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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 11, 1983
UNITED MINE WORKERS OF
AMERICA (UMWA)

v. Docket No. CENT 81-223-R

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

DECISION

The broad question presented here is whether miners, or representatives of miners, have statutory authority under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. V 1981) ("the Mine Act"), to initiate review of citations issued by the Secretary of Labor through the filing of a notice of contest. The administrative law judge held that miners and their representatives do not have such a right. For the reasons set forth below, we agree.

This case arose in the following context. On May 13, 1981, an inspector from the Mine Safety and Health Administration issued an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act to Garland Coal & Mining Company. 30 U.S.C. $ 817(a). 1/ In the withdrawal order, the inspector charged that explosives were being transported to the blasting area of the mine in a manner that constituted an imminent danger. The order alleged that the inspector had observed explosive materials being transported on the front seat and in the glove compartment of a truck.

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1/ Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from,

and to be prohibited from entering, such area until
an authorized representative of the Secretary
(Footnote continued)
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On the same document as the imminent danger withdrawal order, the inspector also issued a citation under section 104(a) of the Mine Act. 30 U.S.C. $ 814(a). 2/ The citation alleged that the manner in which the explosives were being transported constituted a violation of 30 C.F.R. $ 77.1303(c). That mandatory safety standard states that "[s]ubstantial nonconductive closed containers shall be used to carry explosives, other than blasting agents to the blasting site." In addition, the citation also contained a "significant and substantial" finding. 3/

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Fn. 1/ continue
determines that such imminent danger and the
conditions or practices which caused such
imminent danger no longer exist. The issuance
of an order under this subsection shall not
preclude the issuance of a citation under
section 104 or the proposing of a penalty
under section 110.
30 U.S.C. $ 817(a).
2/ Section 104(a) provides:
If, upon inspection or investigation, the
Secretary or his authorized representative
believes that an operator of a coal or other
mine subject to this Act has violated this Act,
or any mandatory, health or safety standard,
rule, order, or regulation promulgated pursuant
to this Act, he shall, with reasonable promptness,
issue a citation to the operator. Each citation
shall be in writing and shall describe with
particularity the nature of the violation,
including a reference to the provision of the Act,
standard, rule, regulation, or order alleged to
have been violated. In addition, the citation
shall fix a reasonable time for the abatement of
the violation. The requirement for the issuance
of a citation with reasonable promptness shall
not be a jurisdictional prerequisite to the
enforcement of any provision of this Act.
30 U.S.C. $ 814(a).
3/ With regards to significant and substantial findings, section 104(d)(1) of the Mine Act in part provides:

If, upon any inspection of a coal or other mine,
an authorized representative of the Secretary finds
that there has been a violation of any mandatory health
or safety standard, and if he also finds that, while
(Footnote continued)
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Thereafter, the United Mine Workers of America ("UMWA"), proceeding as a representative of the miners, filed a notice of contest with the Commission. In the notice of contest, the UMWA submitted that there was "sufficient evidence" to establish that the violation of 30 C.F.R. $ 77.1303(c) was the result of the operator's "unwarrantable failure" to comply with the standard. See section 104(d)(1) at n.3, supra. Accordingly, the UMWA requested that the Commission modify the citation so as to include an unwarrantable failure finding. Garland Coal, the operator to which the citation and order were issued, did not contest the Secretary's action or seek to intervene in the proceeding instituted by the UMWA.

The Secretary filed a motion to dismiss the UMWA's notice of contest on the ground that the UMWA had failed to state a claim upon which relief can be granted. The Secretary argued, among other things, that an "unwarrantable failure" finding cannot be made in a citation if the involved violation is also serving as the basis for an imminent danger withdrawal order. In that regard, the Secretary stated that section 104(d)(1) provides that in order to make an unwarrantable failure finding, the inspector must first determine that the cited violation did not result in an imminent danger. Thus, the Secretary submitted that under the facts of this case the inspector was precluded from making an unwarrantable failure finding.

The UMWA, in turn, filed a motion for summary decision with the judge. It argued that the "Inspector's Statement" regarding the violation of 30 C.F.R. $ 77.1303(c), together with the Mine Safety and Health Administration's "Narrative Findings for a Special [Penalty] Assessment", established that the violation resulted from the operator's unwarrantable failure to comply with the cited standard. 4/

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Fn. 3/ continue
the conditions created bY such violation do not
cause imminent danger, such violation is of such
nature as could significantly and substantially
contribute to the cause and effect of a coal or
other mine safety or health hazard, and if he finds
such violation to be caused by an unwarrantable
failure of such operator to comply with such mandatory
health or safety standards, he shall include such
finding in any citation given to the operator under

this Act.
30 U.S.C. $ 814(d)(1). (Emphasis added.)
4/ Both the inspector's statement and the narrative findings were attached to the motion for summary decision. The inspector's statement was a standardized form filled out by the inspector who had issued the citation and it addressed the cited violation. The narrative findings was a statement by the Mine Safety and Health Administration to the effect that the circumstances of the case warranted the waiving of the penalty assessment formula appearing in 30 C.F.R. $ 100.3 and the determination of a "special" assessment under 30 C.F.R. $ 100.4 (1981).
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On August 28, 1981, the judge issued a pre-hearing order dismissing the case. 3 FMSHRC 2016 (August 1981)(ALJ). The judge based his dismissal on the ground that the UMWA, as a representative of the miners, did not have the statutory authority to contest the citation. In light of his conclusion, the judge did not pass upon the issues raised in the parties' pre-hearing motions.
Following the judge's order of dismissal, the UMWA's petition for discretionary review was granted by the Commission. 30 U.S.C. $ 823(d)(2). We also granted leave to intervene to Peabody Coal Company, U.S. Steel Corporation and the Council of the Southern Mountains, Inc., and oral argument was heard.
The issue before us at the present time is extremely narrow. Although a number of potentially important questions involving the interpretation of various key provisions of the Mine Act have been raised by the parties, the sole issue ruled on by the judge and before us on review is whether miners and representatives of miners ("miners") have the statutory authority under the Mine Act to contest citations. Because we agree with the judge's disposition of the preliminary question of the UMWA's right to institute this proceeding, we need not reach or decide at this time the secondary issues raised by the parties.
The judge's conclusion that miners do not have the right to contest citations was based on the express statutory language of section 105(d) of the Act. 30 U.S.C. $ 815(d). Section 105(d) sets forth certain Secretarial actions that operators and miners may contest:
If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under

section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.... The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section.
(Emphasis added.)
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In sum, the above statutory language states that under section 105(d) an operator may contest (1) the issuance or modification of an order of withdrawal, (2) a citation, (3) a proposed penalty assessment, and (4) the reasonableness of the length of abatement time contained in the citation. Comparatively, miners may contest (1) the issuance, modification or termination of a section 104 withdrawal order and (2) the reasonableness of the length of abatement time contained in the citation.
Thus, as the judge noted in his order dismissing the case, "[t]he words 'or citation' are conspicuously absent from the list of items a miner or representative or miners may contest." 3 FMSHRC at 2017. Accordingly, a plain reading of the unambiguous language of 105(d) supports the conclusion that Congress did not intend for miners to have the right to contest citations. 5/
Despite the unambiguous language of section 105(d) the UMWA submits that the Mine Act's legislative history establishes that Congress in fact intended miners to have the right to contest citations. 6/ In support of this argument we are directed to the following passage in the Conference Report:
Procedure for Enforcement
The Senate bill required that within a reasonable time after completion of the inspection, the Secretary notify the operator, by certified mail, of the proposed civil penalty to be assessed for any violation noted in the inspection. Such notice, a copy of which must be sent to the representatives of miners at the mine, would notify the operator that he had fifteen working days

from receipt to contest the citation or proposed civil penalty assessment. If within 15 working days, the operator or any miner or the representative of miners did not contest the civil penalty assessment or citation, such would be the final order of the Commission, and would not be reviewable in any court.
* * * * * *
The conference substitute conforms to the Senate bill, with an amendment changing the period within which appeals may be taken from orders and penalty proposals from "fifteen working days" to "thirty days." The conferees intend that this shall mean 30 calendar days.

5/ Both the UMWA and intervenor Council of the Southern Mountains, Inc. note that in Energy Fuels Corp., 1 FMSHRC 299 (May 1979), we found section 105(d) to be ambiguous. However, our discussion of ambiguity in Energy Fuels was directed at the question of whether an operator may contest a citation prior to the Secretary's proposing a penalty. It is inapposite to the question presented here.

6/ In that respect, the UMWA is joined by intervenors Peabody Coal Company, U.S. Steel Corporation and the Council of the Southern Mountains, Inc.

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S. Rep. 95-461, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1328 (1978) ["Legis. Hist."]. (Emphasis added.)

We find the UMWA's and intervenors' reliance upon this portion of the legislative history to be misplaced. This portion of the Conference Report concerns section 105(a) of the Act -- addressing the procedural scheme for when a citation and proposed penalty become a final order of the Commission -- and not section 105(d). 7/ We read section 105(a) and the corresponding legislative history contained in the Conference Report as providing that unless the operator contests the citation and/or proposed penalty within the 30-day period, and unless the miners contest the reasonableness of the length of the abatement period contained in the citation within that same time frame, the citation and proposed penalty become a Commission final order. Thus, we find that section 105(a) does not expand upon the section 105(d) rights of miners to contest specified Secretarial enforcement actions -- that is, the right to contest the issuance, modification and termination of a withdrawal order issued under section 104 and the right to challenge the length of the abatement period contained in a citation.

We find the Mine Act's legislative history relating to section 105(d) to be equally unpersuasive. Regarding section 105(d), the Conference Report states the following:

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7/ Section 105(a) provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

30 U.S.C. $ 815(a). (Emphasis added.)

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Administrative Review

The Senate bill required that parties wishing to contest the issuance or modification of an order, or a notification, or the abatement requirement notify the Secretary of the intention to contest within 15 working days of receipt thereof. The Senate bill required that the Secretary immediately notify the Commission, which would afford the parties an opportunity for a hearing, and issue a final decision, based on findings of fact affirming, modifying or vacating the Secretary's order, citation or proposed penalty, and directing other appropriate relief. The order of the Commission would become final 30 days after its issuance.

Miners or their representatives were afforded the
opportunity to participate in such hearings as parties.
* * * * * *
The conference substitute conforms to the Senate bill,
with the amendment providing 30 calendar days for the
filing of administrative appeals rather than the
15 working days provided in the Senate bill.
S. Rep. 95-461, 95th Cong., 1st Sess. 53 (1977), Legis. Hist. at 1331.
(Emphasis added.)

Although this portion of the Conference Report refers to "parties" contesting citations, in light of section 105(d)'s specific grant to operators, but not miners, of the right to contest citations, we find the preceding passage insufficient to establish that Congress intended to allow miners to contest citations. Instead, this portion of the Conference Report merely collectively summarizes the section 105(d) statutory rights that operators and miners have to challenge Secretarial enforcement actions. 8/

The Senate Report on S.717, the bill that substantially formed the basis for the Mine Act, is also bereft of any specific language to indicate that the Senate intended miners to have the right to contest citations. See S. Rep. 95-181, 95th Cong., 1st Sess. 34-35 (1977) ["S. Rep."], Legis. Hist. at 622-623. With regard to section 105(d), the Senate Report's section-by-section analysis states:

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8/ For that same reason, we reject the UMWA's argument that Commission Rule 20(b) expressly provides for miners to contest citations. 29 C.F.R. $ 2700.20(b). That procedural rule merely summarizes the various rights to contest set forth in section 105(d) of the Mine Act and quoted extensively in Commission Rule 20(a). 29 C.F.R. $ 2700.20(a). Moreover, we could not, through procedural rules, expand upon the statutory rights to contest granted by Congress in section 105(d).

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Section [105(d)] provides that if an operator notifies
the Secretary that he intends to contest the issuance
or modification of an order or a notification, or the
reasonableness of an abatement period, or any miner or
representative of miners notifies the Secretary that
he plans to so contest, the Secretary shall immediately
so advise the Commission. The Commission must then
provide an opportunity for a hearing and thereafter
issue an order affirming, modifying, or vacating the
Secretary's citation, order, or proposed penalty or
directing other appropriate relief. Such an order
becomes final 30 days after its issuance.

The rules of procedure prescribed by the Commission shall provide affected miners or their representatives an opportunity to participate as parties to Commission hearings under this subsection. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section [104].

S. Rep. at 69, Legis. Hist. at 657. (Emphasis added.)

As with the Conference Report, in light of the unambiguous language of section 105(d), we view the section-by-section analysis as an inartful summary of the statutory provisions of that section. 9/

In sum, we find that a careful reading of the cited portions of the Mine Act's legislative history does not support the proposition that in section 105(d) Congress intended to confer upon miners the statutory right to contest citations. Moreover, even if we read the legislative history in the light most favorable to the UMWA's position, we do not find such Congressional intent to be so clearly expressed as to overcome the plain and unambiguous language used in section 105(d). Accordingly, we find the clear and precise language of section 105(d) to be controlling. See American Tobacco Company v. Patterson,_____U.S._____, 71 L.Ed. 2d 748, 755 (1982); United States v. Turkette, 452 U.S. 576, 580 (1981).

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9/ In addition, a statement made by Senator Javits during the Senate floor debate on S.717, and relied upon by the UMWA, likewise fails. Senator Javits stated:

Administrative review of challenges to these procedures is lodged in an independent Mine Safety and Health Review Commission. Any affected party may appeal a citation, penalty, or order, and the Commission is directed to hold a hearing on their claim.

Legis. Hist. at 910-911. (Emphasis added.) For the reasons mentioned above, we do not equate the phrase "[a]ny affected party may appeal a citation" with affording affected miners the right to contest a citation.

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Furthermore, assuming arguendo that the Mine Act's legislative history could be read to evidence Congressional intent to confer on miners standing to contest citations, the failure of Congress to specifically incorporate such intent into the language of section 105(d) would be especially puzzling in view of the fact that the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976)(amended 1977), did not contain a specific statutory provision allowing miners or operator's to contest the merits of a notice of violation -- the Coal Act's equivalent of a citation. See 30 U.S.C. $ 815(a)(1)(1976). In the Mine Act, Congress

specifically gave operators the right to contest citations. One would assume, therefore, that if Congress had intended miners to also have this right, it would have at the same time specifically provided them such a right in section 105(d). 10/

In the final analysis, we confront again the assertion of a right which leads to a search of the statute to find the requisite authority. The statute contains no express provision for the asserted right. Our dissenting colleague searches elsewhere and finds implications, but no express statutory provision.

It may very well be desirable for the miner or the miner's representative to have a right to contest the issuance of a citation, but it remains the prerogative of the Congress to provide such right. It is not the prerogative of this Commission to confer that right in the absence of statutory provision. Repeated recitation of the purpose of the 1977 Act, which is well known, gives no support to an attempt to impart to the Act a provision which simply is not there. The 1977 Act represents a thoroughgoing amendment of the 1969 Act. The basic issue in this case did not spring forth last month or last year. It finds inception in the absence of statutory provision in the 1969 Act, which forcefully begs the question: If it is so plain that the Congress intended to provide the right asserted here, why was it not clearly provided for in the 1977 Act?

Finally, we reject the claims advanced by the UMWA and intervenor Council of the Southern Mountains, Inc. that miners are denied due process and equal protection of the law by not being permitted to initiate review of citations issued by the Secretary. Regarding the due process objection, neither the UMWA, nor the Council of the Southern Mountains, has identified a "life, liberty or property" interest of which miners are being deprived in this case. The fact that Congress enacted remedial safety and health legislation does not confer upon miners a due process right to initiate a challenge to the Secretary's issuance of a citation. Moreover, due process requires only that a party

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10/ Where Congress intended for miners to have an affirmative right under the Mine Act, it clearly provided for such. E.g., section 101(a)(7), 30 U.S.C. $ 811(a)(7) (transfer of miners overexposed to hazardous substances); section 103(c), 30 U.S.C. $ 813(c) (requiring (Footnote continued)

be afforded an opportunity to be heard "at a meaningful time and in a meaningful manner" appropriate to the nature of the case. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Thus, even if we assumed the existence of a due process right of miners to be heard regarding the issuance of

citations, the informal Secretarial review provisions contained in 30 C.F.R. Part 43 afford miners due process. Those informal review provisions allow miners the opportunity to explain to a representative of the Secretary why a citation should be issued.

As for the equal protection argument, we find that the UMWA and the Council of the Southern Mountains have failed to show that no rational reason exists for the manner in which Congress sought to achieve safety in the mines -- that is, by permitting operators to initiate a contest to the Secretary's issuance of a citation, but not miners. See Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 21-27 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982). In fact, a rational reason for the statutory scheme concerning the right to contest citations seems obvious -- Congress quite rationally may have thought it unnecessary to afford miners the right to contest the Secretary's issuance to an operator of a citation alleging a violation of the Act. Congress legitimately could have expected that operators, not miners, are adversely affected by issuance of a citation.

Fn. 10/ continued

the Secretary to adopt regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents, and to have access to the records of one's own exposure); section 103(d), 30 U.S.C. $ 813(d) (interested persons' access to accident reports); section 103(f), 30 U.S.C. $ 813(f) (right to accompany Mine Safety and Health Administration inspector during inspection of mine, without loss of pay); section 103(g), 30 U.S.C. $ 813(g) (right to request a special inspection if there is reason to believe that a violation or an imminent danger exists and right to obtain informal review if the inspector does not issue a citation or a withdrawal order); section 105(c)(3), 30 U.S.C. $ 815(c)(3) (right to bring an independent action for discrimination before the Commission in the event that the Secretary declines to do so); section 107(e)(1), 30 U.S.C. $ 817(e)(1) (right to seek Commission review of the Secretary s issuance, modification or termination of an imminent danger withdrawal order); section 111, 30 U.S.C. $ 821 (right to seek compensation if idled as a result of a withdrawal order issued under certain sections of the Act); section 115, 30 U.S.C. $ 825 (mandatory health and safety training); section 302(a), 30 U.S.C. $ 862(a) (miners' access to roof control plan); section 303(d)(1), (f), (g) and (w), 30 U.S.C. $ 863(d)(1), (f), (g), and (w) (interested persons' access to records of operator's safety and health examinations); and section 312(b), 30 U.S.C. $ 872(b) (miners' access to confidential mine map).

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Accordingly, we hold that miners and representatives of miners

do not have statutory authority under section 105(d) of the Mine Act to initiate review of citations issued by the Secretary of Labor. 11/ The judge's order dismissing the UMWA's notice of contest is, therefore, affirmed.

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

11/ This case does not raise, and we do not decide, any issue concerning the scope of the right of miners or their representatives under section 105(d) to participate as parties in a proceeding initiated through an operator's contest of a citation. Compare e.g., OCAW v. OSHRC, 671 F.2d 643, 647-48 (D.C. Cir. 1982), with Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3d Cir. 1980).

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Commissioner Lawson dissenting;

The majority has defined the question before us as "broad", but found the issue to be "extremely narrow". Slip. op. at 1, 4, supra. However, defined, I would hold that they have erred in finding that miners or their representatives are barred from initially contesting section 104(a) citations for reasons other than the reasonableness of abatement periods.

It is significant that the miners' representative (UMWA), and intervenors Council of the Southern Mountains, Peabody Coal Co., and U.S. Steel Corporation, all agree that the miners and their representative do have the authority under the statute to contest the citation here issued by the Secretary. Oral Arg. 49-50. I concur. 1/ The Secretary therefore stands alone in asserting that miners should be denied the right to thus participate in this implementation of the Act.

The Mine Act granted both operators and miners expanded rights to challenge citations, as contrasted to the 1969 Coal Act, which permitted challenges only as to the time period for abatement. 30 U.S.C. $ 815(a)(1) (1970). The judge below and majority here premise their denial of Secretarial actions which miners may contest on--a part of--the language of section 105(d), which enumerates matters an operator may contest as:

"the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof under section 104." Federal Mine Safety and Health Act of 1977 $ 105(d), 30 U.S.C. $ 815(d) (1981 Supp.).

That same section of the Act, however, also provides that miners

or their representatives may contest the issuance, modification or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104 (emphasis added). From this the majority concludes that because citations and penalty assessment are included in the list of actions which operators may contest, but not mentioned in the list of actions which miners and their representatives may contest, Congress intended to deprive miners of the opportunity to challenge citations and penalty assessments.

1/ As set forth hereinafter, I take no position on the merits of the particular case before us, but would remand to the ALJ for hearing and development of the facts and determination of the other issues addressed by the parties. I would, to that extent, agree with the majority that the secondary issues (slip. op. at 4, supra), need not be addressed at this time.

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However, the then majority of this Commission in the case of Energy Fuels, 1 FMSHRC 299 (May 1979), in construing section 105(d) of the Act, conceded that its language was ambiguous. 2/ As stated there:

> These ambiguities convince us that the words of the 1977 Act can not serve alone as an accurate gauge of congressional intent. We have therefore considered the legislative history of the 1977 Act, and what construction and application of the 1977 Act would best implement it.

Energy Fuels, supra, at 301.

A review of that legislative history reflects the intention of the Congress that not only operators but miners are permitted to contest citations. As the Senate Report noted:

> Section 10[5](d)--provides that if an operator notifies the Secretary that he intends to contest the issuance or modification of an order or notification, or the reasonableness of an abatement period, or any miner or representative of miners notifies the Secretary that he plans to so contest, the Secretary shall immediately so advise the Commission.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 69 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 3401, 3468 (emphasis added).

The Conference Report on the Act also reviewed and specifically commented on section 105:

> If within 15 working days, the operator or any miner or the representative of miners did not contest the civil penalty assessment or citations, such would be the final order of the Commission....

H. Conf. Rep. No. 95-655, 95th Cong., 1st Sess. 50 (1977) reprinted in [1977] U.S. Code Cong. & Ad. News 3485, 3498 (emphasis added). Even analyzed negatively, as does the majority, the legislative history is silent as to any restriction of the right of miners or their representatives to contest citations, or that Congress intended miners to have less opportunity to challenge citations, or their modifications, than would operators. Nor is there any dispute that Congress rejected the 1969 Coal Act limited appeal restriction which permitted only challenges to the reasonableness of the time period set for abatement of the violation.

2/ Intervenors Peabody and U.S. Steel recognized this ambiguity also, in supporting the Mine Workers position in this case. Oral Arg. 51.

The majority's characterization of the legislative history cited "[w]e view the section by section analysis as an inartful summary of the statutory provisions of ... section [105(d)]." Slip. op. at 8, supra, and its unwarrantably confident reading of Senator Javit's remarks (n. 10, supra), fail when read in the light of the overriding purpose of the statute, and its emphasis upon the rights and obligations of both the operators and the miners "to prevent the existence of unsafe and unhealthful conditions and practices in such mines." Section 2(e).

The Commission is empowered to and should provide a hearing to allow miners to contest citations. Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950). This Commission did provide the operator a review hearing of a temporary reinstatement order under section 105(c), to protect property rights, even though that section has no such provision. Sec. ex rel. Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 1707, 1712 (July 1981). See also 29 C.F.R. $ 2700.44.

Finally, and perhaps of overriding importance in the administration of the Mine Act, the Secretary's view, as noted, is contrary to that of all other parties to this case, and is in essence that his prosecutorial discretion is unlimited. Perhaps the most respected authority on administrative law has strongly criticized this view, and pointed out that the exercise of the discretionary power of an agency not to enforce can be of even greater concern than its power to enforce:

> Curiously, discretion not to enforce is not merely the other side of the discretion-to-enforce coin, although almost everyone, including some of the best of judges and lawyers, tend to assume that it is. Not only does discretion not to enforce necessarily mean discretion to discriminate, but it is more dangerous because it is much less controlled

than the affirmative power: (1) Exercise of the negative power is usually final, not merely interim. Exercise of the affirmative power usually leads to a proceeding, with opportunity for some sort of review. (2) The negative power is commonly secret, so that extraneous influences on discretion are less likely to be detected. Affirmative enforcement is usually intrinsically open and may often be reported to the press. (3) Guiding standards or principles are more likely to be formulated for action than for inaction. (4) Findings and reasons often support enforcement decisions but seldom support discretionary decisions not to enforce. (5) A discretionary decision to enforce may be reviewed, although often it is not. But a decision not to enforce is almost never reviewed.
2 K. C. Davis, Administrative Law Treatise, 214 (2d ed. 1979). See also Sections 9:2, 9:6 at 220. 239-40, 244.
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Mr. Davis points to several cases in which courts have moved away from the traditional view and have refused to allow "the phrase prosecutorial discretion to be treated as a magical incantation which automatically provides a shield for arbitrariness." Medical Committee for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970). In Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), a nine-judge court unanimously affirmed a district court decision ordering the Secretary of Health Education and Welfare, and the Director of HEW's Office of Civil Rights, to institute enforcement proceedings against more than two hundred systems of higher education and school districts, and to withhold federal funds, because of violations of Title VI of the Civil Rights Act of 1964, involving school desegregation.
Further, this Commission has in the past refused to accept the Secretary's view that its prosecutorial functions were unreviewable. Old Ben Coal Co., 1 FMSHRC 1480 (October 1979). See also Phillips Uranium Corp., 4 FMSHRC 549 (April 1982). The Commission in those cases rejected the Secretary's argument that he had complete discretion as to whether to cite the mine owner or the contractor for a violation that occurred at the mine owner's site.
It is also clear, and the Secretary concedes, that the Commission is the proper forum for relief if the Secretary fails to carry out his statutory mandate. Tr. Oral Arg. at 41. Nor was the Secretary able to articulate any practical reason why miners or their representatives should be forbidden to contest citations. Tr. Oral Arg. at 46-48.
Finally, it has been noted and is clear in the legislative history of the 1977 Act, (H. Rep. 95-312 at 15; S. Rep. 95-181 at 8-9) that the Congress criticized the Secretary (then the Secretary of the

Interior) for being seriously deficient in carrying out his responsibilities under the '69 Act. At oral argument, a request was made for statistics as to enforcement since the inception of the 1977 Act, some of which were subsequently furnished to the Commission. Those statistics indicate a substantial decrease in several categories of citations and orders initiated since the 1977 Act became law. For example, section 104 citations issued between fiscal years 1979 and 1981 decreased in the Secretary's "coal" districts from 135,000 to 105,000; similarly, section 104(d) citations decreased from 840 to 764 in this same period of time, and failure to abate withdrawal orders under section 104(b) declined from 1,867 to 1,389. In the Secretary's "metal and non-metal" districts, section 104(a) citations decreased from 44,000 to 23,000; and section 104(b) failure to abate withdrawal orders declined from 301 to 179 (although section 104(d) citations did increase from 39 to 77).

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Citations in coal districts on a calendar year basis declined from 139,000 in 1979 to 112,000 in 1981, and significant and substantial violations declined from 96,000 to 52,000 over the same period of time. In metal and non-metal districts, citations declined from 41,000 to 21,000, and significant and substantial violations from 37,000 to 14,000 over a similar time span.

Unfortunately, the Secretary states that MSHA does not maintain separate statistics for voluntary dismissals, i.e., dismissals that are sought by the Secretary. This, at best, therefore leaves unanswered the question of whether or not the Secretary is dismissing cases after citations are issued at a greater, lesser, or equivalent rate than has obtained in the past. The Secretary also averred that he keeps no statistics on the voluntary withdrawal or dismissal of cases brought (per district), compared to the number of enforcement actions pursued.

While these statistics are not conclusive, they do present the possibility that there is more than mere rhetoric underlying the allegations of the miners' representative and the intervenor Council of Southern Mountains that the Secretary's prosecutorial vigor has lessened. More cogently, the Secretary has averred that the Commission's standard of review must be abuse of discretion (Tr. Oral Arg. at 39), but presents the Commission with data which is insufficient for meaningful review. This is, perhaps, most evident in the "claimed inability of the Secretary to supply data on cases withdrawn by him, which, together with his repetitive reliance on "prosecutorial discretion", frustrates any attempt to determine whether or not there has, indeed, been any abuse of discretion, or "pattern or practice by the Secretary in violation of his authority" (Council of Southern Mountains v. Donovan, 516 F.Supp. 955, 960

(D.D.C. 1981)), and precludes this--or any other forum's--review thereof.

The adversary system is, in my view, entitled to at least the same measure of respect as reliance on "prosecutorial discretion" and indeed presents preferable possibilities for the parties to challenge either abusive enforcement or lack of enforcement. For that reason, too, permitting the miner or miner's representative to fully participate and litigate issues such as those presented in this case@appears to be far more in accord with the purpose and intent of the Act, certainly as reflected in the legislative history, than the denial to the most affected parties, the miners, of the right to review Secretarial action or inaction, even if limited to an abuse of discretion. Miners, too, must be assured that the Secretary is in compliance with the Act.

Further, there is substantial precedent construing the 1969 Act--a fortiori applicable to the 1977 Act--which holds that between two possible interpretations of the Act, the one that promotes safety must be preferred. See District 6, UMWA v. IBMA, 562 F.2d 1260, 1265 (D.C. Cir. 1977). Accord, UMWA v. Kleppe, 532 F.2d 1403, 1406 (D.C. Cir. (1976), cert denied, 429 U.S. 858 (1976); Munsey v. Morton, 507 F.2d 1202, 1210-11 (D.C. Cir. 1974); Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978); Phillips v. IBMA, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). It follows that the interpretation of section-105(d) that best promotes safety is one that permits miner participation in citation review.

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Finally, and since section 105(d) does not specifically preclude miner's contest of a citation, interpreting that section as conferring such a right would be consistent with the remedial enforcement scheme of the Mine Act, and foreclose the "imbalance in the Act's enforcement scheme" feared by the judge below. As we noted in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3d Cir. 1981):

In determining whether section 105(c)(1) protects Pasula's refusal to work, we considered it important that the 1977 Mine Act was drafted to encourage miners to assist and participate in its enforcement.

Thus, for the reasons set forth, I dissent and would remand this case to the judge below.

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