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SOL (MSHA) V. MICH COAL
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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. CENT 83-4 A.C. No. 13-01855-03501
v.	
MICH COAL COMPANY, RESPONDENT	No. 6 Mine

DECISION

Before: Judge Kennedy

This matter is before me on (1) the regional solicitor's motion to withdraw his petition for assessment of a civil penalty pursuant to Rule 11, (2) Judge Merlin's order denying the motion and directing the submission of information to support the compromise, (3) Judge Merlin's order to the regional solicitor to show cause for ignoring his order to submit information, (4) Judge Merlin's order assigning the matter to this trial judge, (5) the regional solicitor's request for reconsideration of Judge Merlin's order together with information in support of the motion to withdraw, (6) this trial judge's order to the parties to brief the jurisdictional issue and to furnish additional information to enable the judge to determine the gravity of the violation and the adequacy of the $20 penalty proposed for the offense charged, (7) the operator's response thereto, and (8) a notice of appearance by Michael McCord on behalf of the Secretary together with (a) a motion to suspend compliance with my order and (b) a motion requesting certification to the Commission of the Secretary's claim that a motion to withdraw a petition for assessment of a civil penalty at any stage of a penalty proceeding does not require formal judicial approval by the trial judge or the Commission because there is no longer a dispute between the parties subject to the Commission's jurisdiction. This latter issue goes far beyond any question I had heretofore imagined was presented by the regional solicitor's motion. For this reason alone, I would have denied the request for certification.

I deem this record a particularly inappropriate vehicle for decision of the question posed by Mr. McCord. I am also at a loss to understand why the Secretary sought to avoid a decision by the trial judge by filing a simultaneous request for interlocutory appeal with the Commission. At the time this request was filed I had not received a response to my order and had neither denied or granted the regional solicitor's pending motion to withdraw. If I grant the motion, any appeal would appear to be moot. Unless, of course, the Secretary can prevail on the Commission to issue an advisory decision on the basis of the Secretary's ex parte briefing on the matter. I do not believe the Commission's rules provide for such a decision and certainly not under the guise of an interlocutory appeal from a nonexistent dispute.

In any event, after this matter was assigned I determined the record was still deficient with respect to several of the statutory criteria, including prior violations, size of the operator and its true financial condition. I also determined that before I ruled on the regional solicitor's claim that under the circumstances presented "section 110(i) and 110(k) of the Act do not apply" to Rule 11 motions "because the Secretary has not sought an assessment to which section 110(i) would apply nor has he in any manner settled, compromised, or mitigated a penalty so as to cause section 110(k) to be invoked," I would await the solicitor's response in a related matter, Pyro Mining Company.

Interestingly enough, Mr. Mascolino's response in Pyro was at variance with both that of the regional solicitor and Mr. McCord. At this point, it is important to note that in this case (Mich Coal), the motion is to withdraw a petition for assessment of a penalty whereas in the Pyro case the motion is to dismiss the operator's "Request for Hearing with Review Commission" the so-called green card which is the operator's first pleading and notice of intent to contest the penalty proposed. In Pyro, the operator recanted his notice of contest almost immediately after he filed it by paying the amount of the penalty proposed, $20. Mr. Mascolino on behalf of the solicitor urged that this type of case be treated differently from a case like Mich Coal in which both the operator and the Secretary seeks to opt out after the Secretary's proposal for penalty has been filed with the Commission. Mr. Mascolino argued that:

> The issue is not whether the Commission's jurisdiction technically attaches when the contest card is received. The issue is whether the operator who

> promptly disavows that course should be permitted to do so without the examination which would be involved if the case were to be tried or payment submitted after a petition had been filed and issue joined. (Emphasis supplied.) Statement in Support of Motion to Dismiss filed February 7, 1984.

Mr. Mascolino seems to recognize that once a petition for assessment of a civil penalty has been filed the Commission and the trial judge have exclusive jurisdiction to approve dismissal under Rule 11 or a settlement under Rule 30. But, Mr. Mascolino argues, where the petition for proposal of a penalty has not been filed the Commission's jurisdiction is so tenuous or "technical" the parties should not have to justify what is tantamount to a voluntary nonsuit.

Before ruling on either of these matters, I would have preferred to consolidate them for briefing and oral argument so that I could have a record for the public and the Commission setting forth all the nuances of law and permutations of fact that are involved. Because of Mr. McCord's attempt at a preemptive strike that may no longer be a viable option. At a minimum the three solicitors involved seem to want answers to the following questions:

1. Should the Commission allow voluntary dismissals or nonsuits where an operator "promptly" after filing a notice of contest tenders payment in full of the penalty proposed by MSHA? (Mr. Mascolino's position).

2. Should the Commission require its judges to grant motions to withdraw proposals for penalties filed by the Secretary before an answer has been filed without any record support other than a showing that payment has been made? (Regional Solicitor's position).

3. Should the Commission require its judges to grant motions to withdraw the Secretary's proposals for penalty at any stage of a penalty proceeding, i.e., at any time prior to issuance of the judge's final decision without satisfying the judge that such a disposition is appropriate and in accord with the purposes and policy of the Act? (Mr. McCord's position).

Each of these questions and variations thereon must be answered in the light of the Congressional purpose embodied in sections 105(d), 110(i) and 110(k) of the Act as well as Commission Rules 10, 11, 26, 29(b) and 30. While for reasons previously and hereinafter indicated, I find it inappropriate and unnecessary to decide any of the foregoing questions definitively, I find most shocking the proposition advanced by Mr. McCord on behalf of the Secretary. For if I understand it correctly Mr. McCord is moving boldly, if somewhat recklessly, to usurp the authority and power conferred on the Commission by section 110(i) and 110(k) of the Act. (FOOTNOTE 1) These provisions as well as the entire legislative history of the Act are redolent with expressions of Congressional distrust of MSHA's ability to retain its professional objectivity and commitment to vigorous enforcement when confronted with industry blandishments. Secretary v. Parmalou Bros., Inc., Dkt. No. WILK 79-4-PM et al, decided on February 13, 1979.

The plain language of the Commission's Rules and section 110(i) and (k) of the Act convincingly establish that the Presiding Judge and not MSHA or the solicitor is charged with responsibility for deciding whether to approve a Rule 11

motion to withdraw or a Rule 30 motion for settlement. (FOOTNOTE 2) In fact, Rule 11 specifically provides that while a party may withdraw a pleading at any stage of the proceeding, it may do so only with the "approval of the Commission or the Judge." Judicial approval certainly connotes something more than a mere ministerial act. The Commission should not become party to a procedure, however innocuous on its face, that may result in subversion of the Congressional policy of full, true and public disclosure of the basis upon which penalty cases are compromised, settled, withdrawn or dismissed.

As Judge Merlin so trenchently observed:

> The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

Order of July 15, 1983.

I am aware that the Solicitor's Office at the direction of the Assistant Secretary has adopted a policy of filing Rule 11 motions in lieu of motions to approve settlement

in an effort to implement the "cooperative," some might even say "lax," enforcement policy of the single penalty assessment procedure. See 30 C.F.R. 100.4. But as I have said elsewhere, prosecutorial discretion does not extend to nullifying the Act. There are limits on the power of MSHA and the solicitor to thwart the will of Congress. One of them is this Commission.

The solicitor is compelled to seek approval of Rule 11 and Rule 30 motions because the Commission following the will of Congress has so decreed. Congress, in its wisdom, changed the law in 1977 to require approval of all "compromises" of penalty cases. This embraces both "mitigations" and "settlements." A motion to withdraw a penalty petition in lieu of an adjudication by the Commission is certainly a compromise of the litigation and if it involves acceptance of a $20 penalty that MSHA improvidently, erroneously or intentionally assessed for a significant and substantial violation it is both a mitigation and a settlement that should receive the strictest judicial scrutiny.

The legislative history of section 110(k) of the Act shows Congress felt the public interest in vigorous enforcement is best served when the process by which penalties are assessed is carried out in public, "where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process." S.Rpt. 95-181, 95th Cong., 1st Sess. 44-45 (1977). As the Senate Report continued, "the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." Id.

I cannot believe the Commission is going to surrender its statutory enforcement authority by ordering its judges to rubber stamp motions to dismiss or withdraw. If it does, I am confident there will be a public outcry if the purpose or effect of such action is to grant the solicitor authority denied MSHA by the Congress in 1977.

The suggestion that the Commission did just this in Mettiki Coal Corporation, 3 FMSHRC 2277 (1980) is clearly erroneous. The plain meaning of Mettiki is that regardless of how a motion is labelled, i.e., either as a motion to dismiss or withdraw (under Rule 11) or a motion to approve settlement (under Rule 30) if the record in support of the

motion "indicates that full payment of the [penalty initially] sought by the Secretary is a satisfactory and appropriate resolution of [the] controversy" it is an "abuse of discretion" for the trial judge to deny the motion. (Emphasis Supplied.) It was the "abuse of discretion" issue on which Mettiki turned and not on whether the motion was filed under Rule 11 or Rule 30. Nothing in Mettiki shows a disposition to strip the Commission and its judges of jurisdiction and authority to evaluate either type of motion in accordance with the statutory criteria set forth in section 110(i), 110(k) or the purposes and policy of the Act. See, Co-Op Mining, 2 MSHC 106 (1980). Just as it would be unfair to assess a penalty where no violation occurred it would be a travesty to allow the assessment of a $20 penalty for an egregious violation simply because an overworked or overly sympathetic solicitor calls the operator's attention to the fact that it would be better to pay the penalty than to subject the matter to the scrutiny of a judge charged with responsibility for seeing that there is a full and true disclosure of the facts. Compare, Bethlehem Mines, Inc., 6 FMSHRC ---, Jan. 13, 1984.

Turning to the merits of the instant motion, I find the information furnished considered as a whole is sufficient to support dismissal of this matter because the failure to take a single respirable dust sample posed no significant health hazard and was more the result of oversight than negligence. Further, there is no evidence that the violation was part of a pattern or practice of culpable neglect or knowing failure to comply with the mandatory respirable dust standard violated.

Based on an independent evaluation and de novo review of the circumstances, therefore, I find the compromise of this matter is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED; the captioned matter DISMISSED; and all other pending motions, including the request for certification for interlocutory appeal, DENIED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 Because of the importance of the questions raised to the proper administration and vigorous enforcement of the Mine Safety Law, and the Secretary's desire to rush the Commission to judgement, I have undertaken to set forth my preliminary views of this long festering dispute. I regret that due to the desire of the Commission's staff to take jurisdiction of these questions away from me, I have not had the time for the mature deliberation and research I think they deserve. Nor has the solicitor, Mr. McCord, helped by churlishly refusing to brief the matter for me¬preferring instead the route of an ex parte interlocutory appeal to the Commission. While the bypass tactic may strike some

as clever, I find it ethically distasteful. I trust the Commission will find equally distasteful the prospect of being asked to render prematurely an ex parte decision on so sensitive a matter. Indeed, I feel the matter is of sufficient importance that it should be decided only after all affected interests are afforded an opportunity to be heard. This, of course, is not the first time the commonality of interest between the solicitor and the operators has been conjoined in an attempt to stampede the trial judge and the Commission over a volatile policy issue. As I have said, I do not believe the Commission should entertain the Secretary's request for an interlocutory appeal but if it does it will have something beside a totally ex parte record to consider.

~FOOTNOTE_TWO

2 On September 29, 1980, former Chief Administrative Law Judge Broderick wrote the Assistant Solicitor, Arlington, Virginia that: "It is the position of the Review Commission that its jurisdiction attaches when a notice of contest is filed in our docket office. This is true whether the cases involve a quick change of heart by the operator or a mistake or a late payment. They can only be closed by a Commission Order." Section 105(d) and Commission Rule 26 both require notices of contest to be docketed "immediately" with the Commission. The solicitors, or at least some of them, now concede jurisdiction attaches when the notice of contest is filed but all of them seek a ministerial order of dismissal if, upon the advice of his own counsel or that of the solicitor, the operator decides MSHA really made him an offer he can't refuse.