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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEST 79-66-M A.C. No. 35-00533-05002 R
v.	M.F. Pit and Plant
READYMIX SAND & GRAVEL COMPANY, INC., RESPONDENT	

DECISION

Appearances: Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Alex M. Byler, Esq., Pendleton, Oregon, for Respondent

Before: Administrative Law Judge Michels

This matter is before me for hearing and decision on the petition for assessment of civil penalty filed by the Petitioner on May 14, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (the Act). The Respondent, Readymix Sand & Gravel Company, Inc., filed a timely answer to the petition denying the charges and contending that no fine should be assessed. A hearing was held in Pendleton, Oregon on August 30, 1979, and the parties appeared through counsel. Posthearing briefs were filed by both sides and Respondent filed a reply brief.

This action concerns a charge of a refusal to allow inspectors to enter Respondent's mine for the purpose of inspection. The issue arose on November 29, 1978, when Jim Busch, President of the Respondent, refused to grant inspectors entry to the operator's crushing and cleaning plant.(FOOTNOTE 1) The Respondent was charged with a violation of section 103(a) of the Act for this refusal.

The Respondent has raised two defenses: (a) that a statute allowing a warrantless administrative search is invalid and (b) that the crushing and screening plant involved, located separate from the pit, is not a plant used at, and in connection with, an excavation or mine so as to come within the definition of "mill" in 30 CFR 55.2. For these reasons, Respondent asks that the proceeding be dismissed.

(a) Non-consensual Search

Respondent's first argument concerns the warrantless search. In contending that the statute in allowing a warrantless administrative search is invalid it cites Marshall v. Barlow's Inc., 436 U.S. 307 (1978). Respondent also cites a recent decision in U.S. District Court for the District of New Mexico, Valley Transit Mix, Inc. v. Marshall (cited in 1 MSHC 2081 (1979).

Petitioner has submitted, however, the recent decision of the Sixth Circuit in Marshall v. Nolichuckey Sand Company, Inc., (No. 79-1111, decided October 5, 1979), in which the court concluded that the enforcement needs in the mining industry make a provision for warrantless search reasonable and that a warrant is not needed for periodic inspections of "active workings" of sand and gravel "mines." Likewise the Third Circuit in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589, 593 (1979) held that "the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard asserted in Barlow's."

In light of these direct Federal Circuit Court precedents, Respondent's contention on warrantless search is rejected.

(b) Jurisdiction Over the "Mill"

Facts

There are no serious disputes about the facts. On November 29, 1978, inspectors Darwin G. Chambers and John M. Moore, arrived at the M. F. Pit and Plant facility for the purpose of inspection of the Respondent. James Busch, President of the company, informed the inspectors that he would not permit them to conduct an inspection of the crushing and cleaning plant until he had consulted his lawyer. Mr. Busch did not deny access to the actual gravel mining area, i.e., the pit. He drew a distinction between the pit where the material was excavated and the plant where crushing,

mixing and other processing takes place and believed that the latter was not subject to MSHA's jurisdiction. The plant and the pit are separated by a small distance, a matter to be discussed below in further detail (Tr. 5-6, 17-20).

The inspectors discussed the Act and regulations with Mr. Busch and asserted they did have jurisdiction. In the course of these discussions, Mr. Busch called his lawyer who affirmed to him that he was not subject to the regulations under the Act. On that day, November 29, 1978, Inspector Chambers issued a citation. The following day, the same inspectors returned and they were then permitted to conduct an inspection. The refusal to permit inspection covered a period of less than 24 hours. In the period between visits of the inspectors on November 29, Mr. Busch, according to his testimony, was advised that he was subject to heavy fines and possibly a prison term if he refused entry. He thought of this as a "mighty big club" and so he allowed entry when the inspectors returned the following day. No warrant was shown (Tr. 6-7, 18-20).

The locations of the two facilities in question, the plant and the pit, are shown on a map received as Respondent's Exhibit R-1. They are separated by a distance of approximately 460 feet (Tr. 28).

The Respondent basically deals in rock products. It excavates sand and gravel from open pits. This material is processed by crushing, screening and washing. Some is sold as crushed rock and some is manufactured into asphaltic concrete, ready mix concrete and concrete masonry units (Tr. 11). The company has several sites from which it extracts sand and gravel. One is designated the Milton-Freewater (M-F) pit and plant site which is located in Umatilla County. These are the facilities involved in this proceeding (Tr. 11-14).

The sand and gravel produced at the pit site is largely processed at the nearby plant. About 1-1/2 percent is processed elsewhere. Some material from other pits is also processed at the Milton Freewater plant but the record does not disclose the percentages. It is a fair inference from the whole record that most of the material processed at the M-F plant comes from the nearby pit. The plant covers some 7.75 acres and it has an office, scale, concrete batch plant, asphaltic concrete mixing plant, rock crushing and screening plant, and other facilities (Tr. 30-36, 14).

The plant produces 100,000 to 150,000 tons per year. Approximately 35 persons are employed at the plant and 3 at the pit (Tr. 33-34, 37). The Respondent sells its products in interstate commerce (Tr. 12).

The sand and gravel excavated at the pit is hauled by truck to the plant. Some times of the year for a few months the Walla Walla river, which has a water course between the two properties is flooded, and the material is hauled on county roads. This is about a 10 minute trip. Otherwise the river bed is completely

dry, and the material is hauled

directly across the separating strip, a distance of some 460 feet. This short haul takes 4-5 minutes. From the actual site of the pit to the plant location is a distance of 1,600 - 1,700 feet (Tr. 15-16, 28-29).

It is not only the river bed that separates the plant and pit, however, within the 460 feet strip there is land owned by a third party, namely, Umatilla County. Respondent and Umatilla County have an arrangement whereby, the county, whose only access to the property is through Respondent's pit site, is given a right of entry through Respondent's fence and gate. There apparently is no quid pro quo. The county at times has denied a right of way to the Respondent across its property. This happened in 1972 and other times, but not in the last year. Respondent has no easement and uses the county property only on a permissive basis (Tr. 16-17, 21-26).

Discussion

In approaching the issue of jurisdiction, the first inquiry is whether a materials plant such as above described, is included within the Act as a mine and thus subject to the provisions of the Act under section 4. Section 3(h)(1) defines coal or other mines in pertinent part as "an area of land from which minerals are extracted in nonliquid form %y(3)5C and (C) lands, excavations %y(3)5C structures, facilities, equipment %y(3)5C used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals %y(3)5C."

There apparently is no debate in this matter concerning the applicability of the Act to Respondent's crushing plant facility. Because of certain terminology in the standards, Respondent contends that its plant is excluded from regulation but it does not argue that the Act is inapplicable.

The plain words of the statute, as quoted above, leave little if any doubt that the definition of a mine includes the kind of milling facility operated by the Respondent. Aside from that, the legislative history indicates Congress' intention that the coverage of the Act be broadly interpreted and specifically that milling is included. See for example, S. Rep. No. 95-181, 95th Cong. 1st Sess. 1, 14, reprinted in the 1977 U.S. Code Cong. & Admin. News 3401, 3414.

The Third Circuit Federal Court of Appeals in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589, 592 (1979) stated that it agreed with the district court that the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator.

Thus, there appears to be no doubt that Respondent's plant or mill is subject to the Act and the regulations.

Respondent argues, however, that the phrasing of the definition of the term "mill" under Part 55 (see also Part 56) serves to limit the jurisdiction of the regulatory agencies. Part 56 contains standards directly applicable to sand, gravel and crushed stone operations. At 30 CFR 56.2 the following is found under defintions: ""Mill' includes any ore mill, sampling works, concentrator, and any crushing, grounding, or screening plant used at, and in connection with, an excavation or mine." The same definition is contained in Part 55 which covers health and safety standards for metal and nonmetalic open pit mines.

Respondent's argument is to the effect that this definition means if the plant is not contiguous to the mine or on the same tract of real property upon which the mine is located, that it is not a mill or plant subject to inspection. In this case, it argues that because the plant was completely separated from the pit by a minimum of at least 460 feet, and sometimes much more depending upon the season or other events, the plant was not in fact "at" the pit.

In response to this argument, Petitioner in its post hearing brief contends in effect that the Act is controlling and that "[n]o geographical limitation can or should be grafted upon the statutory definition by the usage of a certain preposition used in a regulation drafted prior to the 1977 Mine Safety Act." (FOOTNOTE 2) Petitioner also makes the point that the word "mill" is followed by the word "includes" whereas all of the other words in the definitional section are followed by the word "means" and that the drafters by using such terminology did not intend the definition for "mill" to be all inclusive. Further, Petitioner argues that the definitions in Parts 55 and 56 only refer to the standards which contain the particular word defined and if such word is not used, its definition has no relevance to the standard.

I accept the Petitioner's contention to the effect that the definition of the word "mill" as it appears in Parts 55 and 56 of 30 CFR is not a declaration of the Secretary's policy on the enforcement of the Act over milling facilities. The Secretary otherwise has indicated in the interagency agreement between MSHA and the Occupational Safety and Health Administration that he has retained jurisdiction over milling processes and nothing in the agreement suggests that such jurisdiction is limited by the relationship of the plant to the pit. Federal Register, Vol. 45 No. 75 pg. 22,829, April 17, 1979. In the circumstances, I don't believe that the definition of "mill" alone in the standards can be considered as a general limitation on the Secretary's authority to proceed under the Act. If these definitions have any application, it is limited to the enforcement

of the mandatory standards in Parts 55 and 56 in which the word "mill" appears. I have been unable to locate any standard in those parts, however, using the word "mill."

In this instance, MSHA has cited the Respondent, not for a violation of any mandatory standard but for a violation of a section of the Act itself. In light of the discussion above, I conclude that the definition of the word "mill" in Parts 55 and 56 is not related to the charge and is not a limitation on the authority of the Secretary to allege a violation of the Act.

Moreover, even if the "mill" definition should be construed as applicable and binding upon the Secretary, I would further conclude that nothing in the definition would prevent the Secretary from proceeding against the mill or plant operated by the Respondent. As the Petitioner observed in its brief, the use of the word "includes," especially where all other terms defined are followed by the word "means," clearly suggests that other facilities are included although not specified. The definition in other words is not all inclusive and, accordingly, the Secretary is free to apply the law, as it does, to Respondent's mill.

Finally, the preposition "at" in the definition does not necessarily require that a mill be "on" the pit property. Webster's Dictionary defines "at" in part as a word used as a function word to indicate presence in, on, or near: as the presence of the occurrance at a particular place. Cases cited in Words and Phrases under "at" indicate that the preposition "at" is commonly used as the equivalent of near or about e.g., Jordan v. Board of Supervisors of Tulare County, 221 P.2d 977, 979 and Abernathy v. Peterson, 225 P 132, 133. In this instance the M-F plant or mill was clearly near and also operated in conjunction with the pit even though not contiguous.

In light of the above, I find that Respondent's M-F plant or mill is subject to the provisions of the Act.

The charge is that Respondent by refusing entry to authorized representatives of the Secretary for the purpose of an inspection violated section 103(a) of the Act. This section authorizes inspections as follows: "Authorized representatives of the Secretary %y(3)5C shall make frequent inspections and investigations in coal or other mines each year %y(3)5C [and] shall have a right of entry to, upon, or through any coal or other mine."

Section 104(a) provides that an inspector shall issue a citation to an operator violating the Act. It states in part:

> If upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated the Act,

> or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

With regard to penalties, section 110(a) provides that an "operator of a coal or other mine in which a violation occurs of a mandatory standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *." [Emphasis added.]

In view of such language it seems clear to me that a refusal of entry to inspectors who seek to conduct an inspection of a mine constitutes a violation of the Act for which civil penalties may be assessed.

There is no dispute about the facts on this record that the operator did refuse entry to authorized representatives who sought to conduct an inspection. Thus, I find that the operator did violate 103(a) of the Act, as charged, and is subject to assessment for such violation.

Assessment

History of prior violations: The record contains no evidence of prior violations.

Appropriateness of penalty to the size of the operator: The operator has 30-35 employees at its plant and office and three employees at the pit (Tr. 16, 32). It produces 100,000 to 150,000 tons annually (Tr. 37). I find this to be a small be medium sized operation.

Effect of the penalty: There being no contrary evidence, I find that the penalty assessed will not effect the operator's ability to continue in business.

Good Faith: I find that the operator, after it had determined its legal liability, exhibited good faith in achieving rapid compliance by admitting the inspectors. This happened within 24 hours of the refusal of entry.

Gravity: I find this violation to be serious because the entire effectiveness of the law depends upon access by inspectors for the making of inspections.

Negligence: I find only slight negligence because the Respondent in good faith believed that it had a legal right, based on certain language in Parts 55 and 56, to deny access to the inspectors.

Penalty: MSHA requests a penalty of $100 for this violation. I have found the Respondent is chargeable only with slight negligence. It was in effect seeking to establish a principle, which it was advised was valid, for the refusal of entry. It is not clear that it would have obtained a hearing on the issue without first refusing entry to the inspectors so as

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to establish a basis for review. Thus, this was in a sense a technical violation. In these circumstances, it seems to me that only a nominal penalty is warranted and I will assess a penalty of $10.

ORDER

It is ordered that Respondent pay the penalty of $10 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge

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FOOTNOTE START HERE
~FOOTNOTE_ONE
1 Inspector Darwin Chambers issued a citation to the Respondent on November 29, 1978, in which the condition or practice is described as follows:

"On November 29, 1978, Jim Busch, President, refused to allow Darwin G. Chambers and John M. Moore authorized representatives of the Secretary, entry to the crushing and screening plant of the M F Pit and Plant, for the purpose of conducting an inspection of the crushing and screening operations of the mine pursuant to Section 103(a) of the Act. Mr. Busch stated that federal inspectors could not enter his mine to conduct an inspection of the crushing and screening plant. Mr. Busch was advised that this operation was covered by the "Act'."

~FOOTNOTE_TWO
2 This argument is distinctly at odds with the position taken by the Petitioner at the hearing and the discrepancy is pointed out by the Respondent in its posthearing reply brief. I accept the position taken by Petitioner in its posthearing brief as the considered view of the Secretary.