



The above case was originally assigned to Judge William Fauver in conjunction with several other civil penalty proceedings involving the same Respondent. By Notice of Hearing issued October 15, 1979, this case was scheduled to be heard at Abington, Virginia, on November 27, 1979. On October 19, 1979, Respondent moved to change the hearing site from Abington, Virginia to Arlington, Virginia, and because of a conflict in the hearing schedule of Respondent's counsel, to continue the hearing date to either January 15, 1980, or February 5, 1980. Petitioner did not object and on October 31, 1979, Judge Fauver granted the motion and issued an Order setting the hearing for February 5, 1980, at Arlington, Virginia.

On February 1, 1980, Petitioner filed a motion to continue the hearing to April 1, 1980, and to change the hearing site back to Abington, Virginia. As grounds for the motion Petitioner stated that, the issuing inspector and the Secretary's key witness, Mr. James A. Baker, was no longer an employee of the Mine Safety and Health Administration and that after numerous attempts, the Secretary was unable to secure Mr. Baker's presence at the prescribed hearing due to his busy business schedule, the great distance involved, and a lack of subpoena authority beyond 100 miles. Judge Fauver in his Order stated that the Petitioner was in error as to the 100 mile limit on the subpoena power of the Commission and that there was no mileage or geographical limitation thereon. Judge Fauver further stated that the Petitioner had known of the February 5, 1980, hearing date and site for many months and denied the motion. Petitioner was allowed an additional day to subpoena Mr. Baker and the hearing was set for February 6, 1980.

A review of a partial transcript of the hearing on February 6, 1980, reveals that Mr. Baker was unable to attend the hearing due to adverse weather conditions and requested that he be relieved from honoring the subpoena. This request was granted by Judge Fauver. The Respondent's counsel took exception to granting a continuance in this case stating that their witnesses had come to the hearing from New Mexico and Colorado, and the attorney from Abington, Virginia. Further, Respondent requested that if a continuance was granted, that the hearing be held in Denver, Colorado, and that expenses and costs be assessed against the Government for travel and expenses for Respondent's counsel and witnesses.

A review of the record shows a letter was mailed on February 13, 1980, by Respondent's counsel, Gary W. Callahan, to Petitioner's counsel, Mike Bolden, which states as follows:

"This letter is to confirm our conversation of Monday, February 11, 1980, at which time we tentatively agreed to have the trial in 78-395-P in Denver, Colorado, on May 7, 1980. I am sending a copy of this letter to Judge Fauver and, of course, will wait his approval."

On February 13, 1980, Respondent filed a Motion to Dismiss the above case asserting that the Government had failed to make a reasonable or diligent effort to have their witness at the hearing; that the Respondent had been prepared for the hearing and had brought their two witnesses from New Mexico and Colorado for the hearing and that to continue the case would make the Respondent's decision to continue to resist the assessed penalty a questionable economic decision.

Judge Fauver, having considered Respondent's letter of February 13, 1980, requesting a relocation of the hearing site to Denver, Colorado, and motion to dismiss filed February 19, 1980, issued an Order on February 20, 1980, denying the motion to dismiss and setting the hearing for May 7, 1980, in Denver, Colorado. Subsequently, the case was reassigned to the undersigned for further proceedings.

A Notice of Hearing was issued, by the undersigned, on March 3, 1980, setting the hearing for May 7, 1980, at 9:00 a.m. in Denver, Colorado.

On March 20, 1980, the Respondent filed a motion to assess costs with the undersigned restating the history of the case as outlined herein above. Said motion was opposed by the Petitioner by motion dated April 1, 1980. The undersigned, issued an Order dated April 8, 1980, denying the Respondent's motion to assess costs by reason of Judge Fauver's prior Order dated February 20, 1980, wherein he denied Respondent's previous motion to dismiss and granted the request for a change in the hearing site to Denver, Colorado, and implicit therein, denied Respondent's prior request for assessment of costs and expenses. A subsequent motion to dismiss dated April 7, 1980, was denied by the undersigned in an Order dated April 21, 1980, wherein said motion to dismiss dated April 7, 1980, was considered to be identical to the prior motion considered and denied by Judge Fauver.

On April 29, 1980, Petitioner requested and was sent a subpoena requiring Mr. James A. Baker to appear at the hearing in Denver, Colorado on May 7, 1980 at 9:00 a.m.

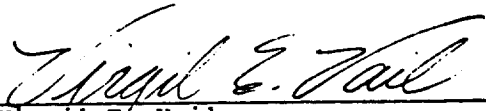
The hearing convened on May 7, 1980, at 8:50 a.m. in Denver, Colorado, with Michael C. Bolden appearing as counsel for the Petitioner and Gary W. Callahan appearing as counsel for the Respondent. At the commencement of the hearing, Mr. Bolden explained that Mr. Baker, the Government's witness, refused to come to the hearing and that without his testimony, the Government was unable to establish a prima facie case and Petitioner requested a continuance of the case.

Respondent then moved again that the case be dismissed and said motion was granted in a decision from the bench as follows:

"JUDGE VAIL: I see no justification for continuing to subject the Respondent in this case to additional expenses, and I am going to grant your motion to dismiss the citation and the assessment of a penalty against the Clinchfield Coal Company. The basis for this is that I feel that the Petitioner should have secured a subpoena earlier and had it served on Mr. Baker, and then of course if he had failed to appear at this hearing, there is a proceeding for enforcing the compliance, but I feel that's the least that the Government should have done in this case; that with the history of Mr. Baker's uncooperativeness in the last instance, we could have foreseen, or the Government could have foreseen, additional problems in having him appear here, and I feel that based on the fact that proper procedures were not followed in either securing his deposition or in serving him with an official subpoena in order to at least have him in violation of that, is failure on the part of the Government to take whatever basic necessary steps would have been necessary to prove their case. I think that there's merit to the argument of the Attorney for the Respondent that they have been prepared both in Virginia at the original hearing and again at the time of the continuation for the subsequent hearing date set, and now here, they are prepared to proceed with their case, and having these expenses, and I feel that my dismissing this penalty is only proper in the sense."

The bench decision is hereby affirmed.

It is hereby Ordered that as set forth herein, the bench decision granting Respondent's motion to dismiss Docket Number NORT 78-395-P is affirmed and Citation Control Number 44-04251-02011 I is vacated.

  
Virgil E. Vail  
Administrative Law Judge

Distribution:

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