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

CONSOLIDATION COAL COMPANY, APPLICANT	Notice of Contest
	Docket No. WEVA 80-333-R
v.	
	Citation No. 812080
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Order No. 632501 April 24, 1980
	O'Donnell No. 20 Mine
AND	
UNITED MINE WORKERS OF AMERICA (UMWA), RESPONDENTS	

DECISION

Appearances: Karl Skrypak, Esq., and Samuel Skeen, Esq., for Applicant Thomas Mascolino, Esq., and Stephen Kramer, Esq., for Respondent, Secretary of Labor Mary Lu Jordan, Esq., for Respondent, United Mine Workers of America

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

On April 24, 1980, federal mine inspectors arrived to inspect Consolidation Coal Company's O'Donnell No. 20 Mine in response to a request by the miners under section 103(g) of the Act. Several miners were allowed by the operator to accompany the inspectors during the walkaround. However, the operator refused to permit representatives of the International Union's Safety Division to accompany the inspection party. Because of the refusal, the inspector on April 24, 1980, issued a citation to the operator for violating section 103(f) of the Act. When the operator failed to comply with the citation, a "no area withdrawal order" was issued on the same day.

Immediate review was sought by the operator under the Energy Fuels doctrine, 1 FMSHRC 299 (May 1, 1979). All parties have agreed to submit the case for decision based upon a joint stipulation of facts. Each party has filed a brief. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STATUTORY PROVISION

Section 103(f) of the Act provides:

> (f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

ISSUES

1. Is the operator entitled to immediate review of the citation and order issued in this case?

2. Do miners and their representatives have the right, under section 103(f) of the Act, to accompany an inspector during a walkaround inspection conducted pursuant to section 103(g) of the Act?

3. Does the failure of the International Union and its representatives to file with MSHA under 30 C.F.R. Part 40 (or former Part 81) allow an operator to prevent such person or persons from accompanying an inspector during the walkaround portion of the inspection?

4. Did the operator violate section 103(f) of the Act as alleged in the citation and order?

FINDINGS OF FACT

1. MSHA inspectors arrived at the operator's O'Donnell No. 20 Mine on April 24, 1980, to perform an inspection requested by the United Mine Workers of America (UMWA), the collective bargaining representative of the miners.

2. Also arriving at the mine that day were members of the International UMWA Safety Division who identified themselves as representatives of the miners for walkaround purposes under section 103(f) of the Act. The operator had been informed the previous day that the mine safety committee wanted these individuals to accompany the MSHA inspectors.

3. The operator refused to permit the International Safety Representatives to accompany the inspectors because their names were not listed on the document filed with the operator on September 20, 1979 entitled "Employees Who Travel With Inspectors While at Mine 20."

4. A letter dated March 22, 1978, entitled "Certificate of Representation" filed by the UMWA with MESA (predecessor of MSHA) under Part 81 of the Federal Coal Mine Health and Safety Act of 1969. A copy was sent to Applicant. This letter designated by title, but not by name, the representatives of the miners in the subject mine, including "authorized Representatives of the UMWA Safety Division * * *." No subsequent document concerning miner representatives at the subject mine was filed with MSHA.

5. I conclude that the UMWA did not comply with the filing requirements in 30 C.F.R. Part 40.

6. Because of the refusal of the operator to permit International Union Safety Representatives to accompany the inspection party, a federal inspector issued a citation and an order on April 24, 1980, for a violation of section 103(f) of the Act. The order was terminated on April 28, 1980.

DISCUSSION

The operator in this case sought immediate review of the citation and order issued on April 24, 1980. In Energy Fuels Corp. v.

MSHA, 1 FMSHRC 299 (May 1, 1979), it was held that an operator served with a citation for a violation that has been abated may immediately contest the allegation of violation in that citation. Respondent UMWA, by motion filed April 28, 1980, challenged the operator's right to review of the citation, stating that the violation had not yet been abated. However, the parties stipulated on May 12, 1980, that the violation had been abated on the day of Respondent's motion, April 28, 1980. Applicant therefore is entitled to a review of the citation.

The parties have not raised the issue whether representatives of miners are entitled, under section 103(f), to accompany an inspector during a walkaround inspection of a mine conducted pursuant to section 103(g). In MSHA v. Helen Mining Co., 1 FMSHRC 1796 (November 21, 1979) the Commission was divided on whether an operator must pay a miners' representative for time spent accompanying an inspector during a section 103(i) "spot" inspection. But all members agreed that, despite the language in section 103(f) limiting the walkaround right to inspections "made pursuant to the provisions of subsection (a)," the legislative history unmistakably reveals that the walkaround right under section 103(f) applies to any inspection under the Act. Therefore, walkaround rights in the present case are governed by section 103(f).

The operator's principal defense to the citation is that the International representatives were not "representatives of miners" entitled to accompany the inspector during the walkaround since they had not complied with the filing requirements for representatives of miners in 30 C.F.R. Part 40, or former Part 81. Both Part 40 and Part 81 (its predecessor) require representatives of miners to file with MSHA and serve upon the relevant operator certain identifying information. The purpose of the regulations, presumably, is to help both MSHA and the operators identify the proper representative of miners in order to forestall any arguments over representative status during inspections, or during proceedings before the Commission when representatives may elect party status. However, the failure to comply with whatever filing requirements may obtain in this case should not be permitted to strip representatives of the walkaround rights guaranteed in section 103(f).

Resolution of this case, of course, depends upon a proper interpretation of section 103(f) of the Act. The crux of the problem involves an inherent tension between two portions of that subsection. On the one hand, an inspector is authorized to permit more than one representative to accompany him if he believes this will aid the inspection. An Interpretative Bulletin issued by MSHA, 43 Fed. Reg. 17546 (April 25, 1978), elaborates on the discretion of the inspector in this area:

> Considerable discretion must be vested in inspectors in dealing with the different situations

> that can occur during an inspection. While every reasonable effort will be made in a given situation to provide an opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed and orderly inspection. The inspector cannot allow inordinate delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners.

On the other hand, section 103(f) states that it is "[s]ubject to regulations issued by the Secretary * * *." Thus, the operator here argues that failure to comply with the applicable filing requirements deprives a party of representative status under the Act.

I conclude that the walkaround right granted by the statute, and subject to control by the inspector, overrides the operator's convenience which would be served by strict compliance with the filing requirements. This conclusion is in accord with the discretion vested in compliance safety and health officers under the Occupational Safety and Health Act, 29 C.F.R. 1903.8.

I reject Applicant's argument that the failure of the International Union to comply with the filing requirements deprives them of the status of representatives of the miners. First, it is difficult to believe that a right so central to the legislative scheme could be divested by the mere failure to comply with technical filing requirements. I am persuaded by the need to interpret the Act liberally for the sake of the miners' safety and health. Phillips v. IBMA, 500 F.2d 772, 782 (D.C. Cir. 1974). If the right of management to discipline its employees for just cause must yield to the walkaround right, Leslie Coal Mining v. MSHA, 1 FMSHRC 2022 (December 12, 1979), surely the applicable filing requirements must yield as well.

Second, it would be imprudent to rob the inspector of the discretion clearly intended to be his under the Act. A thorough, detailed and orderly inspection is indeed the first priority. If the walkaround right is to be sensibly applied it must be recognized that an inspector has the inherent authority to order reasonable actions in furtherance of his inspection. Cf. C.F. & I. Steel Corp. v. MSHA, 1 FMSHRC 672 (June 27, 1979). Here, the inspector determined, based on his experience and personal observations at the mine site, that the International safety representatives could aid him during the inspection. His determination should not be overturned absent proof that it constituted an abuse of discretion. This

is not to say that the failure to file as a representative may not be a factor in denial of the walkaround right. But the decision on this is for the inspector, not the operator.

Third, a decision that the applicable filing requirements do not necessarily affect walkaround rights accords with the latest interpretation of those requirements by MSHA, the agency which drafted them. Upon promulgation of 30 C.F.R. Part 40, MSHA commented that "miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as representatives under this part." 43 Fed. Reg. 29508 (July 7, 1979). Considered in light of the foregoing discussion, I find this to be a logical interpretation of section 103(f).

It remains only to be decided whether the individuals denied entrance to the mine on April 24, 1980, were representatives of miners within the meaning of section 103(f). Again, the key is whether the inspector abused his discretion in finding that they were. In discussing walkaround pay, section 103(f) directs that "only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay * * *.". Clearly, then, nonemployees may be representatives of miners. In this case, there is no doubt that the inspector acted within the bounds of his discretion. Admittedly, there was no collective bargaining agreement in effect between the operator and UMWA. But UMWA was, and is, the exclusive representative of the miners for collective bargaining and has a long history of representing the miners at the O'Donnell No. 20 Mine. It was well within the province of the inspector to decide that the International safety representatives could contribute certain insights and expertise beyond that to be expected from the safety committeemen employed at the mine. I find that in denying them entrance, contrary to the inspector's order, the operator violated section 103(f) of the Act.

CONCLUSIONS OF LAW

1. The operator has a right to immediate review of the citation and order issued in this case.

2. Miners and their representatives have the right under section 103(f) to accompany an inspector during a walkaround inspection conducted pursuant to section 103(g) of the Act.

3. The failure to file as a representative of miners under 30 C.F.R. Part 40, or former Part 81, does not entitle an operator to deny a representative of miners its right under section 103(f) to accompany an inspector during a walkaround inspection.

4. The operator in this case committed a violation of section 103(f) by refusing entrance to the O'Donnell No. 20 Mine on April 24,

1980, to members of the International UMWA Safety Division, contrary to the order of the inspector.

ORDER

The citation and order in this case having been properly issued, Applicant's notice of contest is hereby DISMISSED.

James A. Broderick
Chief Administrative Law Judge