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KERR-MCGEE COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

KERR-MCGEE COAL CORPORATION, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. WEST 91-84-R Citation No. 3242337; 10/25/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION, RESPONDENT	Docket No. WEST 91-85-R Order No. 3242340; 10/25/90 Jacobs Ranch
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION, PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 91-220 A.C. No. 48-00997-03513
v.	Jacobs Ranch
KERR-MCGEE COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner;
Charles W. Newcom, Esq., SHERMAN & HOWARD, Denver, Colorado, for Contestant/Respondent.

Before: Judge Lasher

These three consolidated contest/civil penalty proceedings came on for hearing in Denver, Colorado, on July 23, 1991. Kerr-McGee Corporation (herein "K-M") in two contests challenges Citation No. 3242337 issued on October 25, 1990, by MSHA Inspector Jimmie Giles1 charging a violation of 30 C.F.R. 40.4 and

104(b) "failure to abate" Withdrawal Order No. 3242340 issued approximately 10 to 20 minutes after the Citation was issued. The Secretary of Labor (herein "MSHA") in the related penalty proceeding captioned seeks assessment of a penalty for the violation alleged in the citation.

Contentions of the Parties

The general issues are whether K-M violated 30 C.F.R. Part 40.4 and 103(f) of the Act by failing to post the designation of representative of miners (in the record three times as Exhibits K-1, M-1, and A-1 to the stipulation) and, if so, the appropriate amount of penalty for such violation.

As MSHA points out, there is no question that K-M did not post the "designation" and that it refused to abate the allegedly violative practice by posting it after being requested to do so by MSHA--which resulted in MSHA's issuance of a "failure to abate" withdrawal order. The issue then is whether the defenses asserted by K-M relieve it from posting the designation and excuse the failure to abate.

K-M states the issues as:

1. Can a union, or an employee of that union, "represent" miners at a mine when the union does not represent the mine's employees pursuant to the provisions of the Labor Management Relations Act ("LMRA")?

2. Does MSHA's application to 30 C.F.R. Part 40 create an unnecessary and improper conflict between MSHA's regulations and the LMRA?

3. Under Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447, 452 (10th Cir. 1990) is it an "abuse" for a union, which does not represent employees at a mine pursuant to the provisions

of LMRA to seek to become a "representative of miners" under 30 C.F.R. Part 40 to facilitate organizing efforts at the mine?

4. If a union's use of 30 C.F.R. Part 40 would require a mine operator to waive its rights under the LMRA, is such a use of Part 40 an "abuse?"

K-M's contentions then are:

1. Properly interpreted, 30 C.F.R. Part 40 requires that before a labor union, or an employee of a union, can "represent" miners and thus be a "Representative of Miners," under the Act the union must be certified as a representative under the LMRA (T. 33-34);3

2. MSHA's application of 30 C.F.R. Part 40 to K-M unnecessarily and impermissibly conflicts with the LMRA (T. 43, 44);

3. The designation in this matter is for union organization purposes and is thus an abuse of Mine Act regulations as applied to K-M, and under Utah Power & Light, supra, K-M can take action against the abuse (see T.37);

In this connection, KM alleges that "Both the UMWA's attempt to gain under Mine Act regulations what it cannot acquire under the LMRA (access to mine property and various mine records, and a role in mine business as it relates to health and safety . . .) and MSHA's proposed application of Part 40 at K-M which aids the UMWA in this organizing endeavor are an abuse."

4. K-M, in this litigation, does not raise the issue of technical defects in the designation of miners (T. 49).

30 C.F.R. Part 40, headed "Representative of Miners" consists of five sections which appear below.

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The Regulation

40.1 Definitions.

As used in this Part 40:

(a) "Act" means the Federal Mine Safety and Health Act of 1977.

(b) "Representative of miners" means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and

(2) "Representatives authorized by miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.

40.2 Requirements.

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

(b) Miners or their representative organization may appoint or designate different persons to represet them under various sections of the act relating to representatives of miners.

(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

(Approved by the Office of Management and Budget under control number 12190042)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 29509, July 7, 1978, as amended at 47 FR 14696, Apr. 6, 1982]

40.3 Filing procedures.

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name, address, and Mine Safety and Health Administration identification number, if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; of if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information fled is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.

40.4 Posting at mine.

A copy of the information provided the operator pursuant to 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

40.5 Termination of designation as representative of miners.

(a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.

(b) The Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners which have been terminated pursuant to paragraph (a) of this section or which are not in compliance with the requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

FINDINGS

A. Stipulated Facts (Ex. M-7)

1. Kerr-McGee is the owner and operator of the Jacobs Ranch Mine, located in Campbell County, Wyoming. There are no issues of jurisdiction in this matter.

2. On or about July 24 and 25, 1990, seven miners employed at the Jacobs Ranch Mine signed Exhibit A to the Stipulation which may be introduced into evidence in this case.

3. Exhibit A4 lists the UMW as the miners' representative and lists UMW representatives to represent miners at the Jacobs Ranch Mine.

4. Employees at the Jacobs Ranch Mine have never been unionized by the UMW or any other union.

5. One of the UMW representatives, Dallas Wolf, resides in Gillette, Wyoming, and is International Teller/Organizer for the UMW, who is living in Gillette for the purpose of unionizing the coal miners in the Powder River Basin, including the miners at the Jacobs Ranch Mine.

6. The second listed UMW representative, Bob Butero, resides in Trinidad, Colorado, and is an international representative of the UMW.

7. After Exhibit A was signed by the seven employees listed thereon, it was mailed by Dallas Wolf to the District Manager, Coal Mine Safety and Health, District 9 in Denver, Colorado.

8. Exhibit A was received by the Coal District 9 office and returned to Mr. Wolf for further information. The additional information was provided and received by the Coal District 9 office on or about August 30, 1990.

9. On or about September 6, 1990, the Coal District Manager, District 9, mailed a letter to Mr. Wolf, acknowledging receipt of Exhibit A.

10. The letter to Dallas Wolf from William Holgate, dated September 6, 1990, acknowledging receipt of Exhibit A is attached as Exhibit B and may be admitted into evidence in this case.

11. Dallas Wolf mailed Exhibit A to K-M Jacobs Ranch Mine, on or about August 30, 1990.

12. Exhibit A was received by the Jacobs Ranch Mine and discussed by K-M management at the mine and at the office in Oklahoma City, Oklahoma. It was determined by management that the designation would not be posted at the time, or in any other location because of the view of K-M, which MSHA disagrees with, that Exhibit A is not proper under 30 C.F.R. 40.

13. On or about October 25, 1990, MSHA received a 103(g) complaint regarding the Jacobs Ranch Mine. The complaint alleged that Exhibit A had not been posted at the mine as required by 30 C.F.R. 40.4.

14. Upon receipt of the complaint, Coal Mine Inspector Jimmie Giles proceeded to the Jacobs Ranch Mine and presented a copy of the complaint to mine management, including Ron Crispin.

15. Mr. Crispin informed Mr. Giles that Exhibit A had not been posted. During the visit by Inspector Giles, Mr. Crispin read a statement of position to Mr. Giles. The statement of position is attached hereto as Exhibit C and may be introduced into evidence in this case.

16. Thereupon, Inspector Giles issued a 104(a) citation to the Jacobs Ranch Mine for a violation of 30 C.F.R. 40.4, Citation No. 3242337.

17. Inspector Giles informed the mine operator, through Mr. Crispin, that they would have approximately 15 minutes to abate the Citation by posting Exhibit A.

18. Mr. Crispin conferred with the Oklahoma City office and determined that the operator would not post Exhibit A.

19. After about 20 minutes, Exhibit A had not been posted and Inspector Giles had been notified that the mine would not post it. Inspector Giles the issued Order No. 3242340, a 104(b) order for failing to abate a citation.

20. Mr. Giles then left the mine and returned to his office in Sheridan, Wyoming.

21. As a result of the citation and order, K-M management representatives traveled to McAlester, Oklahoma, for a conference with MSHA sub-district manager, Joseph Pavlovich. No change was made in the citation or order as a result of the conference.

22. On or about November 16, 1990, K-M filed a timely notice of contest with regard to the citation and order issued in this matter. Thereupon, the Secretary of Labor filed a timely response.

B. Findings in Connection with Stipulation

Exhibit M-1 (Ex. A to the Stipulation entered into by the parties) consists of a total of nine pages and

a. designates Bob Butero, International Safety Representative and Dallas Wolf, International Teller,5 of UMWA as

> "representatives" and seven employees as "alternate representatives" to serve as representatives of the miners under the Federal Mine Safety and Health Act of 1977, "for all purposes" (T. 32),
>
> b. was "submitted as required" by 30 C.F.R. 40.3, and
> c. prior to the submission of Exhibit M-1, there had been no prior designations, i.e., no miners' representatives under the Mine Act at the subject mine (T. 26-28, 54, 151).

Exhibit C to the Stipulation, Respondent's written statement of position objecting to the designation referred to in paragraph 14 of the Stipulation which was read to the MSHA inspector who issued the Citation, provides as follows:

> Kerr-McGee does not believe it can lawfully be required to accept the designation of a non-employee walk-around representative at the Jacobs Ranch Mine or to recognize any other action by a non-employee. MSHA Inspectors are entitled to, and encouraged to, talk to Jacobs Ranch employees as a part of all inspections. Inspections should proceed on that basis without outside interference.6

C. General Findings

The subject coal mine is located in the Powder River Basin of Wyoming. The UMWA, since the summer of 1990, has been actively seeking to unionize the subject mine as well as other mines in the Powder River Basin. Dallas Wolf is an international representative of the UMWA who moved to Gillette, Wyoming, in April 1990, to engage in union organizing activities. The UMWA held

several meetings in Gillette which were attended by Jacobs Ranch miners, which meetings were organized by Mr. Wolf. In July 1990, the UMWA sponsored several days of safety training, presented by Robert D. Butero, International Health and Safety representative residing in Trinidad, Colorado. Issues discussed during the safety training included safety and walk-around rights of miners. At the end of the safety training sessions, July 24 and 25, 1990, seven Jacobs Ranch miners signed the designation (Ex. M-1). Mr. Wolf played a key role in the preparation, circulation, and filing of the designation. The use of 30 C.F.R. Part 40 and the designation of miners' representatives was part of UMWA's organizing strategy and was an organizing "tool."7

After the designation was signed, it was sent to MSHA and was received on August 18, 1990. Concurrently, Mr. Wolf mailed a copy to the mine.

Subsequently the designation was corrected by additional information and completed forms were sent to and received by MSHA and K-M. (Exs. M-3 and M-4).

Upon receipt of the designation, KM by general management decision determined not to post it even though it was familiar with the UP&L decision granting walk-around rights to non-employees (T. 147). K-M's determination not to post was made several months prior to the appearance of MSHA Inspector Jimmie Giles at the mine when the Citation and Order were issued. K-M made no protest of the designation during this period and the testimony of its Manager of Administration, Ronnie D. Crispin, in this and related connections has considerable significance in this matter:

> Q. Okay. In between the time you decided not to post and the time Mr. Giles wrote his citation, did you send any letters to MSHA explaining why you didn't want to post that designation form?
>
> A. No, we did not.

* * * * *

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Q. Mr. Crispin, is it your understanding that this designation, Exhibit M-1, is somehow abusive or something that was abused by the union? Is that your understanding of M-1?

* * * * *

A. Personally, I feel, yes, it's an abuse of intent in that.

Q. (My Ms. Miller) Will you explain why you think that with regard to this document.

A. Because it designates United Mine Workers as a Representative.

Q. What's abusive about that?

A. Because, obviously, they do not represent our employees.

Q. In the collective bargaining sense, they don't represent your employees?

A. That's correct.

Q. Is there anything else that you see that's abusive about that document, anything else, or is that the--

A. That's the issue.8 (T. 148-149)

On or about October 25, 1990, MSHA received a Section 103(g) complaint stating that the Jacobs Ranch Mine had not posted the designation of representative form as required by Part 40 regulations. Inspector Giles then traveled to the mine on that day and presented the complaint to mine management, i.e., Ron Crispin. Mr. Crispin informed the inspector that, indeed, the designation had not been posted and that it would not be posted. Crispin told Inspector Giles that the two miners designated as walk-

around representatives were union members and were not employed at the Jacobs Ranch Mine. Mr. Crispin further indicated that the mine had not received a notification from MSHA that the designation was a valid one. Inspector Giles then called his supervisor and the Denver District Office to determine the status of the designation form. Giles learned that MSHA did not notify K-M regarding a designation but that the representative of miners provided a copy to the operator, as noted on the form. He then issued the 104(a) citation and, as shown in the stipulation, informed K-M that he would allow them 15 minutes to post the designation, and abate the decision. Mr. Giles hereafter was informed that the designation would not be posted and he then issued the 104(b) order for a failure to abate.

On January 2, 1991, MSHA District Manager, William Holgate, had a letter hand-delivered to K-M. The letter informed K-M of his intention to request that the asessment office begin a daily penalty if the citation was not immediately abated. K-M was given 24 hours to abate and it did so at that time.

Normally, the procedure for an inspection is for the inspector to be accompanied by a representative of the operator and a representative of the miners. Upon arrival at the mine, the MSHA inspector will contact the operator to let him know that he is at the mine and ask if there is a designated representative of the miners available. If so, the inspector will contact that representative; if not, he may ask the miners present if they would like to select someone to accompany the inspector. (Tr. 166). The inspector is supposed to control the inspection and if the representative of the operator or the representative of the miner who is accompanying the inspector does something inappropriate the inspector should interrupt the inspection and explain that the representative is to only accompany the inspector and assist him in the inspection. (T. 167). The inspector would stop a representative from engaging in any union organizing activity and if it persists would prohibit that representative from participating in the inspection. (T. 168).

Based on many years of experience, MSHA subdistrict manager Joe Pavlovich testified to the practical aspects of a walk-around representative's duties:

> A. Basically, what the person does is just travel with an inspector and assist him most of the time. What we end up finding is, we probably train the people in health and safety regulations, as much as anything, through their accompaniment and asking questions and showing them what the correct interpretations of the regulations are and the conditions that we find. (T. 168-169).

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> Q. Is there a time when someone who is not employed at the mine might be valuable to the inspector.
>
> A. Well, we have had people involved in accident investigations who would not be familiar with the mine, but they are valuable to the inspection work force at the time, usually in their knowledge of accidents or accident types or assistance in mine rescue or whatever we're involved in at the time. (T. 169).

During the course of the inspection, the walk-around representative will have access to certain training records. (See, for example, Exhibit M-17). In spite of testimony to the contrary by Mr. Crispin, that is the only non-public record that is kept by the mine that the inspector and the representative might view. The other documents that would be accessible to a miners' representative are accessible to the general public, and the miners' representative thus does not see anything that he could not otherwise see or review. (T. 171-173).

DISCUSSION AND ADDITIONAL FINDINGS

The position of MSHA is found meritorious and is adopted.

Examinaton of the pertinent provision of the Act and the regulations disclose no restrictions or qualifcations on "persons" or "organizations" in their inherent right to serve as representatives of miners. Specifically, there is no requirement of prior certification by the National Labor Relations Board (see T. 34) nor any intimation of such to be found. The term "representative of miners" includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws. (See Legislative History Conference Report excerpt, Ex. M-6). The language of the regulation is express. It is concluded that UMWA was at material times an "organization" within the meaning of 30 C.F.R. 40.1(b)(1) and was not barred from representing miners as authorized by MSHA's regulations. The interpretations of MSHA to this effect have been consistent. Likewise precedent has been consistent, including the Utah Power & Light decision mentioned previously.

In Secretary of Labor v. Benjamin Coal Company, 9 FMSHRC 17, 51-52 (January 1987), Judge George Koutras stated ". . . it seems clear to me that in addressing the very concerns raised by the respondent [Benjamin Coal] with respect to the application of the collective bargaining provision of the National Labor Relations Act with respect to the definition of the term "representative," the Secretary, in promulgating Part 40 clearly distinguished the NLRB law and the Mine Act purposes and rejected any notion that a representative of miners can only be based on any "majority rule.' . . . I conclude . . . that the fact that the UMWA may not represent the respondent's miners for puposes of NLRB or NLRA collective bargaining purposes does not foreclose its representation of the miners who designated it to act as their representative in the exercise of their rights under the Mine Act."

I find merit in MSHA's position that there is no conflict between the Mine Safety and Health Act and the Labor Management Relations Act in their application here. Although K-M uses the term "representative" in discussing both Acts, the term does not have the same meaning in both Acts. Under the LMRA, a representative is elected by a majority of the workers, pursuant to LMRA regulations. The purpose of the representative is to present the needs of the employees to the employer, concerning terms and conditions of employment. Pursuant to the LMRA "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . " 29 U.S.C. 159(a). The representation, under the Labor Management Relations Act, is pervasive; it covers virtually all aspects of the labor-management relationship, and for a long term. The requirements of the LMRA that both sides are obliged to meet are extensive, and have been the subject of a long legal history. By contrast, under the Mine Safety and Health Act, a representative can be chosen by only two or more miners, pursuant to regulation, solely for the purpose of accompanying the mine inspector during his inspection.9

"Representative of Miners" is defined at 30 C.F.R. 40.1(b) as "Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act."

MSHA has determined that any person qualified to be on a mine site may act as miner's representative. The representative need not be an employee of the mine, nor a member, or nonmember, of any labor or other organization. Because the Secretary is charged with administering the Mine Act, a remedial statute, the Secretary's construction of the Act "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act. In order to sustain construction by the agency that administers the statute, a Court need only find that the agency's interpretation is reasonable. Unemployment Compensation Comm'n v. Aragon, 328 U.S. 143, 154-154 (1946). The Court "need not find that [the administering agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceeding." Id. at 153. Accord: Udall v. Tallman, 380 U.S. 1, 16 (1965); Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984). As the Tenth Circuit states in a case dealing with the Secretary's interpretation of the similar Occupational Safety and Health Act:

"[The] interpretation given a statute by the administrative agency charged with carrying out the mandate of the statute of the statute should be given great weight. Indeed, the interpretation given a statute by the administrative agency charged with its enforcement should be accepted by the courts, if such interpretation be a reasonable one. And this is true even though there may be another interpretation of the statute which is itself equally reasonable." Brennan v. OSHRC, 513 F.2d 553, 554 (10th Cir. 1975).

In this regard, the Mine Act Senate committee report states: "Since the Secretary of Labor is charged with responsibilty for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and thecourts. S. Rep. No. 95-181, 95th Con., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 637 (1978).

The Secretary's interpretation of the statute and regulation is actually supported by the Tenth Circuit's decision in Utah Power & Light Company v. Secretary of Labor, supra. In that

case, miners at the Deer Creek Mine in Utah designated as a representative of miners for walk-around purposes a member of the United Mine workers who was not employed at the Deer Creek Mine. Although the Deer Creek Mine also recognized the UMW as a representative for collective purposes pursuant to the LMRA, the Court focused on the meaning of "representative" as used in the Mine Act in determining that "the Act clearly spells out the purpose of a miners' representative's participation in an inspection." That participation is solely to aid the inspector in this investigation. The Court did not compare a walk-around representative to a collective bargaining representative for purposes of the LMRA. The statements made by the Court with regard to the meaning of "representative" were in the context of addressing the issue raised by the mine operator, that if non-employees of the mine were allowed to act as walk-around representatives, it may open the door for unions to participate at mines not represented by a labor organization. The Court found no merit in the operator's contention that would cause it to limit walk-around rights. Instead, the Court determined that the Mine Act and the regulations place no limits on who may be chosen as a walk-around representative and hence it is logical to infer that the "no limitation" aspect of the designation extends to members of labor and other organizations. The Court noted that the Secretary's position was amply supported by the history of the Mine Act, and that the Secretary's interpretation of the Act was "reasonable and supportable." (See T. 174).

The Court, in passing, merely noted the argument of the mine operator regarding possible abuse, and dismissed the argument with the one sentence that K-M relies on here. That sentence, when read in the context of the decision, does not give K-M the right to ignore the posting requirements and to ignore an order issued by MSHA. The Court stated:

> UPL's argument ignores the fact that, as with a federal inspector, the Act clearly spells out the purpose of a miners' representative's participation in an inspection. Section 103(f) provides that an authorized miner's representative shall have the opportunity to accompany a federal inspector during the inspection of a mine "for the purpose of aiding such inspection." While we recognize UPL's concern that walk-around rights may be abused by non-employee respresentatives, the potential for abuse does not require a construction of the Act that would exclude non-employee representatives from exercising walk-around rights altogether. The solution is for the operator to take

> action against individual instances of abuse when it is discovered. (Emphasis added.)

K-M has shown no individual instance of abuse in this case. Nor has it shown, beyond speculation, that UMWA's organizing strategy, or for that matter the purposes of any of those signatory to the designation, contemplated misuse of Part 40 rights by either "outside" or fifth-column type infiltration of working areas to enlist members, distribute literature, purloin confidential K-M records, etc., under the facade of Mine Act walk-around participation. I am unable to conclude, absent clearer basis and authority to do so, that the exercise of important safety rights granted under one Act of Congress can per se be abusive because such exercise is either controlled or influenced to some degree by an organization engaged in union organizing the rules for which are set forth by an agency created by another Act of Congress. One would reasonably expect that both parties, having various rights under various laws and regulations, would exercise them.

The exercise of rights under the Mine Act by certain K-M employees to desgnate UMWA as their "representative of miners" is found not to be an "abuse" even though UMWA has not been certified as collective bargaining representative for K-M's employees or appropriate units of them.

CONCLUSIONS

1. The exercise of a right given under one law, the Mine Safety and Health Act, as part of a labor organization's program to organize miners under another labor law, is not per se an "abuse." If, in exercising the right, "individual instances" occur where a union engages in improper conduct, then the question of specific abuse arises and must be determined on a case by case basis.

2. In the process of designation of miners' representatives under the Act the subjective intent of the union, organization, or person does not determine whether there is an abuse. The right to designate miners' representatives exists under the Act independent of whether union organizing is ongoing (and is an ulterior motive), and "abuse" thereof must be something beyond the exercise of the right.

3. Conversely, depriving a union, other organization, or person of their full rights under the Mine Act to designate a representative under the Act by failing to post the designation, while being part of a mine operator's own opposition to organizing efforts can at the same time be a violation of the Act.

In conclusion, no merit is found to the defenses and contentions raised by K-M which have been specified previously herein and analyzed. The fact that it refused to post the designation is admitted. Accordingly, the violation as charged in the Citation and Order is found to have occurred.

Assessment of Penalty

K-M is a large mine operator (265-270 employees in 1990); (T. 135) with a history of eight prior violations during the pertinent two-year period preceding the instant violation. (Ex. M-5).

The violation is found to have occurred as a result of a well-deliberated decision by K-M to challenge the validity of the regulation requiring posting of the miners' designation of representatives made in the background of its resistance to the UMWA organizing campaign. In gauging culpability, whether negligence or deliberate action, the reason originally assigned by K-M for refusing to post the designation appears to rest on thin legal ground, and the failure to post did deprive miners of rights guaranteed in the Act and implementing regulations.

The infraction was of a moderate degree of seriousness since it deprived the miners of their rights (T. 55) including their right to know who their representatives were and the scope of their authority so that safety concerns could be communicated to them in advance of inspection.10

Finally, it does not appear that K-M, upon notification of the violation, proceeded to promptly abate the same.

In mitigation, it is noted that K-M established that it has a favorable safety record.

Upon consideration of the foregoing, a penalty of $300 is found appropriate for this violation and such is here ASSESSED.

ORDER

1. Contestant K-M's Notices of Contest in the two Contest Proceedings are DENIED: Citation No. 3242337 and Withdrawal Order No. 3242340 are AFFIRMED; the two Contest proceedings are DISMISSED.

2. Respondent K-M shall, within 30 days from the date of this decision, pay to the Secretary of Labor the sum of $300 as and for the civil penalty above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE

1. The Citation, issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (herein "the Act"), describes the alleged violation in these terms: "The operator has failed to post a list of the representatives of the miners on the mine bulletin board." The Citation, which was served on Ron Crispin, Manager of K-M's Jacobs Ranch Mine, did not designate the infraction as "significant and substantial."

2. This "no area affected" Order, which did not close or shut down any area of the mine or equipment, alleged "The operator has made no effort to post a list of the miners' representatives on the mine bulletin board, and refuses to do so." In its Notice of Contest, K-M contends that "No violation can be found because the designation of the United Mine Workers of America as a representative of miners under 30 C.F.R. part 40 for Jacobs Ranch Mine miners is improper."

3. K-M's Jacobs Ranch Mine employees have never been represented for collective bargaining purposes by UMWA or any other union. (T. 75).

4. The stipulation refers to Exhibits "A", "B", and "C", which are described in the stipulation and are contained in the Exhibits file as part of the record.

5. Exhibit K-36, page 11.

6. I find it significant that this was the reason K-M gave at the time for its refusal to post the designation and that on its face, the basis so asserted directly contradicts the fundamental holding of the landmark case, Utah Power & Light Co., supra, that non-employee persons and organizations can serve as miners' representatives for walk-around purposes. The emphasis here is on opposition to "non-employee walk-around" representatives and "outside interference." Nothing is said about "abuse," even assuming arguendo that at this juncture recognizable abuse was a viable legal concept.

7. In this record K-M at best showed UMWA used Part 40 as a

"tool" to create employee interest and to enhance its standing. Beyond that K-M's fear as to UMWA's future action was speculative.

8. In terms of K-M's intent and purpose in refusing to post the designation, this testimony coincides with the written-out reason given to Inspector Giles when the Citation and Order were issued.

9. MSHA seeks a representative of miners at each mine for the purpose of assisting the mine inspector and accompanying the inspector to point out any problems tha miners may have noticed. The representative remains with the inspector during the investigation and his only allowed activity is that of advising and observing the mine inspector. Should the representative engage in any other activity, he will be asked to leave and another representative will join the inspector. In MSHA terms, this person is a "walk-around representative."

10. As the Tenth Circuit Court stated in Utah Power & Light Co., supra, ". . . knowledge on the part of the miners of the identity, whereabouts, and scope of responsibility of their representatives promotes the purposes of the Act." (See T. 53-54).