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SOL (MSHA) V. SANGER ROCK
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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 88-275-M A.C. No. 04-01937-05505
v.	Docket No. WEST 89-71-M A.C. No. 04-01937-05506
SANGER ROCK & SAND, RESPONDENT	Sanger Pit and Mill

DECISION

Appearances: Susanne Lewald, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, For Petitioner; J.F. Baun, President, Sanger Rock and Sand, Sanger, California, pro se

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent Sanger Rock & Sand (Sanger) with violating two safety regulations1 promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (the Act).

After notice to the parties, a hearing on the merits was held in Fresno, California on December 13, 1989.

The parties filed post trial briefs.

Threshold Issues

In support of its motion to dismiss, Sanger raises two issues.

Initially, the operator asserts MSHA did not acquire jurisdiction over it for the reason that the federal government has

failed to comply with Article I, Section 8, Clause 172 of the United States Constitution. Specifically, it is argued that, since the United States does not possess fee simple title to Sanger's property and since the state of California did not cede the property to the United States, then the case should be dismissed for lack of "territorial jurisdiction."

Discussion

For the purpose of this ruling, I assume the federal government does not own this property and I further assume the property has not been ceded to the federal government by the state of California. But I nevertheless conclude that Sanger's arguments are misdirected. The cited portion of the Constitution relied on is a grant of authority relating to the District of Columbia, the seat of government of the United States.

The Constitutional clause relied on by Sanger does not require that the federal government own property as a pre-condition to regulating such property.

In support of its position, Sanger relies upon United States v. Benson, 495 F.2d 475 (1974).

Benson is not controlling. In Benson the defendants therein were convicted of a robbery that was committed within the territorial jurisdiction of the United States. The territorial jurisdiction of the United States involved in the case was Fort Rucker, Alabama, a military installation. In view of this fact the federal military code, by virtue of Clause 17, was the exclusive law on the military installation.

Since Article I, Section 8, Clause 17 is neither a grant of authority to regulate mines nor a restriction on the federal authority, it is necessary to look elsewhere in the Constitution for such authority.

The grant of authority to regulate mines rests in the "Commerce Clause"3 contained in Article I, Section 8, Clause 3 of the Constitution.

It is apparent, with such a grant of authority, that Congress enacted the Mine Act and defined commerce as it relates to mining. Specifically, in Section 4 of the Act, Congress stated:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this chapter.

Further, "Commerce" is defined in the 1969 Act as follows:

> [C]ommerce means trade, traffice, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof.

The use of the phrase "which affect commerce" in the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See: Brennan v. OSHA, 492 F.2d 1027 (2d Cir. 1974); United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975); Polish National Alliance v. NLRB, 332 U.S. 643 (1977).

In Perez v. United States, 402 U.S. 146 (1971), it was held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases.

In short, mining is among those classes of activities which are regulated under the Commerce Clause and thus is among those classes which are subject to the broadest reaches of federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act as well as court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979). See also: Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

The courts have consistently held that mining activities which may be conducted affect commerce sufficiently to subject the mines to federal control. See: Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1978); Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: Secretary of Labor v. Rockite Gravel Company, 2 FMSHRC 3543 (December 1980); Secretary of Labor v. Klippstein and Pickett, 5 FMSHRC 1424 (August 1983); Secretary of Labor v. Haviland Brothers Coal Company, 3 FMSHRC 1574 (June 1981); Secretary of Labor v. Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

In a prior decision involving the Secretary and Sanger, Commission Judge August F. Cetti ruled against Sanger's "territorial jurisdictional" argument. Sanger Rock & Sand, 11 FMSHRC 403 (March 1989).

Sanger also argues that the state of California has its own laws and regulations that protect the safety and health of its citizens. Therefore, the federal government lacks jurisdiction in California.

This argument has been raised in a number of cases. Commission judges have consistently held that state and federal OSHA statutes do not preempt the 1977 Mine Act. See: Brubaker-Mann, Inc., 2 FMSHRC 227 (January 1980); Valley Rock and Sand Corporation, 4 FMSHRC 113 (January 1982); Black River Sand and Gravel, Inc., 4 FMSHRC 743 (April 1982); San Juan Cement Company, Inc., 2 FMSHRC 2602 (September 1980); Sierra Aggregate Co., 9 FMSHRC 426 (March 1987). I agree with these holdings, and I also note that section 506 of the 1977 Mine Act permits concurrent state and federal regulation. Under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. Dixie Lee Ray v. Alantic Richfield Company, 435 U.S. 151, 55 L. Ed. 2d 179 (1978); Bradley v. Belva Coal Company, 4 FMSHRC 982, 986 (June 1982).

For the foregoing reasons, Sanger's "territorial jurisdictional" argument in support of its motion to dismiss is denied.

Sanger also asserts that the Secretary's citaions should be vacated because she has not complied with 5 U.S.C. 552,4 a portion of the Administrative Procedure Act.

In particular, Sanger states the inspector only presented his I.D. card at the time of the inspection. However, the I.D. card did not show his title, authority, or other relevant matters.

In dealing with its citizens, Sanger believes the government, through the federal register, must at least show the inspector's duties, delegated authority, as well as MSHA's central and field organizations.

In its post trial brief Sanger asserts that MSHA's failure to publish in the Federal Register has adversely affected it as a member of the public. Some, but not necessarily all, of the adverse effects are as follows:

(A) Representatives of the Secretary over-stepping their authority with no way for the public to know what that authority is.

(B) Not knowing the "chain of command" in any government agency renders the public at an extreme disadvantage when dealing with that agency.

(C) How, where, and to whom are complaints registered in regard to misconduct by a representative of the Secretary if the organization plans are not published?

(D) Due process is most important to the public including mine operators, and without the knowledge of how that can be obtained in MSHA's scheme of operations leaves them vulnerable to the whims of various individuals.

(E) Assessments arising from unauthorized actions of agency "employees".

(F) Sanger has been subjected to possible adverse effects due to an investigation by Mr. Alvarez (MSHA inspector) during which he demanded and received company records to which he may not have had the authority to see. This investigation took place on March 3, 1989. A citation was issued and the disposition is still pending with adverse effects likely.

Sanger also attaches to its brief a federal register publication 5/ of Friday, March 31, 1978, dealing with a delegation of authority and assignment of responsibility for mine safety and health programs. However, Sanger asserts such publications do not satisfy the A.P.A.

The Secretary's contrary positions will be hereafter considered.

Discussion

Publication: Section 552(a)(1) of the A.P.A. requires each agency to separately state and publish in the Federal Register "descriptions of its central and field organization and the methods whereby the public may obtain information, make submittals or requests or obtain decisions."

An agency of the federal government is defined by 44 U.S.C. 1501.6 The Mine Safety and Health Administration (MSHA) is such an agency. However, MSHA has not complied with this above cited A.P.A.

The Secretary's post trial brief does not refer to any relevant publication nor has the judge located any such publication in the Register nor in its codification showing MSHA's "central and field organizations."7 The statutory directive is explicit as to what must be published.

Rather, the Secretary argues Sanger's defense is irrelevant because the rights afforded MSHA employees to make inspections, etc., do not constitute a delegation of any authority vested in the Assistant Secretary of Labor [for MSHA]. Particularly, the Mine Act empowers authorized employees of MSHA to engage in the activities enumerated in Section 103(a) of the Act.

I reject the Secretary's position. It is well established that statutes should be construed together. In short, the authority in the Mine Act does not override MSHA's obligation to comply with the A.P.A.

Secondly, the Secretary argues that the Office of the Solicitor (of Labor) is not a federal agency. Accordingly, the Solicitor does not promulgate rules and regulations which have general applicability and legal effect.

The judge believes this argument involves a mis-communication. A fair reading of Sanger's argument at the hearing as well as its post trial brief indicates a focus directed to MSHA, not to the Solicitor.

The Secretary also argues that Sanger has not been adversely affected by the lack of any publication.

The statute does not require that an individual be adversely affected by a failure to publish. The Secretary's case in support of that position is misplaced. In U.S. v. Fitch Oil Company, 676 F.2d 673 (1982) (Temp. Em. C.A.) appellant relied on the fact that the Department of Energy's (DOE) "audit policy" had been revoked. The appellate court held that such revocation did not vest any constitutional or statutory right in respondent oil company or its officers that would invalidate subpoenas for books, etc., previously issued. The Court ruled that the "audit policy" was not a legislative rule by designation or substance. It was intended to govern internal agency procedures and was therefore not binding on the DOE. In the instant case, except for the publication of the regulations, 30 C.F.R. 56.14007 and 30 C.F.R. 56.12028, no publication was made. In particular, there was no publication of MSHA's "central and field organization . . . for the guidance of the public."

For a precise articulation of the applicable law I find Rowell v. Andrus, 631 F.2d 699 (1980), (10th Cir.) and United States v. Two Hundred Thousand Dollars ($200,000) in United States Currency, 590 F. Supp. 866 (1984) to be persuasive. See also, Pinkus v. Reilly, 157 F. Supp. 548, D.C.,N.J. (1957).

In Rowell the Secretary of the Interior published in the Federal Register a regulation in final form. The difficulty was the publication was entered less than 30 days before its effective date.

On appeal the 10th Circuit Court of Appeals invalidated the published rule and action thereunder because it was published less than 30 days before its effective date as required by Section 553(d) of the A.P.A., 631 F.2d at 702.

In United States v. Two Hundred Thousand Dollars ($200,000) in United States Currency, the United States Customs Department seized $200,000 at an airport. The Court invalidated the forfeiture because Customs failed to satisfy 5 U.S.C. 552 (a)(1)(c).

In short, Customs' form should have been published in the Federal Register, 590 F.Supp. at 870, 871.

The Secretary also argues that to prevail Sanger must show actual prejudice which bears upon the violations for which the company was cited.

In the situation presented here the record does not reflect that Sanger knew MSHA's central and field organizations. If Sanger knew of the matters that should have been published, then it could hardly have asserted this defense. However, in this case Sanger claims to have been prejudiced. In Citation No. 3074994, Sanger was cited for violating 30 C.F.R. 56.12028.8 One of Sanger's objections was that the company had no way of knowing nor any way to check whether it was obliged to turn over ground system testing reports to the MSHA inspector.

The final argument presented by the Secretary is that the selection of Mr. Alvarez as an authorized employee of the Mine Safety and Health Administration is a matter expressly exempted from the requirements of the A.P.A.

I agree. Internal personnel rules and practices are exempt. In 5 U.S.C. 552 (b)(2) an exception appears where the material sought "(2) related solely to the internal personnel rules and practices of an agency."

However, the main thrust of Sanger's case seeks information showing the inspector's duties, delegated authority as well as MSHA's central and field organizations. Such matters are clearly within the statutory mandate.

The Secretary's position is no doubt somewhat difficult. She is charged with enforcing the Mine Safety Act. On the other hand she is obligated to comply with the direct statutory mandate discussed herein. It is the writer's view that if the Secretary now publishes in the Federal Register such publication, if otherwise correct, could be effective 30 days thereafter. Rowell v. Andrus, supra, 631 F.2d at 705. However, such publication will not affect this operator and, for the reasons stated herein, these cases should be dismissed.

Sanger seeks an order dismissing MSHA's citations herein. Since Sanger's motion of dismissal is to be granted it is not necessary to consider any additional issues raised in the case.

ORDER

1. In WEST 88-275-M: Citation No. 3076869 and all penalties therefor are vacated.

2. In WEST 89-71-M: Citation No. 3074994 and all penalties therefor are vacated.

3. WEST 88-275-M and WEST 89-71-M are dismissed.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

1. Citation No. 3076869 alleges Sanger violated 30 C.F.R. 56.14007; Citation No. 3074994 alleges the company violated 30 C.F.R. 56.12028.

2. The cited portion of the Constitution provides that Congress shall have the right:

> To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of of the Government of the United States, and to exercise like Authority over all Places purchased

by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . .

3. The cited portion of the Constitution provides that Congress shall have the right

> to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.

4. The cited statute, a portion of the Administrative Procedure Act, provides in part as follows:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
>
> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.

5. Federal Register, Vol. 43, No. 63.

6. The above cited provision, as it relates to the Federal Register and the Code of Federal Regulations, contains the following definition:

> "Federal agency" or "agency" means the President of the United States, or an executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government.

7. Many matters under the Secretary's jurisdiction have been

published in the Federal Register and recodified in the Code of Federal Regulation (CFR). See various subjects published in C.F.R. 20, 29, 30, 41, 48 and 50. Volume 30, Part I establishes MSHA's official emblem and the balance of 30 C.F.R. generally deals with mining. Included in 30 C.F.R. are the Secretary's mandatory regulations relating to mining.

8. The regulation provides:

56.12028 Testing grounding systems.

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary of his duly authorized representative.