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ALOE COAL V. SOL (MSHA) AND U.M.W.A.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ALOE COAL COMPANY, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. PENN 90-242-R Citation No. 3092481; 8/24/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 90-243-R Citation No. 3092482; 8/24/90 Aloe Strips
AND	Mine ID 36-00799
UNITED MINE WORKERS OF AMERICA, INTERVENOR	

DECISION

Appearances: David J. Laurent, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, for the Contestant;
Edward Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Respondent;
Paul Girdany, Esq., Healey and Whitehill, Pittsburgh, Pennsylvania for the Intervenor.

Before: Judge Weisberger

Statement of the Case

These cases are before me based on a Motion for an Expedited hearing filed on August 29, 1990, contesting the issuance of Citation No. 3092481 and Order No. 3092482. On August 29, 1990, pursuant to a telephone conference call on that date between the undersigned, Counsel for both Parties, and Counsel for the International Union, United Mine Workers of America (UMWA), the cases were set for hearing in Pittsburgh, Pennsylvania, on September 6, 1990. On September 4, 1990, the International Union, UMWA, filed a Notice of Intervention. On September 4, 1990, Intervenor initiated a conference call between the undersigned and Counsel for the other Parties, and requested an adjournment of the hearing scheduled for September 6, 1990, on the grounds that a possible witness would not be available on that date. Neither Counsel for Contescant nor Counsel for Respondent objected to this request and it was granted. These cases were rescheduled and were heard in Pittsburgh, Pennsylvania,

on September 28, 1990. At the hearing, Charles P. Swingle and Grant MacSwain testified for Contestant. Frederick A. Miller, Thomas Rabbitt, Greg Shuba, and Thomas Semak testified for Intervenor.

On September 26, 1990, Respondent filed a Prehearing Brief. At the hearing on September 28, 1990, Intervenor filed a Memorandum of Law in opposition to the Notice of Contest. At the hearing, Contestant requested and was granted 10 days to file a Posthearing Memorandum of Law, which was filed on October 9, 1990. At the hearing, Contestant did not object to the request by Respondent to be allowed 10 days to respond to Contestant's Posthearing Memorandum of Law, and accordingly, Intervenor and Respondent were granted the right to file a Reply within 20 days from the date of the hearing. On October 12, 1990, Intervenor filed a Memorandum of Law in response to Aloe Coal Company's Posthearing Brief. Respondent did not file any Reply.

Stipulations and Findings of Fact

The Parties have stipulated to the following relevant facts:

1. Aloe operates a bituminous coal strip mine in Allegheny and Washington Counties, Pennsylvania.1

2. On July 10, 1989, Aloe's employees, who were represented by the UMWA for purposes of collective bargaining, commenced a strike at the Aloe Mine.2 Shortly thereafter, Aloe resumed mining operations with thirteen (13) replacement workers and six (6) Striking employees who had crossed the picket line and returned to work.3

3. Aloe converted the thirteen (13) replacement workers to permanent status and by letter dated March 23, 1990, the Regional Director for Region Six of the National Labor Relations Board ("Board") stated that Aloe had lawfully converted these individuals to permanent status and had lawfully notified the UMWA of this fact subsequent to December 8, 1989.

4. Both Aloe and the UMWA have been enjoined by the Courts of Common Pleas of both Washington and Allegheny Counties, Pennsylvania, from engaging in certain acts of picket line misconduct, including mass picketing at Aloe's operations in those Counties. Additionally, the Court of Common Pleas of Washington County, Pennsylvania has found the UMWA in contempt of its permanent injunction.4 The Parties, however, agree that the aforesaid injunctions do not bar access to mine property by UMWA representatives to accompany a federal inspector on an inspection if it is determined in these proceedings that Section 103(f) of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. Section 813(f) provides the UMWA with such participation rights.

5. On July 5, 1988, while the UMWA members at Aloe were continuing to work without a contract and the UMWA and Aloe were engaged in negotiations, a settlement agreement was entered into with the National Labor Relations Board as a result of charges which the UMWA filed against Aloe alleging unfair labor practices at 6-CA-20892. This case was closed on October 6, 1989.5

6. On September 25, 1989, another settlement agreement was entered into with the National Labor Relations Board at 6-CA-21989 as the result of charges which the UMWA had filed against Aloe alleging unfair labor practices. Said September 25, 1989 settlement agreement provided that "the ongoing economic strike at the Aloe Mine was converted to an unfair labor practice strike effective July 30, 1989 and will continue to be

an unfair labor practice strike until the Employer complies with all the terms of the instant settlement agreement." This case was closed on December 11, 1989.6

7. On March 22, 1989, a third settlement agreement was entered into with the National Labor Relations Board at 6-CA-22304 as the result of charges which the UMWA had filed against Aloe alleging unfair labor practices.7

8. There are currently pending before the National Labor Relations Board six (6) charges filed by the UMWA against Aloe alleging unfair labor practices committed by Aloe. These Charges are numbered 6-CA-22871, 22898, 22960, 22971(1-2), and 23006.8

9. On June 8, 1990, Aloe filed a certification petition with the Board seeking to have an election to ascertain the UMWA's continued status as the bargaining representative for its employees. The petition is still pending, but an election has not yet been scheduled.9

10. By letter dated August 15, 1990, the Regional Director for Region Six of the Board dismissed charges filed by the UMWA which alleged that Aloe had, on June 6, 1990, unlawfully withdrawn recognition from the UMWA as the collective bargaining representative of Aloe's employers. This decision is presently being appealed by the UMWA

11. All but one of Aloe's twelve (12) UMWA strikers have applied for and are receiving unemployment compensation benefits under the Pennsylvania's Unemployment Compensation Act, 43 P.S. Section 751 et seq., on the basis that since they have been permanently replaced, the employer/employee relationship has been permanently severed.10

12. Prior to July 10, 1989, the UMWA and Local Union 9636's health and safety committee was, pursuant to 30 C.F.R. Section 40.3, the designated representative of the miners at the Aloe Mine.

13. On or about August 17, 1990, the UMWA advised the District Manager of the Mine Safety and Health Administration ("MSHA") District No. 2 that two of Aloe's UMWA strikers (Gary Metz and Frederick A1 Miller) had designated Greg Suba,11 a UMWA employee, as their "walkaround" representative within the meaning of Section 103(f) of the Act, and the regulations published at 30 C.F.R. Section 40.3. The UMWA also advised the District Manager that two other International UMWA officials, Tom Rabbitt and Larry Pasquale, would serve as alternate representatives in the event that Mr. Suba was unable to fulfill his duties.12

14. The UMWA members who designated Messrs. Suba, Rabbitt, and Pasquale as their representatives are among those who have been on strike at the Aloe mine since July 10, 1989.

15. By letter dated August 22, 1990, counsel for Aloe notified the District Manager for MSHA's District No. 2 that it would refuse to allow the UMWA representatives to accompany an MSHA Inspector during an inspection of the Aloe Mine.13

16. By letter dated August 23, 1990, Aloe notified the District Manager for MSHA's District No. 2 that all of Aloe's non-striking employees had selected Charles P. Swingle (an engineer for Aloe) as their representative in accordance with 30 C.F.R. Section 40.3.14

17. On Friday, August 24, 1990, Federal Mine Inspector John Mull arrived at the Aloe Mine for purposes of conducting an inspection pursuant to Section 103(g) of the Act, 30 U.S.C. Section 813(g). At the time, Inspector Mull indicated that Mr. Suba wished to accompany him as a "walkaround" pursuant to 30 C.F.R. Section 40.3.

18. Aloe refused to permit Mr. Suba or any other UMWA official or representative to enter the Mine and accompany Inspector Mull during the inspection.

19. Thereafter, Inspector Mull issued Citation No. 3092481. The Citation stated in pertinent part as follows:

> During the course of a 103(g) inspection conducted on August 24, 1990, by the writer, Grant P. MacSwain, Vice President, refused to permit Greg Shuba (sic), a recognized representative of the miners in accordance with Part 40.3 Title 30 C.F.R., access to mine property to accompany this Inspector on a (sic) inspection.
> Aloe Coal Company also indicated in a letter dated August 22, 1990, from its attorney, J. Michael Klutch, to Jennings D. Breedon, MSHA District Manager, stating, "Aloe will refuse access to its facilities to members, officers, and other representatives of the UMWA for the purpose of accompanying inspectors from the Federal Mine Safety and Health Administration as a "walkaround' on health and safety inspections."

20. After a reasonable time to allow abatement of the Citation, Inspector Mull issued Order No. 3092482. The Order stated in pertinent part as follows:

> No apparent effort was made by the operator to permit Greg Shuba (sic), a recognized representative of the miners, from traveling to mine property to accompany this inspector on this inspection. Grant MacSwain informed this inspector that Aloe would not permit Greg Shuba (sic) on mine property.
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> 21. By letter dated Tuesday, August 28, 1990, Roger W. Uhazie, Acting District Manager for MSHA's District No. 2, advised Aloe's President, David Aloe, that unless Aloe filed a Notice of Contest with the Federal Mine Safety and Health Review Commission ("Commission") on or before August 31, 1990, and unless Aloe requested an expedited resolution of this matter, MSHA would implement Section 110(b) of the Act and propose a civil penalty of up to One Thousand Dollars ($1,000.00) for each day that a failure to correct the cited violation continued. Mr. Uhazie also advised Mr. Aloe that if Aloe filed a Notice of Contest seeking an expedited resolution of this matter, MSHA would hold the Section 110(b) sanctions in abeyance pending a decision from the Commission on its Notice of Contest.15

Summary of the Facts

On July 10, 1989, the employees of Aloe Coal Company ("Aloe"), who were represented by the United Mine Workers of America (UMWA) for purposes of collective bargaining, commenced a strike at the Aloe Mine. As of the date of the hearing the strike had not settled, and there have not been any negotiations since March 1990. Aloe has continued operations with 13 replacement workers, who have been converted to permanent status, and 6 striking employees who returned to work.

On or about August 17, 1990, the UMWA advised the District Manager of the Mine Safety and Health Administration (MSHA), District No. 2, that two of the UMWA strikers had designated Greg Shuba, an UMWA employee, as their walkaround representative for purposes of Section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act).

By letter dated August 23, 1990, Aloe notified the District Manager for MSHA District No. 2 that all of Aloe's nonstriking employees had selected Charles Swingle as their walkaround representative. On August 24, 1990, MSHA Inspector John Mull arrived at the Aloe Mine to conduct an inspection, pursuant to a request filed by UMWA. Mull indicated that Shupa wished to accompany him as a "walkaround." Aloe refused to allow Shuba to enter the mine as a walkaround. Mull issued a Citation, and thereafter a Section 104(b) Order alleging that Aloe improperly denied Shuba access to the mine to accompany him on an inspection, and that, accordingly, Aloe was in violation of Section 103(f) of the Act.

Discussion

As pertinent Section 103(f) of the Act provides ". . . a representative authorized by his miners . . . . " shall be given an opportunity to accompany a representative of the Secretary during an inspection of a mine. Thus, the clear language of Section 103(f), supra, indicates that only those representatives who are authorized by "miners," have a right to accompany an inspector. Section 3(g) of the Act defines "miner," as ". . . any individual working in a coal or other mine;." Thus the issue presented for resolution is whether the striking employees of Aloe who selected Shuba to represent them as a walkaround, are considered to be "miners" as defined in the Act.

Intervenor asserts that the Act is remedial in nature, and thus must be interpreted broadly. In essence, Intervenor and Respondent argue that the striking miners have an expectation of returning to work, and they and their representative have a vital interest in maintaining safety of the work place. For the reasons that follow, I reject these arguments.

In deciding this case, I conclude that the statutory definition of a "miner," as set forth in Section 3(g) of the Act, is controlling. There is an absence of binding legal authority that would permit an expansion of the statutory definition of a "miner" beyond its plain meaning.16 In contrast, the 10th and D.C. Circuit Courts of Appeal have refused to extend the term "miner" beyond the clear wording of the statutory definition.

In Emery Mining Corporation v. Secretary of Labor, 783 F.2d. 155 (10th Cir. 1986), the operator had refused to compensate its miner employees for training they received prior to their having been hired. In holding that the operator's policy did not violate the Act, the Court held that although the Act requires training for "new miners," none of the complainants therein were miners or employed by the operator at the time that they took their training. Thus, the Court refused to extend the plain meaning of the statutory definition of the term "miner," reasoning as follows: "When, as here, a statue is clear on its face, we can not expand the Act beyond its plain meaning." (Emery, supra, at 159). I find that this reasoning applies with equal force to the case at bar. Inasmuch as the Act on its face clearly limits the use of the term "miner" to those individuals "working" in a mine, it can not be expanded beyond its plain meaning to encompass individuals on strike as they are clearly not working in the mine. (See, also, National Industrial Sand Association v. Marshall, 601 F.2d 689 (3rd Cir. 1979), wherein the Court upheld regulations requiring, inter alia, the training of nonemployees working in a mine, and held, at 704, that, with regard to the definition of a "miner" as contained in the Act, "As its standard, the statue looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction operations.")

In Brock on behalf of Williams v. Peabody Coal Company, 822 F.2d 1134 (D.C. Cir., 1987), an operator of a mine, in rehiring laid-off employees, passed over some individuals at the top of the list because they had not received safety training. The Court indicated that the issue for resolution was whether the laid-off individuals who had been passed over, qualified as miners while they were laid-off. The Court rejected the argument of the Secretary that a miner is one who is contractually entitled to employment. The Court took cognizance of the definition of a "miner" as contained in the Act, and noted the ". . . obvious fact that, at the moment when the operators decided not to recall them, they were not "working in a coal . . . mine,' but were instead on layoff." (Peabody, supra, at 1140). (See, Westmoreland Coal Company, 11 FMSHRC 960 (1989) wherein the Commission, in finding that individuals who obtained training at their own expense during a layoff were not entitled to reimbursement, held that individuals on a layoff status are not miners. See also, Emery, supra, wherein the Court, in reversing the Order of the Commission requiring an operator to compensate laid-off miners for prehire training that occurred while they were laid-off, found that it was uncontested that the laid-off individuals were not miners or employees and refused to extend the statutory definition of a miner to encompass individuals who were in a laid-off status).

I conclude that a plain reading of the statutory definition of "miner" excludes laid-off employees as well as those on strike as both are not working in a mine.17 Indeed, following the case law established by Peabody, supra, Emery, supra, and Westmoreland, supra, it might be concluded that if an individual not working in a mine due to being to laid-off solely by virtue of an act of the Operator, is not to be considered a "miner," then, a fortiori, an individual who takes action in removing himself from working in a mine by striking, is certainly not to be considered within the definition of a "miner."

Inasmuch as the employees who appointed Shuba to represent them were on strike they were not miners within the Act. Accordingly Shuba was not a representative of miners and thus did not have any right to serve as a walkaround.18 As such the Contest is sustained.

ORDER

It is ORDERED that the Notice of Contest is SUSTAINED, and it is further ORDERED that Citation No. 3092481 and Order No. 3092482 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. At the hearing, it was stipulated that Aloe Holding Company is owned by six members of the Aloe family, and the Aloe Holding Company owned 100 percent of the stock of Aloe Coal Company and Boich Mining Company, both of which are operating companies that mine bituminous coal. It was further stipulated that the six members of the Aloe family that own Aloe Holding Company individually own Robinson Coal Company which is engaged in the mining of coal. It also was stipulated that the Aloe family members and/or the Aloe Holding Company have other interests that are not pertinent to these proceedings.

2. I find that as of the date of the hearing, these employees were still on strike, and that the last negotiating session was March 13, 1990.

3. I find that Aloe presently has a full complement of active workers and is not planning to expand its work force.

4. It was stipulated that true and correct copies of the Injunction and Contempt Orders were attached to the Stipulations as Joint Exhibit 2-4. These documents were admitted in evidence as Joint Exhibits 5 and 6.

5. It was further stipulated that a true and correct copy of the closing compliance letter and the Settlement Agreement (with change attached) was attached to the Parties' Stipulations as Exhibits 5 and 6. These documents were admitted in evidence as Joint Exhibits 5 and 6.

6. It was further stipulated that true and correct copies of the Settlement Agreement (with change attached) and the closing compliance letter was attached to the Parties' Stipulations as Exhibits 7 and 8. These have been admitted in evidence as Joint Exhibits 7 and 8.

7. It was further stipulated that a true and correct copy of the Settlement Agreement (with change attached) was attached to the Stipulations as Exhibit 9. This was admitted in evidence as Joint Exhibit 9.

8. It was stipulated that a true and correct copies of these changes are attached to the Stipulations as Exhibit 10. This was admitted in evidence as Joint Exhibit 10.

9. It was stipulated that a copy of the Petition was

attached to the Stipulation as Exhibit 11. This was admitted in evidence as Joint Exhibit 11.

10. It was stipulated that true and correct copies of these benefits were attached to the Stipulations as Exhibits 13-23. These were admitted in evidence as Joint Exhibit 13-23.

11. The correct spelling is Shuba

12. It was stipulated that a true and correct copy of the Authorization Form was attached to the Stipulations as Exhibit 24. This has been admitted in evidence as Joint Exhibit 24.

13. It was stipulated that a true and correct copy of the letter was attached to the Stipulations as Exhibit 25. This was admitted in evidence as Joint Exhibit 25.

14. It was stipulated that a true and correct copy of the letter was attached to the Stipulations as Exhibit 26. This letter was admitted in evidence as Joint Exhibit 26. At the hearing, it was further stipulated that on August 23, 1990, representatives of MSHA were aware of the substance of Exhibit 26, and that the inspector saw a copy of that document prior to issuing the Citation on August 24.

15. It was stipulated that a true and correct copy of Mr. Uhazie's letter was attached to the Stipulations as Exhibit 29. This letter was admitted in evidence as Joint Exhibit 29.

16. In Clinchfield Coal Company, Docket No. VA 89-687-R, which is relied on by Respondent and Intervenor, Judge Broderick at a hearing, in a contest of a Closure Order, sustained a Motion by UMWA to intervene on behalf of striking employees. I am not bound by a ruling of a fellow Commission Judge. Further, Clinchfield is inapplicable to the instant case (n.17, infra).

17. I do not find Clinchfield Coal Company, supra, relied on by both Respondent and Intervenor to be applicable to the facts of the instant case. In Clinchfield, supra, the operator sought to challenge a Closure Order issued by an MSHA Inspector, and the UMWA sought to intervene on behalf of striking employees. The operator contended that the striking employees should not be considered "miners" under the Act. Judge Broderick in allowing UMWA to intervene reasoned that a decision on the contest of a Closure Order may affect the interests of miners who are on strike and are represented by the UMWA, and concluded that the striking miners were "miners" under Section 3(g) of the Act. However, as noted correctly by Contestant, Judge Broderick indicated that his conclusion was not "open-ended," and relied on evidence that the employees therein were only on strike for 4 months, and the employer and the Union were presently engaged in negotiations. In contrast, in the case at bar, the strikers have been permanently replaced, the strike has lasted for over 14 months, and the Parties are not negotiating.

18. It is significant to note that the safety interests of those miners who were working at the mine on a day-to-day basis

are being protected, inasmuch as all the nonstriking employees selected a walkaround to represent their interests during MSHA Inspections.