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MSHA V. CUT SLATE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 25, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v. Docket No. WILK 79-13-P

CUT SLATE, INCORPORATED

DECISION

On November 21, 1978, the Secretary of Labor filed a petition for assessment of civil penalty against Cut Slate, Inc., seeking penalties totaling $170 for three alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. $801 et seq. (1978). 1/ On December 20, 1978, Cut Slate answered pro se. On May 16, 1979, the administrative law judge issued a notice of a prehearing conference to be held in Arlington, Virginia on June 5, 1979, to "expedite settlement, hearing or other disposition of the ... matter ... unless prior thereto the parties confer and file a joint motion to approve settlement." On May 25, an officer of Cut Slate responded by requesting that Cut Slate be excused from "attendance at a hearing and/or conferences at a point this great distance from my home and place of business." Cut Slate described itself as the operator of a very small slate quarry, and stated that its office in Fair Haven, Vermont is approximately 900 miles round-trip from Arlington. The matter was not settled, and Cut Slate did not appear at the June 5 prehearing conference. On June 5, 1979 the judge issued a decision pursuant to Rule 26(c) of the Commission's interim Rules of Procedure, 30 CFR $2700.26(c), holding Cut Slate in default and entered an order assessing the proposed penalty of $170. We reverse.

Rule 7 of the Commission's interim Rules of Procedure, 30 CFR

$2700.7, provides:

> All cases will be assigned a hearing site by order of the presiding Judge, who shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors. 2/

1/ The petition alleged violations of 30 CFR 56.15-4 (employee not wearing safety glasses), 30 CFR 56.4-4 (storage of flammable liquids), and 30 CFR 56.4-1 (posting of no smoking signs).

2/ This rule will become Rule 51 of the Commission's permanent Rules of Procedure, effective July 30, 1979 (see Federal Register, June 29, 1979, page 38231).

In order to effectuate the intent of Rule 7 to insure that all parties have reasonable access to the adjudicative process under the Act, we interpret the rule to apply to all instances where the parties are required to personally convene, including prehearing conferences as well as evidentiary hearings. 3/

Rule 7 was derived from section 5(a) of the Administrative Procedure Act, 5 U.S.C. $554(b), which states: "In fixing the times and places for hearings due regard shall be had for the convenience and necessity of the parties or their representatives." The report of the Senate Judiciary Committee considering the APA clarified how the interests of the parties and the agency are to be balanced:

> The last sentence, requiring the convenience and necessity of the parties to be consulted in fixing the time and places for hearings, includes an agency party as well as a private party; but the agency's convenience is not to outweigh that of the private parties and, while the due and required execution of agency functions may be said to be paramount, that consideration would be controlling only where a lack of time has been unavoidable or a particular place of hearing is indispensable and does not deprive the private parties of their full opportunity for a hearing.

Sen. Doc. No. 248, 79th Cong., 2d Sess., 203 (1946).

In NLRB v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941), the employer claimed that the agency action of designating Washington, D.C. as the hearing site resulted in great inconvenience and a heavy financial burden. The respondent's place of business was 700 miles from Washington. The court held that fair play required the Board to hold the hearing at a place convenient to each of the parties and stated:

> The power conferred on the Board by the Act to hold hearings anywhere within the territorial limits of the United States, was not conferred for its sole benefit, but for the benefit also of those subject to the provisions of the Act. It was not intended that those affected by the Act should be penalized by being required to travel and transport witnesses unreasonable distances to attend hearings pursuant to complaint, nor was it intended that the Act should be used as an instrument of intimidation or oppression on those affected by it. One of the purposes to be accomplished in the administration of every law is the maintenance of public confidence in the value of the measure.

3/ The Secretary of Labor also advocated this interpretation of Rule 7 in his brief on review in this case. We note, in reaching our decision, that interim Rule 1(b), 30 CFR $2700.1(b), provides that "[t]hese rules shall be liberally construed to secure the just, prompt and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved."

There is nothing in the record in this case to indicate that Arlington was selected as the prehearing site because either party requested that location. In fact, Cut Slate strenuously opposed the selection of Arlington as the prehearing site. In its letter to the judge of May 25, 1979, Cut Slate protested the designation of the site:

> ... [I]t does not appear reasonable ... that we should be required to travel 900 miles to attend a prehearing conference in Arlington, Virginia, which constitutes not only expense for travel and lodging, but loss of time from our business during our busiest season. It appears that we are being unfairly penalized for standing up for our convictions in declining to pay a penalty assessed by the Department of Labor which we feel was not warranted.... [I] respectfully request that this matter be disposed of without requiring my attendance at a hearing and/or conferences at a point this great distance from my home or place of business.

In the circumstances of this case, Cut Slate demonstrated sufficiently compelling reasons to excuse its attendance at a prehearing conference in Arlington, Virginia. 4/ Accordingly, we hold that the judge abused his discretion in holding a prehearing conference in Arlington and in defaulting the operator for failing to attend the conference. The case is reversed and remanded for further proceedings consistent with this decision.

4/ Cut Slate expressed concern not only at the financial burden that a hearing in Arlington and loss of time away from its business would require, but also at whether it was being unduly penalized for having exercised its right under the Act to contest the violations alleged and penalties sought by the Secretary of Labor. We are mindful that providing due process often entails additional cost to the government. However, we believe the remedial purposes of the Act are best served by providing for fair and accessible hearings, and by avoiding even the appearance of the use of inconvenient sites or other procedural obstacles to force settlements or defaults.