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MSHA V. MID-CONTINENT RESOURCES, UMWA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 23, 1990

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

v. Docket No. WEST 87-88

MID-CONTINENT RESOURCES, INC.

and

UNITED MINE WORKERS OF AMERICA
(UMWA)

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, brought by the Secretary of Labor under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982)("Mine Act" or "Act"), arises from a dispute between the Secretary and Mid-Continent Resources, Inc. ("Mid-Continent"), concerning section 103(f) of the Mine Act, the miner "walkaround" provision. 1/

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1/ The term "walkaround" is used herein for the sake of convenience in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized

representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a

I.

This proceeding arises from a citation and withdrawal order issued to Mid-Continent by the Department of Labor's Mine Safety and Health Administration ("MSHA") on May 13, 1986, charging Mid-Continent with a violation of section 103(f) of the Act. 2/ The citation stated that on May 13, 1986, Mid-Continent denied Robert Butero, allegedly a designated representative of Mid-Continent's 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 Part 40 regulations, that it had been designated by two employees at the Dutch Creek No. 1 Mine as the representative of those miners under the Mine Act. Mr. Butero was listed as the specific representative of the miners. 3/ Shortly after issuance of the citation on May 13, the inspector also issued Mid-Continent a "no area affected" section 104(b) order of withdrawal, 30 U.S.C. 814(b), alleging that Mid-Continent continued to refuse Butero the right to accompany the inspector during inspection of the

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> reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. 813(f).

2/ There was no evidentiary hearing in this matter. Accordingly, the statement of facts in this decision is based on the parties' pleadings and briefs and the relevant citation and order issued by MSHA.

3/ 30 C.F.R. Part 40, the regulations adopted by the Secretary governing

the identification of representatives of miners at mines, sets forth filing requirements for such representatives and procedures for identification of such representatives. 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...."

mine. 4/ Prior to an evidentiary hearing before Administrative Law Judge John J. Morris, the Secretary moved to dismiss the proceeding on the ground that further investigation had disclosed that the individual in question was not a properly designated representative of miners. Mid-Continent opposed dismissal and moved for declaratory relief. Judge Morris denied Mid-Continent's request for declaratory relief and dismissed the proceeding. 10 FMSHRC 881 (July 1988)(ALJ). On review, Mid-Continent repeats its request for declaratory relief. For the reasons that follow, we deny that request and affirm the judge.

At no time during its thirty-plus years of operation has the UMWA represented employees for labor relations purposes at Mid.Continent's mines. As early as 1975, however, the UMWA attempted to become the collective bargaining representative of Mid-Continent's hourly employees when it unsuccessfully sought to have the Redstone Workers Association ("RWA") decertified as the collective bargaining representative under the National Labor Relations Act, 29 U.S.C. 851 et seq. (1982)("NLRA"). Thereafter, the RWA continued as the employees' collective bargaining representative until 1981, when, pursuant to a representation election requested by the UMWA and conducted by the National Labor Relations Board ("NLRB"), Mid-Continent's employees voted to become nonunion. In 1986, the UMWA began another organizing campaign among Mid.Continent's hourly employees. Mid-Continent alleges that beginning in April 1986, the UMWA proceeded to use the miners' representative process provided by the Mine Act and 30 C.F.R. Part 40 as an organizing tool at the Dutch Creek #1 Mine. According to Mid-Continent, in April 1986, the UMWA caused to be filed with MSHA the form signed by two miners designating the UMWA and Mr. Butero as their representative at the mine. In September 1986, the UMWA filed another petition for representation with the NLRB. A representation election was held in December 1986 and Mid-Continent's employees again rejected representation by the UMWA.

On March 16, 1987, the Secretary filed with the Commission a civil penalty petition in connection with Mid-Continent's alleged violation of section 103(f) of the Mine Act. Mid-Continent filed an answer, and the matter was assigned to Judge Morris. In October 1987, the judge set the case for hearing. At that time, he also allowed the UMWA to intervene as a party and permitted the American Mining Congress ("AMC") to appear as amicus curiae. Prior to hearing, however, the Secretary filed a motion to withdraw the civil penalty petition and to dismiss the proceeding. The Secretary asserted that one of the two individuals who had signed the form designating Butero as the miners' representative was not an active miner at the time that the form was filed and, thus, that the designation did not comply with applicable Part 40 requirements. Therefore, according to the Secretary, Butero was not a properly designated miners' representative and

Mid-Continent did not violate the Mine Act in denying him access.

Mid-Continent opposed the Secretary's dismissal request and moved

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4/ A "no area affected" withdrawal order means that actual withdrawal of miners from the mine or an area of the mine is not required.

for declaratory relief. Mid-Continent argued that a nominal number of employees should not be permitted, under color of Part 40, to designate as a miners' representative a union that does not also represent the employees for collective bargaining purposes under the NLRA. Mid-Continent contended that the miners' representative process under the Mine Act was being improperly manipulated to facilitate organizational activity under the NLRA. Mid-Continent also asserted that it had been denied constitutional due process in the application of the Part 40 regulations to it. Mid-Continent further submitted that Butero had been given advance notice of the inspection in violation of section 110(e) of the Act. 5/ Mid-Continent alleged that Butero, who lived several hundred miles from the mine, had arrived at the mine entrance at 6:30 a.m., about the same time as the inspector and, therefore, must have been given advance notice of the inspection. Mid-Continent requested declaratory relief to the effect that section 110(e) had been violated or, alternatively, requested that the matter be referred to the Inspector General of the Department of Labor and to the Department of Justice.

The administrative law judge denied Mid-Continent's requests for declaratory relief and granted the Secretary's motion to dismiss the proceeding. The judge recognized the Commission's discretionary power to grant declaratory relief, but stated that "[t]he pivotal issue is whether the Commission should exercise its discretion and grant declaratory relief." 10 FMSHRC at 885. He concluded that, in this instance, declaratory relief was not warranted. The judge noted Mid-Continent's further contentions that permitting access to its mine by a UMWA representative would "clearly conflict" with the NLRA and that the Mine Act was being improperly manipulated to facilitate union organizational activity under the NLRA. 10 FMSHRC at 885. The judge concluded that his role was to adjudicate Mine Act issues and that Mid-Continent's appropriate avenue of relief, if any, was before the NLRB. 10 FMSHRC at 885-86. He also rejected Mid-Continent's contention that declaratory relief was necessary to explore the tensions between the asserted right of a non-employee to serve as a representative during inspections and the Act's prohibition of the giving of advanced notice of inspections. The judge stated: "[t]he date and time of regularly scheduled mine inspections, as mandated by the Act, would probably be common knowledge to any interested miner at the site." 10 FMSHRC at 886. Accordingly, the judge denied Mid-Continent's motion for declaratory relief, granted the Secretary's motion to withdraw the civil penalty petition, vacated the proposed penalty, and dismissed the

5/ Section 110(e) of the Mine Act states:

> Unless otherwise authorized by this [Act],

> any person who gives advance notice of any inspection to be conducted under this [Act] shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years or both.

30 U.S.C. 820(e).

proceeding. 10 FMSHRC at 886.

The Commission granted petitions for discretionary review filed by both Mid-Continent and amicus AMC. The AMC moved to consolidate the two petitions, and the Commission granted the motion. Subsequently, ASARCO, Inc. ("ASARCO") filed a motion seeking leave to file an amicus brief out of time, which the Secretary opposed. The Secretary also filed a motion to dismiss the AMC's petition for discretionary review on the grounds that the AMC lacked standing to petition the Commission for review of the judge's decision. On December 19, 1989, the Commission issued an interlocutory procedural order in which it concluded that the AMC had not shown a sufficiently direct and concrete interest in the proceeding or that it would be adversely affected by the outcome of the proceeding. Accordingly, we granted the Secretary's motion to dismiss the AMC's petition for discretionary review and vacated that part of the direction for review granting the AMC's petition. Mid-Continent Resources, Inc., 11 FMSHRC 2399 (December 1989). The Commission nevertheless permitted the AMC to continue in its role as an amicus, and to participate in the oral argument before the Commission. 6/ 11 FMSHRC at 2404. We also denied ASARCO's motion to file an amicus brief.

II.

In its brief on review, Mid-Continent primarily addresses the merits of the various issues that it sought to put before the judge in seeking declaratory relief, proceeding on the premise that this case is ripe for the grant of such relief. The Secretary responds essentially that this case is not an appropriate vehicle for declaratory relief as to any of the substantive issues raised by Mid-Continent because there is no actual "case or controversy" between the parties, and, even if there were a case or controversy between the parties, the judge did not abuse his discretion in denying declaratory relief under the circumstances of this case.

The Commission has recognized that it may grant declaratory relief in appropriate proceedings. Beaver Creek Coal Co . 11 FMSHRC 2428, 2430 (December 1989); Kaiser Coal Corp., 10 FMSHRC 1165, 1170-71 (September 1988); Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (lOth Cir. 1983); see also Youghiogheny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985)("Y&0"). The sources of this authority are section 105(d) of the Act, 30 U.S.C. 815(d) empowering the Commission to "direc[t] other appropriate relief, and section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e)(1982)("APA"), which

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6/ The AMC filed a petition for review of this interlocutory Commission

procedural order in the United Stated Court of Appeals for the District of Columbia Circuit. AMC v. FMSHRC & Secretary of Labor, No. 90-1018 (January 19, 1990). The petition seeks review of the Commission's determination that the AMC lacked party status and of the Commission's dismissal of the AMC's petition for discretionary review.

is incorporated by reference into the Mine Act. 30 U.S.C. 815(d). 7/

The discretionary nature of administrative declaratory relief is its paramount feature. Thus, the Tenth Circuit in Climax, supra, rejecting the operator's contention that the Commission was required to grant declaratory relief, explained that the "Commission's power to grant declaratory relief is clearly discretionary, see ... 5 U.S.C. 554(e).... [T]he Commission is not required to grant declaratory relief unless a failure to do so would be an abuse of discretion." 703 F.2d at 452 n. 4. The Court discussed the broad boundaries of that discretion:

> [5 U.S.C. 554(e)] of the [APA] clearly commits the power to grant declaratory relief to the sound discretion of the agency. See also ... 30 U.S.C. 815(d).... In exercising its discretion, the Commission is entitled to assess the advantages and disadvantages associated with declaratory relief. Advantages include the opportunity efficiently to terminate a controversy or remove uncertainty, ... 5 U.S.C. 554(e), while disadvantages include both the administrative burden imposed by a policy of issuing advisory opinions and the familiar problems surrounding the adjudication of abstract controversies. See Yale Broadcasting Co. v. FCC, 478 F.2d 594, 602 (D.C. Cir.), cert. denied, 414 U.S. 914 ... (1973).

703 F.2d at 452. See generally Intercity Transp. Co. v. United States, 737 F.2d 103, 108-10 (D.C. Cir. 1984). The granting of declaratory relief is committed, in the first instance, to the sound discretion of the Commission administrative law judge but his determination is subject to close review by the Commission. See generally 1OA C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d 2759 (1983)("Wright & Miller"); 6A J. Moore, J. Lucas & G. Grother, Moore's Federal Practice Par. 57.08 (2d ed. 1987)("Moore's"). See also. e.g., United States v. State of Washington, 759 F.2d 1353, 1356-57 (9th Cir. 1985)(en banc, per curiam).

The Commission has noted that "the primary purpose of declaratory relief is to save parties from unnecessarily acting upon their own view of the law." Beaver Creek, supra, 11 FMSHRC at 2430, quoting Climax, supra, 2 FMSHRC at 2752. Additionally, for any grant of Commission declaratory relief, the complainant must show that there is an actual, not moot, controversy under the Mine Act between the parties, that the issue as to which relief is sought is ripe for adjudication, and that the threat of injury to the complainant is real, not speculative. See generally. 5 J. Stein, G. Mitchell & B. Mezines, Administrative Law

7/ The Commission has held, however, that 5 U.S.C. 554(e), by itself, does not confer declaratory authority upon the Commission unless Mine Act jurisdiction otherwise obtains. Kaiser, supra, 10 FMSHRC at 1170.

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Analogously, federal courts, in applying the federal Declaratory Judgment Act, 28 U.S.C. 2201 and Fed. R. Civ. P. 57, which implements that Act, may grant declaratory relief only in the context of actual "cases and controversies." This requirement is imposed by Article III, Section 2 of the federal Constitution and by the Declaratory Judgment Act itself. See generally 1OA Wright & Miller 2757; 6A Moore's Pars. 57.11--57-13. Among other things, the Article III "case or controversy" requirement weighs against use of the declaratory process to issue advisory opinions or to resolve abstract or hypothetical problems. E.g., Maryland Casualty Co. v. Pacific Coal & Iron Co., 312 U.S. 270, 272-73, 85 L.Ed. 826, 828-29 (1941). Even more relevant to this case, Article III prohibits declaratory relief in moot cases. E.g., Barany v. Buller, 707 F.2d 285, 287 (7th Cir. 1983). As Wright & Miller state:

> The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy or the opposing party disclaims the assertion of countervailing rights. A case is moot when the issues presented no longer are "live" or the parties no longer have a legally cognizable interest in the outcome.

1OA Wright & Miller 2757 (pp. 602-17)(footnotes omitted).

Courts have granted declaratory relief in situations where, although the events associated with the action may not have ripened into a present controversy, "one or both of the parties have taken steps or pursued a course of conduct which will result in an 'imminent and inevitable litigation, provided the issue is not settled and stabilized by a tranquilizing declaration.'" Bruhn v. STP Corp., 312 F. Supp. 903, 906 (D. Colo. 1970), quoting Borchard, Declaratory Judgments 57 (2d ed. 1941). Similarly, "when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable and declaratory judgment may be rendered to define the rights and obligations of the parties." 1OA Wright & Miller 2757 (pp. 617-18).

We recognize that concepts of mootness must be applied with care in the administrative setting. As the Tenth Circuit noted in Climax, the Article III "case or controversy" requirement does not literally apply to federal administrative agencies like the Commission. 703 F.2d at 451, citing Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1379-88 (D.C. Cir.

1979). The Court explained the appropriate administrative approach to questions of mootness as follows:

> [A]n agency possesses substantial discretion in determining whether the resolution of an issue before it is precluded by mootness. However, in exercising this discretion, an agency receives guidance from the policies that underlie the "case or controversy" requirement of article III. In

> particular, the agency's determination of mootness is informed by an examination of the proper institutional role of an adjudicatory body and a concern for judicial economy. See [Tennessee Gas Pipeline, supra]; Lucas Coal Co. v. Interior Board of Mines Operations Appeals, 522 F.2d 581, 587 (3d Cir. 1975). As a result, we conclude that an agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the article III "case or controversy" requirement.

703 F.2d at 451.

This case is, in fact, moot. The Secretary vacated the underlying citation and withdrawal order and sought dismissal of the civil penalty proceeding, which relief the judge granted. The enforcement action involving that citation and withdrawal order is extinct. Therefore, at the time of the judge's order of dismissal, there was not before the Commission a live "case or controversy" between the Secretary and Mid-Continent as to the enforcement action out of which the request for declaratory relief arose.

Nevertheless, even where the Secretary seeks vacation of a contested enforcement action, a party to that action may oppose such vacation or seek declaratory relief. Y&0, supra, 7 FMSHRC at 203. The Secretary's disclaimer of countervailing rights and her willingness to dismiss the proceeding, are important factors to be taken into consideration in weighing declaratory relief. The opposing party is nevertheless entitled to establish a substantial likelihood of recurrence of the claimed enforcement harm or the imminence of repeated injury.

Here, we conclude that no such showing has been made. No course of conduct has been shown that will necessarily result in imminent or inevitable litigation with the Secretary concerning the issue raised in this proceeding. So far as this record discloses, there is no present claim by the UMWA or any other labor organization that it has been designated as representative of any of Mid.Continent's employees for walkaround purposes. In fact, the Secretary states in her brief that no notification has been filed with her pursuant to 30 C.F.R. Part 40, asserting such representation. S. Br. 10. As the Secretary asserts:

> `Nor is there any basis for assuming that such a filing will be made in the foreseeable future. Since the Secretary vacated the citation [in approximately November 1987], the UMWA has not

> sought to reassert miners' representative status by obtaining the necessary additional authorization in the intervening time period.

Id. Mid-Continent also has not established that similar confrontations have since occurred at its mines, nor has Mid-Continent provided evidence supporting its claim that the alleged problem of nonemployee walkaround representatives is widespread in the industry.

Thus, we are left in this case with Mid-Continent's speculative concerns, which, depending as they do upon multiple contingencies and amounting to pure conjecture, do not provide the basis for declaratory relief. Beaver Creek, 11 FMSHRC at 2431, citing SEC v. Medical Committee on Human Rights, 404 U.S. 403, 406 (1972).

In Climax, the Commission noted that Climax had not abated the citation at issue and found "little reason to believe that [Climax] will expend monies on abatement or risk loss from failure to abate enforcement action by MSHA before contests of any future citations are fully litigated." 2 FMSHRC at 2753. Here, Mid-Continent did not abate the citation and was confronted with a "no-area-affected" withdrawal order. Indeed, even should the multiple speculative contingencies of which Mid-Continent complains occur, the operator has not established that it will suffer irreparable harm before contests of any future citations are fully litigated. We note that the Secretary's counsel assured the Commission at oral argument that it is the Secretary's policy to issue a "no area affected" withdrawal order when, as here, an operator refuses to comply with a citation alleging a violation of section 103(f). Oral Arg. Tr. 29. Such an order does not subject the operator to the withdrawal of miners and the attendant consequences of lost production. Counsel's assurance reiterates the official policy of the Secretary as published in the Secretary's Interpretative Bulletin, setting forth guidelines for MSHA inspectors' interpretation and application of section 103(f). 43 Fed. Reg. 14546, 14547 (1978). Thus, Mid-Continent is at no risk of production loss from failure to abate the citation. See Climax, 2 FMSHRC at 2753.

Further, given the Secretary's assurance that, in the event of an operator's failure to abate an alleged violation of section 103(f), withdrawal of miners will not ordinarily occur, it should not be expected that she would take the more extreme enforcement action of attempting to threaten to impose civil penalties upon a noncompliant operator pursuant to section 110(b) of the Act, 30 U.S.C. 820(b), or criminal penalties pursuant to section 110(d) of the Act, 30 U.S.C. 820(d). We therefore believe that the fears in this regard expressed by counsel for Mid-Continent are not well-founded. See Oral Arg. Tr. 54.

To grant Mid-Continent's request for declaratory relief, the Commission would be required to accept a long chain of possible future contingencies. The Commission would "express legal opinions on academic theoreticals which might never come to pass." Amer. Fidelity & Cas. Co. v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 280 F.2d 453, 461 (5th Cir. 1960). We do not discern any urgent need for declaratory relief or any convincing demonstration that Mid-Continent is being forced to act at real, as opposed to hypothetical, peril.

III.

Accordingly, we conclude that the judge did not abuse his discretion in denying Mid-Continent's request for declaratory relief as to the substantive issues in question. In view of this conclusion, we need not address the merits of those substantive issues.

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On the foregoing bases, we affirm the judge:s decision in result. 8/

Richard V. Backley, Commissioner

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8/ Commissioner Nelson did not participate in the consideration or disposition of this matter.

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