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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 87-88 A.C. No. 05-00301-03609
v.	Dutch Creek No. 1 Mine
MIDÄCONTINENT RESOURCES, INC., RESPONDENT AND	
UNITED MINE WORKERS OF AMERICA, INTERVENOR	
AMERICAN MINING CONGRESS, AMICUS CURIAE	

ORDER OF DISMISSAL

Before: Judge Morris

The issues involved here arise from the federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., ("Mine Act" or "Act").

At issue is whether the judge should grant the Secretary's pending motion to withdraw her complaint proposing a civil penalty or, in the alternative, deny the Secretary's motion and grant respondent's motion for declaratory relief.

A resolution of the issues requires a review of the development and present status of this case.

PROCEDURAL HISTORY

1. On March 16, 1987, the Secretary filed a civil penalty against respondent MidÄContinent Resources, Incorporated. The complaint proposing the penalty arose from Citation No. 2213910, issued to MidÄContinent pursuant to 104(a) of the Act.

The citation charges MidÄContinent with violating 103(f) of the Act. The citation describes the following violative practice:

> On 5/13/86, Donald Ford, Safety Department refused to Robert Butero, a designated representative of the miners, the right to accompany Mike Horbatko, an authorized representative of

the Secretary. During an inspection of the Dutch Creek No. 1 Mine. The inspection was being conducted pursuant to 103(a) of the Federal Mine Safety and Health Act of 1977.

2. Section 103(f) of the Act, allegedly violated here, provides as follows:

> "(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his 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. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. 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. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

3. On August 21, 1987 the judge stayed the proceedings because he believed certain controlling cases were pending before the Commission.

4. On October 16, 1987 the stay was dissolved and the case subsequently set for a hearing.

5. In due course the United Mine Workers of America ("UMWA") was granted party status and the American Mining Congress, ("AMC"), was granted leave to appear as Amicus Curaie.

6. MidÄContinent's amended answer to the Secretary's complaint alleged, in effect, that the designation of the miners representative was invalid (Paragraph 20, Amended Answer).

7. On November 23, 1987, the Secretary moved to withdraw his petition for assessment of a civil penalty. His motion admitted

that after a review and investigation the representative of miners' form was:

> ... signed by two employees (one of whom was then off-work, permanently injured, had no intention of returning, and was unable to return to active employment at MidÄContinent ...

In addition, his motion states that:

> "[c]onsequently, the individual was not an active miner at the time the representative of miners' form was filed with the Mine Safety and Health Administration. In light of the truth of this allegation and the fact that only two people signed the designation (see Respondent's Answer, Exhibit No. 5), the citation and order have been vacated by the Secretary."

8. MidÄContinent opposed the Secretary's motion to withdraw his proposal for penalty and further moved for declaratory relief.

9. MidÄContinent's opposition to the Secretary's motion states, in part, as follows:

A) That a major issue raised by the proceeding is whether a nominal number of workers can properly designate a union such as the UMWA as their walk-around representative under 30 C.F.R. Part 40 when the designated union is not a union which represents employees at the mine under the Labor Management Relations Act, as amended, 29 U.S.C. 141 et seq. MidÄContinent further asserts the issue was exacerbated in this instance by virtue of the fact that the UMWA was at the very time of the disputed designation in the process of an unsuccessful effort to obtain designation as the collective bargaining representative of MidÄContinent employees by the National Labor Relations Board.

B) Further, MidÄContinent contends the Secretary's position is that any two or more employees may execute a designation under 30 C.F.R. Part 40. As a result a non-employee union representative may gain access to MidÄContinent's mine, or any other mine, regardless of whether that union has been designated a collective bargaining representative of employees by the National Labor Relations Board or whether the designated union is, in fact, or in law, truly "representative'.

C) MidÄContinent further states that since AMC is appearing as Amicus Curiae the problems arising here are demonstrative of similar situations throughout the industry.

D) Further, to allow the Secretary to withdraw his civil penalty without allowing this matter to move forward would deprive MidÄContinent of its efforts to date.

E) MidÄContinent also anticipates being confronted with the identical issue in the near future. The 12Ämonth organizational/election immunity created under Section 9(e)(2) of the National Labor Relations Act, 29 U.S.C. 159(c)(2) between MidÄContinent and the UMWA expired in December 1987.

F) Further, MidÄContinent faces civil penalties under Section 110(a) and (b) of the 1977 Mine Act and face a choice of either complying with the Mine Act (which is in clear conflict with the Labor Management Relations Act) or risk greater penalties under Section 110 of the Mine Act, including the possibility of criminal sanctions. Accordingly, MidÄContinent should be permitted the opportunity to litigate these matters rather than risk penalty alternatives.

G) No claim has been made that the Secretary anticipates reformulating her position on the propriety of a non-employee union representative (who was not selected as a representative of employees under the Labor Management Relations Act). Specifically, MidÄContinent contends this circumvents the National Labor Relations Board and obtains ostensible authority under the Mine Act when said representative is not, in law or fact "representative". Thus, both the factual and legal issues involved are significantly narrower than those involved in Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 453 (10th Cir.1983).

H) According to MidÄContinent a further issue is whether the issuance of the citation contravened the prohibition of advance notice under Section 110(e) of the Mine Act. This issue arises from certain facts urged by MidÄContinent. Thus, if the case is not allowed to proceed to declaratory relief then MidÄContinent requests the matter be referred to the Department of Labor and the Department of Justice for review of potential prosecution for a violation of Section 110(e).

10. On December 23, 1987 the judge cancelled the scheduled hearing in Glenwood Springs, Colorado and gave the parties 15 days to state their views as to whether MidÄContinent should be permitted to proceed with its request for declaratory relief.

11. On March 29, 1988, the Commission issued its decision in Emery Mining Corporation, 10 FMSHRC 276.

12. The parties were given an opportunity to comment on the effect of Emery as it related to the facts involved in the instant case. The Secretary and UMWA oppose MidÄContinent's motion. Amicus Curiae, AMC, supports MidÄContinent's position.

Discussion

As a threshold matter it appears that the Commission has jurisdiction in this case. Section 110(k) of the Act prohibits compromise, reduction or settlement of proposed penalties, once contested, without Commission approval. Commission Rule 30(a), 29 C.F.R. 2700.30(a); Kocher Coal Co., 4 FMSHRC 2123 (1982).

It further appears the Commission, in its discretion, may grant declaratory relief under section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e); Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447 (10th Cir.1983).

The pivitol issue is whether the Commission should exercise its discretion and grant declaratory relief.

MidÄContinent's prinicipal contention focuses on the point that in Emery the miners' were represented by the UMWA. On the other hand, MidÄContinent was union free at the time of the citation contested herein. It has, in fact, been union free since November, 1981.

Emery clearly stands for the proposition that the rights of miners' representatives broadly extends to non-employees. The undersigned judge is obliged to follow the Commission rulings. New Jersey Pulversing Company, 2 FMSHRC 1686 (1980). Accordingly, on this point MidÄContinent could not prevail.

MidÄContinent further contends that permitting access to its mine by a UMWA representative would clearly conflict with the National Labor Relations Act.

However, in Emery Mining Corporation, the trial judge addressed an issue of whether Emery's waiver of liability policy might violate the laws of the State of Utah. 8 FMSHRC at 1206. On appeal the Commission observed that the proper concern was whether Emery had violated the Mine Act. Specifically, the Commission expressed no opinion on any question concerning state law, 10 FMSHRC 289, fn. 11. It would accordingly appear that any relief on this point would lie with the NLRB and not the Commission.

MidÄContinent also argues that the Commission decision deals with a union representative recognized under the NLRB law. However the decision does not address the inherent conflict between the criminal provisions relating to prohibitions on prior notification of inspections in Section 110(e) of the Mine Act and the necessity for prior notification to be given to a non-employee walk-around representative, if the walk-around designation is to be anything other than illusory. It is claimed that the fortuity of a union organizer and inspector both showing up at 6:30 a.m.

is the one fact in this matter which will rarely occur absent prior notification. This problem, according to MidÄContinent, can be ameliorated somewhat in a situation where a union has already been selected by employees. However, there is no way to ameliorate it where, as here, the walk-around designation is being used as a subterfuge to gain access to company property contrary to the LaborÄManagement Relations Act.

I disagree. The date and time of regularly scheduled mine inspections, as mandated by the Act, would probably be common knowledge to any interested miner at the site. In addition, in any event it is the function of this judge to adjudicate issues under the Mine Act, not the Labor Management Act.

For the foregoing reasons the motion of MidÄContinent for declaratory relief is denied and I enter the following:

ORDER

1. The motion of respondent for declaratory relief is denied.

2. The motion of the Secretary to withdraw his petition for assessment of a civil penalty is granted.

3. The proposed penalty is vacated.

4. The case is dismissed.

John J. Morris
Administrative Law Judge