

CCASE:  
NACCO MINING V. MSHA & UMWA  
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FMSHRC-WDC  
OCT 17, 1985

THE NACCO MINING COMPANY

v.

Docket No. LAKE 85-87-R

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

and

UNITED MINE WORKERS OF  
AMERICA

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

### ORDER

BY THE COMMISSION:

On September 13, 1985, Nacco Mining Company notified the Commission of its belief that an ex parte communication between the presiding administrative law judge, Joseph B. Kennedy, and a witness who had testified before him had occurred subsequent to the hearing in this matter. According to NACCO, it had requested the judge to place a statement detailing the conversation in the public record, but the judge had not done so.

On September 17, the Commission issued an order directing the judge and the witness to submit sworn statements 'making a full and complete disclosure of all circumstances surrounding the alleged conversation and all details of its substance.' Both participants to the conversation have submitted the ordered statements, although it must be noted that the judge's statement is much in the nature of an argumentative brief. Nacco has filed a response to the judge's

statement in the form of a rebuttal.

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Based on our review of these submissions we conclude that an ex parte communication within the meaning of 5 U.S.C. § 551 (14) occurred when the miner who had appeared before the judge as a witness contacted the judge to tell him that he believed that the operator subsequently had threatened his job. This is especially true in the present case where the witness was the individual who engaged in the conduct causing the operator to be charged with a violation of the Act. This communication did not concern the merits of the review proceeding pending before the judge, however, and therefore was not a prohibited ex parte communication under 5 U.S.C. § 557(d) and 29 C.F.R. § 2700.82. Nevertheless, in *Knox County Stone Co.*, 3 FMSHRC 2478 (Nov. 1981), the Commission required that when even "innocent or de minimis ex parte communications occur ... they shall be placed on the public record...." 3 FMSHRC at 2486. The judge states that immediately after his conversation with the miner he placed his contemporaneous notes of the conversation in the "public record" and arranged a conference telephone call among all parties during which the substance of the earlier call was reiterated. 1/ The judge suggests that in doing so he fulfilled all applicable requirements.

It is evident from the record, however, that the judge never informed the operator of the fact that he had placed his notes in the record. In fact, after the operator respectfully requested the judge to place a statement describing the nature of the conversation in the record, the judge failed to follow through on his "first thought .. to give [NACCO] a statement, together with a copy of the notes of the conversation ... which were in the public record." Statement at 9. Instead of following this course, which is the obvious and proper method of addressing the operator's legitimate concerns, the judge, without explanation, scheduled a further hearing for the purported purpose of allowing questioning of the miner-witness regarding the conversation. In doing so the judge erred. Although a judge has discretion in regulating the course of proceedings before him, in this instance there is no record support justifying such a further hearing. The "conspiracy" theory espoused by the judge is utterly lacking in record foundation. In this scenario, conjured up by the judge, the operator's attorney may have caused the operator's foreman to "threaten" the miner, knowing that the miner would then contact the judge, thereby allowing the operator's attorney to move to have the judge removed from the case. This unsupported speculation on the part of the judge plainly is an insufficient basis for subjecting the parties to a further hearing. Therefore, the judge's order scheduling a further hearing is vacated.

Since the statements initially sought by the operator have now

been placed in the record, the case is returned to the judge for necessary further proceedings on the merits. Before we do so, however, we briefly address certain other areas of concern. First, we reject the judge's

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1/ We will assume that the notes were, in fact, placed in the official public record. This assumption is not made without some pause, however. In footnote 9 of his statement the judge attempts to broaden the meaning of public record. As the judge is well aware, there is only one official public record associated with every Commission docket. A document is either in such record or it is not.

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attempt to justify his solicitation of the off-the-record contact with the miner-witness that occurred. Whether the judge was motivated by section 105(c) of the Mine Act, 30 U.S.C. § 815(c), or the Federal Victim and Witness Protection Act, 18 U.S.C. §§ 1512-1515, those statutes place the responsibilities sought to be assumed by him in the hands of law enforcement personnel, not administrative law judges of this adjudicatory Commission. If the judge wishes to advise witnesses before him of their rights under federal statutes he should at least make sure his advice is accurate. By seeking to assume the role statutorily placed in other federal departments the judge has confused the adjudicatory function of this agency with the prosecutorial function of MSHA. Second, while we are aware of the concern raised by the operator regarding whether, in light of the tenor and content of certain statements in the judge's submission, a fair decision on the merits of the proceedings can be rendered by the judge, the better course of action is to provide the judge the opportunity to render a final decision based strictly on the record and in accordance with the Commission's rules and the requirements of the APA. Upon completion of this duty, the usual review mechanism is available for measuring the judge's findings and conclusions against applicable standards.

Accordingly, our previously imposed stay of proceedings is dissolved and the case is returned to the judge for briefing by the parties on the merits, if desired, and entry of a final disposition on the merits.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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