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EMERY MINING AND UTAH POWER & LIGHT V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

EMERY MINING CORPORATION AND/OR UTAH POWER & LIGHT COMPANY,
CONTESTANTS

v.

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

AND

UNITED MINE WORKERS OF AMERICA,
INTERVENOR

CONTEST PROCEEDINGS

Docket No. WEST 87-138-R
Citation No. 2844750; 3/24/87

Docket No. WEST 87-139-R
Citation No. 2844751; 3/24/87

Docket No. WEST 87-140-R
Citation No. 2844752; 3/24/87

Docket No. WEST 87-141-R
Citation No. 2844753; 3/24/87

Docket No. WEST 87-142-R
Citation No. 2844754; 3/24/87

Docket No. WEST 87-143-R
Citation No. 2844760; 3/24/87

Docket No. WEST 87-148-R
Citation No. 2844801; 3/24/87

Docket No. WEST 87-149-R
Citation No. 2844803; 3/24/87

Docket No. WEST 87-151-R
Citation No. 2844806; 3/24/87

Docket No. WEST 87-154-R
Citation No. 2844810; 3/24/87

Docket No. WEST 87-162-R
Citation No. 2844825; 3/24/87

(Consolidated)

Wilberg Mine
Mine I.D. 42Ä00080

ORDER OF DISMISSAL

Before: Judge Morris

The issues presented here involve the renewed motion of Utah Power & Light, Mining Division, ("UP & L") for a summary decision in its favor pursuant to Commission Rule 64, 29 C.F.R. 2700.64.

PROCEDURAL HISTORY

On May 26, 1987, UP & L moved for a summary decision.

In support of its motion, UP & L stated that it is entitled as a matter of law to a summary decision that it is not liable as "successor in interest" to Emery Mining Corporation for the violations alleged in the citations and orders contested in the captioned proceedings. (Footnote 1)

UP & L has submitted affidavits in support of its position. These affidavits establish the following facts:

1. The Utah Power and Light Company ("UP & L"), a public electric utility, purchased the Deseret, Beehive and Little Dove Mine in 1971 and the Deer Creek and Wilberg Mine in 1976. Exhibit A, paragraph 2. In 1972, UP & L initially contracted with the American Coal Company and later, beginning in June 1979, with Emery Mining Corporation ("Emery") to operate its mines. Exhibit A, paragraph 3. The Wilberg Mine Fire occurred on December 19, 1984, killing 27 miners, including a number of Emery's upper management personnel.

2. Mine recovery efforts were conducted over an extended period of time, concurrent with the course of MSHA's investigation. Representatives of Emery Mining Corporation were closely involved in those efforts but UP & L personnel were not permitted to participate by MSHA. Exhibit A, paragraph 9.

3. Subsequently, on April 16, 1986, UP & L bought for cash all of Emery's assets with respect to the operation of all of its mines, including the Wilberg Mine, and for the first time assumed operating control of the Wilberg Mine. Exhibit A, paragraph 4. The owners of Emery Mining Corporation did not receive stock in UP & L as part of that transaction, nor did UP & L receive stock in Emery. Exhibit A, paragraph 5. The asset purchase agreement between UP & L and Emery stated that Emery retained any liability resulting from the Wilberg Mine Fire, specifically including "Emery's liability, if any, for MSHA fines assessed to Emery for events caused by Emery and which occur(ed) prior to the Closing Date" of April 16, 1986. Exhibit A, paragraph 8; Exhibit B, paragraph 5; Exhibit C. In addition, Emery reserved sufficient funds to pay for any future Wilberg liabilities. Exhibit B, paragraph 7. Although UP & L retained most of Emery's workforce, UP & L's officers and directors replaced Emery personnel as the top management of the company while those management personnel who were retained assumed subordinate positions in the new organization. Exhibit A, paragraph 7. None of Emery's present or former officers or directors have become UP & L officers or directors since the Asset Purchase Agreement was executed. Exhibit A, paragraph 6.

4. On March 24, 1987, as a result of its Wilberg Mine Fire accident investigation, MSHA issued 34 (Footnote 2) citations and orders to "Emery Mining Corp. and its successor-in-interest (UP & L)." Emery continues to exist, since execution of the Asset Purchase Agreement in April of 1986, as a legally and financially viable company. Exhibit B, paragraph 7. Emery accepts responsibility for any MSHA civil penalties which ultimately result from the 34 Wilberg Mine Fire investigation citations and orders issued on March 24, 1987, and Emery has sufficient funds available to pay those civil penalties. Exhibit B at paragraphs 6 and 7.

(The foregoing affidavits were attached to UP & L's Motion filed May 26, 1987).

On June 29, 1987 the Secretary filed his response in opposition to UP & L's motion and his cross motion for summary decision.

The Secretary, in his response and cross motion stated the following facts:

1. UP & L obtained the mining rights to the Wilberg Mine from the Peabody Coal Company in March 1977. UP & L was officially listed as lessee of the Mine on September 1, 1977 (Exhibit A, page (3Ä1), UP & L Mining Application to the Bureau of Mines, Revised 11/21/83). UP & L's mining plan for the Wilberg Mine was subsequently submitted to the Bureau of Mines (Exhibit B, page 8).

2. Emery was under contract with UP & L to operate the Wilberg Mine from June 1979 to April 16, 1986. During the time Emery was under contract to operate the Wilberg Mine, UP & L had a resident engineer present at the mine on a daily basis to make sure that the mining plan referred to above, was followed (Exhibit B, page 12Ä14).

3. UP & L purchased and owned the major mining equipment utilized by Emery at the Wilberg Mine during the June 1979 to April 16, 1986 period (Exhibit B, page 14).

4. UP & L and Emery mutually agreed on production goals for the Wilberg Mine during this period (Exhibit B, page 13).

5. Under the Mine Act and implementing regulations, mine operators are required to submit a number of mine plans to MSHA for approval. UP & L reviewed Emery's mine plans before they were submitted to MSHA when the plans concerned the mining system in use at the mines (Exhibit B, pages 11, 12).

6. UP & L prepared and submitted to the Bureau of Land Management extensive mining plans for the Wilberg Mine. These plans were prepared and submitted without Emery involvement (Exhibit B, pages 8Ä9).

7. After the Wilberg Mine fire on December 19, 1984 and after UP & L's purchase of Emery's assets in the operation of the mine, including Emery's supervisory and labor personnel, UP & L directly participated in MSHA's investigation of the fire origin area of the Mine (Exhibit C, Exhibit CÄ1).

David D. Lauriski, presently UP & L's Safety Director (formerly Emery's Safety Director) helped plan and direct UP & L employees in this most crucial aspect of MSHA's investigation. Mr. Lauriski and/or other UP & L personnel were present or nearby at all times during the underground investigation (Exhibit C, Exhibit CÄ1).

8. As stated by UP & L (page 3, Statement of Facts to its Motion for Summary Judgment), UP & L retained most of Emery's workforce when it took over complete operation of the Wilberg Mine in April 1986. Although this transfer did not include all of the same officers and directors, UP & L did retain Emery mining supervisors and management personnel including David D. Lauriski, Safety Director, and John Boylen, Mine Manager, at the Wilberg Mine (Exhibits C, D and E).

9. After UP & L purchased Emery assets, Emery appears to exist only as a skeleton corporation. Emery apparently has corporate officers, secretaries, and legal counsel, but few other employees (since UP & L retained them), and Emery exists with no other apparent corporate purpose than the resolution of outstanding claims arising out of the fire. There has been no specific evidence presented concerning Emery's financial situation and its ability to pay any civil penalties imposed (UP & L Exhibit B).

10. On March 24, 1987, when the mine fire investigation orders and citations were issued, UP & L owned, operated and fully controlled the Wilberg Mine. This is indicated by the Legal Identity Reports filed by Emery and UP & L with MSHA as required by law (Exhibits D and E). At the time the citations and orders were issued, UP & L, not Emery, had responsibility for abatement of violations and compliance with mandatory federal mine safety and health standards at the Wilberg Mine.

11. As indicated by the pleadings in this proceeding, both UP & L and Emery are represented by the same legal counsel.

(The foregoing facts were attached to the Secretary's motion and affidavits filed June 29, 1987.)

On July 9, 1987, UP & L filed its reply to the Secretary's response.

On August 5, 1987, the Judge denied the motions filed by both parties. The Judge stated the Secretary had raised a genuine issue of fact "whether UP & L was in control of the Wilberg Mine at the time of the alleged violations", citing Bituminous Coal Operator's Association v. Secretary of the Interior ("BCOA"), 547 F.2d 240 (4th Cir.1977).

On the same date the parties filed pleadings indicating that Emery Mining Corporation, ("Emery"), had paid the proposed penalties in each of the cases listed in the caption of this order. Accordingly, the Judge dismissed said cases as to Emery. (Order, August 5, 1987).

On September 21, 1987, UP & L moved the Judge to reconsider his order of August 5, 1987 denying UP & L's motion for summary decision.

On October 13, 1987, the Secretary filed his response to UP & L's motion for reconsideration.

On October 14, 1987, the Judge denied UP & L's motion to reconsider his order of August 5, 1987. The Judge did not further explain his prior ruling.

On November 16, 1987, UP & L filed a petition for interlocutory review with the Commission. After responses by the Secretary and Intervenor the Commission denied the petition. Utah Power & Light Co., Mining Division, 9 FMSHRC 2028 (December 1987). In its order the Commission considered the Secretary's pleadings as "unfocused and confused providing neither UP & L nor the Commission with a clear statement of his asserted basis for imposing liability on UP & L." Further, "(t)he Secretary, as prosecutor, is responsible for charging violations under the Mine Act, not the Commission." In addition, the Commission observed that "(t)o avoid any possibility of prejudice to UP & L, a clear articulation of the liability theory or theories that the Secretary is alleging and intends to pursue in this important litigation is required," 9 FMSHRC at 2030.

The Commission further indicated "(t)he Secretary must clarify the theory of liability upon which he intends to proceed." In addition, "it is incumbent on the judge to fully explain the basis of his rulings on any such further motions," 9 FMSHRC at 2031.

After the Commission's Order was issued the Secretary did not move to amend his petition nor did UP & L move for a more definite statement of the petition.

Accordingly, on January 11, 1988, the Judge directed the Secretary to clarify his theory of liability against UP & L. The Judge's Order indicated the Secretary could plead in the alternative. Further, UP & L and UMWA (Footnote 3) could reply (Orders, January 11, 1988 and January 15, 1988).

On February 1, 1988 the Secretary's statement on UP & L's liability was filed. The Secretary's theories of UP & L's liability are twofold. His initial theory is that UP & L is liable as a coal mine operator (or co-operator) at the time of the fire; further, and in the alternative, UP & L is liable as a successor-in-interest to Emery.

His statement on his theories of liability reads as follows:

> The Secretary of Labor (Secretary), by the undersigned counsel, states the following in response to the Judge's Order of January 11, 1988, regarding the Secretary's theory of liability against Utah Power and Light (UP & L). The Secretary contends that UP & L is liable as a co-operator with the Emery Mining Corporation ("Emery") or in the alternative, as a successor-in-interest operator to Emery.
>
> The Secretary cited UP & L under the alternative theory as a successor-in-interest to Emery since that characterization of UP & L more graphically described UP & L's status at the time the citations and orders were issued. This does not prevent the Secretary from defending the citations and orders under any available theory relating to UP & L liability that can be shown to apply.
>
> Argument
>
> Utah Power and Light Company ("UP & L") is liable under the Federal Mine Safety and Health Act of 1977 (Mine Act) for mandatory safety violations found during the Mine Safety and Health Administration ("MSHA") investigation of the December 19, 1984, Wilberg Mine fire.
>
> Theories of Liability
>
> I. UP & L is liable as a coal mine operator at the time of the fire.
>
> Under Section 3(d) of the Mine Act, 30 U.S.C. 803(d) an "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine. If more than one entity participates as an operator in a mining operation, either one or

both can be cited for violations that occur at the mine. See Bituminous Coal Operator's Association v. Secretary of the Interior, 547 F.2d 240 (4th Cir.1977); Harman Mining Corporation v. Federal Mine Safety and Health Review Commission, 671 F.2d 794 at 797 (4th Cir.1981). Further, multiple operations can be cited regardless of fault. (Footnote)

The footnote in the Secretary's statement reads as follows:

> "Congress, when it enacted the 1969 Coal Act, recognized that the Act:

Provide[d] liability for violation of the standards against the operator without regard to fault, [and] . . . also provide[d] that the Secretary [would] apply the more appropriate negligence test, in determining the amount of penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine."

The facts which will be introduced at the hearing in this case will show that UP & L was a co-operator of the Wilberg Mine.

Factual Basis

As indicated in the Secretary's Response to UP & L's Motion for Summary Decision (Secretary's Response, pages 4Ä6) on the issue of UP & L liability, both Emery and UP & L were involved with coal production monitoring, planning and development involving the Wilberg Mine from the beginning of their relationship. Also:

1. UP & L was the lessee of the Wilberg Mine from the Bureau of Mines at the time of the fire (see page 4, Secretary's Response).

2. Prior to the fire, UP & L had purchased the major mining equipment utilized by Emery at the Wilberg Mine. UP & L owned this equipment at the time of the fire. (Secretary's Response, page 4).

3. UP & L and Emery mutually agreed on production goals for the Wilberg Mine (Secretary's Response, page 4).

4. UP & L had a resident engineer present at the mine on a daily basis to make sure that UP & L's mining plan was followed (Secretary's Response, page 4).

5. When Emery's mine plans affected the mining system at the Wilberg Mine UP & L reviewed the plans before they were submitted to MSHA for approval (Secretary's Response, page 5).

II. In the alternative, UP & L is liable as a successor-in-interest operator to Emery

The Federal Mine Safety and Health Review Commission has squarely ruled that a successor mine operator is jointly and severally liable for correcting the illegal acts of discrimination committed by a predecessor operator. In such instances the remedies of back pay, costs and civil penalties for the Mine Act violations are included in the liability of the successor-in-interest. See Secretary of Labor v. Sugartree Corporation, Terco, Inc. and Randall Lawson, 9 FMSHRC 394 (March 30, 1987), affirmed by 6th Circuit, Dec. 8, 1987. Munsey v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463 (1980). This result is necessary because the purposes of Mine Act liability are both prospective and remedial. Only UP & L, the current operator, has the capacity to correct or abate violations subsequently cited by MSHA and related to the fire investigation. From the time it became the mine's sole operator on April 16, 1986, only UP & L could take remedial and prospective action designed to prevent such health and safety violations from recurring. Only UP & L can comply with Section 109 of the Mine Act which requires that citations be posted at the mine in order to encourage present and future compliance (Secretary's Response, page 17).

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The Secretary's statement continues:

> Further, UP & L substantially meets the successor-in-interest criteria as highlighted in EEOC V. Mac Millan Bloedel Containers, Inc., 503 F.2d 1986 (6th Cir.1974) and Terco, supra, which are:
>
> 1. Whether the successor company had notice of the charge against the predecessor; (2) the ability of the predecessor to provide relief; (3) whether there was substantial continuity of business operations; (4) whether the new employer uses the same plant (mine); (5) whether the new employer retains the same or substantially the same work force; (6) whether the new employer retains the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the same machinery, equipment, and method of production are used; and (9) whether the same product is produced. Id. at 1094, citing Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, 417 U.S. 249, 256Ä258 (1974).
>
> Factual Basis
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> The relevant facts supporting UP & L being liable as a successor are as follows:
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> 1. UP & L had notice of these violations (See copies of citations and orders issued).
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> 2. UP & L itself has stated that it retained most of Emery's Wilberg Mine workforce. (See Statement of Facts to UP & L's Motion for Summary Judgment, page 3).
>
> 3. Emery's Director of Safety and its Mine Manager at the mine were retained by UP & L. (Secretary's Response; page 5 and Exhibits C, CÄ1 thereto).
>
> 4. UP & L uses most of the same equipment Emery used. (Secretary's Response, page 20).

5. UP & L produces the same product - coal, and it uses the same method of production. (See Exhibits DÄG to Secretary's Response).

6. UP & L operates the same mine, Wilberg.

7. As stated previously, only UP & L can now provide the remedial and prospective relief pertaining to the health and safety conditions and practices cited by MSHA. This goes beyond the payment of any civil penalties assessed. (See Secretary's Response pages 4Ä6 and attached exhibits).

8. UP & L itself, by other pleadings before the Department of Labor termed itself successor-in-interest to Emery (Secretary's Response, Exhibit F).

9. The Secretary anticipates other documents and evidence in support of UP & L liability after discovery is completed. (Footnote)

The footnote in Secretary's Argument reads:

> Requests for answers to Interrogatories and production of documents are pending against Emery and UP & L as of May 13, 1987, and a second set of Interrogatories and request for production of documents have been submitted as of January 29, 1988.

Conclusion:

As stated in the Secretary's Response at page 13, the Secretary has the authority and discretion to cite appropriate parties under the Mine Act in order to achieve the statutory goals of health and safety enforcement. Secretary of Labor v. Cathedral Bluffs Shale Oil, 796 F.2d 533 at 538 (D.C.Cir.1986). Citing UP & L as a co-operator or in the alternative as a successor-in-interest accomplishes this purpose. Under both theories, UP & L has remedial and prospective health and safety responsibilities under the Act, and it is liable for the Wilberg Mine Act violations.

On February 12, 1988 UP & L filed its response to the Secretary's statement and renewed its motion for summary decision.

On March 4, 1988 the Judge severed the cases listed in the caption of this order from the remaining pending cases.

Discussion

I

In support of his position that UP & L was a coal mine operator at the time of the fire, the Secretary argues that he has discretionary authority to cite an operator, an independent contractor, multiple operators, or even an owner for violations of an independent contractor, regardless of fault, citing, among other cases, Bituminous Coal Operator's Ass'n. ("BCOA") v. Secretary of Interior, and Harman Mining Corporation, supra.

Further, the Secretary argues that his decision to impose joint and several liability on Emery and UP & L is particularly appropriate. UP & L is not in the position of a stranger who might purchase a mining operation without any connection with or knowledge of past events at that mine. At all pertinent times, UP & L owned the mining rights. Furthermore, Emery and UP & L worked together when Emery operated the mine. The fact that they continue to have a close business relationship is shown by the fact that they are represented by the same law firm and counsel.

In addition, the Secretary contends that since it acquired the Wilberg Mine in 1977, it exercised ultimate control over the mine's development and production. Emery, which exercised day-to-day operational responsibility at the mine from June 6, 1979 to April 16, 1986, was always ultimately subservient to UP & L control of the mine. This situation was directly analogous to the relationship between a production operator and his independent contractor. The federal courts of appeals have been unanimous in holding that the Secretary has wide discretion to hold either or both liable for violations of the Mine Act committed by the contractor and its employees.

I completely agree that the Secretary has broad discretion in issuing citations and orders under the Act. But the fact remains: UP & L was not cited as an operator but as a successor-in-interest. An enforcement action cannot be sustained absent implementation by the issuance of a citation or order against UP & L as an operator, Act 104(a), (d).

The citations and orders on their face indicate UP & L was only cited as a successor-in-interest. Further, various statements of the Secretary clearly confirm this view. Specifically, the Secretary states he cited UP & L under the alternate theory as a successor-in-interest to Emery since that characterization of UP & L more graphically described UP & L's status at the time the citations and orders were issued. (Footnote 4) Further, "Emery was properly cited as the operator and UP & L was properly cited as a successor-in-interest." (Footnote 5)

It is clear that the requirements of the Act have not been met. The Secretary did not "issue a citation to the operator" to initiate a proceedings under 104(a) or 104(d). If the Secretary seeks to charge UP & L in its own right as an operator liable for the Wilberg fire violation, a citation or order must be issued to UP & L charging it with direct liability for those violations.

In addition, the Commission and the courts have ruled that procedural shortcuts are unlawful under the Act. The Commission invalidated a procedural shortcut in Monterey Coal Co., 7 FMSHRC 1004 (July 1985). In Monterey an order and associated penalties had been contested by the mine operator to whom the order had been issued, on the ground that its independent contractor, FrontierÄKemper, "was the operator responsible for the violation," 7 FMSHRC at 1004. During the course of the litigation, the Secretary moved to amend his penalty proposal to join FrontierÄKemper as an additional respondent. Although the judge granted the motion, the Commission reversed, holding that:

> Before the Secretary may institute a proceeding before this Commission seeking a civil penalty from an operator for a violation of the Mine Act or a mandatory standard, the operator must have been cited for a violation and been given the opportunity either to contest or to pay the Secretary's proposed penalty.

* * * * *

> We believe that Congress did not intend the Secretary to be able to leapfrog over these procedural steps and begin a civil penalty proceeding against an operator by the filing of a proposal for penalty in the first instance, before the Commission.

7 FMSHRC at 1005, 1006.

The foundational principles set forth in Monterey bar the Judge from holding UP & L liable for civil penalties assessed directly against it as a mine operator in the absence of UP & L being cited as an operator and a civil penalty being proposed against it directly. UP & L has only been cited, and it is being subjected to civil penalty liability in these proceedings, for Emery's alleged violations. Had UP & L been cited as an operator, the entire course of this litigation would have been different. Any proposed penalties assessed by MSHA against UP & L as an operator would most likely have been dramatically lower. This is one of the reasons why the Commission in Monterey would not allow the Secretary to shortcut the Act's required procedures by commencing a proceeding against FrontierÄKemper in the midst of an ongoing proceeding against another operator. As the Commission explained:

> Our insistence on the need for compliance with the procedural requirements [of the Act for initiating such proceedings] also serves a practical purpose and furthers the enforcement scheme contemplated by Congress in the Mine Act. Providing a mine operator with the opportunity to pay a civil penalty before the institution of litigation promotes judicial and administrative economy and can assist more expeditious resolution of enforcement disputes.

7 FMSHRC at 1007. See also Phil Baker v. U.S. Department of Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C.Cir.1978), wherein the Court held that a judge could not find a violation of a mandatory safety standard absent the particular statutory proceedings for bringing that issue to federal attention. 595 F.2d at 750.

The Judge previously denied UP & L's motion and Secretary's motion. But his prior analysis of the facts was erroneous. The motions by UP & L and the Secretary for summary decision were denied because it was the Judge's view that a genuine issue of fact was

raised as to whether "UP & L was in control of the Wilberg Mine at the time of the alleged violations." (Order, August 5, 1987). While such a fact issue still exists, control by UP & L would be relevant only if UP & L had been cited and could be held liable as an operator or co-operator.

In short, I conclude that the Secretary's claims that he could have cited UP & L as an operator independently liable for the alleged violations does not empower the Judge to uphold the citations, orders and Emery-based civil penalties here, or to otherwise assess civil penalties against UP & L as an operator. The Secretary's post hoc assertions on UP & L's liability cannot take the place of citations and orders citing UP & L with violations pursuant to the Act.

As the Supreme Court has stated, an agency's action "must . . . be supported by the findings actually made by the Secretary, not merely by findings that we believe he might have made." Industrial Union Dep't., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 659, 100 S.Ct. 2844. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549, 98 S.Ct. 1197 (1978), ("When there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding. . . .' ": American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539, 101 S.Ct. 2478 (1981), ("the post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action").

The Secretary also relies on the fact that, as indicated by the pleadings in the cases, both UP & L and Emery are represented by the same legal counsel (Paragraph 11, Secretary's response filed June 29, 1987).

The fact that UP & L and Emery are represented by the same law firm has no relevance to the issues of UP & L's liability. The interests of UP & L and Emery are not adverse particularly since Emery agrees that it, and not UP & L, bears the liability for any violations as they are finally adjudicated.

The facts relied on by the Secretary would generally establish, if true, that UP & L was an operator at the Wilberg Mine at the time the citations were issued. However, since it is clear UP & L was not cited as an operator, the stated facts are not relevant.

Further, the cases relied on by the Secretary are not controlling. In these cases the owners were, in fact, issued an MSHA citation.

In BCOA the mining company was cited for violations committed by a construction company. In Harman Mining the defense failed but it focused on the issue that the Secretary had not cited the independent contractor. In Cyprus Industrial the owner was cited but was not insulated from liability because an independent contractor committed the violation. The remaining cases relied on by the Secretary are not inopposite the view expressed herein.

In sum, UP & L was never cited as an operator and for the reasons expressed herein the Secretary's attempt to impose liability on UP & L as an operator cannot be sustained.

II

In his alternative theory of liability the Secretary relies on the successorship doctrine and he asserts that UP & L substantially meets the successor-in-interest criteria.

As a threshold matter it appears the Commission has considered the issue of successorship liability only in the context of discrimination cases. Sugartree Corp., 9 FMSHRC 394 (1987) and Glen Munsay v. Smitty Baker Coal Co., 2 FMSHRC 3463 (1980), aff'd in relevant part rev'd in part on other grounds sub nom. Munsey v. FMSHRC, 701 F.2d 976 (D.C.Cir.1983) cert. denied, 464 U.S. 851 (1983). In the cited cases the Commission has held the successor corporation liable for the discrimination committed by the predecessor. The Commission followed the discrimination and labor law precedents and disregarded the general successor liability rule. (Footnote 6) The rationale for its ruling in discrimination disputes was explained by the Commission as follows:

> In Munsey, this Commission noted that the statutory protection against discrimination afforded miners is similar to the statutory protection afforded workers under other labor statutes. The Commission stated: "In certain circumstances, the protections of those other statutes have been construed to include the liability of bona fide purchasers and other

> successors for their predecessors' act of discrimination . . . and . . . in appropriate cases the successorship doctrine should also be applied [by the Commission]. . . ." 2 FMSHRC at 3465. Although Munsey was decided under the Federal Coal Mine Health Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977) ("Coal Act"), the predecessor to the Mine Act, the discrimination protections afforded miners under the Mine Act are even greater than those afforded miners under the Coal Act, and the successorship doctrine clearly applies under the Mine Act as well.

Sugartree, 9 FMSHRC at 397.

The cases at bar do not in any way involve discrimination. The citations and orders arise from the dramatics of a mine fire but all the cases involve disputes as to whether the mine operator did or did not violate a particular mandatory standard; further, whether the facts involve the operator's unwarrantable failure to comply and the appropriate penalty. In short, all the cases pending before the Judge are contest and penalty cases of alleged violations of specific safety standards.

In the pending cases there are present none of the considerations which compelled the Commission in Munsey and Sugartree to adopt the labor/discrimination subject matter exception to the general rule governing successor liability. Even if remedy is a consideration, the violations have all been abated and Emery has paid the penalties involved in the captioned cases. Further, Emery has the funds available to pay any remaining civil penalties.

The fundamental differences between the present enforcement disputes and the discrimination cases the Commission addressed in Sugartree and Munsey are critical since "the resolution of any question concerning successorship involves "striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee.' " Munsey, 2 FMSHRC at 3468, quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 181 (1973). A fair balancing of these interests in this case requires that successor liability not be imposed on UP & L. Unlike the facts in Sugartree and Munsey, the Wilberg miners have no compelling interest which would be vindicated by such an action. The miners who were discriminated against in Munsey and Sugartree could only obtain reinstatement if the successor corporation were held liable. In contrast, any safety violations which may have existed at the Wilberg Mine before the fire have long since been abated (and even if still uncorrected, they could be corrected by UP & L without holding that company liable for Emery's actions).

The Secretary also argues that successorship liability should be imposed because UP & L hired the Emery workforce and certain Emery personnel; namely, the mine manager and safety director.

The Secretary's position lacks merit. Many cases hold that in order to establish successorship a common identity of officers, directors and stockholders is the critical element in determining whether a purchaser of assets is a successor, not the purchaser's "mere employment" of the seller's personnel - even its officers. Bud Antle, Inc. v. Eastern Foods, Inc., supra, 758 F.2d at 1459. There is no such common identity here.

The Secretary's arguments that UP & L must be a successor since Emery now lacks the capacity to abate any violations or post citations are not persuasive. The citations and orders on their face reveal that all of the alleged violations had been corrected or abated the date they were issued. If the Secretary believes UP & L as an operator has violated a regulation then it is his duty to cite UP & L. It will then be UP & L's obligation to comply with the posting requirement of the Act. But at this time the Secretary's assertions that UP & L must be held liable as a successor for remedial reasons are meritless.

The Secretary further contends that some of the violations were charged as "unwarrantable" under Section 104(d) of the Act (Secretary's Response, filed June 29, 1987, page 17). Hence, only the current operator can assume responsibility for the termination of the unwarrantable sequence, because that sequence runs with the mine until a complete inspection of the entire mine discloses no further "unwarrantable" violations. (Footnote 7)

The Secretary's premise is flawed. The nature of the unwarrantable failure sequence precludes automatic application to a subsequent operator of the mine. The unwarrantable failure sequence is a special sanction for dealing with a particular operator who has not responded adequately to the normal, lesser sanctions imposed under 104(a). See Consolidation Coal Co., 4 FMSHRC 1791, 1794 (1982) ("graduated scheme of sanctions"); S.Rep. No. 181, 95th Cong., 1st Sess. 31 (1977) reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 619 (1978). An unwarrantable failure is operator specific: it means that the violation occurred as a result of the operator's indifference, willful intent, or serious lack of reasonable care. Westmoreland Coal Co., 7 FMSHRC 1338, 1342 (1985). Further, it

has been held that a mine operator cannot be held liable for an unwarrantable failure order where the cited operator did not know (nor should have known) of the violation, GEX Colorado Incorporated, 2 FMSHRC 1347, 1350 (1980) (Morris, J). It is one thing to hold a party liable for a violation without fault, but quite another to hold that he unwarrantably failed to comply without fault.

The Secretary's position, cited without authority, is accordingly rejected.

The Secretary also contends that UP & L represented itself as a successor-in-interest to Emery in Docket No. 86ÄMSAÄ3 involving a petition for modification (Secretary's Exhibit F).

The evidence relied on merely shows that UP & L voluntarily assumed Emery's position in ongoing litigation. It falls far short of establishing that UP & L is liable for the violations the Secretary has urged against Emery.

As noted above, the issues presented in this motion appear in other related pending cases. Unless directed otherwise by a higher authority the Judge will, in due course, enter the same order as to UP & L where the issue arises.

In sum, the rationale for imposing the successorship liability doctrine on UP & L does not exist in an enforcement action involving violation of a safety or health standard. Accordingly, the facts and the case law relied on by the Secretary do not support his position.

Emery has paid the penalties in the cases listed in the caption of this order and those cases have been dismissed as to Emery. The Judge further concludes there is no issue of material facts as to UP & L.

Accordingly, for the reasons stated herein, I enter the following:

ORDER

1. The motion of Utah Power & Light for the Judge to reconsider his order denying Contestant UP & L's Motion for summary decision is granted.

2. The Judge's order of August 5, 1987 denying said motion is reconsidered.

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3. The order of August 5, 1987 denying the motion is vacated.

4. The renewed motion for summary decision by Contestant Utah Power & Light is granted.

5. The contest filed by Utah Power & Light is sustained.

John J. Morris
Administrative Law Judge

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Footnote starts here:-

~Footnote_one

1 The identical issue is raised in other contest proceedings involving the same parties and pending before the Judge. The cases are docketed as WEST 87Ä130ÄR, WEST 87Ä131ÄR, WEST 87Ä132ÄR, WEST 87Ä133ÄR, WEST 87Ä134ÄR, WEST 87Ä135ÄR, WEST 87Ä136ÄR, WEST 87Ä137ÄR, WEST 87Ä144ÄR, WEST 87Ä145ÄR, WEST 87Ä146ÄR, WEST 87Ä147ÄR, WEST 87Ä150ÄR, WEST 87Ä152ÄR, WEST 87Ä153ÄR, WEST 87Ä155ÄR, WEST 87Ä156ÄR, WEST 87Ä157ÄR, WEST 87Ä158ÄR, WEST 87Ä159ÄR, WEST 87Ä160ÄR, WEST 87Ä161ÄR, WEST 87Ä162ÄR, WEST 87Ä163ÄR, WEST 87Ä243ÄR, WEST 87Ä244ÄR, WEST 87Ä245ÄR, WEST 87Ä246ÄR, WEST 87Ä247ÄR, WEST 87Ä248ÄR, WEST 87Ä249ÄR. This issue will also affect three penalty cases, docketed as WEST 87Ä208, WEST 87Ä209 and WEST 88Ä25.

~Footnote_two

2 In fact, a total of 41 citations and orders were issued by MSHA. However, seven citations were issued after Exhibit B, the relevant affidavit, was executed.

~Footnote_three

3 The UMWA filed in opposition to UP & L's petition for interlocutory review but has filed no other pleading on the successorship issue raised by UP & L.

~Footnote_four

4 Secretary's statement on UP & L's liability filed February 1, 1988, (at 1).

~Footnote_five

5 Secretary's response to UP & L motion for reconsideration filed October 13, 1987, (at 3Ä4).

~Footnote_six

6 The general rule is that a corporation which purchases the assets of a company does not assume the liabilities of the seller. Certain exceptions exist but they are not involved here. The rule has been applied frequently by courts in many

jurisdictions. See Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, (11th Cir.1985); Mozingo v. Correct Manufacturing Corp., 752 F.2d 168 (5th Cir.1985); Travus v. Harris Corp., 565 F.2d 443 (7th Cir.1977); R.J. Enstron Corp. v. Interceptor Corp., 555 F.2d 277 (10th Cir.1977; Cooper v. Utah Light & Railway Co., 35 Utah 570, 102 P. 202 (1909). 6A Fletcher's Cyclopedia on Corporations,   2953,   7122.

~Footnote_seven

7 The cases in the caption involving the issue of unwarrantable failure are WEST 87Ä149ÄR, WEST 87Ä154ÄR and WEST 87Ä162ÄR.