

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 5, 1991

LARRY FLYNN,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 91-538-R
v.	:	Decertification Notice
	:	
	:	Lad Mining, Inc.
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 35 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 40-02839

DECISION

Before: Judge Merlin

This case is a notice of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. The instant notice relates to citations which the Secretary issued to contestant's operator, Lad Mining, Inc., for allegedly tampering with dust cassettes. The Secretary has filed a motion to dismiss.

In opposing the motion to dismiss, contestant first raises the Secretary's failure to answer within 30 days. The Secretary's answer was only three days late and the delay was non-prejudicial. Equally without merit is contestant's assertion regarding the Secretary's failure to plead jurisdiction. This omission could be easily corrected by an amended answer, but I deem it unnecessary to do so because there is no prejudice and based upon the submissions of the parties the matter is ripe for disposition at this time.

Contestant relies upon and incorporates by reference the arguments contained in the brief filed by the contestant in Little v. Secretary, Docket No. KENT 91-898-R. The parties in Little have agreed that the decision in Roberts v. Secretary, Docket No. KENT 91-896-R, is controlling in that matter.

On September 4, 1991, I held in Roberts that an individual such as contestant has rights arising from his certification which are entitled to due process protections. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision which is determinative of Little is dispositive of this matter.

It is noted that contestant's notice of contest represents that the operator here, unlike the operator in Roberts, has filed notices of contest challenging each of the citations issued to it and that contestant has filed a notice of intervention in those cases.

In light of the foregoing, it is ORDERED that this case be and is hereby DISMISSED.

A handwritten signature in cursive script that reads "Paul Merlin".

Paul Merlin
Chief Administrative Law Judge

Enclosure

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 5, 1991

KIMMIE NOAH, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. SE 91-544-R
: through SE 91-655-R
: Citation No. 9860517; 4/4/91
SECRETARY OF LABOR, : through 9860628; 4/4/91
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Consolidation Coal Company
Respondent :
: Matthews Mine
: Mine ID 40-00520

DECISION

Before: Judge Merlin

These cases are notices of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), seeking to challenge the Secretary's proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. Each notice of contest relates to a citation issued by the Secretary to contestant's operator, Consolidation Coal Company, for allegedly tampering with a dust cassette. The Secretary has filed a motion to dismiss and contestant has submitted a memorandum in opposition.

On September 4, 1991, I held in Roberts v. Secretary, Docket No. KENT 91-896-R, that an individual such as contestant has rights arising from his certification which are entitled to due process protection. However, I further held that I had no jurisdiction to entertain an independent suit by such a miner or to grant him relief. The issues in Roberts are the same as those presented here and therefore, that decision is dispositive of this matter.

As contestant's memorandum points out, the operator here, unlike the operator in Roberts, has filed notices of contest challenging the citations issued to it. Contestant may wish to consider the possibility of becoming a party to the operator's suits. (See Footnote 1, page 3 of the Roberts decision.)

In light of the foregoing, it is ORDERED that these cases be and are hereby DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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