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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. PENN 86-164
A.C. No. 36-02667-03525

v.

Benjamin No. 1 Strip Mine

BENJAMIN COAL COMPANY,
RESPONDENT

UNITED MINE WORKERS OF
AMERICA (UMWA),
INTERVENOR

DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Mine Act", for one violation of the regulatory standard at 30 C.F.R. 40.4. The general issue before me is whether Benjamin Coal Company (Benjamin) violated the cited standard and, if so, the appropriate civil penalty to be assessed in accordance with 110(i) of the Mine Act.

The citation at bar, No. 2404451, as amended, alleges as follows:

The operator failed to post a copy of the information provided the operator pursuant to part 40.3 Code of Federal Regulations. This part [sic] shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.
A certified form letter authorizing the UMWA to act as representatives for several employees, was received by the operator on 10-23-85.

The cited standard, 30 C.F.R. 40.4, requires that "a copy of the information provided the operator pursuant to 40.3 of this Part shall be posted upon receipt by the

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operator on the mine bulletin board and maintained in a current status." (FOOTNOTE 1)

The parties in this case agreed to waive hearings and to submit the matter on a stipulation of facts. According to the stipulation Benjamin owns and operates the No. 6 Preparation Plant located in Clearfield County, Pennsylvania. The plant employs approximately 35 miners and processes coal from various strip mines operated by Benjamin. On October 21, 1985, four miners who worked at the No. 6 Preparation Plant designated the United Mine Workers of America (UMWA) to be a miner's representative at the plant. This written designation was filed with the Federal Mine Safety and Health

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Administration's (MSHA's) Manager of District 2 and a copy was sent to Benjamin in accordance with 30 C.F.R. 40.2(a) and 40.3(b). The designation specifically listed Barry Mylan and Lester Poorman as the UMWA representatives. Mylan and Poorman are employees of the UMWA as Health and Safety Representatives but neither is employed by Benjamin.

There is no dispute that Benjamin has never posted on the mine bulletin board the information it received under 30 C.F.R. 40.3 designating the UMWA as a miners' representative at the No. 6 Preparation Plant. Accordingly, on November 7, 1985, an MSHA inspector cited Benjamin for a violation of 30 C.F.R. 40.4. Since Benjamin continued in its refusal to post the requisite information a section 104(b) "failure to abate" order was issued on December 16, 1985.

In defense, Benjamin first argues that the UMWA cannot be a representative of miners at the plant because the UMWA did not receive a majority of the votes in a March 14, 1984 election conducted under the National Labor Relations Act (NLRA) for selection of an exclusive collective bargaining agent. The statutory authority for representatives of miners in the context of this case is not however the NLRA but the Mine Act. Accordingly, the UMWA's status as exclusive collective bargaining agent under the NLRA is irrelevant to its status as a representative of miners under the Mine Act.

The Mine Act makes several references to miners' representatives for a variety of purposes under the Act. One of the major functions of a miners' representative is set forth in section 103(f) of the Mine Act:

Subject to regulations issued by the Secretary, . . . a representative authorized by [the operator's] miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine%y(4)27

The term "representative of miners" is not defined in the Act. Under regulations issued by the Secretary, however, the "representative of miners" means: "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act%y(4)27" 30 C.F.R. 40.1(b). This definition of "representative of miners" is "a reasoned and supportable interpretation of the Act." *United Mine Workers v. FMSHRC*, 671 F.2d 615, 626 (D.C.Cir.1982). See also *Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694, 696 (9th Cir.1981). Accordingly the UMWA, designated by

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four miners at the No. 6 Preparation Plant, may be a "representative of miners" within the meaning of 30 C.F.R. 40.1(b) of the Mine Act, and the fact that it may lack certification as the exclusive collective bargaining agent under the NLRA is not at all relevant.

It is also significant that in the preamble to Part 40 of the Secretary's regulations the Secretary unequivocally rejected the NLRA definition:

[Some] commenters suggested that the National Labor Relations Board (NLRB) definition of representative be applied while others suggested that the representatives should be elected by a majority⁽⁴⁾²⁷ [T]he NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representative in the context of collective bargaining. The meaning of the word representative under this act is completely different. Additionally the rights of nonunion miners would be severely limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representative to be designated. This insures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of a representative of miners under the act and within the framework of each provision⁽²⁾²⁷

43 Fed.Reg. 29508 (July 7, 1978).

Benjamin next argues that the UMWA and its Safety and Health Representatives, Barry Mylan and Lester Poorman, cannot be representatives of miners under the Mine Act because they are not employees of Benjamin. As the UMWA points out in its brief however, one of the most important functions of a miners' representative under the Mine Act is the inspection walkaround right under Section 103(f). That section provides in part that "such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." (Emphasis added.) It is apparent that if all miners' representatives were required to be employees of the operator, the noted language would be meaningless surplusage. Clearly, Congress intended that non-employees, as well as employees, could be designated as

representatives of miners. See Secretary of Labor on behalf of Mylan and Poorman v. Benjamin Coal Co., and UMWA, Docket No. PENN 86-125-D, (Judge Koutras, January 8, 1987); Consolidation Coal Co., v. UMWA, 2 FMSHRC 1403, 1408 (Judge Broderick, 1980); and Emery Mining Corp. v. Secretary of Labor, 8 FMSHRC 1182, 1202 (Judge Morris, 1986) (review pending). Indeed allowing nonemployees to serve as miners' representatives furthers the purposes of the Mine Act by allowing participation in mine inspections by those specially trained and skilled in mine safety and health matters.

In this case Benjamin concedes that the UMWA was designated by "two or more miners" as a representative of miners at its No. 6 Preparation Plant, and that it was so notified pursuant to 30 C.F.R. 40.3. Under 30 C.F.R. 40.4 Benjamin was required to post on the mine bulletin board the information it thus received concerning the identity of the representative of its miners under the Mine Act. Benjamin concedes that it has not posted that information and accordingly the violation is proven as charged.

In determining an appropriate civil penalty in this case I note that Benjamin continued to refuse to post on the mine bulletin board a copy of the requisite information pertaining to the representative of miners even after being cited. Accordingly an order under 104(b) of the Act was issued for failure to abate the violative condition. However inasmuch as the operator's position in this case has an arguable basis in law and it appears that its refusal to comply with the citation and 104(b) order was founded in its effort to obtain a ruling of law concerning at least in part an issue of first impression I do not attribute high negligence or give significant consideration to the failure to abate under the circumstances.

In addition I find it difficult, based on the limited stipulations of fact before me, to properly evaluate the gravity of the violation. It is not known for example whether the designated representatives of miners were actually denied entry to the mine or whether there was merely a failure to post the requisite notice. Thus it cannot be determined from these facts whether the failure to post the required information, the specific violation charged herein, was in itself of high gravity. In assessing the penalty herein I have also considered the history of violations and the size of the operator's business. Within this framework I find that a civil penalty of \$50 is appropriate.

Gary Melick
Administrative Law Judge

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~FOOTNOTE ONE

1 The standard at 30 C.F.R. 40.3 provides as follows:

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This

information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name and address, and Mine Safety and Health Administration identification number, if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; or if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information filed is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.