FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 94-370
	:	A.C. No. 48-00977-03525
v.	:	
	:	Black Thunder Mine
THUNDER BASIN COAL COMPANY, Respondent	:	

DECISION

Before: Judge Amchan

Factual Background[1]

In September 1990, eight miners employed at Thunder Basin's surface coal mine near Wright, Wyoming, signed a form designating Dallas Wolf and Robert Butero as their representatives under section 103(f) and Part 40 of Volume 30 of the Code of Federal Regulations. The principal function of a miners' representative under these provisions is to accompany MSHA personnel during their inspections of an operator's worksite. Such representatives may also obtain an immediate inspection of a mine pursuant to section 103(g) of the Act.

Respondent refused to recognize Wolf and Butero as miners' representatives and refused to post the form so designating them as required by 40 C.F.R. '40.4. Wolf and Butero have never been employees of Thunder Basin. Wolf is the principal organizer of the United Mine Workers of America (UMWA) in the Powder River Basin. Butero is a health and safety official of the UMWA.

Respondent's Black Thunder mine is non-union and the company has successfully resisted UMWA attempts to organize its workforce. In 1987 the UMWA lost an election conducted pursuant to the National Labor Relations Act by a vote of 307 to 56. The company regarded the designation of Wolf and Butero as miners'

[1]I regard the material facts in this case to be undisputed. The specific findings herein are based on portions of the record identified in my summary decision of May 11, 1994, 16 FMSHRC 1070, 1072-74. These findings were incorporated by reference in my August 24, 1994 decision on remand, 16 FMSHRC 1849.

representatives to be motivated primarily, if not solely, by the desire of a few of its miners to assist the UMWA in its organizational efforts.

In March 1992, Thunder Basin sought and obtained an injunction from the United States District Court for the District of Wyoming prohibiting MSHA from enforcing the Part 40 designation of Wolf and Butero. However, both the United States Court of Appeals for the Tenth Circuit and the United States Supreme Court held that the District Court did not have jurisdiction to issue the injunction, Thunder Basin Coal Company v. Martin, 969 F.2d 970, 973 (10th Cir. 1992); Thunder Basin Coal Co. v. Reich, 510 U.S. __, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994).

In March 1993, the Commission, in Kerr-McGee Coal Corporation, 15 FMSHRC 352, decided that designation of the same union officials as miners= representatives at another non-union mine in the same county as the Black Thunder mine was not invalid, per se. A citation issued to Kerr-McGee for failure to post the form so designating Wolf and Butero was affirmed.

On January 21, 1994, two days after the Supreme Court decision, and an MSHA internal communication regarding that decision, Thunder Basin=s President, James A. Herickhoff, wrote the MSHA District Manager in Denver, Colorado. He requested that the agency issue a citation to resolve the miners= representative issue at the Black Thunder mine. Herickoff stated further that Respondent expected MSHA to specify an abatement time Asufficient for the parties to pursue resolution of this important issue before the Commission and the courts.@

MSHA inspector James A. Beam issued such a citation (No. 3589040) at 8:10 a.m. on February 22, 1994. The citation required abatement within 15 minutes. When this period elapsed without compliance by Respondent, Beam issued Order No. 3589101 pursuant to section 104(b) of the Act. The order did not require Respondent to withdraw miners from any area of the mine or cease

any of its operations. Within hours Thunder Basin filed an application for temporary relief with the Commission and an application for an expedited hearing on the application.

On March 11, 1994, MSHA=s Office of Assessments informed Respondent of its intention to assess a $2,000 daily penalty for each day that the company failed to post the miners= representative form. After my March 25, 1994, decision denying temporary relief, 16 FMSHRC 1033, MSHA informed Respondent on March 27, 1994, that assessment of the daily penalty would commence that day.

On March 28, 1994, Thunder Basin filed a petition for discretionary review of my March 25, 1994 decision. The Commission affirmed the decision on April 8, 1994, 16 FMSHRC 671. On being apprised of the Commission=s decision on April 8, Thunder Basin posted the miners= representative notice.

The denouement of the litigation regarding the miners= representative can be summarized as follows:

August 24, 1994, ALJ decision affirming the citatior

December 2, 1994, Court of Appeals for the District

June 7, 1995, U.S. Court of Appeals for the Tenth Circuit affirms Commission decision in the instant case, Thunder Basin Coal Co v. FMSHRC, 56 F.3d 1275 (10th Cir. 1995)[2].

June 26, 1995, U.S. Supreme Court declines to grant ce 115 S.Ct. 2611, 132 L. Ed. 2d. 854 (1995).

The Secretary has proposed a penalty of $360 for the initial citation and a daily penalty of $2,000 for Respondent=s failure to timely abate that citation. The Secretary=s Complaint asks for a total penalty of $26,360. The $2,000 daily penalty is proposed from March 27, 1994, to April 8, 1994. This is the period from which MSHA informed Respondent that it would assess a daily penalty to the date the miners= representative form was

[2]The Commission did not grant Respondent=s petition for review of the ALJ decision, which became a final order of the Commission.

posted.

Assessment of A Civil Penalty

Section 110(b) of the Act provides that an operator who fails to correct a violation for which a citation has been issued within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues. The Commission is given authority to assess all civil penalties provided for in the Act in section 110(i).

The latter section directs that the Commission shall consider six criteria in assessing penalties: the operator=s history of previous violations, the size of the operator, the negligence of the operator, the gravity of the violation, the effect of the penalty on the operator=s ability to stay in business and the good faith of the operator in achieving rapid compliance after being notified of the violation. The parties have stipulated as to four of the criteria.

Thunder Basin had 23 violations of the Act in the two years preceding the posting violation. It had no prior violations of the cited provisions, nor any prior penalties assessed pursuant to section 110(b). It is a large operator and a $26,360 penalty would not affect its ability to stay in business. The parties also stipulated that the gravity of the violation was Alow,@ that it was not Asignificant and substantial,@ that no lost workdays could be expected and that there was no likelihood of injury due to the violation.

Thus, the only criteria at issue are the good faith of Respondent in achieving abatement and its negligence. As to the latter, Respondent did not negligently fail to post the miners= representative notice, it intentionally did not do so. The real question is Respondent=s Agood faith.@

A better way of phrasing the issue, however, is whether Respondent should be assessed a substantial civil penalty for its insistence on exhausting all avenues of judicial review prior to complying with the citation. The Secretary contends that Thunder Basin=s course violates the fundamental enforcement scheme of the statute. As the Secretary points out, that scheme requires an operator to abate a citation within the time set by MSHA, even if it contests the citation. Further, the Secretary argues that an operator who stands upon his rights, waiting for an adjudication of the citation=s validity, assumes the risk that if the citation is upheld that it will be assessed the daily penalties provided

for in section 110(b).

Respondent argues that the citation in this case is quite different than the typical MSHA citation. First, it asserts that the health and safety of its employees was not affected by its failure to post the miners' representative notice. Secondly, it argues that given the harm done to its rights under the National Labor Relations Act to fairly challenge the UMWA's organizational drive, it was entitled to wait until the Commission ruled on its application for temporary relief before posting the notice.

The difficulty with Respondent's position is that the Commission had already spoken on the issue in this case prior to the issuance of instant citation and order. Respondent, at numerous junctures, has argued that the facts in its case were distinguishable from those in Kerr-McGee. I rejected that argument in my March 25, 1994, decision on Respondent's application for temporary relief, 16 FMSHRC 1033 at 1037-38.

I reiterate my belief that any fair reading of the Kerr-McGee decision establishes that the Commission was fully aware that the designation of Wolf and Butero as miners' representatives was made in part, if not primarily, to assist the UMWA organizational drive at Kerr-McGee. Kerr-McGee is indistinguishable from the instant matter. This being the case, I conclude that MSHA was acting reasonably in refusing to extend the abatement date to allow Thunder Basin to adjudicate the validity of the citation issued to it on February 22, 1994, Martinka Coal Co, 15 FMSHRC 2452 (December 1993).

Assessing the penalty in this case requires a balancing of two considerations. First is what I conclude was Thunder Basin=s insistence of getting a Asecond bite of the apple@ in the adjudication process despite the Commission=s decision in Kerr-McGee. As I stated in my March 25, 1994 Order Denying Temporary Relief, this is analogous to requesting a stay of the Kerr-McGee decision, which is expressly prohibited by section 106(c) of the Act.

On the other hand, I agree with Respondent that this is not a case in which its failure to abate necessarily exposed miners to hazards. Indeed, I conclude that whether it did so is purely speculative. Only if Wolf or Butero could have apprised MSHA of hazards at Respondent=s mine of which miners at the site would not have been aware would Respondent=s noncompliance have posed a threat to its employees. Although such a possibility existed, I conclude that any danger arising from Respondent=s failure to abate was very remote.

Finally, I have given consideration to Respondent=s argument, at pages 14-15 of its brief, that in part it was relying on assurances from the Commission and Tenth Circuit that it would not be subject to daily penalties if it chose to litigate rather than abate. The decisions on which it relies, Mid-Continent Resources, Inc., 12 FMSHRC 949 (May 1990) and the Tenth Circuit decision overturning the injunction, predate the Commission=s decision in Kerr-McGee. Once the Commission decided Kerr-McGee, Respondent=s reliance on these assurances was unreasonable.

Balancing the aforementioned factors, I conclude that an appropriate penalty is $100 per day from March 27, 1994 to April 8, 1994; a total penalty of $1,300. Respondent could have been assessed a daily penalty commencing February 22, 1994. However, MSHA proposed a daily penalty from March 27, and I conclude that the $2,000 per day proposal is much too high given the low gravity of the violation.

ORDER

Respondent is hereby ordered to pay to the Secretary of Labor the sum of $1,300 within 30 days of this decision. Upon such payment this case is dismissed.

Arthur J. Amchan
Administrative Law Judge

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