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VIRGINIA POCAHONTAS V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

VIRGINIA POCAHONTAS COMPANY, CONTESTANT	Contest of Citations
v.	Docket Nos. Citation 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 AFTER REMAND AND ORDER OF DISMISSAL

Counsel for contestant filed on October 19, 1982, in the above-entitled proceeding a motion to dismiss the notices of contest with the understanding that the dismissal will not prejudice contestant's rights in any civil penalty proceeding arising from the same citations which were the subject of the notices of contest. Section 2700.22 of the Commission's procedural rules, 29 C.F.R. 2700.22, provides that the failure to file a notice of contest of a citation " * * * shall not preclude the operator from challenging the citation in a penalty proceeding." An operator who has filed a notice of contest and who has subsequently asked that it be dismissed should be no less entitled to challenge the citation in a civil penalty proceeding than one who has not filed such a notice at all. Therefore, I conclude that dismissal of the notices of contest in this proceeding will be without prejudice to contestant's rights in any civil penalty proceeding which may develop at some future time.

In an order issued May 20, 1982, the Commission remanded these cases to me for further proceedings consistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *United Mine Workers of America v. Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (1982), cert. denied, No. 82-33, October 12, 1982. My original decision (2 FMSHRC 2586 (1980)) in this proceeding vacated Citation Nos. 696067 and 696089 because they had the effect of requiring contestant to pay a miners' representative for accompanying an inspector during a "spot" inspection. My decision had followed the precedent enunciated by the Commission's decisions in *The Helen Mining Co.*, 1 FMSHRC 1796 (1979), and *Kentland-Elkhorn Coal Corp.*, 1 FMSHRC 1833 (1979), in which the Commission had held that operators do not have to pay miners' representatives for accompanying inspectors who are engaged in making "spot" inspections. The Commission's decisions in *The Helen Mining* and *Kentland-Elkhorn* cases were reversed by the court in the *UMWA* case, *supra*.

In the circumstances described above, it appears to me that granting the motion to dismiss without reinstating the citations might leave some doubt as to the prospective status of the citations. Inasmuch as my original decision had granted the

notices of contest at the same time as the

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citations were vacated, it is possible that granting the motion to dismiss would have the implied effect of reinstating the citations, but the procedure which will remove all doubt as to the present validity of the citations under the court's UMWA decision, supra, is for me specifically to reinstate the citations. Therefore, my order will hereinafter reinstate the citations as well as grant the motion to dismiss the notices of contest.

WHEREFORE, it is ordered:

(A) Paragraph (B) of the order accompanying my decision issued September 11, 1980, in this proceeding (2 FMSHRC at 2588) is rescinded and Citation Nos. 696067 and 696089 dated August 17, 1979, are reinstated.

(B) The motion to dismiss filed by contestant on October 19, 1982, is granted.

(C) The notices of contest filed in Docket Nos. VA 79-131-R and VA 79-137-R are dismissed and this proceeding is terminated.

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