

CCASE:
SOL (MSHA) V. EASTERN ASSOCIATED COAL
DDATE:
19891027
TTEXT:

~2113

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEVA 89-198
A. C. No. 46-01456-03826

v.

Docket No. WEVA 89-199
A. C. No. 46-1456-03824

EASTERN ASSOCIATED COAL
CORPORATION,
RESPONDENT

Federal No. 2 Mine

ORDER OF CONSOLIDATION AND ORDER

It is ORDERED that WEVA 89-199 be consolidated with WEVA 89-198.

On October 16, 1989, Petitioner filed a First Request for Production of Documents and a Motion to Compel Responses to the Request for Production of Documents. The Request seeks, inter alia, notes taken by Respondent's agent during a MSHA inspection.

Respondent, in a Response, and a Motion to Strike Petitioner's Request for Production of Documents filed October 23, 1989, essentially argues that the Motion should be denied as formal discovery was not initiated until October 13, 1989, and informal discovery was agreed to July 24, 1989, both dates being more than 20 days subsequent to the filing of the Proposal for Penalty on July 3, 1989.

Although formal discovery was not initiated within 20 days after the Proposal for Penalty was filed, and more than 60 days have elapsed since the Proposal was filed, Respondent has not established any legal prejudice should Petitioner's request be allowed. Accordingly, in the interest of justice, and in order to narrow the evidentiary issues, I find that the discovery rules in 29 C.F.R. 2700.55 should be liberally construed. (See, Hickman v. Taylor 329 U.S. 495 (1947)). Accordingly, Respondent's Motion to Strike is DENIED.

Respondent, also argues, in essence, that notes taken at the inspection be not discoverable inasmuch as Petitioner can obtain the equivalent of the materials without "undue hardship" as its representative was at the scene of the alleged violation. (See,

~2114

Rule 26(b)(3), Fed. R. Civ. P.). I do not find merit to Respondent's argument. Clearly written statements of Respondent's agents that are contemporaneous with the cited condition, are unique and thus are discoverable (See, Galambus v. Consol. Freightways Corp. 64 FRD 468 (ND Ind (1974); Gillman v. United States 53 FRD 316 (DC NY (1979))).

Respondent also asserts that the practice of taking notes at inspections "were implemented to aid in the preparation of cases for trial." (sic). Respondent further asserts that if notes were in fact taken, they were taken "to prepare a defense should litigation be required to resolve violations." As such, Respondent argues, that the notes are not discoverable as they are covered by the work product protection. Rule 26(b), supra, protects from discovery materials ". . . prepared in anticipation of litigation for trial" I find that Respondent has not established that the particular notes in question were prepared specifically in anticipation of litigation. It has not been established by Respondent that at the time the notes were taken, there was nay substantial anticipation that the subject citation would be likely to be litigated. Rather, it appear form Respondent's assertion, that the notes were taken as a standard procedure at inspections, and as such were taken in the regular course of business. Accordingly, I conclude that they are outside the scope of the work product protection. (See, Moore's Federal Practice at 26-354, and cases cited therein).

Based on the above, Petitioner's Motion to Compel Responses is GRANTED.

It is ORDERED that, no later than 10 days after the date of this Order, Respondent shall produce and serve Petitioner with all materials requested in Petitioner's Request for Production of Documents filed October 16, 1989.

Avram Weisberger
Administrative Law Judge
(703) 756-6210