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GEORGE LOGAN (MSHA) V. BRIGHT COAL & JACK COLLINS
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 8, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of GEORGE ROY LOGAN

v. Docket No. KENT 81-162-D

BRIGHT COAL COMPANY, INC. and
JACK COLLINS

DECISION
This proceeding involves a discrimination complaint brought by
the Secretary of Labor on behalf of George Roy Logan under section
105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the
"Mine Act"), 30 U.S.C. $ 815(c)(2). The Secretary alleges that Logan
was unlawfully discharged by Bright Coal Company, Inc. ("Bright") and,
individually, by his former supervisor, Jack Collins. The basic legal
claim underlying the complaint is that on or about January 19, 1981,
Logan engaged in safety activity protected by the Mine Act by refusing
to set safety posts in an area of broken, unsupported, dangerous top,
and that Logan was discharged by Collins for engaging in such
activity. The administrative law judge held in favor of Bright and
Collins, and dismissed the Secretary's complaint. 4 FMSHRC 1343 (July
1982)(ALJ). For the reasons that follow, we reverse and remand with
instructions for further proceedings.
I.
The primary issue before us arose in the discovery phase of
this litigation. Respondents Bright and Collins sought production
from the Secretary of all statements given to the Secretary by Logan
and others, as well as the Secretary's records relating to his
investigation of the case. Respondents filed a motion to compel
production of the documents on the grounds that they were essential to
the preparation of respondents' defense, and that the Secretary had
not shown that the information was protected from disclosure.
The Secretary maintained that all statements made by Logan had
been provided to respondents during the course of Logan's deposition.
The Secretary declined to produce the other requested documents

asserting that they "would reveal or tend to reveal the identity of informers who may have given information to the Secretary," and that such information
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was protected pursuant to the informer's privilege, the attorney work product privilege, and the executive privilege. 1/ The Secretary opposed respondents' motion to compel production, stating that the motion was unsupported, inasmuch as respondents failed to demonstrate that the documents requested were essential to preparation of their case, the existence of extraordinary circumstances requiring disclosure, or their inability to obtain elsewhere the information sought.

Respondents filed an amended motion to compel production stating that their need for the requested documents was "apparent," that the Secretary had made no showing that the documents were privileged, that certain of the documents bear upon the integrity of the investigation conducted by the Mine Safety and Health Administration ("MSHA"), and that the Secretary's fear of possible economic reprisal by the operator against miners who had given statements was moot because the operator had ceased operations. Respondents sought an order from the judge compelling the Secretary to comply with their amended request for production including, among other things, "all documents and witnesses, not expected to be introduced, which or who tend to disprove the allegations of the applicant."

Such was the procedural and legal posture of the question of privilege as it was placed before the administrative law judge. The judge noted that the provisions of Commission Rule 59, 29 C.F.R. $ 2700.59, relating to disclosure of miner witnesses and informants, must be observed. 2/ The judge ruled that an "informer" is one who provides MSHA with information detrimental to an operator. According to the judge, a person who gives the Secretary information favorable to an operator is not an informer and that person's identity must be disclosed by the Secretary upon request. The judge also ruled that all statements in the Secretary's possession which tend to disprove the allegations of the discrimination complaint were to be disclosed.

1/ It is apparent that the Secretary's underlying motive for invoking the executive and attorney work product privileges is to shield the identity of informers. Accordingly, this case is resolved straight forwardly by addressing the issue presented solely in the context of the informer's privilege. Should the Secretary determine that continued litigation of the claimed attorney work product privilege is necessary in this case, he may reassert and further support it before the administrative law judge below. The Secretary has declined to pursue on review the applicability of the executive

privilege.
2/ Rule 59 provides:
Name of miner witnesses and informants.
A Judge shall not, until 2 days before a hearing,
disclose or order a person to disclose to an operator or his
agent the name of a miner who is expected by the Judge to
testify or whom a party expects to summon or call as a witness.
A Judge shall not, except in extraordinary circumstances,
disclose or order a person to disclose to an operator or his
agent the name of an informant who is a miner.
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The Secretary requested the judge to reconsider his ruling.
The Secretary stressed that, through the depositions that had been
taken, the respondents already had been supplied with the names of all
persons having knowledge of the facts. The Secretary argued that the
narrow definition of "informer" adopted by the judge defeated the
underlying purpose of the informer's privilege. He maintained that if
he were to comply with the judge's order, the respondents, being aware
of all persons having knowledge of the facts, and being provided with
the identities of those persons who made statements favorable to the
respondents, could thereafter readily determine the identity of those
persons who had made statements detrimental to their position.
The judge rejected the Secretary's arguments. He ruled that a
person making a statement to the Secretary which tended to discredit
Logan, or that would show that there was no discrimination, was not
an informer and that such person's identity and statements were not
privileged. According to the judge, if an individual gave information
favorable to the respondents, but also reported a violation of the
Mine Act, MSHA was to disclose the former information in such a way
as to avoid revealing the latter. If individuals who made statements
favorable to the respondents were called as witnesses, the judge
directed that no questions be asked of them that would tend to reveal
whether they had reported violations of the law.
The Secretary declined to produce the documents in accordance
with his policy of protecting confidential sources. The judge, in
turn, issued an order listing a number of sanctions he would impose at
the hearing should the Secretary refuse to comply with the particulars
of his order. The judge also issued a subpoena duces tecum to the
Secretary compelling him to bring to the hearing all documents tending
to disprove the allegations of Logan, and the names of witnesses which
these documents indicated would testify adversely to the Secretary's
position.
Respondents filed a motion to dismiss on the ground that the
Secretary had failed to comply with the judge's orders. The Secretary
did not oppose dismissal. The judge, however, denied the operator's

motion for dismissal noting the absence of assent by the alleged discriminatee, Logan. Shortly before the hearing, the Secretary provided the judge and counsel for respondents with a copy of his investigative file, except for those items which the Secretary deemed to be privileged, and a list of all persons whose names appeared in his file, including those believed to have knowledge of relevant facts.

II.

The informer's privilege is the well-established right of the government to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials. Roviaro v. United States, 353 U.S. 53, 59 (1957). See generally Annot., 8 ALR Fed. 6 (1971). The purpose of the privilege is to protect the public interest by maintaining a free flow of information to the government

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concerning possible violations of the law and to protect persons supplying such information from retaliation. Roviaro, 353 U.S. at 59; Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 305 (5th Cir. 1972). The privilege is qualified, however, and where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. Roviaro, 353 U.S. at 60-61. 3/

Respondents contend that the Secretary improperly attempted to limit the scope of discovery based solely upon a bare assertion of privilege without proper support by affidavit or proof of the applicability of the privilege. The burden of proving facts necessary to support the existence of the informer's privilege rests with the Secretary. Secretary of Labor v. Stephenson Enterprises Inc., 2 BNA OSHC 1080, 1082 (1974), 1973-74 CCH OSHD • 18,277 at 22,401, aff'd. 578 F.2d 1021 (5th Cir. 1978). In the instant case, counsel for the Secretary asserted the privilege and resisted attempts by the respondents to obtain the disputed material. There is authority for the proposition that the privilege can be invoked only through the filing of a formal claim of privilege and confidentiality by the head of the department with control over the matter, supported by affidavits attesting to facts sufficient to allow an independent judicial determination that the privilege exists. Fowler v. Wirtz, 34 F.R.D. 20 (S.D. Fla. 1963); Cf. Black v. Sheraton Corp. of America, 564 F.2d 531, 543 (D.C. Cir. 1977). The great weight of case law concerning the privilege, however, addresses and disposes of the issue without focusing on whether the privilege was "formally" raised. Here the claim of privilege was raised by the Secretary's trial attorney in response to the respondents' motions and the judge's orders. While the Secretary's claim of privilege may not have been

raised in as formal and complete a fashion as possible, it was raised
with sufficient formality to alert the judge and the opposing parties
to the possibility of harm that could occur from disclosure of the
statements. We therefore hold that the Secretary's method of raising
the privilege was sufficient. We proceed with analysis of the general
issue.

3/ Before the question of privilege is reached, it must be determined
whether the information sought through discovery is relevant to the
subject matter of the proceeding. Wirtz v. Continental Finance and
Loan Co., 326 F.2d 561, 563 (5th Cir. 1964). The scope of discovery
in Commission proceedings is governed by Commission Procedural Rule
55(c), which provides:
Parties may obtain discovery of any relevant matter,
not privileged, that is admissible evidence or appears
reasonably calculated to lead to the discovery of
admissible evidence.
29 C.F.R. $ 2700.55(c). No one has disputed the relevancy of the
information contained in the statements sought by respondents.
Certainly, the judge appears to have considered the material to be
relevant. Given the absence of objection, the judge's rulings, and
the broad interpretation traditionally accorded rules governing
discovery, we assume that the material subject to the judge's orders
is relevant, and proceed to consider whether the informer's privilege
applies.

Although it is not absolutely clear from the record whether
the Secretary is actually asserting the informer's privilege on behalf
of non-miners as well as miners, the public interest in protecting
persons who discuss alleged Mine Act violations with government
officials is served regardless of the relationship of the informer to
the alleged violator, i.e., whether the informer is an employee of the
respondent or a non-employee. Courts have long recognized the
obligation of all citizens to cooperate in law enforcement efforts and
have encouraged and protected the communication of possible violations
of law by shielding the informer's identity. Roviaro, 353 U.S. at 59.
In addition, it has been held that the informer's privilege is
applicable to any person furnishing information to government
officials concerning violations of the Occupational Safety and Health
Act of 1970, 29 U.S.C. 651 et seq. Secretary of Labor v. Quality
Stamping Products Co., 7 BNA OSHC 1285, 1288 (1979), 1979 CCH OSHD
 23,520 at 28,504 (OSHRC). We believe that a similar conclusion i
appropriate under the Mine Act.
The Mine Act and its legislative history reflect congressional
concern about the possibility of retaliation against miners who

participate in enforcement of the Act. Section 103(g)(1) provides
miners with the right to obtain an immediate inspection of the mine
upon the miner's notification to the Secretary of the existence of a
violation or danger. 30 U.S.C. $ 813(g)(1). This section further
provides that "the name of the person giving said notice and the names
of individual miners referred to therein shall not" be provided to the
operator. See S. Rep. No. 181, 95th Cong., 1st Sess. 29 (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 617 (1978) ("Legis. Hist.").
Similarly, section 105(c)(1) of the Act proscribes discrimination
where, among other things, a miner has instituted or caused to be
instituted any proceeding under or related to the Act, or has
testified or is about to testify in any such proceeding. 30 U.S.C.
$ 815(c)(1); Legis. Hist. at 623. We believe that these expressions
of congressional concern for protecting the identity of miners who
contact the Secretary regarding violations of the Act, and otherwise
protecting miners who participate in enforcement of the Act,
underscore the need for the recognition and proper application of the
informer's privilege in Mine Act proceedings. Therefore, in order to
maximize the lines of communication with the Secretary concerning
violations of the Mine Act, we hold that a person's status as an
informer is not dependent on whether that person is an employee of a
mine operator. The presence of an employment relationship, however,
with the greater opportunity for retaliation that it provides, is a
relevant factor to be considered in conducting the balancing test,
discussed infra, for determining whether the privilege must yield in a
particular case.

The crucial issue in the present case remains whether the
substance of the information furnished to the Secretary by an
individual is determinative of that person's status as an informer.
Respondents contend that the administrative law judge properly ruled
that persons who furnish the Secretary with information favorable to
the operator are not informers. The Secretary maintains that an
informer is entitled to anonymity, regardless of the substance of the
information he furnishes.

We hold that the applicability of the informer's privilege to
the Mine Act does not rise or fall based upon the substance of a
person's communication with government officials concerning a
violation of law. To hold otherwise would undermine the very purpose
of that privilege. The informer's privilege is recognized at law in
order to encourage all citizens to cooperate with government officials
who are investigating possible violations of our nation's laws. To
ensure that this public interest is fully served, it is essential

that citizens who communicate with government officials in such
investigations can be confident that their cooperation will not affect
them adversely. This confidence would be seriously eroded, and the
citizenry's desire to cooperate by communicating with government
officials chilled, if the substance of a communication were held to
control the disclosure or non-disclosure of the identity of the person
giving the statement.

The practical reasons underlying this conclusion are manifest.
Not only could disclosure of the identities of persons giving
favorable statements to MSHA lead, by process of deduction, to the
identification of those persons giving adverse statements, but persons
identified as giving favorable statements would be vulnerable to
direct or subtle pressure to give even more favorable testimony.
Cf. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 240 (1978).
Furthermore, even though statements favorable to a party would not be
resented by that party, other interested persons or parties might not
hold as charitable a view of the "favorable" statements. Id.
Finally, a disclosure test that turns on the "favorable" or
"unfavorable" nature of the contents of a statement would place on
the government an obligation difficult to discharge due to the
inherent subjectivity of the judgment required.

Therefore, we hold that the judge erred in ruling that the
informer's privilege applies only to persons furnishing information
detrimental to a party. Rather, an "informer" is a person who has
furnished information to a government official relating to or
assisting in the government's investigation of a possible violation
of law, including a possible violation of the Mine Act. Because the
judge applied an erroneous test in ruling that the Secretary was
required to disclose information and thereafter imposed sanctions
against the Secretary for his failure to make that disclosure, a
remand to the judge for application of the proper test is necessary.
Given the procedural posture of this case, on remand the judge
should order the Secretary to turn over the balance of the material
withheld for an in camera inspection. In evaluating this material,
the judge should first determine whether the information sought by the
respondents is relevant and, therefore, discoverable. If he concludes
that the material is discoverable, he should then determine whether
the information is privileged. Application of the informer's
privilege should be based upon the definition of "informer" adopted
above.

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Recognizing that the informer's privilege is qualified, if the
judge concludes that the privilege is applicable, he should next
conduct a balancing test to determine whether the respondents' need
for the information is greater than the Secretary's need to maintain

the privilege to protect the public interest. Drawing the proper
balance concerning the need for disclosure will depend upon the
particular circumstances of this case, taking into account the
violation charged, the possible defenses, the possible significance
of the informer's testimony, and other relevant factors. Among the
relevant factors to be considered are the possibility for retaliation
or harassment, and whether the information is available from sources
other than the government.

The burden of proving facts necessary to show that the
information is essential to a fair determination rests with the
party seeking disclosure. Hodgson v. Charles Martin Inspectors of
Petroleum, Inc., 459 F.2d at 307. In this regard a demonstrated,
specific need for material may prevail over a generalized assertion of
privilege. Black v. Sheraton Corp. of America, 564 F.2d at 545. Some
of the factors bearing upon the issue of need include whether the
Secretary is in sole control of the requested material or whether the
material which respondents seek is already within their control, and
whether respondents had other avenues available from which to obtain
the substantial equivalent of the requested material. Where the
disclosure of the identity of an informer is essential to a fair
determination of the case, the privilege must yield or the case may be
dismissed. Roviaro, 353 U.S. at 59.

If, on the one hand, the judge concludes that the Secretary's
need to preserve the identity of his informers should prevail, he
should deny the amended motion to compel production of documents, seal
the material previously withheld as part of the record for use on any
appeal, and proceed to decide the case on the merits without resort to
the sanctions previously imposed due to the Secretary's nondisclosure
of the statements. If, on the other hand, the judge concludes that
the respondents' need for this information is essential for a fair
determination of the case, and that the privilege must yield, he
should order the Secretary to disclose the information. The judge
may, at his discretion, conduct a limited hearing to afford the
parties an opportunity to develop additional evidence based upon the
disclosure. He should then proceed to decide the case solely on the
basis of the supplemented record. Should the Secretary resist the
judge's order to disclose, dismissal of the proceeding is the
appropriate sanction with further review available in accordance with
section 113(d)(2) of the Mine Act. 30 U.S.C. $ 823(d)(2). In any
event, the judge's decision must be supported by findings of fact and
conclusions of law, and be grounded in the body of case law developed
by the Commission in the areas of work refusal and discriminatory
discharge.

For the reasons set forth above, we reverse the decision of the

administrative law judge and remand the case to him for further
proceedings consistent with this decision.

James A. Lastowka, Commissioner

L. Clair Nelson, Commission