

CCASE:
SOL (MSHA) V. THUNDER BASIN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
DONALD L. GREGORY,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 92-279-D

Black Thunder Mine

v.

THUNDER BASIN COAL COMPANY,
RESPONDENT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
LOY D. PETERS,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 92-280-D

Black Thunder Mine

v.

THUNDER BASIN COAL COMPANY,
RESPONDENT

DECISION AND ORDER DISMISSING PROCEEDING
and
CANCELING HEARING

Before: Judge Lasher

I have previously entered two separate Orders requiring a response to discovery. Orders were dated July 8, 1992, and July 22, 1992. On or about August 5, 1992, the Secretary of Labor filed a Notice Regarding Discovery in which she indicated the discovery would not be responded to by Mr. Gregory. See Stipulation of the parties dated August 7, 1992, indicating that the positions taken as to Mr. Gregory are the same positions taken as to Mr. Peters.

The Commission has held that "[s]hould the Secretary resist the Judge's order to disclose [a matter in discovery], dismissal of the proceeding is the appropriate sanction with further review available, in accordance with section 113(d)(2) of the Mine Act."

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Secretary of Labor on Behalf of Logan v. Bright Coal Company, Inc., 6 FMSHRC, Dec. 2520, 2526 (November 1984). The Commission recently reaffirmed this procedure in Secretary of Labor v. ASARCO, Inc., 12 FMSHRC, Dec. 2548, 2560 (December 1990). Thus, dismissal is appropriate here.(FOOTNOTE 1)

It is noted that there were Notices of Taking Deposition of Complainants filed in this action on May 18, 1992. These Notices specifically requested that each Complainant bring with him all "written statements given to any governmental agency or any other person or entity, tape recordings, or any other documents of any type, which in any way relate to [Complainant's] allegations in this action." In conjunction with that deposition, counsel for Respondent notes to the Judge that, as agreed by the parties, there was no need to subpoena Complainants pursuant to the conduct of the deposition. Any statements that were given are either in the possession of Complainants or can be obtained by them and thus production can and must be ordered. 8 Wright & Miller, Federal Practice and Procedure, 2210 p. 621. This situation was glossed over in the Secretary's "Notice Regarding Discovery."

The requested information is plainly relevant. The discovery request is not, as alleged, addressed to union organizing activities, but rather is addressed to statements made regarding the nature and scope of alleged mistreatment of the two Complainants by Thunder Basin. The orders granting discovery contained protective language. Even assuming, for the sake of argument, that there are no conflicts between the statements sought in the discovery request, and statements given to MSHA, that cannot be a basis for denying the discovery. For example, variations between statements in the form of omissions or additions between the two statements may give rise to questions, even assuming that, literally speaking, there are no "conflicts" as such. In view of the information already contained in the Commission files, I find the Secretary's assertion of informer's privilege a transparency.

ORDER

1. For the reasons indicated, these two proceedings are DISMISSED.

2. The hearing scheduled to commence in Casper, Wyoming, on August 25, 1992, is CANCELED.

Michael A. Lasher, Jr.
Administrative Law Judge

FOOTNOTE START HERE-

1. The Secretary's motion for Certification for Interlocutory Review, under Authority of Commission Procedural Rule 74 is rendered moot by dismissal of this proceeding on this ground. This issue can be resolved on appeal. Bright Coal Company, supra.