

CCASE:

UTAH POWER & LIGHT V. MSHA AND UMWA

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FMSHRC-WDC

December 23, 1987

UTAH POWER & LIGHT CO.,
MINING DIVISION

Docket Nos. WEST 87-130-R through
WEST 87-163-R
WEST 87-243-R through
WEST 87-249-R

v.

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

and

UNITED MINE WORKERS OF AMERICA

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

Utah Power & Light Co., Mining Division ("UP&L") has petitioned the Commission for interlocutory review of an order issued in these proceedings by Commission Administrative Law Judge John J. Morris denying UP&L's motion for summary decision. Respondent Secretary of Labor and Intervenor United Mine Workers of America ("UMWA") oppose the petition. Upon consideration of the petition and oppositions, the petition is denied for the reasons set forth below.

On March 24, 1987, as a result of an investigation by the Department of Labor's Mine Safety and Health Administration ("MSHA") of a fire and loss of life at the Wilberg Mine in December 1984, the Secretary issued numerous citations and orders to "Emery Mining Corp. and its successor-in-interest Utah Power & Light Co., Mining Division. At the time of the fire, the Wilberg Mine was owned by UP&L but, pursuant to contract, was being operated for UP&L by Emery Mining Corporation ("Emery"). On April 16, 1986, UP&L purchased Emery's assets and assumed direct operation of the Wilberg Mine.

UP&L contested the citations and orders issued to it by the Secretary asserting that it was "not liable for the violation[s] as Emery's successor-in-interest." The Secretary filed general answers to UP&L's notices of contest, denying all allegations contained in the contests.

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On May 22, 1987, during the course of pre-hearing proceedings, UP&L filed a motion for summary decision pursuant to Commission Procedural Rule 64, 29 C.F.R. § 2700.64, arguing that, as a matter

of law, it was not liable as a successor-in-interest for the violations alleged in the citations and orders. The Secretary filed a response and crossmotion for summary decision, asserting that "UP&L can be held liable as either 'successor-in-interest' to [Emery] or independently as a mine operator for violations cited by [MSHA]" Sec. Response and Cross-Motion for Summary Judgment at 3. In an unpublished order issued on August 5, 1987, the judge denied both motions. The only explanation given in the order for his denial was that "a genuine issue of fact concerns whether UP&L was in control of the Wilberg Mine at the time of the alleged violations." Order at 3 (August 4, 1987). On September 18, 1987, UP&L moved the judge for reconsideration, contending that the question of whether UP&L was in control of the Wilberg Mine, although possibly relevant to whether UP&L may be held liable as an operator, was irrelevant to whether UP&L was liable as Emery's successor-in-interest as charged in the citations and orders -- the sole issue raised in UP&L's motion for summary decision. Judge Morris denied the motion for reconsideration without explanation.

Commission Procedural Rule 74, 29 C.F.R. § 2700.74, sets forth the standard of review governing consideration of such petitions: The Commission, in its discretion, may grant interlocutory review "upon a showing that the [challenged] ruling involves a controlling question of law and that immediate review of the ruling may materially advance the final disposition of the proceeding." Because the Secretary has failed to articulate clearly the theory underlying his charges against UP&L, and because the judge's order does not state clearly the basis for his rulings on UP&L's motions, we are unable to determine whether the issue of UP&L's liability as a successor-in-interest involves a controlling question of law and whether interlocutory review will advance the final disposition of this case.

The record reveals that the contested citations and orders were issued to UP&L as Emery's "successor-in-interest." The record also reveals that the thrust of UP&L's defense to date is that it is not liable as a successor. In response to UP&L's motion for summary decision, the Secretary stated that UP&L also may be independently liable as an "owner-operator" (Sec. Response at 7), but the major focus of the Secretary's argument was that UP&L is liable as a successor-in-interest. Sec. Response 8-21. Additionally, in response to UP&L's motion for reconsideration the Secretary stated as follows:

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Although the Secretary determined that Emery was properly cited as the operator and UP&L was properly cited as a successor-in-interest, we fully agree that UP&L exercised operator-type health and safety

responsibilities under the Mine Act. Therefore, if it is determined by the judge that, based upon the facts, UP&L was a co-operator of the Wilberg Mine at the time of the cited violation, then the Secretary would accept that determination and would agree that such a determination would be a proper exercise of his authority.... The facts at the time of issuance supported, in the Secretary's view, citing UP&L, at least, as a successor-in-interest. However, after review, further evidence might support charging UP&L as a co-operator as well as a successor-in-interest.

Sec. Response at 3-4 (emphasis added). The Secretary further states in his opposition to UP&L's petition for interlocutory review that "[t]he fact that UP&L was cited as a successor does not mean that the judge may not hold it liable as an operator if the evidence supports such a finding." Sec. Opposition To Motion for Interlocutory Review 3 (emphasis added). The Secretary also argues that any defect in his pleadings may be corrected subsequently through Fed. R. Civ. P. 15(b)(amendments to conform to the evidence).

We regard the existing state of the Secretary's pleadings as unfocused and confused, providing neither UP&L nor the Commission with a clear statement of his asserted basis for imposing liability upon UP&L. The Secretary as prosecutor is responsible for charging violations under the Mine Act, not the Commission. As UP&L notes, the Secretary's theory for imposing liability will determine the nature of UP&L's defense to the allegations contained in the citations and orders. UP&L Petition for Interlocutory Review 4-5. To avoid any possibility of prejudice to UP&L, a clear articulation of the liability theory or theories that the Secretary is alleging and intends to pursue in this important litigation is required.

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These proceedings are in a preliminary, prehearing stage. The Secretary must clarify the theory of liability upon which he intends to proceed. UP&L may, of course, renew or interpose whatever defenses or motions it deems appropriate. Finally, it is incumbent on the judge to fully explain the basis of his rulings on any such further motions.

Accordingly, the petition for interlocutory review is denied.

Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner

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