CCASE:
NACCO MINING V. MSHA & UMWA
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NOV 5, 1985

THE NACCO MINING COMPANY

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. LAKE 85-87-R

and

UNITED MINE WORKERS OF
AMERICA

STATEMENT OF NONACQUIESCENCE

In his sworn statement of September 28, 1985 (copy attached), the trial judge set forth his reasons for believing that the Rule 82 inquiry initiated at the request of the coal operator's lawyers should proceed to hearing to determine whether Nacco or any other interested persons "knowingly made or knowingly caused to be made" the potentially disqualifying ex parte communication of August 8, 1985.

By its order of October 17, 1985, however, the Commission abruptly terminated the trial judge's jurisdiction to pursue the matter and proceeded to whitewash and coverup the serious questions of misconduct raised by the trial judge's statement.

The record shows that in order to escape the thicket of its complicity and absolve the operator of responsibility, the Commission chose to foreclose inquiry into why Mr. Sikora did what

he did when he did it. It also chose to foreclose inquiry into why the coal operator's lawyers, after first conceding there was no impropriety involved ln the Palmer contact, decided to use it to suggest disqualification.

Ignoring the serious adverse inferences that flow from Nacco's refusal to permit Mr. Sikora to testify or even make a written statement, the Commission in an Act of administrative noblesse oblige granted Nacco and its lawyers the functional equivalent of a Fifth Amendment immunity. Thus, without consulting the other parties and in cavalier disregard for the Sunshine Act, the Commission has decreed that it is not going "to let the sun shine in".

Because the Commission's disposition of Nacco's interlocutory appeal approves Nacco's proposal to suppress a legitimate inquiry and condemns the trial judge for seeking a full and true disclosure of the facts, I wish the record to show my nonacquiensence in the Commission's action. I find the Commission's action to be not simply in error but in pari delicto and not simply an abuse of discretion but an egregious abuse of process and usurpation of the powers conferred by Congress under $ 556(c) of Title 5 of the United States Code (the APA) on the trial judge.

Subsection (c)(4) of $ 556 as well as $ 557(d)(1)(D) of the Sunshine Act specifically and independently empower the presiding judge to "take depositions or to have depositions taken when the ends of justice would be served." I cannot in good conscience

become a party even tacitly to the Commission's suppression order or permit my silence to be so construed regardless of the consequences in terms of further political retaliation.

The Commission's remand order of October 17 also raises matters of concern to the trial judge and those interested in vigorous enforcement of the mine safety laws.

First is the Commission's admonition to the trial judge to refrain from advising miners who appear as witnesses against mine operators of the protection afforded them against retaliation or retribution.

The suggestion that miners' retaliation complaints can be addressed only to the Mine Safety and Health Administration of the Department of Labor is clearly erroneous. The courts have held that "an employee's right to testify freely in mine safety proceedings encompasses the giving of statements" and the "filing of complaints" with government officials other that MSHA investigators. See Secretary v. Stafford Construction Company, 732 F. 2d 954 (D.C. Cir. 1984); Phillips v. Board of Mine Operations Appeals, 500 F. 2d 772 (D.C. Cir. 1976), cert. denied 420 U.S. 938 (1975).

As the court noted in Stafford Construction, Congress intended that the Mine Act be "construed expansively to assure that miners will not be inhibited in any way from exercising rights afforded by this legislation." Indeed, since the anti-discrimination provisions of the Mine Act apply to MSHA as well as any other "person" who discriminates, it would be incongruous

to suggest that a miner discriminated against by MSHA can file his complaint only with MSHA. See Local 9800, UMWA v. MSHA, 2 FMSHRC 2680 (1980). 1/

As my statement of September 28, 1985, points out, the same considerations apply with equal, if not greater, force to complaints of retaliation or intimidation under the recently enacted Victim and Witness Protection Act of 1982.

My second concern with the remand order is its suggestion that the trial judge's criticism of the actions of the Commission indicates an incipient disqualifying bias against Nacco. I find the Commission's attempt to place its thumb on the scales of justice while the underlying safety enforcement proceeding is still before the trial judge on the merits highly improper. It is arrogant and unprincipled to suggest the trial judge ignore the impressions that resulted from the evidence he heard and the decision he rendered before the August 8 contact.

Whether the adverse bench decision of July 31 provided the motive or impetus for the Sikora threat of August 7 that resulted

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1/ It is worth noting that the office of the solicitor of the Department of Labor, the erstwhile prosecutor, declined to sponsor Mr. Palmer as a witness. The solicitor apparently knew that Mr. Palmer would testify that he was in effect required to risk his life and that of his fellow miners in order to keep his job. For the office of the solicitor to elicit such highly incriminating testimony would be most damaging to Nacco's claim that it had no responsibility for Palmer's actions. Calling Palmer to testify would also have been a violation of former Secretary Ford B. Ford's policy of "cooperative enforcement". It was clear to this trial judge, therefore, that if Mr. Palmer was to receive any witness protection it would have to come from the trial judge. I could not in good conscience on the one hand encourage Mr. Palmer to testify freely and on the other leave him to the tender mercies of Nacco and MSHA.

in the allegedly disqualifying contact by Palmer on August 8 was the principal reason the trial judge ordered the taking of their depositions. The question of whether the trial judge was "set up" was not something "conjured up" by the trial judge. Both the Union and MSHA thought the inquiry on this should go forward. Because the Commission decided the inquiry might be embarrassing to Nacco, it has, I believe, improperly intervened to order that the Rule 82 inquiry not proceed. This is the type of coverup that impugns the integrity of the Commission's process.

Finally, I find most disturbing the Commission's tacit promise to circumvent, if necessary, the deferential standard of review applicable to the trial judge's findings. Under the statute and controlling decisions of the courts such findings are conclusive if supported by substantial evidence. Donovan v. Phelps Dodge Corp., 709 F. 2d 86 (D.C. Cir. 1983). The Commission's reference to the "usual review mechanism" as the standard against which the trial judge's final disposition will be "measured" is most disquieting as it is a standard not reflected in either the statute or the case law.

We all know that "mechanisms" are subject to manipulation and certainly the imprecise concept of disqualifying bias or its appearance is one of them. In view of the Commission's personal involvement in the unsuccessful attempt to disqualify the trial judge, it would have been more prudent and judicious for the Commission to have remanded the matter for final disposition by

the trial judge, with refusal of the Commission from its review function leaving that to the courts as provided by precedent and the statute.

For these reasons, I feel compelled to disassociate myself from the strictures on decisional autonomy implicit in Commission's order of remand.

Accordingly, it is DIRECTED that this statement of non-acquiescence be made a part of the public record of this proceeding. It is FURTHER DIRECTED that this statement be served on the Commission and the parties, and be published to those committees of Congress responsible for oversight of the Commission's activities.

Joseph B. Kennedy
Federal Administrative Law Judge

Distribution As Ordered.