

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 10, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. YORK 94-76-RM
v.	:	through YORK 94-83-RM
	:	
ROCK OF AGES CORPORATION	:	

ORDER

BY THE COMMISSION:

On October 9, 1997, counsel for Rock of Ages filed a Motion to Participate in Oral Argument on behalf of David Gomo, and Motion to Accept Late Request for Participation in the above-captioned matter. Upon review of the motions, Chairman Jordan and Commissioner Marks vote to deny them. Commissioner Riley and Commissioner Verheggen would grant the motions.

To grant the relief requested requires the affirmative vote of a majority of participating Commissioners. *Jim Walter Resources, Inc.*, 17 FMSHRC 1682 (October 1995). Accordingly, because there is no majority vote on this motion, the motion is denied.

The separate views of the Commissioners follow:

Chairman Jordan and Commissioner Marks, in favor of denying the motion:

We vote to deny the Motion to Participate in Oral Argument filed by counsel for Rock of Ages on behalf of David Gomo. Our denial is based on the fact that David Gomo's prior motion for amicus curiae status indicated that it was filed on behalf of A[t]he employees of the Rock of Ages Corporation, by and through their undersigned union representative.@ Mot. at 1. The Commission subsequently granted amicus curiae status to Athe employees of Rock of Ages, through their union representative.@ Order of December 29, 1995. The motion filed by counsel for Rock of Ages now makes clear that Mr. Gomo seeks to appear at oral argument Aon his own behalf.@ Mot. at 1. Our colleagues urge us not to impose the Aextraordinary reasons@ for amici participation in oral argument required by Fed. R. App. P. 29. However, it is our colleagues who are prepared to take the extraordinary step of allowing an individual to appear before us who has not been granted status as a party or an amici in this matter. We note further that Mr. Gomo has never filed a brief in this case. It would be patently unfair to the other participants at the oral argument (all of whom have submitted briefs to the Commission) to permit him to offer his views when they have not had the benefit of being able to prepare a response by reviewing his brief.

Although it is true, as our colleagues remind us, that the Commission has usually granted participation to amici asking to argue before the Commission, that right generally has been granted only to organizations or unions representing the views of industry or workers. We recall no instance in recent Commission history when an individual, in no representative capacity, was permitted to share his thoughts with the Commission during oral argument. We also do not remember an instance in which an amicus was permitted to argue after failing to file a brief.

Accordingly, after careful review of this motion on its own merits, we have voted to deny it. Because we review each motion that comes before us based on the substance of its own independent arguments, we fail to understand our colleagues' position that the Commission's grant of the USWA's motion to participate in oral argument necessitates that we grant Mr. Gomo's motion.<sup>1</sup> Under that rationale, once an amicus has been permitted to argue on behalf of one party, *any* person asking to argue for the opposing side must be similarly entitled, simply in the name of equitable considerations.

True equity does not mean that the Commission must employ a tit-for-tat rule requiring an equal number of amici on both sides of a question. Rather, true equity means that the Commission must carefully evaluate the merits of each motion, taking into account the procedural and substantive issues raised, and any institutional concerns the motion might generate.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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<sup>1</sup> We are frankly puzzled by our colleagues' assertion that the USWA has come before us after the fact to assume the representative role. The Commission's previous orders permitted Mr. Gomo and the International Union to each play a distinct representative role, and to submit separate arguments on behalf of each side. The key phrase, as our colleagues recognize, is that we assumed amici would appear in a representative role. Since Mr. Gomo has now indicated he would be appearing at argument as an eyewitness to the events at issue, Mot. at 1, we disagree with our colleagues' claim that it is too late in the game to withdraw our invitation.

Commissioner Verheggen and Commissioner Riley, in favor of granting the motion:

We write separately because we are deeply troubled by the Commission's denial of Mr. Gomo's motion to participate in the upcoming oral argument in this case. Until today, the Commission has routinely accommodated amici wishing to participate in oral argument. Clearly, the Commission has never relied upon Rule 29 of the Federal Rules of Appellate Procedure, which states that motions by amici to participate in oral argument will be granted only for extraordinary reasons.<sup>2</sup> Fed. R. App. P. 29. Indeed, our colleagues who now vote to deny Mr. Gomo's motion only days ago voted in favor of granting a similar motion from the amicus curiae United Steel Workers of America (USWA). That our colleagues now refuse to similarly accommodate Mr. Gomo strikes us as inequitable.

Mr. Gomo moved for amicus status, and his motion was granted. Although technically we did not grant amicus status to Mr. Gomo personally, that the USWA has subsequently come before us to assume the representative role does not alter the fact that a local worker asked for and was granted amicus status. It is too late in the game to withdraw our invitation. To quibble with exactly who he represents, especially in light of the fact that the Secretary does not oppose Mr. Gomo's motion (on the condition that [he] not be allowed to testify . . . and that his argument be otherwise proper in scope),<sup>2</sup> is to exalt form over substance at the expense of equity and a balanced and open exchange of ideas.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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<sup>2</sup> The Commission's Office of General Counsel has determined administratively that the USWA has no position on Mr. Gomo's motion. We also note that our colleagues are concerned that [i]t would be patently unfair if Mr. Gomo were allowed to present oral argument because he chose not to file a brief, and thus, the Secretary and USWA were not able to prepare a response. But the Commission never required Mr. Gomo to file a brief. Moreover, the Commission is institutionally capable of ensuring that any presentation given by Mr. Gomo would not stray beyond the evidentiary scope of our review.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

