

CCASE:
VIRGINIA POCAHONTAS V. SOL (MSHA)
DDATE:
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TTEXT:

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

VIRGINIA POCAHONTAS COMPANY, CONTESTANT	Contest of Citations
v.	Citation
	Docket Nos. Nos. Date
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	VA 79-131-R 696067 8/17/79 VA 79-137-R 696089 8/17/79 Virginia Pocahontas No. 2 Mine

DECISION GRANTING MOTION TO DISMISS

The issues involved in the above-entitled cases were consolidated and scheduled for hearing in an order issued February 29, 1980. The issues raised by the Notices of Contest are whether Virginia Pocahontas Company violated section 103(f) of the Federal Mine Safety and Health Act of 1977 by refusing to pay miners' representatives for accompanying inspectors who were conducting other than regular inspections pursuant to section 103(a) of the Act.

The Commission held in The Helen Mining Co., 1 FMSHRC 1796 (1979), and in Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), that an operator does not have to pay a miner who accompanies an inspector who is making a "spot" inspection. Those decisions have been appealed by the Secretary and UMWA to the United States Court of Appeals for the District of Columbia Circuit. In a subsequent order issued March 11, 1980, I granted a motion for stay filed by counsel for the Secretary. After I became aware that the Commission in The Helen Mining Co., 2 FMSHRC 778 (1980), had denied a motion for stay based on the same argument which had been used by the Secretary's counsel in the motion for stay granted by my order issued March 11, 1980, I issued a further order on July 8, 1980, dissolving the stay and requiring the parties to state whether these cases could be disposed of on the basis of stipulations in lieu of holding hearings.

In response to my order of July 8, 1980, counsel for the Secretary filed on August 12, 1980, the following stipulations:

Virginia Pocahontas Company, Virginia Pocahontas No. 2 Mine, I.D. No. 44-01009, VA 79-131-R. This proceeding concerns 104(a) Citation No. 0696067, issued on August 17, 1979, when

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the Mine Operator refused to compensate Mary Griffith, miners' representative, who accompanied a Federal mine inspector on May 3, 1979, on a ventilation technical inspection,

Virginia Pocahontas Company, Virginia Pocahontas No. 2 Mine, VA 79-137-R. This proceeding concerns 104(a) Citation No. 0696089, issued on August 17, 1979, when the Mine Operator failed to compensate three different representatives of the miners for accompanying three different inspectors on July 17, 1979, on a ventilation survey.

The Office of the Solicitor and MSHA stipulate that none of the above inspections was a regular inspection. [Emphasis is part of all material quoted above.]

Counsel for Virginia Pocahontas filed on August 18, 1980, a letter in which he concurred in the descriptions of the facts set forth in the stipulations above and moved that I vacate Citation Nos. 696067 and 696089 on the grounds that both citations alleged violations of section 103(f) pertaining to other than regular inspections for which Virginia Pocahontas does not have to compensate the representatives of miners who accompanied the inspectors who were making "spot" inspections.

Counsel for the Secretary filed a letter on August 19, 1980, in which he recognized that the Commission's decision in the Helen Mining and Kentland Elkhorn cases, supra, would require the granting of the motion to vacate filed by counsel for Virginia Pocahontas, but stated that he opposes the grant of the motion in order to preserve the Secretary's position in the court proceedings challenging the Commission's decisions in the aforesaid cases.

I find that the Commission's decisions in the Helen Mining and Kentland-Elkhorn cases, supra, are dispositive of the issues raised by the Notices of Contest filed in this consolidated proceeding. The sole issue is whether Virginia Pocahontas violated section 103(f) when it refused to compensate the miners' representatives who accompanied the inspectors during their "spot" inspections. Although Virginia Pocahontas did subsequently pay the miners under protest so as to keep the inspector from issuing withdrawal orders, it is clear under Commission precedent that Virginia Pocahontas did not violate section 103(f) by initially refusing to pay the miners' representatives on May 3, 1979, and July 17, 1979. Therefore, I find that Citation Nos. 696067 and 696089 dated August 17, 1979, should be vacated and the Notices of Contest should be granted.

My order setting the cases in this proceeding for hearing consolidated for purposes of hearing and decision all civil penalty issues which might be raised when and if Petitions for Assessment of Civil Penalty were subsequently filed with respect to Citation Nos. 696067 and 696089. If counsel for Virginia Pocahontas will ask in any answer to such prospective Petitions

that the cases be assigned to me, I shall dismiss those Petitions
on the

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basis of my ruling in this decision if there is no change in the outstanding law at that time.

It should be noted that my order of February 29, 1980, had consolidated with the issues raised in Docket Nos. VA 79-131-R and VA 79-137-R all issues raised by Virginia Pocahontas in its Notice of Contest in Docket No. VA 79-136-R. The Commission's Helen Mining and Kentland-Elkhorn decisions did not dispose of one of the issues raised by the Notice of Contest in Docket No. VA 79-136-R. Therefore, the parties have requested that a hearing be held concerning one of the issues raised in Docket No. VA 79-136-R. The issues raised in Docket No. VA 79-136-R will be set for hearing by separate order. The order in this case will sever the issues raised in Docket No. VA 79-136-R from the issues raised by the other two Notices of Contest involved in this proceeding.

WHEREFORE, it is ordered:

(A) The issues raised by the Notice of Contest filed in Docket No. VA 79-136-R are severed from this consolidated proceeding and the Notice of Contest filed in Docket No. VA 79-136-R will be scheduled for hearing by a separate order as requested by the parties.

(B) The Notices of Contest filed in Docket Nos. VA 79-131-R and VA 79-137-R are granted and Citation Nos. 696067 and 696089 dated August 17, 1979, are vacated.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)