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SEWELL COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SEWELL COAL COMPANY, APPLICANT	Application for Review
	Docket No. HOPE 79-274
v.	
	Order No. 0637263
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	February 21, 1979 Sewell No. 4 Mine

DECISION

Appearances: Gary W. Callaghan, Esq., Lebanon, Virginia, for Applicant;
David L. Baskin, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Applicant seeks review of an order of withdrawal issued on February 21, 1979, under section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(b), because of the refusal of Applicant to permit Respondent to inspect and copy certain records. Both parties requested an expedited proceeding. Pursuant to notice, a prehearing conference was held in Washington, D.C., on March 29, 1979. At the conference, the parties stipulated to the facts and issues before me, and a briefing schedule was agreed upon. Briefs were filed by both parties on April 16, 1979, and a reply brief was filed by Respondent on April 26, 1979. Applicant did not file a reply brief.

Based on the stipulations of the parties, I adopt the following as my:

FINDINGS OF FACT

1. Applicant, Sewell Coal Company, was, during the month of February 1979, and prior thereto, the operator of a coal mine in Nicholas County, West Virginia, known as the Sewell No. 4 Mine, I.D. No. 46-01477.

2. Sewell Coal Company is subject to the provisions of the Federal Mine Safety and Health Act of 1977 with respect to the operation of the subject mine.

3. I have jurisdiction of the parties and subject matter of this proceeding.

4. The mandatory safety standards involved in this proceeding are contained in Part 50 of 30 CFR, particularly, 30 CFR 50.41.

5. On February 13 and 14, 1979, Federal mine inspector Ronnie Bowman, a duly authorized representative of the Secretary of Labor, began an inspection of foremen's records, accident, injury and illness records, and medical and compensation records at the subject mine. These records were contained in individual personnel files which also contained other data. The inspection was conducted in order to ascertain Applicant's compliance during 1975, 1976, and 1977, with the accident, illness, and injury reporting requirements in effect during those years, and to verify MSHA's existing data base respecting mine accidents, injuries, and illnesses.

6. On February 16, 1979, Inspector Bowman returned to the mine and continued to review the medical and compensation records along with the safety director of the mine. When the inspector discovered what he considered to be two instances of failure to report injuries in 1977, he mentioned this fact to the safety director. The safety director then telephoned a company official, and after a discussion with him, told the inspector that he would not be permitted to continue to inspect the files.

7. On February 21, 1979, the inspector returned to the mine office and was again denied access to the personnel files. The inspector issued a 104(a) citation under 30 CFR 50.41 and when the citation was not abated, issued a 104(b) closure order.

ISSUES

1. Whether MHSA may, under 30 CFR Part 50, without obtaining a valid search warrant, inspect Applicant's personnel files? These files contain medical and other information related to accidents, injuries, and illnesses reportable under Part 50 or to compliance with Part 50. They also contain medical and other information unrelated to accidents, injuries, and illnesses reportable under Part 50, or to compliance with Part 50.

2. Whether MSHA may, under 30 CFR Part 50, copy from these files, information relevant and necessary to the issue of whether Applicant has complied with the injury and illness reporting requirements of Part 50?

3. Whether the inspection of the personnel files described above violates any provision of the Privacy Act?

STATUTORY PROVISIONS

Section 103(a) of the Act provides:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. * * * For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilites under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

Section 103(h) provides:

> In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary or the Secretary of Health, Education, and Welfare is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

Section 110(d) provides:

> Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a) or section 105(c), shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

REGULATION

30 CFR 50.41 provides:

> Upon request by MESA, an operator shall allow MESA to inspect and copy information related to an accident, injury or illnesses which MESA considers relevant and necessary to verify a report of investigation required by 50.11 of this Part or relevant and necessary to a determination of compliance with the reporting requirements of this Part.

DISCUSSION AND CONCLUSIONS OF LAW

NONCONSENSUAL WARRANTLESS INSPECTION

Section 103(a) of the Act directs authorized representatives of the Secretary to "make frequent inspections and investigations in coal or other mines." It further provides:

> For the purpose of making any inspection or investigation under this Act, the Secretary * * * or any authorized representative of the Secretary * * * shall have a right of entry to, upon, or through any coal or other mine.

It is clear from the legislative history that Congress intended this language to give a right of entry without the necessity for obtaining a search warrant:

> Section 104(a) authorizes the Secretary * * * to enter upon or through any mine for the purpose of making any inspection or investigation under this Act. This is intended to be an absolute right of entry without need to obtain a warrant * * *. Safety conditions in the mining

~868

> industry have been pervasively regulated by Federal and State law. The Committee intends to grant a broad right-of-entry to the Secretaries * * * to make inspections and investigations of all mines under this Act without first obtaining a warrant * * *. The Committee notes that despite the progress made in improving the working conditions of the nation's miners, * * * mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.FOOTNOTE 1)

See also in this connection Marshall v. Donofrio, 465 F. Supp 838 (E.D. Penn. 1978), in which the court held that warrantless inspections of coal mines are not prohibited under the rule of Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

There is little doubt that nonconsensual inspections of mines without search warrants are authorized by the Act, and Respondent concedes as much.

DOES THE RIGHT TO INSPECT WITHOUT WARRANT INCLUDE THE OFFICES OF THE MINE OPERATOR?

The statutory authorization for inspection and investigation refers to "mines." A "coal or other mine" is defined in section 3(h)(1) of the Act as

> (A) an area of land from which minerals are extracted * * *, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property * * *, used in, or to be used in, or resulting from, the work of extracting such minerals * * *.

In a broad sense, mine offices which contain employee health records, would seem to be included in "structures * * *, or other property * * * used in * * * the work of extracting minerals." This construction conforms to that which the Court of Appeals for the Sixth Circuit made concerning similar language in the 1969 Coal Mine Safety Act:

> Even in the absence of warrants, the investigators had a right to enter the six company facilities which were

> searched. Section 813(b)(1) provides a "right of entry to, upon, or through any coal mine' for the purpose of making any inspection or investigation mandated by the Act. The term "coal mine' is broadly defined in Section 802(h) to include "all structures * * * placed upon * * * or above the surface [of land] used in, or to be used in, or resulting from the work of extracting * * * coal.' All six offices, including the company's general office, were situated in close proximity to working mines and were instrumental in the administration of ongoing mine operations. They were, therefore, part of coal mine premises within the meaning of the Act and subject to entry by representatives of the Secretary at reasonable times. United States v. Consolidation Coal Co., 560 F.2d 214, 219 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, 98 S. Ct. 2481 (1978), reinstated, 579 F.2d 1011 (1978).

The above-quoted language is dicta, since a warrant was issued in the Consolidation case. However, in this construction, the court relies on the "premise that the nature of the Act entitles it to expansive interpretation." Such an interpretation persuades me that an inspector may, without a warrant, enter mine offices where records are kept.

DOES THE RIGHT TO INSPECT WITHOUT WARRANT INCLUDE THE RIGHT TO SEARCH THE RECORDS KEPT BY THE MINE OPERATOR?

In addition to the authorization for inspections and investigations given by section 103(a) of the Act, section 103(h) requires a mine operator to

> [E]stablish and maintain such records, make such reports, and provide such information as the Secretary * * * may reasonably require * * *. The Secretary * * * is authorized to compile, analyze, and publish * * * such reports or information * * *.

Applicant states that it will produce all records required to be kept by statute upon request of the inspector and admits that production of such records is required without the need for a warrant. The difficult question presented, however, is whether the Secretary may, without a warrant, examine additional records and documents which are not required to be kept by statute and which may contain information other than that related and necessary to comply with Part 50 of the regulations. Two Federal courts in dicta have answered this question in the negative under the 1969 Act. In the case of The Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973), a three-judge court, in upholding the constitutionality of warrantless searches of coal mines, stated:

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The governmental interest in promoting safety, it might be concluded, far outweighs any interest the mine operators may have in privacy.

* * * * * * *

The mine operator, though, does have a general expectation of privacy in his offices on the mining property. There is, however, no expectation of privacy in the maps, books, and records which are maintained for and in compliance with the Mine Safety Act. These must, of course, be produced upon demand to the federal inspector when he makes his unannounced entry. But the Act does not authorize these inspectors to rummage in any wholesale way or to initiate a general search of the mine operator's offices for such records.

Id. at 51 note 5.

In the Consolidation Coal Co. case, supra, the court stated at page 217: The Government advances three alternative rationales for reversing the district court's orders: 1) the searches were constitutionally permissible without warrants under Section 813(a)(4) which authorizes frequent inspections and investigations in coal mines * * * for the purpose of * * * determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under [the Act].

* * * * * * *

We reject out of hand the Government's first contention. The Youghiogheny decision stands for the proposition that only inspections of the underground portions or "active workings' of coal mines may be performed without search warrants under Section 813(a) and (b). It expressly excludes from the purview of its holding warrantless searches of offices on the mining property * * *. In addition nothing in the Act authorizes the wholesale seizure of records which took place here. Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant.

"It is, however, implicit * * * that the right to inspect does not carry with it the right, without warrant in the absence of arrest, to reach that which is to be

inspected by a resort to self-help in the face of the owner's protest.' Hughes v. Johnson, 305 F.2d 67, 69 (9th Cir. 1962).

In In re Surface Mining Regulation Litigation, 456 F. Supp 1301, (D.D.C. 1978), the court examined a regulation promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977, which authorized warrantless searches of surface coal mining operations including the premises in which records required to be maintained were located. The Secretary of the Interior limited the scope of the regulation by a directive to inspectors to obtain warrants before entering any building on the premises. As thus limited, the regulation was upheld because coal mining is a prevasively regulated industry.

In the case of C.A.B. v. United Airlines, 399 F. Supp 1324 (N.D. Ill. 1975), aff'd 524 F.2d 394 (7th Cir. 1976), the courts considered a grant of authority to the Civil Aeronautics Board under the Federal Aviation Act to have access to "all documents, papers and correspondence, now or hereafter existing, and kept or required to be kept." Following the rule of construction that "a court should not construe a statute in such a manner as to raise a serious constitutional issue," the courts interpreted the statute so as to authorize access only to documents required to be kept or documents related to the required records.

These cases show a strong judicial reluctance to read into a statute an authorization for a warrantless search of records not specifically required to be kept by law. A serious constitutional question would be raised by a statute purporting to authorize inspection of all documents in a company's possession without a warrant. See e.g., United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); Colonnade Catering Corp v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); Camara v. Municipal, Court 387 U.S. 523, 87 S.Ct. 1727 18 L.Ed.2d 930 (1967); See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.E.2d 943 (1967); see also FTC v. American Tobacco Co., 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696 (1924); U.S. v. Morton Salt Co, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

Although I am not empowered to pass on the constitutionality of the Act or a provision of the Act which created the Commission, Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v Robinson, 415 U.S. 361 (1974), I am obliged to construe the Act. A cardinal rule of construction requires me to construe it, if possible, so as to avoid conflict with the Constitution. NLRB v. Mansion Home Center Management Corp., 473 F. 2d 471 (8th Cir. 1973). U.S. v. Biswell, supra., Colonnade Catering Corp. v. U.S., supra. With this rule in mind, I turn again to the language of the statute and to the legislative history.

Inspections and investigations are authorized "for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, * * * diseases and physical impairments originating in the [the] mines, (2) gathering information with respect to mandatory health or safety standards * * *." This language does not specifically authorize searching records in a mine office, but neither does it exclude it. The Senate Committee Report relates the absence of a warrant requirement to "the notorious ease with which many safety or health hazards may be concealed if advance warning of an inspection is obtained." This reasoning obviously applies much more directly to the areas where mining is being performed than to the records in the office.

Mining is a pervasively regulated industry because of health and safety hazards in the work place which distinguish it from most other industries. For these reasons, it is treated differently from most other industries in being subjected to warrantless inspections. But I cannot perceive any substantial differences in the records and files maintained in the mining industry and those maintained in any other industry that would justify treating the former differently under the fourth amendment. Nor does the requirement of a warrant or other legal process before inspecting personnel files maintained by Respondent appear to be so burdensome that it would affect the health and safety of the workers. The relationship of the activity of keeping records to employment safety and health is indirect at most. It is possible, of course, for a mine operator to conceal or destroy or falsify records, if he is aware of an impending inspection. The danger of such an occurrence, however, is not comparable to the danger referred to in the Senate Committee Report that safety or health hazards may be concealed if advance warning of an inspection is obtained. Nor is the danger of tampering with records unique to mining or any other pervasively regulated industry. I conclude that there is not the same urgency for warrantless inspections of mine office records as for other mine work areas. Therefore, following the rule of construction referred to earlier, and guided by the language in the Youghiogheny and Consolidation cases, I conclude that the Mine Safety and Health Act does not authorize wholesale warrantless, nonconsensual searches of files and records in a mine office.

MAY THE SECRETARY BY RULE AUTHORIZE WARRANTLESS, NONCONSENSUAL SEARCHES OF MINE RECORDS?

Section 101 of the Act (in language adapted from section 101 of the Coal Mine Safety Act of 1969) empowers the Secretary to develop and promulgate by rule improved mandatory health or safety standards for the protection of life and prevention of injuries. Pursuant to this authority, Part 50 of Title 30 was published for public comment on October 17, 1977, and became effective January 1, 1978. The question of warrantless inspections of records is not addressed in the preamble to the proposed rules or in the preamble to the final

rules. The latter document discusses objections to Proposed Rule 50.41 on the ground that it invades employees' rights to privacy. It also states that "without inspection of records beyond those required to be kept it is impossible to verify the required records." It is clear, however, that since a statute may not constitutionally authorize warrantless searches of company files and records, a fortiori, a regulation promulgated by the Secretary may not do so.

Part 50 does not explicitly authorize warrantless inspection. To so construe it would raise a serious constitutional question under the fourth amendment. I interpret the regulations so as to avoid this constitutional conflict.

Therefore, I conclude that 30 CFR 50.41 does not authorize the Secretary to inspect without a warrant Applicant's personnel files containing medical and other information, some related and some unrelated to accidents, injuries, and illnesses reportable under Part 50, or to compliance with Part 50. It follows that the regulation does not empower the Secretary to copy from these records without a warrant, information relevant and necessary to the issue of whether Applicant has complied with the injury and illness reporting requirements of Part 50.

PRIVACY ACT

In view of my conclusions stated in the section immediately above, I need not consider the issue raised by Applicant at the prehearing conference that nonconsensual access to its records by the Government would violate the Privacy Act, 5 U.S.C. 552a. And I note that Applicant did not argue this issue in its brief. Since the Privacy Act refers to maintenance and disclosure of records by Federal Government agencies, it does not appear to be at all relevant to the issues before me.

ORDER

Based on the above findings of fact and conclusions of law, I conclude that Order No. 0637263 and Citation No. 0637262 were invalidly issued and they are hereby VACATED.

James A. Broderick
Chief Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1 Senate Committee Report No. 95-181, 95th Cong., 1st Sess., 27 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, p. 615.