

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 25, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 94-72, etc.
	:	
v.	:	
	:	
	:	
BUCK CREEK COAL INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Jordan, Chairman; Doyle and Marks, Commissioners

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"). On February 17, 1995, Buck Creek Coal Inc. ("Buck Creek") filed with the Commission a petition for interlocutory review of Administrative Law Judge T. Todd Hodgdon's February 15, 1995, Order Continuing Stay (the "February 15 Order Continuing Stay"). By order dated March 27, 1995, the Commission granted the petition. For the reasons that follow, we vacate the February 15 Order Continuing Stay.

I.

Factual and Procedural Background

A. The September 8 Stay Order

This is Buck Creek's second request for interlocutory relief from an order staying proceedings issued by Judge Hodgdon. Buck Creek's initial petition requested relief from a Stay Order issued on September 8, 1994 ("September 8 Stay Order"), which stayed more than 300

contest and penalty proceedings then pending against Buck Creek as well as all subsequent cases involving Buck Creek.¹

In granting the Secretary's motion to stay, the judge relied on the Secretary's referral to the United States Attorney for the Southern District of Indiana of numerous violations for possible criminal prosecution of Buck Creek and its officers, and on a letter from the Criminal Division of the Justice Department stating that its criminal investigation could be impaired by civil proceedings before the Commission involving the same evidence and facts. S. Mot. for Stay at 1; September 8 Stay Order at 3.

In that order, the judge stayed proceedings "for ninety days or until such time as the United States Attorney . . . makes a determination regarding prosecution of Buck Creek . . . and any of its officers, whichever first occurs." September 8 Stay Order at 4-5. The judge stated that he would consider lifting the stay on a case-by-case basis "[i]f a subsequent case arises which involves unique circumstances, such as a withdrawal order" / *d.* at 4 & n. 4. The judge directed the parties to report the status of the criminal proceedings to him monthly. / *d.* at 5.

On November 25, Buck Creek petitioned for interlocutory review of the September 8 Stay Order. The Secretary opposed interlocutory review. On December 7, the stay expired and the Secretary moved for an extension. On January 10, 1995, the judge issued an Order Continuing Stay and Notice of Prehearing Conference ("January 10 Order Continuing Stay"), which provided in part:

When the stay was granted in September, I did not anticipate the unbroken wave of cases which have continued to be filed in this matter. The cases involve citations issued at least as early as July 1993 and proceed, as of the date of this order, through November 1994. It seems conceivable, as argued by counsel for Buck Creek, that not all of these cases are connected or related to the U.S. Attorney's criminal investigation. If that is the case, it may be possible to dispose of some cases

January 10 Order Continuing Stay at 4.

¹ The order notes that 11 proceedings had been stayed by orders dated June 30, July 18 and July 22, 1994. September 8 Stay Order at 2 n.1.

The judge scheduled a prehearing conference for February 9, 1995, to determine whether and under what conditions the stay should be continued. January 10 Order Continuing Stay at 4. Because the September 8 Stay Order had expired and because the judge's January 10 Order Continuing Stay contemplated a closer examination on a case-by-case basis, the Commission denied without prejudice Buck Creek's petition for interlocutory review of the September 8 Stay Order on grounds of mootness. *Buck Creek Coal Inc.*, 17 FMSHRC ___ (February 8, 1995).

B. The February 15 Order Continuing Stay

At the February 9 prehearing conference, the Secretary requested that the stay be continued for another 90 days. Tr. 17, 23. He stated that he was not yet prepared to address lifting the stay because of developments in federal criminal prosecutions against two Buck Creek employees in an unrelated case, as a result of which access to certain material was strictly limited. Tr. 9-10, 14. The Secretary represented to the judge that a forthcoming ruling in the unrelated case would permit examination of those documents and a decision on criminal prosecution within the next 90 days. Tr. 15-18. He further represented that he would not renew his request for a "complete stay" at the end of that period. Tr. 18. The Secretary supported his motion with a letter from an Assistant U.S. Attorney stating that a continued stay would be "beneficial" to the Government's investigation.²

On February 15, the judge issued another Order Continuing Stay, which extended the stay until May 16, 1995. February 15 Order Continuing Stay at 5. The order notices a status conference for that date to determine whether and under what conditions the stay would be continued. / d. Buck Creek's petition for interlocutory review followed.

II.

Disposition

Buck Creek contends that the Secretary has failed to establish "special circumstances" warranting a stay and that there is a strong public interest in the expeditious adjudication of these civil proceedings. Pet. 1 at 4-8.³ It asserts that *Thunder Basin Coal Co. v. Reich*, 127

² Letter from Sharon M. Jackson, Assistant United States Attorney, to Thomas A. Mascolino, Deputy Associate Solicitor of Labor, dated February 8, 1995.

³ In the instant petition, Buck Creek primarily relies on the arguments it made in its petition for interlocutory review of the September 8 Stay Order. References to Buck Creek's earlier and present petitions are in the form "Pet. 1 ___" and "Pet. 2 ___," respectively.

L.Ed.2d 29 (1994), requires that civil matters be resolved by the Commission before criminal prosecutions can proceed in district court and urges the Commission to revisit its decision to the contrary in *Southmountain Coal, Inc.*, 16 FMSHRC 504 (March 1994). Pet. 1 at 9-14. Buck Creek argues that, due to the mounting number of stayed citations, the blanket stay has denied it due process. Pet. 2 at 4.

The Secretary asserts that the judge did not abuse his discretion in granting the stay. S. Opp'n 2 at 4.⁴ He argues that stays of civil proceedings pending the outcome of associated criminal prosecutions are commonplace and warns that the criminal investigation may be impeded if the stay is lifted. S. Opp'n 1 at 3-5. The Secretary argues that *Thunder Basin* has no application to the issue of whether a civil proceeding should be stayed pending parallel criminal investigations. *Id.* at 6-8.

We review the judge's grant of the stay for abuse of discretion. *Scotia Coal Mining Co.*, 2 FMSHRC 633, 636 (March 1980); *see also Securities & Exchange Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980); *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). We conclude that the judge abused his discretion in continuing the blanket stay on February 15.

A stay of civil proceedings may be appropriate "when the interests of justice seem[] to require such action" *United States v. Kordel*, 397 U.S. 1, 12 n.27, *quoted in Dresser*, 628 F.2d at 1375. From the precedent in this area, we distill several factors that are appropriate for consideration in determining whether a stay should be granted: (1) the commonality of evidence in the civil and criminal matters (*see Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975), civil proceedings properly stayed if they "churn over the same evidentiary material" as the criminal case); (2) the timing of the stay request (*see Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), imminence of indictment favors limiting scope of discovery or staying proceedings); (3) prejudice to the litigants (*see Peden*, 512 F.2d at 1103-04, failure to show prejudice undercuts claim that stay was improper; *Campbell*, 307 F.2d at 487-88, discovery that prejudices criminal matter may be restricted); (4) the efficient use of agency resources (*see Molinaro*, 889 F.2d at 903, including among stay factors "efficient use of judicial resources" in case involving defendant's request for stay); and (5) the public interest (*see Scotia*, 2 FMSHRC at 635, noting "the public interest in the expeditious resolution of penalty cases").

⁴ The Secretary relies heavily on his opposition to the earlier Buck Creek petition for interlocutory review. References to the Secretary's oppositions to Buck Creek's earlier and present petitions are in the form "S. Opp'n 1 ___" and "S. Opp'n 2 ___," respectively.

Our review of the record persuades us that the judge failed to address these factors in his February 15 Order Continuing Stay and that the record does not contain evidence sufficient to support a finding that the criteria for a stay have been met. The Justice Department's assertion that a stay would be "beneficial" to the Government falls short of the demonstration required to support a stay.

We conclude that the first element listed above, commonality of evidence, is a key threshold factor that has not been established on this record. The consolidated dockets now contain more than 500 alleged violations, many characterized as resulting from low or moderate negligence. The Secretary has presented no legal theory on which to conclude that indictments alleging willful or knowing violations of the Mine Act, if brought, can rest on citations alleging low or moderate negligence. *See* section 110(d) of the Act, 30 U.S.C. ' 820(d).

We also find the prospective application of the stay to be inappropriate. The record does not support a conclusion that current allegations of violations bear any relationship to the criminal investigation.

In evaluating the harm that may be caused by granting or refusing to grant a stay, the judge is required to balance the litigants' competing interests. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987). Criminal defendants enjoy limited discovery compared with the broad scope of discovery available in civil proceedings. *Compare* Rules 26 through 37, Fed. R. Civ. P., with Rules 15 and 16, Fed. R. Crim. P.; *see also Campbell v. Eastland*, 307 F.2d at 487. When the government moves for a stay, it is generally seeking to prevent the prejudice that can result from a defendant's use of civil discovery to learn the government's strategy and evidence in the criminal matter. *See Campbell*, 307 F.2d at 487. Accordingly, courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable to them in the parallel criminal case. *E.g., United States v. One 1964 Cadillac Coupe de Ville*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966), *citing Campbell*.

However, a complete stay of the civil proceeding is by no means the only method by which to avoid prejudice to a related criminal prosecution. The judge has the power to impose limitations on the time and subject matter of discovery, which would permit the civil matter to proceed without harming the criminal case. *See* Commission Procedural Rule 56(d), 29 C.F.R. ' 2700.56(d); Milton Pollack, *Parallel Civil and Criminal Proceedings*, Address Before the Transferee Judges' Conference (October 17-19, 1989), *in* 129 F.R.D. 201, 211-12.

In light of our conclusion that the nexus between the civil and criminal matters has not been established, and that measures less drastic than a complete stay are available to prevent prejudice to the government, we need not address the other criteria for determining whether a stay is warranted.⁵

⁵ We reject the operator's argument that *Thunder Basin Coal Co.*, 127 L.Ed.2d 29, requires that Commission proceedings be resolved before criminal proceedings can advance. The

Court in *Thunder Basin* held that "[m]ine operators enjoy no corresponding right [to resort to district court in the first instance] but are to complain to the Commission and then to the Court of Appeals." *Thunder Basin*, 127 L.Ed.2d at 39 (footnote omitted). We disagree that the Court's holding establishes a bifurcated enforcement scheme whereby the Commission first adjudicates violations, following which the district court decides whether the violations were willful. In *Southmountain Coal Inc.*, the Commission rejected a similar argument. 16 FMSHRC at 505 n.1. We decline to overturn that holding.

III.

Conclusion

For the foregoing reasons, we vacate the February 15 Order Continuing Stay without prejudice to the imposition by the judge, upon request, of a limited stay covering particular proceedings based on the criteria set forth herein, including the commonality of issues and evidence between the civil and criminal matters. The judge should also consider this commonality of evidence when determining the limits of discovery in order to permit civil proceedings to advance without prejudice to criminal matters.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Marc Lincoln Marks, Commissioner

Commissioner Holen, dissenting:

I respectfully dissent. I do not agree that the facts in this case establish that Administrative Law Judge T. Todd Hodgdon abused his discretion in granting his Order Continuing Stay of February 15, 1995.

Courts have recognized that the government is entitled to stay civil proceedings pending disposition of a related criminal case. *See Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975). Beginning in June 1994, the judge issued a series of stays of short duration. September 8, 1994 Stay Order at 2 n.1. In July, the Secretary, for the first time, sought a 90-day stay because of an ongoing criminal investigation and the possible interference that Commission proceedings might pose. Motion for a Stay of Civil Proceedings, dated July 29, 1994. The judge, on September 8, issued a stay of 90 days, subject to the operator's showing of unique circumstances in any matter that would lead to consideration to lifting of the stay. September 8 Stay Order at 4 n.4. The judge required the parties to report to him monthly on the status of the criminal proceedings. *Id.* at 5. Following the expiration of the stay in December, the judge, on January 10, 1995, issued a 30-day continuance of the stay. January 10, 1995 Order Continuing Stay and Notice of Prehearing Conference. On February 9, the parties appeared before the judge; the Secretary sought a 90-day stay, based on a request from the U.S. Attorney's office, noting that a complete stay would not be sought at the end of the 90-day period. Tr. 7-10, 37-38 (February 9, 1995 Hearing). I do not conclude that the judge's deliberate approach, issuing two 90-day stays under limited conditions, in response to an overlapping criminal investigation, was abusive.

I agree with the majority that a party seeking a stay bears the burden of showing the need for it. *See slip op.* at 4. I also agree that, in deciding whether to grant a stay, a judge is, in general, required to balance the interests of the parties, *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987), *slip op.* at 5, and should take into account certain factors, which the majority has drawn from legal precedent and has set forth. *See slip op.* at 4 (citations omitted). These factors include the public interest and the efficient use of the Commission's resources. *Id.* In deciding whether to grant a stay in a case such as this, involving potentially related civil and criminal proceedings, a judge must, of course, address specifically the commonality of issues and evidence. *Id.* at 4-5 (citations omitted).

Arlene Holen, Commissioner