

15 FMSHRC 2099 (Oct. 1993) the Commission, looking to the U.S. Supreme Court's decision in *Cuyahoga Valley Ry. Co. v. United Transportation Union*, 474 U.S. 3 (1985), held that the Secretary has the authority to vacate citations and that such actions are not reviewable.

In *Cuyahoga* the Supreme Court noted the distinct roles of the Commission and Secretary of Labor as adjudicator and prosecutor, respectively, and that Congress did not intend a commingling of those roles.¹ See, also *Rockville Crushed Stone, Inc.* 1994 WL 700964, December 1994 (Judge Merlin²), noting *RBK*'s holding that the "vacation of citations and orders are within the Secretary's unreviewable prosecutorial discretion." cf. *PC Sand & Gravel*, 32 FMSHRC 235, 2010 WL 1145201, February 2010, (Chief Judge Lesnick) in which that judge distinguished the Secretary's effort to vacate citations "in the context of a motion to approve a settlement agreement."

As at least the title, if not the substance, of the Joint Motion is to dismiss the petition for the assessment of the civil penalty in this docket, and as such action does not require Commission approval, the proceeding has become moot and therefore this matter is **DISMISSED, with prejudice.**

William B. Moran
Administrative Law Judge

Distribution:

Leslie Paul Brody, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street SW, Room 7T10, Atlanta, GA 30303

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 2400 N Street NW, 5th Floor, Washington, DC 20037
Washington, DC 20037

¹While *Cuyahoga* dealt with the authority of the Occupational Safety and Health Review Commission, there is no basis to distinguish the Mine Safety and Health Review Commission's authority and the Commission recognized that fact in *RBK Construction*.

²Judge Merlin was the Chief Administrative Law Judge at that time. He has since retired.