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NACCO MINING V. MSHA & UMWA
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FMSHRC-FCV
SEP 28, 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

TRIAL JUDGE'S RESPONSE

Pursuant to 28 U.S.C. $ 1746 and subject to the penalties for perjury, the trial judge in this proceeding makes the following statement in response to the Commission's order of September 17, 1985.

I.

On July 19, 1985, William E. Palmer, a continuous mining machine operator for Nacco Mining Company testified as a bench witness in this proceeding. 1/ Prior to giving his testimony, the trial judge advised Mr. Palmer on the record of his witness

1/ Mr. Palmer was the mining machine operator allegedly responsible for the unwarrantable failure (working under unsupported roof) violation charged in this proceeding. He was listed as a witness for Nacco in its pretrial submission of July 15, 1985. At the commencement of the hearing on July 18, 1985, however, Mr. Reidl, counsel for Nacco, announced that he would not call Mr. Palmer as a witness for the operator. The trial judge then ordered the appearance of Mr. Palmer as a bench witness (Tr. 48-51).

protection rights under $ 105(c) of the Mine Act and instructed him, pursuant to the Federal Victim and Witness Protection Act of 1982, 18 U.S.C. $$ 1512-1515, to contact the trial judge's office "if he felt he was being unfairly retaliated against by anyone as a result of his testimony" (Tr. 415). 2/

Neither during the introduction of the witness Palmer, nor at any time during the balance of the trial did counsel for Nacco or any other party raise any objection to the handling of the witness Palmer. The trial on the merits concluded on Wednesday, July 31, 1985, with the trial judge rendering an unfavorable tentative bench decision against Nacco. 3/

Eight days later, on Thursday, August 8, 1985, the trial judge received a call from Mr. Palmer. In substance, Mr. Palmer, after first identifying himself, said that in the dinner hole the night before his section foreman, Stanley Sikora, told him in the presence of the rest of the crew that he, Sikora, had to produce 550 tons of coal per shift or lose his job and that if he lost his job he was going to take someone with him. Palmer said he considered Sikora's statement was a threat against his job.

2/ Section 6 of the Witness Protection Act provides that in "any proceeding before a Federal Government agency which is authorized by law" the presiding officer "should routinely" advise witnesses on steps that may be taken to protect them from intimidation. Section 1513 provides criminal penalties for retaliating against witnesses and informants in official proceedings. The legislative history shows that this prohibition "extends to the situation where the retaliation takes the form of discharging a person from his job." Sen. Rep. 97-532, 97th Cong., 2 Sess. 20-21 (1982).

3/ A copy of the bench decision is attached as Exhibit A.

Palmer also complained that Nacco had put the original helper back, the "greenhorn", and told him, Palmer, that he had to run the miner in every cut, except one. The trial judge told Mr. Palmer he would make a record of his complaint.

The trial judge made typed notes of Mr. Palmer's complaint, placed them in the public record and asked the office manager to place a conference call to counsel for the parties. When the conference operator reported a two-hour lead time would be required to complete the call, the trial judge left instructions to set up the call for 3:00 p.m. The trial judge's conversation with Mr. Palmer lasted approximately three minutes. To verify the authenticity of the call, the trial judge asked Mr. Palmer for his address and phone number. There were no other details offered or solicited. The trial judge has not spoken to Mr. Palmer on or off the record since August 8, 1985. 4/

Mr. Sikora testified as a witness for Nacco in this proceeding. He claimed he did not know and had no reason to know that Mr. Palmer had operated the continuous mining machine in a manner that showed a reckless disregard for his safety and that of his co-workers. Despite its claim that Sikora was not and should not have been aware of what Palmer did, Nacco suspended him for approximately three weeks without pay for his failure to notice

4/ A copy of the trial judge's contemporaneous notes of his conversation with Mr. Palmer and later with counsel as they appear in the public record are attached hereto and made a part hereof as Exhibit B. The trial judge put his notes in the public record not to record an illegal oral communication with Mr. Palmer but to establish a record of Mr. Palmer's complaint and the fact that it had been relayed to counsel for investigation.

and report Mr. Palmer's dereliction. Further, Nacco never denied the fact that the violation occurred or its potential for causing a fatality or seriously disabling injury. The sole contest was over Nacco's responsibility for Palmer's admittedly highly culpable act. This was phrased as a challenge to the propriety and quality of the subdistrict manager's finding that the violation was unwarrantable and that the 104(a) citation should be upgraded to a 104(d)(1) citation.

The post hoc simplicity of the factual and legal issues presented masked the fact that from the outset the stakes for all parties were high. If the tentative bench decision is confirmed and upheld, Nacco may be subject to summary closure orders until it passes a "clean" inspection. This could make the risk of noncompliance very expensive for Nacco. On the other hand, MSHA and the Union believe that recision of the unwarrantable failure finding may significantly and substantially increase the risk of death or disabling injuries in this mine. Under the circumstances, it is understandable that the operator would seek the sympathetic assistance of the Commission in removing the trial judge from further participation in the decision of this case.

After the conference call came in at 3:00 p.m., on Thursday, August 8, 1985, the trial judge relayed to counsel the substance of Mr. Palmer's complaint. As the trial judge's handwritten notes indicate, there was general agreement that Mr. Palmer's complaint raised no ex parte considerations. In fact, Mr. Reidl,

counsel for Nacco, stated that he thought the complaint had "no relevance" to the concluded contest proceeding. See footnote 10, infra. Its relevance to a violation of $ 105(c) was left for counsel to investigate.

The only off-the-record communication that ever occurred between Mr. Palmer and the trial judge was on August 8, 1985, as relayed to counsel. It was not an illegal or prohibited communication within the meaning of the Sunshine Act because:

1. All parties were on notice from the time Mr. Palmer testified on July 19, 1985, that he was to report any retaliatory action to the trial judge. No counsel objected to this procedure. The legislative history of the Sunshine Act shows Congress knowingly intended to exclude two categories of off-the-record communications from the definition of "ex parte communication" as set forth in 5 U.S.C. $ 551(14). Thus, as the Senate Report noted: "A communication is not ex parte if either (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable notice. If a communication falls into either of these two categories, it is not ex parte." Legislative History, Sunshine Act, 233, 533, 571 (1976). From and after July 19, 1985, counsel for Nacco had advance notice with adequate opportunity to object to the possible receipt of an off-the-record communication by the trial judge from Mr. Palmer. Counsel for Nacco never objected or demanded the right to be present when and if such a communication occurred.

2. All parties were seasonably informed of the substance of Mr. Palmer's report to the trial judge and the trial judge's notes of the communication were placed in the public record at the time it was made.

3. Mr. Palmer was a bench witness who appeared under compulsory process. His complaint to the trial judge and its contemporaneous relay to all parties was a protected activity under the Mine Act and "consistent with the interests of justice and the policy" of both the Mine Act and the Sunshine Act. 5 U.S.C. $ 557(d)(1)(D); 30 U.S.C.$ 815(c)(1).

4. Mr. Palmer was not an "interested person" within the meaning of $ 557(d)(1)(A) of Title 5 because he had no "special interest" in the outcome of the contest proceeding in which he testified as a public witness. Leg. His., supra, 231.

5. Mr. Palmer's complaint was not relevant to the merits of the contest proceeding which was concerned only with events which occurred in June 1984. It could not influence the trial judge's decision as the hearing on the merits was concluded and a tentative bench decision adverse to Nacco made on July 31, 1985.

In Patco v. FLRA, 685 F.2d 547, 563 (D.C. Cir. 1982), the Court held that in the Sunshine Act, "Congress sought to establish common-sense guidelines to govern ex parte contacts in administrative hearings, rather than rigidly defined and woodenly applied rules." The Act is not a no-fault liability statute. Its sanctions apply only to "a party" who "knowingly makes or knowingly causes to be made" a communication in violation of $ 557(d). Mr. Palmer, of course, was not a party to this proceeding and neither was the trial judge. Further the trial judge did not "knowingly make or knowingly cause to be made" an off- the-record communication by Mr. Palmer. The timing of the communication was, insofar as the trial judge was concerned, pure happenstance.

The Sunshine Act and its legislative history show that sanctions may be imposed on a party, a new trial granted, or disciplinary action taken against an agency official only where a contact was "knowingly made or knowingly caused to be made" and was not "clearly inadvertent," "unintentional", "innocuous" or "non-

prejudicial". 5/ Patco v. FLRA, supra 564-566, 567, 574-575; 5 U.S.C. $ 557(d)(1)(D); 556(d). Indeed, in Patco the court held that Congress intended that the drastic sanctions of dismissal or denial of a party's interest should be applied only in the rare case where a party secretly and corruptly sought to influence the decision making process. Id. 564-565, 571, 574-575. At this stage of this case, all we know is that the contact was made by a nonparty. What we do not know is whether Mr. Palmer was the witting or unwitting instrument of a party's desire to establish an ex parte contact. Because Mr. Palmer was employed by one of the parties, Nacco, at the time of the contact, because recent decisions by the Commission lend color to the view that any ex parte communication, however inadvertent, innocuous or harmless,

5/ Contrary to Nacco's suggestion, the Commission may not void a proceeding or censure a trial judge for an "inadvertent", "innocuous" or "nonprejudicial" ex parte contact. The legislative history shows that a proceeding may be voided or disciplinary action taken against an agency official only where (1) the contact was "knowingly made or knowingly caused to be made by a party" and (2) such action is "consistent with the interests of justice and the policy of the underlying statues administered by the agency." Legislative History, supra, 232-234; 532, 533; 570-571. The Senate Report noted:

> "The subsection specifies that an agency may rule against a party for making an ex parte communication only when the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, the committee concluded that an agency should not definitively rule against a party simply because of an inadvertent violation. It is expected that an agency will rule against a party under this subsection only in rare instances." Leg. Hist., supra, 534.

may justify removal of the trial judge from the proceeding, 6/ and because one of the parties, Nacco, might benefit by removal of the trial judge or voiding of the proceeding, the trial judge in the interest of justice and fairness to all concerned ordered the record reopened and the matter set for hearing after Nacco indicated it wished to challenge the Palmer contact and "all other off-the-record contacts between" the trial judge and Mr. Palmer. 7/

As in Patco, the trial judge under the authority of section 557(d)(1)(D) and 556(d) set Mr. Reidl's inquiry for exploration at a hearing, not because he assumed he "would find serious wrongs or improprieties, but because the allegations of misconduct were serious enough to require full exploration." Id. 566.

The trial judge believes that the steps he took to publicly record and relay Mr. Palmer's complaint to the parties in interest on August 8 fully satisfied the Sunshine Act's requirement of public disclosure of an off-the record communication. Patco, supra, 564. The second remedy, the application of sanctions against any party that "knowingly" violated the Act was to be explored at the hearing at which Mr. Palmer, Mr. Sikora or any other witnesses necessary to a full and true disclosure of the facts would be called. Without explanation for its precipitate action, the Commission stayed this hearing indefinitely on September 17.

6/ T. P. Mining Company, 7 FMSHRC 1010 (July 10, 1985); Peabody Coal Company, 7 FMSHRC , (August 5, 1985).

7/ Nacco has never furnished any factual basis for its inflammatory assertions concerning "other off-the-record" contacts.

II.

Since on August 8 counsel voiced no problem with Mr. Palmer's communication to the trial judge and since the trial judge had concluded that receipt of the communication was wholly "consistent with the interests of Justice and the purposes of the underlying statues administered by the agency" (5 U.S.C. $ 557(d)(1)(D), 556(d))), he gave no further thought to the matter until August 19 when he received Mr. Reidl's August 13 letter demanding a "written statement describing in detail all off-the-record communications that have taken place between you and Mr. Palmer." In light of Mr. Reidl's statements during the August 8 conference call, the trial judge was, to say the least, surprised at this "demand." The trial judge's first thought was to give Mr. Reidl a statement, together with a copy of the notes of the conversation with Palmer which were in the public record. But then the trial judge realized that such candor might not be consistent with the interests of justice or fair to Mr. Palmer, the other parties or the trial judge. For this reason and because of the shocking breadth of the charges, as more fully developed in Part III below, the trial judge issued an order on August 20 setting a hearing for September 11 at which the parties would be able to examine Mr. Palmer regarding not only his August 8 conversation with the trial judge but any others that might have occurred. On September 4, the trial judge issued a further order in which, inter alia, he ordered Nacco to

submit a statement from Mr. Sikora regarding his August 7 conversation with Mr. Palmer.

On September 17, the Commission summarily obstructed the orderly procedure adopted by the trial judge for ascertaining the true facts pertaining to Nacco's charges. The basis of the Commission's September 17 order is the allegation by Nacco that the trial judge engaged in a prohibited ex parte communication with Mr. Palmer on August 8. As relief for this allegedly improper communication, Nacco requested that the Commission (1) order the trial judge to "place on the public record a written statement detailing the substance of an alleged ex parte communication" of August 8, 1985, (2) assign another judge to conduct a special hearing to determine "the nature, extent, source and effect of this and any other ex parte communication connected with this case" and (3) to vacate the trial judge's orders of August 20 and September 4. Notification of ex Parte Communication (hereafter Notification). p.2.

For any component of the requested relief to be granted, a finding must be made that an ex parte communication prohibited by Commission Rule 82 occurred during the trial judge's phone conversation with Mr. Palmer on August 8. Rule 82 directs that a statement of an ex parte communication be placed in the public record and authorizes the issuance of such orders as fairness requires only "[i]n the event an ex parte communication in violation of this section occurs." As we have seen, no prohibited

ex parte communication occurred on August 8. 8/

Assuming for purposes of argument that Mr. Palmer violated 5 U.S.C. $ 557(d)(1)(A) and Rule 82 by phoning the trial judge ex parte on August 8, the actions of the trial judge took following that phone conversation complied fully with the Sunshine Act and Rule 82 and thus provided Nacco with all the protection and relief to which it is entitled.

As stated above, immediately upon the conclusion of Mr. Palmer's call, the trial judge placed the fact and substance of his call on the public record of this proceeding. 9/ In addition, in order to ensure that the parties received actual notice of Mr. Palmer's communication, the trial judge also placed a conference call to counsel for the parties. During that call, the trial judge informed counsel that he had received a call from Mr. Palmer and relayed its substance. See Affidavit of Paul W.

8/ The trial judge notes that the Commission's September 17 order does not initiate any disciplinary proceeding under Rule 82 against the trial judge. As Rule 82 expressly provides, such a proceeding must be preceded by an appropriate notice to those against whom an "ex parte communication" charge is being made, and no decision on or factual findings relevant to the charge may be made unless based upon the record of an evidentiary hearing at which the accused have been afforded the opportunity to present their own evidence and cross-examine the witnesses presented against them. The September 17 order contains no such notice and provides no such opportunity for an evidentiary hearing.

9/ The legislative history of the Sunshine Act defines the term public record" as "the docket or other public file containing all the material relevant to the proceedings, including the public file of * * * related matters not accepted as evidence in the proceeding." Leg. Hist., supra, 233. The file in which the trial judge placed his typed notes of Mr. Palmer's communication is clearly part of the "public record" of this proceeding.

Reidl (Attachment 2 to Nacco's Notification), paras. 4-6.10/ Thus, on August 8, within four hours of Mr. Palmer's call, the parties had actual and complete notice of the substance of the communication he had made to the trial judge, and, as a result, they had the Opportunity to respond on the record in any manner they deemed appropriate.

The trial judge's August 8 memorandum for the record and conference call to counsel for the parties fully satisfied the requirements of 5 U.S.C. $ 557(d)(1)(C). Section 557(d)(1)(C) provides that, following receipt of an improper ex parte oral communication, a presiding official "shall place on the public record of the proceeding * *.* [a] memorand[um] stating the substance of [the] oral communication * * * *. The Senate report on the Sunshine Act defined the purpose of $ 557(d)(1)(C) as follows (Leg. Hist., supra, 232):

The purpose of this provision is to notify the opposing party and the public, as well as all decision makers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. * * * In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

10/ It is relevant to note that, as shown by his affidavit, Mr. Reidl did not even suggest during the August 8 conference call that he believed Mr. Palmer's call may have been an improper ex parte communication. Indeed, Mr. Reidl acknowledges that, during the conference call, he "asked why were we having this conversation." Id., para. 7. Nacco's failure even to suggest on August 8 that an ex parte communication problem might exist strongly suggests that the challenge to Mr. Palmer's communication is nothing but a desperate effort to have the trial judge's tentative decision vacated by the Commission and this case assigned to another trial judge.

The trial judge's actions on August 8 following Mr. Palmer's phone call provided just such actual notice to the parties of his call and of the nature of his communication. Thus, Nacco has already obtained all the protection and relief to which it might possibly be due as a result of Mr. Palmer's communication to the trial judge on August 8. 11/

Since Nacco has already obtained the relief to which it was due if Mr. Palmer's call was an improper ex parte communication, it is plainly not entitled to, and there is clearly no need for, the assignment of "a Special Judge to hold an evidentiary hearing to determine the nature, extent, source and effect of this and other ex parte communications connected to this case involving" the trial judge. Notification, p. 2. 12/

Stripped of its pejorative rhetoric, Nacco's position is that trial judges who receive what may be an ex parte communication, who then fully comply with the APA and Rule 82 by placing the communication on the public record and who go even further by

11/ Indeed, since the Commission has not issued any regulation which requires its trial judges to go beyond placing a memorandum of an ex parte communication in the public record (see Rule 82(b)(2)), Nacco and the parties were not in any sense "entitled" to the conference call placed to them on August 8 by the trial judge.

12/ Nacco's reference to "other ex parte communications" is totally unsubstantiated. Based upon a single call from a witness to the trial judge and as part of its apparent effort to avoid the consequences of his tentative decision, the company raises-- without the slightest evidence--the specter of further illegal ex parte communications in this proceeding. Its reference to such "other" communications in wholly without merit and provides no basis whatsoever for the assignment of a "Special Judge."

providing actual notice of the communication to the parties and an opportunity to respond must be subject to Commission or "Special Judge" review to determine whether they remain capable of adjudicating the case. Nacco's position is absurd and an insult to the integrity of the Commission's administrative law judges. It must be rejected in the firmest terms by the Commission. 13/

III.

Under the Sunshine Act and the Commission's rules, whenever a communication received from an outside source is challenged as illegal or prohibited, the judge presiding over the proceeding has to make an initial determination of (1) whether the communication was a prohibited ex parte contact, and (2) whether it was seasonably and adequately disclosed in the public record. For reasons already stated, the trial judge believed the Palmer contact was not a prohibited ex parte contact and that in any event it had been seasonably disclosed in the public record. By its letter of August 13, however, Nacco asserted a right to challenge not only the Palmer contact of August 8 but other unspecified ex parte contacts "that have taken place between you and Mr. Palmer."

When the trial judge issued his order of August 20, 1985, therefore, he contemplated that the reopened hearing would

13/ Nacco has not alleged any bias or any unfair conduct on the part of the trial judge in this proceeding. Rather, its request for the assignment of a special judge is premised solely upon the trial judge's receipt of Mr. Palmer's call.

explore the facts relating to the Palmer contact of August 8 and whatever other facts Nacco had to offer as to other contacts between Mr. Palmer and the trial judge. Because counsel for Nacco declined to produce Mr. Sikora voluntarily as a witness, the trial judge determined to await the receipt of Mr. Palmer's testimony which, if Mr. Reidl were correct, would disclose the other alleged contacts between him and the trial judge. He also determined that depending upon Mr. Palmer's disclosures it might be necessary to call Mr. Sikora or other witnesses with knowledge material to a full and true disclosure of the facts. Because the trial judge was not in a position to respond to Nacco's request for the disclosure of contacts with Mr. Palmer that never occurred, the trial judge determined that in fairness to all parties, as well as the trial judge, Mr. Palmer's sworn testimony as to all contacts between him and the trial judge should be taken in open court. 14/

Surprisingly enough, Nacco objected not only to making Sikora available voluntarily but to any hearing at all to explore its charges including its charges of secret, unspecified contacts between Mr. Palmer and the trial judge. The other parties on the other hand agreed with the procedure proposed by the order of August 20 asserting a right to be present when Mr. Palmer was

14/ During the teleconference of August 26, counsel agreed that in order to preclude any taint of Mr. Palmer's testimony he would be deemed sequestered until he testified and that the trial judge would issue a subpoena to be served by Mr. Myers, counsel for the Union.

asked to disclose not only the details of the August 8 contact but the other unspecified contacts.

In its motion to vacate the trial judge's order reopening the record, filed August 30, Nacco, without explanation, dropped its charges of other, secret, unspecified ex parte contacts with Mr. Palmer and sought only "a written statement detailing [the trial judge's] conversation with Bill Palmer."

To afford the other parties the time accorded them under the Commission's rules to respond to Nacco's motion to vacate the order setting the 557(d) hearing for September 11, the trial judge issued an order on September 4 continuing that hearing until further order. To permit the trial judge to better evaluate the necessity for calling Mr. Sikora, this order directed Nacco to furnish "a statement from Mr. Sikora concerning his post-hearing remark to Mr. Palmer". By this time, the trial judge determined that the hearing to explore the alleged contacts with Palmer might also have to explore whether Sikora's alleged threat on August 8 had been made--or whether Sikora had been induced by others to make it--with the knowledge that Palmer would follow the instructions given at the July 19 hearing and call the trial judge. Communication of the threat to the trial judge could then, as it was, be challenged as a prohibited ex parte communication and presented to the Commission as a basis for removal of the trial judge from this proceeding and vacation of his tentative decision. Consequently if the alleged threat to Palmer was, in fact, made or was caused to be made with such knowledge or

purpose, Palmer's call might well constitute an illegal ex parte communication within the meaning of 5 U.S.C. $ 557(d)(1)(D), and thus subject that party and/or the individuals responsible to the sanctions provided in 5 U.S.C. $ 556(d) and Rule 82(b)(1) of the Commission's rules. Under $ 556(d) and Rule 82, if the Commission finds that an attorney was instrumental in causing such a violation it may prohibit that individual from practicing before the agency. Leg. Hist. 233. To help determine whether Sikora's threat to Palmer, if true, was made or caused to be made with the knowledge or purpose described above, the trial judge as part of his September 4 order required Nacco to submit a statement from Sikora in which he addressed his August 8 remarks to Palmer.

At this juncture, Nacco sought the protective assistance of the Commission in quashing any inquiry of Sikora by representing that the hearing which had been set was not for the purpose of exploring a section 557(d) violation but of determining whether there was a section 105(c) violation. 15/ The Commission moved quickly--within one business day--to foreclose any inquiry of Sikora and to direct the matter along lines that, it was thought, boded well to permit the removal of the trial

15/ To lend a patina of legitimacy to its recourse to the Commission, Nacco resurrected and expanded its claim of other unspecified contacts to include not only Mr. Palmer but "any other ex parte contacts in this case" and coupled it with a request that a "special judge" be assigned to "hold an evidentiary hearing".

judge and vacation of his tentative decision without embarrassing questions to Sikora. 16/

Without ever looking at the public record, the Commission accepted Nacco's bald assertion that contrary to its rules and decisions the trial judge had withheld from the public record a prohibited ex parte contact with Mr. Palmer. To correct this assumed dereliction, the Commission summarily stayed all proceedings before the trial judge and directed him to file a sworn statement "making a full and complete disclosure of all circumstances surrounding the alleged conversation and all details of its substance."

The Commission further ordered that a "similar affidavit shall be submitted by Mr. Palmer" and directed that "the United Mine Workers of America use its best efforts to facilitate Mr. Palmer's compliance with this order." Pending receipt of these statements the Commission reserved action on whether to assign a special judge to hold an evidentiary hearing on the remainder of Nacco's charges.

Thus, on the basis of totally unfounded allegations by Nacco and without even looking at the public record or affording the other parties an opportunity to be heard, the Commission usurped

16/ Nacco's Notification of Ex Parte Communication was hand-delivered to the offices of the Commission at 4:50 p.m., Friday, September 13, 1985, and served by mail on the other parties and the trial judge. The trial judge's office received Nacco's Notification at 11:03 a.m., Monday, September 16, 1985. Without waiting for service or a response from the other parties, the Commission issued its protective order on Tuesday morning, September 17, 1985.

the authority and jurisdiction granted the trial judge under the Sunshine Act, the APA and its own rules to determine (1) the legality of Mr. Palmer's communication, (2) whether it was disclosed in the public record and (3) whether a "party" "knowingly made or knowingly caused" an illegal contact to be made.

The trial judge believes the Commission must take no further action to lend color to Nacco's obviously frivolous charges or lawless attempt to create a pretext for his removal from this case and the vacation of his tentative decision. If the Commission provides any of the relief implicitly requested by Nacco, it will cause irreparable injury not only to the other parties but to the credibility and integrity of the Commission's decision-making process.

Any action by the Commission that creates an appearance of taint or impropriety in one of its proceedings where none, in fact, occurred would raise grave questions over the even-handed administration of justice by the Commission. The trial judge trusts that on reflection the Commission will see Nacco's action for what it is and will deal with it in an appropriate manner.

In conclusion the trial judge feels compelled to say that he believes the Commission's recent acrimonious campaign of career harassment and repeated lawless and unwarranted attacks upon the trial judge's adjudicatory independence were largely responsible for inciting the irresponsible action that led to the filing of the Notification of September 13, 1985. Simple justice requires the Commission dissolve its improvident stay of September 17,

~1760
1985, and remand this matter to the trial judge for final disposition.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the facts recited in the statement are true and correct.
Executed on September 28

Joseph B. Kennedy

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Exhibit A

FMSHRC-FCV

THE NACCO MINING COMPANY Contestant	CONTEST PROCEEDING
	Docket No. LAKE 85-87-R Citation No. 2330657; 6/5/85 Modified to Citation No. 2330657-02; 6/24/85
v.	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Powhatan No. 6 Mine

TENTATIVE DECISION

Based on an independent evaluation and de novo review of the circumstances that led to the modification of the 104(a) citation I find:

1. Stanley Sikora, Section Foreman, on the 9 left 2 east section failed his duty and obligation to supervise properly and diligently the work of William Palmer in making a cross-cut between the 3rd and 2nd entries at the 6 plus 94 spad on the first shift on May 30, 1985.

2. The Operator's own engineering drawings show Mr. Sikora was negligent in failing to observe that Mr. Palmer was off the sight lines by approximately 7 feet. The same drawings and measurements also show that had Mr. Sikora exercised the high degree of care imposed on him by the Mine Act he should have known that Mr. Palmer had worked some 20 feet beyond the last permanent roof support.

3. Mr. Sikora, in his haste to complete his pre-shift examination, negligently failed to observe that Mr. Palmer not only holed through into the No. 2 entry, but pushed his coal clear up to the far rib. Had Mr. Sikora exercised the high degree of care imposed on him by the Mine Act, he would have observed and therefore known that Mr. Palmer could not have pushed coal to the far rib except by making a long or deep cut that took him under unsupported roof.

4. Mr. Sikora's negligence is imputable to the Operator, NACCO.

5. Mr. Palmer, the continuous miner operator involved, knew or should have known that he had executed an unlawful long or deep cut. His negligence is attributable to NACCO's failure to supervise and control Mr. Palmer's actions.

6. Mr. Palmer's reckless disregard for his own safety and that of his fellow miners was attributable to the negligent failure of NACCO's management to provide the supervision, training, and control over Mr. Palmer necessary to insure compliance with the high degree of care imposed on the Operator by the Mine Act.

7. NACCO's top management knew or should have known that wide and long cuts were rife in the mine because the sub-district manager and a supervisory inspector had reported these conditions to top management, on February 12 and May 23, 1985. During this same period the United Mine Workers of America and members of its safety committee, all representatives of the miners, had complained of these same unsafe mining practices. Despite this first-hand knowledge of the situation, top management took no effective action to insure its cessation.

8. NACCO's management is independently responsible for its failure to provide adequate supervision and control over its work force.

9. Confusion, ambiguity, and ignorance of the standard of care required seems to be pervasive at all management levels in the NACCO Mining Company.

10. For the purpose of this decision I accept the Operator's assertion that its policy is to put safety.ahead of production.. If that is true, and if the Union's assertions to the same affect are to be believed, a program of progressive discipline should go far toward insuring future compliance by both.

11. Because of its negligent failure to inculcate in Mr. Sikora and Mr. Palmer the habits and practices of safety conscious miners and its past permissiveness with respect. to imposing discipline for serious safety violations, I find NACCO's top management must be held accountable for the attitudes, conditions, and practices that led to Mr. Sikora's and Mr. Palmer's actions.

This failure, standing alone and independent of the violation, and negligence imputable from Mr. Sikora and Mr. Palmer fully justified Mr. Reid's actions. It was time he sent a message to management that it could not ignore. That is what Section 104(d) is all about. I conclude, therefore, that a preponderance of the evidence in the record considered as a whole warranted modification of the 104(a) citation to that of a 104(d)(1) citation.

Accordingly, it is ordered the contest of the (d)(1) citation be and hereby is, den its validity affirmed.

Joseph B. Kennedy
Trial Judge
7/31/85

EXHIBIT B

August 8, 1985.

At a meeting in the dinner hole last night Sikora announced that he had to get 550 tons or lose his job and that if he did he was going to take someone with him. XXXXX Palmer/said further that Xthey changed the helper on me,/greenhorn and told him he had to run the miner in every cut except for one. The whole crew heard it. He said he had not filed any complaints with MSHA and was calling me pursuant to my instructions at the hearing.
He lives in Jacobsburg, Ohio; Phone 614/926=1819

11:35 a.m.

~1765
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