

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

July 28, 1995

RNS SERVICES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 95-382-R
	:	Citation No. 3713378; 6/16/95
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 95-383-R
ADMINISTRATION (MSHA),	:	Citation No. 3713379; 6/16/95
Respondent	:	
	:	RNS Services Mine
	:	Mine ID No. 36-07266

## DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania for the Contestant; James Brooks Crawford, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Respondent.

Before: Judge Weisberger

### History of these cases

These cases, which were consolidated for hearing, are before me based upon Notices of Contest filed by RNS Services, Incorporated (RNS) challenging the issuance of two citations by the Secretary of Labor (Secretary). On June 19, 1995, RNS filed a Motion to Expedite. A telephone conference call was convened to discuss this motion. After hearing arguments from both parties, the cases were scheduled for hearing on July 6, 1995. The parties each filed a pre-hearing memorandum of law on June 29, 1995. At the hearing, James E. Biesinger, Gary L. Boring, and Leo E. Makovsky testified for the Secretary. Neil Hedrick, and Robert J. Pavelko testified for RNS. The parties filed post-hearing briefs on July 24, 1995.

### Findings of Fact

The following findings of fact are based upon the parties' stipulations and the evidence of record:

1. The No. 15 dumps site at issue, a 15 acre parcel, is

operated by RNS.

2. A pile of material on the site, approximately 1,200 feet long, 500 feet wide and 90 feet wide, consists of refuse from a preparation plant that had been operated by Barnes and Tucker Coal Company, or its predecessor Barnes Coal Company. The preparation plant processed coal from the Barnes and Tucker No. 15 underground mine. Washing, screening, and sizing of coal were performed at the preparation plant.

3. The No. 15 mine ceased operations sometime prior to 1969. The No. 15 preparation plant ceased production sometime prior to 1968, and was demolished.

4. There are no buildings or other facilities on the site at this time. The No. 154 mine had operated in the "B" seam which contained metallurgical coal with a normal BTU value of between 13,000 and 14,000 BTUs.

5. In January 1995, RNS acquired the No. 15 site in from Lancashire Coal company, a subsidiary of Inland Steel, which had acquired the site from Barnes and Tucker.

6. RNS supplies coal refuse to the Cambria Co-Generation Facility (Cambria) in Ebensburg, Pennsylvania, which generates electricity and steam. The material supplied by RNS to Cambria is broken and sized at Cambria's facility. RNS has a flat fee contract with Cambria to deliver coal refuse, and remove ash<sup>1</sup> from the Co-Generation Facility. RNS does not receive any payment from Cambria based on the quantity of coal refuse it delivers to Cambria.

7. RNS has the following equipment at the site: A hydraulic excavator to remove material from the pile and load trucks, a water truck, a bulldozer, and a backhoe.

8. With the exception of a 4 inch grizzly to remove timbers from the pile, there is no screening, crushing, sizing or washing of the material at the subject site.

9. The material removed from the pile is loose, and is not being taken from its natural deposit.

10. Testing of material removed from the pile indicates that it shows the characteristics of coal.

11. The work being conducted at the No. 15 site by RNS is under a no-cost government financed reclamation contract with the Commonwealth of Pennsylvania. This contract calls for the removal of refuse from the site, and the provision of cover and

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<sup>1</sup>The ash is a product of the burning of coal refuse at Cambria.

revegetation.

12. The hazards at the site are associated with the collapse of the highwall. Also present are hazards associated with material falling off the highwall as well as tripping and stumbling hazards. In addition, the material in the pile has the potential to burn or explode.

#### Violations

On June 16, 1995, MSHA inspector Gary L. Boring inspected the subject site. He issued a citation alleging the failure to record the results of daily inspections at the site. He also issued a citation alleging that RNS had not established a ground control plan. RNS does not challenge the factual assertions set forth in these citations, and agrees that the relevant mandatory standards were violated. However, RNS challenges MSHA jurisdiction over the subject site.

#### Discussion

Section 4 of the Federal Mine Safety and Health Act of 1977 (the Act) provides as follows:

Each coal or other mine, the products of which enter commerce, or the operations or products of which enter commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

"Coal or other mine" is defined in Section 3(h)(1) of the Act as follows:

[C]oal or other mine means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (c) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of

extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

The Secretary argues that he has jurisdiction under the Act under two theories. He first maintains that RNS was, in its work performed at the No. 15 refuse disposal site, "engaged in the work of preparing coal" under Section 3(h)(2)(i) of the Act. Under the latter section,, "work of preparing the coal " is defined as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal ... and such other work of preparing such coal as is usually done by the operator of the coal mine."

In the instant cases, with the exception of the removal of coal, none of the activities set forth in Section 3(h)(2)(i) of the Act are performed at the site. The sole activities performed at the site, those of the removal of material by a hydraulic excavator, the loading of the material on trucks, and the transporting of material to the Cambria facility are not activities set for in section 3(h)(2)(i), supra.

In this connection, the operation at issue is to be distinguished from the cases relied on by the Secretary, in which jurisdiction was found to exist over operations that performed breaking, crushing, and sizing of coal.<sup>2</sup> I thus conclude that

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In Air Products & Chemicals, Inc., 15 FMSHRC 22428 (1993) the Commission held that the breaking, crushing, sizing and storing of coal were activities usually performed by an operator, and that accordingly the coal handling facility at issue was subject to the Act's jurisdiction. In Westward Energy Properties, 11 FMSHRC 2408 (1989), the Commission concluded that an operation in which coal mining waste was screened and crushed was subject to the Act's jurisdiction. In the same fashion, in Alexander Brothers Incorporated, 4 FMSHRC (1982), it was held by the Commission that an operation that included breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading was engaged in the preparation of coal and hence was

the operation herein was not the work of preparing coal, and hence does not fall within the definition of a mine as set forth in Section (3)(h)(1), supra.

The Secretary also argues that the No. 15 refuse site meets the definition of "coal or other mine" under Section 3(h)(1) of the Act in that "the area at issue constitutes lands ... structures, facilities ... or other property ... used in or resulting from the work of extracting such minerals from their natural deposits in non-liquid form ... ."

In the instant cases, it is clear that the material being removed was from a pile that was not in its natural deposit. Rather, the refuse material had been deposited on the ground after the completion of the coal preparation process. In this connection, Section 3(h)(i) of the Act refers to three different mining activities: extracting materials, milling minerals, and preparing coal or other materials. (Lancashire Coal Company v. Secretary of Labor, 3d Cir. 968 F.2d 388 (1992)).

The scope of the definition of "coal or other mine" in the Act with respect to extraction of minerals from their natural deposits includes "lands, excavations ...structures ... used in or to be used in, or resulting from the work of extracting minerals from their natural deposits ... ." The scope of the Act's definition with respect to coal preparation is limited to "lands ... or other property used in or to be used in the work of preparing coal or other minerals." The definitional language with respect to coal preparation does not include the phrase "resulting from," which is included with respect to extraction of

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subject to the Act. In Mineral Coal Sales Incorporated, 7 FMSHRC 615 (1985), the Commission held that a company that stored, mixed, crushed and sized coal was subject to the jurisdiction of the Act. In RNS Services Inc., 16 FMSHRC 1322 (Judge Melick)(June 1994) Judge Melick found jurisdiction to exist where the operation included activities of breaking, sizing, and cleaning of coal.

material from a natural deposit. The language with respect to coal preparation is thus limited to lands, etc., "used in or to be used in" such work while the scope of the Act with respect to mining itself is broader, also including lands, "resulting from" the work of extracting such minerals.

In Lancashire, supra, the Court held that MSHA did not have jurisdiction over the demolition and reclamation work done at a coal silo,<sup>3</sup> part of an abandoned preparation plant. In Lancashire, supra, the Court took cognizance of the differences in the wording with respect to mining, and preparing, as well as the legislative history. The court held that buildings resulting from the preparation of coal were not within the acts jurisdiction. In contrast, based on the wording of the Act, buildings resulting from the extraction of coal are within the Act's jurisdiction.

Thus, focusing on the different treatments in the Act between the activities of extraction and preparation of coal, I find that the pile at issue did not result from the initial extraction of coal, since the coal that was extracted had been subjected to subsequent preparation. I find that the pile resulted from the preparation plant, and from the preparation of coal.

For all the above reasons, I find that the subject operation was not a mine as defined in the Act. I thus find that it was not subject to the Act's jurisdiction. Hence, the notices of contest are sustained, and the citations at issue, Nos. 3713378 and 3713379, are to be dismissed.

#### ORDER

IT IS ORDERED that Citation Nos. 3713378 and 3713379 be DISMISSED.

Avram Weisberger  
Administrative Law Judge

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<sup>3</sup>This coal silo is located on a parcel of land that, prior to January 1995, was part of the same parcel as the site at issue in the case at bar. The silo is approximately 50 feet from the pile at issue.

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