

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 07 2014

CHRISTOPHER PULLIAM,
Complainant,

v.

STERLING MATERIALS,
Respondent

DEBORAH L. PULLIAM,
Complainant,

v.

STERLING MATERIALS,
Respondent

DISCRIMINATION PROCEEDINGS

Docket No. KENT 2013-1045
MSHA Case No.: SE-MD 13-26

Docket No. KENT 2014-238
MSHA Case No.: SE-MD 13-25

Mine ID: 15-18068
Mine: Sterling Materials

**ORDER TO SUBMIT AUDIO TAPE AND TRANSCRIPT
FOR IN CAMERA INSPECTION**

Before: Judge Lewis

These discrimination proceedings are before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On April 16, 2014, Respondent filed a Motion to Compel Production of Audio Recording. The Motion arose after Complaint, Christopher Pulliam, refused to produce an audio recording in response to Respondent's discovery request. On April 24, 2014, Complainant filed an Omnibus Response to Respondent's Motion to Compel Production of Audio Recording and Motion for Protective Order.¹

The Complainant referred to 29 C.F.R. §2700.61 ("Rule 61" or the "miner informant rule"), 29 C.F.R. §2700.62 ("Rule 62" or the "miner witness rule"), and 29 C.F.R. §2700.5(d) ("privacy considerations") as the basis for refusing to produce the requested audio tape. Complainant argues that the miner's name is on the recording, as well as his or her distinctive voice, and that disclosing such information would expose the miner to instant retaliation. The

¹ In addition to arguing against production of the audio tape, Complainant's response also argues against Respondent's pending Motion for Protective Order, which was also filed on April 16, 2014.

Complainant states that it intends to play the tape at the hearing, as well as call the person speaking on the tape as a witness.

Complainant's presentation of Rule 61 and Rule 62 for purposes of not producing the audio tape is problematic and often conflates the two privileges. The miner informant rule only applies to the government, and may not be asserted by a private party. In *Bright Coal Co.*, the Commission stated that the "informer's privilege is the well-established *right of the government* to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials." 6 FMSHRC 2520, 2522 (Nov. 1984) (emphasis added); see also *Asarco, Inc.*, 12 FMSHRC 2548 (Dec. 1990) (reaffirming the rule in *Bright Coal Co.*). The Commission further stated that the "purpose of the privilege is to protect the public interest by maintaining a free flow of information *to the government* concerning possible violations of the law and to protect persons supply such information from retaliation." *Bright Coal*, 6 FMSHRC at 2522-2523 (emphasis added). In the instant case there is no indication that the tape is a recording of a miner acting as an informant to the government. Therefore, the reliance on Rule 61 is inapposite.

In drafting the Mine Act, Congress repeatedly placed in the statute provisions that protect miners from discrimination. In addition to Rules 61 and 62, Section 105(c) protects miners in making health and safety complaints, as well as engaging in other protected activities. 30 U.S.C. §815(c). Additionally, §103(g)(1) protects the names of miners and representatives of miners when making complaints to the Secretary concerning violations of the Act or imminent dangers in the mine. 30 U.S.C. §813(g)(1). Though the miner informant rule may only apply to the Secretary, Congress made clear that as a general policy matter, miners who report violations of the Act should be protected.²

Complainant makes it clear that it "fully intends to play this tape at the trial, and call this person as a witness." *Complainant's Response*, at 9. Therefore, it is more properly Rule 62 that is at issue. Rule 62 states, "A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness." Rule 62 applies to all miners who are called as witnesses, and are not limited to miners who are informants. *Secretary of Labor obo Richard M. Bundy v. Kennecott Utah Copper Corp.*, 2002 WL 1969243, *6. Complainant uses Rule 62 as a blanket exception from releasing any information on the audio tape. However, "it is the *name* of the informant, not the *contents* of his statements, that is protected, unless disclosure of the contents would tend to reveal the identity of an informant." *MSHA v. Don Dewild & Keith Buescher, Employed by Mobile Premix Sand & Gravel*, 19 FMSHRC 220 (Jan. 1997) (ALJ) (emphasis added).

Complainant's reliance on Rules 61 and 62 in turning over any of the contents of the audio tape is misplaced. Though the miner witness rule certainly applies in this instance, it only protects the name and identifying information of the miner. Based on the submissions of the

² It should be noted that participating in a Commission proceeding is a "protected activity" under the Mine Act, and if any miner suffers discrimination as a result, he or she would have recourse under Section 105(c).

parties, this Court is not able to determine what part of the contents of the tape should be turned over to the Respondent at this stage. As such, an *in camera* review of the materials is necessary.

Therefore, it is **ORDERED** that Complainant shall, within 7 days from this Order, transcribe the audio tape and submit both the tape and transcription for *in camera* review. The transcription of the audio tape shall be on done on pages with line numbers, and Complainant may submit to this Court a recommendation of information to be redacted should the judge rule in favor of the Motion to Compel, with reference to specific line numbers. Each recommendation should be accompanied by a specific reason, which the judge will consider in making a final decision.



John Kent Lewis
Administrative Law Judge

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