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SOL (MSHA) V. SOUTHERN OHIO COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. LAKE 79-24 A.O. No. 33-01173-03036
v.	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION AND ORDER

In response to the order to show cause of December 6, 1979, the Secretary has filed a motion for summary disposition and the operator a response that is in effect a cross-motion for summary disposition or to dismiss based on the legal defense raised in its pretrial submission of September 17, 1979. Oral argument on the motions was heard on January 17, 1980. The operator claims its defense challenging the validity of Citations Nos. 278700, 278801 and 278802,(FOOTNOTE 1) is timely and may be raised under sections 105(a) and (d) of the Act, 30 U.S.C. 815(a), (d), Rule 22 of the Commission's Rules of Procedure, and the Commission's decision in Energy Fuels Corporation, DENV 78-410, 1 BNA MSHC 2013, 2020, 1 FMSHRC Decisions 299, 315 (May 1, 1979) (dissenting opinion of Commissioner Lawson).

I agree that as interpreted by the Commission in Energy Fuels, the Act permits an operator to challenge the validity of an abated citation either within thirty days of its issuance or

thirty days after receipt of a notice of proposed penalty assessment.(FOOTNOTE 2) On the other hand, the Commission has held the validity of closure orders must be challenged immediately or not at all. Pontiki Coal Corp., PIKE 78-420-P, 1 BNA MSHC 2208, CCH 1979 OSHD 23,979, 1 FMSHRC Decisions 1476 (October 25, 1979); Wolf Creek Collieries, PIKE 78-70-P, FMSHRC 79-3-11 (March 26, 1979). This anomaly results from the fact that the Commission has interpreted section 105(a) of the Act as permitting a challenge to the issuance (validity) of a section 104(a) citation after receipt of a notice of proposed penalty assessment. Energy Fuels, supra; Rule 22. For the reasons set forth in Commissioner Lawson's dissenting opinion in Energy Fuels, I believe the Commission should reconsider and eliminate this anomaly in the review procedure. Compare Beckley Coal Mining Co., HOPE 79-35, et al, (November 27, 1978).

Assuming therefore, without deciding, that a challenge to the issuance of a citation includes a challenge to its validity on the ground that the inspection giving rise to its issuance was unauthorized,(FOOTNOTE 3) I will proceed to consider the operator's motion on its merits.(FOOTNOTE 4)

The undisputed facts show that during a closeout conference following a regular inspection of the Meigs No. 2 Mine on December 21, 1978, Inspector Petit received an oral request from a representative of the miners to examine the areas referred to in the challenged citations. (Wilson Deposition at 34). As a result of the inspector's observations, three citations issued charging the operator with failure to comply with its approved roof control plan and the mandatory safety standard set forth in 30 CFR 75.200. The conditions cited were promptly abated and thereafter the Secretary proposed a penalty of $325.00 for each citation.

Section 103(g)(1) of the Mine Act, 30 U.S.C. 813(g)(1), provides that at the written request of a miner or representative of miners who has reasonable grounds to believe that an imminent danger or a violation of the Act or a mandatory standard exists MSHA shall perform an immediate special inspection to determine the existence of the complained of condition or practice, except that if the complaint indicates an imminent danger the operator shall be notified "forthwith" so that action can be taken to abate the condition or withdraw the miners even before the inspection.(FOOTNOTE 5) 30 CFR Part 43 (1978); Legislative History, Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 1324 (July 1978). Section 103(g)(1) further provides that a copy of the notice given MSHA by the miner or his representative "shall be provided the operator or his agent no later that at the time of the inspection." Id.

Respondent claims the failure of the inspector to furnish this copy to its agent at the time of the inspection requires a finding that the inspection was unauthorized and that citations issued as a result are null and void. I do not agree.

Sections 103(g)(1) and (2)(FOOTNOTE 6) originated as sections 104(f)(1) and (2) of the Senate Bill, S. 717. Leg. Hist., supra, at 531-532. With reference to the requirement for furnishing a copy of the miner's written notice to the operator, the Senate Report states:

> While Section 104(f)(1) requires that such complaints be written, and signed by the complaining party, the Committee does not intend to preclude the Secretary's response to unwritten or unsigned complaints. The Committee notes that MESA currently maintains an inward WATS line (an "800" number) for the express purpose of receiving complaints about hazardous conditions in the mines. The Secretary must respond to appropriate complaints under section 104(f)(1), but need not necessarily follow up on complaints that do not meet the requirements of that section. Leg. Hist., supra, at 617.(FOOTNOTE 7)

It appears therefore that while an inspector is not required he is authorized to make a special spot inspection "to determine if such violation or danger exists in accordance with the provisions of" Title 1 of the Act.

This construction is consonant with section 103(g)(2) which does not require that a copy of the request for inspection be furnished the operator where the request is made prior to or during an inspection. While the failure of the miner to reduce his request for inspection to writing may justify a refusal by the inspector to make either a (g)(1) or (g)(2) inspection, it does not render the inspection performed an illegal or unauthorized search or furnish any ground for complaint by the operator of a violation of any procedural or substantive rights conferred by the Act.

Reference to the Conference Report, S. Rep. 95-461, 95th Cong., 1st Sess., at 46, Leg. Hist., supra, at 1324, shows that the purpose of the requirement that the "request for an inspection be served on the mine operator no later than the commencement of the inspection" was "to protect Õthe complainingÊ miners from possible retribution" by the operator. This echoes the statement by the Senate Committee that "the Committee is aware of the need to protect miners against possible discrimination because they file complaints..." Leg. Hist., supra, at 617.

Finally, with respect to the requirement that MSHA notify an operator or his agent "forthwith" if the complaint indicates an imminent danger,(FOOTNOTE 8) the Conference Report states:

> The failure of the Secretary to notify the operator or his agent under this provision will not nullify any citation or order that may be issued as the result of the inspection in response to the request under this section, even if such inspection discloses the existence of an imminent danger situation in the mine. Leg. Hist., supra, at 1324.

The corollary of this is that the inspector's failure to give a copy of the written notice to the operator at the time of the inspection does not invalidate any citation issued under section 103(g) because (1) an operator is not entitled to advance notice of a compliance inspection; (2) the purpose of furnishing a copy of the miner's complaint is for the miner's

protection not the operator's; (3) the inspector is authorized to make the inspection even where the request is oral; and (4) there is no requirement for furnishing a copy of the notice where the request for inspection is made prior to or during the course of a regular inspection. Leg. Hist., supra, at 617, 1324; 30 CFR part 43.

What was fashioned by Congress as a shield against retaliation should not by an exercise in literalism be converted into a sword of nullification.

I conclude therefore that the purpose of furnishing a copy of the miner's complaint to the operator is to put the operator on notice that the complainant was engaged in a protected activity in filing the complaint. The operator acts then at his peril if he retaliates because the copy of the notice lays the foundation for a finding of willful and knowing violation of the anti-discrimination provisions of the Act. Section 105(c)(1), 30 U.S.C. 815(c)(1). Such a violation may be subject to the civil and criminal sanctions of sections 110(c) and (d), 30 U.S.C. 820(c), (d).

For these reasons, I find the failure to furnish a copy of a request for a special inspection does not invalidate the inspection or nullify the citations issued as a result of the inspection. It is ORDERED therefore that the operator's motion for summary disposition or to dismiss be, and hereby is, DENIED.

Following oral argument on the motions, counsel for both parties moved that in the event respondent's legal defense was overruled settlement of the three violations involved be approved at the amount originally assessed for each violation, $325.00. The remaining two violations charged are subject of a motion for approval of settlement in the amount of $160.00 each filed November 29, 1979. For the reasons set forth in the parties' submissions and based on an independent evaluation and de novo review of the circumstances, I find the proposed settlement in accord with the purposes and policy of the Act.

Accordingly, it is FURTHER ORDERED that the motions to approve settlement be, and hereby are, GRANTED, and that the operator pay the penalty agreed upon, $1295.00, on or before Wednesday, February 20, 1980, and that subject to payment the captioned petition be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE 1
The other two citations involved in this proceeding are subject of a motion to approve settlement filed November 29, 1979.

~FOOTNOTE 2
The challenge to validity was not filed until September

17, 1979. This was much longer than thirty days after receipt of the notice of proposed penalty assessment. The Rules, however, do not provide at what stage of a civil penalty proceeding a challenge to validity other than a general denial must be filed. Compare Rule 22 with Rule 28. In view of the uncertainty in the Commission's statement of its procedures, I will assume for the purpose of this disposition that the challenge was timely.

~FOOTNOTE 3

Since an ultra vires inspection does not result in automatic application of the exclusionary rule, the fact that an inspection is found to be unauthorized may not retroactively invalidate the use of the citation as the predicate for a valid penalty proceeding. See Savina Home Industries v. Secretary, 594 F.2d 1358, 1361-1365 (10th Cir. 1979); Todd Shipyards Corp. v. Secretary, 586 F.2d 683, 690 (9th Cir. 1978). As noted in the text infra, the inspector here acted pursuant to clear congressional authorization. It is obvious, therefore, that enforcement of the instant citations will not contravene the imperative of judicial integrity that calls for application of the exclusionary rule. See, United States v. Peltier, 422 U.S. 531, 536 (1975).

~FOOTNOTE 4

For purposes of disposing of the operator's motion, I have assumed that the inspection and citations were the result of a request for special inspection made under section 103(g)(1) of the Act, 30 U.S.C. 813(g)(1). Transcript p. 14.

~FOOTNOTE 5

Section 103(g)(1), 30 U.S.C. 813(g)(1) provides:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

~FOOTNOTE 6

Section 103(g)(2), 30 U.S.C. 813(g)(2) provides:

> Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a

coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

~FOOTNOTE 7

Resort to legislative history may be had even where the statutory language seems clear and unambiguous because "while the clear meaning of statutory language is not to be ignored, "words are inexact tools at best' ... and hence it is essential that we place the words of a statute in their proper context by resort to legislative history." Tidewater Oil Co. v. United States, 409 U.S. 151, 157 (1972).

~FOOTNOTE 8

Supra, note 5.