CCASE:
SOL (MSHA) V. SALT LAKE COUNTY RD DEPARTMENT
DDATE:
19801125
TTEXT:

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. WEST 79-365-M
v.	MSHA CASE NO. 42-00890-05001
SALT LAKE COUNTY ROAD DEPARTMENT, RESPONDENT	MINE: Welby Pit

APPEARANCES:
Robert Bass, Esq., Office of the Solicitor, United States Department of Labor, Kansas City, Missouri
for the Petitioner

Kevin F. Smith, Esq., Salt Lake County Attorney Office, Salt Lake City, Utah
for the Respondent

Before: Administrative Law Judge Virgil E. Vail

STATEMENT OF THE CASE

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. [hereinafter referred to as "the Act"]. On March 27, 1979, an official representative of the Mine Safety and Health Administration (MSHA) issued citation number 336350 to the respondent for an alleged violation of mandatory safety standard 30 C.F.R. 56.14-1(FOOTNOTE 1). The citation charged that the respondent failed to have a feeder pulley guard in place. A penalty of $60.00 was proposed by the MSHA Office of Assessments.

On August 28, 1979, respondent notified the Mine Safety and Health Administration that it wished to contest the alleged violation. Petitioner filed a proposal for penalty and motion to accept late filing of proposal for penalty on December 10, 1979. Petitioner stated that his reason for the delay in filing the proposed penalty was a lack of clerical personnel and a high volumn of cases.

On January 11, 1980, respondent filed an "answer" and a motion for summary decision requesting an order dismissing said proposal for penalty by reason of the late filing.

A hearing was held on July 23, 1980 in Salt Lake City, Utah. At that time the parties stipulated to a settlement agreement, as to the penalty assessment for the violation involved herein; subject to a determination of the three issues raised by the respondent in its motion for summary decision.

Issues:

The issues in this case are as follows:

(1) Whether the gravel pit involved herein and operated by Salt Lake County is exempt from regulation under the Federal Mine Safety and Health Act of 1977, (2) whether the inspection was lawfully conducted, and, if so, (3) whether the proposal for penalty should be dismissed due to the late filing thereof.

DISCUSSION

1. Whether the pit in question is under the jurisdiction of the Federal Mine Safety and Health Act of 1977.

The premises involved herein are described as a small "mine" from which sand and gravel are extracted by the respondent, Salt Lake County Highway Department, for use on local roads within the State of Utah. The respondent did not sell its products outside the State of Utah (Tr. 5).

The respondent contends that the Tenth Amendment to the United States Constitution prohibits Congress from exercising authority over integral governmental operations of a state by invoking the commerce clause. More specifically, respondent argues that the building and maintaining of roads is an "integral function" of the state, and free from Congress' power under the commerce clause. As authority, respondent cites the United States Supreme Court case of National League of Cities v. Usery, 426 U.S. 833 (1976). Respondent concedes that not all of a state's proprietary activities are exempt from regulation, but contends that construction and maintenance of public roads, including raw materials needed for such construction and maintenance, are integral governmental services. The petitioner argues that sand and gravel pits operated by the state and local governments are subject to the Act.

In National League of Cities v. Usery, supra, the Supreme Court held as unconstitutional the minimum wage and overtime provisions of the Fair Labor Standards Act, as applied to employees of state governments. The Court held that such provisions take away the state's freedom to structure integral operations in areas of traditional government functions and are not within the authority granted Congress by the commerce clause.

The question here then is whether the respondent's operation of a gravel pit that is used in furnishing materials for maintenance of local roads is a traditional, integral, government service.

The Court in National League of Cities v. Usery, supra, conceded that a state's operation of a railroad would not be exempt from federal regulations. This upheld decisions in two earlier cases, United States v. California, 279 U.S. 182 (1936), and Parden v. Terminal Railroad Company, 377 U.S. 184 (1964) involving state railroads in conjunction with state-owned and operated docks.

A review of a number of federal court decisions considering this issue indicates that each factual situation must be closely scrutinized. In Friends of the Earth v. Carey, 552 F.2d 25 (2nd Cir. 1977), the Court determined that certain provisions of the Federal Clean Air Act could be enforced against the State with regard to traffic control. A different decision was reached in Jordon v. Mills, 473 F. Supp. 13 (E.D. La. 1979) where the Court held that a state run store in the prison was not subject to antitrust statutes, but was a fundamental state function and an integral part of running a prison.

The issue of whether state owned and operated sand and gravel pits are under the jurisdiction of MSHA and whether enforcing the Act against the state violates the Tenth Amendment was previously raised in a Commission proceeding decided by Judge Laurenson in the case of Secretary of Labor, Mine Safety and Health Administration (MSHA) v. New York Department of Transportation, Docket Nos. YORK 79-21-M, WILK 79-102-PM, YORK 80-2-M, (July 3, 1980). This case involved a similar factual situation, wherein the state extracted and stored sand for highway maintenance. In addressing the proposition that the Tenth Amendment prevented MSHA from enforcing the Act against state operations, Judge Laurenson concluded "(T)hat mining sand and gravel is not a traditional governmental function; maintaining roads is such a function. cf., Friends of the Earth, supra. Comparing the facts in this case with the federal decisions, mining is not an integral or essential part of the state function."

In a Commission proceeding involving the same question of whether a pit operated by a political subdivision of the State of Washington was exempt from MSHA regulation, Judge Morris held that mining was not an integral governmental function. He stated as follows: "The maintenance of county roads is an essential and traditional service of local governments. The operation of a mine is not .... The operation of a sand and gravel pit is not an activity that is necessary to the separate and independent existence of a state." Secretary of Labor, Mine and Safety and Health Administration, (MSHA) v. Island County Highway Department, DOCKET No. WEST 79-372-M. (November, 1980) I agree with the conclusion reached in these two cases.

The operation of a sand and gravel pit is not necessarily a typical or required function of the states or their political

subdivisions. The products used from such operations, although required in the construction and maintenance of roads, is usually available from other sources in the

state. I find an analogy here with the decision in United States v. California, supra, relating to the railroads and their relationship to the state owned docks. I find that the respondent's operation of a gravel pit is not an integral governmental function and that such pit is therefore subject to MSHA regulation.

2. Whether the inspection herein was lawfully conducted

The respondent argues that a judicially sanctioned permit was required before the Secretary's inspector could lawfully enter the mine premises. As authority for this position, respondent cites Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). I find that the established law is to the contrary. In Marshall v. Nolichuckey Sand Company, Inc., 606 F. 2d 693 (6th Cir. 1979), cert. denied, 100 S.Ct. 1835 (1980), a warrantless inspection of a sand and gravel "mine" under the Act was upheld. The Court in that case stated that the enforcement needs of the mining industry made provisions for warrantless inspections reasonable. Further, in Marshall v. Stoudts Ferry Preparation Company, 602 F. 2d 589 (3rd Cir. 1979), a warrantless inspection of the company's sand and gravel preparation plant was found to have satisfied the reasonableness standard as set forth in Marshall v. Barlow's, Inc., supra.

3. Whether the proposal for penalty should be dismissed due to the late filing thereof.

The respondent argues that the proposal for penalty should be dismissed on the grounds that it was untimely filed and is in violation of the law and regulations, particularly as to the time limits for bringing a case, as set forth in Title 29 of the Code of Federal Regulations. Respondent asserts that the time limits set out in 29 C.F.R. 2700.272 are mandatory and should apply equally to all parties.

The Petitioner concedes that he did not file the required proposal for penalty within the 45 day limit prescribed by Commission Rule 27. However, the Petitioner argues that good cause existed for the untimely filing due to an extraordinarily high case load and lack of clerical personnel to operate a word processing machine to accomplish necessary typing. He cites 29 C.F.R. 2700.93 of the Commission Rules as providing broad discretion for extending time for late filing.

A review of past decisions of the Federal Mine Safety and Health Review Commission confirms Petitioner's statement that this issue has not yet been decided by the Commission. However, the same factual situation under a similar Act was addressed in Jensen Construction Company of Oklahoma, Inc. v. OSAHRC and Marshall, 597 F. 2d 246 (10th Cir. 1979) wherein the Secretary failed to file a formal complaint within 20 days after receiving notice that Jensen was contesting the issued citations. The Secretary's formal complaint was not filed until 48 days after the Secretary received the notice of contest. The particular rules governing the time within which the Secretary shall file a complaint with the Commission under the Occupational Safety and Health Review Commission's rules of procedure are as follows:

> "29 C.F.R. 2200.33 (a)(1).
>
> The Secretary shall file a complaint with the Commission no later than 20 days after his receipt of the notice of contest.
>
> 29 C.F.R. 2200.5
>
> Requests for extensions of time for the filing of any pleading or document must be received in advance of the date on which the pleading is due to be filed."

The Secretary's excuse, in that case, for the untimely filing of his complaint was an extraordinarily large caseload. The Tenth Circuit Court of Appeals upheld the Administrative Law Judge's finding that there was no demonstrated prejudice to Jensen. The Court stated that the regulations vest broad discretion in the Commission or the Administrative Law Judge concerning the consequences to be suffered in the event of a failure to timely file any pleading permitted by such regulations. The Administrative Law Judge in that instance found no "demonstrated prejudice" and under such circumstances was disinclined to impose the extreme sanction of vacating the citation.

I find the above decision analogous to the issue here. The respondent has shown no demonstrated prejudice resulting from the late filing of the proposal for a penalty.

A review of the legislative history of the Federal Mine Safety and Health Act of 1977 reveals that the Senate Committee, when considering procedures for enforcement of the Act, considered the possibility that circumstances such as this might arise and stated as follows:

> Enforcement Procedure
>
> The procedure for enforcement of the Act is based upon the procedure under the Coal Act. After an inspection, the Secretary shall within

> a reasonable time serve the operator by certified mail with the proposed penalty to be assessed for any violations. The bill requires that the miners at the mine also be served with the penalty proposal. To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. 717, 95th Cong., p. 622. (Emphasis added).

The purpose of the time limit should not be treated lightly. However, unless the respondent shows that he was prejudiced by the late filing, the parties should proceed to a hearing on the merits of the case. I find in this case that the respondent was not prejudiced by the late filing herein.

CONCLUSIONS OF LAW

Salt Lake County Road Department, in its capacity as a mine operator of the Welby Pit, is subject to the 1977 Mine Safety Act, that the warrantless inspection was legal; and that the respondent was not prejudiced by the late filing of the proposal for penalty.

ORDER

Based on the foregoing findings of fact and conclusions of law and the stipulation entered into by the parties, I enter the following order: Citation No. 336350 together with a penalty assessment of $60.00 is hereby affirmed. Respondent shall pay the affirmed penalty within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

~FOOTNOTE_ONE

1 56.14-1. Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

~FOOTNOTE_TWO

2 2700.27 Proposal for a penalty. (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

~FOOTNOTE_THREE

3 Section 2700.0 Extension of Time. The time for filing or

serving any document may be extended for good cause shown. A request for an extension of time shall be filed 5 days before the expiration of the time allowed for the filing or serving of the document.