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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 88-231  
A.C. No. 05-00301-03549

v.

Dutch Creek No. 1 Mine

MIDCONTINENT RESOURCES, INC.,  
RESPONDENT

ORDER

1. Respondent has served on petitioner certain interrogatories and requests for production of documents.

2. Petitioner responded thereto and a number of objections have been posted by the petitioner. The parties orally argued to their respective positions in a conference call on November 9, 1988.

On respondent's motion to compel, I find the following issues:

Interrogatory No. 8 poses the following question to which respondent filed the following answer.

8. As to each of the foregoing orders, list by name, address, place of employment and occupation, each person the issuing MSHA inspector contacted in the course of the issuing inspector's investigation prior to the issuance of each of said orders.

Answer No. 8. Order No. 3223449 - George Prewitt.

Order No. 2832627 - David Powell

The identity of any miner who discussed this citation with the inspector will be protected as confidential and disclosure of any identity is hereby objected to.

Discussion

Commission Rule 59, 29 C.F.R. 2700.59, provides as follows:

2700.59 Name of miner witnesses and informants.

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

The judge is bound by the foregoing Commission Rule. Accordingly, respondent's motion to compel discovery as to the identity of any such miner is denied. However, petitioner is directed to state whether any miners are to be called as witnesses and to state the number of such witnesses without disclosing their identity.

Respondent's motion to compel, as modified herein, is granted.

Interrogatory No. 9 poses the following question to which respondent filed the following answer:

9. As to each of the foregoing orders, please identify what fact(s) or data, if any, relied upon by the issuing inspector, elicited during the pre-order or pre-citation investigation, was provided by what person(s), if any, named responsive to Interrogatory No. 8.

Answer No. 9. Response to Number 8 above is hereby incorporated.

Discussion

Facts relied upon do not identify any miner that may be involved. Respondent's motion to compel is granted.

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Interrogatory No. 10 poses the following question to which respondent filed the following answer:

10. As to each of the foregoing orders, please identify the name and address of each person petitioner expects to call as a witness at the hearing in this matter, and with respect to each person:

a. State the subject matter about which the person is expected to testify:

b. State the substance of the facts or the expected testimony about which the person is expected to testify:

c. State the substance of the opinions, if any, to which the person is expected to testify:

d. Summarize the grounds for each opinion.

Answer No. 10. The Secretary has not yet determined what witnesses will be called to testify, but will state that Phil Gibson and Lee Smith may be called to testify in this matter.

#### Discussion

The parties have agreed that, except for the identity of miner witnesses, petitioner will answer Interrogatory 10 by November 22, 1988.

Accordingly, respondent's motion to compel is granted.

Interrogatory No. 11 poses the following question to which respondent filed the following answer.

11. As to each of the foregoing orders, please identify and describe each exhibit which petitioner intends to mark and offer as an exhibit in evidence at the hearing on the foregoing citations or orders.

Answer No. 11. The Secretary will mark and introduce the MSHA History of Assessed Violations. At this time, the Secretary has not determined what, if any, other exhibits will be used.

Discussion

The same agreement and ruling is entered herein as provided above as to Interrogatory No. 10.

Interrogatory No. 13 poses the following question to which respondent filed the following answer.

13. Please state, if not in writing and subject to one of the following requests for production, the enforcement policy or policies affecting Mid-Continent Resources, Inc. as determined and put in effect by each of the following persons: J.L. Spicer, Ron Schell, John W. Barton, William A. Holgate, and/or J.M. DeMichie.

Answer No. 13. All formal policies are placed in writing by MSHA. All other policies are protected by the deliberative-process privilege and objection is hereby made to this request.

Discussion

The claim of privilege asserted by petitioner is sustained and respondent's motion to compel is denied.

Request for Production of Document No. 17 asks for the following to which respondent responded as follows:

17. As to each of the foregoing orders, please provide legible copies of any and all documents which petitioner intends to mark and offer as exhibits to be received in evidence in the trial of this matter.  
Response No. 17. The Secretary has not yet determined what evidence will be introduced.

Discussion

Petitioner has agreed to produce all such documents by November 22, 1988. Petitioner will further submit a final update by November 25, 1988.

Accordingly, respondent's motion to compel is granted.

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Request for Production of Document No. 18 asks for the following to which respondent responded as follows:

18. Any and all notes of memoranda concerning enforcement at MidContinent Resources, Inc.'s operations in Coal Basin, Colorado.  
Response No. 18. Objections, this request is burdensome and requests documents that are confidential.

#### Discussion

This request is overly broad. The thrust is directed at MidContinent's assertions that the Secretary has abused his prosecutorial discretion. This issue has been partially heard and is pending before the undersigned Judge in WEST 89-3AR. If the Commission has jurisdiction to review an alleged abuse of discretion by the Secretary (an issue not yet determined but pending before the undersigned Judge) then requests of this type should be presented, argued and briefed in WEST 89-3AR. In sum, an orderly record requires that all of these issues be presented in one case.

Petitioner's objections are sustained and respondent's motion to compel is denied.

Request for Production of Document No. 19 asks for the following to which respondent responded as follows:

19. Any and all memoranda or memorial of enforcement policies affecting MidContinent Resources, Inc. developed or promulgated by J.L. Spicer, Ron Schell, John W. Barton, William A. Holgate, and/or John M. DeMichiei.

Response No. 19. Objection, this request is burdensome and calls for documents that are confidential.

#### Discussion

The same ruling is made herein as to the Request for Production involved in Request No. 18.

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Request for Production of Document No. 20 asks for the following to which respondent responded as follows:

20. Any and all notes or memoranda other than the informant's name made from telephone calls or personal contacts by MSHA personnel with Mid-Continent (other than management) personnel regarding Mid-Continent (other than management) personnel regarding Mid-Continent's operations and/or alleged violations.

Response No. 20. No documents exist regarding these violations and objection is made as the request calls for confidential information.

#### Discussion

Petitioner has agreed to comply with this request and respondent accepts the limitation that the request be limited to Docket No. WEST 88-230 and WEST 88-231.

Accordingly, respondent's motion to compel, as modified, is granted.

Request for Production of Document No. 21 asks for the following to which respondent responded as follows:

21. Any and all notes or memoranda pertinent to the criteria, review, and processing of special assessment violations.

Response No. 21. Objection, this request is overbroad, burdensome, and calls for privileged material.

#### Discussion

Controlling case law establishes that a mine operator, prior to a hearing, may raise the issue that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. *Youghiogeny and Ohio Coal Company*, 9 FMSHRC 673, 679-680 (1987).

Accordingly, respondent's motion to compel is granted.

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Request for Production of Document No. 22 asks for the following to which respondent responded as follows:

22. Any and all notes or memoranda received by MSHA from the U.S. Department of Labor Inspector General, the General Accounting Office, or any other federal or state investigative agency concerning complaints and/or mining methods or practices conducted at Mid-Continent Resources, Inc.

Response No. 22. Objection, this request is overbroad, burdensome, and calls for privileged material.

#### Discussion

The same ruling is entered herein as in Request No. 18.

#### ORDER

For the reasons stated above and for additional reasons agreed to in the conference call, the undersigned enters the following order:

1. The above rulings are confirmed.
2. The rulings herein are controlling as to the same issues pending in WEST 88-230.
3. Petitioner has been ordered to answer interrogatories and requests herein within certain time frames. Respondent is likewise ordered to answer petitioner's interrogatories and requests within the same time frames.

John J. Morris  
Administrative Law Judge