CCASE:
MSHA V. SEWELL COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
September 26, 1980

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Docket Nos. HOPE 79-6-P
HOPE 79-227-P

v.

SEWELL COAL COMPANY

DECISION

On June 5, 1979, the administrative law judge issued a prehearing order in this penalty proceeding, stating that if the parties were unable to settle the case, they were to "recommend a mutually acceptable time and site for hearing." In letters to the judge, Sewell Coal Company recommended several hearing dates in October 1979, while the Secretary stated that he "has no preference."

On January 2, 1980, the judge set these cases for hearing on February 5, 1980, in Charleston, West Virginia, apparently without calling counsel first to inquire if that would be a "mutually acceptable time ... for hearing." Two days later, the counsel for Sewell notified the judge that he had a schedule conflict because a case before a different Commission judge had previously been scheduled to be heard in Arlington, Virginia, on February 5. Sewell's counsel requested that the hearing in this case be postponed until March. On January 15 the judge denied the request, stating that "[o]ur exceedingly heavy docket makes it impossible to delay or adjust hearing dates based on the availability of one attorney."

The hearing was convened on February 5; no attorney appeared on behalf of Sewell. The judge held Sewell to be in default, and a decision was entered assessing a total of $1,220 in penalties, the amount originally proposed by the Secretary.

In his decision, the judge noted that the case load of the Commission's judges has become increasingly heavy and complex, that he is often required to travel to all parts of the country to conduct hearings, and that his itinerary is often tightly packed with hearing dates and involves numerous lawyers. He noted, as the Commission has, 1/ that Congress has forcefully expressed its desire that penalty cases be expeditiously adjudicated by the Commission. The judge considered the desire of Sewell to have its present counsel represent it in these cases, but rejected Sewell's argument that this attorney's expertise in mine safety and health matters is so great that only he can adequately represent Sewell. The judge also stated that "our moving this large number of cases cannot be dependent on [present counsel's] availability."

We granted Sewell's petition for discretionary review on April 21, 1980. 2/ We now reverse and remand.

In its brief on review, Sewell relies heavily upon the alleged expertise of its present attorney in arguing that the judge abused his discretion in refusing to grant a continuance. Sewell notes that this attorney has been the only lawyer, with the exception of two instances within the past two years, to represent the large Pittston Group of mine companies, of which Sewell is a part, in MSHA and surface mining matters. Sewell's argument, however, overlooks that right to counsel of its choice is not unqualified. The public interest in the expeditious adjudication of penalty cases demanded under the 1977 Mine Act and the convenience of the administrative law judge also must be considered. 3/ We are of the view that due process is given in this regard when a party has been afforded the opportunity to obtain competent counsel, since the public and Congress' interest in expediting adjudication is compelling, and the agency's flexibility cannot be limited in the manner suggested by the operator's counsel in this instance. This is not the extraordinary case in which due process requires that a party's choice of one particular counsel is overriding.

1/ Scotia Coal Mining Co., 2 FMSHRC 633, 1 BNA MSHC 2327, 1980 CCH OSHD 24,333 (1980), pet for rev. filed, No. 80-3303 (6th Cir., April 29, 1980).

2/ In its petition, Sewell did not object to the default sanction imposed by the judge. It raised only the question of whether the judge lawfully denied a continuance. We therefore have no occasion to discuss the use of a default here. Section 113(d)(2)(A)(iii) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. II 1978)["the 1977 Mine Act"].

3/ N.L.R.B v. Glacier Packing Company, Inc., 507 F.2d 415 (9th Cir. 1974); N.L.R.B. v. American Potash & Chemical Corp., 98 F.2d 488 (9th Cir. 1938).

Nevertheless, the judge's discretion in setting a date for a hearing is not absolute. Section 5(a) of the APA, 5 U.S.C. 554(b), which is made applicable by section 105(d) of the 1977 Mine Act, states that "[i]n fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." The administrative law judge must therefore balance the public interest and the due execution of the agency's functions with the convenience of the parties. 4/ The amount of "due regard" given in this case to the convenience of Sewell and its lawyer before the hearing was scheduled was little or none. In the prehearing order, the judge requested that all parties provide him with a list of proposed hearing dates. The Secretary responded that he had no preference for a date; Sewell's attorney specifically requested that the hearing be held on one of various dates in October 1979. There was no response from the judge until January 2, 1980, when he scheduled the hearing. It does not appear from the record that the judge considered Sewell's response to his prehearing order regarding hearing dates.

After the judge docketed the hearing for February 5, 1980, the attorney for Sewell immediately notified the judge of his schedule conflict. In denying Sewell's motion for a continuance, the judge said that his heavy caseload and docketing problems made rescheduling the hearing impossible. The judge's consideration was heavily influenced by the fact that he had already set a hearing date. The judge, to a large extent, presented Sewell with a fait accompli and did not consider the matter afresh when Sewell objected.

Although the question is a very close one, we conclude that, in the circumstances of this case, the judge abused his discretion in denying a short continuance without any apparent indication that the suggested October dates were considered and rejected. Although the judge may not have been required to solicit a "mutually acceptable time ... for hearing" in this case, once he embarked upon this course, it was arbitrary for him to have forced the operator to a hearing without even attempting the minimal scheduling accommodation sought by Sewell's counsel. We do not mean to imply, however, that a judge must schedule hearing dates only to suit the needs or desires of the parties. The considerations voiced by the judge are very real and legitimate ones. However, had the judge in this instance acknowledged Sewell's response to his prehearing order, and inquired of counsel's availability prior to establishing his hearing schedule, an accommodation might (though not necessarily) have been possible, and "due regard" to the parties' needs, in addition to the

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4/ See Attorney General's Manual on the Administrative Procedure Act, 46 (1947). See also Burnham Trucking Co. v. United States, 216 F. Supp. 561, 564 (E.D. Pa. 1963):

> The statute expressly speaks of the convenience of the "parties" and we interpret this to mean that in scheduling an application for hearing, the convenience of all persons concerned ... must be accorded due recognition. Due regard for the convenience and necessity of the parties cannot be divorced from the convenience of the agency.

agency's, could have been accorded at the outset. Because he did not do so, the judge was required to flexibly exercise his discretion anew when Sewell objected. If a judge inquires of the parties before setting a hearing date, he should at least give consideration to their responses. Whether he should accommodate such responses is a matter that falls within his discretion, dependent upon several factors, including, but not limited to, the convenience of the parties.

Nevertheless, the conduct of counsel for Sewell in ignoring the judge's hearing order and neither appearing at the hearing as scheduled, nor providing a representative even for purposes of setting forth on the record his client's position, is not condoned and we trust will not be repeated.

Accordingly, the judge's order is vacated and the case is remanded for further proceedings.

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Distribution

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