CCASE:
THUNDER BASIN COAL V. SOL (MSHA)
DDATE:
19940511
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

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

SUMMARY DECISION

Before: Judge Amchan

Overview of the decision

On April 20, 1994, Contestant, Thunder Basin Coal Company filed a motion for summary decision pursuant to Commission rule 67, 29 C. F. R. 2700.67. In response, the Secretary of Labor requested that the motion be denied. The Secretary did not file a cross-motion and contends that these matters are not ripe for summary decision for either party.

While the Secretary does not rule out the possibility that he may file a motion for summary decision in the future, he asks that these matters be set for hearing. Contestant, replying to the Secretary, asks that if its motion is not granted, that summary decision be entered for the Secretary.

For the reasons set forth below, I grant summary decision in favor of the Secretary of Labor despite the fact that he neither asked for, nor desires such disposition of these matters. Conversely, I deny Contestant's motion for summary decision.

Rule 67 provides that summary decision shall be granted only if the entire record shows that there is no genuine issue as to any material fact; and the moving party is entitled to summary decision as a matter of law. Although there is no precedent for granting summary decision for the non-moving party under the Federal Mine Safety and Health Act, the weight of authority under Rule 56 of the Federal Rules of Civil Procedure is that such a disposition is appropriate if supported by the record.

"Even where the non-movant vigorously opposes a motion for summary judgment on the ground that triable issues of fact exist, the trial court is not precluded from entering summary judgment, if, in reality no factual dispute exists and the non-movant is entitled to summary judgment as a matter of law." 6 James W. Moore, et al., Moore's Federal Practice, 56.12 at 165 (2d ed. 1994). F.D.I.C. v. Sumner Financial Corp., 376 F. Supp. 772 (M.D. Fla. 1974) (court held that what non-moving party asserted was a genuine issue of fact was only a dispute regarding the legal significance of the facts); See also In re: Continental Airlines, 981 F. 2d 1450, 1458 (5th Cir. 1993).(Footnote 1)

Most of the facts on which the Secretary takes issue with Respondent's "Undisputed Facts Supporting Motion for Summary Decision" pertain to the motivation of the United Mine Workers of America in fostering the designation of two of its employees as walkaround representatives for eight employees at Respondent's non-union mine under Part 40 of Volume 30 of the Code of Federal Regulations. Some of these facts also pertain to the motivation of the Thunder Basin employees who signed the "UMWA" walkaround designation.

I grant summary decision for the Secretary because I conclude that under the controlling precedent, Kerr-McGee Coal Corporation, 15 FMSHRC 352 (March 1993), appeal pending, D. C. Cir. No. 93-1250, the motivation of these individuals is irrelevant. The Secretary states at page 3 of his response to Contestant's motion, "[i]n addition, the Commission decided that designating a union member as a walk around representative or completing a designation form for the purpose of union organizing is not an abuse of the walk around right." As I believe that is an accurate interpretation of the Kerr-McGee decision, I conclude there are no genuine issues of material fact and that under Kerr-McGee the Secretary is entitled to summary decision as a matter of law.(Footnote 2)

_____

1The Commission in Missouri Gravel Company, 2 BNA MSHC 1481, 1482 n. 2 (November 1981) stated that summary decision without a motion should be not be issued except in the most exceptional circumstances. In so stating, the Commission appears to recognize that there may be situations in which summary decision may appropriately be issued without a motion from either party. Further, the analysis cited above from Moore's Federal Practice indicates that prevailing authority deems summary judgment in favor of the non-moving party more appropriate than summary judgment when neither party has asked for such disposition of the case.

_____

2I essentially agree with Contestant that the disputed facts are neither material nor genuinely disputed, Contestant's reply to the Secretary's response to motion for summary decision, at

(Continued...)

Rather than set this matter for hearing to determine, if possible, facts that I believe have no bearing of the outcome under Kerr-McGee, I conclude that is far better to allow Contestant to pursue this case before the Commission and the appropriate court of appeals. Before these tribunals Contestant can either argue that the instant case is distinguishable from Kerr-McGee or that Kerr-McGee was wrongly decided.

I am convinced that further evidentiary proceedings before the undersigned would serve little purpose. I conclude that the instant case is indistinguishable from Kerr-McGee in any manner that is material. Further, as a Commission judge, I am bound to follow Kerr-McGee unless it is overruled.

Factual Findings

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 3) Wolf and Butero are employees of the United Mine Workers of America (UMWA) and not of Contestant (Contestant's

ÄÄÄÄÄÄÄÄÄ
(Continued...)

page 2. For example, Judge Lasher's conclusion in Kerr-McGee at 13 FMSHRC 1898, that "[t]he use of 30 C.F.R. Part 40 and the designation of miner's representatives was part of [the] UMWA's organizing strategy and was an organizing "tool.", cannot be seriously questioned. This does not mean that the UMWA or the Thunder Basin employees who signed the UMWA walkaround designation are not also genuinely interested in safety at Contestant's mine or employee walkaround rights.

In paragraph 9, pages 2-5 of its "Response To Undisputed Facts," the Secretary contends that there is no evidence that the designation was done for organizing and that to the contrary the deposition testimony of the miners indicates that they wanted the opportunity to accompany MSHA inspectors and were interested in safety. Secretary's counsel has conceded to me that these employees could have satisfied their desire to accompany the inspector by designating each other as miners' representatives (Oral argument of March 17, 1994, Tr. 131-138). While this does not mean that these employees may not have a legitimate safety interest in desiring the assistance of the UMWA during MSHA inspections, I find that assisting the UMWA organizational drive was a major factor in the designation at issue.

_____

3The principal function of a miners' representative is to accompany MSHA personnel during their inspections of operators' worksites.

Exhibit 2). Dallas Wolf is the principal UMWA organizer in the Powder River Basin (Contestant's Exhibit 1, pp. 39-47). Robert Butero is a health and safety representative of the UMWA, who lives in Trinidad, Colorado. He is an employee of the UMWA department of occupational safety and health, not the organizing department (Secretary's Exhibit 18). Mr. Butero's tasks include serving as an employee walkaround representative during MSHA inspections. 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 UMWA 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 property (Contestant's brief in support of motion for summary judgment, pp. 6-8).(Footnote 4)

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 UMWA employees. 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 UMWA 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." (Secretary's Exhibit 22).

While MSHA accommodated contestant in its request for a citation, it declined to set an abatement period which would delay posting of the UMWA designation on the company bulletin board until Thunder Basin's challenge to the validity to that designation was resolved before the Commission and reviewing

_____

4Thus far Thunder Basin Coal has successfully resisted the UMWA'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 (FMSHRC Docket No. WEST 93-652-D, Tr. 420).

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 UMWA 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.

On March 25, 1994, I issued an order denying temporary relief. That order was affirmed by the Commission on April 8, 1994, on the grounds that Contestant had not demonstrated a substantial likelihood that the Commission's findings would be favorable to it. The Commission also ruled that Thunder Basin had not shown that the 15 minutes allowed for abatement was unreasonable.

On April 8, 1994, Contestant abated the alleged violation by posting the disputed walkaround designation form (Exh. 1 to Contestant's Opposition to the Secretary's Motion for Extension of Time). On April 20, 1994, Contestant filed the instant Motion for Summary Decision.

The record establishes that there is no genuine issue of material fact and that the Secretary is entitled to summary decision as a matter of law.

The Commission's decision in Kerr-McGee Coal Corporation, 15 FMSHRC 352 (March 1993), appeal pending, D. C. Cir. No. 93-1250, held that it is the conduct of a miners' representative, during a walkaround under section 103(f), rather than the motivation of such representative, that must be examined to determine whether there has been an abuse of the Mine Safety Act's walkaround provisions, 13 FMSHRC at 361. The Commission also held that the Secretary is not required to integrate National Labor Relations Act concepts into his regulations implementing the walkaround provisions of the Mine Act, 13 FMSHRC at 362.

In Kerr-McGee, the Commission also addressed evidence of the sort that Thunder Basin contends distinguishes this case from Kerr-McGee. After its evidentiary hearing Kerr-McGee moved the trial judge to reopen the record to receive newly discovered evidence. Included in the evidence proffered was "a series of internal UMWA memoranda to and from [Dallas] Wolf, which it asserted, revealed that Wolf had been designated as a walkaround

representative in order to facilitate on-going UMWA organizing activities.", 13 FMSHRC at 355. The judge denied the motion to reopen, finding that the documents merely revealed that union organizing was taking place and that this was established and undisputed at trial.

The Commission's decision in affirming the trial judge's denial of the motion to reopen the record in Kerr-McGee implies that the Commission also did not consider documents indicating that the walkaround designation was motivated by UMWA organizing activities to be material. Therefore, I conclude all the documentation offered to establish the same conclusion in this case is irrelevant to its disposition.

In short the black letter law on the issue involved in this case is the Kerr-McGee decision. That decision stands for the proposition that designation of union employees, including one whose principal function is to organize non-union mines, as walkaround representatives 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 the Secretary is entitled to summary decision.

CONCLUSION

For the reasons stated herein, I grant summary decision in favor of the Secretary and affirm citation 3589040 and order number 3589101.

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

~1076
Distribution:

Thomas C. Means, Esq., Timothy M. Biddle, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004 (Certified Mail)

Thomas F. Linn, Esq., Atlantic Richfield Company, 555 Seventeenth Street, 20th Floor, Denver, CO 80202 (Certified Mail)

Margaret Miller, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Colleen Geraghty, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Charles W. Newcom, Esq., Sherman & Howard, 633 17th Street, Denver, CO 80202 (Certified Mail)

Ray McIntosh, P. O. Box 414, Wright, WY 82732 (Certified Mail)

Roy Earle Knutson, Jr., 601 N. Plains Dr., Gillette, WY 82716 (Certified Mail)

Everett Kraft, P. O. Box 127, Upton, WY 82730 (Certified Mail)

/jf