

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 11, 2016

MARSHALL JUSTICE,  
Complainant,

v.

GATEWAY EAGLE COAL CO., LLC,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2015-924-D  
PINE-CD 2015-03

Gateway Eagle Mine  
Mine ID: 46-06618

**ORDER**

Before: Judge Simonton

This case is before me upon a complaint of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Complainant Marshall Justice filed a complaint of discrimination with MSHA in May 2015 against his employer, Gateway Eagle Coal Company. The Secretary issued a determination on July 9, 2015, finding insufficient evidence of discrimination. Complainant filed the instant action with the Commission on August 10, 2015. When Gateway failed to file a response to the complaint within 30 days, the Chief Administrative Law Judge issued an Order to Show Cause on October 20, 2015, giving Gateway another 30 days to respond. Gateway did not file a response. On February 4, 2016, Complainant filed a Motion for Default Judgment. The case was assigned to me on February 10, 2016.

In his Motion for Default Judgment, Complainant asked that judgment be entered against not only Gateway, but also against Rockwell Mining, LLC, which Complainant alleged is a successor-in-interest to Gateway. Compl.'s Mem. Supp. Mot. Default J. 2-4. At the request of the Court, Rockwell filed a memorandum of law opposing Complainant's motion to add it as a party. Rockwell argued that Complainant had failed to set out a claim upon which relief could be granted, because Rockwell had obtained the Gateway Eagle Mine in a bankruptcy sale, and the bankruptcy court's sale order barred successor liability claims against Rockwell based on actions of Gateway. Rockwell's 1st Mem. Law 14-19. After considering Rockwell's filing, I ordered the parties to submit additional briefs on the issue of Rockwell's status as a successor. On the basis of those briefs and the prior submissions of the parties, I make the following findings and order.

## I. BACKGROUND

Marshall Justice began his employment with Gateway Eagle Coal Company in 2012, when Gateway took ownership of the mine where he was an employee. Compl. 2. Justice alleges that Gateway took disciplinary action against him in February and May 2015 in retaliation for a safety complaint Justice made to MSHA on February 6, 2015. He seeks compensation for work days missed, injunctive relief, and attorneys' fees.

The parent company of Gateway Eagle Coal Company, Patriot Coal Corp., filed a petition for relief under Chapter 11 on May 12, 2015. Complainant filed a proof of claim with the bankruptcy court on July 27, 2015, regarding the discriminatory discipline alleged in this case. Compl.'s Suppl. Br., Ex. 4. As part of the bankruptcy proceeding, arrangements were made to sell the assets of Patriot Coal. After a bidding process, Blackhawk Mining, LLC, won the right to purchase Patriot's assets, and the bankruptcy court approved the sale on October 9, 2015. *In re Patriot Coal Corp.*, Ch. 11 Case No. 15-32450 (Bankr. E.D. Va. Oct. 9, 2015) (order confirming plan of reorganization) ("Confirmation Order"). Blackhawk's subsidiary Rockwell Mining, LLC, registered with MSHA as the operator of the Gateway Eagle Mine as of October 26, 2015. Compl.'s Suppl. Br., Ex. 9.

The bankruptcy court's confirmation order states that the sale of Patriot's assets to Blackhawk was "free and clear of all Liens, Claims and interests." Confirmation Order ¶ 114. The order further states that:

Blackhawk is not and shall not be deemed ... to: 1) be a successor (or other such similarly situated party) to any of the Debtors . . . .

Blackhawk ... is not, and shall not be, a successor to the Debtors by reason of any theory of law or equity . . . .

[Blackhawk and its affiliates] shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of ... successor or transferee liability [or] labor, employment or benefits law ... with respect to the Debtors or their affiliates . . . .

Confirmation Order ¶¶ 76, 116, 120.

## II. DISCUSSION

### A. *Default Judgment Against Gateway*

Complainant argues that default judgment should be entered against Gateway because it did not file an answer in this case and did not respond to the Order to Show Cause. Compl.'s Mot. Default J. 1-2.

The Commission's procedural rules provide that an order of default may be entered against a party who fails to respond to an order to show cause. 29 C.F.R. § 2700.66. Here, the initial complaint was served on Gateway on August 10, 2015. Compl.'s Mot. Default J., Ex. 1. Gateway then had 30 days to respond to the complaint, 29 C.F.R. § 2700.43, but failed to file an answer. An Order to Show Cause was issued on October 20, 2015. Gateway did not file an answer or otherwise respond to the order to show cause. Accordingly, I find that it is appropriate to enter an order of default against Gateway.

### *B. Default Judgment Against Rockwell*

Complainant also seeks entry of a default judgment against Rockwell Mining, LLC. Rockwell was not a named party in Complainant's original complaint, but Complainant alleges in his motion that Rockwell is a successor-in-interest to Gateway. Accordingly, I interpret Complainant's motion as seeking to amend the complaint to join Rockwell as a respondent on a theory of successor liability.

Amendment of a complaint in Commission cases is governed by Federal Rule of Civil Procedure 15(a). *See Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); 29 C.F.R. § 2700.1(b) (stating that Federal Rules are applicable where no Commission rule on point). Under Rule 15, a court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, a court may properly deny leave to amend where amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Steinburg v. Chesterfield*, 527 F.3d 377, 390 (4th Cir. 2008).

The Commission has held that a corporate successor may be held liable for its predecessor's violations of the Mine Act. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394, 397 (Mar. 1987), *aff'd sub nom. Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987); *see also Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465 (Dec. 1980) (applying successorship doctrine in a Coal Act case). However, Rockwell argues that successor liability is not available in a case where the alleged successor company acquired the predecessor's assets "free and clear" as part of a bankruptcy proceeding. Rockwell's 1st Mem. Law 5. The Commission has not decided the issue of the effect of a free-and-clear asset sale on successor liability under the Mine Act.

Rockwell acquired the Gateway Eagle Mine when Rockwell's parent company, Blackhawk, purchased the assets of Patriot Coal in a sale authorized by the bankruptcy court. Section 363(f) of the Bankruptcy Code permits a trustee in bankruptcy to "sell property under subsection (b) or (c) free and clear of any interest in such property of an entity other than the estate." 11 U.S.C. § 363(f). Courts have generally held that this language empowers the trustee to sell assets free and clear of successor liability claims. *See, e.g., In re Motors Liquidation Co.*, No. 15-2844-BK(L), 2016 WL 3766237, at \*12 (2d Cir. July 13, 2016); *In re Chrysler LLC*, 576 F.3d 108, 126 (2d Cir. 2009), *vacated as moot sub nom. Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009); *In re Trans World Airlines*, 322 F.3d 283, 288-90 (3d Cir. 2003) ("TWA"); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996); *but see Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994). These courts have interpreted the "interests in property" language to refer not only to *in rem* interests, but also to interests that

“arise from the property being sold.” *Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 290; *see also Motors Liquidation*, 2016 WL 3766237, at \*12. Thus, the Fourth Circuit, where the Gateway Eagle Mine is located, has held that a pension fund’s right to collect premium payments from a successor under the Coal Act is an “interest in property” that may be extinguished in a §363 sale because

[t]hose rights are grounded, at least in part, in the fact that those very assets have been employed for coal-mining purposes: if [the debtors] had never elected to put their assets to use in the coal-mining industry, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek premium payments from them.

*Leckie*, 99 F.3d at 582.

Additionally, these courts have observed that allowing a claimant to assert a successor liability claim against a §363 asset purchaser would “subvert the Bankruptcy Code’s priority scheme, by allowing a low-priority, unsecured claim to leapfrog over other creditors in the bankruptcy.” *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 703 (S.D.N.Y. 2012); *see also Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 292; *New Eng. Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982). Moreover, courts have noted that allowing the bankruptcy trustee to sell assets free and clear of successor liability claims enables the trustee to maximize the sale price of the assets. *See Douglas v. Stamco*, 363 F. App’x 100, 103 (2d Cir. 2010); *TWA*, 322 F.3d at 292-93; *Leckie*, 99 F.3d at 586-87. While this may be at the expense of successor liability claimants, it is consistent with the Bankruptcy Code’s goal of preserving jobs. *See TWA*, 322 F.3d at 293.

Complainant argues that a bankruptcy court does not have the power to extinguish claims for successor liability under the Mine Act, citing *International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980) (“*ITP*”). Compl.’s Suppl. Br. 5. In that case, the NLRB held that a bankruptcy court’s free and clear sale order did not extinguish a successor’s liability for back pay under an NLRB order against the debtor. 249 N.L.R.B. 1301, 1303 (1980) (“*ITP*”). The Board stated that

[W]hile a bankruptcy court may have the authority to assign a certain priority to the Board’s claim for backpay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts.

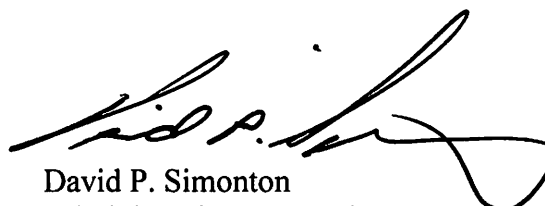
*ITP*, 249 N.L.R.B. at 1303. A FMSHRC ALJ recently cited *ITP* in an order suggesting that a §363 sale order does not preclude a finding of successor liability under the Mine Act. *Varady v. Veris Gold USA, Inc.*, 38 FMSHRC \_\_\_, slip op. at 14, No. WEST 2014-307-DM (Mar. 4, 2016) (ALJ); *but see Bailey v. Osborne*, 38 FMSHRC \_\_\_, slip op. at 5-6, No. WEVA 2016-241-D (July 14, 2016) (ALJ) (order denying motion to dismiss) (noting “questionable” status of *ITP*). However, *ITP* was decided under the previous Bankruptcy Act, and it is unclear whether it is

applicable under the current Code. The decision was not appealed, and it appears to be contrary to the decisions of the courts of appeals cited above. Accordingly, I decline to apply it here.

In this case, the bankruptcy court ordered the sale of Patriot's assets to Blackhawk "free and clear of all Liens, Claims and interests," and stated that Blackhawk would not be liable as a successor to Patriot. Confirmation Order ¶¶ 114, 116. This was within the bankruptcy court's power under §363. Accordingly, Rockwell cannot be held liable under a theory of successor liability for acts of discrimination by Gateway. Complainant's proposed amendment to his complaint adding Rockwell as a respondent would be futile.

### III. ORDER

Upon review of the complaint and the entire record in this case, Complainant's motion for a default judgment against Gateway Eagle Coal Company, LLC, is hereby **GRANTED**. Should Complainant wish to obtain an order of payment against Gateway, he is directed to submit a claim for personal relief no later than August 26, 2016. Complainant's motion to amend his complaint to add Rockwell Mining, LLC, as a party to this action under a theory of successor liability is **DENIED**, and his motion for a default judgment against Rockwell is **DENIED**.



David P. Simonton  
Administrative Law Judge

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