CCASE:
CYPRUS EMPIRE V. MSHA AND UMWA
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January 25, 1993

CYPRUS EMPIRE CORPORATION	:	
	:	
v.	:	Docket Nos. WEST 91-454-R
	:	WEST 91-455-R
SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION (MSHA)	:	WEST 91-456-R
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	
	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The sole issue is whether the striking employees of Cyprus Empire Corporation ("Cyprus") were "miners" within the meaning of the Mine Act, for purposes of being entitled to have their previously designated walkaround representative accompany an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") during a mine inspection. Commission Administrative Law Judge John J. Morris concluded that Cyprus' striking employees were not miners because they were not working in the mine at the time of the inspection. Consequently, he vacated two citations and an order of withdrawal alleging violations of section 103(f) of the Mine Act, 30 U.S.C. 813(f), which authorizes designated walkaround representatives to accompany inspectors. Cyprus Empire Corp., 13 FMSHRC 1040 (June 1991)(ALJ). For the reasons set forth below, we affirm the judge's decision.

I.
Factual and Procedural Background

The collective bargaining agreement between Cyprus and the United Mine Workers of America ("UMWA") at Cyprus' Eagle No. 5 Mine expired on May 12, 1991. The parties failed to reach a new agreement and the miners, represented by the UMWA, went on strike the next day. Cyprus halted the production of coal but continued to operate the mine on a standby basis with management employees. Cyprus did not hire replacement workers.

On May 30, 1991, while the strike was ongoing, MSHA Inspector Ervin St. Louis arrived at the mine to conduct a regular inspection under section 103(a)

of the Mine Act, 30 U.S.C. 813(a). None of the miners' representatives previously designated by the striking employees were at the mine or in the picket line on that day and Inspector St. Louis conducted his inspection without a miners' representative. At that time, he asked the mine manager whether Cyprus would permit one of the previously designated miners' representatives to act as a walkaround representative if such a request were made. Cyprus subsequently informed the MSHA district office that it would object to a UMWA walkaround representative. Thereafter, the miners then working at the mine, who were all management employees, selected James A. Shubin, a company safety inspector, to act as their representative for walkaround purposes.

Inspector St. Louis returned to the mine on June 3, 1991, for the second day of his inspection, accompanied by Dean Carey, a striking employee who had previously been designated as a miners' representative under 30 C.F.R Part 40, and informed mine management that Carey wished to accompany him during his inspection.(Footnote 1) Carey was a bargaining representative of the UMWA local and chairman of its safety committee, and had been a walkaround representative at the mine for nine years. All of the employees he represented were also on strike.

Mine Manager William Ivy discussed the matter with Inspector St. Louis and informed him that Cyprus refused to permit Carey or any other UMWA-designated representative to act as a walkaround representative. Ivy told the inspector that Shubin had been selected as the representative of the miners currently working at the mine and that Cyprus would challenge any citations issued to it as a result of its refusal to allow Carey to act as a walkaround representative.

Inspector St. Louis issued to Cyprus a citation under section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging a violation of section 103(f) of the Act.(Footnote 2) Section 103(f), entitled "Participation of representatives of operators and miners in inspections," states, in pertinent part:

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1 30 C.F.R. Part 40 contains the Secretary's regulations implementing section 103(f) of the Act.

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2 The "condition or practice" section of the citation states:

> The representative of the miners requested at the mine office the right to accompany an MSHA authorized representative of the Secretary during an MSHA AAA inspection. Mine management refused entry to mine property. The miners are on strike and have pickets on the road to the mine outside of mine property. Mine management denied the representative of the miners entry on mine property to accompany the authorized representative during pre-inspection conference.

Exh. S-1.

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given the opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine 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 reasonable number of miners concerning matters of health and safety in such mine.

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

Within an hour after issuance of this citation, Inspector St. Louis issued to Cyprus an order of withdrawal under section 104(b) of the Mine Act, 30 U.S.C. 814(b), for failure to abate the citation.(Footnote 3) After issuing this order, St. Louis inspected the mine accompanied only by Shubin.

The inspection continued the next day. When Cyprus again refused to admit Carey, the inspector issued another section 104(a) citation for a violation of section 104(b) of the Act. Inspector St. Louis completed his inspection accompanied only by Shubin.

Cyprus filed notices of contest of the citations and order and an expedited hearing was held before Judge Morris on June 11, 1991. The UMWA intervened in the proceeding. Following an evidentiary hearing, the judge found that Cyprus had not violated section 103(f) of the Mine Act and vacated the citations and the order of withdrawal. 13 FMSHRC at 1049. The judge noted that the term "miner" is defined in section 3(g) of the Mine Act, 30 U.S.C. 802(g), as "any individual working in a coal or other mine" and that it is uncontroverted that "no union miners had worked underground since the strike had begun." 13 FMSHRC at 1047.

The judge found that Cyprus' striking employees were not "working in a coal or other mine." 13 FMSHRC at 1049. He concluded that, because the Commission and Courts of Appeal have not "gone beyond the plain meaning of the statutory words in section 3(g)," Cyprus' striking employees did not qualify as miners under section 103(f). Id. The judge vacated the two citations and the order. The Commission granted the UMWA's petition for discretionary review. The Secretary did not seek review of Judge Morris' decision.

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3 Inspector St. Louis did not order the actual withdrawal of miners. The order stated that it was "a nonclosure order" that did not affect any area of the mine. Exh. S-2.

II.
Disposition of Issues

On review, the UMWA argues that the Commission should construe the term miner broadly to include employees who are on strike. Specifically, the UMWA contends that the strikers' previously designated walkaround representative should be entitled to accompany an MSHA inspector on an inspection during the strike. The UMWA maintains that, since strikers remain the employees of an operator, they should, by analogy, remain the miners of the operator. For the reasons stated below, we reject the UMWA's arguments and affirm the judge.

The "primary dispositive source of information [about the meaning of statutory terms] is the wording of the statute itself." Wyoming Fuel, 14 FMSHRC 1282, 1286 (August 1992). Neither party disputes that only miners are entitled to designate a walkaround representative to accompany an MSHA inspector. Miner is defined in the Act as "any individual working in a coal or other mine." 30 U.S.C. 802(g). The legislative histories of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977), and the Mine Act provide no background to the language of this definition. Under the definition, an individual need not be an employee of an operator to qualify as a miner under the Mine Act. Likewise, an individual who is employed by a mine operator is not necessarily a miner under the Act unless he or she is working in a mine, as that term is defined in section 3(h). Thus, a person's status as a miner is determined not by the fact that he is employed by an operator, but rather by whether, as the statute provides, he works in a mine.

While the issue in this case is one of first impression, the Commission, as noted by the judge, has previously examined the term "miner" in the context of training rights under section 115 of the Act, 30 U.S.C. 825. Finding the section 3(g) definition of "miner" determinative, the Commission held that, for section 115 purposes, job applicants and former miners on layoff did not qualify as "miners" under the Act and, hence, were not entitled to training rights under section 115. Emery Mining Corp., 5 FMSHRC 1391 (August 1983), aff'd in part, rev'd in part, 783 F.2d 155 (10th Cir. 1986)(job applicants); UMWA on behalf of James Rowe et al., etc. v. Peabody Coal Co., 7 FMSHRC 1357 (September 1985), Secretary on behalf of I.B. Acton, et al. v. Jim Walter Resources, 7 FMSHRC 1348 (September 1985), aff'd sub nom. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987) Secretary on behalf of Jerry Dale Aleshire et al. v. Westmoreland Coal Co., 11 FMSHRC 960 (June 1989)(individuals on laidoff).

In Peabody, the Commission reasoned:

> Underlying our holding is our belief that the Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners.
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> We are not prepared to interpret the rights and obligations mandated by the Act through interpretation of a private contractual agreement unless required to do so by the Act itself. See Local Union No. 781, District 17, United Mine Workers of America v. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1179 (May 1981).
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> We recognize that under the National Labor Relations Act and the Railway Labor Act, statutes governing labor-management relations, laid-off employees in general and laid-off employees with a right to reinstatement based upon seniority have been held to be entitled to certain rights granted by those acts.... However, these [principles] arise under statutes whose very purpose is the governance of labor-management relations.... The entirely discrete purpose of the Mine Act, and the nature of the rights granted by section 115, prevent us from transferring this reasoning to the Mine Act.

7 FMSHRC at 1364-65. These same general principles apply in this case.

There is no dispute that, for purposes of the National Labor Relations Act, 29 U.S.C. 151 et seq. (1988) ("NLRA"), the strikers in this case were "employees" of Cyprus at the time of the inspection. Section 2(3) of the NLRA, 29 U.S.C. 152(3), defines the term "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." In the Mine Act, however, which is the proper focus of our inquiry, Congress chose to define miners as individuals who work in a mine, rather than as employees of an operator. The Mine Act's definition of "miner" is not grounded in the rights of employees under the NLRA or under private collective bargaining agreements. See Peabody, 7 FMSHRC at 1364-65. We perceive no statutory warrant in the Mine Act for treating an operator's striking employees as "miners."

The courts also have analyzed the Mine Act's definition of miner in the context of training rights. In National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 704 (3rd Cir. 1979), a case involving challenges by operators to the Secretary's training regulations, the court stated that "the statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction activities." (emphasis in original). In Peabody, the D.C. Circuit, in affirming the Commission, held that laid-off individuals are not miners for purposes of the training rights granted under section 115 of the Act because such individuals are not working in a mine, exposed to the hazards of mining, or employed by a mine operator. 822 F.2d at 1147-49. Finally, in Emery Mining, the court held that individuals who had obtained safety training at their own expense in order to be eligible for employment by the operator were not entitled to compensation for such training because they were not miners as defined in the Act. 783 F.2d at 157-59. These decisions are consistent with the result we

reach herein.

The UMWA argues that the Commission must defer to the Secretary's interpretation of the term "miner" as applied to walkaround rights. The Secretary's analogous construction of the term "miner," however, was rejected as unreasonable by the Peabody court. 822 F.2d at 1151. Moreover, the Secretary has not appealed the judge's adverse decision in the present case or otherwise participated in this appeal. She may well have abandoned her position that striking miners have the right under section 103(f) to designate a walkaround representative. In any event, the wording of the statute sets forth Congress' intent as to the definition of "miner." Even if there were remaining ambiguity, the Secretary has presented no position to which the Commission could accord weight.

Contrary to the contentions of the UMWA (UMWA Br. at 4-5), the right of miners to refuse to work in the face of hazardous conditions, as set forth in section 105(c) of the Act, 30 U.S.C. 815(c), and to file for compensation under section 111, 30 U.S.C. 821, will not be affected by our affirmance of the judge's decision. Miners do not lose their status as miners by exercising their right under the Mine Act to refuse to work in the face of hazardous conditions or their right to compensation when they are withdrawn from the mine by order of the Secretary. These are rights specifically provided under the Mine Act. The term "miner" must be interpreted in the context of the particular Mine Act section in which it appears in order to effectuate the safety purposes of each section. Furthermore, the safety purposes of section 103(f) were not dimished in this instance because the striking employees were not exposed to the hazards of mining and, thus, did not require a walkaround representative. Those miners who were working in the mine at the time were represented by their chosen walkaround representative. When striking employees return to work, they once again have the right to designate a walkaround representative. If they believe that violations or imminent dangers exist, their representative can "obtain an immediate inspection by giving notice to the Secretary or his representative of such violation[s] or danger[s]" under section 103(g)(1), 30 U.S.C. 813(g)(1).

In conclusion, we hold that the striking employees of Cyprus were not entitled to have their previously designated walkaround representative accompany the MSHA inspector during his inspection of the mine.

III.
Conclusion

For the foregoing reasons, we affirm the judge's decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner