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SOL (MSHA) V. DONALD I. GIACOMO
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
THE FEDERAAAL BUILDING
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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

DONALD L. GIACOMO, EMPLOYED
BY WYOMING FUEL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 92-100
A.C. No. 05-02820-03605 A

Golden Eagle Mine

ORDER GRANTING MOTION TO COMPEL

Pending herein is Respondent's motion to compel Petitioner to disclose the names of witnesses who will testify in the pending case. Petitioner, relying on Commission Rule 59, 29 C.R.F. 2700.59 (FOOTNOTE 1), declines to produce the requested information.

At the Judge's direction, Petitioner produced for an In Camera inspection the portion of her file she desires to protect with the informant privilege. The material submitted may contain the names of informant witnesses and their testimony.

DISCUSSION

The controlling case law is the Commission decision in Secretary of Labor v. ex rel. George Roy Logan v. Bright Coal Co., Inc., and Jack Collins, 6 FMSHRC 2520 (1984).

In Logan the Commission stated it was appropriate for the Judge to conduct a balancing test to determine whether the Respondent's need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Logan, 6 FMSHRC at 2526.

Findings of Fact

1. This case is a civil penalty proceeding brought by the Secretary of Labor against Donald L. Giacomo ("Giacomo") under Section 110(c) of the Mine Act.

2. Citation 3240616 charges Giacomo violated 30 C.F.R. 75.1725A. (FOOTNOTE 2)

~1093

3. Citation 3240616 (FOOTNOTE 3) alleges Giacomo violated Section 102(d)(1) of paragraph 5 of the Act.

4. Petitioner, in her original petition for assessment of a civil penalty, alleged in part as follows:

5. Evidence developed during MSHA's investigation of the circumstances surrounding the issuance of the Section 104(d)(1) Order indicates that Respondent kept the machine in production by placing a miner in the operator's compartment of the continuous-mining machine.

5. On June 1, 1992, Petitioner amended paragraph 5 of the original petition to read as follows:

5. Evidence developed during MSHA's investigation of the circumstances surrounding the issuance of Order No. 3240616 on May 14, 1990, indicates that Respondent knew the continuous mining machine was being operated manually by a miner from within the cab and by a miner operating the remote controls, and knowingly allowed or condoned hazardous operation of the machine in this manner.

6. The assertion of informant's privilege has been formally raised by the Secretary of Labor.

7. The In Camera inspection reveals statements were made concerning the operation of the continuous miner. Accordingly, the statements are relevant in these proceedings.

8. The informants may not assist Respondent's defense but the applicability of the informant's privilege does not raise or fall upon the substance of a person's communication with the government officials concerning a violation of law. (Logan, 6 FMSHRC at 2525).

9. In discovery in this case, Petitioner asked Respondent the following question and Respondent replied under oath as noted:

2. State the name, job title, current business address, employer, and current telephone numbers for each person you believe to have knowledge of the facts concerning the violation alleged in Order No. 3240616.

ANSWER: I do not know what violation is alleged in Citation Order No. 3240616. I was not allowed to attend hearings regarding Citation Order No. 3240616, and my attorney was forcibly removed from a hearing in which said Citation was presumably litigated and evidence regarding the Citation was to be heard. When I attended a Safety and Health Conference during which evidence of the alleged violation was supposed to have been presented, I advised that a decision has already been made that a violation had occurred and I would only be allowed to present a statement in mitigation. The Secretary of Labor has refused to provide me with the names

of witnesses who could explain what I am accused of doing. Therefore, all I can do is read the Citation and try to guess how a violation is supposed to have occurred and what unnamed witnesses might speculate about what I did or did not do, thus resulting in the knowing authorization, ordering or carrying out of a violation of mandatory safety standards. The Citation alleges that the violation occurred on May 11, 1990, when I was working as a foreman helping to remove the Longwall from the southwest Longwall section two of Wyoming Fuel Company's Golden Eagle Mine. Persons whom I believe to have been working on that date are: Bob Mattis, David Fagneta, Dan Renner, Keith Mantelli, Jack Feltzger, Jr., David Wakefield, Ed Shannon, John A. Garcia, James Sterns, Felix Martinez, Jim Paravecchio, Wayne Schoupe, Bob Vigil, and Sam Henry. I do not know the current job titles, current business addresses, employers, or current telephone numbers for the above-listed individuals. We are not currently employed by the same employer and do not work in the same mine.

In answering Petitioner's Interrogatories, Giacomo stated under oath that he does not work for Wyoming Fuel Company nor does he presume to speak for Wyoming Fuel Company.

11. The information sought here is not available from other sources since only Petitioner knows the names of the witnesses she intends to call. As a result, Respondent has no other avenues available to discover such witnesses.

12. Disclosure is essential to a fair determination of the issues since Giacomo will have an opportunity to depose Petitioner's witnesses and prepare his defense.

Further Findings and Discussion

Petitioner admits Giacomo is not an employer or a coal mine operator. Further, it is admitted he does not work at the same mine with any individuals who might be called by the Petitioner as witnesses. (Petitioner's response, page 3; filed May 4, 1992). Nevertheless, Petitioner claims Giacomo is an "agent" within Commission Rule 59.

~1096

It is true that Petitioner must prove Giacomo was an agent of the mine operator to establish a violation of Section 110(c). However, the foregoing admitted facts establish that Giacomo is not an agent of an operator within the meaning of Rule 59.

Petitioner further asserts a possibility of retaliation exists against miners who might testify.

I disagree. Giacomo is not a mine operator and does not work at the same mine as any individuals who might be called as witnesses. (Petitioner's Response, page 2, filed May 4, 1992). Merely working in the same geographic area as the Golden Eagle Mine is insufficient to establish the possibility of retaliation.

Petitioner further states Respondent knows the "universe of all persons who may have information regarding this case" and the requested information is "available from sources other than the government."

Contrary to Petitioner's position, a review of the In Camera material reveals two potential witness informants who are not listed by Giacomo as persons having knowledge of the facts concerning the violation alleged. (See para. 9, supra, where Giacomo lists persons having knowledge of the facts).

In sum, it is the Judge's view that the factual situation presented here involved "extraordinary circumstances" within the meaning of Commission Rule 59. Further, Respondent's need for the information is greater than the Secretary's need to maintain the privilege in order to protect the public interest.

Accordingly, I enter the following:

ORDER

1. Respondent's motion to compel is GRANTED.
2. Within 15 days, Petitioner is ORDERED to disclose the names of the individuals she intends to call as witnesses in this case.
3. The material submitted to the Judge for an In Camera inspection is hereby SEALED. The following notation shall appear on the sealed envelope:

~1097

DOCUMENTS HEREIN WERE SEALED ON JUNE 4, 1992,
BY ORDER OF THE PRESIDING JUDGE. A COPY OF
THIS ORDER WAS ATTACHED TO THE ENVELOPE SEALING
SAID DOCUMENTS.

4. The Judge has also signed the sealed envelope beneath the foregoing notation.

John J. Morris
Administrative Law Judge

FOOTNOTES START HERE:-

1. The cited Commission Rule reads as follows:

2700.59 Name of miner witnesses and informants.

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.

2. 75.1725 Machinery and equipment; operation and maintenance.

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

3. Citation No. 3240616 reads as follows:

Persons were required by management to operate equipment that was not maintained in safe operating condition, in that, based on statements received from both labor and management, the Joy Continuous Miner in MMU 010-0 headgate was being operated on the 5-11-90 a.m. shift by the following methods:

The remote control would not function to raise the miner head while mining coal. A man was placed in the cab to operate this function while the miner was being operated by remote control. This practice was dangerous due to two persons subject to being on opposite sides of the operating machine and accidental error. Also dangerous due to the fact that neither person had complete control at all times. Both the shift foreman and safety manager were present and had instructed the crew to proceed by this method. This is unwarrantable action (MSHA Citation No. 32406160, at Section 1(8) "Condition or Practice").