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LONNIE JONES V. D&R CONTRACTORS
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FMSHRC-WDC
July 24, 1986

LONNIE JONES

v. Docket No. KENT 83-257-D(A)

D&R CONTRACTORS

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY BACKLEY, DOYLE AND NELSON:

This case involves a complaint of discrimination filed by Lonnie Jones pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982). In his decision on the merits, the Commission Administrative Law Judge concluded that Mr. Jones had been discharged by D&R Contractors ("D&R") on April 25, 1983, in violation of section 105(c)(1) of the Mine Act. 6 FMSHRC 1312 (May 1984)(ALJ). 1/

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1/ Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative

> of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. $ 815(c)(1).

In a subsequent decision concerning remedies, the judge ordered D&R to pay Jones back wages, certain costs and attorney's fees. 6 FMSHRC 2480 (October 1984)(ALJ). The Commission granted D&R's petition for discretionary review. D&R contends that it was improperly joined as a party to this action. We agree. For the reasons that follow, we reverse the judge's decision and dismiss this proceeding.

Given the nature of our disposition, the following statement of facts is restricted to the procedural history of this case. On May 10, 1983, Jones filed his initial Mine Act discrimination complaint, pursuant to section 105(c)(2) of the Mine Act, with the Department of Labor's Mine Safety and Health Administration ("MSHA"). 2/ His complaint was

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2/ Section 105(c)(2) of the Mine Act provides:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 [United States Code] but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission

> shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to [this] paragraph.

30 U.S.C. $ 815(c)(2).

filed against Ronald Perkins, who was named as foreman of Mingo Coal Company ("Mingo") and D&R. The complaint alleged that Jones was discharged by Perkins on April 25, 1983, because he had exercised his statutory right to refuse to work under hazardous conditions.

After investigating Jones' complaint, MSHA determined administratively that a violation of section 105(c)(1) of the Mine Act had not occurred. MSHA communicated the results of its investigation to Jones in a letter dated June 13, 1983. The letter also advised Jones that if he wished to pursue his claim, he had the right, pursuant to section 105(c)(3) of the Act, to file a discrimination complaint on his own behalf with this independent Commission within 30 days of notice of MSHA's determination. 3/

3/ Section 105(c)(3) of the Mine Act provides:

> Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 [United States Code] but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be

assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section [106] of this [Act]. Violations by any person of [section 105(c)(1)] shall be subject to the provisions of sections [108] and [110(a)] of this [Act].

30 U.S.C. $ 815(c)(3).

On June 27, 1983, Jones timely filed his section 105(c)(3) discrimination complaint with this Commission, naming Mingo as the sole respondent. The complaint was served on Roger Daniel, owner and operator of Mingo.

On August 18, 1983, Mingo filed an answer and a motion for dismissal or summary judgment. In addition to asserting that Jones had never been in its employ, Mingo alleged that Jones had been an employee or partner of D&R, an independent contractor that operated the mine owned by Mingo. Based on this allegation, Mingo argued that D&R was an indispensable party to the action.

On August 22, 1983, Jones filed a motion to join D&R as a party-respondent. In turn, Mingo opposed Jones' motion on the ground that joinder of D&R was untimely. Subsequently, the presiding Commission judge issued an order provisionally joining D&R as a party "for purposes of hearings on all pending motions." Unpublished Order dated October 17, 1983. The judge's order stated that all pending motions would be entertained at the start of the hearing, and that a hearing on the merits would follow, if it were deemed necessary.

The judge's order also directed Jones to serve D&R with a copy of the discrimination complaint. Jones' complaint was served on D&R on October 25, 1983, and D&R filed its answer on November 17, 1983. Among other things, D&R's answer alleged that Jones was not employed by D&R, but rather was a joint venturer or partner of D&R. D&R further asserted that Jones' complaint against D&R should be dismissed because it was time-barred by section 105(c)(3) of the Mine Act, which provides that a miner's complaint is to be filed within 30 days of notification that the Secretary of Labor will not prosecute a complaint on the miner's behalf (n. 3 supra).

The hearing on this matter was held on February 7-8, 1984. Attorneys entered appearances for Jones, Mingo and D&R. At the start of the hearing, the judge heard arguments on Jones' motion to join D&R as a party. Jones' attorney explained that the motion to join was made "because of [Mingo's] allegations ... that D&R Contractors [was] an indispensable party ..., the remedy [was] not to dismiss the case, but to allow for the joinder of D&R...." Tr. 10. However, in response to questions by the judge, Jones' attorney stated his legal position that Jones "was totally an employee of Mingo ... and not [an employee or] partner of D&R.. ." Tr. 11. He further stated "[s]o far as Mr. Jones is concerned, it s his position there is no evidence that he is an employee or partner of D&R Contractors." Tr. 12. Mingo

asserted that its defense to Jones' charge was that Jones was an employee and/or partner of D&R and that Mingo was not responsible for his discharge. After inquiring of the parties whether there were any objections to the dismissal of D&R and receiving negative responses from the attorneys for

both Jones and Mingo, the judge dismissed D&R. Tr. 11-17. 4/ Because Ronald Perkins, D&R's foreman and a partner of D&R, was subpoenaed as a witness, he remained, but was sequestered along with the other witnesses. D&R's counsel also remained, although he did not participate in the hearing.

Jones then presented his case on the merits. In part, he testified about his employment relationship with Mingo and its owner Roger Daniel. At the close of Jones' case, Mingo asserted that Jones had failed to prove his case and moved for summary judgment and a directed verdict. The judge decided to consider the motions overnight.

At the start of the second day of the hearing, on February 8, 1984, the judge denied both of Mingo's motions. The judge opined that if there was to be any finding of discrimination, "the only person chargeable or

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4/ The following colloquies are illustrative:

Q. (JUDGE): Do you know of any evidence, through your discovery or any other information, that would lead you to believe that ... Mingo ... and/or D&R ... will produce evidence to show that Mr. Jones was an employee, or partner, of D&R ...?

A. (MR. ARMSTRONG, JONES' ATTORNEY): So far as Mr. Jones is concerned, it's his position there is no evidence that he is an employee or a partner of D&R....

Q. (JUDGE): And that is your legal position?

A. (ARMSTRONG): Yes.

* * * *

Q. (JUDGE): [L]et's get back to the question of the joinder of D&R....

Mr. Armstrong, you do not see any necessity of retaining D&R as a party, is that correct?

A. (ARMSTRONG): No, your Honor.

Q. (JUDGE): And Mingo ... does not see any necessity of

retaining D&R as a party?

A. (MR. BURTON, MINGO'S ATTORNEY): Not as against Mingo....

(JUDGE): Then D&R will be dismissed as a party in this case.

Tr. 11-12, 17.

the only entity chargeable with that would be D&R Contractors and/or Ronald Perkins." Tr. 211. The judge then asked Jones' counsel whether he had any objections to the rejoining of D&R as a party. Jones' counsel had no objection.

Admitting that D&R's joinder was "rather unusual" after Jones' case-in-chief had been completed, the judge noted that D&R's counsel had been present throughout the previous day's proceedings. Tr. 211-12. D&R, however, objected to being rejoined. It argued that the discrimination complaint against it, which had been effected by Jones' August 22, 1983, joinder motion, was time-barred by the relevant 30-day time limit in section 105(c)(3) of the Act. Following a discussion off the record, the judge agreed with D&R's period of limitations argument. The judge based his determination, however, on his mistaken belief that Jones had filed his joinder motion in August 1984 (rather than in 1983). Tr. 215-17. Finding that Jones had not moved to join D&R until well beyond the.applicable 30-day filing period in section 105(c)(3) of the Act, the judge concluded, "[T]hat [ruling] I previously made that [D&R is] no longer a party to this proceeding would stand." Tr. 217.

Mingo renewed its motion to dismiss Jones' complaint for failure to join an indispensable party. The judge determined that there was sufficient evidence to proceed against Mingo and denied the motion. Mingo proceeded with its defense. The only witnesses presented by Mingo were Daniel and Perkins. Although D&R s counsel was present he took no part in their examination or cross=examination. After the testimony of these two witnesses, Mingo rested its case and the judge took the case under advisement.

Two weeks after the conclusion of the hearing, on February 22, 1984, the judge arranged a conference call with the attorneys for Jones, Mingo and D&R. Although there is no transcript or minute of this conversation, it is clear that the judge arranged the call because he had recognized the computational mistake that he had made in ruling on the period of limitations defense raised by D&R. 6 FMSHRC at 1314 n. 2. It appears that during the call the judge informed the parties that his decision not to join D&R on February 8, 1984, was based on his miscalculation of the time that had elapsed from the date of the Secretary's non-prosecution letter to Jones and the date of Jones' subsequent motion to join D&R. Using the correct date of Jones' joinder motion, August 22, 1983, the judge determined that Jones' filing delay of some 35 days was excusable. He told the parties of his intent to rejoin D&R and, according to his written decision in this matter, offered D&R the "opportunity to present

additional evidence and/or to cross examine witnesses...." 5/

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5/ During this conference call the judge also informed the parties that he intended to dismiss Mingo as a party because he had concluded that Mingo was not Jones' employer and was not responsible for his discharge. On March 7, 1984, the judge issued an order severing Jones' case against Mingo from the present case involving D&R and, on March 8, 1984, reduced his decision in this regard to writing. 6 FMSHRC 632 (March 1984)(ALJ).

D&R appears to have objected to its joinder on two grounds: that it had been dismissed on the first day of the hearing -- with Jones' consent -- and, therefore, had not had the opportunity of participating in the hearing process; and, again, that Jones' motion for joinder was time-barred. D&R followed up its oral objection with a written statement of its objections and a letter informing the judge that D&R was not going to submit any additional evidence. In its objections, D&R repeated that it had been dismissed with Jones' consent and had not participated in the hearing. On March 7, 1984 the judge joined D&R and then severed the case involving D&R from Jones action against Mingo. Subsequently, D&R was permitted to and did file a brief on the merits of this case.

In his decision on the merits, the judge focused most of his attention on D&R's timeliness argument and the evidence concerning Jones' discharge. The judge rejected D&R's due process objections to its joinder after the hearing. In a footnote generally describing the February 22, 1984, conference call, the judge stated:

> D&R Contractors was given opportunity to present additional evidence and to cross-examine witnesses who had appeared at the hearings in this case. It is noted that counsel for D&R Contractors was present throughout the hearings and that D&R Contractors waived the opportunity to present additional evidence and/or to cross-examine witnesses.

6 FMSHRC at 1314 n.2. The judge concluded that Jones' discharge was in violation of section 105(c)(1) of the Mine Act and, in his subsequent remedial order, directed D&R and Ronald Perkins to pay Jones back wages with interest plus costs and his attorney's fees. We subsequently granted D&R's petition for discretionary review.

The procedural error claimed by D&R in this case presents us with a straightforward due process issue: whether the judge's post-hearing joinder of D&R as a party effectively denied the operator an adequate opportunity to defend against the claim of unlawful, discriminatory discharge. We hold that it did. The highly unusual procedure followed by the judge in this case denied D&R the fundamental right to defend itself in a meaningful manner, thereby depriving D&R of due process of law.

The crucial procedural facts are clear. Initially, D&R was joined only provisionally by the judge and was dismissed as a party on the first day of the hearing before any testimony was taken. The

grounds of dismissal were substantive -- viz., that D&R was not the responsible employer in this matter. Jones' counsel voluntarily and unequivocally consented to this dismissal. Tr. 10-17; see n. 4, supra. At that point, D&R's potential liability, if any, was terminated. 6/

6/ As noted earlier, the judge reinforced his dismissal of D&R by declining to rejoin it as a party at the conclusion of Jones' case-in-chief. The judge ruled, "[T]hat [ruling] I previously made that [D&R is] no longer a party to this proceeding would stand." Tr. 217; see p. 6, supra.

Nevertheless, despite having dismissed D&R twice as a party in this case, the judge, following a conference call that he initiated, rejoined D&R two weeks after the conclusion of the hearing. We find that this post-hearing joinder is violative of D&R's due process rights and are unpersuaded by the reasons offered by the judge supporting the joinder. The judge noted that counsel for D&R had been present at the hearing, and he relied principally upon the fact that counsel for D&R had been given the opportunity to present evidence and to cross-examine witnesses who had testified at the hearing, but had declined the offer. See 6 FMSHRC at 1314 n.2.

We hold that under the facts of this case the judge's offer to D&R to reopen the record did not afford sufficient due process and thus the post-hearing joinder of D&R was improper. Simply stated, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Given the fact that D&R was not a party to this litigation when the case was tried before the judge, the reopening of a cold administrative record can hardly be said to satisfy the meaningful time and meaningful manner requirement contemplated by the Court in Mathews v. Eldridge and Armstrong v. Manzo and their progeny. The fact that counsel for D&R was present at the hearing is not persuasive. D&R's counsel did not participate in the hearing -- he was only a spectator. The judge's offering D&R the post-hearing opportunity to present evidence and to cross-examine witnesses (who had testified two weeks earlier) has a hollow ring. Accordingly, to uphold the post-hearing joinder of D&R under the facts of this case would be a serious affront to the principle of due process.

In finding the judge's post-hearing joinder of D&R to be improper, we are mindful of the consequences to complainant Lonnie Jones. Nevertheless, in seeking to uphold Jones' right under the Mine Act to be free of unlawful discrimination, we cannot infringe upon the due process rights of D&R. Moreover, we note that Jones' counsel substantially contributed to the procedural confusion that has plagued this case. As noted above, Jones' counsel voluntarily consented to the pretrial dismissal of D&R as a party. In addition Jones had every opportunity through the Commission's pretrial discovery process to determine the appropriate employing entity. See 29 C.F.R. $$ 2700.55-.57. As the transcript reveals, Jones' counsel was on express notice, when he consented to D&R's dismissal at the outset of the hearing, that Mingo might well defend on the ground that it was not Jones' employer. In the adversarial system,

Jones must live with the consequences of his counsel's consent to D&R's dismissal and his counsel's failure to seek the seasonable rejoinder of D&R.

There must be reasonable limits to the dismissal and rejoinder of parties in Commission practice. In this case the sua sponte judicial

addition of a party after its dismissal with consent and after hearing was fundamentally unfair and contrary to Commission process. Accordingly, we hold that the judge erred in joining D&R. 7/

Finally, we wish to comment briefly upon the judge's sua sponte activity in the attempted post-hearing joinder of D&R. At least under the particular facts of the case, we find the judge's efforts to have been misdirected. The role of the Commission and its judges is to adjudicate, not to litigate, cases -- a procedural axiom followed by this Commission from its formation. See e.g., Canterbury Coal Co., l FMSHRC 1311, 1312-14 (September 1979). Pertinent to our present purposes, parties bring discrimination cases under the Mine Act. The Commission does not solicit, initiate, or revive a party's complaint. The Mine Act provides for the traditional adversarial hearing process familiar to American law and we must be vigilant in respecting that process. 30 U.S.C. $ 815.

For the foregoing reasons, the judge's decision is reversed and this proceeding is dismissed with prejudice. 8/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

7/ Given our disposition, we do not reach D&R's objection to Jones' complaint on the ground of timeliness nor the substantive merits of Jones' case.

8/ Chairman Ford did not participate in the consideration or disposition of this matter.

Commissioner Lastowka, dissenting:

The administrative law judge concluded that Lonnie Jones was discharged by D&R Contractors in violation of section 105(c)(1) of the Mine Act. On review D&R challenges the judge's decision on procedural grounds only, contending "that it was improperly joined as a party to this action." Slip op. at 2. Agreeing with D&R, my colleagues hold that the joinder below "effectively denied the operator an adequate opportunity to defend against the claim of unlawful, discriminatory discharge ... thereby depriving D&R of due process of law." Slip op. at 7. I agree that the determination of the proper respondent in this discrimination proceeding followed an unusual and tortuous path. I cannot conclude, however, that the judge's ultimate joinder of D&R impugned D&R's constitutional due process rights to a fair hearing.

In evaluating the merits of D&R's procedural objection it must be kept foremost in mind that we are dealing with administrative proceedings provided by Congress to determine civil liability under an important and particularly remedial section of a safety and health statute. Such proceedings, of course, must be conducted consistent with the dictates of due process. Due process, however, does not require that "administrative hearings ... be conducted with all the formalities and strictures of a criminal case." Mack v. Florida State Board of Dentistry, 430 F.2d 862, 864 (5th Cir. 1970), cert. denied. 401 U.S. 954 (1971). Rather, the touchstone of procedural due process in administrative proceedings requires consideration of whether substantial prejudice has occurred. Arthur Murray Studio v. F.T.C., 458 F.2d 622, 624 (5th Cir. 1972). Notably absent from the record in this case is any demonstration of substantial prejudice suffered by D&R as a result of the judge's reconsideration of his previous denial of Jones' joinder motion. Quite to the contrary, as discussed below the record amply demonstrates that no prejudice resulted from the judge's ruling.

First, D&R was named by Jones in his initial complaint of discrimination filed with MSHA 15 days after his asserted illegal discharge. Thus, D&R had prompt notice of Jones' claim against it and cannot assert prejudice based on surprise or faded witness memories. Second, although the complaint filed with the Commission initially named only Mingo Coal Company as respondent, Jones promptly moved to add D&R as a respondent following the filing of Mingo's answer asserting that D&R, not Mingo, was his employer. Third, D&R was offered a hearing once the judge realized that his denial of joinder at the hearing in part had been based on his own obvious

computational error in determining a pertinent time period. D&R refused a hearing, however, choosing instead to rely on procedural objections to its "late joinder." Fifth, the rampant confusion evident in this record over the nature of Jones' employment relationship with D&R and Mingo is attributable in large part to the less than clear "partnership" arrangement used in this case, and apparently commonly used in Kentucky, primarily as a device to avoid

obligations under workers' compensation and other programs. Tr. 152-156, 199-206. See also BNA, Mine Safety and Health Reporter, February 5, 1986, at 342 (State of Kentucky to take corrective action addressing use of mining partnership agreements, which are described as "a significant problem area in need of attention", due to widespread confusion over ownership responsibilities). Sixth, as a result of the partnership arrangement, through which Roger Daniel as sole owner of Mingo contracted with D&R, comprised of Ronald Perkins as foreman/partner and Jones and several other miners as additional partners, all of the principals with knowledge of the circumstances surrounding the disputed discharge who testified at the proceedings involving Mingo are the same individuals who would have testified in the proceeding against D&R. Therefore, the witnesses were known to D&R and readily available at the time of its joinder. Reopening the hearing to permit their further testimony and cross-examination and for the introduction of additional evidence does not contravene due process. Little Sandy Coal Sales, 7 FMSHRC 313 (March 1985).

In light of the above, I conclude that the showing of substantial prejudice necessary to sustain a procedural due process objection has not been established in this record. By refusing the judge's offer to reconvene the hearing, D&R deprived itself of the very opportunity to defend against the merits of Jones' complaint that it now protests it has been unfairly denied.

Insofar as the administrative law judge's authority to reopen the hearing is concerned, I cannot agree with my colleagues' suggestion that the judge's actions constituted inappropriate advocacy rather than impartial adjudication. Slip op. at 9. "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing." City of New Orleans v. Paine, 147 U.S. 261, 266 (1893). Accord, Bookman v. U.S., 453 F.2d 1263, 1264-65 (Ct. Cl., 1972); Faircrest Site Opposition Committee v. Levi, 418 F. Supp. 1099, 1109 n. 3 (N.D. Ohio, 1976). Here, Jones' complaint was still pending within the jurisdiction of the judge. While the case was before him, he determined that he had committed a basic and obvious factual error in denying joinder. He decided to rectify rather than ignore his error. In doing so he acted appropriately; the failure to do so would have been error. 1/

1/ An apt parallel to the judge's actions in the present case might be drawn from the following comments by the court in Faircrest Site Opposition Committee v. Levi. supra:

The second action challenged by plaintiff under the arbitrary and capricious standard is the L.E.A.A.S ultimate decision to issue a negative declaration. Plaintiff points to the fact that the deciding representative of L.E.A.A., Eldon James, changed his mind on this issue no less than three times in less than a month. Clearly such actions are not, to say the least, conducive to the public confidence in the responsibility of Washington administrators; nor is this Court impressed with the procedural

(Footnote continued)

Federal Rule of Civil Procedure 21 provides further support for the judge's action. Rule 21 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just.

(Emphasis added). Pursuant to Rule 21, the judge possessed the authority to rejoin D&R and his offer to reconvene the hearing to allow it to present its case is a just term for permitting the joinder. See Commission Procedural Rule 1(b), 29 C.F.R. $ 2700.1(b)(Federal Rules of Civil Procedure applicable to Commission proceedings insofar as practicable).

In sum, while I agree that "there must be reasonable limits to the dismissal and rejoinder of parties in Commission practice" (slip op. at 8), considering the clear remedial purpose underlying section 105(c) of the Mine Act, to conclude that such limits were exceeded in the present case is to adopt a "hypertechnical and purpose-defeating interpretation." Donovan v. Stafford Construction Co. and FMSHRC, 732 F.2d 954, 959 (D.C. Cir. 1984). Therefore, I respectfully dissent from the majority's dismissal of Jones' complaint.

James A. Lastowka, Commissioner

Footnote 1/ continued

> lapses and indecisiveness demonstrated by L.E.A.A. in this action. However, the issue herein presented is whether its decision is arbitrary or capricious. These demonstrations of sporadic indecisiveness are merely evidence of said legal characterization; they are not proof thereof.
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> ....[W]hile James' wavering decisions certainly appear on the surface to be the result of arbitrary and capricious action, upon reflection it is apparent that they were not.

418 F. Supp. at 1104-05.

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