FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-243-M
Petitioner	:	A.C. No. 48-01497-05506 JVU
	:	
v.	:	
	:	
RAIL LINK INCORPORATED,	:	General Chemical Mill
Respondent	:	

ORDER DENYING SECRETARY=S
MOTION FOR A PROTECTIVE ORDER

Counsel for the Secretary filed a motion seeking a protective order to prevent Rail Link from taking depositions of Robert M. Friend, District Manager of MSHA=s Rocky Mountain District for Metal/Nonmetal, and Jake H. DeHerrera, the Assistant District Manager. As grounds for the motion, the Secretary argues that: (1) these individuals have no first-hand knowledge of the facts in this case; (2) the depositions will, at the most, yield cumulative information; (3) it is Aannoying, oppressive, and unduly burdensome@ to require these officials to answer questions that will be asked and answered by other MSHA officials; (4) these individuals are high level MSHA officials who do not have the time to give depositions in each of the many cases filed in the Rocky Mountain District; and (5) it is likely that these individuals will be asked questions involving agency deliberations that are not relevant and are protected by the deliberative process privilege. Rail Link opposes the Secretary=s motion and the parties briefed the issues.

This case, along with other Rail Link cases that are pending before me, raises issues of MSHA jurisdiction. Rail Link contends that MSHA does not have jurisdiction over its operations and employees. Although the penalties are not high, the legal and factual issues are important to Rail Link.

Commission Procedural Rule 56(b) provides that parties Amay obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.@ 29 C.F.R. ' 2700.56(b). Rule 56(c) provides that Aa judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppressive or undue burden or expense.@ Inquiry into the facts that led MSHA to conclude that it has jurisdiction over the cited facility may produce information that is admissible at the hearing or that is likely to lead to the discovery of admissible evidence. As a general matter, I

hold that deposition questions about MSHA jurisdiction is an appropriate subject for discovery in this case.

As a general matter, high level executive department officials should not, except in extraordinary circumstances, be called to testify regarding their reasons for taking official actions. *Simplex Time Recorder Co. V. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). High level officials are protected from compulsory testimony because they must be free to conduct their jobs without the constant interference of the discovery process. *Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990).

I find that Messrs. Friend and DeHerrera are not the type of high level officials that require such protection. Rail Link=s facility is within MSHA=s Rocky Mountain District. Messrs. Friend and DeHerrera, directly or indirectly, supervise the MSHA inspector who issued the citations. They may have direct information about the issues in this case that would not be available from other individuals. Although they have important positions within MSHA, they are not of such a high level that they require special protection from compulsory testimony that higher level officials require. *See Newmont Gold Co.*, 18 FMSHRC 1304, 1306-07 (July 1996)(ALJ Manning).

The fact that these individuals may not actually have knowledge of facts that will shed light on the issues raised in this case is not sufficient justification to issue a protective order. They may have such knowledge and counsel=s statement to the contrary cannot be the basis for a protective order. The Secretary has not shown that the proposed depositions will be oppressive or will expose these individuals or MSHA to Aundue burden or expense.@

The Secretary=s argument that much of the requested information will be subject to the deliberative process privilege is not well taken. The fact that objections may be raised to specific questions in a deposition does not provide a sufficient basis to bar the deposition altogether. It is not clear at this juncture whether and to what extent the deliberative process privilege will apply. In an order issued in *Newmont Gold Co*., 18 FMSHRC 1532 (August 1996), I set forth my understanding of the application of the deliberative process privilege which may be of use to the parties in the present case.

Part of the Secretary=s concern appears to be that the depositions will get into broad issues of MSHA policy governing independent contractor liability and the definition of the term Acoal or other mine@ in section 3(h)(1) of the Mine Act. The proposed deponents may not be in the position to describe the outer limits of MSHA jurisdiction. I agree with the Secretary that a series of broadly worded hypothetical questions can be burdensome and will often produce meaningless answers. A discussion of this issue can be found in my order in *Newmont Gold Co.*, 18 FMSHRC 1709, 1713-14 (September 1996), which I incorporate herein.

In the alternative, the Secretary requests that I set time and scope limitations for the depositions. I deny the Secretary=s request. Nevertheless, Rail Link should understand that the purpose of the depositions is to gather facts concerning the issuance of the citations at issue,

including the reasons for MSHA=s assertion of jurisdiction. The depositions need not be lengthy or burdensome.

For the reasons set forth above, the Secretary=s motion for a protective order is **DENIED**. If Rail Link still wishes to take the depositions of Messrs. Friend and DeHerrera, the depositions shall be scheduled at a mutually satisfactory time and place.

Richard W. Manning
Administrative Law Judge

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