of Facts," a copy of which is attached hereto as "Plea Agreement Exhibit B."

Mr. Harrah agrees that if he withdraws from this agreement, or this agreement is voided as a result of a breach of its terms by Mr. Harrah, and he is subsequently tried on any of the charges in the information, the United States may use and introduce the Stipulation of Facts in the United States case-in-chief, in cross-examination of Mr. Harrah or of any of his witnesses, or in rebuttal of any testimony introduced by Mr. Harrah or on his behalf. Mr. Harrah knowingly and voluntarily waives, see United States v. Mezzanatto, 513 U.S. 196 (1995), any right he has pursuant to Fed. R. Evid. 410 that would prohibit such use of the Stipulation of Facts. If the Court does not accept the plea agreement through no fault of the defendant, or the Court declares the agreement void due to a breach of its terms by the United

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Defendant's initials

States, the Stipulation of Facts cannot be used by the United States.

The United States and Mr. Harrah understand and acknowledge that the Court is not bound by the Stipulation of Facts and that if some or all of the Stipulation of Facts is not accepted by the Court, the parties will not have the right to withdraw from the plea agreement.

10. **AGREEMENT ON SENTENCING GUIDELINES.** The United States and Mr. Harrah agree that the following provisions of the United States Sentencing Guidelines apply to the information (plea agreement Exhibit "A").

a. Count One

USSG § 2B1.1

Base offense level 6

b. Count Two

USSG § 2B1.1

Base offense level 6

No adjustments

Adjusted offense level 6

The United States and Mr. Harrah have not reached an agreement on whether specific offense characteristics and other adjustments apply to Count One, and in particular whether USSG § 2B1.1(b)(13) and USSG § 3C1.1 apply. Therefore, the parties do not agree on an adjusted offense level for Count One.

Regardless of the resolution of the disputed Sentencing Guidelines issues, the United States and Mr. Harrah agree that if the following conditions are met Mr. Harrah should be granted acceptance of responsibility under USSG § 3E1.1:

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(a) Mr. Harrah must fully comply with all of the terms of this plea agreement and truthfully admit the offenses of conviction and admit or not falsely deny any additional relevant conduct;

(b) Mr. Harrah must not violate any state or federal law pending final disposition of his case.

The United States and Mr. Harrah acknowledge and understand that the Court and Probation Office are not bound by the parties' calculation of the United States Sentencing Guidelines set forth above and that the parties shall not have the right to withdraw from the plea agreement due to a disagreement with the Court's calculation of the appropriate guideline range.

11. **WAIVER OF APPEAL AND COLLATERAL ATTACK.** The parties retain the right to seek appellate review of the District Court's determination of the Sentencing Guideline range, if an objection is properly preserved. Nonetheless, Mr. Hannah knowingly and voluntarily waives his right to seek appellate review of any sentence of imprisonment or fine imposed by the District Court on any ground, so long as that sentence is below or within the Sentencing Guideline range determined by the District Court prior to any departure or variance. Similarly, the United States waives its right to seek appellate review of any sentence of imprisonment or fine imposed by the District Court on any other ground, so long as that sentence is within or above the Sentencing Guideline range determined by the District Court prior to any departure or variance.

Mr. Hannah also knowingly and voluntarily waives the right to challenge his guilty plea and his conviction resulting from this plea agreement, and any sentence imposed for the conviction, in collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

The waivers noted above shall not apply to a post-conviction collateral attack or direct appeal based on a claim of ineffective assistance of counsel.

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Defendant's initials

12. **WAIVER OF FOIA AND PRIVACY RIGHT.** Mr. Harrah knowingly and voluntarily waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without any limitation any records that may be sought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a, following final disposition.

13. **FINAL DISPOSITION.** The matter of sentencing is within the sole discretion of the Court. The United States has made no representations or promises as to a specific sentence. The United States reserves the right to:

(a) Inform the Probation Office and the Court of all relevant facts and conduct;

(b) Present evidence and argument relevant to the factors enumerated in 18 U.S.C. § 3553(a);

(c) Respond to questions raised by the Court;

(d) Correct inaccuracies or inadequacies in the presentence report;

(e) Respond to statements made to the Court by or on behalf of Mr. Harrah;

(f) Advise the Court concerning the nature and extent of Mr. Harrah's cooperation; and

(g) Address the Court regarding the issue of Mr. Harrah's acceptance of responsibility.

14. **VOIDING OF AGREEMENT.** If either the United States or Mr. Harrah violates the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept this agreement, it shall be void.

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Defendant's initials

15. **ENTIRETY OF AGREEMENT.** This written agreement constitutes the entire agreement between the United States and Mr. Harrah in this matter. There are no agreements, understandings or recommendations as to any other pending or future charges against Mr. Harrah in any Court other than the United States District Court for the Southern District of West Virginia.

Acknowledged and agreed to on behalf of the United States:

R. BOOTH GOODWIN II
United States Attorney

By: Blaire L. Malkin
BLAIRE L. MALKIN
Assistant United States Attorney

BLM/fgc

I hereby acknowledge by my initials at the bottom of each of the foregoing pages and by my signature on the last page of this eight-page agreement that I have read and carefully discussed every part of it with my attorney, that I understand the terms of this agreement, and that I voluntarily agree to those terms and conditions set forth in the agreement. I further acknowledge that my attorney has advised me of my rights, possible defenses, the Sentencing Guideline provisions, and the consequences of entering into this agreement, that no promises or inducements have been made to me other than those in this agreement, and that no one has threatened me or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

Thomas Harrah
THOMAS HARRAH
Defendant

3/21/11
Date Signed

Mary Lou Newberger
MARY LOU NEWBERGER
Counsel for Defendant

21 March 2011
Date Signed

TAH
Defendant's initials

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

UNITED STATES OF AMERICA

v. CRIMINAL NO. _____

30 U.S.C. § 820(f)
18 U.S.C. § 1001

THOMAS HARRAH

I N F O R M A T I O N

The United States Attorney Charges:

COUNT ONE

(False Statement, Representation, and Certification in MSHA Document)

Background

1. At all relevant times, Performance Coal Company, LLC, was engaged in the business of operating an underground mine in Raleigh County, West Virginia, within the Southern District of West Virginia, known as the Upper Big Branch Mine, whose products and operations affected interstate commerce. As such, Performance Coal Company, LLC, was subject to the provisions of the Federal Mine Safety and Health Act of 1977 ("the Mine Act") and to the regulations promulgated thereunder, including the mandatory safety standards in Title 30, Code of Federal Regulations.

2. At all relevant times, Title 30, Code of Federal Regulations, Section 75.360 required that a certified person conduct a pre-shift examination of any underground area where any person was scheduled to work or travel. It also required that the

"PLEA AGREEMENT EXHIBIT A"

certified person certify that the examination was completed. Title 30, Code of Federal Regulations, Section 75.362 required that a certified person conduct an on-shift examination of each section where any person was assigned to work during the shift or where mechanized mining equipment was being installed or removed during a shift. It also required that the certified person certify that the examination had been completed. Further, Title 30, Code of Federal Regulations, Section 75.100 defined a certified person as one who had been certified as a mine foreman, an assistant mine foreman, or a pre-shift examiner.

3. To become certified as an assistant mine foreman, one must take and pass an examination. Defendant THOMAS HARRAH had taken and failed the assistant mine foreman's examination in August, 2007.

4. Prior to January 2008, defendant THOMAS HARRAH began working for Performance Coal Company, LLC.

5. Starting in or around January 2008 and up to and including August 2009, defendant THOMAS HARRAH performed foreman duties, including conducting pre-shift and on-shift examinations, at the Upper Big Branch Mine. During this time period, defendant THOMAS HARRAH did not have a mine foreman or assistant mine foreman's certificate and was therefore not qualified to perform these examinations. Defendant THOMAS HARRAH knew at that time that he did not have a foreman's certificate, and that he was not qualified to perform these examinations.

6. Between January 2008 and August 2009, defendant THOMAS HARRAH signed numerous pre-shift and on-shift reports certifying that he had properly examined the pumps, the number one section, and the number three section.

7. On each pre-shift and on-shift report that he signed, defendant THOMAS HARRAH falsely listed his foreman's certification number as 38690. Defendant THOMAS HARRAH knew that this foreman's number did not belong to him. In fact, the number belonged to another individual.

The Violation

8. On or about December 16, 2008, at or near Montcoal, Raleigh County, West Virginia, within the Southern District of West Virginia, defendant THOMAS HARRAH knowingly made a false statement, representation, and certification in a record, report and other document filed and required to be maintained pursuant to Chapter 22 of Title 30 of the United States Code, that is: defendant THOMAS HARRAH falsely stated, represented, and certified in the pre-shift report for the Upper Big Branch Mine that he was certified to properly examine the number 3 section of the Upper Big Branch Mine by signing his name as a pre-shift examiner and entering a foreman's certificate number when, in fact, and as defendant THOMAS HARRAH knew at that time, he was not certified to make such an examination.

In violation of Title 30, United States Code, Section 820(f).

COUNT TWO

(False Statements to Law Enforcement)

9. The United States realleges and incorporates by reference paragraphs one through seven of Count One of this Information as if fully set forth herein.

9. On or about October 22, 2010, at or near Comfort, Boone County, West Virginia, and within the Southern District of West Virginia, defendant THOMAS HARRAH knowingly and willfully made materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of the Government of the United States, in that (1) defendant THOMAS HARRAH stated and represented to a Federal Bureau of Investigation (FBI) Special Agent and a Mine Safety and Health Administration (MSHA) Special Investigator that an officer of Performance Coal Company provided THOMAS HARRAH with a phone number to call after THOMAS HARRAH had taken and failed the mine foreman's examination and (2)defendant THOMAS HARRAH further stated and represented that when he called this number the person on the phone provided him, THOMAS HARRAH, with a mine foreman's certification number.

10. These statements and representations were false, fictitious, and fraudulent, as defendant THOMAS HARRAH then and there well knew, because defendant THOMAS HARRAH had not been instructed by the Performance Coal Company officer to call any telephone number after he failed the examination, and in fact defendant THOMAS HARRAH invented the foreman's certification number

he used to sign the pre-shift and on-shift examination books at the Upper Big Branch mine.

In violation of Title 18, United States Code, Section 1001.

UNITED STATES OF AMERICA

R. BOOTH GOODWIN II
United States Attorney

By: _____
BLAIRE L. MALKIN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY

UNITED STATES OF AMERICA

v. CRIMINAL NO.

THOMAS HARRAH

STIPULATION OF FACTS

The United States and Thomas Harrah stipulate and agree that the facts comprising the offenses of conviction (the two-count information in the Southern District of West Virginia) and some of the relevant conduct for that offense include the following:

COUNT ONE:

From December 2007 until August 2009, Thomas Harrah (Harrah) was employed by Performance Coal Company at the Upper Big Branch Mine. Throughout that time period, Performance Coal Company ("Performance") operated an underground mine, known as the Upper Big Branch Mine (the "mine"), located in Montcoal, Raleigh County, West Virginia, in the Southern District of West Virginia. The mine's products and operations affected interstate commerce. Therefore, Performance was subject to the provisions of the Federal Mine Safety and Health Act of 1977 ("the Mine Act") and to the regulations promulgated thereunder, including the mandatory safety standards in Title 30, Code of Federal Regulations.

Those safety standards included the requirement that a certified person, that is a mine foreman or assistant mine foreman, conduct pre-shift and on-shift examinations. A pre-shift examination had to be conducted of any underground area where any person was scheduled to work or travel. A certified person had to certify that such an exam was completed. An on-shift examination was required to be completed on any section where a person is assigned to work during a shift. A certified person had to certify that the on-shift examination was completed.

From January 2008 to August 2009, Harrah signed forms that certified that pre-shift and on-shift exams were completed on the number one section, the number three section, and the pumps at the mine. On each of these certifications, Harrah falsely listed his foreman's certification number as 38690. Throughout the time that Harrah used this foreman's number, he knew it was not his number

and he knew he was not qualified to perform the examinations or to certify that they had been performed. Harrah knew he was not qualified as a foreman or an assistant foreman, because he had failed the assistant foreman's examination in August 2007. Despite having failed the exam, Harrah made up a foreman's number, and used this number to certify examination books. He used this number on over 200 occasions, including on December 16, 2008, where he certified that he had conducted a pre-shift examination on the number three section of the mine.

In August 2009, Harrah was transferred from Performance to the Marfork Coal Company ("Marfork"). Marfork was engaged in the business of operating the Slip Ridge Cedar Grove Mine ("Slip Ridge"), whose products and operations affected interstate commerce. Therefore, Marfork was subject to the Mine Act and to the regulations promulgated thereunder. Slip Ridge is located in Raleigh County, West Virginia, within the Southern District of West Virginia. While employed at Slip Ridge, Harrah used a foreman's number that did not belong to him, to certify that pre-shift and on-shift examinations had been properly completed. While employed at Slip Ridge, Harrah used a different foreman's number from that which he had used at Upper Big Branch. He used this second false number approximately three times during one shift. He knew when he used that number that he was not certified as a foreman or assistant foreman, and he knew that the number he was using was not assigned to him.

COUNT TWO:

On October 22, 2010, Harrah was interviewed by a Federal Bureau of Investigation (FBI) special agent and by a special investigator with the Mine Safety and Health Administration (MSHA), at his residence in Comfort, Boone County, West Virginia. At that time he was questioned about his use of a mine foreman's number that did not belong to him. In this interview Harrah stated that he had taken and failed the mine foreman's examination. When he returned to work at Performance Coal, he informed an officer of Performance Coal that he had failed the examination. Harrah then stated that the officer provided him a phone number to call. Harrah further stated that when he called this number the person on the phone provided him with a mine foreman's certification number. He stated that he was also faxed a copy of a mine foreman's card, but that he lost this card.

On October 28, 2010, Harrah was reinterviewed by the FBI and MSHA. On that date, he had admitted that he had been dishonest with the FBI and MSHA agent at the first interview. When he failed the examination, the Performance Coal officer did not give him a

number to call, but instead discussed with him the possibility of retaking the examination. Harrah did not retake the examination. Instead, a couple weeks after learning he had failed the examination, he reviewed the examination book, and saw the foreman's numbers for those who had recently passed the examination. He changed a couple of digits on one of those numbers and a couple of months later he began using that number to sign pre-shift and on-shift examination books at the Upper Big Branch mine.

When he was interviewed by the FBI special agent and MSHA special investigator on October 22, 2010, he knew that the information he provided them about how he had received the false foreman's number was untrue.

This Stipulation of Facts does not contain each and every fact to the United States concerning the scope and effect of his relevant conduct, and is set forth for the limited purpose of establishing a factual basis for the defendant's guilty plea.

Stipulated and agreed to:

Thomas Harrah	3/21/11
THOMAS HARRAH Defendant	Date
Mary Lou Newberger	21 March 2011
MARY LOU NEWBERGER Counsel for Defendant	Date
Blaire L. Malkin	3/22/2011
BLAIRE L. MALKIN Assistant United States Attorney	Date