

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 28, 2023

Warrior Met Coal Mining LLC,

Contestant

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

Respondent;

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

Petitioner

v.

Warrior Met Coal Mining LLC,

Respondent.

CIVIL CONTEST PROCEEDINGS

Docket No. SE 2023-0030

Docket No. SE 2023-0031

Docket No. SE 2023-0032

Mine: No. 4 Mine

Mine ID No. 01-01247

Docket No. SE 2023-0028

Docket No. SE 2023-0029

Mine: No. 7 Mine

Mine ID No. 01-01401

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2023-0041

A.C. No. 000566006

Docket No. SE 2023-0051

A.C. No. 000567006

Docket No. SE 2023-0056

A.C. No. 000567766

Docket No. SE 2023-0067

A.C. No. 000568866

Docket No. SE 2023-0101

A.C. No. 000570906

Mine: No. 4 Mine

Mine ID No. 01-01247

Docket No. SE 2023-0042

A.C. No. 000566007

Docket No. SE 2023-0053

A.C. No. 000567007

Docket No. SE 2023-0057

A.C. No. 000567767

Docket No. SE 2023-0068

A.C. No. 000568867

Docket No. SE 2023-0089
A.C. No. 000570247
Docket No. SE 2023-0098
A.C. No. 000561080
Docket No. SE 2023-0099
A.C. No. 000570907
Docket No. SE 2023-0118
A.C. No. 000571802

Mine: No. 7 Mine
Mine ID No. 01-01401

**ORDER GRANTING THE ACTING SECRETARY'S
AMENDED MOTION TO DISMISS AND DENYING WARRIOR MET'S MOTION TO
CONSOLIDATE THESE CASES WITH NEWLY FILED INTERFERENCE CASE**

Before: Judge Thomas P. McCarthy

These consolidated contest and civil penalty proceedings are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1994). In this matter, the Acting Secretary has issued five 104(a) citations and thirteen penalty assessments to Warrior Met Coal Mining LLC (“Respondent”), each alleging a violation under section 103(f) of the Mine Act. The five citations are currently docketed as “Contest Proceedings,”¹ while the thirteen penalty assessments are docketed as “Civil Penalty Proceedings.”² The collective citations issued by the Acting Secretary allege that Respondent violated the Mine Act on multiple occasions by denying “miners’ representatives” access to the No. 4 and No. 7 Mines. Respondent denies these allegations and asserts that the individuals claiming to be miners’ representatives were not properly designated by an individual or individuals actively working in a coal or other mine. *See* 30 U.S.C. § 802(g); *see also* *Cyprus Empire Corp.*, 15 FMSHRC 10 (Jan. 25, 1993).

I. Procedural History

On November 8, 2022, Respondent timely filed two documents titled “Notice of Contest and Unopposed Request for Expedited Hearing.” The first of these filings concerned Docket Nos. SE 2023-0028 and -0029, which both involve alleged violations at the No. 7 Mine. The second filing concerned Docket Nos. SE 2023-0030, -0031, and -0032, which each relate to alleged violations relating to the No. 4 Mine. On December 2, 2022, the Secretary of Labor filed Answers

¹ The “Contest Proceedings” are before this tribunal as Docket Nos. SE 2023-0028, -0029, -0030, -0031, and -0032.

² The “Civil Penalty Proceedings” are before this tribunal as Docket Nos. SE 2023-0041, -0042, -0051, -0053, -0056, -0057, -0067, -0068, -0089, -0098, -0099, -0101, and -0118.

to each Notice of Contest.³ The matter was set for hearing on April 24, 2023 in Birmingham, Alabama.

Following these initial submissions, the parties engaged in a protracted parley involving complex discovery that was at times directly overseen by this tribunal. Both parties engaged in written discovery and Respondent conducted depositions of an MSHA District Manager, Assistant District Manager, and Coal Field Office Supervisor. On January 11, 2023, the Acting Secretary submitted a Motion in Limine to Exclude Irrelevant Evidence and Testimony. On January 27, 2023, Respondent filed a Motion for Temporary Relief requesting that the undersigned

consolidate all Petitions for Civil Assessment of Civil Penalties against [Respondent] [Dockets Nos. SE 2023-0041, SE 2023-0042, SE 2023-0051, SE 2023-0053, SE 2023-0056, and SE 2023-0057] and prohibit any future Petitions for Civil Assessment of Civil Penalties against [Respondent] related to the Enforcement Actions or any similar circumstances pending the resolution of this matter.

Resp't App. for Temp. Relief at 3. Respondent then filed a Motion to Compel on January 31, 2023, seeking to require the Acting Secretary to "fully respond to [Respondent's] Interrogatories and Requests for Production of Documents, and to provide further testimony." Resp't Mot. to Compel at 1.

On February 2, 2023, my office received 1) Respondent's Opposition to the Secretary's Motion in Limine, 2) Respondent's Motion to Postpone and Reschedule Hearing and Related Prehearing Deadlines, and 3) the Secretary's Opposition to Respondent's Application for Temporary Relief. On February 7, 2023, the undersigned held a conference call with the parties to discuss outstanding motions, including Respondent's Motion to Compel and the Acting Secretary's Motion in Limine. During the conference call, the parties were encouraged to narrow and work toward resolution of outstanding discovery issues. In addition, the Secretary was ordered to provide a privilege log consistent with Fed. R. Civ. Proc. 26(b)(5)(A)(ii). Further, the

³ The Secretary and, after March 11, 2023, the Acting Secretary, submitted Civil Penalty Petitions on the following dates:

- January 6, 2023, for SE 2023-0041 and -0042;
- January 17, 2023, for SE 2023-0056 and -0057;
- January 19, 2023, for SE 2023-0051 and -0053;
- February 21, 2023, for SE 2023-0067 and -0068;
- March 2, 2023, for SE 2023-0089;
- March 21, 2023, for SE 2023-0098, -0099, and -0101; and
- April 3, 2023, for SE 2023-0118.

Respondent submitted Answers to eight of the thirteen Civil Penalty Petitions, which were received on:

- February 6, 2023, for SE 2023-0041 and -0042;
- February 15, 2023, for SE 2023-0051, -0053, -0056, and -0057; and
- March 23, 2023, for SE 2023-0067 and -0068.

undersigned agreed to review disputed documents *in camera* if the parties were unable to resolve redaction or privilege issues through a privilege log or protective order.

On February 13, 2023, the undersigned issued an Order Denying Respondent's Application for Temporary Relief. On February 15, 2023, the Secretary submitted a Response to Respondent's Motion to Compel. On February 21, 2023, following receipt of the Secretary's Response, the undersigned held a follow-up conference call to further discuss all discovery issues outstanding, including the discoverability of certain topics, the production of documents by MSHA to Respondent, the submission of other documents for *in camera* review, and further depositions of MSHA and United Mine Workers of America ("UMWA") representatives.⁴ At the conclusion of this conference call, Respondent was given until March 3, 2023, to file a Reply to the then Acting Secretary's Opposition, and the Acting Secretary was given until March 10, 2023, to file a Sur-Reply. Respondent timely filed a Reply on March 10, 2023, and the Acting Secretary submitted a Sur-Reply on March 10, 2023.

On March 24, 2023, my office received a notice of appearance from legal counsel for the UMWA and a Motion to Revoke Third Party Subpoena *Duces Tecum*.

On March 26, 2023, the Acting Secretary filed a Motion to Dismiss all of the five Contest Proceedings and five of the thirteen Civil Penalty Proceedings in the exercise of her prosecutorial discretion. *See RBK Construction, Inc.*, 15 FMSHRC 2099, (October 1993). My office received a first amended version of this Motion to Dismiss on April 2, 2023, which was updated to include all thirteen of the pertinent Civil Penalty Dockets. On April 10, 2023, my office received a second amended version of the Acting Secretary's Motion to Dismiss ("Amended Motion to Dismiss").⁵

Also on April 10, 2023, the Acting Secretary filed a section 105(c)(1) interference complaint with two counts. Count One alleged that Respondent interfered with the exercise of statutory rights by miners and miners' representatives at the No. 4 and No. 7 mines by refusing to allow properly designated miners' representatives to accompany MSHA on inspections, thereby discouraging miners and their representatives from exercising their rights under section 103(f) and chilling their participation in MSHA inspections. Count Two alleged that Respondent interfered with the exercise of statutory rights by miners and miners' representatives at the No. 4 and No. 7 mines by filing a motion to hold the UMWA and individual picketers in contempt of Alabama Circuit Court for alleged violations of the Court's latest injunction, including their attempts to exercise section 103(f) rights, thereby chilling miners and miners' representatives exercise of those rights.

⁴ With regard to Respondent's discovery requests seeking the identity of striking miners who designated UMWA representatives, the undersigned found that MSHA was not obligated to disclose the names of the designating miners. *Wolf Run Mining*, 446 F. Supp. 651, 655-56 (N.N. W. Va. 2006). Accordingly, with regard to that issue, the undersigned granted the Secretary's Motion in Limine and denied Warrior Met's Motion to Compel. Given the parties' representation that they were working towards a settlement of the above matters, the undersigned found it unnecessary to definitively rule on other outstanding discovery or evidentiary issues at that time.

⁵ Specifically, the Acting Secretary moves to vacate all contest and civil penalty proceedings in the above-captioned matter.

Also on April 10, 2023, Respondent filed a Motion to Consolidate the above-captioned collective Contest and Civil Penalty Proceedings with the Interference Complaint, docketed as SE 2023-0146 and -0147. On April 12, 2023, the Chief Judge assigned the interference proceeding to my office.

On April 14, 2023, the Acting Secretary filed an Amended Interference Complaint in Docket Nos. SE 2023-0146 and -0147, alleging that Respondent chilled miners' and miners' representatives' exercise of section 103(f) rights when it filed a Motion for Contempt in Alabama Circuit Court in response to alleged continued violations of the Circuit Court's injunction. In this Amended Complaint, the Acting Secretary alleges that Respondent refused to allow designated miners' representatives to accompany MSHA on inspections on November 4, 2022; November 8–9, 2022; November 14–17, 2022; November 22–23, 2022; November 29, 2022; December 1–2, 2022; December 5–6, 2022; December 8, 2022; December 15, 2022; January 11–13, 2023; January 20, 2023; January 26–27, 2023; January 30, 2023; February 22–23, 2023; March 10, 2023; and March 13, 2023. *See* Sec'y Am. Compl., ¶¶ 9–44. The Acting Secretary dropped Count One of the original interference complaint and alleged that in January 2023, the UMWA, Floyd Conley, Eddie Pinegar, and Keri Bester filed section 105(c) complaints with MSHA alleging interference with protected rights. The sole remaining count remained the same as Count TWO of the original complaint alleging section 105(c)(1) interference by pursuit of state court contempt charges for the exercise of statutory rights under the Mine Act, including section 103(f) walkaround rights.

On April 18, 2023, the undersigned held a conference call with the parties to ascertain their respective positions on the pending motions. During that call, the undersigned learned that on about February 16, 2023, the UMWA made an unconditional offer to return to work effective on or about March 2, 2023. In addition, the undersigned represented that I was inclined to grant the Acting Secretary's Motion to Dismiss, and deny Warrior Met's Motion to Consolidate, but reserved decision until both parties had an opportunity to file a written response to each other's respective motions. On April 20, 2023, the Acting Secretary filed an Opposition to Respondent's Motion to Consolidate, and Respondent filed a Response to the Acting Secretary's Amended Motion to Dismiss. For the reasons set forth below, I deny Respondent's Motion to Consolidate, and grant the Acting Secretary's Amended Motion to Dismiss all of the above-captioned dockets.

II. Analysis

Although the procedural history in this case is lengthy, the undersigned must resolve only a relatively straightforward inquiry – whether to consolidate interference Dockets SE 2023-0146 and -0147 with the eighteen total dockets that the Acting Secretary has moved to dismiss. Commission Rule 12 states that “The Commission and its Judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues.” 29 C.F.R. § 2700.12. The Commission has held that “[a] determination to consolidate lies in the sound discretion of the trial judge.” *Pennsylvania Electric Company*, 12 FMSHRC 1562, 1565 (Aug. 1990).

The Acting Secretary has exercised her unreviewable discretion to vacate the eighteen above-captioned citations. *See RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Acting

Secretary contends that there is nothing for the undersigned to do procedurally except dismiss these cases.

Although Respondent does not oppose the dismissal, it argues that dismissal should only come after consolidating the above-captioned proceedings with the newly filed interference proceeding. In its Response to the [Acting] Secretary's Amended Motion to Dismiss, Respondent argues that its proposed consolidation-then-dismissal framework would allow the parties to avoid a recapitulation of the complex discovery that took place in these cases, and will therefore "greatly promote judicial economy and avoid duplicative discovery disputes." Resp't Resp. to Sec'y Am. Mot. to Dismiss at 1-2. Respondent also contends that "whether striking employees constitute miners under the Mine Act such that they can validly designate miners' representatives is a central issue in the Interference Proceeding just as it was in these Contest Proceedings. *Id.* at 3 (internal quotations omitted). Respondent further contends that, because similar legal and procedural issues may arise again during the course of these newly filed interference proceedings, the

Parties (and the Court) may be forced to largely duplicate their significant efforts in discovery because the Acting Secretary seeks a complete, unconditional dismissal of the Contest Proceedings. [Respondent] will be compelled to issue an entirely new set of written discovery requests, re-notice all depositions, re-issue third-party subpoenas, and endure the inevitable objections, motions in limine, and dilatory tactics of the Acting Secretary. ("...")

Because [Respondent] and the Acting Secretary (with significant assistance from the Court) have already engaged in extensive discovery on topics that are certain to arise again, [Respondent] respectfully requests the Court consolidate these cases prior to dismissing the Contest-Proceeding dockets. This will prevent the Parties from duplicating efforts in discovery, which could again require the Court's intervention to resolve discovery issues already addressed in the Contest Proceedings. Accordingly, the interests of judicial economy favor consolidation prior to dismissal.

Resp't Resp. to Sec'y Am. Mot. to Dismiss at 4.

The Acting Secretary opposes Respondent's arguments concerning consolidation, instead arguing that

The question in the interference case is not whether striking miners are "miners." It is whether, from the perspective of a reasonable miner, [Respondent's] actions tended to interfere with miners' or miners' representatives' exercise of protected rights, and whether those actions were justified by a legitimate and substantial business interest. See 30 U.S.C. 815(c)(1); *Marshall Cnty. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 923 F.3d 192, 201-204 (D.C. Cir. 2019). That analysis focuses on any reasonable miner or miners' representative, not on any particular one. *Wilson v. Fed. Mine Safety & Health Rev. Comm'n*, 863 F.3d 876, 882 (D.C. Cir. 2017).

Sec'y Opp'n to Resp't Mot. to Consolidate at 2.

I agree with the Acting Secretary's reasoning essentially for the reasons set forth in her Opposition. It appears that the relevant question in the interference complaint is not limited *only* to whether striking miners are "miners" as defined in the Mine Act, but also, as the Acting Secretary puts it, "how a reasonable miner or miners' representative—regardless of whether any particular person was on strike—would be affected by Respondent's actions." Sec'y Opp'n to Resp't Mot. to Consolidate at 2. I also agree with the Acting Secretary's assessment that the discrete issues in the contest and penalty cases and in the recently filed interference case are different. Certainly, there will be some overlap between the facts at issue in these cases and the interference case, as they collectively relate to Respondent's alleged conduct towards striking workers during the strike at the No. 4 and No. 7 mines. However, there is now an unconditional offer to return to work and the Acting Secretary asserts that she will rely on new witnesses and different evidence in the interference matter; introduce new evidence that will purportedly show that Respondent "filed a motion in state court seeking to hold persons in contempt of court for exercising their statutory [walkaround] right to accompany MSHA;" and submit state court filings that are "unique to the interference issue and were not offered in the contest and penalty proceedings." Sec'y Opp'n to Resp't Mot. to Consolidate at 2-3.

Finally, I agree with the Acting Secretary's position that discovery in the interference case will not necessarily be duplicative of that conducted in these contest and civil penalty cases. Generally, section 105(c) complaints occur when an operator has allegedly denied or interfered with statutory rights such as walkaround rights or used other legal proceedings to interfere with statutory rights. *See Marshall Cnty. Coal Co.*, 923 F.3d at 201-204. Although Respondent claims that the "Parties (and this tribunal) may be forced to largely duplicate their significant efforts in discovery because the Acting Secretary seeks a complete, unconditional dismissal of the Contest Proceedings," the discovery in the contest and penalty cases concerned citations for alleged violations of section 103(f), whereas the interference case will concern Respondent's alleged violations of section 105(c). *See* 30 U.S.C. § 815(c)(2). What is necessary to prove a violation of 105(c) is different from what is relevant to prove a violation of section 103(f), particularly since the Secretary dropped Count One of the original interference complaint.

In short, the undersigned finds insufficient evidence currently before me to conclude that the matters at issue in the interference cases are sufficiently similar to those at issue in the contest and civil penalty cases as to warrant consolidation. *See* 29 C.F.R. § 2700.12; *see also Pennsylvania Electric Company*, 12 FMSHRC at 1565. More importantly, the Acting Secretary has exercised her unreviewable discretion to dismiss the contest and civil penalty proceedings. *See RBK Constr., Inc.*, 15 FMSHRC 2099. Respondent does not oppose that dismissal, it merely seeks to delay it. I see no good reason to watch these cases languish on the Commission's docket when the Acting Secretary's unreviewable discretion to dismiss these proceedings essentially makes resolution of these matters moot. Respondent may use any discovery already obtained in these matters as evidence, if relevant, in the interference proceeding, and may pursue additional discovery in that proceeding.

Accordingly, I deny Respondent's motion to consolidate, and grant the Acting Secretary's Amended Motion to Dismiss.

ORDERS

For the reasons discussed above, the Acting Secretary's Amended Motion to Dismiss is **GRANTED**.

Further, Warrior Met's Motion to Consolidate is **DENIED**.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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