FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 2 2 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceedings : Docket No. VINC 79-93-P : A.O. No. 12-01433-03002
v.	: Docket No. VINC 79-102-P'
JOHN L. HAVILAND, ROBERT P. HAVILAND, and CLEVE RENTSCHLER, d/b/a HAVILAND BROTHERS COAL COMPANY, Respondent	: A.O. No. 12-01433-03003 : Haviland Strip Mine

ORDER TO SHOW CAUSE

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner; George A. Brattain, Esq., Terre Haute; Indiana, for the respondent.

Before: Judge Koutras

Statemeht of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety and health standards found in Part 71, Title 30, Code of Federal Regulations. Respondent filed timely answers and contests denying the alleged violations, and asserting that it is not subject to the Act because the products of its mining activity do not enter or affect interstate commerce. A hearing was convened in Terre Haute, Indiana, on July 1, 1980, and the parties appeared and participated therein.

The July 1, 1980, Hearing

An inform+ prehearing conference was conducted prior to going on the record, and the purpose of the conference was to afford counsel an opportunity to discuss the parameters of the hearing as well as to advise me as to the status of the court action initiated by the Secretary to enjoin the respondent

from refusing entry to MSHA inspectors attempting to inspect respondent's mining operation, Ray Marshall, Secretary of Labor, U.S. Department of Labor v. John L. Haviland, et al., No. TH 77-178-C, District Court, S.D. Indiana, Terre Haute Division.

Respondent's counsel asserted that while the initial injunction action was brought by the Secretary of the Interior, the Secretary of Labor was substituted as a party plaintiff when the 1977 Act became effective, and that a motion to stay further enforcement by the Secretary is still pending before the court (Tr. 36-37). Counsel asserted that the motion was filed November 3, 1978, that it is in effect a motion to restrain the Secretary from continuing its enforcement activities at the subject mine (Tr. 38), and that the Commission is not a party to that court action (Tr. 40).

Respondent's counsel objected to the commencement of the hearing on the ground that the motion is still pending and that the question concerning the Secretary's enforcement jurisdiction over the respondent's asserted "self-employed" mining operation is still pending with the court. Counsel submitted a copy of a Memorandum Order issued by the Honorable James E. Noland, District Court Judge, on February 24, 1978, denying the Secretary's motion for a preliminary injunction to compel the respondent to permit MSHA inspections of its mine. Judge Noland reserved any ruling on the respondent's motion to dismiss the case, and as of the date of the hearing the matter was still pending before the court.

Petitioner took the position that the respondent is engaged in the business of mining coal at its strip-mining operation and that the mine is subject to the Secretary's enforcement jurisdiction even though its operations may only be intrastate. In support of its jurisdictional argument, petitioner relies on sections 3(h) and 4 of the Act. Section 3(h) defines a "coal mine," and section 4 states that "[e]ach coal mine, the products of which affect commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." Citing the cases of Secretary of Labor-v. Shingara, 418 F. Supp. 693 (E.D. Pa. 1976); Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Wickard v. Filburn, 317 U.S. 111 (1942); and Fry v. United States, 421 U.S. 542 (1974), petitioner asserts that since the coal mining industry is a pervasively regulated industry which affects commerce, it is-clear that respondent's mining operation is subject to the Act.

Petitioner also asserted that since the court has not rendered a final decision as to the jurisdictional question, the Commission has jurisdiction to proceed with the instant civil'penalty proceedings without prejudicing respondent's rights in the pending court action (Tr. 30).

With regard to the Secretary's policy concerning any further attempts to inspect respondent's mining operation subsequent to the October 18, 1977, refusal of entry to its inspectors, petitioner's counsel stated that when respondent Robert Haviland advised the inspectors not to return to the mine site without a warrant, that request was honored, and MSHA inspectors have

made no further attempts to inspect the mine (Tr. 30-31). Although counsel took the positionthat the Secretary has the authority to conduct warrantless inspections, no further attempts have been made to conduct such inspections at the mine in question (Tr. 32).

Petitioner's motion to amend its pleadings to name two additional parties comprising respondent's coal company, a partnership, was granted (Tr. 8-11). The record reflects that copies of petitioner's motion to amend were served on respondent's counsel of record, and counsel's objection that the individual partners were not served was rejected (Tr. 11).

In view of the fact that the Commission was not joined as a party to the case pending before the court, and considering the fact that the Commission is independent of the Department of Labor, it is my view that Judge Noland's order does not enjoin or otherwise limit the Commission's jurisdiction to continue with its administrative determination and adjudication of a case properly before it. Accordingly, counsel's objections were rejected and the hearing proceeded over his continuing objections (Tr. 45). Testimony and evidence in support of the two alleged violations were presented by MSHA during the course of the hearing, and respondent was given a full opportunity to cross-examine the inspectors and to present any testimony or evidence in defense of the citations. Aside from certain information concerning the' size and scope of its mining operation, and its jurisdictional arguments, respondent declined to advance any affirmative defense to the conditions or practices cited as alleged violations of the standards in question and it called no witnesses on its own behalf (Tr. 168-169).

By agreement and stipulation, the parties agreed that the findings of fact made by Judge Noland in his February 24, 1978, Memorandum Order may be incorporated by reference and adopted by me in these proceedings (Tr. 212). However, the parties were advised that I retain continuing jurisdiction in these proceedings before the Commission and that the parties are not foreclosed from eliciting additional information at any subsequent hearing concerning any additional factual, jurisdictional, or other matters (Tr. 213).

With respect to the statutory criteria found in section 110(i) of the Act concerning the size of respondent's mining operation and the effect of any civil penalties on this operation, respondent's counsel stated that he was prepared to show that in the year 1977 respondent's annual coal production was 9,654 tons, which sold for $8 a ton to the Log Cabin Coal Company, for approximately $77,200 in gross revenues. Production in 1978 was 6,565 tons, with gross sales to Log Cabin in the amount of $65,565. For the year 1979, respondent's annual production was 6,132 tons, with gross sales to Log Cabin in the amount of $73,534, and direct local sales amounting to $250. Counsel stated that all of these revenues for the period 1977 to 1979, are gross sales and do not reflect expenses for gas, oil, or the partnership profits realized from such sales. As an example, counsel stated that net revenues to the partnership for the year 1979 amounted to $44,357, and he estimated that this reflects one of the smallest coal mining operations in the State of Indiana (Tr. 215-216).

Respondent's counsel described the mining operation carried out by the partnership as a stripping operation consisting of a lo-acre tract of "gully-scrub" land which had originally been shaft mined before the year 1920. The operation is conducted by the two Haviland brothers, one of whom is a farmer, and Mr. Cleve Rentschler, their brother-in-law and a former elementary school principal. They strip mine the Brazil Block of low sulphur coal, which is some 20 to 30 feet deep, and it is a source of extra income to the partner' ship. All of the coal is sold to Log Cabin Coal Company, a shale and clay mining operation located in Brazil, Indiana (Tr. 217-220). Petitioner's counsel expressed agreement with the extent and scope'of the mining opera-tion as described by respondent's counsel and agreed that it is a small operation (Tr. 221).

There is no dispute that the respondent in this case operates a surface coal mine within the State of Indiana, that it began its mining operation in 1974, that with the exception of some 250 tons of coal sold directly by the individual respondents locally in 1979, all of the coal produced during the years 1977 to 1979 was sold intrastate to Log Cabin Coal Company located in Brazil, Indiana. It also seems clear that the mining operation is conducted solely.by the three named partners, John L. and Robert P. Haviland and Cleve Rentschler, doing business as the Haviland Brothers Coal Company (Tr. 88-90, 187-188).

Testimony and Evidence Adduced at the Hearing

Fact of Violations

Docket No. VINC 79-102-P

This case concerns a section 104(a) citation (No. 256040) issued by an MSHA inspector on August 14, 1978, charging the respondent with a violation of the provisions of mandatory standard 30 C.F.R. § 71.101(a). The citation states as follows: "The operator of the mine has not submitted the initial respirable dust samples to determine the amount of respirable dust in the atmosphere to which each employee is exposed."

MSHA inspector Clarence, Bailey confirmed that he issued Citation No. 256040 on August'14, 1978, charging a violation of section 71.101(a) for failure by the respondent to submit initial respirable dust samples to deter-mine the amount of atmospheric respirable dust to which mine employees are exposed. MSHA's subdistrict office advised him that the mine had submitted no samples, and as a result of this he issued the citation. Inspector Bailey explained that dust samples are taken by means of individual dust pumps which each sampled employee wears during a full 8-hour shift, the dust cassettes are then sent to MSHA's Pittsburgh laboratory for analysis, and the operator is notified of the results. If the samples show more than 1 milligram of dust, another sample is required within 6 months, and if the result is less than 1 milligram, only annual samples are required, He indicated that a mine operator may be temporarily certified to conduct dust surveys, and that dust samplers are available for purchase by an operator. The purpose of sampling

is to determine whether there are any dust exposure problems at the mine, and while 2 milligrams of dust is acceptable, anything above that is a violation (Exh. P-8, Tr. 173-180).

Inspector Bailey identified Exhibit P-9 as a copy of a withdrawal order he issued on September 15, 1978, after the expiration of the abatement period fixed for the citation, and that order affected the entire mine because each individual miner would have to be sampled. Inspector Bailey quoted from the condition or practice from the face of the order as follows (Tr. 183-184): "The operator of the mine failed to submit the initial respirable dust sample to determine the amount of respirable dust in the atmosphere, to which each employee is exposed. After the issuance of Citation No. 254040, dated August 14, 1978."

The order reflects that it was served by certified mail, and Mr. Bailey confirmed that this was the case (Tr. 184). He identified Exhibit P-10 as his "inspector's statement" concerning the order (Tr. 184). Mr. Bailey also indicated that samples were not required prior to 1978 because respondent was informed by MSHA that he need not submit samples, but Mr. Bailey could not specifically state why respondent was so informed (Tr. 197-198).

Docket No. VINC 79-93-P

This case concerns a section 104(b) notice issued under the 1969 Act, No. 1 B.E.P., on October 12, 1977, charging the respondent with a violation of 30 C.F.R. § 71.303(a), and it states as follows: "The operator has not conducted the initial survey of the noise levels to which each miner in each surface installation and at each surface worksite is exposed during his normal working shift." The notice contains a notation that it was "served to Bob Haviland by certified mail because the inspectors were ordered off the property being mined by the person served."

MSHA inspector Bryan E. Page testified as to his background and experience, and he confirmed that he attempted to conduct an inspection at the mine on October 17, 1977, for the purpose of ascertaining whether the respondent was in compliance with the noise level survey requirements of section 71.302. A letter dated July 22, 1977 (Exh. P-2) put respondent on notice as to the requirements for such a survey, and respondent was, given until August 17, 1977, to comply. Robert Haviland told him that he could make no inspections unless he had a warrant and he left the mine site. While there, he observed a dragline and bulldozer doing some reclamation work, and he also observed a coal shovel which was not in operation. He also observed three people there. Subsequently, on October 18, 1977, he issued a citation charging the respondent with a violation of section 71.303(a) and served it by certified mail (Exh. P-3). The citation charged the respondent with failure to submit an initial noise reading for each employee,' and while the abatement time was fixed as November 30, 1977, the citation has never been abated (Tr. 67-77). The initial citation cited the wrong standard, but it was subsequently modified to cite the correct section, 77.302(a) (Tr. 79).

Inspector Page identified Exhibit P-4 as an inspection report "cover sheet" prepared after each mine inspection. The report contains a mine identification number which is issued after an operator submits his legal identification papers upon commencing his mining operations. Mr. Page stated that respondent is a strip-mine partnership mining the Brazil Block of coal, and mined about 25 tons of coal daily on one shift from one pit, and this information was based on previous reports filed with MSHA .(Tr. 81-86). He also identified Exhibit P-5 as his "inspector's statement" which he filled out when he issued the citation (Tr. 92), confirmed that he was at the mine for 5 or 10 minutes, and that he went there on instructions of his supervisor because the respondent had not submitted a noise survey (Tr. 96).

On Cross-examination, Mr. Page confirmed that the persons he observed at the mine were the two Haviland brothers, and that any noise levels required to be surveyed were those levels to which they would be exposed. He confirmed that he has heard noise levels of 90 decibels and that this level does not offend his ears, although he has been exposed to noise levels requiring him to wear ear muffs (Tr. 96-8).

In response to further questions, Mr. Page indicated that noise levels are measured with a noise meter device held close to a persons's head, and it registers the noise level by means of a dial (Tr. 99). The survey would be taken on the three pieces of equipment he observed at the mine, namely, a loading shovel, dragline, and a bulldozer. The survey results are recorded on cards provided by MSHA, and the requirements and procedures for submitting them are found in section 70 of the standards (Tr. 99-104).

MSHA inspector Clarence Bailey testified as to his training and experience, and confirmed that he modified the citation issued by Mr. Page to reflect a failure to file an initial noise survey as required by section 71.302(a), and he did so on August 14, 1978 (Exh. P-6, Tr. 108).

Mr. Bailey quoted the condition he cited on his modified citation as follows (Tr. 110-112):

> The operator of the mine has not conducted the survey of the noise levels to which each miner in each surface installation and at each surface worksite is exposed during the normal work shift.
>
> The subject violation No. 1 BIP dated 10-13-77 was issued pursuant to section 104(b) of the Federal Coal Mine Safety and Health Act of 1969, which was amended by the Federal Mine Safety and Health Act of 1977. This violation is modified to section 104(a) of the Amendments Act to reflect this change. 71.303(a) corrected to 71.302(a).

Inspector Bailey identified Exhibit P-7 as a section 104(b) order of withdrawal he issued on August 14, 1978, for failure by the respondent to abate the previous citation concerning the noise level survey. Since MSHA

had no evidence that the survey had ever been submitted or received, he had no alternative but to issue the order which in effect ordered that all mining cease (Tr. 114). The order was transmitted to Robert Haviland by certified mail and the stamp date on the face of the order reflects that it was transmitted on September 1, 1978 (Tr. 115-116). He could not confirm when it was actually mailed or when the respondent received it (Tr. 117); and he personally did not mail it (Tr. 118).

On cross-examination, Mr. Bailey stated that since all such orders are mailed by certified mail, he believes that respondent received the order in question. However, he confirmed that he personally did not see the order or any cover letter actually placed, in the mail (Tr. 123).

In response to further questions, Mr. Bailey stated that he had no personal knowledge that respondent continued mining subsequent to the issuance of the withdrawal order of August 14, 1978, because he never returned to the mine, nor did he attempt to go back to post an MSHA closure sign at the mine (Tr. 130). However, prior to the issuance of the citation and order, he had previously inspected the mine on a regular inspection during 1976 or 1977 and issued four citations. However, when the respondent learned that it would be subjected to civil penalties for all citations issued at the mine, it prohibited Inspector Page from coming back on the property (Tr. 132).

Regarding his prior inspections, Mr. Bailey stated that he believed he issued citations for lack of a backup alarm, a seat belt, and a fire extinguisher and that they were abated and the citations terminated (Tr. 151). Respondent's counsel stated that respondent did not remit any civil penalties for these citations because they were issued against the Haviland Coal Corporation, and they were subsequently defaulted and turned over to the Justice Department for collection (Tr. 155-156).

In view of the pending court action taken by-the Secretary in this case, I issued an order on September 22, 1980, directing the parties to inform me of the status of the case pending with Judge N&land. In addition, the parties were also directed to advise me as to the necessity of any additional hearings so as to bring these cases to finality. By letter and enclosure filed October 23, 1980, petitioner's counsel filed a copy of a computer printout detailing respondent's prior history of violations, a copy of Judge Noland's Memorandum and Order of February 14, 1978, denying the.Secretary's motion for a preliminary judgment, six depositions, and additional documents and information concerning the pending court litigation. That record includes the following:

1. Depositions of John Lee Haviland and Robert Paris Haviland, taken March 28, 1978.

2. Deposition of Martin Eugene Monahan, Mayor, City of Logansport, Indiana, Chairman of the Board of Works and City Council, and Supervisor of the Logansport Municipal Utility, taken March 29, 1978.

3.. Deposition of Donald D. Kampenga, General Manager, Essex Controls Division, Electrica-Mechanical Group, United Technologies, Hartford, Connecticut, taken March 29, 1978.

4. Deposition of Edward E. Boyles, Customer Services Supervisor, General Telephone Company of Indiana, Logansport, Indiana, taken March 29, 1978.

5. Deposition of Harry A. Bahnaman, General Manager, Wilson Produce Company, Logansport, Indiana, taken March 29, 1978.

6. Copy of the official transcript of the hearing held before the Honorable James E. Noland, on January 4, 1978, with respect to defendants' motion to dismiss the Secretary's suit. The transcript contains the testimony of John Haviland, Robert Haviland, and Cleve Rentschler.

7. Several motions, briefs, legal memoranda, and copies of several court decisions dealing with the jurisdictional claims raised by the respondents in this proceeding, all of which have been filed in connection with the pending litigation before Judge Noland.

At the close of the hearing in these cases, the parties were informed that I intended to retain jurisdiction of this matter and that the cases would be continued and the record left open pending further disposition by Judge Noland. Since my order of September 22, 1980, no additional information has been forthcoming from the parties concerning the disposition of the matter before the court. Under the circumstances, and in order to insure timely adjudication of the cases now pending before me, the parties are advised that I intend to go forward with the adjudication of these cases so as to finally dispose of the cases. Accordingly, IT IS ORDERED that the parties SHOW CAUSE within thirty (30) days as to why these cases should not now be scheduled for an additional hearing to afford the parties a final opportunity to present any additional factual or legal evidence, testimony, or arguments as to the merits of the cases so as to enable me to issue timely decisions disposing of the dockets. The parties are also directed to advise me as to the feasibility of stipulating or agreeing as to any matters which are not in dispute, including incorporating by reference any prior testimony or information generated by the court suit as reflected in the record now pending before the court.

George A. Koutras
Administrative Law Judge

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