

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 14, 2023

MORTON SALT, INC.,
Contestant,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
Respondent.

CONTEST PROCEEDINGS

Docket No. CENT 2023-0069
POV Notice 9679401; 12/01/2022

Docket No. CENT 2023-0070
Order No. 9673196; 12/12/2022

Docket No. CENT 2023-0071
Order No. 9674873; 12/07/2022

Docket No. CENT 2023-0072
Order No. 9674876; 12/12/2022

Docket No. CENT 2023-0073
Order No. 9674877; 12/12/2022

Docket No. CENT 2023-0074
Order No. 9674883; 12/14/2022

Docket No. CENT 2023-0075
Order No. 9674887; 12/14/2022

Docket No. CENT 2023-0076
Order No. 9674888; 12/20/2022

Docket No. CENT 2023-0077
Order No. 9674891; 12/20/2022

Docket No. CENT 2023-0078
Order No. 9674895; 12/28/2022

Mine: Weeks Island Mine and Mill
Mine ID: 16-00970

**ORDER GRANTING IN PART SECRETARY OF LABOR'S
MOTION TO DISMISS CONTEST TO POV NOTICE**

ORDER OF DISMISSAL

Before: Judge Simonton

These cases are before me upon notices of contest filed by Morton Salt Inc. (“Morton”) under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 801 et seq. Docket No. CENT 2023-0069 was assigned by the Commission’s docket office to a contest of a Pattern of Violations (POV) Notice, which was issued by MSHA on December 1, 2022.¹ Notably, however, Morton did not contest the POV Notice itself. Instead, it contested nine Section 104(e) withdrawal orders issued following the POV Notice and simply referenced the POV Notice, No. 9679401, in each of those notices of contest.² *See, e.g.*, Notice of Contest, CENT 2023-0070. Accordingly, it appears that Docket No. CENT 2023-0069 may have been created in error.

On January 24, 2023, the Secretary moved to dismiss CENT 2023-0069 and to strike any reference to Morton’s contest of the POV Notice in each 104(e) Notice of Contest filed in Docket Nos. CENT 2023-0070, CENT 2023-0071, CENT 2023-0072, CENT 2023-0073, CENT 2023-0074, CENT 2023-0075, CENT 2023-0076, CENT 2023-0077, and CENT 2023-0078. The Secretary argues that the Federal Mine Safety and Health Review Commission lacks jurisdiction over a contest to a POV Notice pursuant to the Commission’s holding in *Pocahontas Coal Co., LLC*, 38 FMSHRC 176 (Feb. 2016). Sec’y of Labor’s Mot. to Dismiss Contest to POV Notice at 2. According to the Secretary, Morton cannot establish the Commission’s jurisdiction over its contest of the POV Notice. *Id.* at 4.

Morton filed a Statement in Opposition to the Secretary’s Motion to Dismiss on February 3, 2023. In its statement, Morton confirms that it “did not file a Notice of Contest to the POV Notice; it did not directly challenge or contest the POV notice.” Contestant’s Statement in Opp’n to Sec’y of Labor’s Mot. to Dismiss Contest to POV Notice at 2. Morton argues that the POV notice, since it is joined by the nine Section 104(e) withdrawal orders MSHA issued after the POV Notice, does not stand alone. *Id.* Morton asserts that because it is indirectly challenging the POV Notice by contesting the withdrawal orders, the court does not need to dismiss Docket No. CENT 2023-0069 but should instead consolidate it with the contests of the nine Section 104(e) withdrawal orders and issue an order confirming that Morton seeks review of the POV Notice during the contest of those orders. *Id.* at 3-5.

¹ If an operator has a pattern of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of coal or other mine health or safety standards, Section 104(e)(1) of the Mine Act directs MSHA to issue a notice of such pattern to the operator. 30 U.S.C. § 814(e)(1). If any inspection within 90 days following the notice reveals a significant and substantial violation of a mandatory health or safety standard, MSHA must issue a withdrawal order. *Id.* Section 104(e) also provides for MSHA’s issuance of additional withdrawal orders for subsequent significant and substantial violations discovered until an inspection of the entire mine reveals no significant and substantial violations of mandatory health or safety standards. *Id.* § 814(e)(2)-(3).

² The contest cases, Docket Nos. CENT 2023-0070 through CENT 2023-0078, were assigned to me alongside Docket No. CENT 2023-0069.

In *Pocahontas Coal Co., LLC*, the Commission held that “the language of section 105(d) does not give the Commission authority to review a direct challenge to a POV notice.” 38 FMSHRC 176 at 182. However, an operator may obtain Commission review of a POV notice during a contest of a related withdrawal order issued under Section 104(e). *Id.* at 184. Accordingly, Morton will be able to challenge the validity of the POV Notice during the contest proceedings for the nine dockets challenging the Section 104(e) withdrawal orders. I thus see no legitimate reason to grant the portion of the Secretary’s motion that requests the court strike any reference to Morton’s contest of the POV Notice in the Notices of Contest in Docket Nos. CENT 2023-0070 through CENT 2023-0078. I do find, however, that dismissal of Docket No. CENT 2023-0069 is appropriate. Both parties recognize that the Commission does not have jurisdiction to review a POV notice standing alone, and, procedurally, it stands alone in Docket No. CENT 2023-0069. It is properly challenged indirectly in Docket Nos. CENT 2023-0070 through CENT 2023-0078 and I will hear arguments about its validity in those proceedings.

Accordingly, the Secretary’s Motion to Dismiss Contest to POV Notice is hereby **GRANTED IN PART**. It is **ORDERED** that Docket No. CENT 2023-0069 is **DISMISSED**.



David P. Simonton
Administrative Law Judge

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