CCASE:
MSHA V. MEDICINE BOW COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 26, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. WEST 81-163
v. WEST 81-164

MEDICINE BOW COAL COMPANY

DECISION

This consolidated case on interlocutory review involves two civil penalty proceedings arising under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979). The issue is whether the Secretary's admitted failure to file his penalty proposals in the two proceedings below within the 45-day period prescribed by Commission Rule 27, 29 C.F.R. $ 2700.27, required dismissal of the cases. For the reasons discussed below, we affirm the administrative law judge's conclusion that under the test announced in Salt Lake County Road Department, 3 FMSHRC 1714 (1981), dismissal was not warranted on the facts present in this record.

The facts are not disputed. In the first case (Docket No. WEST 81-163), an MSHA inspector issued five citations to Medicine Bow Coal Company during the period June 24, 1980, through August 12, 1980. 1/ In the second case (Docket No. WEST 81-164), the same MSHA inspector issued Medicine Bow another citation on August 26, 1980. 2/ On December 22, 1980, Medicine Bow received the Secretary's proposed assessments in both cases for the six citations. Medicine Bow timely sent the Secretary notices of contest by certified mail in both cases. According to the certified mail return receipts, the notice of contest in the first case was received in the Secretary's Denver, Colorado Assessment Office on January 19, 1981, and the notice in the second case was received on January 20, 1981.

1/ The citations charged violations of various regulations applicable to surface coal mining operations. One citation alleged a violation of 30 C.F.R..$ 77.504 (damaged insulation on electrical equipment); another alleged a violation of 30 C.F.R. $ 77.603 (improper clamping of trailing cables); and three alleged violations of 30 C.F.R. $ 77.1104 (accumulations of combustible material).

2/ This citation alleged a violation of 30 C.F.R. $ 77.1605(b) (inadequate brakes for mobile equipment).

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On February 2, 1981, the Secretary sent copies of both notices of contest to the Commission's Washington, D.C. office, and on February 9, 1981, the Commission assigned docket numbers to the two cases. (Commission Rule 26, 29 C.F.R. $ 2700.26, requires the Secretary to "immediately transmit to the Commission the notice of contest, at which time a docket number will be assigned and all parties notified.") On March 20, 1981, the Secretary mailed his penalty proposals in both cases to the Commission, and the documents were received on March 23, 1981. 3/

In relevant part, Commission Rule 27 provides:

(a) When to file. Within 45 days of receipt of a timely notice of contest of a notification or proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

Applying Rule 27 and with January 19 and 20, 1981, as the respective dates on which the Secretary received Medicine Bow's notices of contest, the Secretary's penalty proposals were due to be filed on March 5, 1981, in the first case, and March 8, 1981, in the second. 4/

Since the Secretary filed on March 20, 1981 (n. 3 below), his proposals were a maximum of 15 days late.

In both cases, Medicine Bow filed motions for dismissal with the judge based on the late filing of the Secretary's penalty proposals. In separate orders issued on August 7, 1981, the judge denied the motions on the basis of our decision in Salt Lake, which was issued on July 28, 1981, after all the relevant filings had occurred in these two cases.

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3/ The certificates of service and envelopes used for mailing reflect that the Secretary apparently mailed the penalty proposals by certified mail, although the return receipts are not included in the formal files. The judge found that there was "no indication in the file" that the Secretary had sent the proposals by certified mail, and treated the documents as having been filed on March 23, 1981, when they were received by the Commission. We give the Secretary the benefit of the doubt in this matter and treat his proposals as having been filed on March 20, 1981, when they were apparently sent by certified mail. See Commission Rule 5(d), 29 C.F.R. $ 2700.5(d) (as relevant here, filing is effective upon receipt or upon mailing by certified or registered mail, return receipt requested). In any event, the three-day difference in the filing date does not affect our resolution of this case.

4/ The filing date in the second case was actually Saturday, March 6,

1981, but Commission Rule 8(a), 29 C.F.R. $ 2700.8(a), would move the due date to the. following Monday.

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This case basically involves a straightforward application of Salt Lake to the relevant facts. Nevertheless, there are a few preliminary matters on computation of time and the Secretary's response to Salt Lake which we address before moving to the major analysis.

We affirm the judge's determination that the Secretary will be deemed to have received a notice of contest sent by certified or registered mail on the date indicated on the return receipt (in this case, January 19 and 20). 5/ We disagree with the judge, however, that the filing time for penalty proposals is augmented by the 5 days that Commission Rule 8(b), 29 C.F.R. $ 2700.8(b), allows for filing documents in response to those served by mail. On review, the Secretary disavows reliance on this 5-day bonus period. Br. 8 n. 4. The 45-day period in Rule 27 is a sufficient amount of time to allow for the processing of mail. We fear that further delay would be the inevitable by-product of reading Rule 8(b) into Rule 27. We hold, therefore, that Rule 8(b) does not apply to the Secretary's filing of penalty proposals.

In his brief to us, the Secretary states that "the test established in Salt Lake reflects the appropriate factors which an administrative law judge should consider in deciding whether or not to accept a late-filed proposal for penalty." Br. 6. However, the Secretary takes issue with a major premise of Salt Lake--namely, that Commission Rule 27 "implements" the statutory directive in section 105(d) of the Mine Act that "the Secretary shall immediately advise the.Commission of [a notification of contest of penalty], and the Commission shall afford an opportunity for hearing." See Salt Lake, 3 FMSHRC at 1715. The Secretary contends that he satisfies this statutory directive by complying with Commission Rule 26, which, as noted above, requires the Secretary after receipt of a notice of contest to "immediately transmit" the notice to the Commission so that a docket number can be assigned.

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5/ We fully endorse the judge's rejection of the Secretary's argument that the date on which such documents are internally stamped "received" should be the notification date. As he stated:

The purpose of sending a document by certified mail is to provide the sender confirmation of its receipt by the proper party and the date of receipt. This is the only date the mine operator has notice of and upon which it can base any subsequent actions.

The Secretary's statement that it must rely on [internal

bureaucratic processing of the mail] does not support its position. Mine operators as well could contend that they have various office procedures upon which they must rely that may delay the actual receipt of a notice from the government by the individual charged with the responsibility of responding to that document. The law has traditionally recognized the date on the return receipt as evidence of the date a document was received. I see no reason to give special consideration to the bureaucratic procedures of the government.

(Footnote continued)

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The Secretary takes too narrow a view of the relationship of Rules 26 and 27 to section 105(d). As developed in Salt Lake. Congress' overriding concern in enacting section 105(d) was providing for prompt penalty enforcement. To effectuate that goal, the Secretary has two related duties under Commission rules after receiving a notice of contest: notifying the Commission's docket office in order that a docket number can be assigned, and filing his penalty proposal so that the crucial stage of the pleading process is started, leading to the hearing that the Commission must provide under section 105(d). That hearing requires more than a docket number; it requires the filing of a penalty proposal as an essential pleading. Both procedural steps are a form of "notification," one for clerical purposes, and the other for pleading purposes; both implement the Mine Act's mandate for prompt penalty assessment. If the Secretary believes that his clerical notice to the docket office under Rule 26 is sufficient for "notification of the Commission," that may well explain the delays in filing penalty proposals. We accordingly reject the Secretary's position. We now turn to the issue of whether the judge properly refused to dismiss the cases.

The judge correctly interpreted Salt Lake as creating a two-part test. Salt Lake first established that the Secretary must show adequate cause for any delayed filing. 3 FMSHRC at 1715-17. The Secretary's excuse here is basically the same one accepted as minimally adequate in Salt Lake: insufficient clerical help. The excuse was presented in more detail in these cases, and considerably less delay was involved than in Salt Lake. The significant operative events in the two proceedings below occurred prior to our warning in Salt Lake and, thus, the Secretary did not have the benefit of those views when the late filings occurred. Had the delay occurred after our admonition in Salt Lake, our conclusion as to whether adequate cause was established might be different. 6/ We also held in Salt Lake that adequate cause notwithstanding, dismissal could be required where an operator demonstrates prejudice

caused by the delayed filing. 3 FMSHRC at 1715-18. Medicine Bow has shown no specific claim of prejudice such as missing witnesses, or lateness so great as to unduly delay a hearing. Medicine Bow's argument that during the pendency of the case it is effectively forced to comply with MSHA's interpretation of standards and that the citations are carried on MSHA's records, presents nothing more than the unavoidable consequences of a contested citation faced by all operators. As the judge reasoned, the relatively short delay here did not result in any significantly later hearing, and if Medicine Bow wanted expedited proceedings, it should have so moved. In short, Medicine Bow has failed

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fn. 5/ continued
The Secretary did not press this argument on review. The Secretary also states that steps have been taken to improve the internal mail routing of notices of contest--a development that we hope augurs well for increased efficiency in processing penalty cases.
6/ We reject the suggestion in the Secretary's brief that unless his delayed filing is caused by "significant malfeasance," a penalty proceeding should not be dismissed absent prejudice to the operator. Our test is adequate cause, not absence of malfeasance, significant or otherwise.
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to show a delay so great that preparation or presentation of its case was prejudiced.
On the basis set forth above, we affirm the judge. We vacate our stay pending interlocutory review, and remand these cases to the judge for further proceedings.
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