CCASE:
CLIMAX MOLYBDENUM V. MSHA
DDATE:
19801007
TTEXT:
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
October 7, 1980
CLIMAX MOLYBDENUM COMPANY, a
division of AMAX, INC.
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), Docket Nos. DENV 79-102-M
through 79-105-M
and
OIL, CHEMICAL, AND ATOMIC
WORKERS' INTERNATIONAL
UNION, LOCAL 2-24410

DECISION

In this case, a mine operator filed notices of contest of citations issued by the Secretary of Labor. After substantial pre-hearing discovery by both parties, the Secretary concluded that he could not prove that violations occurred. He vacated the citations and moved that the operator's notices of contest be dismissed as moot. The Secretary took the position then, and restates it before us, that his vacation of a contested citation automatically deprived the judge and this Commission of jurisdiction. The operator and the union did not challenge the vacation of the citations, but the operator did resist the dismissal of its notices of contest. It now seeks a declaratory order interpreting the standard alleged by the citations to have been violated, or, in the alternative, a set-off of its litigation expenses against future civil penalties. We hold today that once an operator contests a citation, the Secretary cannot deprive the Commission of jurisdiction by vacating such citation. In this case, the Secretary's motion to dismiss the operator's notices of contest should have been granted only upon terms and conditions that the judge deemed proper. However, for the reasons set forth herein, we believe that the only appropriate relief which should have been granted by the judge in this case was to vacate the citations in question with prejudice. We deny the operator's requests for declaratory relief and set-off expenses.
~2749
I.
On October 31, 1978, an inspector of the Labor Department's Mine Safety and Health Administration (MSHA) issued to Climax Molybdenum

Company, a division of AMAX, Inc., four citations under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. •801 et seq. (Supp. II 1978)["the Act"]. The citations alleged that, contrary to 30 CFR •57.5-5, there existed at the Climax mine in July of 1978, excessive concentrations of silica-bearing dust and that "[f]easible engineering and administrative controls were not being used to eliminate the need for respiratory protection [i.e., personal respirators]." 1/

Climax filed notices of contest of the citations under section 105(d) of the Act and asked that the citations be vacated and declared void. Climax denied that it violated the standard, alleging that feasible engineering and administrative controls were being used, and that officials of the Department of Labor had not indicated what other engineering or administrative controls they believed would be necessary to abate the alleged violations. Climax also alleged that the abatement periods set by the citations were too short, and requested, in the alternative, that the abatement period be extended. Climax did not comply with the abatement requirements of the citations.

1/ 30 CFR •57.5 reads in part as follows:

□57.5 Air quality, ventilation, radiation, and physical agents. Air Quality[.] General--Surface and Underground.

57.5-1 Mandatory. Except as permitted by •57.5-5:

(a) ... [T]he exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. * * * Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

57.5-5 Mandatory. Control of employee exposure to harmful contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with air. However, where accepted engineering controls measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentration of airborne contaminants exceeding permissible levels if they are

protected by appropriate respiratory protective equipment.
* * *
~2750
On June 26, 1979, the administrative law judge scheduled a prehearing conference for July 9 and a hearing for July 10. On July 2, the Secretary moved to dismiss Climax's notices of contest. The motion stated that the Secretary had determined that he "cannot sustain the particular violations alleged" and would vacate the citations. 2/ At a hearing before the administrative law judge, the Secretary stated he had found "problems with our sampling procedures" and "problems with our evaluation of feasibility." On July 5, MSHA vacated the citations on the ground that the Secretary had "insufficient evidence to establish that Climax was in violation of [section] 57.5-5, on the date the sample was taken."
At a conference on July 9 and 10, Climax opposed dismissal of its notices of contest. Climax argued it needed an interpretation of the standard now because the Secretary contemplated future enforcement of the dust standard based on the Secretary's erroneous interpretation. Climax argued that section 105(d) of the Act empowered the Commission to accord "other appropriate relief" over and above the vacation of citations, and that the "affirmative rulings" it was requesting were appropriate. Climax specifically stated that it did not dispute the Secretary's vacation of the citations.
In his decision the judge granted the Secretary's motion to dismiss the notices of contest on the ground that the case is moot. He noted that the interpretation Climax seeks will not necessarily be incapable of resolution in future cases. Inasmuch as the Secretary had vacated the citations, the judge reasoned, Climax "had obtained ... all the relief it can reasonably expect to obtain." The judge also recommended to the Commission that Climax be granted a set off of its expenses against future civil penalties. 3/ Climax petitioned for discretionary review, which we granted.
II.
We first reject the Secretary's argument that his vacation of a contested citation automatically deprives the Commission of jurisdiction. The rule urged by the Secretary would leave no room for the Commission to ensure that cases over which the Commission has jurisdiction are terminated on terms in accordance with the Act. We hold therefore that once an operator contests a citation before the Commission, the Secretary cannot by vacating the citation deprive the Commission of jurisdiction.

2/ Section 104(h) states:
Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by

the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106.

3/ Before issuing his decision, the judge stated to the parties that if Climax submitted a statement of its expenses and a request for a setoff, he would recommend a set-off to the Commission. Climax later submitted a statement of its expenses and a request for a set-off; the expense claimed amounted to about $190,500.

~2751

We view the Secretary as a plaintiff in this matter and apply Fed. R. Civ. P. 41(a)(2). 4/ The Secretary's representation that he cannot prove that excess concentrations occurred and the Secretary's concession that there can be no violation of the engineering control requirement of section 57.5-5 if the dust levels are not proved to exceed those permitted by section 57.5-1, lead us to hold that the judge should have required the Secretary to vacate the citations with prejudice, or should have done so himself. It appears that Climax is in substantial agreement with the position of the Secretary that without a violation of section 57.5-1, the issue of whether the engineering control requirements of section 57.5-5 are met does not arise. Cf. Morgan v. Koch, 419 F.2d 993, 999 (7th Cir. 1979)(federal court may dismiss where clear from opening statement that plaintiff had no possibility of recovery); Levine v. Colgate-Palmolive Co., 283 F.2d 532 (2d Cir. 1960), cert. denied, 356 U.S. 821 (1961)(federal court procedure; disclosure at pre-trial conference showed that plaintiff had no claim). To erase any doubt as to whether these citations were dismissed with prejudice, we now enter an adjudication on the merits and vacate the citations with prejudice.

Climax seeks a declaratory order pursuant to the provisions of section 105(d) of the Act and section 5(d) of the Administrative Procedure Act ["the APA"], 5 U.S.C. •554(e), 5/ interpreting 30 CFR □57.5-5 and stating that in July, 1978, there were no feasible dus controls that

---

4/ Commission Rule 1(b) states:

Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. •554 and 556), the Commission or any judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

Fed.R.Civ.P. 41(a)(2) states in part:

(a) Voluntary Dismissal: Effect Thereof.

* * *

(2) By Order of Court. Except as provided in paragraph (1)

of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. ... Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

5/ Section 105(d) states in part:

If ... an operator of a ... mine notifies the Secretary that he intends to contest the issuance of [a] ... citation ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with [5 U.S.C. •554] ...), and thereafter shall issue an order, based on findings of facts, affirming, modifying, or vacating the Secretary's citation ... or directing other appropriate relief ... [Emphasis added.]

The declaratory relief provision of the APA states that "[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

~2752

should have been implemented other than those then in use at the Climax mine. Climax argues that the case is not moot because the vacated citations were short-term administrative orders, capable of repetition, yet evading review within the meaning of Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1910); this same controversy will arise again and there is a need for resolving the legal issues now for the guidance of Climax; and the mere cessation by the Secretary of his allegedly illegal conduct (e.g., the issuance of the citations without inquiring into feasibility) does not moot a case, citing United States v. Concentrated Phosphate ExPort Ass'n., 393 U.S. 199, 203 (1968). Climax also emphasizes the Secretary's unwillingness to concede that his interpretation of the standard is fundamentally wrong.

The Secretary's position is that his vacation of the citations rendered this case moot because there is no longer a live controversy between adverse parties as to whether Climax violated 30 CFR •57.5-5. He argues that, because he would have been unable to prove the necessary predicate that dust levels were excessive, the judge could not have properly issued a ruling on the contours of Climax's duty to use engineering controls where there had been over-exposure; such a ruling, he argues, "would have been nothing more than an advisory opinion based upon a hypothetical state of facts." The Secretary also states that the enforcement policy that caused MSHA to issue these citations no longer exists, but he does not describe the new policy that has replaced it. Finally, the Secretary argues that the "capable of repetition, yet evading review" exception to the federal courts'

mootness doctrine does not apply here because the issue of the proper interpretation of the dust standard will not evade review once the Secretary cures whatever deficiency afflicted his sampling here.

We need not decide whether our vacation of the citations renders the Commission powerless to accord declaratory relief, or whether the declaratory relief aspects of this case are otherwise moot or not ripe or adjudication, for we conclude that we should not issue a declaratory order in any event.

We are not convinced that further proceedings in this case will serve the primary purpose of declaratory relief--to save parties from unnecessarily acting at their peril upon their own view of the law. Climax is not in the position of a party which must act at its peril if declaratory relief is denied, nor is it in the position of an operator that has obeyed a citation, contested it, sees it vacated, and seeks declaratory relief. Climax did not obey these citations, and, of equal importance, the Secretary did not attempt to enforce them by issuing a withdrawal order for failure to abate under section 104(b) or a notification of proposed assessment of penalty for failure to abate under sections 105(b) and 110(b). Climax has therefore not suffered abatement expenses, and there is little reason to believe that it will expend

~2753

monies on abatement or risk loss from failure-to-abate enforcement actions by MSHA before contests of any future citations are fully litigated. It appears that the Secretary's position on feasibility is now unsettled, or at least different from that which he took at the outset of this litigation. 9/ In short, we are not yet convinced that our early resolution of these issues is prudent. Declaratory relief is, accordingly, denied.

III.

Climax requests in the alternative that the Commission order that future civil penalties assessed against Climax be set off against the expenses Climax incurred in this litigation. We conclude that such a set-off is not appropriate relief and therefore deny the request.

Climax relies upon a decision of the Interior Department's Board of Mine Operations Appeals under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. •801 et seq. (1976)(amended 1977). In North American Coal Co., 3 IBMA 93, 1973-74 CCH OSHD •17,658 (1974), the Board recognized a limited right to a set-off of losses caused by later vacated withdrawal orders against the civil penalty for the associated violation. The Board's decision turned on its view that economic losses from withdrawal orders had "independent penalizing, deterrent effects" that should be considered when calculating the deterrent effect of a penalty for the associated violation. Climax argues that the principle established by the Board's North American

decision is equally applicable here. We disagree.
The Board believed that the prospect of suffering economic loss from the disruption caused by a withdrawal order would deter an operator from violating the Act and would induce compliance. It therefore viewed the civil penalty as a supplementary deterrent and inducement to comply that could be assessed in light of the economic loss from a withdrawal order. That premise does not apply, however, if the condition that gave rise to the withdrawal order is not the same condition for which a civil penalty is assessed. Thus, if the economic loss from a withdrawal order were set off against a penalty for a later violation, the later violation will not have been sufficiently penalized. That is apparently why the Board insisted that the withdrawal order and the penalty must stem from the same violation.

_____

9/ Cf. Mechling Barge Lines v. United States supra note 17, 368 U.S. at 331 (discretion of federal courts to withhold declaratory relief where "ultimate form [of challenged administrative practice] cannot be confidently predicted"). We also note that the Secretary's brief in Hilo Coast Processing Co., No. DENV 79 50-M, took no clear position on the proper interpretation of the term "feasible" in this same 1977 Mine Act standard.

~2754

Therefore, in this case, the Board's rationale in North American does not apply. Climax wants penalties for future violations to be set off by its expenses for litigation over past conditions. Yet, the litigation expenses Climax has incurred in the present case will not necessarily have any deterrent effect against future violations. Accordingly, the alternative requests for a declaratory order or for an order granting a set-off are denied. The citations are vacated with prejudice.

Richard V. Backley, Commissioner
Frank F. Jestrab, Commissioner
A. E. Lawson, Commissioner
Marian Pearlman Nease, Commissioner

~2755

Distribution
Hugh A. Burns, Esq.
Rosemary M. Collyer, Esq.
Dawson, Nagel, Sherman & Howard
2900 First of Denver Plaza
633 Seventeenth St.
Denver, Colorado 80202
W. Michael Hackett, Esq.
Climax Molybdenum Company

13949 West Colfax Ave.
Golden, Colorado 80401
David Jones, President
Oil, Chemical & Atomic Workers Int'l. Union
Local No. 2-24410
P.0. Box 949
Leadville, Colorado 80461
Edwin Matheson, Chairman
Int'l Brotherhood of Elec. Workers
Local Union 1823
Minturn, Colorado 81645
Thomas A. Mascolino, Esq.
Dennis R. McDaniel, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Va. 22203
James A. Kasic
440 S. 43rd St.
Boulder, Colorado 80303