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Federal 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. BARB 79-62-PM Assessment Control No. 40-00806-05001
v.	
NOLICHUCKEY SAND COMPANY, INC., RESPONDENT	Pit No. 436 and Mill

SUMMARY DECISION

This proceeding involves a Petition for Assessment of Civil Penalty filed on October 26, 1978, by counsel for the Mine Safety and Health Administration, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking assessment of a civil penalty for an alleged violation of section 103(a) of the Act by respondent because respondent had declined to permit an inspector to examine respondent's Pit No. 436 and Mill on the ground that a search warrant was required.

Counsel for respondent filed on July 6, 1979, a request that the hearing in this proceeding be continued until such time as the Sixth Circuit Court of Appeals had rendered a decision bearing upon the constitutionality of section 103(a) of the Act. I deferred the setting of a hearing until the Sixth Circuit had issued its decision in Ray Marshall v. Nolichuckey Sand Company, Inc., 606 F.2d 693 (6th Cir. 1979), and until the Supreme Court had denied certiorari (446 U.S. 908 (1980)). The Sixth Circuit affirmed a district court decision (Ray Marshall v. Nolichuckey Sand Company, Inc., 490 F. Supp. 1041 (E.D. 1978), which had upheld the constitutionality of section 103(a) providing for warrantless inspections of respondent's Pit No. 436 and Mill and which also had denied respondent's motion for preliminary and permanent injunction to prohibit MSHA from carrying out the provisions of the Act.

After I became aware of the fact that the Supreme Court had denied certiorari of the Sixth Circuit's decision, I issued a prehearing order on October 15, 1980, setting forth the facts to which petitioner and respondent had stipulated in the Nolichuckey case before the district court and requested that counsel for the parties advise me as to whether they could agree upon those stipulations of fact for the purpose of resolving the civil penalty issues in this proceeding. MSHA's counsel filed on November 24, 1980, a response to the prehearing order indicating that he was willing to adopt the proposed stipulations for the purpose of deciding the issues in this proceeding. Counsel for respondent filed on

November 28, 1980, a response to the prehearing order in which he stated that MSHA's counsel did not wish to settle the issues (FN.1) and that he was requesting a hearing.

Counsel for MSHA thereafter filed on December 1, 1980, a motion for summary decision, pursuant to 29 C.F.R. 2700.64, stating that there is no genuine issue as to any material fact in this proceeding and that MSHA is entitled to a summary decision as a matter of law. Attached to the motion for summary decision is a copy of the district court's Nolichuckey decision, supra. The motion states that the court's decision sets forth the facts with respect to issuance of Citation No. 107809 which is the basis for the violation of section 103(a) of the Federal Mine Safety and Health Act of 1977 alleged in the Petition for Assessment of Civil Penalty filed in this proceeding. The motion also points out that the court's decision in the Nolichuckey case avers that the parties have stipulated that respondent's Pit No. 436 and Mill are subject to the provisions of the Act.

Counsel for respondent filed on December 17, 1980, a reply to the motion for summary decision in which, among other things, he stated that evidence was required as to the issue of negligence because respondent had raised a valid constitutional issue in good faith. Respondent noted that although it lost the issue of the constitutionality of section 103(a) before the Sixth Circuit, the correctness of its argument had been recognized by the Ninth Circuit's decision in Ray Marshall v. Elden Wait, 628 F.2d 1255 (1980), finding that warrantless searches are not constitutional, thereby disagreeing not only with the Sixth Circuit's decision in Nolichuckey, supra, but with the decisions of the Third, Fourth, and Fifth Circuits which had also found warrantless searches to be constitutional (Marshall v. Stoudt's Ferry, 602 F.2d 589 (3rd Cir. 1979), cert. den. 444 U.S. 1815 (1980); Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980); and Marshall v. Texoline, 612 F.2d 935 (5th Cir. 1980)).

Section 2700.64(d) provides that if a judge finds it necessary to deny a motion for summary decision because an evidentiary hearing is required, he shall issue an order specifying the factual issues as to which a substantial controversy exists. Inasmuch as it appeared to me that the issue of respondent's negligence, if any, was dependent upon uncontroverted facts as to which no hearing was required, I issued on December 24, 1980, a second prehearing order requiring respondent's counsel to specify the facts which he would adduce if a hearing were to be scheduled in this proceeding. Respondent's counsel filed on January 30, 1981, a response to that order stating that he had now decided to agree to the stipulations of fact set forth in my first prehearing order of October 15, 1980, and that he did not wish to present any witnesses at a hearing for the purpose of adducing facts in addition to those stated in my prehearing order of October 15, 1980.

I conclude from respondent's reply to my second prehearing order that respondent is now agreeable to my granting MSHA's motion for summary decision and to my rendering a decision in this proceeding upon the basis of the stipulations of fact set forth in my first prehearing order. The facts which the parties have agreed to stipulate are:

> 1. Charles E. McDaniel, an authorized representative of the Secretary of Labor, went to Nolichuckey Sand Company, Inc.'s Pit No. 436 and Mill on April 11, 1978, for the purpose of making a regular inspection pursuant to section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(a).
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> 2. Thomas Bewley, Nolichuckey's vice-president, refused to permit Inspector McDaniel to make an inspection of the pit or mill on the ground that the inspector needed a search warrant authorizing him to make such an inspection.
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> 3. Inspector McDaniel returned the next day, April 12, 1978, and was again refused permission to inspect the pit or mill because he did not have a search warrant.
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> 4. After Inspector McDaniel had been denied permission to inspect Nolichuckey's pit and mill, he issued Citation No. 107809 dated April 12, 1978, under section 104(a) of the Act alleging that Nolichuckey had violated section 103(a) of the Act.
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> 5. Nolichuckey's pit and mill are subject to the provisions of the Act.
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> 6. Inspector McDaniel was not harmed or threatened with physical assault or verbal abuse on the 2 days when he was not permitted to inspect the pit and mill.
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> 7. Nolichuckey's business involves 20,754 man-hours per year. Therefore, Nolichuckey operates a small business.
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> 8. Payment of penalties will not cause Nolichuckey to discontinue in business.

The issues in a civil penalty case are whether a violation of the Act or the mandatory health or safety standards occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Occurrence of Violation

The Petition for Assessment of Civil Penalty in this proceeding alleges that respondent violated section 103(a) of the Act. Section 103(a), in pertinent part, provides:

> (a) Authorized representatives of the Secretary or the

Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year * * *.

> [T]he Secretary shall make inspections * * * of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

There can be no doubt about the fact that section 103(a) gives MSHA inspectors "a right of entry to, upon, or through" a mine for the purpose of making inspections. The findings of fact, supra, show that respondent's vice-president on 2 successive days declined to allow an MSHA inspector to enter its pit or mill for the purpose of making an inspection. While respondent is entitled to assert a constitutional right in contesting the validity of section 103(a)'s provision for warrantless searches, in doing so, it runs the risk of being cited for a violation of the Act. The legislative history leaves no doubt but that Congress intended for the inspectors to be able to make inspections without obtaining a search warrant. Page 27 of Senate Report No. 95-181, 95th Cong., 1st Session, contains the following comments regarding warrantless searches (Legislative History of the Federal Mine Safety and Health Act of 1977, Subcommittee on Labor, July 1978, p. 615):

> * * * The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant. This intention is based upon the determination by legislation. The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.
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> The Committee has specifically adopted the prohibition on advance notice of inspections which is currently the rule under the Coal Act, and rejects the provision of the Metal Act which permits such advance notice.

I conclude on the basis of the clear language of section 103(a) and the legislative history of that section that Congress wanted inspectors to be able to enter all mines for the purpose of inspecting them without having to give any advance notice or having to obtain a search warrant. Consequently, I find that a violation of section 103(a) occurred when respondent refused to

allow the inspector to enter his pit or mill for the purpose of making a regular inspection (Finding Nos. 1-3, supra).

Assessment of Penalty

Section 110(a) of the Act provides that "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty * * *". Since I have found that a violation of the Act occurred, it is now necessary that a penalty be assessed after consideration of the six criteria set forth in section 110(i) of the Act. Stipulation of Fact Nos. 7 and 8, supra, have already covered two of the six criteria, namely, the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business.

As to the criterion of respondent's history of previous violations, the Proposed Assessment in the official file shows that the Assessment Office assigned zero penalty points under that criterion when it determined a proposed penalty under the assessment procedures set forth in 30 C.F.R. 100.3. On the basis of the Proposed Assessment, I find that no increase in a penalty otherwise determinable under the other criteria should be made under the criterion of respondent's history of previous violations.

The criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance should be applied in relation to the fact that respondent found it necessary to bar the inspector from making a warrantless inspection so that an appeal of the constitutional issue could be made. In Bituminous Coal Operators' Association, Inc. v. Ray Marshall, 82 F.R.D. 350 (D.D.C. 1979), the court denied BCOA's attempt to obtain review of an interpretative bulletin published by the Secretary of Labor with respect to the walk-around rights of miners under section 103(f) of the Act. The court noted that it would be necessary for an operator to violate that section of the Act in order to obtain judicial review of the enforcement procedures which MSHA intended to use with respect to a miner's walk-around rights. The court also recognized that the operator would be subject to a civil penalty for violating the section just to test MSHA's enforcement procedures. The court then stated (82 F.R.D. at 354) that "* * * it would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section 103(f), a provision which normally is not absolutely vital to human health and safety". Since respondent in this proceeding found it necessary to violate section 103(a) for the sole purpose of testing the constitutionality of a provision of the Act, I find that no portion of the penalty should be assessed under the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance.

As to the criterion of negligence, here again, respondent deliberately had to violate section 103(a) for the purpose of raising a constitutional issue. A willful violation could be considered to be in the category of gross negligence if respondent had not in good faith raised a valid constitutional

issue. As indicated in the first part of this decision, although respondent lost the constitutional issue in its own litigation,

the Ninth Circuit held section 103(a)'s warrantless search provision to be unconstitutional in the Wait case, supra, and a district court held that provision to be unconstitutional in Marshall v. Douglas Dewey and Waukesha Lime & Stone Co., 493 F.Supp. 963 (E.D. Wis. 1980), appeal pending, U.S. Supreme Court No. 80-901. The fact that two courts have held the warrantless search provision to be unconstitutional and that the matter is now pending before the Supreme Court of the United States show that respondent raised a valid constitutional issue.

In the Dewey case, the court was critical of another court's holding in the Sink case, supra, to the effect that the injunction procedure in the Act permits an operator to present his objections to a district court before any sanctions are imposed. The court then noted in the Dewey case that Dewey had to pay a civil penalty of $1,000 for a violation of section 103(a). The court in the Dewey case then stated (493 F.Supp. at 965):

> While the preliminary injunction proceedings may get the defendants into court to vindicate their constitutional rights, the cost to them is indeed quite high. It seems a strange procedure to impose such a burden on a citizen in order to enjoy the fruits of the Fourth Amendment which courts are enjoined to liberally construe, and to which all owe a duty of vigilance for its effective enforcement, lest there be an impairment of those very rights for which it was adopted. Ker v. State of California, 374 U.S. 23, 83 S. Ct. 1623, 10 L.Ed.2d 726 (1963). This is a particularly high cost to pay to protect valid privacy claims. The mine operator must choose between protecting valid privacy interests or his pocketbook. In essence, the injunctive procedure does not present a fair means for protecting privacy interests.

The Ninth Circuit made similar comments in its Wait decision when it stated (628 F2d at 1259):

> * * * While we accord Congress great deference in matters within its constitutional competency, we cannot allow it to determine by statutory definition the privacy expectations of American citizens. It is the duty of this court to preserve the constitutional values embodied in the Bill of Rights. In this day of ever-increasing federal health and safety regulation, it is especially important that we view encroachments upon individual privacy with exacting scrutiny. Blanket application of this type of regulation to businesses large and small demands that we carefully avoid the trampling under of the rights of those whose expectation of privacy in their enterprises may be real and substantial.

In view of the courts' belief that an operator ought to be able to test the constitutionality of the Act without being exposed to large civil penalties, I believe that the criterion of

negligence should be given very little weight in assessing a civil penalty in this proceeding.

The final criterion to be considered is the gravity of the violation. The district court in the Nolichucky case at 490 F.Supp. 1041 stated at page 1043 that the inspector had gone to respondent's mine for the purpose of making a periodic safety and health inspection and that the sole purpose of the attempted inspection was to check routinely for possible violations of the Act. The court said that the inspector had no knowledge of any specific violation at respondent's pit or mill.

If the inspector had had reason to believe that dangerous conditions existed in respondent's pit or mill, he could have issued a withdrawal order and could, if necessary, have sought an injunction to require respondent to comply with the order. Moreover, if the inspector thereafter found any serious violations when the inspector examined respondent's pit and mill subsequent to respondent's losing its constitutional challenge to warrantless searches, those alleged violations became the subject of civil penalty proceedings, and if those violations are found to merit large penalties, they will no doubt be assessed in future cases.

There is no evidence that respondent's constitutional challenge of section 103(a) left any of respondent's employees exposed to dangerous conditions while the constituional issues made their way through the courts. It would be just as speculative for me to assume that employees were exposed to dangerous conditions as it would be for me to find that they were not. Therefore, as to the criterion of gravity, I find that little weight should be given to that criterion in assessing a civil penalty in this proceeding. In view of the fact that a small operator is involved and that the inspector was not exposed to any threat of assault or verbal abuse, I find that respondent should be assessed only a nominal penalty of $50 for the exercise of a valid constitutional right in challenging the warrantless search provisions of section 103(a) of the Act.

WHEREFORE, for the reasons given above, it is ordered:

(A) The motion for summary decision filed December 1, 1980, by counsel for the Secretary of Labor is granted.

(B) Within 30 days from the date of this decision, respondent shall pay a civil penalty of $50.00 for the violation of section 103(a) of the Act alleged in Citation No. 107809 dated April 12, 1978.

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

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~FOOTNOTE_ONE

1 MSHA's counsel also filed a response to the letter from respondent's counsel stating that respondent's version of his telephone conversation with respondent's counsel was contrary to

his understanding of that conversation.