

CCASE:
MSHA (JERRY LEE DOTSON) V. LAD MINING,
LARRY FLYNN, & RONALD CALHOUN
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SECRETARY OF LABOR, : DISCRIMINATING PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-181-D
on behalf of :
JERRY LEE DOTSON, : Mine No. 50
Complainant :
v. :
LAD MINING INC., LARRY FLYNN, :
AND RONALD CALHOUN, :
Respondent :

ORDER

On February 10, 1992 the Secretary of Labor ("Secretary") filed a complaint of discrimination on behalf of Jerry Lee Dotson ("Complainant") pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (The "Mine Act"), 30 U.S.C. 815(c)(2), alleging that Lad Mining Inc., Larry Flynn and Ronald Calhoun ("Respondents") had discharged unlawfully and refused to rehire Dotson. Respondents filed a timely answer, and initiated discovery, serving the Complainant with interrogatories and requests for production of documents. The Secretary, acting on behalf of the Complainant, refused to divulge some of the information sought by the Respondents on the grounds of privilege. The Respondent's now seek to compel its disclosure.

The pertinent interrogatories and responses involved in this dispute are as follows:

The Respondents have requested Complainant to identify all persons having knowledge of Complainant's claims and the substance of their knowledge [Interrogatory 2]. Complainant has answered, in part, by naming himself and Alfred Meeks, a former contractor/operator of the mine, as having knowledge of orders to discharge Complainant for allegedly protected activity and by naming Alfred Meeks as having knowledge of Respondent Calhoun's control over the daily operations of the mine and of Calhoun's attitude toward compliance with health and safety laws, but Complainant has declined to produce the names of potential miner

witnesses pursuant to Commission Procedural Rule 59. 1

The Respondents have requested that Complainant identify each witness and summarize the testimony of each witness [Interrogatories 3 & 4]. Complainant has responded that Dotson and Meeks can be expected to testify and that two days prior to the hearing, and in accordance with Commission rules, Complainant will produce the names of miner witnesses. Further, Complainant has stated that he will testify to statements from other operators to the effect that Calhoun "blacklisted" him and statements that he will never work again as a coal miner in the area and that Meeks will testify regarding Calhoun's control of mine operations, his orders to fire Complainant and Complainant's work record, skills and reputation.

The Respondents have requested that Complainant identify persons with knowledge of the facts and circumstances regarding the allegedly common practice of "rehiring" every previously employed miner when the operations of the mine change hands [Interrogatory 13]. Complainant has responded that he will rely on statements from himself and other miner witnesses whose names he will not disclose "at this time."

The Respondents have requested that Complainant identify all persons with knowledge of the Respondents' alleged refusal to rehire Complainant because of his asserted protected safety activity [Interrogatory 14]. Complainant has responded that he will rely on circumstantial evidence, as well as statements from mine witnesses, and that the names of the witnesses will not be disclosed "at this time."

The Respondents have requested identification of all persons having knowledge of the facts and circumstances concerning Complainant's application for employment with Larry Flynn and/or Lad Mining, Inc. [Interrogatory 21]. Complainant has identified Dotson, Flynn and Calhoun, and miner witnesses whose names will not be disclosed "at this time."

Following Complainant's response to the interrogatories, the

1Rule 59 states:

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

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Respondents moved for an order compelling the Secretary to furnish the names of operators and/or miners who the Complainant will quote in his testimony but who the Secretary will not call as witnesses and to furnish a summary of the alleged statements of these operators and/or miners. Respondents state they recognize that the Secretary is not required to disclose the names and testimony summaries of miner witnesses expected to be called until two days prior to the hearing but argue they seek instead the names of operators and/or miners who will be quoted by the Complainant but who will not be called to testify.

The Secretary, on behalf of Complainant, has responded that although Complainant will testify regarding conversations with coal mine operators and miners concerning his alleged "blacklisting" by Calhoun and its effect on his ability to work in the mining industry, the Secretary opposes disclosure of the names of such individuals based on the informer's privilege (Commission Rule 59) and that counsel for the Secretary has assured Complainant that the names of individuals who have spoken with him regarding his blacklisting will not be disclosed pursuant to the privilege. The Secretary states that the informer's privilege clearly encompasses protection of the identities of individuals who provide information during the course of a governmental investigation regardless of whether or not the person is ultimately called to testify as a witness at trial, and that a ruling requiring the Secretary to disclose the names of all individuals who provided information regarding Complainant's blacklisting will hinder MSHA's ability to conduct thorough investigations and obtain information regarding future Mine Act violations, as well as render meaningless MSHA's assurances of confidentiality. The Secretary also argues that Respondents have not made the showing necessary to overcome the informer's privilege.

Under Commission Procedural Rule 55(c), 29 C.F.R.

2700.55 (c), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all relevant material not privileged is subject to discovery. The Commission and the Federal Courts have broadly construed the discovery rule to include relevant material, and conversely, have narrowly construed the claim of privilege. *Hichman v. Taylor*, 329 U.S. 495(1947); Secretary on behalf of *Logan v. Bright Coal Co. Inc.*, 6 FMSHRC 2520 (1984). The burden is on the party claiming that relevant material is not subject to discovery because of privilege.

The Respondents, recognizing that privilege exists with regard to individuals who will appear as witnesses, have, in effect, narrowed their request for information to the identification of those who will not testify but who will be quoted or paraphrased by Complainant in his testimony and to summaries of what Complainant will say they said as it relates to his complaint of discrimination. As set forth below, I will

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grant the Motion to Compel to the extent that it relates to such operators and/or miners who have spoken or otherwise communicated with Complainant but not with an MSHA investigator or other government official or agent.

The privilege to withhold from disclosure the identity and statements of persons who may have furnished information regarding violations or possible violations of the Mine Act is a qualified privilege that balances the public interest in protecting the free flow of information to MSHA's enforcement staff and the right of those who give information to be protected from possible retaliation against a respondent's need for the information to prepare his or her defense. Bright Coal Company, Inc., 6 FMSHRC at 2522-2523. See also: Wirtz v. Continental Finance & Loan Co. of West End, 326 F.2d 561 (5th Cir. 1964); Brennan v. Engineered Products, Inc., 506 F.2d 299 (8th Cir. 1974).

As noted by the Commission in Bright, 6 FMSHRC at 2524, the privilege, codified in Commission Rule 59, reflects Congressional concern, set forth in the Mine Act and its legislative history, about the possibility of retaliation against miners who participate in the enforcement of the Act and the desire to protect the identity of those who contact the Secretary regarding violations of the Act. Responding to this concern, the Commission, when interpreting the privilege, has sought to "maximize the lines of communication with the Secretary concerning violations of the Mine Act." 6 FMSHRC at 2524 (emphasis added). However, claims of privilege are to be narrowly construed, and the Commission has been careful to provide its judges with a framework for application of the privilege. It has defined the term "informer" and instructed that application of the informer's privilege should be based upon that definition. Bright, 6 FMSHRC at 2525.

An "informer" is "a person who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of the Mine Act," Bright, 6 FMSHRC at 2525 (emphasis added). Under the Commission's procedural framework, a judge must first determine if the information sought is relevant and discoverable. 6 FMSHRC at 2523. Next, the judge must determine whether, based upon the definition of "informer", the information is privilege. 6 FMSHRC at 2525.

Here, the Respondents seek to compel the Secretary to disclose the names of operators and/or miners who will be quoted or paraphrased by Complainant and to provide summaries of their statements regarding Complainant's claims, in particular, alleged blacklisting and alleged refusal of Respondents to rehire Complainant. This information bears directly on Complainant's

allegations of discrimination and is relevant and discoverable. 2

The next step is to determine whether the information is privileged. Bright, 6 FMSHRC at 2525. This determination must first be based upon the definition of "informer". It is here that the Secretary's inclusive opposition to disclosure fails, because "informers," for the purpose of Rule 59, are those persons who have furnished information to a government official or agent relating to or assisting in the government's investigation of a possible violation of the Mine Act. Bright, 6 FMSHRC at 2525.

The Secretary, in her response to the Motion to Compel, is clear that she opposes production of the names and summaries of the testimony of operators and/or miners who have engaged in conversations with Complainant regarding his allegations of discrimination, but conversations with Complainant are not the same as furnishing information to an MSHA investigator or other government official so as to assist in the government's investigation of a possible Mine Act violation. Complainant, although the subject and potential beneficiary of a government investigation and although a party who may be represented by the government, is not an official or agent charged with enforcing the law. Nor is it conceivable to me that the informer's privilege was ever meant to extend to conversations with those other than such officials or agents. If such were the case, it would undercut the very nature of the privilege--furtherance and protection of the public interest in effective law enforcement through recognition that prescribing anonymity encourages citizens to communicate their knowledge the violations of the law to those charged with enforcing the law. *Rovario v. United States*, 353 U.S. 53 59 (1957). 3

2While the Commission in Bright suggested in camera inspection of information sought in order to determine its relevance, 6 FMSHRC at 2523, in this instance the relevant nature of the material sought is apparent on the face of the Secretary's pleadings.

3However, I agree with the Secretary that the fact that those who may be quoted by the Complainant will not be called to testify does not, in and of itself, render the informer's privilege inapplicable. Many who provide information to the government during the course of an investigation are not called to testify and for a variety of valid reasons. Nonetheless, the information they provide and their willingness to come forward is vital to the effectiveness of an investigation. Their participation should be encouraged. Restricting the protections from retaliation inherent in the informer's privilege only to those who ultimately testify would, in my opinion, hinder the efficacy of governmental enforcement.

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Thus, I hold, as both parties seem to recognize, that Complainant need not produce to Respondents the names of potential miner witnesses until two days prior to trial. Nor need Complainant produce to Respondents the names and summaries of the testimony of operators and/or miners who communicated with MSHA investigators or other government officials or agents charged with enforcing the law regarding the substance of Complainant's allegations of discrimination. However, and with regard to such operators and/or miners who Complainant will quote or paraphrase in his testimony and who will not be themselves called to testify and who have spoken with Complainant but not communicated with MSHA investigators or other government law enforcement officials, Complainant must produce to Respondents their names and a summary of the words Complainant will attribute to them.

Accordingly, Complainant is ORDERED to produce the names and summaries in question as outlined above, and in further response to Interrogatories 3, 4, 13, 14, and 21, within ten days of this order.

David Barbour
Administrative Law Judge
(703) 756-6200

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