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MSHA AND UMWA V. MID-CONTINENT RESOURCES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 19, 1989

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

and Docket No. WEST 87-88

UNITED MINE WORKERS OF AMERICA

v.

MID-CONTINENT RESOURCES, INC.

BEFORE: Ford B. Ford, Chairman; Backley, Doyle, and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982)("Mine Act" or "Act"), the American Mining Congress ("AMC") and Mid-Continent Resources, Inc. ("Mid-Continent") filed petitions for discretionary review of a decision by Commission Administrative Law Judge John Morris. 10 FMSHRC 881 (July 1988)(ALJ). The Commission granted both petitions for review, briefing has been completed in the case, and oral argument is scheduled for December 21, 1989. After review was directed the Secretary of Labor filed a motion seeking dismissal of the AMC s petition for review. In addition, ASARCO, Inc. ("ASARCO") filed a motion requesting leave to file an amicus curiae brief out of time in support of the AMC's and Mid-Continent's positions as to the merits of the case. For the reasons that follow, we grant the Secretary's motion to dismiss the AMC's petition for discretionary review but conclude that, under the circumstances, the AMC may continue its participation as an amicus curiae

and may participate in the scheduled oral argument in this proceeding.
We deny ASARCO's motion requesting leave to file an amicus curiae brief out of time.

I.

Background

This proceeding arises from a citation issued to Mid-Continent by the Department of Labor's Mine Safety and Health Administration ("MSHA") on May 13, 1986, charging the operator with a violation of section 103(f) of the Act, 30 U.S.C. 813(f). The citation alleged that on May 13, 1986, Mid-Continent had denied Robert Butero, a designated representative of miners, access to Mid-Continent's Dutch Creek No. 1 Mine near Redstone, Colorado, for purposes of accompanying an MSHA inspector on walkaround during the latter's inspection of the mine. About one month earlier, the United Mine Workers of America ("UMWA") had notified both MSHA and Mid-Continent, pursuant to the Secretary's regulations at 30 C.F.R. Part 40, that it had been designated by two employees at the Dutch Creek No. 1 Mine as these miners' representative under the Mine Act. 1/ The notification designated Mr. Butero as the specific representative of the miners. Shortly after issuance of the citation, the inspector issued a withdrawal order to Mid-Continent, pursuant to section 104(b) of the Act, 30 U.S.C. 814(b), alleging that Mid-Continent had continued to refuse Butero the right to accompany the inspector during inspection of the mine.

On March 16, 1987, the Secretary filed a civil penalty petition against Mid-Continent in connection with the citation. Mid-Continent filed an answer and the matter was assigned to Judge Morris. In October 1987, the judge granted the UMWA party status as an intervenor, and the AMC was permitted to appear as amicus curiae. On November 23, 1987, the Secretary filed a motion with the judge seeking to withdraw the civil penalty petition. The Secretary conceded that one of the two individuals who had signed the designation form was not an active miner at the time that the form was filed and, thus, that the designation did not comply with the requirements of 30 C.F.R. 40.1(b) (see n.1). In response to an order to show cause why the motion should not be granted, Mid-Continent opposed the Secretary's motion and moved for declaratory relief. Mid-Continent argued that a nominal number of employees should not be permitted under color of 30 C.F.R. Part 40 to designate as the miners representative a union that did not also represent the employees for collective bargaining purposes under the National Labor Relations Act ("NLRA"). Mid-Continent contended that the Mine Act miners' representative process was being improperly manipulated to facilitate organizational activity for NLRA purposes.

On July 1, 1988, the judge entered an order of dismissal in which he granted the Secretary:s motion to withdraw the civil penalty petition, vacated the proposed penalty, denied declaratory relief, and dismissed the

proceeding. 10 FMSHRC 881. The Commission received and granted petitions for discretionary review from both Mid-Continent and the AMC; which, as noted, had participated as amicus curiae below. The

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1/ 30 C.F.R. 40.1(b) defines "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act...."

AMC also filed a motion to consolidate the two petitions, which the Commission granted. Briefs of Mid-Continent and the AMC were received by the Commission on September 16, 1988. Opposing briefs of the UMWA and the Secretary were received by the Commission on November 1 and 7, 1988, respectively. On November 7, 1988, the Secretary filed a motion to dismiss the AMC's petition for discretionary review and, on that same date, ASARCO filed a motion for leave to file an amicus curiae brief out of time.

Intervenor UMWA has filed a response in support of the Secretary's dismissal motion, while the AMC and Mid-Continent have filed oppositions to the motion. The AMC and Mid-Continent support ASARCO's motion to file its amicus curiae brief, while the Secretary and the UMWA oppose it. We turn first to consideration of the Secretary's motion to dismiss the AMC's petition.

II.

AMC's Standing to Petition the Commission for Review

Section 113(d)(2)(A)(i) of the Mine Act provides that "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission...." 30 U.S.C. 823(d)(2)(A)(i) (emphasis added). The specific question presented is whether, in the circumstances of this case, the AMC is a "person adversely affected or aggrieved" by Judge Morris' decision and, hence, possessed of standing to petition for review of that decision. We answer that question in the negative.

In our view, the Mine Act does not contemplate that any nonparty dissatisfied with a judge's decision is empowered to seek Commission review merely by virtue of such dissatisfaction and the fact that the Act uses the term "person" instead of "party" in section 113(d). We conclude that, in order to petition the Commission for review under section 113, an "adversely affected or aggrieved" nonparty must demonstrate a sufficiently direct and concrete interest in the proceedings below and show that the interest is adversely affected by the outcome of the proceedings.

Our analysis begins with the language of the Mine Act and the general federal law of appeal. Section 113(d) uses the term "person" rather than "party" and the plain meaning of this terminology suggests that circumstances may obtain where a nonparty may petition the Commission for review of a judge's decision. Nothing in the text of section 113 or the scant legislative history on the subject specifically explains the intended scope of the language in question. However, viewing the Act as an integral whole, we perceive two prominent statutory themes that guide

resolution of the issue.

First, appeals to the Commission from judges' decisions pursuant to section 113(d) arise in an adjudicative context in which traditional adversarial litigation, conducted in a two-tiered administrative arena of trial-type hearings and discretionary review, is the vehicle for

dispute resolution. Second, the Mine Act throughout mandates efficient and expeditious litigation and adjudication. Within this general framework, we discern no warrant for an interpretation of section 113(d)'s review procedure that is out of line with normal litigation processes or that is likely to complicate or prolong the resolution of disputes under the Act.

The general rule of federal appellate law is that only a litigant who was a party to the proceedings below and who is aggrieved by the judgment or order may appeal. E.g., Hispanic Soc v. New York City, 806 F.2d 1147, 1152 (2d Cir. 1986); United States v. LTV Corp., 746 F.2d 51, 53-54 (D.C. Cir. 1984); SEC v. Lincoln Thrift Ass'n, 577 F.2d 600, 602 (9th Cir. 1978). See generally 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice Par. 203.06 (2d ed. 1988). This rule protects both the litigating parties' normal right to control the direction of litigation, including appeal, and judicial management of an efficient appellate process. The primary exception to this general rule is where a non-party demonstrates a legally recognizable interest adversely affected by the trial court's judgment. E.g., Hispanic Soc., supra, 806 F.2d at 1152.

The AMC contends, however, that the Commission should apply to the administrative appellate review structure of the Act the "zone of interest" standing test developed by the Supreme Court in Clarke v. Security Indus. Ass'n, 479 U.S. 388 (1987), and Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Stated simply, this test requires that, to establish standing to challenge agency action in the federal courts, a plaintiff must show injury in fact as a result of the action and that the interest sought to be protected is arguably within the zone of interests protected or regulated by the statute in question. E.g., Clarke, supra, 479 U.S. at 394-400. We find this approach inapposite in the context of section 113(d) of the Mine Act.

As the AMC acknowledges in its response to the Secretary's dismissal motion, the zone of interest test was developed in the context of the judicial review provisions of section 10(a) of the APA, 5 U.S.C. 702. 2/ Section 702 addresses judicial review of agency action in the federal courts in the first instance, often in circumstances where such judicial review is the only available mechanism for challenge of agency action. See, e.g., Data Processing, supra, 397 U.S. at 156-58. The test has been applied, for example, in contexts where the statute at issue specifically incorporates section 702 within its judicial review structure (e.g., Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 921 (D.C. Cir. 1989)); where there is no other avenue of judicial challenge to agency action, yet Congress did not intend to preclude judicial review (e.g., Data Processing, supra); and for a multiplicity

2/ 5 U.S.C. 702 states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

of challenges in the first instance to agency legislative-type rulemaking actions (e.g., Calumet Indus. v. Brock, 807 F.2d 225 (D.C. Cir. 1986)).

The AMC fails to recognize, however, the problems with incorporating these concepts into the section 113(d) administrative review setting. First, the Mine Act provides that "[e]xcept as otherwise provided in this Act, the provisions of sections ... 701-706 of [the APA] shall not apply to" proceedings under the Act. 30 U.S.C. 956. Section 113(d) of the Act does not otherwise incorporate section 702 of the APA into the administrative mechanism of the Act. Thus, the statutory basis underlying the zone of interest test is expressly excluded from the Mine Act. Second, section 702 of the APA concerns judicial review of agency action, not agency review of administrative law judge decisions. Third, many of the applications of the "zone of interest" principles have occurred in the legislative rulemaking arena. By their very nature, legislative rules, as opposed to adjudications of specific enforcement actions, often affect a universe of interested persons.

In our judgment, allowing all nonparties that might satisfy a "zone of interest" test to appeal judge's decisions to the Commission would serve to strip the litigating parties of control of the litigation in question and encumber the Commission's adjudicative process with numerous appeals from a wide variety of persons, groups, or associations "interested" in the development of the law. Accordingly, we find the usual and general principles of federal appeal, summarized previously, to be a preferable guide to resolution of the question of nonparty administrative appeal under section 113(d) of the Mine Act.

Applying these principles to the case at hand, the question is whether the AMC, a nonparty below, has shown a direct and concrete interest in this litigation and demonstrated that the outcome below has had an adverse impact on that interest. We stress at the outset that not every disagreement with a judge's decision amounts to a legally recognizable interest that is adversely affected. Rather, more substantial involvements such as a direct stake in the property or events that are the subject of the litigation, some concrete involvement in the controversy between the parties, or some direct effect of the judgment on a recognizable interest of the nonparty are required.

Here, literally speaking, there is not a "case or controversy" involving the AMC under the Mine Act in the context of the present proceeding. Nor has the AMC demonstrated how the judge's dismissal of the Secretary's enforcement proceeding has had an adverse impact on it. Instead, the AMC argues that it is "adversely affected or aggrieved" because it has an interest in the legal principles involved in this

proceeding, i.e., the questions surrounding the identification of miners' representatives under the Act. However, every Commission proceeding, to some extent, involves an interpretation of the Mine Act, a mandatory standard,@or some legal principle affecting the enforcement or meaning of the Mine Act. Under the AMC's position, mining trade associations, mine operators, and miners generally would have a sufficient interest in Commission proceedings to bestow upon them the

right to file a petition for review of most administrative law judge decisions. We are confident that Congress, in enacting the Mine Act did not intend to create such a potential litigation "free-for-all" in review proceedings before the Commission. We therefore conclude that the AMC has not presented a specific and concrete legal interest enabling it to appeal the judge's decision.

This holding does not preclude the AMC or similar organizations from participating in the Commission's adjudicatory processes. Amicus participation is liberally granted in Commission proceedings. We note, also, that our ruling on the Secretary's dismissal motion deals solely with the problem of admitting new parties on appeal after trial, and we intimate no view at this time as to the specific criteria that ought to control intervention at trial. 3/

In sum, we grant the Secretary's motion to dismiss the AMC's petition for discretionary review and vacate that part of our Direction for Review granting the AMC's petition as well as our subsequent order of consolidation. Mid-Continent's petition remains for review. However, in the circumstances presented, the AMC may continue in its role as an amicus and we will permit it to participate in the oral argument on the merits of this proceeding. The AMC's petition and briefs will be considered as amicus briefs. AMC's request for oral argument on the Secretary's motion to dismiss is denied.

III.

ASARCO's Motion to File an Amicus Brief Out of Time

We deny ASARCO's motion for leave to submit an amicus curiae brief out of time. Although the Commission's rules do not address the time for filing of an amicus brief, the Commission may properly look for guidance to Fed. R. App. P. 29 ("Rule 29"). 4/ ASARCO recognizes that

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3/ Further, even an intervenor may be required to demonstrate an "appealable interest" for purposes of seeking administrative or judicial review in situations where all the other parties have decided not to appeal. Cf. United States v. Imperial Irrigation Dist., 559 F.2d 509, 521 (9th Cir. 1977).

4/ Rule 29 provides:

Brief of an Amicus Curiae

A brief of an amicus curiae may be filed only if

accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the

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its brief has been tendered out of time. The fourth sentence of Rule 29 states that "[s]ave as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing...." ASARCO's brief was not submitted until almost two months after the time allowed Mid-Continent (the party whose position it supports) to file its brief. The Secretary and the UMWA oppose ASARCO's motion.

We conclude that ASARCO could reasonably have been expected to be aware of the litigation in this proceeding and to have sought participation on a more timely basis. Because ASARCO's brief was tendered almost two months out of time, and both the Secretary and UMWA, parties to the proceeding, oppose ASARCO+s participation as an amicus, ASARCO's motion is denied.

> applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

IV.

Conclusion

For the reasons explained above, we grant the Secretary's motion to dismiss the petition for discretionary review filed by the AMC. The AMC may continue as an amicus on review and may participate in oral argument on the merits of this proceeding. The caption of this proceeding is revised to delete the AMC as a party. ASARCO's motion for leave to file an amicus brief is denied. ASARCO's brief and any reference to the brief are stricken from the record. 5/

Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner

5/ Commissioner Nelson did not participate in the disposition of these motions.

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Distribution

Charles W. Newcom, Esq.
Sherman & Howard
3000 First Interstate Tower North
633 Seventeenth St.
Denver, Colorado 80202

Edward M. Green, Esq.
Mark G. Ellis, Esq.
American Mining Congress
1920 N Street, N.W.
Suite 300
Washington, D.C. 20036

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Colleen Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Edward Mulhall, Jr., Esq.
Delaney & Balcomb
P.0. Drawer 790
818 Colorado Avenue
Glenwood Springs, Colorado 81602

Henry Chajet, Esq.
Doyle & Savit
919 18th Street, N.W.
Washington, D.C. 20006