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SOL (MSHA) V. ADKINS COAL CORP.
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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. VA 87-8 A.C. No. 44-05185-03544
v.	
ADKINS COAL CORPORATION, RESPONDENT	Mine No. 1

ORDER

On August 4, 1988, Petitioner filed a Motion to Permit Discovery, requesting an order permitting the initiation of discovery, pursuant to 29 C.F.R. 2700.55(a), inasmuch as the Motion was filed beyond 20 days after the filing of the Petition for Assessment of Civil Penalty.

On August 25, 1988, a Stay Order was issued, pursuant to Respondent's Motion for Continuance filed on August 11, 1988, which was not opposed by Petitioner, pending the filing of a 110(c) action against certain individuals concerning the same subject matter as the above case. In a conference initiated by the undersigned with Counsel for both Parties on December 8, 1988, it was indicated that a request for hearing with regard to the 110(c) action had been filed. On December 15, 1988, Respondent submitted a statement in response to Petitioner's First Request for Production of Documents which had been filed along with Respondent's Motion on August 4, 1988.

In its Motion, Petitioner alleged that the discovery sought is relevant, reasonably calculated to lead to the discovery of admissible evidence, within the knowledge and custody of the Respondent, and will assist Petitioner in the preparation for trial.

Petitioner's First Request for Production of Documents seeks discovery of documents contained in "the personal notebook maintained by the mine foreman." Respondent argues that the notebook is to be considered an attorney work product, inasmuch as it ". . . was maintained by the mine foreman on the advise and pursuant to instruction by Counsel." (sic).

Based upon the representations in Petitioner's Motion, which have not been challenged by Respondent in its statement filed on December 15, 1988, I find that good cause has been established, and discovery may be permitted. 29 C.F.R. 2700.55(c), in essence, provides that discovery includes relevant material that is not privileged, and which is either admissible or appears reasonably calculated to lead to the discovery of permissible evidence. In order to eliminate surprise and allow the Parties to prepare for trial, in general, the rules of discovery should be broadly applied (See Hickman v. Taylor, 329 U.S. 495 (1947)). Although Respondent maintains that the notebook in question should be considered an attorney work product, as it was maintained by the mine foreman on the advice and pursuant to instructions by Counsel, Respondent has not alleged that the notebook in question was maintained in preparation for trial (c.f. Rule 26(b), Federal Rules of Civil Procedure). Clearly, any notebook kept, even on the advice of Counsel, in the regular course of the business would be outside the "work product" protection (See cases cited in Moore's Federal Practice at 26Ä354, 355). Further, inasmuch, as the notebook in question appears to be in the exclusive control of Respondent, it would appear that Petitioner would suffer undue hardship should discovery not be allowed (Rule 26(b)(3), supra).

Accordingly, it is ORDERED that Petitioner's Motion to permit discovery is GRANTED and Petitioner's First Request for Production of Documents is allowed.

Avram Weisberger
Administrative Law Judge
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