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KERR-McGEE COAL V. SOL (MSHA)
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March 4, 1993

KERR-McGEE COAL CORPORATION	:	
	:	
v.	:	Docket Nos. WEST 91-84-R
	:	WEST 91-85-R
SECRETARY OF LABOR,	:	WEST 91-220
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act" or "Act"), and presents the issue of whether miners may choose as their representative for "walkaround" purposes under section 103(f) of the Mine Act,(Footnote 1) a union, or the agent of a union, that is not the miners' collective bargaining representative under the National Labor Relations Act, 29 U.S.C. 151 et seq. (as amended)(1988)("NLRA"). This case arose when an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Kerr-McGee Coal Corporation ("Kerr-McGee") a citation alleging that Kerr-McGee had violated 30 C.F.R. 40.4 when it failed to post at its Jacobs Ranch Mine, a nonunion mine, the names of certain miners' representatives not employed by Kerr-McGee. These individuals were agents of

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

> 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 ... for the purpose of aiding such inspection and to participate in pre- or post-inspection conference held at the mine....

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

the United Mine Workers of America ("UMWA") and were designated as miners' representatives by certain miners employed at the Jacobs Ranch Mine.(Footnote 2) The inspector subsequently issued an order of withdrawal pursuant to section 104(b) of the Mine Act, 30 U.S.C. 814(b), after Kerr-McGee declined to abate the alleged violation.

Following an evidentiary hearing, Administrative Law Judge Michael A. Lasher, Jr., upheld the citation and order. 13 FMSHRC 1889 (December 1991) (ALJ). The judge concluded that, although the UMWA did not represent the miners at the Jacobs Ranch Mine for collective bargaining purposes under the NLRA, the designation of nonemployee UMWA agents as miners' representatives did not constitute a "per se" abuse of the miners' representative process under the Mine Act and the Secretary's implementing regulations at 30 C.F.R. Part 40 ("Part 40"). For the reasons discussed below, we affirm.

I.

Factual and Procedural Background

A. Factual Background

Kerr-McGee owns and operates the Jacobs Ranch Mine, a surface coal mine employing approximately 270 miners and located in the Powder River Basin near Gillette, Wyoming. The employees at the mine have never been unionized. Dallas Wolf, an organizer for the UMWA, moved to Gillette in April 1990, for the purpose of unionizing miners in the Powder River Basin, including the Jacobs Ranch miners.

The UMWA held several meetings in Gillette that were organized by Wolf and attended by a number of Kerr-McGee miners. In July 1990, the UMWA also sponsored several days of safety training for Kerr-McGee miners. These training sessions were presented by Robert Butero, a UMWA safety and health representative. At the end of the training sessions, Wolf urged those in attendance to sign forms designating Wolf and Butero as their miners' representatives under Part 40.(Footnote 3) Seven of the Jacobs Ranch miners designated

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2 The regulations of the Secretary of Labor dealing with miners' representatives are contained at 30 C.F.R. Part 40. Section 40.4, entitled "Posting at mine," provides:

> A copy of the information provided the operator pursuant to 40.3 of this part [designating the miners' representative] shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

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3 The Secretary's regulation defines the term "representative of miners" as "[a]ny person or organization which represents two or more miners at a ... mine for the purposes of the Act." It equates the term to "[r]epresentatives authorized by the miners, miners or their representative, authorized miner

Wolf and Butero as their miners' representatives and themselves as alternate representatives.(Footnote 4) The record reflects that neither Wolf nor Butero actually acted in his capacity as miners' representative at the Jacobs Ranch Mine.

Under 30 C.F.R. 40.3, miners' representatives are required to file with MSHA information regarding their designation and identity and to provide copies to the affected operator. Wolf mailed the miners' representative designation form to the MSHA District Office in Denver and its receipt was acknowledged. Kerr-McGee received its copy of the form and decided that it would not post the designation of Wolf and Butero at the mine pursuant to section 40.4 (n.2 supra), because it believed that it was not required to accept agents of the UMWA as miners' representatives. Kerr-McGee did not inform MSHA of its decision not to post the designation.

MSHA Inspector Jimmie Giles inspected the Jacobs Ranch Mine on October 25, 1990, in response to a complaint submitted to MSHA pursuant to section 103(g) of the Mine Act, 30 U.S.C. 813(g), that the miners' representative designation form had not been posted at the mine. Ron Crispin, Kerr-McGee's manager of administration, informed Inspector Giles that the designation form was not, and would not be, posted. Crispin read to Inspector Giles a prepared statement that Kerr-McGee was not required to accept the designation of nonemployees as miners' representatives.(Footnote 5)

Inspector Giles issued Kerr-McGee a citation alleging a violation of section 40.4, for failure to post the designation form on the mine bulletin board, and allowed Kerr-McGee 15 minutes to abate the condition by posting the form. After Crispin again declined to post the designation form, Inspector Giles issued an order of withdrawal pursuant to section 104(b) of the Act, 30

3(...continued)
representative," and other similar terms used in the Act. 30 C.F.R. 40.1(b)(1) & (2). Thus, under Part 40, any two miners at a mine may designate "any person or organization" to represent them as a miners' representative.

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4 Prior to this designation, there had never been a miners' representative designated under Part 40 at the mine. Since this designation, approximately 92 Jacobs Ranch miners have been designated as Part 40 representatives. S. Br. at 18-19 n.9.

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5 The statement provides:

> Kerr-McGee does not believe it can lawfully be required to accept the designation of a non-employee walkaround representative at the Jacobs Ranch Mine or to recognize any other action by a non-employee. MSHA Inspectors are entitled to, and encouraged to, talk to Jacobs Ranch employees as a part of all inspections. Inspections should proceed on that basis without outside interference.

Exh. C. to Stipulation, Exh. M-7.

U.S.C. 814(b), for refusal to abate the alleged violation. Kerr-McGee finally abated the citation after receiving a letter from the MSHA district manager stating that Kerr-McGee would be assessed a daily penalty (see 30 U.S.C. 820(b)) if it did not immediately abate the violative condition. Kerr-McGee filed timely notices of contest of the citation and the order, and the matter proceeded to an evidentiary hearing before Judge Lasher.

B. Procedural Background

Following the hearing, and before submission of the parties' post-hearing briefs, Kerr-McGee moved to reopen the record based upon newly discovered evidence. Kerr-McGee asserted that, in an unrelated proceeding after the hearing, its counsel had obtained from the UMWA several documents establishing that certain statements made by Wolf in his pre-hearing deposition in this matter were incorrect. Wolf had testified in his deposition that he did not have any letters or written reports regarding this case or his designation as a miners' representative. Kerr-McGee offered, as its newly discovered evidence, a series of internal UMWA memoranda to and from Wolf, which, it asserted, revealed that Wolf had been designated as a walkaround representative in order to facilitate on-going UMWA organizing activities.

In an unpublished order, the judge denied Kerr-McGee's motion to reopen. The judge stated that the prerequisites for reopening a record for the presentation of newly discovered evidence are:

> the evidence [is] discovered after the completion of the trial; due diligence on the part of the moving party to discover the new evidence prior to trial is shown or inferred; the evidence is not merely cumulative or impeaching; the evidence is material; and the evidence is such that a new trial would probably produce a new result.

Unpublished Order at 2 (October 11, 1991)(citation omitted)("Order"). The judge determined that Kerr-McGee did not establish that it had exercised due diligence to discover the documents prior to trial. The judge next determined that the evidence was largely cumulative, and that a number of the documents had been discovered prior to trial and were either accepted into evidence or dismissed by the judge as irrelevant. The judge also noted that the veracity of Wolf's deposition testimony was a matter for impeachment and, as such, was not a sufficient basis for reopening the case. Finally, the judge rejected Kerr-McGee's argument that the newly discovered evidence would probably produce a different result. The judge explained that the documents merely revealed that union organizing activity was taking place in the Powder River Basin, and that this was established and undisputed at trial. Order at 2-3.

In his decision on the merits, the judge concluded that the designation of Wolf and Butero as miners' representatives at the Jacobs Ranch Mine did not constitute a per se abuse of the miners' representative process, and that Kerr-McGee's refusal to post the designation was not justified. The judge first determined, upon examination of Part 40 and section 103(f) of the Mine

Act, that a union may represent miners for walkaround and other Mine Act purposes even though it is not the collective bargaining representative of those miners under the NLRA. 13 FMSHRC at 1901. The judge pointed out that the language of section 40.1(b) (n.3 supra) expressly provides that a "representative of miners" includes "any individual or organization" that represents two or more miners, and does not set forth any restriction or qualification that the representative must be recognized as such under other labor laws. Id. (emphasis added). The judge relied on Utah Power & Light Co. v. Secretary, 897 F.2d 447 (10th Cir. 1990)("UP&L"), aff'g, Emery Mining Corp., 10 FMSHRC 276 (March 1988), in which the United States Court of Appeals for the Tenth Circuit, affirming the Commission, held that walkaround rights may be extended to miners' representatives who are not employees of the affected operator. Id.

The judge further determined that a conflict did not exist between the Mine Act and the NLRA. The judge reasoned that the representative process has distinct meanings and purposes under each Act. 13 FMSHRC at 1902. He explained that under the NLRA, a representative is elected by a majority of workers for a broad range of collective bargaining purposes. In contrast, under the Mine Act and the Secretary's Part 40 regulations, a representative is chosen by two or more miners for the primary purpose of accompanying a mine inspector during an inspection. Id.

The judge also noted that MSHA has consistently interpreted the term "representative" in the Mine Act and Part 40 as any person qualified to be on a mine site, regardless of whether that person is an employee of the mine operator or a member of a labor or other organization. 13 FMSHRC at 1903. Finally, the judge observed that UP&L had clearly indicated that the Secretary and an affected operator could take appropriate action against any miners' representative who abuses the walkaround process by engaging in inappropriate activities, such as union organizing, during walkaround. 13 FMSHRC at 1904-05, citing UP&L, 897 F.2d at 452. The judge held that instances of abuse must be considered on a case-by-case basis. The judge concluded that the exercise of Mine Act rights by Kerr-McGee employees to designate nonemployee UMWA members as their representatives was not an abuse of the miners' representative process. 13 FMSHRC at 1905. The judge determined that "at best [Kerr-McGee] showed [that the] UMWA used Part 40 as a `tool' to create employee interest and to enhance its standing." 13 FMSHRC at 1898 n.7. Accordingly, the judge denied Kerr-McGee's contests of the citation and order, and assessed a civil penalty of $300. 13 FMSHRC at 1906.

The Commission subsequently granted Kerr-McGee's petition for discretionary review, which challenges the judge's decision on the merits and his denial of the motion to reopen. The American Mining Congress, the National Coal Association and the Wyoming Mining Association (collectively, "industry amici"), jointly, and the UMWA, separately, filed amicus curiae briefs in this proceeding, and the Commission heard oral argument.

II.

Disposition of Issues

A. Motion to Reopen

Kerr-McGee argues that the judge erred in denying its motion to reopen the record. We disagree.

Although the Commission's procedural rules, 29 C.F.R. Part 2700, do not specifically address motions to reopen a hearing on the basis of newly discovered evidence, Commission Procedural Rule 54(a), 29 C.F.R. 2700.54(a), authorizes Commission judges to regulate the course of hearings and to dispose of procedural motions. The Commission also may properly look for guidance to the Federal Rules of Civil Procedure ("Fed. R. Civ. P.")(29 C.F.R. 2700.1 (b)), and precedent thereunder. A motion to reopen the record t submit new evidence is not expressly addressed in the federal rules but, rather, is committed to the sound discretion of the trial judge. See generally Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971). In general, an abuse of discretion occurs when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for its ruling. See, e.g., In re Coordinated Pretrial Proceedings, etc., 669 F.2d 620, 623 (10th Cir. 1982).

A motion for a new trial under Fed. R. Civ. P. 59 ("Rule 59") has certain similarities and affords some guidance. See J. Moore, J. Lucas & G. Grother, 6A Moore's Federal Practice 59.04[13](2d ed. 1992)("Moore's"). A motion to reopen, however, seeks to offer additional evidence before a decision has been rendered and, consequently, the standards for granting such a motion are less stringent than those for a motion seeking a new trial.(Footnote 6) Generally, in determining whether to grant a motion to reopen, it is appropriate to consider the time when the motion is made, the character of the additional evidence, and the effect of granting the motion. 6A Moore's at 59.04[13]

The judge applied the post-judgment Rule 59 criteria, urged upon him by Kerr-McGee, and did not expressly refer to the less stringent pre-judgment test. In applying the somewhat similar Rule 59 criteria, however, the judge, in effect, considered the essential factors of the pre-judgment test. Of particular importance, the judge characterized the "new" evidence as cumulative, and noted that a number of the allegedly newly found documents had been discovered prior to trial and rejected at trial as irrelevant. Order at 2. The judge also determined that admission of the evidence would not have altered his findings in any event. Order at 3. He explained that the evidence merely demonstrated that union organizing activity was taking place in the Powder River Basin, which had been established at trial and was not disputed. Id. Under the circumstances, any error in setting forth the stricter Rule 59 criteria was harmless.

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6 The stricter criteria for a Rule 59 post-judgment motion are the ones cited by the judge in his pre-trial order.

Because a rational basis existed for the judge's denial of Kerr-McGee's motion to reopen, and the judge's error, if any, was harmless, we conclude that the judge did not abuse his discretion. Accordingly, we affirm his order denying the operator's motion to reopen the record.

B. Designation of Wolf and Butero as Miners' Representatives

1. Contentions of the parties on review

The thrust of the operators'(Footnote 7) argument is that the Mine Act should be construed to prohibit a union or a union member from being designated as a "representative of miners," unless that union also represents the miners under the NLRA. The operators assert that granting representative status to a nonemployee union agent infringes upon an operator's right to control access to its private property by nonemployees, including nonemployee union organizers. In support, the operators rely heavily on Lechmere, Inc. v. NLRB, 502 U.S. , 117 L.Ed.2d 79 (1992).

Kerr-McGee distinguishes UP&L, 897 F.2d 447, on the grounds that, in that case, the nonemployee miners' representative was a union member who sought to act as a representative at a union mine, whereas the present case involves a nonunion mine. Thus, Kerr-McGee asserts that UP&L is not controlling.

According to the operators, the Secretary's Part 40 Regulations and, in particular, the definition of "representative of miners," are legally infirm. The operators assert that the Part 40 definition of representative, which allows for multiple representation by "any" individuals or organizations, conflicts with provisions of the NLRA that prohibit a unionized employer from dealing with any agent other than the official collective bargaining agent. They argue that permitting a union member to act as a miners' representative at a nonunion mine not only intrudes upon the operator's right under the NLRA to control access to its private property by union organizers but also tends to create a favorable impression among the miners towards the union. The operators contend that the Secretary's interpretation of Part 40 is unreasonable and that to permit the kind of representation involved here amounts to a failure to accommodate Part 40 to the NLRA's regulatory scheme.

The operators contend that the designation of a union agent as a walkaround representative at a nonunion mine constitutes an abuse of section 103(f), even under UP&L, because it is plainly for an ulterior purpose. Kerr-McGee urges that the aim of designating UMWA representatives here was to foster their organizing efforts rather than to promote health and safety and, consequently, that aim was abusive of the Mine Act.

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7 Unless otherwise noted, the arguments of industry amici are included in our discussion of Kerr-McGee's position and the term "operators" is used in reference to their arguments. Similarly, the arguments of amicus UMWA are incorporated in our discussion of the Secretary's position.

The Secretary responds that the operators' suggested approach to the miners' representative process is overly restrictive under the Mine Act and the Part 40 implementing regulations. The Secretary notes that nothing in Part 40 prohibits the Kerr-McGee miners from designating an agent of the UMWA or any labor union as their miners' representative under the Mine Act, even though the designated union is not the miners' collective bargaining representative under the NLRA. The Secretary emphasizes that section 103(f) of the Mine Act imposes no status limitations on who may serve as a miners' representative, and, accordingly, Part 40 regulations simply mirror the statute's broad approach.

The Secretary urges that deference should be given to his interpretation of the Mine Act and to his interpretation of the regulations that he has adopted. See Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-45 (1984). The Secretary asserts that his interpretation of the relevant portions of Part 40 should be accepted, as it is reasonable, consistent with the Mine Act, and is supported by his "contemporaneous construction" of Part 40, published at the time Part 40 was promulgated. The preamble to the regulations specifically discussed and rejected the definition of "representative" as used in the NLRA, explaining that the purposes of the representation process under the two statutes were different. (Footnote 8)

The Secretary further contends that UP&L, 897 F.2d 447, is dispositive. There, the Tenth Circuit held that nonemployees may serve as walkaround representatives. Under UP&L, an operator may take appropriate action against a designated representative only if he engages in specific conduct unrelated to safety or health. The Secretary contends that, as the judge found, Kerr-McGee has failed to show instances of such abusive conduct. The Secretary acknowledges that there was a union organizing campaign underway at the Jacobs Ranch Mine, but argues that, as shown by the record, the designation of the UMWA representatives was also intended to advance miners' safety. Thus, even

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8 The preamble to Part 40 states:

> [T]he NLRB definition is inappropriate because the NLRB definition of "Representative" concerns itself with a representative in the context of collective bargaining. The meaning of the word representative under this [A]ct is completely different. Additionally the rights of nonunion miners would be severely limited by a definition of "Representative of Miners" based on the collective bargaining concept. Furthermore, the "majority rule" concept is a fundamental component of the NLRB definition of representative, which contemplates only any one union miner representative at each mine. The purposes of the Mine Act are better served by allowing multiple representatives to be designated.

43 Fed. Reg. 29508 (July 7, 1978).

if the miners' representatives possessed a "mixed motive," i.e., safety and unionizing, there was no abuse of the walkaround function.

Finally, the Secretary argues that the Part 40 regulations do not impermissibly conflict with the NLRA. The Part 40 regulations do not impinge on Kerr-McGee's right under the NLRA to deny access to its property to nonemployees engaged in union organizing because the miners' representative has only a limited access, a carefully delineated right to assist with inspections, and may not use that access to engage in organizing activities.

2. Analysis

We find the judge's reasoning persuasive and conclude that this matter is controlled by the decisions of this Commission and the Tenth Circuit in the UP&L litigation. The general issue of whether an operator's miners may designate an individual who is not an employee of the mine operator as their miners' representative for walkaround purposes has been previously determined by the Commission. In Emery, the Commission held that "as a matter of statutory right a nonemployee may be chosen by the miners of a given mine as their representative and ... such a representative may properly be afforded the opportunity to participate in walkaround at that mine -- although without compensation from the operator." Emery, 10 FMSHRC at 284-85, aff'd, UP&L, 897 F.2d at 449-52. The Commission's conclusion in Emery was based on the language of section 103(f) of the Mine Act, which "imposes no employee-status limitation as to whom [miners] may choose [as their own representative]." 10 FMSHRC at 284. The Commission determined that the Secretary's Part 40 regulations' "broad definition of representative is in accord with the underlying statutory text [of section 103(f)]." 10 FMSHRC at 285.

In affirming the Commission's holding on this issue, the Tenth Circuit concluded that the Secretary's and the Commission's interpretation of section 103(f) was "both reasonable and supportable" and held that miners may authorize nonemployees to act as their representative under 103(f) of the Act. 897 F.2d at 452. In reaching this conclusion, the Court determined that the underlying purpose of section 103(f) "can be furthered by allowing both employees and nonemployees to act as miners' representatives for walkaround purposes." Id. The Court noted that miners may benefit from the participation of nonemployee representatives in walkaround because such representatives "may have greater expertise in health and safety matters than an employee representative." 897 F.2d at 451.

In UP&L, the mine operator had argued that the Secretary's interpretation of section 103(f) in the Part 40 regulations was not reasonable, in part, because it would allow the representative of a union to gain access to a nonunion mine for purposes unrelated to the Act's safety objectives. 897 F.2d at 452. In addressing this argument, the Court stated:

> While we recognize UPL's concern that walkaround rights may be abused by nonemployee representatives, the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walkaround rights

> altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them.

Id. Contrary to Kerr-McGee's assertions on review, the Court did not base its holding on the fact that, in that case, the miners were represented for NLRA purposes by a union and, therefore, the designation of a nonemployee union member as a miners' representative was permissible. Rather, the Court interpreted the language of section 103(f) to permit representation by nonemployees generally, including agents of a labor organization.

We discern no basis in section 103(f) or Part 40 for applying the principles set forth in Emery/UP&L only to situations where the designated representative is a member of a union that also represents the miners for collective bargaining purposes under the NLRA. The language of section 103(f) does not prohibit miners from designating agents of a union as their walkaround representatives on the basis that such miners are not represented by the union for collective bargaining purposes. To the contrary, the Commission has held that, under the broad language of section 103(f), miners possess the right to designate a representative of their own choosing for section 103(f) purposes. Emery, 10 FMSHRC at 284-85; Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298 (September 1986). Further, the operators' position would limit nonunionized miners' right to designate representatives of their own choosing, thereby creating distinctions between unionized and nonunionized miners that have no basis in the statute.

The Commission held in Emery that section 103(f) specifically provides that the requirements set forth therein are "[s]ubject to regulations issued by the Secretary" and that the Secretary's pertinent regulations at Part 40 are consistent with the language of section 103(f). 10 FMSHRC at 285. Moreover, the Secretary's manner of enforcement of his regulations is consistent with those regulations and with Emery. Thus, the Secretary says that he does not determine who qualifies as a walkaround representative based on a person's status or motives. Oral Arg. Tr. 45-48. Instead, the Secretary focuses on the actual conduct of the miners' representative during the inspection. Oral Arg. Tr. 48. The Secretary states that it is irrelevant who is chosen as a miners' representative so long as the representative's "demeanor and behavior" is proper and consistent with the purposes of section 103(f). Id.

The Commission is aware, as was the 10th Circuit in UP&L, that allowing a union agent limited access to mine property under section 103(f) is subject to possible abuse. We agree with the Secretary and the judge that it is the conduct of a miners' representative, during a walkaround under section 103(f), rather than the motivation of such representative, that must be examined to determine whether there has been abuse. Although the UMWA agents, Wolf and Butero, are organizing mines in the Powder River Basin, there has been no showing here that they will, through their conduct, abuse the rights and corresponding responsibilities of section 103(f). Kerr-McGee's concerns as to possible future problems are speculative. Conduct by a miners' representative that constitutes abuse can be addressed on an individual basis by an operator

and the Secretary, while generally preserving the right of miners to select representatives of their choice. See UP&L, 897 F.2d at 452.

Kerr-McGee also seeks reversal of the judge's decision on the basis that Part 40, as applied here, conflicts with the NLRA. The NLRA broadly guarantees employees the right to "bargain collectively through representatives of their own choosing...." 29 U.S.C. 157. The Mine Act, on the other hand, is a more narrowly tailored statute that pervasively regulates the safety and health of employees in one industry. In effect, the operators ask the Commission to read into section 103(f) of the Mine Act the concept of collective bargaining representation under the NLRA with the result that a nonemployee agent of a union could not be a miners' representative unless he is also a duly certified bargaining representative at that mine. When promulgating Part 40, the Secretary concluded that it would be inappropriate to incorporate the NLRA definition of a "representative" because "the meaning of the word representative under [the Mine] Act is completely different." 43 Fed. Reg. 29508 (see n.8 supra).

Although we cannot ignore other statutes when interpreting the Mine Act, nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA. Our proper field of judicial inquiry is the Mine Act. See generally PBGC v. LTV Corp., 496 U.S. 633, 645-47 (1990). We agree with the Secretary that he is not required to integrate the NLRA's concepts of collective bargaining representation into his regulations implementing the Mine Act. Nor is this Commission required to integrate NLRA concepts into its interpretation of the Mine Act. See, e.g., UMWA on behalf of James Rowe et al., etc. v. Peabody Coal Co., 7 FMSHRC 1357, 1364-65 (September 1985), aff'd, 822 F.2d 1134 (D.C. Cir. 1987).

The restrictions that have developed under the NLRA concerning nonemployee access to an employer's property for organizing or related purposes arise under a statute "whose very purpose is the governance of labor-management relations." Peabody, 7 FMSHRC at 1365. The discrete safety and health purpose of the Mine Act, and the text of section 103(f), render these NLRA principles inapplicable here. As noted, the Secretary rejected the approach advocated by the operators when he promulgated Part 40. See UP&L, 897 F.2d at 452; Emery, 10 FMSHRC at 285. We hold that the concept of representative as it has developed under the NLRA is not determinative of the miners' representative designation process under Part 40.

The Supreme Court's decision in Lechmere does not require a different result. Lechmere construed the provisions of the NLRA governing the access rights of nonemployee union organizers to employers' private property. In Lechmere, the Court was concerned with "the relationship between the rights of employees under 7 of the [NLRA] ..., 29 U.S.C. 157, and the private property rights of employers." Lechmere, 117 L.Ed.2d at 85. The Court did not address general legal principles relating to the balancing of property rights of employers against federal regulatory requirements established under other statutes, such as the Mine Act. Lechmere does not reverse walkaround law as it has developed under the Mine Act and does not overrule UP&L.

Under the Mine Act, nonemployees may enter a mine for the limited purpose of accompanying MSHA inspectors during their inspection of a mine. The Mine Act entails pervasive regulation and a diminished expectation of full enjoyment of private property rights. For example, search warrants for government inspections are not required because, in part, the Mine Act "is specifically tailored to address [Congress' safety and health] concerns, and the regulation of mines [that] it imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he `will be subject to effective inspection.'" Donovan v. Dewey, 452 U.S. 594, 603 (1981)(citation and footnote omitted). Accordingly, the Court's analysis of the property rights of employers in Lechmere, which relates solely to employee organizing rights under the NLRA, is not applicable to this case.

To the extent that Kerr-McGee is seeking a resolution of rights and obligations under the NLRA, it is in the wrong forum. If the Secretary, either through regulation or enforcement, requires an operator to take specific actions that could constitute an unfair labor practice or would otherwise conflict with the NLRA, the proper forum to resolve such conflicts is the National Labor Relations Board ("NLRB"). The NLRB may determine whether the Mine Act's requirements or the Secretary's implementing regulations serve as a defense to an unfair labor practice charge.

III.

Conclusion

For the foregoing reasons, the judge's decision is affirmed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner