

CCASE:

EMERY MINIG AND UTAH POWER AND LIGHT V. MSHA, UMWA

DDATE:

19890110

TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

WASHINGTON, D.C.

January 10, 1989

EMERY MINING CORPORATION
and UTAH POWER AND LIGHT
COMPANY

DOCKET NOS. WEST 87-130-R
THROUGH 137-R

WEST 87-144-R
THROUGH-147-R

v.

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

WEST 87-150-R
WEST 87-152-R
WEST 87-153-R

and

UNITED MINE WORKERS
OF AMERICA (UMWA)

WEST 87-155-R
THROUGH 161-R

WEST 87-163-R

WEST 87-243-R
THROUGH 249-R

WEST 87-208-R
WEST 87-209-R
WEST 87-25

DIRECTION FOR REVIEW AND ORDER

On November 19, 1988, the Secretary of Labor filed a petition for interlocutory review of an order issued August 30, 1988, wherein the presiding administrative law judge granted the petition of Utah Power and Light Company ("UP&L") to vacate 30 modified citations and orders to the extent that they named UP&L as a party.

On December 5, 1988, UP&L filed an opposition to the petition for interlocutory review arguing, among other things, that the subject order was not interlocutory but rather was a final order, reviewable only upon the timely filing of a petition for discretionary review in accordance with 30 U.S.C. Sec. 823(d)(2)(A)(i) and Commission Procedural Rule 70, 29 C.F.R. Sec. 2700.70. See UP&L Opposition at 6.

~2

On December 19, 1988, the Secretary filed a reply to UP&L's

opposition, arguing that the subject order was not a final decision because the requirements of Rule 54(b) of the Federal Rules of Civil Procedure were not met.^{1/} Specifically the Secretary stated that: The August 30 Order contains no express determination that there is no reason for delay or express direction for the entry of final judgment as to Utah Power and Light.

Sec. Reply at 3.

In *Local Union 1889, District 17, United Mine Workers of America v. Westmoreland Coal Co.*, 5 FMSHRC 1407, 1411-12 (August 1983), pursuant to Commission Procedural Rule 1(b), 29 C.F.R.

Sec. 2700.1(b), we applied Rule 54(b) in the context of an adjudication of fewer than all claims presented in an action.^{2/} We find that Rule 54(b) is equally applicable in the context of adjudications involving multiple parties. We concur in the statement in 10 *Wright, Miller, & Kane, Federal Practice and Procedure*, Sec. 2654 at 38 (1983) (footnotes omitted):

The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much-needed certainty in determining when a final and appealable judgment has been entered. As stated by one court, "if it does choose to enter such a final order, the court] must do so in a definite, unmistakable manner." [David v. District of Columbia, 187 F.2d 204, 206 (D.C. Cir. 1950).] Absent a certification under any Rule 54(b) order in a multiple-party or multiple-claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.

See also, *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984).

^{1/} The Secretary's Motion to File Reply Memorandum is hereby granted.

^{2/} Rule 1(b), 29 C.F.R. Sec. 2700.1(b) states: Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. Secs. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil

Procedure as appropriate.

~3

In the case at bar, the parties clearly have differing views as to the effect of the order intended by the administrative law judge. Accordingly, we hereby grant the petition for interlocutory review for the limited purpose of remanding this matter to the administrative law judge for an expeditious determination of whether a certification of finality in accordance with Rule 54(b) is appropriate. After the judge clarifies the nature of his dismissal on remand, we will issue a further appropriate order concerning the Secretary's petition for interlocutory review. Pending issuance of such an order by the Commission, all time requirements are hereby stayed.

Accordingly, we hold in abeyance our ruling on the Secretary's petition, and we retain jurisdiction pending the judge's determination on remand.

RICHARD V. BACKLEY, Commissioner

JOYCE A. DOYLE, Commissioner

JAMES A. LASTOWKA, Commission