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SOL (MSHA) V. NATIONAL LABOR RELATIONS BOARD
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November 9, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DONALD L. GREGORY, Petitioner and NATIONAL LABOR RELATIONS BOARD, Intervenor v. THUNDER BASIN COAL COMPANY, Respondent	:	Docket No. WEST 92-279-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LOY D. PETERS, Petitioner and NATIONAL LABOR RELATIONS BOARD, Intervenor v. THUNDER BASIN COAL COMPANY, Respondent	:	Docket No. WEST 92-280-D

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

DECISION

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), involves discrimination complaints brought by the Secretary of Labor ("Secretary") against

Thunder Basin Coal Company ("Thunder Basin") on behalf of Donald L. Gregory (Docket No. WEST 92-279-D) and Loy D. Peters (Docket No. WEST 92-280-D). The issue is whether Administrative Law Judge Michael A. Lasher, Jr., in his order reported at 14 FMSHRC 1391 (August 1992)(ALJ), erred in dismissing the two complaints because of the Secretary's failure to comply with the judge's orders compelling discovery. The Secretary had declined to disclose certain information sought during discovery on the grounds that it was protected by the informant's privilege and that it involved documents under the control of another federal agency, the National Labor Relations Board ("NLRB").

The Commission granted the Secretary's petition for discretionary review of the judge's order and granted the NLRB's motion to intervene in support of the Secretary's position. The Commission also permitted amicus curiae participation by the American Mining Congress and the National Coal Association ("industry amici") in support of Thunder Basin. For the reasons set forth below, we reverse and remand for further proceedings.

I.

Factual and Procedural Background

Thunder Basin owns several coal mines, including the non-union Black Thunder Mine in Wyoming.(Footnote 1) In 1990, pursuant to the Secretary's regulations at 30 C.F.R. Part 40 ("Part 40"), some Black Thunder miners designated agents of the United Mine Workers ("UMWA"), who did not work at the mine, as their representatives for purposes of the Mine Act, including "walkaround" rights under section 103(f) of the Act, 30 U.S.C. 813(f). Both Gregory and Peters, maintenance technicians at the Black Thunder Mine, were designated as alternate miners' representatives.

On March 11, 1991, Thunder Basin filed a suit against the Department of Labor's Mine Safety and Health Administration ("MSHA") in the United States District Court for the District of Wyoming to enjoin MSHA from enforcing its Part 40 regulations against Thunder Basin. Gregory and Peters testified at depositions on behalf of MSHA. Peters also testified at the subsequent court hearing.(Footnote 2)

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1 There has been no hearing in this case. Background information is based on the parties' pleadings and briefs and the judge's orders.

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2 In an unpublished order of March 21, 1991, the District Court issued a preliminary injunction enjoining the Secretary from enforcing Part 40 against Thunder Basin. The Court concluded that the UMWA was improperly using the miners' representative process under the Mine Act as a tool for union organizing purposes. On July 21, 1992, the United States Court of Appeals for the Tenth Circuit vacated the District Court's judgment and remanded the case to the lower court with instructions to dismiss the proceeding for lack of subject matter jurisdiction. Thunder Basin Coal Co. v. Martin, 969 F.2d 970. The Supreme Court granted Thunder Basin's petition for writ of certiorari seeking review of the Tenth Circuit's decision. Thunder Basin Coal Co. v. Reich, No. 92-896 (March 8, 1993). The case was argued in the Supreme Court on October 5, 1993.

In November and December 1991, Peters and Gregory filed discrimination complaints with the Secretary, pursuant to section 105(c) of the Mine Act, 30 U.S.C. 815(c).(Footnote 3) After investigating the complaints, the Secretary, on February 24, 1992, filed discrimination complaints on behalf of Gregory and Peters, alleging that Thunder Basin had discriminated against them because of their cooperation with MSHA in the Thunder Basin litigation. According to the complaints, Peters had been reprimanded and given a negative performance appraisal, while Gregory had been subjected to several instances of harassment. The complaints also asserted that Thunder Basin had refused to recognize Gregory and Peters as alternate miners' representatives. Thunder

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3 Section 105(c) provides in pertinent part:

> Discrimination or interference prohibited; complaint; investigation; determination; hearing
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> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner ... has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this [Act].
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance.

Basin answered on March 16, 1992, denying that it had discriminated against the complainants. The complaints were consolidated for hearing.

In the meantime, the UMWA filed an unfair labor practice charge with the NLRB on January 30, 1992, alleging that Thunder Basin had discriminated against Peters and six other miners in order to discourage their membership in the UMWA in violation of sections 8(a)(1) and (a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(1) and (a)(3) (1988). On April 29, 1992, the NLRB issued a complaint alleging that Thunder Basin had committed various unfair labor practices in an attempt to discourage Thunder Basin employees from supporting the UMWA. Among other things, the complaint alleged that Thunder Basin had given Peters a negative performance appraisal due to his union activities. The complaint did not mention Gregory by name.

In deposition notices in the Mine Act proceeding, directed to both Gregory and Peters and filed with the judge on May 18, 1992, Thunder Basin requested the complainants "to produce ... the originals and all non-conforming copies of all notes, memoranda, [and] written statements given to any governmental agency ... which in any way relate to [complainants'] allegations in this action...." On June 9, 1992, Thunder Basin deposed Gregory.

Counsel for Thunder Basin asked Gregory whether he had "any statements, notes or memoranda" that he may have given to a government agency relating to his Mine Act complaint, and Gregory responded that he did not. Dep. Tr. 10-11. Gregory was asked whether he had given any such statements and replied that he had not. Dep. Tr. 11. Counsel asked Gregory whether he was aware of "any other notes or letters or other written documents that may be in existence that relate to [his] claims in this action." Id. Gregory asked to speak with the Secretary's counsel. Id. The Secretary's counsel stated that Gregory was not obligated to provide information regarding "anything he's given to the NLRB." Id. Thunder Basin's counsel then asked Gregory whether he had given any statements about his treatment by Thunder Basin to anyone else and the Secretary's counsel again objected. Dep. Tr. 12-14. Counsel also asked Gregory whether he believed that any of the alleged mistreatment he had received was tied to any union activities, and the Secretary's counsel instructed Gregory not to answer the question. Dep. Tr. 130-31.

On June 24, 1992, Thunder Basin filed a motion to compel discovery. It requested the judge to direct a response to questions relating to any oral or written statements that Gregory may have given to any other governmental agency regarding his treatment by Thunder Basin, to require production of any such written documents, and to permit inquiry into whether Gregory believed that any alleged mistreatment he had received was tied to his union activities. Thunder Basin argued that such information was relevant for evaluation of whether the alleged mistreatment stemmed from the exercise of Mine Act rights or from union activities protected under the NLRA, and for purposes of impeachment. Motion to Compel at 3. The Secretary opposed the motion, asserting that the information sought was protected by the informant's privilege.

The judge, on July 8, 1992, issued an order granting Thunder Basin's motion to compel. The judge found that the requested information could reveal inconsistencies, thus providing impeachment material for the forthcoming trial. July 8 Order at 1-2. The judge directed the Secretary to make Gregory available for deposition on such matters but only "for the limited purposes indicated in the Motion...." July 8 Order at 2 (emphasis in original).

The Secretary filed a motion for reconsideration and, on July 20, 1992, the judge issued a second order, "affirming" his prior order. The judge emphasized that the discovery authorized in his prior order was "limited to questions and/or documents leading to impeachment material (prior inconsistent statements made by [Gregory]) which may also be relevant to the anticipated `motivation' issue." July 20 Order at 3. The judge stated:

> [A]s Respondent contends, to "the extent Mr. Gregory may have told (the NLRB) a different story, whether with regard to the ways in which he believes he was mistreated or the reasons for that mistreatment" [such areas] may be inquired into on discovery, and if inconsistent to his testimony in this action, be admissible at hearing.

Id. The judge also prohibited Thunder Basin from using the deposition to learn the identity of other informants. Id.

The Secretary, on August 6, 1992, filed a Notice Regarding Discovery on behalf of Gregory and Peters, indicating that he would not comply with the directed discovery. The Secretary relied on the informant's privilege and also stated that he did not have custody or control of any document or information that the complainants may have provided to another agency. Anticipating that the judge would rule consistently as to Peters, the parties, on August 7, l992, filed a stipulation requesting the judge to enter an identical discovery order with respect to Peters. On that date, Thunder Basin also moved for sanctions and dismissal of both cases on the basis of the Secretary's refusal to comply with the judge's earlier discovery orders. On August 11, the judge issued an order compelling discovery in the Peters case.

On August l4, 1992, the judge, citing Secretary on behalf of Logan v. Bright Coal Co., 6 FMSHRC 2520 (November 1984), issued his decision and order dismissing both complaints because of the Secretary's failure to comply with his orders compelling discovery. The judge indicated that any statements that the complainants may have given to other government agencies "are either in the possession of Complainants or can be obtained by them," that production of any such documents was thus proper, and that their availability "was glossed over [by] the Secretary...." 14 FMSHRC at 1392. The judge found that the material sought was "plainly relevant" and emphasized that his orders contained "protective language." Id. He reiterated his view that any such material could be useful for impeachment purposes. Id. He noted that "[i]n view of the information already contained in the Commission files, I find the Secretary's assertion of informant's privilege a transparency." Id.

At the time the judge issued his August order, the NLRB unfair labor practice proceeding was pending, with a hearing scheduled for October 1992.

II.

Disposition of Issues

A. Parties' Arguments on Review

The Secretary argues that the informant's privilege protects the complainants from having to disclose whether they were NLRB informants and from having to produce any confidential statements that they may have given the NLRB as part of its unfair labor practice investigation of Thunder Basin. The Secretary and the NLRB contend that the release of any such protected material would impede the NLRB's enforcement of the NLRA. The Secretary further argues that, having found the material relevant, the judge failed to apply the principles announced by the Commission in Bright to determine whether the informant's privilege attached and, if so, to balance whether the operator's need for the material was greater than the Secretary's need to maintain the privilege in the public interest.

The NLRB asserts that application of the Bright test would show that the public interest in efficient enforcement of the NLRA, and an informant's right to be protected against retaliation, outweigh Thunder Basin's need for any statements that the complainants may have given the NLRB. The NLRB states that it has a vital interest in maintaining confidentiality of witnesses' identity and statements in order to assure continued reporting of violations. The Secretary and NLRB contend that Thunder Basin's need for the information is not great because it is based only on the surmise that the information may be inconsistent with the complainants' Mine Act statements. Moreover, the materials sought are extraneous because Thunder Basin has obtained from the Secretary the material related to the Mine Act proceeding.

The NLRB also maintains that the "official information" privilege applies to its materials, as they would be contained in governmental investigation files. NLRB Br. 14-16.

Thunder Basin argues that the judge properly ordered discovery because the information sought was clearly relevant to the complainants' statements about their alleged discriminatory treatment. The operator sought discovery from the complainants, not from MSHA or the NLRB and consequently the informant's privilege is not properly invoked by those agencies. The operator and the industry amici argue that the informant's privilege does not apply because the identities of Gregory and Peters were disclosed in the NLRB proceeding and the underlying purpose of the privilege precludes its application where the informant's identity has been revealed. The operator and amici assert that, even if the informant's privilege is applicable, Thunder Basin's need for the material outweighs any public interest under a Bright balancing test. They also contend that the official information privilege may not be invoked on review because it was not raised before the judge and, even if it has now been properly raised, the privilege does not apply to the materials sought. In reply, the NLRB argues that the official

information privilege was properly raised for the first time in its motion to intervene because it had not been a party before the judge.

B. Applicable General Principles

The essential question presented on review is whether a complainant represented by the Secretary may be required to disclose whether he was also an informant in an NLRB unfair labor practice investigation and, if so, to produce any statements he gave to the NLRB. The Secretary provided Thunder Basin with copies of Gregory's MSHA statements; the general availability of a complainant's statements to MSHA is not in dispute. See Bright, 6 FMSHRC at 2520.

In reviewing claims that a judge erred in a discovery dispute, the Commission cannot merely substitute its judgment for that of the judge. Asarco, Inc., 12 FMSHRC 2548, 2555 (December 1990)("Asarco I"). A Commission judge is granted wide discretion in discovery matters. In Re: Contests of Respirable Dust Sample Alteration Citations, 14 FMSHRC 987, 1005 (June 1992)("Dust Sample Cases"). The Commission's role is to determine whether the judge's factual determinations are supported by the record and whether he correctly interpreted and applied the law or otherwise abused his discretion. Asarco I, 12 FMSHRC at 2555. See also Asarco, Inc., 14 FMSHRC 1323, 1327-28 (August 1992)("Asarco II").

Commission Procedural Rule 61, 58 Fed. Reg. 12158 (March 3, 1993; effective May 3, 1993), to be codified at 29 C.F.R. 2700.61, provides that, "except in extraordinary circumstances," a judge "shall not ... disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner."(Footnote 4) The informant's privilege is based on the Supreme Court's discussion in Roviaro v. United States, 353 U.S. 53 (1957). The informant's privilege is the right of the government to withhold from disclosure the identity of persons furnishing information on violations of the law to law enforcement officials. Bright, 6 FMSHRC at 2522-23. In general, the privilege protects against the disclosure of an informant's identity and against the release of those portions of written statements that could reveal an informant's identity. The Commission has emphasized -- and all parties to the present proceeding agree -- that the privilege is qualified. Where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. Bright, 6 FMSHRC at 2523.

In Bright and subsequent cases, the Commission has set forth a framework for analysis of whether an informant's identity and statements should be disclosed. First, the judge must determine whether the information requested is relevant. See Asarco II, 14 FMSHRC at 1327; Asarco I, 12 FMSHRC at 2553. Second, if the judge concludes that the material is relevant, he must determine whether it is privileged; the burden of proving facts necessary to support the privilege rests with the government. See Asarco I, 12 FMSHRC at 2553; Bright, 6 FMSHRC at 2523. Third, if the qualified privilege exists, the

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4 The present Commission rule carries forward unchanged the Commission's prior informant's rule, 29 C.F.R. 2700.59 (1992).

judge should conduct a balancing test.

The Commission described this test in Bright:

> Recognizing that the informer's privilege is qualified, if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Drawing the proper balance concerning the need for disclosure will depend upon the particular circumstances of [the] case, taking into account the violation charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Among the relevant factors to be considered are the possibility for retaliation or harassment, and whether the information is available from sources other than the government.
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> The burden of proving facts necessary to show that the information is essential to a fair determination rests with the party seeking disclosure. Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d [303] at 307 [(5th Cir. 1972)]. In this regard a demonstrated, specific need for material may prevail over a generalized assertion of privilege. Black v. Sheraton Corp. of America, 564 F.2d [531] at 545 [(D.C. Cir. 1977)]. Some of the factors bearing upon the issue of need include whether the Secretary is in sole control of the requested material or whether the material which respondents seek is already within their control, and whether respondents had other avenues available from which to obtain the substantial equivalent of the requested material.

6 FMSHRC at 2526.

C. Informant's Privilege

Applying the principles of Bright, we agree with the judge's threshold determination that the information sought was relevant in the context of Commission discovery. 14 FMSHRC at 1392. See Commission Procedural Rule 56(b), 58 Fed. Reg. 12158 (March 3, 1993; effective May 3, 1993), to be codified at 29 C.F.R. 2700.56(b)(discovery permitted of any relevant matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence).

We disagree, however, with the judge's determination that a qualified informant's privilege did not attach to the information sought by the operator. The judge concluded that Gregory had apparently been identified as an informant because he was named as a discriminatee in the NLRB proceeding

and, thus, any claim of privilege had been waived. July 20 Order at 3. In fact, as discussed below, Gregory was not named in the NLRB complaint. Presumably, the judge reached an identical conclusion as to Peters, who was actually named in the NLRB complaint.

In general, an individual's claim to the protection of the informant's privilege may be waived if he is identified or otherwise revealed as an informant. See generally Roviaro, 353 U.S. at 60 & n.8. The Commission's decisions, however, have recognized the importance of this privilege. See Asarco II, 14 FMSHRC at 1327; Bright, 6 FMSHRC at 2522-25. Further, our Procedural Rule 61 permits disclosure of an informant's identity only in "extraordinary circumstances." Accordingly, we will not consider that an informant has been identified or the privilege waived except where there is an express identification of an individual as an informant or an express waiver of that individual's claim of privilege. See, e.g., Dole v. Loc. 1942, IBEW, 870 F.2d 368, 375 (7th Cir. 1989).

Here, the UMWA, not Gregory or Peters, was the charging party in the NLRB proceeding. Although the judge indicated that Gregory had been named as a discriminatee in the NLRB's unfair labor practice complaint, Gregory is not mentioned in that complaint. While Peters is included therein as a discriminatee, as the NLRB notes, such inclusion is not tantamount to disclosure of Peters as an informant. See NLRB Reply Br. at 5-6. Other sources of information regarding Peters were available to the NLRB, and we hold that, in the circumstances presented, Peters' inclusion in the NLRB complaint does not, in itself, constitute identification of him as an informant or a waiver of the privilege.

Accordingly, we conclude that neither Gregory nor Peters has been expressly identified as an NLRB informant and that the informant's privilege has not been waived as to either individual. Therefore, we hold that a qualified privilege exists as to whether either Gregory or Peters gave an oral or written statement to the NLRB. We reverse as legal error the judge's determination to the contrary.

We remand this matter to the judge so that he may carry out the required balancing of competing interests pursuant to Bright.(Footnote 5) The privilege protects information that would disclose whether the complainants gave statements to the NLRB and is to be balanced against the operator's need for that information.

The judge shall permit the NLRB, as the custodian of any such statements, to be heard on its need to maintain the privilege to protect the public interest and its own enforcement responsibilities under the NLRA. The judge shall evaluate Thunder Basin's need during discovery for information that would disclose whether complainants were NLRB informants and whether that need cannot be satisfied adequately at trial, if either complainant is called to

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5 While some language in the judge's orders suggests balancing, his conclusions appear to rest on his determination that the privilege had been effectively waived.

testify. See Asarco I, 12 FMSHRC at 2561 n.3.

If the judge determines in his analysis pursuant to Bright that the information is not discoverable, the judge may at trial order disclosure of informants' statements. See generally Jencks v. United States, 353 U.S. 657, 667-69 (1957); 18 U.S.C. 3500 (1988)(Jencks Act). We note that the NLRB itself turns over at trial, for cross-examination purposes, a witness's prior statements relative to the subject matter of his testimony. 29 C.F.R. 102.118(b)-(d)(NLRB "Jencks" procedure).

We reject the argument raised by Thunder Basin and industry amici that the informant's privilege cannot be invoked by the Secretary because the operator sought the information directly from the complainants and not from the government. The Secretary here, in representing the alleged discriminatees, is carrying out his enforcement responsibilities under section 105(c)(2) of the Mine Act. The informant's privilege is essentially the government's right to withhold certain information to protect individual informants. Bright, 6 FMSHRC at 2522-23.

If the judge concludes on remand that the informant's privilege outweighs the operator's need for the information during the discovery phase, he need not reach the official information privilege and shall order this case to proceed. If he finds that the informant's privilege should yield, he shall resolve the official information privilege issue before directing disclosure of the information sought.

D. Official Information Privilege

The NLRB argues that any statements given to it by Gregory and Peters are protected by the official information privilege. As the operator and industry amici assert, this issue is raised for the first time on review and was not presented to the judge. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(iii), bars the Commission, unless good cause is shown, from considering questions upon which a judge had not been afforded an opportunity to pass. We conclude that, in the unusual circumstances presented, good cause has been shown. This matter was dismissed during the discovery stage. We believe that the NLRB, as a practical matter, could not have been expected to intervene prior to the judge's dismissal order. Therefore, we will permit the NLRB and the other parties to be heard on remand regarding this issue.

The official information privilege protects governmental investigative files. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984). This privilege prevents the unwarranted disclosure of documents from law enforcement investigatory files as well as testimony about that information. In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988). The reason for protecting investigative files is similar to that for the informant's privilege: the need for free disclosure to the government. In general, this privilege may be invoked in Mine Act proceedings. See Dust Sample Cases, 14 FMSHRC at 1008-09. We remand so that the judge may determine if this privilege has been properly invoked and is applicable in this case. See Sealed Case, 856 F.2d at 271; Dust Sample Cases, 14 FMSHRC at 999-1001,

1009. The official information privilege, like the informant's privilege, is qualified and is subject to a similar balancing of the government's interest in non-disclosure and the operator's need for the information prior to hearing. Sealed Case, 856 F.2d at 272. On remand, the judge shall determine and apply the appropriate factors for a balancing analysis.

E. Additional Discovery Protection

In the event the judge determines that neither privilege outweighs the operator's need for information now, he shall order disclosure. We concur with the other protections set forth by the judge in his discovery orders. Should disclosure be ordered, the Secretary shall protect against the disclosure of the names of other informants. The operator is entitled to pursue only the specific information previously recognized by the judge in his discovery orders.(Footnote 6) See 14 FMSHRC at 1392.

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6 The operator and industry amici contend that sustaining the Secretary's claim of privilege would conflict with the Memorandum of Understanding executed by the Secretary and the General Counsel of the NLRB (45 Fed. Reg. 6189 (January 25, 1980))("MOU"), which states that the NLRB should "defer or dismiss" an unfair labor practice charge whenever a complaint related to the same factual matters is also brought under section 105(c) of the Mine Act. The record contains no evidence that the two sets of complaints are factually identical. In any event, we conclude that the MOU is not binding on either agency. See generally Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536-37 (D.C. Cir. 1986).

III.

Conclusion

For the foregoing reasons, we vacate the judge's July and August 1992 discovery orders and his dismissal order of August 14, 1992. This matter is reinstated and is remanded to the judge for further proceedings consistent with this opinion.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner