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THUNDER BASIN COAL V. SOL (MSHA)
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MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 25, 1994

THUNDER BASIN COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 94-238-R
	:	Citation No. 3589040; 2/22/94
v.	:	
	:	Docket No. WEST 94-239-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 3589101; 2/22/94
	:	Black Thunder Mine

ORDER DENYING TEMPORARY RELIEF

On February 22, 1994, Contestant filed an application for temporary relief from Order No. 3589101 which was issued earlier the same day pursuant to section 104(b) of the Act. An expedited hearing on the application was held in Falls Church, Virginia on March 17, 1994. For the reasons stated below I deny the temporary relief requested.

Background Facts

In September 1990, eight miners employed at contestant's non-union mine near Wright, Wyoming, signed a form designating Dallas Wolf and Robert Butero as their representatives under section 103(f) and Part 40 of volume 30 of Code of Federal Regulations.(Footnote 1) Wolf and Butero are employees of the United Mine Workers of America (UMW) and not of Contestant. Dallas Wolf is the principal UMW organizer in the Powder River Basin. The eight Thunder Basin employees listed themselves as alternate miners' representatives.

Thunder Basin Coal Corporation refused to recognize the validity of this designation. The primary reason for this refusal is that contestant believes that the designation of Wolf and Butero is an abuse of walkaround provisions of the Federal Mine Safety and Health Act because it is motivated solely by a desire to aid the UMW in its effort to organize the mine. The company contends that it thus infringes on its rights under the National Labor Relations Act to exclude union organizers from its

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1 The principal function of a miners' representative is to accompany MSHA personnel during their inspections of operators' worksites.

property (Affidavit of Marshall B. Babson, exhibit 3 to contestant's reply brief).(Footnote 2)

In March, 1992, contestant obtained an injunction in the United States District Court for the District of Wyoming prohibiting MSHA from enforcing the Part 40 designation of the UMW employees(Footnote 3). However, both the United States Court of Appeals for the Tenth Circuit and the United States Supreme Court held that the District Court did not have jurisdiction to issue the injunction. Thunder Basin Coal Company v. Martin, 969 F. 2d 970, 973 (10th Cir. 1992); Thunder Basin Coal Co. v. Reich, 62 U.S.L.W. at 4062 (U.S. Jan. 19, 1994).

On January 21, 1994, Thunder Basin's President, J. A. Herickoff wrote MSHA District Manager William Holgate inviting MSHA to issue a citation in order to achieve swift resolution of the legal validity of the designation of the UMW employees. Contestant also stated that it expected MSHA to specify an abatement time "sufficient for the parties to pursue resolution of this important issue before the Commission and the courts."

MSHA accommodated contestant in its request for a citation. However, it declined to set an abatement period which would delay posting of the UMW designation until Thunder Basin's challenge to the validity to that designation was resolved before the Commission and reviewing Federal courts. At 8:10 a.m., on February 22, 1994, MSHA inspector James M. Beam issued citation 3589040 to contestant for failure to post the UMW designation on the bulletin board near the mine's bath house. He set an abatement period of 15 minutes (Citation 3589040, blocks 2 and 18).

When 15 minutes elapsed, inspector Beam issued order 3589101 pursuant to section 104(b) of the Act. Within hours contestant filed an application for temporary relief with the Commission and an application for an expedited hearing on its application. Subsequently, MSHA informed contestant that it intends to propose a $2,000 daily penalty for the company's refusal to post the disputed designation (Oral argument Tr. 64).

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2 Thus far Thunder Basin Coal has successfully resisted the UMW's persistent efforts to organize its mine. In 1987, the UMW lost an election conducted pursuant to the National Labor Relations Act at the Black Thunder Mine by a vote of 307 to 56.

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3 After it received the designation of Wolf and Butero, contestant received forms designating of a number of its own employees as MSHA walkaround representatives. These employee designations have been recognized and posted by Thunder Basin.

The Commission has no authority to grant the temporary relief requested by Contestant

Section 104(b)(2) of the Federal Mine Safety and Health Act provides:

> An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 104 together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if-
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> > (A) a hearing has been held in which all parties were given an opportunity to be heard;
> > (B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and
> > (C) such relief will not adversely affect the health and safety of miners.
>
> No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104...(emphasis added).

Although contestant characterizes its application as a request from relief from the section 104(b) order, it is in reality a request for relief from the section 104(a) citation. What contestant seeks is a Commission order prohibiting MSHA from proposing daily penalties for its refusal to post the "UMW" miners' representative designation. Although MSHA issued what it terms a "no area affected" section 104(b) order, it did not need to do so in order to propose daily penalties.

Section 110(b) of the Act, as amended, provides:

> Any operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues.

Thus, under the statutory scheme MSHA could propose daily penalties for contestant's failure to abate citation 3589040 as soon as the fifteen minutes provided for abatement expired. it did

not need to issue a section 104(b) order to do so(Footnote 4). As the Act specifically prohibits temporary relief from the citation, I have no authority to grant contestant's application.

The overall scheme of the Act confirms the aforementioned reading of statutory language. The provisions for temporary relief appear to be directed to situations where MSHA has prohibited operation of a mine, or portions thereof, pursuant to a withdrawal order. Such an order has the potential of causing immediate, certain, and unwarranted economic damage to the operator. Where employees are not withdrawn by such an order, no such danger exists. Although the legislative history of the Act does not deal expansively with this issue, it does indicate that temporary relief was not intended to prevent MSHA for goading an operator into compliance with the threat of daily civil penalties.

At page 623 of the legislative history, Senate Report 95-181 discusses the temporary relief provision:

> While there is no provision for temporary or interim relief from abatement requirements generally, section 106(b) does authorize the Commission under certain circumstances designed to assure that the health and safety of miners shall not be threatened, to grant temporary relief from further abatements once the initial abatement period has run and a failure to abate closure order has been issued under section 105 (b) (emphasis added).

At page 618 of the legislative history the Senate Report describes the order for which temporary relief may be sought as those which are issued in situations in which miners are withdrawn from an area. There is nothing in the legislative history that indicated that the Commission is empowered to facilitate the operator's pre-emptive strike against daily penalties proposed pursuant to section 110 (b).

The harm to the operator in the instant case is that it either posts the disputed UMWA designation or runs the risk that statutory mechanism for dealing with such situations is for the Commission to review the penalty assessment.

If the Commission concludes that the time allowed for abatement was unreasonable, or that the underlying citation was invalid, it will vacate the penalties proposed by MSHA. Even if

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4 Indeed, the issuance of the section 104(b) order tends to confuse the issues in this case.

it finds that the citation is valid and the abatement period appropriate, the Commission is not bound by MSHA's penalty proposal. Sellersburg Stone Co. v. FMSHRC, 736 F. 2d 1147, 1152 (7th Cir. 1984). The Act contemplates that an operator who refuses to abate a citation within the time allotted by MSHA runs the risk that it will be assessed the daily penalties set forth in section 110 (b) if MSHA's position is vindicated. The statute does not contemplate any Commission relief for the operator in this situation.

Assuming that the Commission has authority to grant temporary relief in the instant case, contestant has not established that it is entitled to such relief

Section 105 (b) provides that temporary relief can be granted if a hearing has been held, the applicant shows there is a substantial likelihood that it will prevail before the Commission, and the health and safety of miners will not be adversely affected. The first condition has been satisfied 5

As to the third condition, I conclude that any compromise at health and safety from granting temporary relief is purely speculative. It may well be that participation in an MSHA inspection by Mr. Wolf and/or Mr. Butero may enhance the safety at contestant's mine, or have no affect. Contestant argues that it is already a very safe operator, and the evidence it has proffered supports that proposition. However, it is possible that Mr. Butero, in particular, who is a safety and health official of the UMWA with exposure to comparative operations, would have insights in regard to safety and health conditions at the Black Thunder Mine. Finally, compromise safety is equally speculative.

The primary hurdle to granting contestant's request for temporary relief is its inability to show that there is a substantial likelihood that the findings of the Commission will be favorable to it in light of the Commission's decision in Kerr-McGee Coal Corporation, 15 FMSHRC 352 (March 1003), appeal pending, D. C. Cir. No. 93-1250). Contestant argues that it has evidence not in the record in Kerr-McGee which should cause the

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5 Several employees of contestant, who are sympathetic to its position in this case, sought party status a few days before the expedited hearing in this case. As the interests of these undersigned chose not to cancel the hearing and so informed counsel for the contestant and the Secretary of Labor Tr. 5-6). Indeed, to delay consideration contestant's application for temporary relief would appear to be contrary to the wishes of these employees.

Commission to rule in its favor, application for Temporary Relief, p. 15, n. 15 and Attachment 2 to Exhibit C of the Application.

The decision in Kerr-McGee indicates that the Commission was fully aware that the designation of Wolf and Butero by Kerr-McGee employees was done in part, if not primarily, to advance the UMWA effort to organize that mine. Indeed, the Commission affirmed the administrative law judge's decision denying Kerr-McGee's motion to reopen the record to introduce internal UMWA documents which arguably revealed the organizational motive in the walkaround representative designation.

The Commission affirmed the judge's finding that such evidence was cumulative and ruled that error, if committed, was harmless 15 FMSHRC at 357-8. In light of the Commission's rulings on the internal union documents in Kerr-McGee, it is impossible for the undersigned to conclude that the Commission is likely to reach a different result in the instant case based on the documents proffered in the Application for Temporary Relief

In short the black letter law on the issue involved in this case is the Kerr-McGee holding that designation of union employees as walkaround representative at a non-union mine which they are trying to organize is not invalid per se. That decision is controlling and leads me to conclude that contestant has not established that it is likely to prevail on the merits.

Contestant argues also that it needs only to show that it will prevail on the issue of whether the 15 minute abatement period was unreasonable, not on the issue of whether the underlying citation was valid. To the undersigned this is a distinction without a difference. If the prevailing case law is that the part 40 designation of Wolf and Butero is valid, it is issue of the abatement period.

The company position is that MSHA must give it an opportunity to overturn Kerr-McGee before requiring it to abate the citation issued for failure to post the UMWA walkaround designation. Such an argument is analogous to granting a stay of the Commission's Kerr-McGee decision, which is prohibited by section 106 (c) of the Act. The fact that Kerr-McGee is now legally required to comply with the Commission's decision in its case indicated to the undersigned that it is not substantially likely that Thunder Basin will prevail before the Commission on the issue of whether the 15 minute abatement period was reasonable. If the company is legally required to post the UMWA designation, 15 minutes seems not to be an unreasonable amount of time to accomplish this task.

Contestant contends that an adverse ruling on this application will cause it significant and irreparable harm. I assume that recognition of the Wolf and Butero walkaround designation will be advantageous to the UMWA organizational effort to some extent. If that were not the case contestant would not be so adamant in refusing to post the designation. On the other hand, it is difficult to believe that the recognition of the walkaround designation will determine the outcome of the UMWA organizational drive.

However, I conclude that whatever advantage the UMWA may obtain is irrelevant to the disposition will be application. Moreover, whatever advantage the UMW gains will be at least counterbalanced by the negative impact on the organizational campaign when contestant takes down the designation form if it ultimately prevails in its challenge to its validity.

Conclusion

For the reasons stated herein, I conclude that I have no authority to grant the relief requested by contestant. Assuming that I have such authority, I conclude that contestant has not satisfied the criteria set forth in section 105(b)(2) of the Act.

Arthur J. Amchan
Administrative Law Judge
(703) 756-6210