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MINERALS EXPLORATION V. MSHA
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April 1, 1986

MINERALS EXPLORATION COMPANY

v. Docket No. WEST 81-189-RM

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

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), and involves two related proceedings. The first is a consolidated contest by Minerals Exploration Company ("Minerals") of an imminent danger withdrawal order issued pursuant to 30 U.S.C. $ 817(a) and a civil penalty proceeding dealing with an alleged violation by Minerals of 30 C.F.R. $ 55.3-5 (1984). That matter was presided over by Commission Administrative Law Judge John A. Carlson. The second proceeding, heard on an interlocutory basis by former Commission Administrative Law Judge Jon D. Boltz, involves Minerals' motion for sanctions against officials of the Department of Labor's Mine Safety and Health Administration ("MSHA") and the Secretary of Labor's trial counsel for alleged improprieties in prosecuting the proceeding before Judge Carlson. In an unpublished order issued on April 7, 1982, prior to Judge Carlson's decision on the merits, Judge Boltz denied Minerals' motion for sanctions. Approximately one year later, Judge Carlson issued his decision upholding both the imminent danger withdrawal order and the citation and the judge assessed a civil penalty. 5 FMSHRC 669 (April 1983)(ALJ). Following Judge Carlson's decision, Minerals filed with the Commission a petition

for discretionary review primarily challenging Judge Boltz's order denying sanctions. 1/

1/ The Commission is an independent adjudicatory agency established to resolve legal disputes arising under the Mine Act. 30 U.S.C. $ 823. The Commission is not a part of and is in no way connected with the Department of Labor or the Mine Safety and Health Administration.

The crucial issues before us concern allegations of impropriety on the part of MSHA officials and counsel for the Secretary. For the reasons set forth below, we affirm Judge Boltz's order denying sanctions and we affirm Judge Carlson's decision on the merits. At the same time, we express our strong disapproval and, as appropriate, serve warning with respect to some of the activities of certain MSHA officials and the Secretary's trial counsel.

I.

Facts and Procedural History

At the time of the operative events in this case, Minerals operated the Sweetwater uranium project, a large surface uranium mine located near Rawlins, Wyoming. The underlying case arose in connection with a citation and imminent danger withdrawal order issued in February 1981 by MSHA to Minerals for allegedly violating section 55.3-5 by permitting loose, overhanging rock on the east wall of the C-1 pit. 2/ A hearing on the merits of the citation and withdrawal order was held before Judge Carlson in April 1981, and was continued until June 29, 1981.

Prior to resumption of the hearing, a telephone conference call was held on June 22, 1981, among Judge Carlson, Anthony Weber, counsel for Minerals, Phyllis Caldwell, counsel for the Secretary, and Bevelyn Suter, President of the Progressive Mineworkers Union ("the Union"), representative of miners at the Sweetwater mine. The conference call was initiated by Judge Carlson for the purpose of discussing the Union's written request that Union Secretary Daphne Hamilton be permitted to appear at the hearing to "help make sure that the facts are correctly represented." During the call, Ms. Suter expressed concern that falsified documents would be introduced by Minerals at the hearing. Attorney Weber subsequently testified that due to a bad connection he could not hear Suter's end of the conference call. Weber did understand, however,

2/ Former section 55.3-5 provided:

> Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

30 C.F.R. $ 55.3-5 (1984). In January 1985, this provision was

replaced by 30 C.F.R. $ 56.3005 (1985), which is virtually identical.

through the comments of Judge Carlson, whom he could hear, that the Union was concerned over possibly falsified documents being used by Minerals at the hearing. 3/

Later that same day, following the conference call, attorney Caldwell received a telephone call from the MSHA subdistrict office covering the Sweetwater mine, informing her that a letter had been received from Union Secretary Hamilton making similar allegations that falsified documents would be introduced at the hearing. As a result of that phone call, Caldwell and her supervisor, Senior Attorney James Barkley, arranged for an MSHA investigation into the claims of document falsification. MSHA Special Investigator Jerry Thompson was assigned to the task. Inspector Thompson began talking privately with Minerals drafting department employees and, by the next day, June 23, 1981, learned that Brian Baird was the Minerals draftsman who had worked on original drawings of the C-1 pit -- drawings that had become the focus of the inspector's investigation. Caldwell directed Inspector Thompson to interview Baird.

The inspector visited Baird's home in the Rawlins area on Sunday, June 28, 1981, the day before the resumption of the hearing before Judge Carlson. Thompson identified himself as an MSHA special investigator and stated that he wanted to ask Baird questions about the documents to be used at the hearing the next day in the Denver. Baird indicated that the drawings of the C-1 pit originally had been completed from survey notes but later had been changed, supposedly upon the basis of visual observations. Baird showed Thompson one of the original drawings and told him that there were other original drawings at the mine. Baird expressed concern that the modified drawings were not accurate. Before Thompson left Baird's home, he obtained a written statement from Baird regarding the changes in the drawings.

3/ During the call, Weber made comments which led other participants in the conversation to believe that he was threatening with discharge Union representatives Suter and Hamilton (who were then on sick-leave status with Minerals) if they participated in the hearing. Weber's comments became the focus of several additional proceedings. Prior to the resumption of the hearing on June 29, 1981, the Secretary filed with Judge Carlson a letter seeking the institution of disciplinary proceedings against Weber. Judge Carlson referred this letter to the Commission and the Commission referred the matter to Commission Administrative Law Judge Paul Merlin for disciplinary proceedings. The matter was resolved, based on stipulations, at a hearing before Judge Merlin. The judge admonished Weber concerning his remarks but

held that no further disciplinary proceedings were warranted. Disciplinary Proceeding (Minerals Exploration Co.), 3 FMSHRC 1919, 1920-21 (August 1981)(ALJ). The Secretary also initiated a discrimination case against Minerals based on this incident. FMSHRC Docket No. WEST 82-38-DM. That case eventually was settled by the parties.

The hearing on the merits reconvened in Denver on June 29, 1981. Prior to the taking of testimony, counsel for the Secretary presented Judge Carlson with the letter requesting disciplinary proceedings against Minerals' counsel, Weber (n. 3 supra). On the afternoon of June 29, Minerals began its defense by presenting the testimony of Project Manager Larry Dykers. Mr. Dykers testified about the plan map covering the C-1 pit. After Weber moved for introduction of the drawing, counsel for the Secretary, Barkley, requested voir dire. Barkley established that the map originally had been drawn by Baird and, as presented at the hearing, showed the existence of a safety bench on the east wall of the C-1 pit. Barkley then objected to the admission of the map as "irrelevant because it would seem to be a document that may have been falsified to the point that it is irrelevant" M. Tr. 472. 4/ Barkley indicated that he was prepared to subpoena Minerals' entire drafting department to testify concerning the alleged falsification.

Weber reacted with surprise but expressed a willingness to bring the Minerals employees to the hearing in order to resolve the matter. It was then 5:00 p.m. and the judge suggested an adjournment -- but only until the afternoon of the following day. Weber did not request a longer continuance or object to this procedure. This procedural decision set into motion the main series of events which led to the present litigation.

Barkley requested subpoenas for Minerals' employees and documents. The judge issued signed subpoenas in blank to Barkley. The evidence indicates that the parties never reached any understanding as to the individuals who would be subpoenaed. Barkley conferred with Inspector Thompson concerning the Minerals employees to be subpoenaed. They agreed that Thompson and another MSHA Inspector, Merrill Wolford (who had issued the underlying citation and imminent danger order), were to drive 250 miles to Rawlins to serve the subpoenaed individuals. Thompson telephoned Baird from Denver to inform him that he would be subpoenaed that evening to appear at the hearing in Denver the following day. Thompson asked Baird to inform the other draftsmen that they would be subpoenaed. Thompson inquired as to whether Baird had brought home his original drawings of the C-1 pit. Baird replied that he had not. Thompson told Baird not to worry because he would be bringing a subpoena requiring Baird to obtain the original documents.

At approximately 1:30 a.m. on June 30, 1981, the two inspectors arrived in the Rawlins area and began serving the subpoenas. Apart from Baird, they served four Minerals employees, all of whom refused

an offer of transportation to Denver. The inspectors reached Baird's home at 3:00 a.m., and then proceeded to the mine offices, some 40 minutes away, to obtain original drawings of the C-1 pit. Baird questioned the propriety of taking the documents from the mine, and Thompson replied that the subpoena required that action.

4/ For purposes of this decision, transcript citations to the hearing before Judge Carlson on the merits are designated M. Tr. Transcript citations to the hearing before Judge Boltz on Minerals' Motion for Sanctions, are designated S. Tr.

The inspectors and Baird arrived at the mine offices at 4:00 a.m. After finding several mine entrances to be locked, the party finally found one that was unlocked. They proceeded to Baird's desk, where Baird picked up a cardboard tube containing the drawings. They then drove to Denver. The other subpoenaed Minerals employees went to work later in the morning of June 30 and they attempted to gather all documents possibly relevant to the C-1 pit. They then flew to Denver in two company chartered planes.

Barkley met with Baird on the morning of June 30, 1981, upon the latter's arrival in Denver. Baird again expressed concern about his removal of the documents from the mine and Barkley told him "not to worry about it." S. Tr. 842. Later that morning, Barkley arrived at the Commission's Denver office, where the hearing was being held. He instructed Inspector Thompson to locate two of the subpoenaed witnesses, who worked in the drafting department, so that he could talk with them. Those two individuals told Barkley that the modifications in the drawings were based upon good faith subjective judgment. Barkley stated that "people had gone to jail trying to take refuge in subjective judgment." Dickey Affidavit at 4; Hill Affidavit at 6-7.

When the reconvened hearing commenced, Barkley announced that he would present all his evidence through Baird, and excused the other four subpoenaed employees. During the course of Baird's testimony, Barkley used the drawings that Baird had obtained from Minerals' office. These documents were entered into evidence without objection from Weber. At the conclusion of Baird's testimony, Weber requested and Judge Carlson permitted a continuance to allow Weber to respond on the matter of possible document falsification. After the close of the hearing, and upon request from Barkley, the judge ordered that the documents which had been produced in response to the subpoenas be kept in the hearing room overnight. The parties agreed that the next morning Minerals' employees would separate the documents into relevant and irrelevant categories. The Secretary's counsel was to arrive later in the morning for document inspection.

The following morning, Weber departed from the Denver area and left Minerals' Project Manager Dykers, who is not a lawyer, in charge of the document separation and production process. Dykers decided that the daily reminder diaries that some of the employees had brought did not have to be produced. Those employees returning to the mine that morning took their diaries with them. Barkley and other representatives of the government arrived later in the morning and proceeded to review the documents, including those separated out by

Minerals as irrelevant.

During the examination of the documents, it was realized that the daily diaries were not present. Dykers indicated that they had been determined to be irrelevant and had been given to the employees returning to Rawlins. At Barkley's insistence, Dykers agreed to try to retrieve the diaries from the Minerals employees at the Denver airport. Dykers succeeded, and when the diaries were returned to the Commission offices, Barkley took them into a separate room for examination. Barkley subsequently refused to return the diaries to Minerals for a period of months, despite repeated requests from Minerals.

The hearing on the merits did not resume as anticipated. Initially, the delay was because of the Secretary's request for disciplinary proceedings against Weber. After that matter was concluded, Minerals filed in September 1981 the motion for sanctions that is the primary subject of this review. That motion was transferred to then Judge Boltz because of the possibility that Judge Carlson might be called as a witness. The hearing on the sanctions motion covered four days (November 9-12, 1981), and Judge Boltz issued his order denying sanctions on April 7, 1982. 5/

In his decision denying Minerals' motion for sanctions, Judge Boltz found that Inspector Thompson had not coerced Baird's written statement and that Inspectors Thompson and Wolford had not acted improperly by serving the subpoenas and by entering the mine property with Baird in order to obtain the subpoenaed documents. The judge also determined that there was no impropriety on the part of counsel for the Secretary in conducting an independent investigation of the falsification allegations without notifying Minerals' counsel, in examining the subpoenaed documents that Minerals had designated as irrelevant, and in retaining and refusing to return the daily reminder diaries of Minerals' employees. The judge concluded that he found "nothing in the conduct of counsel for the Secretary or in the conduct of Inspectors Thompson and Wolford that was improper in the circumstances of this case." Slip op. 8.

Subsequently, on September 15, 1982, following negotiations between the parties, a joint motion for decision on the merits based on the existing record was filed with Judge Carlson. The judge issued his decision on the merits on April 6, 1983. In finding a violation, Judge Carlson did not utilize the record from the hearing before Judge Boltz on sanctions. Judge Carlson indicated that he was "not prepared to hold whether or not the drawings were 'falsified'," because "such a holding [was] not necessary to reach a proper decision on the merits of the case." 5 FMSHRC at 676. The judge stated:

> I did find Baird an earnest and believable witness with no discernible motive for dissembling. At the very best, the process by which the final set of drawings came about betrays a subjectivity, a flexibility, which robs them of any weight favorable to Minerals. Beyond that, even if the modified drawings were accepted as accurate, they would not persuade me of the absence of violation.

Id. Finding that other evidence independently supported s finding of violation, the judge concluded that Minerals had violated section

55.3-5 and that the imminent danger order had been issued appropriately.

5/ Minerals petitioned the Commission for discretionary review of Judge Boltz's order denying its motion for sanctions. The Commission, treating Minerals' petition as one for interlocutory review, denied the request without prejudice to renew after final disposition of the case by Judge Carlson.

II.

Disposition of Minerals' Assertions of Improprieties

On review, Minerals repeats the assertions of governmental impropriety raised before Judge Boltz. Minerals argues that it was prejudiced by the actions of MSHA officials and counsel for the Secretary and requests vacation of the civil penalty and dismissal of the proceeding. Minerals contends that these sanctions are necessary to deter the government from future impropriety and illegality, and to prevent the tainting of Commission proceedings. We examine separately each assertion of impropriety.

A. Minerals' objections concerning the Secretary's initial investigation into the possible falsification of evidence

1. The general propriety of the Secretary's investigation

Minerals contends that it was improper for the Secretary to authorize and direct between June 22 and 28, 1981, a "secret" investigation involving interviews with employees of the opposing party without advising the judge and opposing counsel. Minerals argues that such actions violated Commission discovery procedure and opened the door to unethical conduct.

As Judge Boltz noted, the time period for completion of discovery under Commission Procedural Rule 55, 29 C.F.R. $ 2700.55, had expired on June 22, 1981. However, when charges surfaced during the June 22 conference call that falsified evidence might be introduced, it was wholly appropriate for both parties' attorneys -- as responsible advocates and as officers of the court -- to pursue the matter. We hold that at that juncture of the case, in light of the nature of the allegations, either party could have proceeded properly by requesting the reopening of discovery (see 29 C.F.R. $$ 2700.55(a) & (b)), or by investigating the allegations. Within the adversarial framework of Commission trial proceedings, there is no general bar against investigations by either party into possible new evidence whose existence is suggested during the course of a trial.

We reject the contention that Minerals' counsel, Weber, was not on notice as to the existence of the falsification problem and the likelihood that the opposing party would have a vital interest in determining the truth of the allegation. As noted above, Weber was made aware from the comments of Judge Carlson during the conference

call that the Union was raising an issue concerning his client's possible falsification of evidence. Weber should have been alert to the obvious implications of such a charge.

Thus, we discern no impropriety in the fact that the Secretary decided to investigate further the Union's allegations of falsified evidence. We note, however, certain ethical constraints relevant to such private inquiries. The American Bar Association ("ABA") Model Code of Professional Responsibility provides in relevant part:

> During the course of his representation of a client a lawyer shall not ... communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party....

DR 7-104(A)(1)(1980 ed.). Cf. ABA, Model Rules of Professional Conduct, Rule 4.2 (1983). These model rules prohibit communications with an opposing "party" without the other lawyer's consent. We do not find it necessary in the present context to adopt formally these particular model rules or to construe the full scope of the term "party." Here, the Minerals employees contacted during the Secretary's private investigation appear to have been non-managerial draftsmen lacking substantial organizational responsibility. Moreover, we are mindful of the important purpose of these contacts and of the unusual circumstances of this case. For present purposes, we remind the Commission Bar of the need to be respectful of the ethical provisions cited above and of the developing law in this area. Cf. Massa v. Eaton Corp., 39 FEP 1211 (D. Mich. 1985). On the basis of the foregoing, we agree with Judge Boltz that there was no general impropriety in the Secretary's undertaking his investigation into allegations of evidentiary falsification.

2. Whether Inspector Thompson coerced Baird's written statement

Minerals contends that Inspector Thompson coerced Baird's written statement during their meeting at Baird's home. The evidence shows that Inspector Thompson identified himself to Baird as an MSHA special investigator and indicated that he wanted to discuss the drawings which were to be presented at the hearing in Denver. Inspector Thompson also told Baird that a refusal to talk with him could be construed as assisting in an attempt to cover up the falsification.

Judge Boltz found that Baird's statement was not coerced. The interview with the MSHA investigator occurred in Baird's home and was conducted in the presence of his wife. It lasted 45 minutes and unfolded in a conversational atmosphere. Baird himself displayed a generally cooperative attitude, although he experienced some understandable discomfort in supplying information that he believed might reflect badly on his employer. He volunteered a drawing from his portfolio and made free-hand sketches to help the inspector understand the modifications made to the drawings. On the other hand,

Thompson's statement that a refusal to talk with him could imply guilt was overbearing and a reflection of poor judgment. We disavow such investigative tactics, but we conclude that this errant statement did not coerce a statement from Baird. Accordingly, in consideration of the totality of the circumstances, we find that substantial evidence supports Judge Boltz's conclusion that Baird's statement was not coerced.

3. Barkley's use of Baird's statement at the reconvened hearing

Minerals asserts that Barkley's use of the products of the Secretary's investigation into the allegations of falsified evidence at the reconvened hearing was improper. Minerals argues that Barkley introduced Baird's statement in a theatrical effort to disrupt its case by interrupting the hearing and catching Minerals by surprise. The surprise in question was not the type removed by the procedural rules or cases cited by Minerals. The surprise was collateral--that is, it was intended as an attack on the credibility of evidence. There was no change in the theory of the case upon which either side was proceeding. Moreover, given the fact that Weber was aware of the falsification allegations as of June 22, 1981, it strains credulity to believe that Barkley's production of Baird's statement could have come as a complete surprise to Minerals.

B. Mineral's objections to the subpoena process

Minerals' next major claims of impropriety focus on the subpoena process, which began at the recess of the hearing on June 29, 1981, following the introduction of Baird's statement. It is obvious that this juncture of the hearing was an unfortunate turning point, and most of the additional allegations of misconduct can be traced to the failure of the parties and the judge to evaluate adequately a practical and just method for proceeding with the case and resolving the complication that had arisen. The judge's late afternoon decision to allow a continuance of only one-half day when the witnesses and documents to be subpoenaed were 250 miles away in Rawlins, Wyoming, was ill-conceived. Sound judicial practice requires that sufficient time be provided for the issuance, service of, and compliance with subpoenas. Such practice will avoid serving subpoenas in the middle of the night that require witnesses to travel with subpoenaed documents 250 miles to a hearing the next afternoon. However, we must observe that Weber's lack of protest and his acquiescence in this procedure seriously undercut Minerals' present objections.

1. Subpoenas in blank

Minerals challenges the judge's issuance of subpoenas in blank to Barkley. The issuance of subpoenas in blank is authorized by Fed. R. Civ. P. 45(a), which applies "so far as practicable" to Commission proceedings. 29 C.F.R. $ 2700.1(b). Therefore, we perceive no error in the judge's issuance of blank subpoenas although

such practice must be governed by careful discretion.

2. Scope of the subpoenas

Minerals next objects to the scope of the subpoenas duces tecum. in that they covered documents relevant to the entire C-1 pit from December 11, 1980, rather than being limited to the section of the east wall of the C-1 pit at issue from the later date of citation in February 1981.

Relevance is the touchstone in analyzing the proper scope of a subpoena or discovery request. We have no trouble concluding that the request was relevant, especially in the context of a possible falsification of documents. In any event, even if the subpoena was overbroad, the appropriate remedy for Minerals was to object on the basis of irrelevance or burdensomeness. 29 C.F.R. $ 2700.58(c). However, trial counsel for Minerals failed to object to the scope of the subpoenas. Accordingly, we find no error.

3. Service of the subpoenas

Minerals also objects to the service of the subpoenas in the middle of the night and by an interested party. As a general legal proposition, there is no prohibition against either of these occurrences, although obviously better and preferable practice calls for service during normal hours. This is particularly so in a situation like the present, in which a reasonable continuance could have been granted without prejudice to either party. The subpoenas then could have been served during normal hours and the subpoenaed individuals would have had sufficient time to travel the 250 miles to the hearing in Denver. As a matter of policy, we do not encourage or favor service of Commission subpoenas in the middle of the night absent genuine emergency or extraordinary circumstances, which were not present here.

However, the clear inconvenience attendant upon the service conducted in this case does not render the service improper or illegal. Again, it must be emphasized that Weber, counsel for Minerals, failed to object and failed to urge an alternate timetable. We are also influenced by the fact that all but one of the subpoenaed Minerals employees was notified by telephone in the early evening of June 29, 1981, that they were to be subpoenaed to appear at the hearing in Denver the following day.

Notwithstanding the above, we are compelled to observe and disapprove the heavy-handed manner in which Thompson proceeded. The record indicates that he represented himself in a manner causing several of the subpoenaed witness to believe that they were being confronted by an agent of the Federal Bureau of Investigation. S. Tr. 278, 280, 312, 410, 443-444. Moreover, several of these witnesses testified that Thompson s early morning intrusion caused genuine fear and intimidation. S. Tr. 253, 254, 346, 347, 413.

As to Minerals' objection to service by an interested party, Commission Procedural Rule 58(a) governing subpoena service states

that a subpoena "may be served by any person who is not less than 18 years of age." 29 C.F.R. $ 2700.58(a). Inasmuch as Rule 58(a) does not prohibit service by an interested party (assuming Inspector Thompson to be such a party). we find no irregularity in service of the subpoenas by Inspector Thompson.

4. Entry of Inspectors into Minerals' mine offices

Minerals challenges Judge Boltz's finding that there was no impropriety in the actions of Inspectors Thompson and Wolford in connection with Baird's removal of drawings from the mine office at approximately 4:00 - 4:30 a.m. on the morning of June 30, 1981. The Secretary"argues that the inspectors did nothing illegal and that it was Baird who took the documents as required by the subpoena. Our review of the record, however, convinces us that Baird would not have travelled to the mine and taken the documents on his own. In the early hours of June 30 when the inspectors served Baird with the subpoenas and proceeded with him to the mine offices, Baird questioned the propriety of taking the documents from the mine and Thompson replied that the subpoena required it. To this extent, the entry and taking of the documents may be viewed as the action of MSHA. Thus, the next question is whether the removal of the documents was illegal or otherwise improper.

In deciding this question, control or custody of documents as well as ownership is critical in the determination of the propriety of document production under subpoena. Service on one who has control of documents may be sufficient as against the owner. See, e.g., Mattie T. v. Johnston, 74 F.R.D. 498, 502 (N.D. Miss. 1976), and authorities cited. However, the present case is different from the control involved in the cases relied upon by the Secretary. In those cases, the person subpoenaed exerted substantial control over the documents. Here, the evidence shows that Baird's control over the drawings was nominal, encompassing only the requirements of his immediate work assignment. In short, the subpoena did not allow Baird to take the documents without the permission of his superior. Thus, Judge Boltz's conclusion that there was no impropriety on the part of the inspectors in removing the drawings from Minerals' mine offices is erroneous. We are particularly disturbed by the MSHA inspectors' middle-of-the-night entry into private mine offices, without identification to appropriate agents of the operator. We strongly denounce Thompson's abuse of authority and reiterate our disapproval of the ill-controlled subpoena process agreed to by the parties.

Despite our conclusion that the exhibits were improperly obtained, we find no prejudice to Minerals. The outcome on the merits rested on adequate, independent grounds. Accordingly, we deem it inappropriate to invoke the extreme remedy of dismissal of the proceedings on the merits.

C. Mineral's objections to counsel's conduct after service of the subpoenas

1. Barkley's treatment of the subpoenaed Minerals employees

Minerals argues that counsel for the Secretary, Barkley, improperly questioned two of its employees who had been subpoenaed and that Judge Boltz failed to address this objection. Dealing with the latter assertion first, we note that although Judge Boltz did not address this objection

directly he resolved it indirectly when he found that counsel for the Secretary had not abused the Commission subpoena power and that the persons subpoenaed were witnesses for MSHA. Slip op. 7.

As to the merits of this particular contention, Minerals' argument is focused on Barkley's meeting with two subpoenaed Minerals draftsmen in advance of the resumption of the hearing on June 30, 1981, to discuss their testimony. These individuals were subpoenaed as MSHA's witnesses. While the authority for the issuance of subpoenas is through the Commission (30 U.S.C. $ 823(e) & 29 C.F.R. $$ 2700.54(a), .57 & .58), witnesses appear on behalf of the party requesting the subpoena. Because the draftsmen were witnesses for MSHA, it was reasonable and proper for Barkley to attempt to interview them before they gave their testimony.

Minerals also argues that Barkley improperly threatened the two employees by commenting that people had gone to jail trying to take refuge in subjective judgment. However, no one who heard Barkley's remark indicated that it was an assertion of an action to be taken or a prediction of events to follow. Although Barkley's comment was clearly improper and ill-chosen, evidencing a lack of understanding of proper prosecutorial conduct, it did not constitute an improper threat of criminal prosecution.

2. Barkley,s release of the subpoenaed witnesses

Minerals' allegations of misconduct as to the release of the subpoenaed witnesses involves more comments by Barkley which Minerals asserts misled Judge Carlson. Immediately after Barkley's discussion with the two draftsmen discussed above, the hearing resumed. Barkley informed Judge Carlson that he would present all of his evidence through Baird and, therefore, was excusing the remaining subpoenaed witnesses. Barkley's stated reason for this action was effectively that the testimony of the other witnesses would be cumulative. This explanation was a distortion of the facts known to Barkley and certainly beneath the level of candor reasonably expected of an officer of the court. As Barkley explained at the sanctions hearing, the real reason for his excusing the other witnesses was that they had given him a "very pat kind of response or defense to their involvement." S. Tr. 800. Barkley should not have represented otherwise to the judge.

3. Barkley's examination and retention of subpoenaed documents

Minerals next argues that Judge Boltz erred in finding no impropriety in Barkley's examining all the produced documents, including those separated out by Minerals as irrelevant, on July 1, 1981, and that it was improper for Barkley to take and refuse to return for a period of months the daily reminder diaries of the Minerals employees.

All of Minerals' witnesses testified that because they were pressed for time at the mine on the morning of June 30, they gathered all possibly relevant documents to take to Denver to be sorted out later. In general,

absent permission, one party has no right to examine the opposing party's documents to ascertain what is properly obtainable. However, the record indicates an utter lack of clear agreement between the parties as to how the documents would be produced and examined. Indeed, this dispute over the documents occurred largely because of the absence of Weber from the document production activities. At the recess of the hearing on June 30, the parties agreed to meet the next morning to exchange and examine documents. Nevertheless, prior to the document exchange Weber departed Denver and left in charge Dykers, a Minerals employee who is not an attorney. Weber did not explain to the judge or to counsel for the Secretary his intention to depart before the document examination took place. At the very least, we find it surprising that an attorney would allow documents to be produced to opposing counsel without first approving their release. Furthermore, Weber failed to give Dykers any instructions regarding the actions that should have been taken if a dispute arose. Given Weber's abdication of his adversarial responsibility, we cannot find wrongdoing in Barkley's examination of the produced documents.

We do not agree, however, with Judge Boltz's conclusion that there was no impropriety in Barkley's taking and refusing to return the diaries of the subpoenaed employees. A subpoena duces tecum does not allow retention of the originals of subpoenaed documents without permission. Whatever may be argued about the scope of the subpoena or the agreement of the parties, it is clear that Minerals did not agree to give the originals of the diaries to MSHA. In fact, the record supports the opposite conclusion. Minerals emphatically requested their return and the request should have been honored. Barkley was without authority to take and withhold the diaries and his actions are extremely troubling. Notwithstanding this conclusion, we do not perceive any fatal prejudice to Minerals' case on the merits in this instance as a result of Barkley's actions. In finding a violation, Judge Carlson noted that he relied on other unrebutted evidence and that the diary entries were too vague to be used. 5 FMSHRC at 676 n. 3.

D. Minerals' request for sanctions

We have detailed our serious concern regarding several aspects of the conduct of certain Department of Labor employees. Most troubling are Barkley's taking and retention of documents belonging to the operator, his misrepresentation to the judge as to the reason that he was excusing witnesses, and Thompson's abuse of authority, his middle-of-the-night entry into mine offices, and his taking mine

documents. The record also indicates that Weber's performance as Minerals' counsel significantly contributed to the disruptions and in fact to some of the allegations of improprieties now raised by Minerals. We have noted further the procedural mismanagement of some aspects of this case by the Commission judge.

Minerals supports its arguments that sanctions should be imposed by relying primarily on criminal cases involving the Fourth and Fifth Amendments involving defendants' motions to exclude improperly obtained evidence, and on a series of cases involving defendants' attempts to have criminal indictments dismissed because of alleged prosecutorial

misconduct during grand jury investigations. We do not find these cases controlling. As we have emphasized, Judge Carlson's decision on the merits rests on adequate, independent grounds apart from the drawings taken from the mine and the improperly retained diaries. Furthermore, even courts dealing with the possible dismissal of criminal indictments have required a showing that the alleged prosecutorial misconduct has materially prejudiced the defendant's case. See, e.g., Laughlin v. United States, 385 F.2d 287, 292 (D.C. Cir. 1967). As explained above, we cannot conclude that the objectionable conduct of the Secretary's representatives prejudiced Minerals' case on the merits, or affected the substantive outcome of the citation and withdrawal order contest. We believe, however, that the noted serious deficiencies in the performance of the Secretary's personnel must be addressed. We find it appropriate in this instance to address those deficiencies by strongly urging the Secretary of Labor to review the noted objectionable performance by his employees and to take appropriate remedial action to ensure that such conduct by his representatives will not be repeated.

Accordingly, under all the circumstances of this case, we conclude that sanctions or disciplinary proceedings before the Commission are inappropriate.

III.

Conclusion

For the reasons set forth herein, we decline to impose the severe sanction of dismissal sought by Minerals. We affirm Judge Carlson's decision, and on the bases discussed above, we affirm Judge Boltz's order denying sanctions against the Secretary. 6/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

6/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission in this matter.