

It is not disputed that in order to establish jurisdiction the Secretary must show that the PTC was, during relevant times, a "coal mine" under the Act. Under Section 3(h)(2) of the Act, coal mine "means an area of land and all structures, facilities, machinery, tools, equipment, sheds, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities". More particularly, at issue herein, is whether the PTC was involved in "work of preparing the coal". The term "work of preparing the coal" is defined in Section 3(i) of the Act as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading

On August 22, 1996, Robert Visnic, Transportation Manager, refused to allow Joseph F. Facello and William A. McGilton, authorized representatives of the Secretary, entry into the Powhatan Transportation Center for the purpose of conducting an inspection of the facility pursuant to Section 103(a) of the Act. Mr. Visnic stated that MSHA was being denied entry based on the operator's belief that this facility is not subject to MSHA jurisdiction.

The order at bar, No. 3500862, charges as follows:

On August 22, 1996, after the expiration of a reasonable time allowed to comply, Robert Visnic, Transportation Manager, continued to deny Joseph A. Fellico and William A. McGilton, authorized representatives of the Secretary, the right of entry into the Powhatan Transportation Center, for the purpose of conducting an inspection of the facility in accordance with requirements of Section 103(a) of the Act.

of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine".

The activities occurring at the PTC during relevant times are not in dispute. The PTC is located on an area of land adjacent to the Ohio River. Bituminous coal, which has already passed through a processing plant, is received at the facility by rail, truck and river barge. No breaking, sizing, crushing, washing, or drying occurs at the PTC and, indeed there is no physical change to the coal. Most of the coal received at the PTC comes from the Powhatan No. 6 mine. This coal is received either by train or truck and is dumped in a hopper. It is then conveyed by belt directly to barges in the Ohio River where it is loaded and shipped to customers, primarily electric utilities.

Coal is also received at the PTC from third party sources by truck and river barge. Coal delivered by river barge is transferred by crane into a hopper and further transported by conveyor to a stacker tube. From the stacker tube the coal is stored in a stockpile and, when needed, this coal is placed onto a belt. Powhatan No. 6 Coal may also be transported at the same time on the same belt and loaded onto river barges. Third party coal arriving by truck may also be simultaneously dumped with Powhatan No. 6 coal onto the conveyor and loaded onto river barges for delivery to customers.

According to Richard Rice, manager of marketing and sales for the Ohio Valley Coal Company (owner of the Powhatan No. 6 Mine) and Vice President of the American Coal Sales Company (owner of the PTC), with the exception of coal from the Maple Creek Mine, the third party coal is so poor in quality it would not meet the contract specifications for its utility customers. This third party coal must therefore be admixed with Powhatan No. 6 coal. (Tr. 133-134). According to Rice, the third party coal (with the exception of Maple Creek coal) is purchased for "economic reasons". It is cheaper than Powhatan No. 6 coal. Thus the cheaper coal from third party sources is loaded together with the more expensive Powhatan No. 6 coal to improve profits (Tr. 133-136). Rice further noted that under the agreements between the Ohio Valley Coal Company and its utility customers, PTC cannot ship third party coal alone. Accordingly, Foreman Visnic will adjust by computer the volume of coal dumped onto the conveyor from third party sources based on the amount of other coal coming into the PTC. Visnic therefore decides how much third party coal to load onto the conveyor from the stockpile and to be loaded onto the barges for delivery. Rice told Assistant MSHA District Manager Robert Crumrine sometime in 1995 that "you can call it mixing if you want to" in reference to this operation. (Tr. 227).

Robert Murray, President of the Transloading Company, opined that no preparation occurs at the PTC. In Murray's opinion coal is not mixed or co-mingled but is merely conveyed or transloaded. He maintains there is no intent to process coal.

It is therefore undisputed that the PTC performs the functions of loading bituminous coal onto barges at its Ohio River facility and storing coal received from third party sources at a stockpile before further transporting this coal by conveyor to river barges. Recently in *RNS Services, Inc. v. Secretary of Labor and FMSHRC*, No. 96-3245 (3rd Cir., May 29, 1997), the

Circuit Court reaffirmed that the storage and loading of coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user, and the Mine Act was intended to reach all such activities. See also *Pennsylvania Electric Company v. FMSHRC*, 969 F.2d 1501(3rd Cir., 1992).

The undisputed evidence in this case also clearly demonstrates that the "mixing" of bituminous coal has taken place at the PTC within the meaning of Section 3(i) of the Act. The term "mix" is defined in Webster's Third New International Dictionary (unabridged), 1986, as synonymous with "mingle, co-mingle, blend, merge", etc. The merging or co-mingling of third party coal with Powhatan No. 6 coal at the PTC therefore clearly constitutes "mixing". Under the circumstances the PTC is clearly within the jurisdiction of the Act and MSHA has the authority under Section 103(a) of the Act to enter and conduct inspections at that facility.

The Commission in *Secretary v. Oliver M. Elam, Jr. Company*, 4 FMSHRC 5 (January 1982) also found, in determining Mine Act jurisdiction, that a facility would more likely come within the Act's jurisdiction if the coal was prepared by the subject facility to meet customers' specifications or to render the coal fit for a particular use. In this case it is acknowledged that third party coal (except for that received from the Maple Creek Mine) was of such poor quality as not to be capable in itself to meet the contract specifications of the utility customers. Accordingly, it was necessary to combine that coal with coal from the Powhatan No. 6 mine to improve the quality of the coal to meet the specifications of the utility power plants. For this additional reason it is clear that the PTC was a "mine" within the meaning of the Act and that MSHA therefore had jurisdiction to inspect that facility.

ORDER

Citation No. 3500861 and Order No. 3500862 are affirmed and these Contest Proceedings are dismissed.

Gary Melick
Administrative Law Judge
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