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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WILK 79-13-PM A.O. No. 30-00090-05001
v.	
CUT SLATE, INC., RESPONDENT	Potter Quarry and Mill

DECISION AND ORDER ON MOTION TO APPROVE SETTLEMENT

This matter was assigned to the presiding judge on May 19, 1979. A review of the record disclosed that on December 20, 1978, the operator filed an answer admitting the three violations charged but contending that in view of his prompt abatement of the hazards cited the penalties assessed should be forgiven and remitted. (FOOTNOTE 1) In 1976, the Board of Mine Operations Appeals held that the Mine Safety Act does not allow remittiturs, even for no-fault violations. R. M. Coal Company, 7 IBMA 64 (1976). Since the operator did not claim the penalties assessed were arbitrary or excessive except to the extent there was no provision for total remission and since there appeared to be no triable issue of fact, the parties were directed to confer and file a motion to approve settlement or appear at a prehearing conference in Arlington, Virginia on June 5 to discuss their differences.

When the operator refused to discuss settlement with counsel for the Secretary, reiterated his claim for remission, and requested the "matter be disposed of without requiring my attendance at a hearing" the presiding judge carefully reviewed the record and suggested that counsel for the Secretary again explain that abatement was no justification for dismissing a petition to assess penalties.

The presiding judge also took note of the fact that the operator objected to attending a prehearing settlement conference in Arlington, Virginia because of the time and expense involved. Since the presiding

judge had attempted to give "due regard for the convenience and necessity of the parties" before issuing the notice of prehearing conference, the principal focus at this point was on the operator's expressed desire to have the matter resolved without even a prehearing.

When counsel advised that the operator insisted on total remission and when the operator also failed to appear at the prehearing conference, the presiding judge issued a decision and order of default assessing penalties in the amount originally proposed, namely $170.00. (FOOTNOTE 2)

Thereafter, the Commission acting on a complaint relayed by a congressional committee, directed the default assessment for review and invited briefs from the parties. Only the Solicitor responded with a brief that failed to set forth the facts revealed by the record. For example, the brief failed to note the operator's request that his claim for remission be disposed of on the basis of his answer and letter of August 8,1978 without a hearing. The brief did suggest, however, that the matter be remanded to the presiding judge for a more detailed explanation of the factors considered in issuing the default assessment.

Instead, the Commission issued its decision of July 25, 1979 in which it erroneously assumed the only basis for the default assessment was the operator's failure to attend the prehearing conference of June 5, 1979. (FOOTNOTE 3) As I have indicated, and as the

record clearly shows, that was not correct. The operator's failure to appear at the prehearing conference was only one of the two factors considered. The principal factor was the operator's failure

to advance a defense that required an evidentiary hearing, his admission of the three violations charged, and his failure to show or even claim that the penalties proposed were arbitrary or excessive, and his failure in the light of this to make a reasonable excuse for his refusal to discuss settlement with counsel for the Secretary. Contrary to the Commission's view, the operator was not penalized for asserting his right to contest the violations. He did not contest the violations only the Secretary's refusal to grant him a total remission, a type of relief not available under the Act with or without a hearing. (FOOTNOTE 4)

Because of the views expressed by the Commission, after remand the matter was set for another prehearing, and, if necessary, evidentiary hearing in Rutland, Vermont. Shortly thereafter the operator agreed to pay the penalties assessed under the default order of June 5 and counsel for the Secretary filed a motion to approve settlement.

Based on my independent evaluation and de novo review, I find the penalties proposed, while on the low side, acceptable and in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $170.00, on or before Friday, August 24, 1979, and that subject to payment the captioned petition be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE
1 Respondent operates a small slate quarry near the town of Hampton, New York which is about 75 miles north of Albany-Troy, New York.

~FOOTNOTE_TWO
2 In view of the operator's claim of a travel imposition and the presiding judge's assumption it was made in good faith and not for the purpose of harrassment, the order of default was issued in the disjunctive. In other words, even if the operator had a valid excuse for not wanting to spend $400.00 to argue his remission point in Arlington then he had no excuse for refusing to discuss settlement of the matter with Mr. Walsh (one of the Secretary's most able and competent lawyers) when the operator had admitted the violations charged, made no claim the penalties initially proposed were excessive and was resting his case solely on a claim of total remission that as a matter of law could not be considered.

~FOOTNOTE_THREE
3 The Commission held that under section 5(a) of the APA, 5 U.S.C. 554(b) and its rules of practice, the only factor

relevant to a determination of the balance of convenience for a prehearing site is its distance from the situs of the operator's mine. Thus, the Commission held that "additional cost to the government" is not to be considered since considerations of "due process" and "appearances" of overreaching must be avoided at all costs.

(Footnote 3 continued on page 3)

Until the Commission established this policy, the presiding judge believed that under the statute and the Commission's rules of practice he was required to "give due regard to the convenience and necessity of the parties" including the government agencies involved and "other relevant factors" including the comparative expense to the parties. Accordingly, he took official notice of the fact that to transport to and maintain the Secretary's counsel and the presiding judge in Rutland, Vermont, the hearing site nearest Hampton, New York, and return would cost the government agencies involved a minimum $750.00, whereas the cost to the operator of sending one representative to discuss settlement in Arlington, Virginia would cost a minimum of $400.00. The cost to the operator, of course, would actually be much less since it would be a business expense deductible from his income tax. Furthermore, in Arlington a Commission hearing room was available whereas in Rutland a hearing room had to be obtained from a state agency. Thus, when the presiding judge balanced the costs and convenience of the government agencies against that of respondent it appeared the balance of convenience favored holding the settlement conference in Arlington.

The only authority cited by the Commission for disregarding the plain language of the statute and its own rules was a case decided five years before passage of section 5(a) of the APA. Furthermore, the case involved the setting of a site for a protracted evidentiary hearing that involved the travel and maintenance of several witnesses not a single representative for a one day settlement conference. The cases that have interpreted section 5(a) since its passage in 1946 have uniformly held that "Due regard for the convenience and necessity of the parties cannot be divorced from the convenience of the agency." Burnham Trucking Co. v. United States, 216 F. Supp. 561, 564 (D. Mass. 1963) (3 Judge Court); Maremont v. F.T.C. 431 F. 2d 124, 129 (7th Cir. 1970). It is respectfully suggested that at its earliest opportunity the Commission reconsider its sweeping amendment of section 5(a) of the APA.

~FOOTNOTE_FOUR

4 Oversight committees and the Commission should resist the temptation to usurp the presiding judge's authority to regulate the course of adjudicatory proceedings, especially where they do not understand the details of the day-to-day happenings or the parties'litigating posture as reflected in the pleadings. See, Appalachian Power Co., 35 Ad. L. 2d 574, 578 (FPC 1974). The committees and the Commission are entitled to hold the judges accountable but they should do so on the basis of an informed understanding and not mere surmise. There is as strong a public interest in avoiding harrassment of the judges

as the parties. Litigation brought merely to harrass is a wholly unredeemed burden and an affront to the administrative process.