CCASE:
EMERY MINING AND/OR UTAH POWER & LIGHT V. UMWA
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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	CONTEST PROCEEDINGS
v.	Docket No. WEST 87-130-R Citation No. 2844485; 3/24/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEST 87-131-R Order No. 2844486; 3/24/87
AND	Docket No. WEST 87-132-R Order No. 2844488; 3/24/87
UNITED MINE WORKERS OF AMERICA, (UMWA), INTERVENOR	Docket No. WEST 87-133-R Order No. 2844489; 3/24/87
	Docket No. WEST 87-134-R Citation No. 2844490; 3/24/87
	Docket No. WEST 87-135-R Citation No. 2844491; 3/24/87
	Docket No. WEST 87-136-R Citation No. 2844492; 3/24/87
	Docket No. WEST 87-137-R Citation No. 2844493; 3/24/87
	Docket No. WEST 87-144-R Order No. 2844795; 3/24/87
	Docket No. WEST 87-145-R Order No. 2844796; 3/24/87
	Docket No. WEST 87-146-R Order No. 2844798; 3/24/87
	Docket No. WEST 87-147-R Order No. 2844800; 3/24/87
	Docket No. WEST 87-150-R Order No. 2844805; 3/24/87
	Docket No. WEST 87-152-R Order No. 2844807; 3/24/87
	Docket No. WEST 87-153-R Order No. 2844808; 3/24/87

Docket No. WEST 87-155-R
Citation No. 2844811; 3/24/87

Docket No. WEST 87-156-R
Order No. 2844813; 3/24/87

Docket No. WEST 87-157-R
Order No. 2844815; 3/24/87

Docket No. WEST 87-158-R
Citation No. 2844816; 3/24/87

Docket No. WEST 87-159-R
Citation No. 2844817; 3/24/87

Docket No. WEST 87-160-R
Order No. 2844822; 3/24/87

Docket No. WEST 87-161-R
Order No. 2844823; 3/24/87

Docket No. WEST 87-163-R
Citation No. 2844826; 3/24/87

Docket No. WEST 87-243-R
Citation No. 2844828; 8/13/87

Docket No. WEST 87-244-R
Citation No. 2844830; 8/13/87

Docket No. WEST 87-245-R
Citation No. 2844831; 8/13/87

Docket No. WEST 87-246-R
Citation No. 2844832; 8/13/87

Docket No. WEST 87-247-R
Citation No. 2844833; 8/13/87

Docket No. WEST 87-248-R
Citation No. 2844835; 8/13/87

Docket No. WEST 87-249-R
Citation No. 2844837; 8/13/87

Wilberg Mine
Mine I.D. No. 42Ä00080

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEST 87-208 A.C. No. 42-00080-03578
v.	Docket No. WEST 87-209 A.C. No. 42-00080-03579
EMERY MINING CORPORATION, AND ITS SUCCESSORÄINÄINTEREST UTAH POWER & LIGHT COMPANY, MINING DIV., RESPONDENT	Docket No. WEST 88-25 A.C. No. 42-00080-03584 Wilberg Mine
AND	
UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	

ORDER

The issues presented here involve the Secretary of Labor's renewed motion for summary decision and a motion by Utah Power and Light Company, Mining Division (UP & L) to vacate 30 modified citations and orders. (Footnote 1)

Utah Power and Light opposes the Secretary's renewed motion for summary decision (Footnote 2) and further moves to dismiss the citations and orders as modified or, in the alternative, moves for a summary decision if the modifications are ruled invalid.

Prior to discussing the pending issues it is necessary to detail certain relevant procedural history:

On March 4, 1988 the Judge severed 11 cases from the general consolidation of the cases. After severance these cases were reconsolidated. The cases were docketed as WEST 87Ä138ÄR, WEST 87Ä139ÄR, WEST 87Ä140ÄR, WEST 87Ä141ÄR, WEST 87Ä142ÄR, WEST 87Ä143ÄR, WEST 87Ä148ÄR, WEST 87Ä149ÄR, WEST 87Ä151ÄR, WEST 87Ä154ÄR and WEST 87Ä162ÄR. The dual common denominator in these cases was that Emery Mining Corporation (Emery) had paid the proposed penalties in full and a dismissal had been entered as to Emery (Order, August 5, 1987). Further, a renewed motion for a summary decision by UP & L was pending in the cases.

On March 9, 1988 UP & L's motion was granted. Since there were no remaining issues the cases were returned to the Commission. These cases are reported at 10 FMSHRC 339.

The ruling in the cases holds that UP & L had not been cited as an operator and an enforcement action could not be sustained against it. Specifically, in part, the Judge stated that "UP & L was not cited as an operator but as a successor-in-interest," 10 FMSHRC at 349. The decision further holds that the successorship doctrine did not apply under the circumstances of the case.

The Secretary did not appeal the Judge's order of dismissal but on April 27, 1988 she restated her prior position and indicated she would modify the remaining citations and orders to cite UP & L as an owner-operator.

The nature of the modification of the citations and orders are as stated below in her renewed motion for summary decision. The modifications were made on April 25, 1988 and filed with the Commission on May 4, 1988.

On May 17, 1988 the Secretary filed her renewed motion for summary decision. The motion, in its entirety, provides as follows:

> The Secretary of Labor hereby renews her previously filed motion for summary decision on the issues of Utah Power and Light's (UP & L) liability as an operator. This motion is renewed because of additional information obtained in discovery after the Judge's March 9, 1988, Order of Dismissal, and because the remaining unpaid citations and orders were modified in response to the Judge's Order. As modified, those citations describe the operators as:
>
> > Utah Power & Light Company, owner-operator as well as the successor-in-interest to Emery Mining Corporation; and Emery Mining Corporation.

The additional information, which was received in discovery on March 14, 1988, consists of a portion of the Coal Mining Agreement between UP & L and the American Coal Company, which, in 1979, became the Coal Mining Agreement (Agreement) between UP & L and Emery. (Footnote 1) (See Appendix A hereto). Under the Agreement, UP & L agreed to provide a mining plan for its Wilberg and Deer Creek Mines and to "furnish all capital equipment, [and to] pay for materials and supplies" in exchange for American Coal Company's, and later Emery's agreement to "perform all of the work and services necessary for the production of coal mined by deep mining or underground methods" from the Wilberg and Deer Creek Mines (See Appendix A, p. 1). Although the Secretary has not yet received the entire Agreement from UP & L or Emery, the portion that has been produced indicates that UP & L agreed to pay the "Total Cost of Production" at the Wilberg Mine. Under the Agreement, the "Total Cost of Production" means "all costs incurred by American [and later Emery] for the purpose of mining, washing, blending, processing, storing and loading coal produced from Deer Creek and Wilberg Mines and in operating and maintaining said Deer Creek and Wilberg Mines under the terms of this Contract." (See Appendix A, p. 2).

These costs included salaries and wages, etc., as well as the:

> "(v) costs of complying with federal, state or local laws, rules, regulations, including mining laws and regulations and court orders, judgments and settlements including related attorneys fees relating to proceedings arising out of American's [Emery's] performance under this Contract, but excepting all costs incurred by American [Emery] with respect to any proceeding against Utah [UP & L];" (emphasis supplied) (See Appendix A, p. 3).

The Secretary's footnote reads as follows:

1 A copy of the entire Coal Mining Agreement between UP & L and Emery was requested in discovery by the Secretary on January 28, 1988. To date, the entire Agreement has not been received. It is extremely possible that the Agreement, in its entirety, will show an even closer nexus between UP & L's and Emery's operations at the Wilberg Mine.

There remains no genuine issue of material fact in dispute concerning UP & L's status as an owner-operator at the time of the December 19, 1984, Wilberg Mine Fire or as a successor-in-interest operator when Emery Mining Corporation (Emery) departed from the Wilberg Mine operation on April 16, 1986 (Order, page 4). The Secretary supports the renewed motion with the following undisputed facts:

Undisputed Facts.

1. UP & L has been owner of the coal mineral rights for the Wilberg Mine since 1976 (pages 2, 4, Judge's March 4, 1988, Order of Dismissal, hereinafter "Order"). UP & L contracted with the American Coal Company in 1972 to operate UP & L's Deseret, Beehive and Little Dove mines as a contract operator and in 1976 to operate the Deer Creek and Wilberg mines. Beginning in June 1979, and ending on April 16, 1986 UP & L contracted with Emery Mining Corporation (Emery) to operate UP & L's mines as a contract operator (Order, page 2).

2. UP & L submitted its mining application for the Wilberg Mine to the Bureau of Mines. Subsequently, UP & L submitted mining plans for the Wilberg mine to the Bureau of Mines. These extensive mining plans were prepared and submitted without Emery involvement. (Order, page 4).

3. During the entire time that Emery was under contract with UP & L 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 plans referred to above, were followed (Order, page 4).

4. UP & L purchased and owned all of the major mining equipment used at the Wilberg Mine during the entire June 1979 to April 16, 1986 contract period with Emery (Order, page 4). The Agreement between Utah Power and Light and Emery stated that UP & L would:

> "provide a mining plan and will furnish all capital equipment, [and] pay for materials and supplies . . ." (see Appendix A, p. 1).

5. In UP & L's contractual mining Agreement with American Coal Company, and subsequently with Emery, UP & L agreed to pay the "Total Cost of Production" as described under Article VII of the Agreement (see Agreement, Appendix A). One of the costs described in Paragraph 7.01(iii) of the Agreement relates to: taxes, assessments and fines except for willful violations and other charges imposed on Emery by federal, state, or local governments. (This section was amended February 24, 1984, to "taxes, assessments and similar charges ....").

In addition, Paragraph 7.01(v) provided that UP & L would reimburse Emery for the:

> "costs of complying with federal, state or local laws, rules, regulations, including mining laws and regulations . . . (emphasis supplied). (See Appendix A, Para. 7.01(v)).

The fact that UP & L reimbursed Emery is supported by Emery's Answer to Interrogatory 3a of the Secretary's First Set of Interrogatories and Request for Production of Documents:

> Interrogatory 3a
>
> (a) Explain any indemnity agreement between Emery and UP & L concerning liability for violations and penalties under the Mine Act and other state and federal laws. Submit a copy of any written agreement to this effect.
>
> 3a. Response: UP & L and American Coal Company (the predecessor of Emery) entered into a Coal Mining Agreement dated November 24, 1976. The Coal Mining Agreement originally provided that fines (except for willful violations) were a reimburseable cost from UP & L to Emery.

6. UP & L and Emery mutually agreed on production goals for the Wilberg Mine during the June 1979ÄApril 16, 1986, period (Order, page 4). The amended Mining Contract Agreement between the companies refers to monthly fees paid to Emery for coal tonnage delivered to UP & L each month with different fees for different tonnage quotas. (See pages 1 and 2 of the "Second Amendment to Coal Mining Agreement Between Emery Mining Corporation" (included in Appendix A hereto) where reference is made to the deletion of Paragraph 6.03 of the Agreement).

7. Under the Mine Act and its 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 these plans concerned the mining system in use at the Wilberg Mine (Order, page 4) (Footnote 2).

8. As stated by UP & L (page 3, Statement of Facts to its Motion for Summary Judgment), UP & L retained most of Emery's work force when it took over complete operations of the Wilberg Mine in April 1986. Although this transfer did not include all of Emery's officers and directors, UP & L retained Emery mining supervisors and management personnel including David D. Lauriski, Safety Director, and John Boylen, Mine Manager, at the Wilberg Mine (See Exhibits C, D, and E To Secretary's Response to Contestant's Motion for Summary Decision). (See also Order, p. 4).

A list of UP & L employees after April 16, 1986, and a list of Emery Wilberg employees before April 16, 1986, were submitted by UP & L and Emery in response to Interrogatory 3(b) and 3(c) of the Secretary's First Set of Interrogatories and Request for Production of Documents. Comparison of these lists indicates that most of Emery's work force at Wilberg was retained by UP & L, including several foremen, i.e., Mr. Clifford N. Leavitt, General Maintenance Foreman; Richard A. Cox, Mine Foreman; Lee Lemon, Maintenance Superintendent; Harry Earl Snow, General Mine Foreman; Scott Timothy, Section Foreman; and others.

9. After the December 19, 1984, Wilberg fire, UP & L personnel directly participated in MSHA's investigation of the fire origin area of the Mine.

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The Secretary's footnote reads as follows:

2 This makes business sense, for as stated above in Paragraph 5, UP & L reimbursed Emery for total production costs, including costs incurred in complying with federal mining laws and regulations.

David D. Lauriski, presently UP & L's Safety Director (formerly Emery's Safety Director), helped plan and direct UP & L employees in this 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 (Order, page 4).

10. At their request, UP & L representatives were present in January 1985, at the initial sworn statement proceedings held by MSHA during MSHA's investigation of the Wilberg fire. (See Appendix B hereto, Secretary of Labor's Memorandum in Opposition to Motion for Preliminary Injunction, in pertinent part, pages 1, 3 and 4). When the Society of Professional Journalists sought access to the proceedings, a Temporary Restraining Order was issued on January 24, 1985, stopping the taking of the sworn statements.

On February 8, 1985, the U.S. District Court for the District of Utah issued a preliminary injunction permitting the taking of statements with MSHA, the State Commission, and the United Mine Workers of America (UMWA) present. Emery, but not UP & L, then filed a complaint asking permission to participate. On February 14, 1985, the preliminary injunction was modified to permit Emery to participate (MSHA Wilberg Mine Fire Report at page 26). By its own choice, UP & L never filed a complaint requesting participation. Verbatim transcripts of the sworn statements taken at the proceedings were available to the public, including UP & L (Appendix B, page 4).

11. On March 24, 1987, when the mine fire investigation orders and citations were issued by MSHA, 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. See Exhibits D and E to the Secretary's Response to Contestant's Motion for Summary Decision). At the time the citations and orders were issued, UP & L, and not Emery, had responsibility for abatement of the violations and for compliance with mandatory federal mine safety and health standards at the Wilberg Mine. In addition, UP & L, and not Emery, had the responsibility to post the citations and orders pursuant to Section 109(a), 30 U.S.C. 819(a), of the Mine Act. Further, as indicated on the face of the citations and orders issued on March 24 and August 13, 1988, both UP & L and Emery were served copies of the citations/orders.

On July 6, 1988 UP & L responded to the Secretary's renewed motion and on July 12, 1988 UP & L moved to vacate the 30 modified citations and orders dated April 25, 1988.

Extensive briefs were filed by the Secretary and UP & L.

Discussion

The pivotal issue presented by UP & L's motion is whether the Secretary can modify the 30 citations and orders herein to charge UP & L with direct liability for the alleged violations.

By way of background: the Wilberg Mine fire started December 19, 1984. On March 24, 1987 the Secretary issued citations and orders charging Emery, as the operator, with 34 (later increased to 41) violations of the Act. The citations and orders further charged UP & L with derivative liability for Emery's alleged violations as Emery's alleged successor-in-interest.

In his order of March 9, 1988 in 11 of the pending cases the Judge ruled that UP & L had not been cited and could not be held as an operator; further, he ruled that UP & L could not be held liable as a successor-in-interest, 10 FMSHRC 339.

On April 25, 1988 the Secretary sought to modify (Footnote 3) the citations and orders so as to charge UP & L with direct liability for the alleged violations as an operator. In sum, this new attempt to impose direct liability comes in the 40th month after the fire and in the 13th month after the citations and orders were originally issued against Emery.

On the factual scenario presented here I conclude that the purported modifications cannot stand. In particular, the modifications are untimely, were not issued "forthwith" nor with "reasonable promptness," and the modification conflicts with the procedural requirements of the Act; further, they are prejudicial to UP & L.

In review of the untimeliness issue: on April 25, 1988 the Secretary no longer had the authority to modify the 30 citations and orders since each had already been terminated by MSHA. Section 104(h) of the Act gives the Secretary the power to modify citations and orders but this power is not unlimited. The Act provides that

a citation or order shall remain in effect until modified or vacated by the Secretary. Section 104(h). But once a citation or order is no longer in effect because it was terminated it cannot be modified. Old Ben Coal Co., Docket No. VINC 76Ä56 (June 15, 1976) (ALJ Sweeney). Appeal dismissed, IBMA 76Ä104 (October 19, 1981). (Footnote 4)

In Old Ben, a 104(c)(2) order [the predecessor to the current 104(d)(2) order] had been issued under the 1969 Coal Act, alleging a violation of 30 C.F.R. 75.400. After the operator had abated the violation and after MSHA had terminated the order and 11 days after the operator had filed its application for review challenging the order, MSHA purported to modify the order to correct certain errors with respect to its recitation of the necessary underlying elements of the 104(c) unwarrantable failure chain. MSHA claimed that the modification was authorized by the predecessor to 104(h), 104(g) of the 1969 Coal Act, which provided that "[a] notice [of violation -- the predecessor of a citation] or order . . . may be modified or terminated by an authorized representative of the Secretary."

The Administrative Law Judge held that the order could not be modified by MSHA after it had already been terminated, noting that "[no]thing remains to be modified in an order after such order has been terminated." Unlike "vacation," the Judge explained, termination does not indicate "an expungement ab initio," but rather "a cessation of continuing liability":

> [T]he essential function of a termination is to give notice to the operator of a cessation of liability. An operator is entitled to rely upon the finality of an order upon its termination; and in a section 105(a) review proceeding is entitled to challenge that order as it is written as of the timer of its termination.
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> ****
>
> [A] rule of reason must prevail in determining the time-frame within which [MSHA] may be permitted to modify an order of withdrawal. I conclude that subsequent to the point of abatement and termination an operator is entitled to

> an assurance that the citation which it seeks to challenge under the Act is a fixed target. This is particularly true, as here, where an application [for review -- the predecessor of the notice of contest] had already been filed [challenging, as here, the very element MSHA would seek to change by its modification]. Id. at 10.

Finally, the Judge concluded:

> In sum, an operator seeking review of an order of withdrawal is entitled to rely upon the form and content of that order as of the filing of its application for review, where such order has already been abated and terminated by [MSHA]. Such termination by [MSHA] leaves no operative part of its order extant, and consequently there is nothing left of it to modify. Should bona fide clerical errors exist in the order, then it remains for [MSHA] to argue in a review proceeding that said errors are harmless, or that they do not otherwise effect [sic] the validity of the subject order. But where, as here, the errors are of such a basic nature . . ., then vacation of the order is the only appropriate sanction in a section 105(a) review proceeding. Id. at 11.

Similarly, in Peabody Coal Co., Docket No. DENV 77Ä57ÄP (October 21, 1977) (ALJ Sweitzer) a modification was not permitted where "over two years [had] elapsed since the alleged violation ha[d] occurred and the attempted modification [was] being requested after the [civil penalty] petition had been filed and after the Respondent had moved to dismiss the violation . . . . Slip op. at 3.

In the instant cases the Secretary wants to change her charge not only after the notice of contest had been filed (as in Old Ben and Peabody) but after an order had been entered against her on the charge she had prosecuted.

In review of the untimeliness issue under 104: Section 104(d)(1) requires that orders must be issued "forthwith." However, the Secretary's proposed modifications were not issued until 40 months after the alleged violations occurred and until 13 months after citations and orders alleging the same violations were issued to Emery.

It is a fundamental principle of statutory construction that courts must start with the plain language of the statute. Rubin v. United States, 449 U.S. 424, 430 (1981); International Union, UMWA v. Federal Mine Safety and Health Review Commission, 840 F.2d 77, 81 (D.C.Cir.1988) ["It is a fundamental rule, too often neglected, that in statutory construction the primary dispositive source of information is the wording of the statute itself." (quoting Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 861 (D.C.Cir.1978)]. Where the language is clear, courts must enforce the terms of the statutory provision as they are written unless it can be established that Congress clearly intended the words to have a different meaning. Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842Ä43 (1984) (affirming that where intent of Congress is clear, agency must follow that intent); United States Lines v. Baldridge, 677 F.2d 940, 944 (D.C.Cir.1982); Phelps Dodge Corp. v. Federal Mine Safety & Health Review Commission, 681 F.2d 1189 (9th Cir.1982); Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578 (1984).

Section 104(d) clearly states that unwarrantable failure orders shall be issued "forthwith." (Footnote 5) The words used by Congress are clear: the Secretary must issue a 104(d) order immediately after

she finds another unwarrantable failure violation within 90 days of the issuance of a 104(d)(1) citation. (Footnote 6) See Greenwich Collieries, 9 FMSHRC 2051, 2055Ä56 (1987) (ALJ Maurer), review pending. Furthermore, there is no language in 104(d) which could authorize, either explicitly or implicitly, the Secretary to delay for over 13 months in modifying the orders to charge UP & L with direct liability. See International Union, UMWA v. MSHA, 823 F.2d 608, 617 (D.C.Cir.1987).

Further indicating the Congressional intent is the fact that 104(d) does not contain a savings clause. For example, a 104(a) citation must be issued with reasonable promptness. But the Act provides that "reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of the Act," 30 U.S.C. 814(a). The omission of a similar provision in 104(d) is significant because it is evident that if Congress had intended to include such a savings clause it knew how to do so; ClarkÄCowlitz Joint Operation Agency v. FERC, 798 F.2d 499, 502 (D.C.Cir.1986) (Congress demonstrated that it knew how to restrict the duration of a privilege by including a temporal limit in Exemption 9 and the absence of such a limit in Exemption 10 shows none was intended); Gray v. OPM, 771 F.2d 1504, 1511 (D.C.Cir.1985), cert. denied, 475 U.S. 1089 (1986).

In sum, the Act does not authorize the Secretary to delay for 13 months the issuance of 104(d) orders. Further, the 104(a)

citations were not issued with "reasonable promptness" (Footnote 7) as required by the Act.

While reasonable promptness is not a per se jurisdictional bar to their issuance, the legislative history indicates there must be a reasonable basis for the delay, such as a "protracted accident investigation." S.Rep. No. 181, 95th Cong., 1st Sess. 30 (1977). Here, the protracted accident investigation could justify the initial delays. But by August 13, 1987 the last of the citations and orders had been issued and there appears to be no legitimate basis for the further delay until April 1988 to cite UP & L.

Nor are there any safety issues to justify the delay. As is evident from the face of the citations and orders themselves, any violations that existed at the time of the fire have long since been abated.

In her response to UP & L's motion to vacate the Secretary asserts the modifications of the citations and orders were timely.

(Response filed August 1, 1988 at 8 Ä 13.)

I recognize that considerable delay was caused due to the condition of the mine after the fire and the necessary laboratory studies. But the fact remains that the last of the citations were issued on August 13, 1987; further, the modifications of the citations and orders were issued against UP & L on April 25, 1988. The Secretary relies on proceedings before the Commission to justify the delay but I am not aware that such proceedings justify a further delay in the issuance of 104(a) and 104(d) citations and orders.

In support of her position the Secretary also cites Greenwich Collieries, 9 FMSHRC 2051 (1987), pending on appeal. It may be that the resolution of Judge Maurer's case will have a bearing on the issues argued here.

In review of the "procedural shortcut" issue:

In the order of dismissal issued by the Presiding Judge on March 9, 1988 involving other related cases, it was noted that "procedural shortcuts" have been condemned by the Commission. In reaching this conclusion the Judge relied on the Commission decision in Monterey Coal Company, 7 FMSHRC 1004 (1985) and he emphasized that:

> 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. Emery Mining Corporation, et al, 10 FMSHRC at 352 (emphasis in original).

The prior ruling provides that the Act does not permit the Secretary to prosecute UP & L for a violation without "a civil penalty being proposed against it directly." The Secretary's 30 modifications seek to do that and constitute a procedural shortcut. Additional substantive rights effectively denied UP & L are the right to participate in any investigation relating to the citations and orders, the right to have an individualized penalty assessment, the right to participate in an assessment conference and the right to pay any penalty rather than litigate Emery's proposed assessments.

The Secretary states that she did not take procedural shortcuts. She states UP & L and Emery were cited from the beginning (date of issuance) and the Secretary intended and proposed only one penalty per violation against both of them jointly. (Secretary's response to UP & L's motion filed August 1, 1988 at 11, 12.) The Secretary states that obviously in a practical and equitable sense, in this case, one penalty for two co-operators is more appropriate and more fair than a separate penalty for each operator.

This Judge is bound to follow Commission precedent. The Monterey case is clear on the issue of procedural shortcuts. Accordingly, the Secretary's position is rejected.

In review of the prejudice issue: the Secretary contends UP & L has not been prejudiced. (Footnote 8)

The Presiding Judge stated in his order of March 9, 1988 as follows: "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)." 10 FMSHRC at 349. This ruling is now a final order of the Commission. The prejudice, as detailed above, flows from the failure to cite UP & L as an operator. In short, since UP & L was not cited as an operator it did not receive the statutory rights mandated under the Mine Act.

On the issue of prejudice to UP & L, the Secretary argues that UP & L has been cited and served copies of the citations and orders. It, indeed, did contest all 41 citations and orders, and it did, indeed, contest all the civil penalties assessed herein.

Further, she contends UP & L is not accurate when it states that during the accident investigation MSHA expressly determined that UP & L was not an operator. During the post-fire investigation, UP & L did not present itself as an operator of the Wilberg Mine but, to the contrary, it presented itself as a somewhat distant owner of the mining rights. UP & L's request to participate in the body recovery, was not as an operator but as a likely party to future tort litigation. While UP & L did not participate in the taking of sworn statements, all information relating to the sworn statements taken, (not confidential), and any equipment or laboratory results were made available to UP & L and the public. UP & L personnel were in charge of the physical recovery and were present during MSHA's most crucial part of its investigation.

The Secretary further argues that UP & L had proper and fair notice that it was cited as an operator at the time of issuance of the original and subsequent citations. The fact that under the modifications it was expressly labeled an owner-operator as well as a successor-in-interest only clarified their prior notice of being an operator under the Mine Act. In both instances, UP & L was named under the "operation" blocks on the citation/order/subsequent action forms. Modification to clarify previously issued citations and orders are permitted in a proceeding and do not constitute prejudice. See Jim Walters Resources, Inc., 1 FMSHRC 1827, 1979. (Argument from Secretary's response filed August 1, 1988 at 12, 13).

The prejudice to UP & L is as previously stated. The Secretary's suggestions are basically practical reasons why UP & L was not prejudiced. But the fact remains that the Mine Act vests in a cited operator certain rights. They were not provided to UP & L and, because of that failure, I reject the Secretary's position.

For the foregoing reasons the 30 citations and orders, as modified, dated April 25, 1988, should be dismissed as to UP & L.

UP & L's motion to vacate raises additional issues that should be addressed. The issues generally focus on the assertion that the Secretary's change of theories with respect to UP & L constitutes an abuse of her prosecutorial discretion, was vindictive and, as a result, UP & L is entitled to any costs incurred as a result of the modifications. (Footnote 9)

In support of its position UP & L relies on Thigpen v. Roberts, 468 U.S. 27, 30; U.S. v. Goodwin, 457 U.S. 368; Hardwick v Doolittle, 558 F.2d 292, 5th Cir.1977, cert. denied, 434 U.S. 1049 (1978) among other cases.

On the other hand, the Secretary argues that the Commission has authorized amendments, corrections and modifications long after citations have been terminated citing Jim Walter Resources, Inc. and Cowen and Co., 1 FMSHRC 1827 (1979); and Ralph Foster and Sons, 3 FMSHRC 1181 (1981). (In the two cases cited by the Secretary the Commission particularly found a lack of prejudice, 1 FMSHRC at 1829 and 3 FMSHRC at 1181.)

Further, the Secretary argues that the law is clear: she has broad authority and discretion to cite parties under the Act. The Secretary relies on 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); and Secretary of Labor v. Cathedral Bluffs Shale Oil, 796 F.2d 533 at 538 (D.C.Cir.1986).

As a background matter: these cases have certainly been vigorously prosecuted as well as vigorously defended. In fact, to date the Presiding Judge has ruled on ten complex motions for summary decision, two motions to reconsider and one motion in limine. The judge believes the parties have the right under the A.P.A., 5 U.S.C. 554, 556, and the Mine Act to vigorously pursue their cases if they desire to do so.

The Secretary explains that she did not appeal the Judge's ruling of March 9, 1988 because it was decided that (1) appeal of the order as to paid cases [paid by Emery] was inappropriate and legally unsupportable and (2) if there was an avenue to eliminate the legal concern over the form of the citations and orders still at issue, it should be taken now. And, in fact, it was taken with the modification of the citations and orders filed by the Secretary.

No record of proceedings is available on the issue of an asserted abuse of discretion. But the Secretary's broad enforcement authority and her stated reasons, if established, could constitute persuasive evidence in support of her position that her actions were not an abuse of discretion nor vindictive.

While an order of dismissal is to be entered vacating the 30 modified orders and citations as to UP & L, it is nevertheless appropriate to consider the issues raised by the Secretary in her renewed motion for a summary decision.

The focus of the Secretary's motion is threefold. Initially she asserts the indemnity agreement for the payment of any civil penalties does not nullify UP & L's legal status as an owner-operator. (Footnote 10) Further, she claims UP & L is liable under the Mine Act as an owner-operator. (Footnote 11) Finally, she contends UP & L is liable under the Mine Act as a successor-in-interest operator.(Footnote 12)

I agree the indemnity agreement does not nullify UP & L's legal status. International Union, UMWA v. Federal Mine Safety and Health Commission, et al, 840 F.2d 77, D.C.Cir.1988). However, the Secretary's argument is misdirected. It is true that any owner can be cited. But UP & L was not so cited and the Secretary's efforts to impose liability at this point in time cannot be sustained.

In arguing that UP & L is liable as an owner-operator the Secretary relies on Section 3(d) of the Act as well as the frequently cited cases of Bituminous Coal Operator's Association v. Secretary of Interior, supra, and Harman Mining Corporation v. Federal Mine Safety and Health Review Commission, supra. She particularly relies on certain asserted facts and newly discovered evidence consisting of the 1979 Coal Mining Agreement between UP & L and the American Coal Company (Emery's predecessor).

The Secretary's argument is not persuasive. UP & L does not dispute "that it has been the owner of the coal mineral rights for the Wilberg Mine since 1976; or that it contracted with Emery to operate the mine; or that it had an engineer present at the mine; or that it purchased and owned the major mining equipment; or that it agreed upon production goals for the mine with Emery; or, finally, that it retained many of Emery's employees, including Dave Lauriski, when it eventually took over the operation of the mine in the spring of 1986. Nor does UP & L deny responsibility for the "Total Cost of Production' for the mine. None of the facts asserted by the Secretary, however, indicate that on a day-to-day basis, UP & L operated, controlled or supervised the production process at the mine. They only demonstrate that UP & L played the ordinary role of a mineral owner that contracts with another company to operate a mine for it." (Footnote 13)

For the reasons previously discussed UP & L could not be liable as an operator even pursuant to the renewed motion since it was never (until now) cited as an operator, cooperator, or joint adventurer of a joint venture. In any event, the evidence relied on by the Secretary to establish a "close nexus" between UP & L and Emery would have been relevant if UP & L had been originally cited as an operator. But UP & L was not so cited.

Finally, the Secretary reasserts her position that UP & L is liable as a successor-in-interest. The Judge specifically ruled, in his order of dismissal of March 9, 1988, that the successor-in-interest doctrine did not apply to UP & L. Emery Mining Corporation, et al, 10 FMSHRC at 353. It is unnecessary to further review this issue other than to reaffirm the previous holding.

The extensive and excellent briefs filed by the parties have been most helpful in assisting the Judge in his analysis of the issues. However, to the extent that such briefs are inconsistent with this order, they are rejected.

For the reasons stated herein the following order is appropriate:

~1358

ORDER

1. Utah Power and Light Company's motion to vacate the 30 modified citations and orders dated April 25, 1988 is granted.

2. The 30 modified citations and orders dated April 25, 1988 are vacated as to Utah Power and Light Company.

3. The Secretary's renewed motion for a summary decision against Utah Power and Light Company filed May 17, 1988 is denied.

4. The Presiding Judge retains jurisdiction for all issues involving Emery Mining Corporation.

5. The hearing on the merits will proceed as scheduled on October 4, 1988 in Price, Utah.

John J. Morris
Administrative Law Judge

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Footnote starts here:-

~Footnote_one

On page no: 1339
1/ In the alternative, UP & L considers its pleading to be a motion for summary decision if the citations and orders are invalid as modified.

On page no: 1339

~Footnote_two

2/ A similar motion filed by the Secretary on June 25, 1987 was denied by the Judge on August 5, 1987.

~Footnote_three

3/ The modifications do not change any factual assertions relating to the individual citations and orders.

~Footnote_four

4/ Cited case appended to UP & L's motion filed July 12, 1988.

~Footnote_five

5/ In full, 104(d)(1) provides that:

> If, during the same inspection or any subsequent inspection of such mine with 90 days after the issuance of [a 104(d)(1) citation] an authorized representative of the Secretary finds

another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the are a affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. (Emphasis added.)

~Footnote_six

6/ According to common, ordinary usage, the term "forthwith" means "immediately." See e.g., Webster's New Collegiate Dictionary (1979). Congress' use of the term "forthwith" in the context of providing notice to operators under 103(g)(1) of the existence of an imminent danger -- where the concern of protecting miners right away is primary -- indicates that Congress intended forthwith to mean immediately.

~Footnote_seven

7/ Section 104(a) provides, in full, as follows:

"Sec. 104(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. (Emphasis added.)

~Footnote_eight

8/ Response to motion to vacate (pages 12, 13) filed August 1, 1988.

~Footnote_nine

9/ UP & L's motion to vacate filed July 12, 1988, at 22 Ä 32.

~Footnote_ten

10/ Secretary's renewed motion, filed May 17, 1988, at 10, 11.

~Footnote_eleven

11/ Renewed motion, at 14.

~Footnote_twelve

12/ Renewed motion, at 14.

~Footnote_thirteen

13/ UP & L's Response to Secretary's Renewed Motion filed July 6, 1988 at 5.