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THUNDER BASIN COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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THUNDER BASIN COAL COMPANY, Contestant,	:	CONTEST PROCEEDING
	:	Docket No. WEST 94-148-R
	:	Citation No. 3589022; 11/22/93
v.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 94-303
	:	A.C. No. 48-00977-03524
v.	:	
	:	
THUNDER BASIN COAL COMPANY, Respondent.	:	Black Thunder Mine

SUMMARY DECISION

Before: Judge Amchan

The instant case is before me upon cross-motions for summary decision. The issue is whether Contestant, Thunder Basin Coal Company violated section 109(a) of the Federal Mine Safety and Health Act in failing to post on its mine bulletin board the Order of Temporary Reinstatement issued by the undersigned in Commission Docket No. WEST 93-652-D. For the reasons stated below I grant summary decision in favor of Contestant.

Factual Background

On November 2, 1993, I issued an Order of Temporary Reinstatement in Commission Docket No. WEST 93-652-D, 15 FMSHRC 2290. This order was predicated on my findings that the discrimination complaints of Loy Peters, Darryl Anderson, and Donald Gregory, who were laid off by Thunder Basin in July, 1993, were "not frivolous." I also found that the Secretary of Labor's decision to seek temporary reinstatement for these employees was "not frivolous."

On November 22, 1993, MSHA inspector James Beam was assigned to conduct an inspection of the Black Thunder Mine as a result of a written complaint filed pursuant to section 103(g) of the Act.

This complaint alleged that Thunder Basin had failed to post the temporary reinstatement order (Affidavit of Larry Keller, paragraph 3, Affidavit of Jerry W. Stanart, paragraph 2). The order had in fact not been posted and Beam issued Thunder Basin citation 3589022, alleging a violation of section 109(a) of the Act.

After some discussion the entire order was posted (Affidavit of William S. Mather, paragraph 2). Beam was asked how long the order had to be posted and replied, "long enough for me to see it up." The order remained on the company bulletin board for several days (Mather Affidavit, paragraph 3).

Issue Presented

Does Section 109(a) of Federal Mine Safety and Health Act require an operator to post on the company bulletin board an Order of Temporary Reinstatement?

Analysis and Conclusions

Section 109(a) provides:

> At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

The Secretary contends that the language of the statute is clear on its face and that resort to rules of statutory construction is unnecessary. At first blush the language of the last sentence of section 109(a) appears determinative. When the statute refers to "decisions required by this Act to be given to an operator", the Secretary argues this can only refer to decisions of the Commission and its judges.

Nevertheless, I agree with Contestant, and conclude that section 109(a) is not clear on its face and that the last sentence must be read in the context of the rest of the section. Had Congress intended that all decisions, orders, citations and notices be posted it would not have modified the second sentence

of section 109(a) with the phrase "required by law or regulation to be posted."

The Secretary, at page 4 of its brief in support of its motion for summary judgment, concedes that "it is not asserting that every document generated during the course of litigation must be posted, instead only those documents that evidence a final decision of the Court must be posted." Since any order issued by a Commission judge during the course of litigation, i.e. prehearing orders, notices of hearing, discovery orders, must be given to the operator, even the Secretary seems to realize that the last sentence of section 109(a) must be read in the context of something else.

The "something else" is the second to last sentence of section 109(a) which requires the operator to maintain a bulletin board for orders, citations, notices and decisions required by law or regulation to be posted. Thus, I conclude that what must be posted under the last sentence of section 109(a) are documents, that are required to be posted pursuant to another statutory provision or by a regulation, such as 30 C. F. R. 40.4, requiring posting of an employee walkaround designation, or 30 C. F. R. 44.9, requiring posting of petitions for modification of a standard.

I agree with Contestant that the fact that section 109(a) gives no indication as to how long a document must be posted is a further indication that it is not a free-standing requirement to post all the documents mentioned. In contrast to MSHA, the Occupational Safety and Health Administration (OSHA) has promulgated regulations requiring citations to be posted for 3 working days or until abatement is completed, whichever is later, 29 C.F.R. 1903.16(b). OSHA also promulgated a regulation at 29 C.F.R. 1903.2 requiring the perpetual display of a poster explaining employee rights and obligations. I conclude that Congress contemplated promulgation of similar regulations by MSHA pursuant to section 508 of the 1969 Mine Act, 30 U. S. C. 957.

The Secretary's "interpretation" of section 109(a) is not entitled to deference.

It is well-established that courts should defer to permissible agency interpretations of ambiguous legislation. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 US 837, 843, 81 L Ed 2d 694, 104 S Ct 2778 (1984). Not all agency interpretations are entitled to the same weight. An interpretation that has gone through notice and comment rulemaking is entitled to greater deference than one which has not. An interpretative rule that appeared in the Federal Register is entitled to greater deference than an interpretation that appears only in agency internal documents.

Farther down the hierarchy of agency interpretations are those immaculately conceived in the course of litigation. Professors Kenneth Culp Davis and Richard J. Pierce, Jr., have expressed this idea as follows:

> Congress has not delegated to any agency the power to make policy decisions that bind courts and citizens through formats like letters, manuals, guidelines, and briefs. No court should allow an agency to bind citizens or courts by applying Chevron step two to agency policy decisions announced in formats Congress has not authorized for that purpose. Statements in such informal formats may not even represent the agency's choice of policies. Statements of agency lawyers in briefs and oral arguments are particularly unreliable evidence of an agency's policy, given the powerful incentive for lawyers to take any position that is likely to further their clients interests in a case and the uneven level of supervision of the work product of agency lawyers. I Davis, Kenneth Culp and Pierce, Richard J. Jr., Administrative Law Treatise, 3.5 at page 120 (3d ed. 1994).

Justice White, dissenting in National Railroad Passenger Corporation v. Boston & Maine Corp., 503 US ___, 112 S. Ct. 1394, 118 L. Ed 2d 52, 70, 72 (1992), observed that deferring to a federal agency's construction of the legislation it is charged with administering is one thing, but deferring to the post-hoc rationalization of a government lawyer is another matter entirely. The undersigned has the same reservations towards the interpretation of MSHA policy in this case.

There is no written MSHA policy or interpretation regarding the posting of Commission judge's decisions, including temporary reinstatement orders. The only evidence of such an interpretation or policy is the affidavit of supervisory coal mine inspector Larry Keller, which is attached to the Secretary's motion for summary decision. Mr. Keller states in paragraph 6 that he has always construed section 109(a) to require posting of judge's decisions. There is no indication from where his understanding arises and indeed no indication that Mr. Keller ever considered the issue before. Indeed, I suspect that Mr. Keller never thought much about this issue until confronted with the section 103(g) complaint in this case.

I also believe that it would be a mistake to ignore the context in which the instant case arose, before deferring to the Secretary's "interpretation" of section 109(a). This citation is but another episode in the continuing struggle between Thunder Basin and the United Mine Workers regarding the unionization of its mine, and between Thunder Basin and MSHA regarding contestant's refusal to recognize the designation of UMWA employees as miners' representatives under 30 C. F. R. Part 40, 15 FMSHRC 2290-2291. Given this context it is not surprising

that upon receipt of the section 103(g) complaint in this case, MSHA would conclude that posting of the temporary reinstatement order was required by section 109(a).

I conclude that there is no agency "interpretation" to which deference must be paid. A subjective understanding of what the statute requires, which is not obvious and has never been communicated to the public is not an agency interpretation entitled to deference under Chevron.

Even if Judges' decisions must be posted, there is no requirement under section 109(a) that a temporary reinstatement order be posted.

A temporary reinstatement order does not constitute a determination that a violation of the Act has occurred. It is merely a finding that the complaint of discrimination is not frivolous and enables the complainant to endure the litigation process without economic loss.

In this sense a temporary reinstatement order is much more in the nature of an interim order than a judge's decision. As the Secretary concedes that not every interim order of a judge during the course of litigation need be posted, I conclude that a temporary reinstatement order need not be posted even if section 109(a) requires the posting of final judge's decisions.

The Secretary argues that posting of temporary reinstatement orders is the means by which employees learn that they too can be protected if they chose to exercise their rights pursuant to the Mine Act (Keller affidavit, page 2, paragraph 2). This may be so but miners wouldn't have to rely on temporary reinstatement orders or judge's decisions if the MSHA exercised its authority under section 508 of the Act, 30 U.S.C. 957, and promulgated regulations requiring the posting of appropriate notices regarding employee rights.

In this vein, I again note that the Occupational Safety and Health Administration has promulgated a regulation requiring employers to post a notice informing employees of their rights under the Act, including their right not to be discriminated against. 29 C.F.R. 1903.2, BNA Occupational Safety and Health Reporter 27:1211.

Conclusion

For the reasons stated herein I grant Thunder Basin's motion for summary decision and vacate both citation 3589022 and the penalty proposed for that alleged violation.

Arthur J. Amchan
Administrative Law Judge
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