

CCASE:

WEST VIRGINIA REBEL COAL v. SOL (MSHA)

SOL (MSHA) v. WEST VIRGINIA REBEL COAL

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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

WEST VIRGINIA REBEL  
COAL COMPANY, INC.,  
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. KENT 85-18-R  
Citation No. 2183908; 9/20/84

Docket No. KENT 85-19-R  
Order No. 2183909; 9/21/84

No. 1 Surface Mine

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 85-68  
A.C. No. 15-06365-03530

v.

No. 1 Surface Mine

WEST VIRGINIA REBEL  
COAL COMPANY, INC.,  
RESPONDENT

DECISION

Appearances: J. Edgar Baily, Esq., and George V. Gardner,  
Esq., Gardner, Moss, Brown & Rocovich, Roanoke,  
Virginia, for West Virginia Rebel Coal Co.  
(Rebel);  
Thomas A. Grooms, Esq., Office of the  
Solicitor, U.S. Department of Labor, Nashville,  
Tennessee, for the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

On October 12, 1984, Rebel filed Notices of Contest,  
contesting citation 2183908 issued on September 20, 1984, under  
section 104(a) of the Federal Mine Safety and Health Act and  
order 2183909, issued on September 21, 1984 under section 104(b)  
of the Act. Rebel denied that it violated the Act as charged in  
the citation and order. The Secretary filed its answer on  
December 31, 1984.

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On January 14, 1985, Rebel filed a motion for entry of default and for vacation of the citation and order on the ground that the Secretary's answer was not timely. The motion was denied by an order issued February 5, 1985.

The citation contested herein was issued for Contestant's alleged failure to comply with an order to reinstate miner Larry Duty issued by me in the case of Secretary/Duty v. West Virginia Rebel Coal Co., Docket Nos. KENT 86-161-D and KENT 83-232-D. The withdrawal order contested herein was issued on the ground that no apparent effort had been made to abate the violation previously cited.

The Secretary filed a proposal seeking the assessment of a civil penalty for the violation alleged in the contested citation and order. Since the contest and penalty cases involve the related citation and order, they are hereby consolidated for the purpose of this decision. On October 25, 1985, the parties submitted factual stipulations and moved to have the cases decided on the augmented record, waiving their rights to an oral hearing. Each party has also filed a supplemental statement setting forth its position on the issues involved herein. I accept the stipulations and have considered the entire record including the documentary exhibits filed by the parties. I have also carefully considered the contentions of the parties.

#### FINDINGS OF FACT

1. At all times pertinent hereto, Rebel was the operator of a coal mine in Martin County, Kentucky, known as the No. 1 Mine. The mine produced over 700,000 tons of coal during the four quarters preceding the alleged violations.

2. Secretary/Duty v. West Virginia Rebel Coal Co., Docket Nos. KENT 83-161-D and KENT 83-232-D, (Duty case) consolidated Discrimination Proceedings, were heard by me in July and September 1984, having been reassigned to me after Judge Joseph B. Kennedy, to whom they were originally assigned, recused himself.

3. On September 11, 1984, I issued an order from the bench in the Duty case, ordering that Rebel forthwith reinstate Complainant Duty to the position from which he was discharged on March 3, 1983. This order reaffirmed the written order of reinstatement issued by Judge Kennedy on May 25, 1983. Rebel was represented by counsel at the hearing when the bench order was issued.

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4. On September 14, 1985, Duty reported to work at Rebel's work site where he was refused reinstatement at the direction of Rebel's counsel.

5. On September 18, 1984, I issued a written order of reinstatement in the Duty case, restating and reaffirming the bench order of September 11, 1984. A correction to the September 18, 1984 order was issued October 3, 1984.

6. On September 20, 1984, at approximately 7:00 a.m., Duty again reported for work at Rebel and was refused reinstatement by Milton Preston, Safety Director for Rebel.

7. On September 20, 1984, at 7:15 a.m., MSHA Inspector Creech issued a 104(a) citation because of Rebel's refusal to reinstate Duty. The citation was served on Milton Preston. Termination was due on September 21, 1984 at 7:00 a.m.

8. On September 21, 1984, Duty returned to the mine at approximately 7:00 a.m. and was again refused reinstatement by Preston.

9. On September 21, 1984, at 7:10 a.m. Inspector Creech issued a 104(b) withdrawal order because no apparent effort was made to abate the citation by reinstating Duty.

10. On October 9, 1984, Rebel filed a Petition for Interlocutory Review with the Commission in the Duty case, which was denied by Commission Order of October 12, 1984.

11. On October 15, 1984, Rebel filed a Motion for a Stay of the Order of Reinstatement in the Duty case. I denied the motion by order issued October 18, 1984.

12. Duty was not reinstated by Rebel prior to October 26, 1984 when he would have been laid off in accordance with the union contract.

13. On September 20 and 21, 1984 when the citation and order involved herein were issued, neither Milton Preston nor counsel for Rebel had seen a copy of my written order of September 18, 1984.

14. Rebel is a debtor in possession and is operating the subject mine under the authority of Chapter XI of the Bankruptcy Act, and by direction of the Bankruptcy Court for the Eastern District of Kentucky. Rebel was placed in Chapter XI for reorganization under the Bankruptcy Code on June 27, 1984. A Chapter XI operating order was issued by the Bankruptcy Court to Rebel on September 21, 1984.

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15. On June 1, 1984, Rebel entered into a consulting agreement with Minmag, Inc., whereby Minmag undertook to direct the affairs, operations and enterprises of Rebel. The agreement was approved by the Bankruptcy Court on July 9, 1984.

16. From September 20, 1982 to September 19, 1984, eighty-five violations were charged against Rebel. Rebel paid the assessments on 32 of these violations.

17. Rebel has debts totalling approximately sixteen million dollars.

#### ISSUES

1. Whether Rebel was properly cited for its failure to comply with the order of temporary reinstatement?

2. If so, whether the order of withdrawal was properly issued for the failure of Rebel to comply after the issuance of the citation?

3. If a violation is established, what is the appropriate penalty?

#### CONCLUSIONS OF LAW

Rebel is subject to the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine and I have jurisdiction over the parties and subject matter of this proceeding.

On September 11, 1984, I issued an order in open court that Rebel reinstate Complainant Duty to the position from which he was discharged on March 3, 1983. This order was issued because of my finding that Rebel was not in compliance with the order of temporary reinstatement issued in the same proceeding by Judge Kennedy on May 25, 1983. My order was issued pursuant to section 105(c)(2) of the Act. Rebel failed or refused to comply with the order. The fact, if it is a fact, that Rebel's safety director was not aware of the order is irrelevant. Rebel was aware of and bound by the order. Rebel's action in refusing to comply with the order was a violation of an order promulgated pursuant to the Act. Therefore, it was a violation of section 104(a) of the Act, and the issuance of a citation was mandatory. I conclude that the citation contested herein, No. 2183908 issued September 20, 1984, was properly issued. The citation gave Rebel 24 hours to abate. I conclude that this was a reasonable abatement time.

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Because Rebel failed to comply in the time set for abatement, the 104(b) order was properly issued.

At the time the citation and order were issued, Rebel was of moderate size. Given the nature of the violation charged herein, I conclude that the history of previous violations is not helpful in determining an appropriate penalty. Therefore the penalty assessed will not be increased or decreased because of Rebel's violation history. The violation was serious and was intentional. Rebel now argues that my order was issued in error. However, it did not perfect a challenge to it prior to the issuance of the citation and order. It did not demonstrate good faith in attempting to achieve rapid compliance after notification of a violation. On the contrary, it flouted an order of the Commission and refused to comply after the citation was issued.

Rebel is in bankruptcy. Whether it will be able to continue in business is problematic. Any penalty I assess might be said to have an effect on its ability to continue operating. Nevertheless, a substantial penalty is required for the serious, continued violation of a Commission order. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found herein is \$1,000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation No. 2183908 issued September 20, 1984 is AFFIRMED.
2. Order No. 2183909 issued September 21, 1984 is AFFIRMED.
3. West Virginia Rebel Coal Company, Inc. shall within 30 days of the date of this order pay the sum of \$1,000 as a civil penalty for its violation of section 105(c) of the Act.

James A. Broderick  
Administrative Law Judge