FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 28 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of THOMAS McGARY and RON BOWERSOX	:	
and	:	
	:	Docket No. WEVA 2015-583-D
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:	
v.	:	
THE MARSHALL COUNTY COAL CO., McELROY COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION[1]	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

Respondents in this matter have petitioned the United States Court of Appeals for the District of Columbia Circuit to review the two decisions the Commission issued in the case. D.C. Cir. No. 18-1098 (docketed Apr. 12, 2018); *see* 38 FMSHRC 2006 (Aug. 2016); 40 FMSHRC 261 (Mar. 2018).[2] On April 13, 2018, Respondents moved the Commission for a stay while the two decisions are on appeal.

In their motion, Respondents state that the Secretary of Labor, without taking a position on the Respondents' arguments for a stay, does not oppose the motion. The other party to the case, the United Mine Workers of America International Union ("UMWA"), has not replied to the motion for stay.

[1] Additional captions are listed in Appendix A to this order.

[2] Respondents are five underground coal mines in West Virginia and associated corporate entities, including the owner and operator of the five mines, Murray Energy Corporation. 38 FMSHRC at 2006; 40 FMSHRC at 261 n.2.

Two Commissioners would grant the motion and stay the effect of the Commission's decisions, while two Commissioners would deny the motion. Respondents' stay request is thus, in effect, denied.

The opinions of Commissioners for and against granting a stay in this instance are set forth below.

Acting Chairman Althen and Commissioner Young, in favor of granting the stay:

In this case, the Commission ordered Respondents to rescind a policy requiring miners to give notice to management of their complaints made pursuant to section 103(g) of the Mine Act,[1] not to enforce that policy, to post a Notice for one year of the rescission/non-enforcement of the policy, to pay civil penalties, and for Robert E. Murray, the Chief Executive Officer of Murray Energy Corporation, to read a prescribed statement to the miners.

The record demonstrates that the Respondents posted the required Notice rescinding the announced policy and informing miners of their rights. By now, a year from the posting has expired and the Respondents have, or could have, permissibly removed the notice.[2]

Nearly two years have passed since the Commission's initial decision. Neither the Secretary nor the UMWA has complained of a violation or any failure to comply with the Judge's order regarding the Respondent's section103(g) policy. Therefore, Respondents apparently have complied with the requirements that they not interfere with miners' rights to file section 103(g) complaints.

The Secretary and MSHA, the federal agency responsible for prosecuting violations and enforcing orders, do not oppose the stay and have not otherwise expressed any concern that a stay will injure the public interest. Consequently, the federal enforcement agency that protects the public interest and miners' rights implicitly accepts a stay.

The UMWA, the official representative of the miners, does not oppose the stay and has

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[1] Section 103(g)(1) provides that, if a miner or miner representative has reasonable grounds to believe that a violation of the Act or a mandatory standard exists, the miner or representative has a right to obtain an immediate inspection by the Department of Labor's Mine Safety and Health Administration ("MSHA"). It further provides that the name of the person requesting an inspection shall not be revealed. 30 U.S.C. § 813(g)(1).

[2] In Respondents' second petition for discretionary review, Respondents sought review of the assessed penalty and of the requirement that CEO Murray personally read a statement to the miners.

not otherwise expressed a concern that issuance of a stay will injure any safety rights of miners or the public interest.[3] Consequently, the UMWA implicitly accepts a stay.

These positions of the concerned parties tip the scales decisively in favor of granting the stay and should be dispositive. No one in the world opposes the stay except our colleagues.

Application of the classic stay factors confirms that the Commission should grant the stay. The factors are (1) a showing that the stay is in or does not adversely affect the public interest; (2) no adverse effect on other interested parties; (3) irreparable harm if the stay is not granted; and (4) likelihood of prevailing on the merits of the appeal. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

1. Public interest

In light of the absence of any opposition, we must conclude Respondents have complied with the substantive requirements of the Judge's order to avoid interfering with miners' rights to file section 103(g) complaints. There is no indication that Respondents have interfered with, or attempted to interfere with, miners' statutory rights subsequent to entry of the order. The remaining elements of the order are the payment of a penalty and a personal admission of unlawful activity by CEO Murray.

The Secretary, as guardian of the public interest, does not oppose the stay or assert that a grant of the stay would adversely affect the public interest. The statutory defender of the public interest, therefore, sees no threat to that interest from a stay. The UMWA has not opposed the settlement or suggested any public interest in immediate full compliance.

2. Effect upon other private parties

The UMWA, a zealous defender of miners' rights, has not taken any action to oppose the stay. It has not asserted a need for an immediate personal reading of a notice after two years of quiescent compliance by Respondents with the Commission's order and no claimed infringement of miners' section 103(g) rights. Nor has any individual miner named in this action objected to the stay.[4] Further, the Secretary, charged with the statutory duty to protect miners' rights, has not asserted a need or basis for an immediate personal reading. Consequently, there is no support for a finding that the stay would harm the rights of an affected party or the public interest.

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[3] The lack of opposition to the stay brings up an important question at the outset: if the other parties to the case — the Secretary and the UMWA — do not oppose the stay, does that mean that they have no intention of seeking to immediately enforce the remedial aspects of the Judge's decision that remain to be satisfied by the Respondents? We think the answer to that question is clearly "yes." Without such enforcement, particularly by the Secretary, those remedies effectively are stayed despite the motion not garnering majority support.

[4] MSHA filed each of the cases on behalf of UMWA International Safety Representative Ron Bowersox and another individual. Each of these individuals is a local UMWA representative at his or her respective mine. 40 FMSHRC at 262 n.4.

3. Irreparable Injury

Regarding the element of irreparable harm, the remedy imposed is extraordinary. It mandates a personal action and involves a legal question of first impression before the Commission. The mandated reading would require CEO Murray to read a notice stating that he personally instituted an unlawful policy in awareness meetings with the UMWA miners. The first few sentences of the mandatory statement are:

> The Federal Mine Safety and Health Review Commission has found that the Murray Energy Corporation and its West Virginia subsidiaries have violated the Federal Mine Safety and Health Act and has ordered me to read and abide by this notice. In an awareness meeting between April and July 2014, I outlined a policy requiring that any safety complaint made to MSHA also be made to management. That policy is rescinded.

40 FMSHRC at 272.

The statement, therefore, constitutes a compelled admission by CEO Murray that he personally implemented a policy that violated the Mine Act, and he is rescinding it. Obviously, such a personal admission of unlawful conduct related to worker health and safety far surpasses a simple affirmation of safety principles. Once CEO Murray makes the statement, if Respondents prevail on appeal, there will be no effective way to fully counteract any damage to reputation caused by the original statement. This is the very definition of irreparable injury.

4. Likelihood of Success

In light of the compelling reasons for granting a stay based upon the above-discussed factors, the only possible ground for denying the stay would be an overweening certainty that the circuit court will uphold the Commission's decision in its entirety. However, there are multiple reasons for Commission cautiousness.

The Commission did not address the merits of Respondents' argument regarding the remedy of personally reading a statement. We found that Respondents did not preserve that issue. If the Court disagrees with our procedural ruling, the Respondents presented a substantial question that cuts heavily in favor of a stay. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977). Compelling an individual to personally read a notice to his employees that he violated the law regarding their health and safety most certainly is a bell that cannot be unrung if it is later determined that his actions were lawful. This is particularly true when the compelled reading involves invaluable First Amendment rights. Undoubtedly, given the importance of First Amendment rights and the particularly punitive nature of a compelled reading, the circuit court will carefully review Respondents' claim that they did properly raise the issue before the Commission.

Success in the appeal of the violation would negate any duty to read the statement. Here, the principal argument presented by Respondents before the circuit court is that the Judge

utilized an incorrect standard for determining interference claims. The Administrative Law Judge applied the so-called "*Franks/Hoy* test" for violations of section 105(c). 38 FMSHRC at 2011; *see UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (sep. op. of Chairman Jordan and Comm'r Nakamura).

The *Franks/Hoy* test would eliminate the need for any motivational nexus between protected activity and adverse action despite a quadruple-explicit mandate in the Mine Act that the adverse action must occur "because of" protected activity.[5] Two Commissioners proposed the test in the *Franks/Hoy* case. A majority of the Commission has never accepted the test, which is not a Commission standard.[6]

Most importantly, in a decision issued yesterday, June 27, 2018, the current four members of the Commission split evenly on the adoption of the *Franks/Hoy* test in a case testing the plain meaning of section 105(c). *Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co.,* Docket No. WEVA 2015-904-D. The case involved the introduction of bonus plans. The Secretary did not introduce any evidence that protected activity motivated in any way the introduction of the plans. Therefore, the *Greathouse* case provides an ideal test of the requirements of section 105(c) with less possibility of one set of unusual facts unduly influencing a legal standard applicable to a limitless array of other circumstances. Two Commissioners rejected the *Franks/Hoy* test in favor of applying the plain language of the Mine Act and consistently accepted meaning of section 105(c). An agency's refusal to accept the plain

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[5] As relevant, section 105(c)(1) of the Mine Act provides,

> 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 . . . [1] *because* such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or [2] *because* such miner . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or [3] *because* such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or [4] *because* of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c) (emphases added).

[6] The United States Court of Appeals for the District of Columbia Circuit specifically noted the Commission's refusal to adopt the *Franks/Hoy* test in *Wilson v. FMSHRC*, 863 F.3d 876, 879 (D.C. Cir. 2017), stating "[t]he Commission has not settled upon a test for interference."

meaning of statutory language is a well-recognized and frequent reason for court reversals of agency interpretations in recent years. *See* 2A Norman J. Singer, Sutherland Statutory Construction § 46:1 (7th ed. 2014).

If the circuit court in this case rejects the *Franks/Hoy* test, the court would then have to decide whether the other three Commissioners appropriately affirmed the violation on the ground that the evidence would show a motivational nexus although the Judge found interference based on the *Franks/Hoy* test. *See* 38 FMSHRC at 2012 n.11, 2028 n.22. This is a purely legal question, and the circuit court is the appropriate forum for its resolution.

Conclusion

The enforcement agency and the miners' legal representative do not oppose a stay and do not assert any harm to the public interest from a stay. No party has suggested any harm to the rights of miners from a stay; and, a personal admission of unlawful conduct clearly is an irreparable hardship to an individual. We cannot dismiss the possibility of circuit court disagreement with our decision. A personal reading by CEO Murray would reduce the appeal to an argument over the penalty amount thereby depriving Respondents of any opportunity to challenge the impact/effect of the extraordinary personal reading obligation.

The stay should be granted.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

Commissioners Jordan and Cohen, in favor of denying the stay:

We would deny the motion to stay the Judge's remedial order because, in our view, the operators have not met the criteria they are required to satisfy before a stay request is granted.

In *Secretary of Labor ex rel. Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Those factors include: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. The Court emphasized that a stay constitutes "extraordinary relief." 259 F.2d at 925. The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co.*, 18 FMSHRC 1756, 1757 (Oct. 1996).

The operators' attempt to convince us to stay the Judge's order fails at the first prong of this test, as their claims are not likely to succeed before the Circuit Court. They are appealing our finding that they interfered with the complainants' rights under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and our affirmance of the Judge's remedial order requiring CEO Robert Murray to read a statement.

On the first issue all five Commissioners concluded that CEO Murray's PowerPoint presentation to miners constituted interference with miners' rights to make anonymous safety complaints to MSHA under section 103(g) of the Mine Act, 30 U.S.C. § 813(g).[1] 38 FMSHRC 2006, 2018 (Aug. 2016). Although the Secretary's use of the test for interference contained in *UMWA on behalf of Franks v. Emerald Coal Resources, L.P.*, 36 FMSHRC 2088, 2108 (Aug. 2014) (sep. op. of Chairman Jordan and Comm'r Nakamura) may be an issue presented for review by the D.C. Circuit, our colleagues do not explain why the operator is likely to succeed in persuading the Court to rule in its favor and reject this test. We note that the D.C. Circuit readily utilized this standard in a recent interference case in which neither party challenged it. *Wilson v. FMSHRC*, 863 F.3d 876, 882-83 (D.C. Cir. 2017).

Moreover, when the Commission issued its first decision in this case, our colleagues concluded that it was unnecessary to even consider the issue of the proper test for interference because of their conclusion that "the filing of complaints under section 103(g) clearly motivated the offending portions of the Respondent's presentations. . . . either of [the] competing tests would arrive at the same result." 38 FMSHRC at 2012 n.11. Similarly, we stated in our separate opinion that the Administrative Law Judge was correct in considering CEO Murray's filing of a federal suit against witnesses in this matter to be a bad-faith attempt to intimidate those witnesses. Thus, even if the Court were to rule that animus is a necessary prerequisite for finding interference, the four present Commissioners have concluded it existed. Therefore, CEO Murray is unlikely to succeed on the merits.

[1] CEO Murray made PowerPoint presentations to each shift of miners at each of the five mines involved in this case where he informed miners that they must report to mine management any safety complaint made to MSHA. 38 FMSHRC at 2008.

As to the second issue, the Respondents repeatedly failed to raise the issue when the case was in litigation before the Commission. Accordingly, all four Commissioners held that "[i]n light of [the operators'] multiple failures to make plain to the Judge any objection to CEO Murray being required to personally read a statement as part of the remedy, we affirm in result the Judge's decision on remand." 40 FMSHRC 261, 268 (Mar. 2018).

Accordingly, the Respondents have not demonstrated a likelihood of success based on the merits of their arguments on appeal.

Our vote to deny is also based on the fact that nearly two-and-half years have passed since the Judge's November 2015 order requiring that CEO Murray read a statement to the miners to correct the previous violative PowerPoint presentation he had made. Now that the matter is pending in the court of appeals, it would conceivably take at least another year or more before this case is resolved. Under these circumstances, if a stay is granted but the operator ultimately loses its appeal, there could be a delay of over three years between the time the Judge initially ordered this remedy and compliance with the Judge's order. We thus disagree with the operators' contention that a stay would be in the public interest.

Finally, we would be remiss if we failed to comment on the operators' assertion that CEO Murray will suffer irreparable harm if he is compelled to read the statement drafted by the Judge. As a threshold matter, we have taken into account that the Judge's order permits CEO Murray to read the statement through a video conference instead of traveling to each mine and reading the statement in person (as he did with the violative PowerPoint presentation). 38 FMSHRC 2695, 2700-01 (Oct. 2016) (ALJ). Thus, CEO Murray would not have to experience direct contact with miners in reading his statement.

In addition, although we understand the objection to "compelled speech," we cannot identify the harm suffered by a manager who is ordered by a Judge to tell his employees that, in the words of the statement drafted by the Judge, "You have every right to make a complaint to MSHA without notifying any person at the mine," and "You have a right, under section 103(g) of the Mine Act, to make those reports anonymously and confidentially," and "All miners have a right to make a complaint to MSHA and all miners are protected from retaliation or adverse action for making a Section 103(g) complaint." Id. at 2699-2700. Yes, CEO Murray would only be reinforcing these bedrock principles of the Mine Act because the Judge ordered him to do so. Yet we fail to see how this rises to the level of "irreparable harm." Nor do we find CEO Murray's reading of the statement drafted by the Judge to be a "punitive" remedy, as alleged by our colleagues. We suspect that the drafters of the Mine Act would agree.

For the foregoing reasons, we would deny the operators' motion for a stay pending appeal.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

Appendix A

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RICK BAKER and RON BOWERSOX and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor v. OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	Docket Nos. WEVA 2015-584-D WEVA 2015-585-D WEVA 2015-586-D WEVA 2015-587-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ANN MARTIN and RON BOWERSOX and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor v. HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RAYMOND COPELAND and RON BOWERSOX	:
and	:
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:
v.	:
MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of MICHAEL PAYTON and RON BOWERSOX	:
and	:
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:
v.	:
MARION COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:

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