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CYPRUS EMPIRE v. SOL (MSHA) UMWA
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

CYPRUS EMPIRE CORPORATION,
CONTESTANT

v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
REVIEW ADMINISTRATION,
RESPONDENT

UNITED MINE WORKERS OF
AMERICA (UMWA)
INTERVENOR

CONTEST PROCEEDINGS

Docket No. WEST 91-454-R
Citation No. 3410886; 6/3/91

Docket No. WEST 91-455-R
Citation No. 3410887; 6/3/91

Docket No. WEST 91-456-R
Citation No. 3410889; 6/4/91

Eagle No. 5 Mine 05-01370

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Profes-
sional Corporation, Pittsburgh, Pennsylvania,
for Contestant;
Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent;
Robert L. Jennings, Representative of United Mine
Workers of America, Price, Utah,
for Intervenor.

Before: Judge Morris

This is a contest proceeding arising under the Federal Mine
Safety and Health Act, 30 U.S.C. 801, et seq. (the "Act").

An expedited hearing on the merits was held in Denver,
Colorado, on June 11, 1991.

The parties waived receipt of the complete transcript but
filed post-trial briefs and further requested an expedited
decision.

ISSUE

Whether striking employees who selected Dean Carey to
represent them as a walk-around representative are considered to
be "miners" as defined in 103(f) (Footnote 1) of the Act.

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Enforcement activities: on June 3, 1991, MSHA Inspector Ervin St. Louis issued Citation No. 3410886 for a violation of 103(f) of the Act. The text of the citation is set forth in paragraph 5 of the stipulation, *infra*.

On the same day, approximately 40 minutes later, the inspector issued Order No. 3410887. The text of the order is set forth in paragraph 6 of the stipulation, *infra*.

On June 4, 1991, the inspector issued Order No. 3410889. The text of the order is set forth in paragraph 11 of the stipulation, *infra*.

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The inspector later modified the order to state that Order No. 3410887 had not been modified, vacated, or terminated (with the exception of a time correction).

STIPULATION

At the hearing the parties stipulated as follows:

1. Empire operates Eagle Number 5 Mine, I.D No. 05-01370, located in Craig, Colorado. It is an underground bituminous coal mine and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The administrative law judge has jurisdiction over these proceedings under Section 105(a) of the Act.

3. The citations, orders, and modifications thereto were properly served by a duly authorized representative of the Secretary upon an agent of Empire at the dates and places therein, and may be admitted into evidence for the purpose of establishing their issuance.

4. Citation No. 3410886 was issued on June 3, 1991, at 6:05 a.m., pursuant to Section 104(a) of the Act, 30 U.S.C. 814(a), and alleged a violation of 103(f) of the Federal Mine Safety and Health Act of 1977.

5. Under the heading and caption, condition, or practice, Citation No. 3410886 alleges as follows:

The representative of the miners requested at the mine office the right to accompany an MSHA authorized representative of the Secretary during an MSHA Triple A inspection. Mine management refused entry to the mine property. The miners are on strike and have pickets on the road to the mine outside of the mine property. Mine management denied the representative of the miners entry on mine property to accompany the authorized representative during the inspection conference. The citation was not designated significant and substantial and the time for abatement was set of 6:45 a.m.

6. The contest of Citation No. 3410886 is docketed at number WEST 91-454-R. After Citation No. 3410886 was issued, Order No. 3410887 was issued pursuant to Section 104(b) of the act for failure to abate Citation No. 3410886. Under the heading and caption, condition, or practice, Order No. 3410887 alleges as follows:

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Mine management would not allow the representative of the miners to accompany the authorized representative of the Secretary during the Triple A inspection of the mine. Cyprus Empire Corporation management refused admittance of the United Mine Workers of America, Local 1799, members to be present as miners representatives in the course of the Triple A regular inspection, and any MSHA discussion of actions during this period UMWA memberships is on strike.

7. The miners on the job have elected Mr. Jim Shubin as their representative.

8. A subsequent modification was issued, modification number 3, to the order amending the body of the order and putting the words at the beginning of the second paragraph. The company's position is that the miners on the job have elected Mr. Jim Shubin as their representative.

9. The contest of Order No. 3410887 is docketed at WEST 91-455-R.

10. Citation No. 3410889 was issued on June 4, 1991, pursuant to Section 104(b) of the Act for a failure to abate Citation No. 3410886.

11. Under the heading and caption, condition, or practice, Citation No. 3410889 alleges as follows:

The operator, Cyprus Empire Corporation, continues to refuse the miners' representative the right to accompany authorized representative of the Secretary during the Triple A inspection being conducted at the Eagle No. 5 Mine, I.D. 05-01370. The operator continues to maintain the mine in operable condition and operates the long wall when needed to protect the tailgate and the long wall itself from adverse conditions.

The inspector subsequently issued a modification and added

that Order No. 3410887 had not been modified, vacated, or terminated (with the exception of the time correction).

12. The contest of Citation No. 3410889 was docketed at WEST 91-456-R.

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13. On May 12, 1991, the collective bargaining agreement between Empire and its hourly employees expired. The hourly employees are represented by the United Mine Workers of America for the purpose of collective bargaining. There is presently no collective bargaining agreement in effect. The hourly employees commenced the strike on or about May 13, 1991, related to the negotiations over a new collective bargaining agreement. Thereafter, Empire resumed mining operations utilizing its salaried employees.

14. The mining operations include operation of the longwall mining equipment in order to move the long wall face forward to avoid adverse mining conditions. Other mining activities include mine maintenance-type work, including pumping and building of ventilation control.

15. The employees working at the Eagle No. 5 Mine on June 3, 1991, selected James A. Shubin as their representative for the purpose of accompanying MSHA inspector Irvin St. Louis during his AAA inspection of the Eagle No. 5 mine on those days and all subsequent days. Mr. Shubin accompanied Mr. St. Louis on his inspections.

16. Prior to May 13, 1991, the following hourly employees, who are members of the United Mine Workers and who worked at the mine, were designated pursuant to 30 C.F.R. 40.30 as representative of the employees: Dean Carey, Eugene Vezie, and Chencho Salazar. Such persons are currently on strike and, moreover, the persons who designated such persons as their representatives are currently on strike.

17. On Monday, June 3, 1991, Inspector St. Louis arrived at the Eagle No. 5 Mine for the purposes of conducting a regular quarterly inspection. At that time he indicated that Dean Carey wished to accompany him as a walk-around.

18. Empire refused to permit Dean Carey or any other UMW official or representative to enter the mine and accompany Inspector St. Louis during the inspection.

19. At the time of his inspection on June 3, 1991, Inspector St. Louis was informed of Empire's position and that conversations with MSHA's District 9 office had been conducted previously.

20. On June 3, 1991, Solicitor Margaret Miller informed Counsel for Empire, R. Henry Moore, that if Empire contested the citation, and requested an expedited hearing, MSHA would not implement Section 110(b) of the Act nor propose a civil penalty of up to \$5,000 for each day that a failure to correct occurred.

THE EVIDENCE

The evidence is uncontroverted: IRVIN ST. LOUIS of Craig, Colorado, has been an MSHA inspector for 11 years. He is experienced in mine safety.

On June 3, 1991, Inspector St. Louis intended to conduct an AAA inspection at Eagle No. 5 Mine. This was the first inspection since the miners, represented by UMWA, had gone on strike at the mine.

On June 3, 1991, the inspector met Dean Carey of the UMWA and Bill Ivy, Mine Manager. Mr. Carey requested the right to travel with the inspector, but Mr. Ivy refused. Mr. Ivy stated that the miners had elected Jim Shubin as the miners' safety representative. (Footnote 2) On previous occasions, Carey, Shubin, and Ivy had traveled with the MSHA inspector.

After some discussion, the inspector wrote a 104(a) citation. When the Company did not agree to let Mr. Carey travel with him, a Section 104(b) was issued. (See Exs. S-1, S-2, S-3).

Mr. Ivy gave no indication the Company would comply and the original citation remains in effect at the time of the hearing.

On May 30, 1991, a UMWA picket line had been set up at the mine.

Inspector St. Louis conducted his normal inspection on June 3, 4, and 5, 1991.

DEAN CAREY, a person experienced in mining, is currently on strike at the Eagle No. 5 Mine.

Mr. Carey is a bargaining representative of the UMWA and the chairman of the Mine Safety Committee. He has accompanied federal inspectors and has been the walk-around representative at the mine of nine years.

The entire bargaining unit of the UMWA went on strike at the mine on May 13. No UMWA member has crossed the picket line.

Mr. Carey learned from the picket line that Mr. St. Louis was to conduct an inspection. He requested permission from Mr. Ivy to accompany the inspector. Mr. Ivy refused the request.

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The mine has been a strike four weeks and one day. The last bargaining session was May 10, 1991. Mr. Carey expects further bargaining sessions; further, he expects to resume work.

A strike six years ago lasted 79 days. The striking miners receive compensation from the union strike fund.

Mr. Carey wants to do a walk-around inspection to be sure the mine is safe when the miners return. As a miners' representative, Mr. Carey can request a Section 103(g) inspection.

JOHN CAYLOR, a person experienced in mining and safety, works for Empire's parent company, Cyprus Coal.

After the citation and order were issued, Mr. Caylor contacted William Holgate, MSHA's District 9 manager. He was attempting to avoid additional failure to abate orders. He further advised Mr. Holgate that Empire intended to challenge the citations.

The company has had good relations with MSHA and, if possible, he hoped that litigation could be avoided.

The witness believed there was a principle involved. The safety of the miners was not at risk since they were not underground. Further, he felt a failure to abate order would indicate Empire was a recalcitrant operator. The company wanted to avoid such an impression.

Mr. Caylor acknowledged that Mr. Carey had been designated as a walk-around representative by the UMWA. Mr. Shubin had been so designated before Inspector St. Louis and Mr. Carey arrived at the mine office.

DALE IVY, the mine general manager, has been engaged in mining since 1969.

The collective bargaining agreement expired on May 12, 1991. Since then, coal has been mined on a limited basis, one shift a day. The salaried workers underground are not members of the UMWA. The hourly employees have not been replaced.

The underground workers have rock-dusted, conducted weekly examinations, and run the longwall once a week to prevent adverse roof conditions from developing.

On June 3, Mr. Ivy talked to Inspector St. Louis. He further read Section 103(f) of the Act and stated that Jim Shubin of

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the safety department had accompanied the MSHA inspector. He further decided Mr. Carey should not accompany the inspector because the UMWA was on strike. On June 3, and 4, Mr. Shubin in his walk-around was representing both the miners and the operator.

When the citation was issued, Mr. Ivy told the inspector the company was complying with the Act.

JERRY TAYLOR, an engineering coordinator for MSHA, processes all of the requests submitted to MSHA that require approval.

In Mr. Taylor's opinion, Inspector St. Louis gave the operator a reasonable time to abate the citation. Abatement could be accomplished by the company's agreeing to Mr. Carey's request to accompany the inspector.

For various reasons, MSHA does not allow a hearing on the merits before issuing a failure to abate order.

The paperwork supporting Mr. Shubin as a walk-around representative was received by MSHA on June 10, 1991.

It is MSHA's view that Mr. Shubin does not represent the miners. He represents the operator since he was chosen by salaried management employees and not miners.

MSHA's policy manual and publications do not address situations where the miners are on strike. At the time of the hearing, the striking employees are not doing anything at the mine.

DISCUSSION

The issue, as set forth above, can be simply restated: Are striking employees entitled to walk-around rights under Section 103(f) of the Act?

There is no exact precedent controlling in this factual situation but several cases have considered closely related issues.

As a threshold matter: Section 3(g) of the Act defines a "miner" as ". . . any individual working in a coal or other mine." It is further uncontroverted that no union miners had worked underground since the strike had begun.

In Westmoreland Coal Company, 11 FMSHRC 960 (1989), the Commission reviewed the issue of whether individuals who obtained

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training at their own expense during a layoff were entitled to reimbursement. The Commission held that individuals in a layoff status are not miners. 11 FMSHRC at 964.

In *Emery Mining Corporation v. Secretary of Labor*, 783 F.2d 155 (C.A. 10 1986), the operator refused to compensate its miner employees for training they received before they were hired. In ruling that the company's policy did not violate the Act, the Court noted that none of the Complainants therein were miners or employed by the operator at the time they took the training. If they were not "miners," they were not entitled to compensation, 783 F.2d at 159.

In *Brock on behalf of Williams v. Peabody Coal Company*, 822 F.2d 1134 (D.C. Cir. 1987), the operator, in rehiring laid-off employees, passed over some individuals at the top of the list because they had not received safety training. In ruling against the Secretary's position, the Court determined that the miners were on layoff and not working in a coal mine. In sum, individuals in layoff status are not miners. See also the recent final decision of Commission Judge Avram Weisberger involving miners on strike in *Aloe Coal Company*, 12 FMSHRC 2113 (October 1990).

In support of their positions, the Secretary and the Intervenor rely on an oral order of Commission Judge James A. Broderick in *Clinchfield Coal Company*, (Footnote 3) Va 89-67-R.

In *Clinchfield* the operator was contesting an MSHA closure order. Over the operator's objections, Judge Broderick permitted the UMWA to intervene as a representative of miners under Section 3(g) of the Act.

By way of analogy, Judge Broderick observed that, under the Labor Management Act, striking employees are nevertheless treated as employees and are entitled to the protection afforded by the Labor Act.

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The Judge further observed in Clinchfield that the UMWA and the company were engaged in bargaining efforts. In addition, a settlement of the strike could result in miners' returning to work.

Judge Broderick distinguished those cases involving individual rights, claims for compensation, and training provisions. He indicated such cases are essentially different from those situations where miners are entitled to participate in challenges to closure orders.

Judge Broderick's statement as to "training provisions" appears to be a reference to Emery Mining Corporation, supra. However, the training of miners can be just as critical as walk-around rights under Section 103(f) of the Act.

On the basis of Clinchfield, the Secretary presents a strong argument to distinguish five established cases. However, the Commission and the Appellate Court have not gone beyond the plain meaning of the statutory words in Section 3(g).

In short, the miners involved in this case were "not working in a coal or other mine." Hence, they do not qualify as miners under Section 103(f).

For the foregoing reasons, I enter the following:

ORDER

1. The contest of Citation No. 3410886 is SUSTAINED and the citation is VACATED.

2. The contest of Order No. 3410887 is SUSTAINED and the order is VACATED.

3. The contest of Order No. 3410889 is SUSTAINED and the order is VACATED.

John J. Morris
Administrative Law Judge

1. Section 103(f) of the Act provides as follows:

"(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the

Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have the equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

2. Mr. Shubin is a safety inspector for Empire.

3. Judge Broderick's decision, published at 11 FMSHRC 1568 (1989), does not discuss his prior oral order. Further, the Commission in its review did not discuss the issue, 11 FMSHRC 2120 (1989). The reference to the rights of the striking miners arises from a transcript containing Judge Broderick's order. The transcript was attached to Petitioner's brief.