CCASE:
SOL (MSHA) v. OLIVER ELAM,
DDATE:
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TTEXT:

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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER
v.
OLIVER M. ELAM, JR., COMPANY, INC.,
RESPONDENT

Civil Penalty Proceedings

Docket No. 79-447-P
Docket No. VINC 79-12-P
Docket No. VINC 79-40-PM
Docket No. VINC 79-176-P
Docket No. VINC 79-177-P
Docket No. VINC 79-231-P
Docket No. LAKE 79-11
Docket No. LAKE 79-110
Docket No. LAKE 79-281

Elam Dock

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner
William H. Jones, Jr., Esq., Ashland, Kentucky, for Respondent

Before: Judge Lasher

This proceeding arises under section 105(b) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in South Point, Ohio, on July 24, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered an opinion on the record. (FN.1) My bench decision containing findings, conclusions and rationale appears below as it appears in the transcript, (FN.2) other than for minor corrections.

> These proceedings arise upon the filing of petitions by the Secretary of Labor for assessment of several (16) penalties in the nine dockets involved. The Respondent raised a jurisdictional issue in its answer which subsequently has crystalized into this question: "Whether or not Respondents docking facility is a "coal or other mine', as that term is defined in the Mine Safety and Health Act of 1977?" [30 U.S.C. 802(h)(1) and 802(h)(2)].

Section 802(h)(1) of the Act defines coal or other mine for the purpose of the Act generally. Section 802(h)(2) defines coal mine for purposes of titles II, III, and IV of the Act and I note specifically that title II thereof provides for various detailed statutory health and safety standards, in addition to the foregoing definition. The definition of "Work of preparing the coal", as provided in section 802(a) of the Act provides the statutory language which is to be interpreted in this proceeding. The parties have provided a stipulation which has placed into evidence a record of the answer of the Respondent to interrogatories propounded by Petitioner. In addition, the evidence and record consist of four photographs introduced by Respondent which show various activities being carried on at the Respondent's commercial dock some three years ago. In addition, the testimony of Inspector Thomas Luce was received on behalf of MSHA and the testimony of superintendent David Manning and Oliver M. Elam, Jr., president of Respondent, were received. The above, in addition to the official case file, constitutes the evidence and record upon which the prime jurisdictional issue is to be decided.

The Respondent is a small family corporation which does business as a commercial dock at Coal Grove, Ohio, in the vicinity of Ashland, Kentucky, and Ironton, Ohio. The Respondent has 11 employees who work interchangably between the dock and the construction aspect of the Respondent which, in essence, is an equipment rental business involving some 50 pieces of construction equipment including cranes, trucks, and bull dozers. Respondent usually has three of these employees present at its commercial docking facility on the Ohio River. The Respondent loads some 300,000 tons of coal during its busiest years and during the last two years has loaded approximately 200,000 tons of coal at this dock. In addition the docking facility loads other materials such as steel ingots, pipe, and the like, at this docking facility and the percent of tonnage loaded on to barges at this docking facility attributal to coal ranges from approximately 40 to 60 percent. Additional material is processed through the docking facility in a reverse direction, that is material is brought to the facility by barges from whence it is processed through the dock and loaded on to the trucks for delivery to its ultimate destination. The dock facility is utilized to unload tar pitch, which is a coal derivative and which is directly loaded from the loading bin on to barges without the use of a crusher which (itself) is part of the system of movement of material at the dock.

With respect to coal, Respondent does business with coal brokers, some four or five in number, who are not coal mine

operators and who arrange with Respondent to receive delivery of the coal on Respondent's premises and arrange with Respondent to load the coal on barges to deliver the coal to such customers as power plants and factories elsewhere.

Respondent has no business arrangements, contracts, or dealings directly with the coal mine operators who initially extract the coal nor does it have any arrangement with the customers who ultimately accept delivery of the coal off the barges at the point of the ultimate destination of the coal. The contract between the coal brokers and Respondent is not in writing and it does not have as any part of its basis an agreement by Respondent to crush the coal. The coal is indeed crushed by Respondent as part of its movement of the coal from the place on the premises where the coal is initially stockpiled to the barges. I find on the basis of the evidence that the only purpose the coal is crushed is for the Respondent's ease of loading. Stated another way, the Respondent crushes the coal in furtherance of its own business as a loading dock and as an accomodation to itself to avoid the problems raised (1) by coal falling off the conveyor belt and (2) by large pieces of coal falling into the loading bin which would necessitate going into the bin and manually breaking up the coal so that it can be expeditiously transported by another conveyor belt on to the barges. It also appears from the interrogatories submitted as part of this record that crushing the coal enables a larger amount of the same to be placed in a given space on the barges. Since Respondent is paid on the basis of so many dollars per ton I would infer from this record that it would be economically feasible for Respondent to load as much coal as possible on to each barge. There is no evidence that Respondent contracts to either wash, dry out, or size coal. Respondent contracts with coal brokers only to accomplish the loading of coal delivered to its premises by trucks on to barges and perhaps on occasions to accomplish the reverse process of unloading material from barges and loading on to trucks.

For purposes of this proceeding, the evidence indicates that the coal is first delivered to Respondent's premises by trucks which unload the same in stockpiles located on Respondent's premises. The coal goes into a bin where it proceeds ultimately on to a conveyor which delivers it to a crusher which is approximately 5 feet wide, 6 feet long, and 6 feet high. I note that at one point the inspector indicated that its measurements were 6 feet in each of the three respects. The crusher does not have screens or grates which are customarily used to size the coal and the crusher used by Respondent is an American Ring Crusher which breaks the coal essentially into one size after which the coal

moves on a

conveyor belt on to a barge. The first conveyor belt described in this process is 35 feet long, and it leads from the bin to the crusher. The second conveyor belt from the crusher to the barge is approximately 150 feet long. While the size of the coal so crushed by Respondent may be acceptable to power plants or perhaps other ultimate users of the coal as an energy source, there is no indication that this is part of the business service which Respondent sells to anyone, that is, the coal brokers, the coal mine operators who extract the coal in the first place, or the ultimate consumers thereof.

In addition to the coal, the only other material which Respondent receives, processes, loads, or unloads at its docking facility having any relevance to the question of whether or not it is a coal mine is tar pitch. This tar pitch is delivered to Respondent's premises in the form of a pellet and is dumped directly into the bin from which it goes directly on to the barge without being moved through the crusher. It is clear that no coal is crushed which is not put on barges and only on one occasion in furtherance of a special contract with a glass company, was any uncrushed coal loaded onto barges at Respondents dock. The Respondent, which I would interject here, is a Kentucky Corporation, does not mine coal nor does it or any of its stockholders or officers own any mineral interest. Nor does it purchase coal for resale as a coal broker. At the dock, the Respondent does not furnish equipment, such as the front-end loader, for handling of coal. The coal is handled and weighed by employees of the various brokers.

Respondent has been engaged in this process of loading coal since approximately 1975. It has operated the commercial dock, however, unloading other materials, since 1966. The facility for loading coal previously described was put in in 1975 and the crusher was an integral part of this system from the beginning. The system was originally put in because a company in West Virginia, described by Superintendent Manning as a group of attorneys, wanted a place to load coal. After Respondent installed the loading system, the arrangement fell through and a year and a half elapsed during which time the crusher and the other coal loading system was not utilized. Ultimately, Respondent, which initially wanted to lease this facility, went into the business of loading coal.

To repeat for the purpose of clarity, Respondent is not paid to crush coal, to store it, to wash it, to dry it, or to size it. Respondent's employees are not represented by United Mine Workers of America or any other union, and these

employees are esentially engaged in all the duties and responsibilities invoked by the Respondents construction business and it's commercial loading business.

On the basis of the foregoing, I concude that the crushing of coal, as well as the storage of coal, on Respondent's premises are clearly incidental to its only function of loading this coal on barges. If Respondent is engaged in the crushing of this coal and using its loading business as a guise to mask it's doing business as a coal preparation plant, it is certainly carrying this out with a great degree of success. I find no evidence whatsoever that this is the case. This is bolstered by the fact that at Respondent's facility during the movement of the coal from the stockpiles to its final unloading point on the barge, there are no screens or grates which would size the coal or remove the impurities. Such would also be necessary to "blend" coal for special purposes.

The statutory definition of coal or other mine obtained in section 802(h)(1) of the Act contains three concepts. The first concept provides that a coal mine is an "area of land from which minerals are extracted in non-liquid form." The second concept provides for the inclusion of "Private ways and roads pertinent to such area." (This) refers back to the first definition which specifies that it's a given area of land from which minerals are extracted. The third concept refers to "lands, excavations, underground passage ways, shafts, slopes, tunnels and workings, structures, facilities, equipment, etc., on the suface or underground, used in either the work of extracting such minerals from their natural deposits used in either "the milling of such minerals or the work of preparing coal or other minerals, and includes custom coal preparation facilities." As indicated by MSHA's counsel, the question narrows to whether or not this Respondent is engaged in the work of preparing coal. The definition contained in section 802(h)(2) of the Act-which is confined to the purposes of titles II, III, and IV of the Act-is similar to that contained in the third concept of section 802(h)(1). After studying the same I conclude that again the same question arises, that is, whether or not the impact which Respondent's dock facility places upon the coal which is delivered there constitutes the work of preparing the coal so extracted. Section 802(i) defines the work of preparing the coal as, "The breaking, crushing, sizing, cleaning, washing, drying, mixing, storage, and loading of bitumonous coal, lignite, or anthracite and such other work of preparing such coal as is usually done by the operator of the coal mine."

First off, to state the obvious, it is clear that Respondent is not engaged in the extraction of coal, either undergrund or by strip mining, nor is its business purpose to prepare coal or to perform any of the functions which would be involved in preparing coal such as washing it, extracting the impurities, crushing it, sizing it, blending it, and the like. A contention and point made by MSHA is that the coal industry is "pervasively regulated." I do not construe this phrase to mean that all businesses which store or crush coal come within the purview of the Mine Safety and Health Act. For example, does the business which makes coal figurines or art objects become a coal mine because it stores coal or changes the size of the coal? Does a factory or other business which uses coal as a fuel, and which performs various physical functions on the coal, such as washing the coal, breaking the coal up, sizing the coal, and the like, become a coal mine? I do not think so. In order to accept the position of MSHA in this case and conclude that the commercial dock facility of the Respondent is a coal mine, the basis would have to be acceptable that the physical functions performed on the coal such as crushing, storage, loading, and the like, (alone) establish a business entity as a coal mine. I find that the reading of the statutory definition by MSHA in this case is hyper-technical. It represents a common fallacy in reasoning. To give an illustration, one may say a housecat is a four legged animal with two eyes and a tail, and an elephant is a four legged animal with two eyes and a tail; (that) some cats are gray, and some elephants are gray; and that accordingly, cats are elephants. * * * The fact that some person or business entity loads coal and stores coal and crushes coal and the fact that a coal mine may do the same thing, does not automatically make that person or business a coal mine. I have considered the excellent brief of MSHA in support of its motion for partial summary judgment in this matter wherein are cited numerous cases. Most of the cases cited, however, involved mine operators actually engaged in the removal of the coal from its place in the ground.

I find the storage and crushing of coal by Respondent is purely incidental to it's engagement in an enterprise entirely unrelated to coal mining, and that Respondent does not come within the definition of a coal mine as that term is defined in the Act. Respondent's operation is to be distinguished from the situation where a coal mine operator actually engaged in extraction, milling or preparing coal as an integral part of its operation on the same premises (or on contiguous land) engages in the storage and crushing of coal. This finding, of course, does not leave the Respondent without safety and health obligations since the decision only relates to the jurisdiction of OSHA and MSHA. * * *

As counsel for Respondent has pointed out, and I believe rightfully, the question is where the line should be drawn. There appear to be three physical phases which must be considered. The first being the actual mining or extracting of the mineral from the ground; the second being the shipment of the coal from the premises where it is mined or to the place where it is consumed, and, third, the final destination or the point of consumption by the users of the products. In this case there is no business ownership, contractual relationship or any other connection between this commercial dock enterprise and the first phase, that is, the extracting of the mineral from the ground or the milling phase. I believe the line should be drawn at that point. I thus find that Respondent is not covered by the Federal Mine Safety and Health Act of 1977, since it is not a coal mine. I therefore order that all the citations contained in the nine dockets involved herein, there being 16 such citations or orders, be vacated. There being no merit to MSHA's petition, these nine proceedings are dismissed.

The Government's position and the Respondent's position were very well presented by both counsel who did, I believe an above-par job of representing their clients in these proceedings. This case ultimately will become an important case for the Commission to decide with respect to jurisdiction.

ORDER

The 16 citations contained in the nine dockets involved herein are VACATED.

Michael A. Lasher, Jr. Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Tr. pp. 68-76

~FOOTNOTE_TWO

2 Transcription of the hearing was performed by a new reporter necessitating substantial correcting of the record.