

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 17, 1995

ASARCO, INC., : CONTEST PROCEEDINGS
Contestant :
 : Docket No. CENT 95-8-RM
v. : Citation 4444361; 9/20/94
 :
 : Docket No. CENT 95-9-RM
SECRETARY OF LABOR, : Citation 4328815; 9/21/94
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Sweetwater Mine
Respondent : Mine I.D. 23-00458
 :
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SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-122-DM
on behalf of :
DAVID HOPKINS, : Sweetwater Mine
Complainant :
: Mine I.D. 23-00458
v. :
 :
ASARCO, INCORPORATED, :
Respondent :

ORDER DENYING, IN PART, ASARCO'S MOTION TO COMPEL

Asarco, Inc. filed a request for the production of documents in these proceedings. In response, the Secretary of Labor provided certain documents but refused to provide others on the basis of the informant's privilege, the deliberative process privilege, and the attorney-client privilege. Subsequently, Asarco filed a motion to compel production of three types of documents: (1) statements of miners made to MSHA investigators; (2) a special investigation report of the discrimination complaint prepared by Ms. Judy Peters, an MSHA employee; and (3) a case analysis prepared by Ms. Peters. The Secretary opposed the motion to compel. By order dated May 4, 1994, I ordered the Secretary to provide, for my in camera inspection, a copy of each contested document. There is no dispute that the requested mate-

rial is relevant to these proceedings. For the reasons discussed below, Asarco's motion to compel is denied, in part, and granted, in part.

I. Statements of Miners

During MSHA's investigation of Mr. Hopkins' discrimination complaint, Ms. Judy Peters, an MSHA investigator, interviewed a number of miners. During these interviews, she either tape-recorded the interview or took written statements. The taped interviews were typed in question and answer format. These interview transcripts and written statements (collectively referred to as "statements") were forwarded to me for my review. After reviewing each of the statements, I conclude that all but one are protected by the informant's privilege.

The Commission has stressed the importance of the informant's privilege under the Mine Act. Bright Coal Co., 6 FMSHRC 2520 (November 1984). The Commission held that this privilege is applicable to the furnishing of information to government officials concerning violations of the Mine Act. 6 FMSHRC at 2524. It is the name of the informant, not the contents of the statement, that is protected, unless disclosure of the contents would tend to reveal the identity of an informant. Asarco, 12 FMSHRC 2548, 2554 (December 1990) ("Asarco I"), citing Roviario v. United States, 353 U.S. 53, 60 (1957). The Secretary bears the burden of proving facts necessary to support the existence of the privilege. Asarco I, 12 FMSHRC at 2553.

Each of the statements at issue in this case contains the name of the informant making the statement. In addition, given the detail contained in the statement, I find that disclosure of the contents of each statement would tend to reveal the identity of the informant. Finally, each statement contains the names of other miners, many of whom are also informants. Accordingly, I conclude that each statement is protected by the informant's privilege. Redacting out names and identifying sentences or paragraphs is not feasible because of the detailed nature of the statements. It would not be possible for the Secretary to provide Asarco with meaningful portions of the statements without revealing the identity of one or more informants.

Because the informant's privilege is a qualified privilege, I must perform a balancing test to determine if Asarco's need for the statements is greater than the Secretary's need to maintain the privilege to protect the public interest. Bright, 6 FMSHRC at 2526. The burden is on Asarco to prove facts necessary to show that disclosure of the statements is necessary to a fair determination of the case. Id. Factors to be considered in con-

ducting this balancing test include whether the Secretary is in sole control of the requested material and whether Asarco has other avenues available from which to obtain the substantial equivalent of the requested information. Id. In performing the balancing test in this case, the issue is whether Asarco can get substantially the same information by deposing those miners who have knowledge of the events leading up to Mr. Hopkins' discharge. Asarco, 14 FMSHRC 1323, 1331 (August 1992) ("Asarco II")

I conclude that Asarco could get substantially the same information by interviewing or deposing miners at the Sweetwater Mine who worked with Mr. Hopkins and with the 1311 High Scaling Rig that is the subject of these proceedings. Those are the individuals with knowledge of the events that are important to these cases and Asarco can get substantially the same information by talking to those individuals.

Asarco maintains that it believes that it is "quite likely" that some of the statements contain information that is favorable to its position in these cases. Asarco states that such information is essential for a fair determination of the issues. In Bright, the Commission held that "an informer is entitled to anonymity, regardless of the substance of the information he furnishes." 6 FMSHRC at 2524. The "applicability of the informer's privilege to the Mine Act does not rise or fall based on the substance of a person's communication with government officials concerning a violation of the law." 6 FMSHRC at 2525. Accordingly, Asarco's contention is unfounded.

I conclude, however, that Asarco is entitled to a copy of the statement made by Mr. Hopkins. This proceeding is being brought by the Secretary on Mr. Hopkins' behalf. There can be no doubt in anyone's mind that Mr. Hopkins is an informant and that his identity as an informant is known to Asarco because a discrimination complaint was filed on his behalf. The Secretary would not file a discrimination proceeding without interviewing the complainant. Accordingly, I conclude that the informant's privilege has been waived with respect to Mr. Hopkins.

My holding is consistent with the Commission's decision in Secretary on behalf of Gregory et. al. v. Thunder Basin Coal Co., 15 FMSHRC 2228 (November 1993). The Commission held that the informant's privilege is not waived when an unfair labor practice charge brought by the United Mine Workers Union names a number of miners in the complaint. 15 FMSHRC at 2235-36. The inclusion of a particular miner in the complaint "is not tantamount to disclosure of [the miner] as an informant." 15 FMSHRC at 2236. The unfair labor practice action could have been brought without obtaining information from the miner in question. In the instant

Asarco will be entitled to the names of all the Secretary's witnesses two days before the trial. 29 C.F.R.' 2700.62; Asarco II, 14 FMSHRC at 1331. At or about that time, Asarco may be able to obtain the statement of any miner who will be called as a witness in order to refresh that witness's recollection or to impeach his testimony. Asarco II, 14 FMSHRC at 1331. Asarco's right to the statements of miner witnesses at the time of trial is a separate and procedurally distinct issue from the discovery issue presented here. Id. (citation omitted).

II. Special Investigation Report Prepared by Ms. Peters

The special investigation report ("report") prepared by Ms. Peters consists of two parts: a summary of the interviews and statements Ms. Peters took of miners and a conclusion that Asarco violated section 105(c) of the Mine Act when it terminated Mr. Hopkins. The report recommends that a complaint be filed on his behalf. The report, which is in the form of a memorandum, was prepared by Ms. Peters and is directed to Raymond C. Austin, MSHA District Manager for the South Central District, through Jimmie L. Jones, Supervisory Mine Safety and Health Specialist. I find that this document is protected from disclosure by the informant's privilege and the deliberative process privilege.

Most of the report is a summary of the statements of miners described in section I, above. This summary also includes the summary of statements made to Ms. Peters by a few management employees. The definition of "miner" under the Mine Act includes "any individual working in a ... mine." 30 U.S.C.' 802(g); 29 C.F.R. ' 2700.2. Thus, the informant's privilege applies to statements made to the government by both management and hourly employees. For the reasons set forth in section I above, I believe that these summaries are protected by the informant's privilege. In addition, for the reasons discussed above, Asarco's need for the statements is not as great as the Secretary's need to maintain the privilege to protect the public interest. Asarco has access to all of these individuals and could simply depose or interview them.

The remainder of the report is protected by the deliberative process privilege. This privilege protects communications between subordinates and supervisors within the government that are "antecedent to the adoption of an agency policy." Contests of

case, however, there can be no dispute that Mr. Hopkins is an informer.

Respirable Dust Sample Alternation Citations, 14 FMSHRC 987, 992 (June 1992), quoting Jordan v. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978). The communications must be "related to the process by which policies are formulated." Id. The conclusion and recommendation section easily fits within the deliberative process privilege. This section of the report contains the recommendation of Ms. Peters, a subordinate, to Mr. Austin, a supervisor, that the agency pursue this case. It is not the final agency decision.

I also conclude that Asarco's need for the recommendation section does not outweigh the Secretary's interest in keeping it confidential. Ms. Peter's one page recommendation puts her gloss on the interviews she conducted and states that the information obtained during her investigation "indicates that a violation of Section 105(c) occurred." It is simply her opinion and, since this proceeding is de novo, it will carry no weight. The Secretary's interest in keeping its decision making process confidential far outweighs Asarco's need for this section of the report.

III. Case Analysis

Counsel for the Secretary states that a case analysis prepared by Ms. Peter does not exist. The only case analysis she prepared is the report discussed in section II, above. The Secretary provided for my in camera review, a two-page "case analysis" prepared by an analyst in MSHA's Arlington, Virginia, headquarters. As it does not contain any details, it appears that it may be a transmittal memorandum for the report prepared by Ms. Peters. In any event, like the report, it is protected by the deliberative process privilege. It is a memorandum prepared by a subordinate to a supervisor that recommends that a discrimination complaint be filed against Asarco on behalf of Mr. Hopkins. The Secretary's interest in keeping its decision-making process confidential outweighs Asarco's need for this document.

ORDER

The portion of the report that summarizes the statements of miners also summarizes interviews with Michael R. Roderman, an MSHA inspector, and Michael P. Sheridan, an MSHA engineer. I find that these summaries are protected by this privilege because they reflect the deliberative process and are not purely factual in nature. I believe that report must be viewed as a whole and that the summary of Ms. Peters' interviews of MSHA officials is part of the decision making process rather than merely a factual predicate for the decision to bring these cases. See, Respirable Dust Cases, 14 FMSHRC at 992-93.

Accordingly, Asarco's motion to compel is **DENIED**, except with respect to the transcript of the taped interview of Mr. Hopkins taken on September 19, 1994. The Secretary is **ORDERED** to provide counsel for Asarco with a copy of this transcript within ten days of the date of this order. The Secretary should redact the names of other informants that are contained in the transcript and, to the extent necessary, those portions of the transcript that would tend to reveal the identity of an informant.

Richard W. Manning
Administrative Law Judge

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