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SOL (MSHA) V. PEABODY COAL
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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. DENV 78-565-P A.C. No. 24-00108-02004V
v.	
PEABODY COAL COMPANY, RESPONDENT	Big Sky Surface Mine

DECISION DISMISSING PROCEEDING FOR FAILURE TO PROSECUTE

Petitioner, on July 23, 1979, filed a motion to vacate the citation and withdraw the petition for assessment of civil penalty, stating: "There is insufficient evidence to establish a violation of the aforesaid mandatory standard [30 CFR 77.701] as the only witness who can testify as to the alleged violation is unavailable to testify at the hearing as scheduled." (FOOTNOTE 1)

No written response to such motion was filed by Respondent, although Respondent indicated at the phone conference that it would have no objection.

This matter was first scheduled for hearing on April 6, 1979, by Judge Malcolm P. Littlefield and thereafter rescheduled and continued twice. Finally, after assignment to the undersigned, it was

set for hearing on July 24, 1979. The parties were orally notified of this rescheduling on June 28, 1979, and the notice was issued on June 29. A subsequent request by Respondent, Peabody Coal Company, for a continuance was denied.

Thereafter, on the morning of Thursday, July 19, 1979, only a few days before the hearing scheduled for Tuesday, July 24, Mr. Jerry Atencio, speaking on behalf of the Denver Solicitor's Office, telephoned to advise my law clerk that the citation involved in this proceeding was going to be vacated by MSHA. Upon being informed of this proposed action, at my direction, my clerk telephoned Mr. Atencio to advise him to contact Respondent to determine if there was an objection to the proposed action; and, if there was no objection, to file a motion requesting approval for the vacation and listing grounds for the action. Since the scheduled hearing date of July 24 was imminent, Mr. Atencio was directed that such motion be filed in an expedited manner. The use of a teletype machine or Federal Express was suggested.

Late in the day on July 19, Mr. Atencio telephoned and advised my law clerk of the following: (1) MSHA would not make an appearance at the scheduled hearing; (2) messages had been left at the operator's attorney's office advising him of the proposed action, but no personal telephone contact had been made with that party's attorney; (3) the Solicitor's Denver Office does not have a teletype machine and he interpreted the Commission's Interim Procedural Rules not to require that any motions be filed by expedited means such as Federal Express; and (4) the grounds for the vacation would be the unavailability of MSHA's witness and that the Solicitor had determined that there was insufficient evidence to support the citation.

The following day, Friday, July 20, after it was determined that the operator had not been informed of the proposal to vacate, a telephone conference was arranged. Mr. Thomas Gallagher, counsel for the operator and Mr. Atencio were advised that morning of the conference. However, when the conference was held, since Mr. Atencio was not then available, the Solicitor was represented by Mr. Thomas Korson.

Mr. Korson stated, upon questioning by the Presiding Judge, that the citation was to be vacated for no specific reason, but that it was not for any reason of scheduling. Since this information was different from that which Mr. Atencio had provided the night before, the Presiding Judge further inquired specifically if the vacation had anything to do with the unavailability of a witness. Mr. Korson again affirmed that it had nothing to do with a witness or the scheduling. When invited to state why the matter was being vacated, Mr. Korson replied that no reasons would be given and that it was the prosecutor's privilege to vacate in his own discretion. Mr. Gallagher, speaking for the Respondent, advised that he would not oppose the vacating of the citation. With that understanding, the Presiding Judge stated that upon receipt of the motion and the Respondent's answer, the proceeding would be dismissed.

Thereafter, on July 23, 1979, the Petitioner filed its motion to vacate and withdraw, quoted above.

On August 6, 1979, I issued an order for the Petitioner to show cause why the proceeding should not be dismissed for failure to prosecute. As pointed out in such order, it was obvious that the representations made by the Solicitor's representative to the Presiding Judge at the phone conference were completely at odds with the statements made in the motion to vacate and to withdraw. At the conference, I was told that the withdrawal was not due to the scheduling, while the motion to withdraw explicitly states that the reason was the insufficiency of evidence, as the only witness who could testify was unavailable for the hearing as scheduled.

The situation, as viewed at that time, was summarized in the show cause order as follows:

> The Petitioner had ample opportunity to file with the court a motion for continuance if it, in fact, had a serious problem of witness availability. It confined its contacts wholly to oral communication with my law clerk, and, in fact, did not raise this matter except orally at almost the very last moment. I arranged for a prehearing conference for the express purpose of determining whether there might be a problem because of the scheduling. As indicated, I was told affirmatively, at least twice, there was no such problem. In these circumstances, I believe that the Solicitor or his representative not only misrepresented the situation to the Presiding Judge, but otherwise engaged in such mishandling and lack of interest in prosecuting this case that it appears it should be dimissed for a failure to prosecute.

Petitioner's response, filed August 13, 1979, is quoted in full below:

> NOW COMES the Secretary of Labor, by his undersigned counsel and responds to the Order to Show Cause entered in the above entitled case on August 6, 1979.
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> 1. The chronology of the July 19, 1979 discussions does not fully and clearly set forth the substance of conversations had between Mr. Atencio and Judge Michels' law clerk that the Secretary of Labor would be filing a motion to vacate the citation and withdraw his petition for assessment of civil money penalty. The basis for the aforesaid motion, as stated to the law clerk, was insufficiency of evidence due to the unavailability of the Secretary's only witness. Mr. Atencio informed Judge Michels' law clerk that the unavailability of the witness was of a permanent nature. Judge Michels' law clerk inquired of Mr. Atencio

whether the operator had approved of the Secretary's proposed motion. Mr. Atencio informed the law clerk that the Secretary had not sought such approval prior to filing, as he believed the determination to file such a motion to lie with the Secretary, Mr. Atencio informed the law clerk that attempts had been made to contact Thomas Gallagher, attorney for the respondent but were to no avail; that Mr. Atencio contacted respondent's counsel's office in Denver, Colorado and was informed all the respondent's attorneys were unavailable. Mr. Atencio left a message with the aforesaid office of the Secretary's filing of his motion and requested respondent's counsel to return the call if there were any questions and for respondent to similarly file its objections, if any. At this juncture the law clerk stated the Secretary must file his motion by July 20, 1979, and should have it served either by having it teletyped, delivered by Federal Express, or hand delivered by the Washington, D.C. Office of the Solicitor. At this time Mr. Atencio informed the law clerk that he would discuss this with the Associate Regional Solicitor. In a second conversation with Judge Michels' law clerk, Mr. Atencio informed him that the aforesaid motion would be filed in accordance with 29 C.F.R. 2700.12, by first class mail; that another attempt to contact respondent's Denver counsel had been made to attempt to inform him of the Secretary's motion; and that the Office of the Solicitor was unwilling to expend the funds to dispatch an attorney to the hearing scheduled on July 24, 1979, in light of the fact that the only witness was not available and thus there was no evidence to support prosecution of this action. On Thursday afternoon Mr. Atencio received a call from an attorney (other than Mr. Gallagher or Mr. Linn) in respondent's Denver office acknowledging receipt of Mr. Atencio's earlier advice that the motion to vacate had been filed and informing him that respondent had no objection.

2. In the morning of July 20, 1979, Mr. Atencio received a call from Judge Michels' law clerk inquiring whether Mr. Atencio would be available for a conference call with Judge Michels and Mr. Thomas Gallagher, sometime in the afternoon of the same date. No specific time could be arranged for the conference call at this time due to the fact that it was unknown when Mr. Gallagher would be available. Mr. Atencio informed the law clerk at that time that he (Mr. Atencio) would be in the office during the afternoon. The conference call was placed when Mr. Atencio was on his lunch hour.

3. On July 20, 1979, Mr. Korson was aware that the Judge's secretary had been attempting to arrange a conference call with Mr. Atencio and counsel for the operator.

> One of our secretaries informed him (Mr. Korson) (during the temporary absence of Mr. Atencio) that the Judge wished to schedule a conference call. Since Mr. Atencio was not available Mr. Korson assumed that Mr. Atencio would be available at a particular time of day, and he told the secretary to inform the Judge's secretary that the call could be scheduled later in the day at a time when Mr. Atencio would be available. Unfortunately, Mr. Atencio was not available at the time that Mr. Korson had indicated. Under the circumstances, he substituted for Mr. Atencio. In doing so, he was trying to accommodate the Judge. He was not fully informed of the underlying facts, and perhaps should not have spoken for the Secretary in this matter, for that reason.
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> 4. The aforesaid response and the Order to Show Cause clearly indicate there was a misunderstanding in that the Secretary's burden in establishing his case at any hearing would depend on the testimony of one witness who was unavailable and would continue to be unavailable. The unavailability of this witness was not for any reason of scheduling; otherwise the Secretary would have filed a motion to postpone the hearing for a date certain, had the availability of this witness been related to a scheduling problem.
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> 5. Based on the aforementioned grounds, the Secretary respectfully submits his motion be granted, as there is no evidence on the record of any lack of interest or diligence in his prosecuting this matter.

The response has not only failed to clarify matters, it has added further confusion. In the prehearing conference, the Presiding Judge was told one thing, i.e., that the withdrawal was not caused by the scheduling; in the motion to withdraw another, i.e., that it was caused by the scheduling; and finally, in response to the show cause order, the Presiding Judge was told both things. In his response, the Solicitor claims now that the witness is unavailable and will continue to be unavailable and, thus, there is no evidence to support prosecution of the action. This expressly contradicts his earlier formal motion which states that the witness "is unavailable to testify at the hearing as scheduled." Yet, the Solicitor in his response requests that such motion be granted. He has not corrected, withdrawn or explained the reason for the statement in his motion; he simply reaffirms his request that the Judge grant it. Clearly, the motion cannot be granted as it stands, because it states the petition is withdrawn for the reason of scheduling, whereas that is expressly contradicted by other statements made by the Solicitor.

This contradiction is not a minor matter. If the petition is withdrawn because of the insufficiency of proof due to the permanent

unavailability of a witness, it is a matter over which the Presiding Judge has little, if any, control. If, however, the withdrawal is due to the unavailability of a witness at a hearing as scheduled and that witness would be otherwise available, then it is a matter over which the Judge has some control and responsibility. In his discretion, he may decide to grant the motion based on all the circumstances, or he might attempt to reschedule the hearing. If the Judge is misinformed as to the actual reason for the withdrawal, he is deprived of the opportunity to exercise his function in deciding the issue.

The Solicitor states in his response to the show cause order that the unavailability of the witness was not for any reason of scheduling and that the witness was unavailable and would continue to be unavailable. If this is true, then there is more than a mere misunderstanding. The motion to vacate and withdraw could not be more explicit, stating that the witness could not appear at the hearing as scheduled. That statement has not been withdrawn or corrected.

The Presiding Judge has given the Solicitor every opportunity to clarify his position, first, by a phone call conference, and later by means of an order to show cause. All efforts have resulted in failure. The outcome has been nothing more than the submission of contradictory and obfuscatory statements.

In these circumstances, I can say with all honesty that I do not know which of the Solicitor's assertions to believe. There are too many areas creating doubt. For instance, if the reason for withdrawal is, in fact, the insufficiency of evidence, why did Mr. Atencio file a motion stating that the reason was the unavailability of a witness to testify at the hearing as scheduled? Mr. Korson appeared to know that scheduling was not the reason for withdrawal, though strangely and inexplicably, the Solicitor now claims he was not fully informed. If Mr. Atencio, in filing his motion, meant that the witness was permanently unavailable, why has not he corrected the record, or at least explained why he stated something different? Was the phrasing in the motion, in fact, deliberate with an intent to deceive? Furthermore, because no reason or even a hint of a reason was given for the asserted "unavailability" or the "permanent unavailability" of the witness, there is no basis in the record for determining the accuracy of such representations.

It should be clear that with the record in the state as described above, there is no way that I could grant the motion to vacate and withdraw for the reason stated therein. In my order to show cause, I indicated that I believed the Solicitor or his representative not only misrepresented the situation to the Presiding Judge, but otherwise engaged in such mishandling and lack of interest in prosecuting this case, that it should be dismissed for a failure to prosecute. Nothing in the response has dissuaded me from that view; rather, I am now fully confirmed in it. Accordingly,

This proceeding is hereby DISMISSED for failure of prosecution.

Franklin P. Michels
Administrative Law Judge

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~FOOTNOTE_ONE

1 The full text of the motion is as follows:

"Now comes the Secretary of Labor, by his undersigned counsel, and moves the Commission, pursuant to 29 CFR 2700.15, Interim Rules of the Federal Mine Safety and Health Review Commission, to vacate the citation issued and withdraw his petition for assessment of civil money penalty, and states the following grounds in support thereof:

"1. On January 5, 1978, Notice No. 6-JWO was issued to Respondent for an alleged violation of 30 CFR 701 of Part 77.

"2. On March 15, 1978, the Federal Mine Safety and Health Administration, Office of Assessments, assessed a penalty in the amount of $1,000.00 for the aforesaid alleged violation.

"3. There is insufficient evidence to establish a violation of the aforesaid mandatory standard as the only witness who can testify as to the condition of the alleged violation is unavailable to testify at the hearing as scheduled."