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SOL (MSHA) V. VALLEY 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. MORG 78-46-P A.O. No. 46-01483-02023V
v.	Valley Camp Coal No. 1 Mine
VALLEY CAMP COAL COMPANY, RESPONDENT	

MEMORANDUM OPINION

As the order in this matter indicates, I make it a practice in considering motions to approve settlements under section 110(k) of the Act to make an independent evaluation and to conduct a de novo review of the circumstances and particularly the evidence relating to the gravity and negligence involved in the violations charged. Furthermore, I fully and candidly discuss these evaluations with counsel and the parties.

It has recently come to my attention that the Chairman of the Subcommittee on Health and Safety of the House Committee on Education and Labor, Mr. Gaydos, disapproves of the practice and feels that if a judge during the course of a settlement conference expresses views about the sufficiency of a penalty or indicates that the amount of the penalty may be increased if the facts as to culpability are proved at an evidentiary hearing he may be accused of attempting to "intimidate" or "penalize" an operator for insisting on a hearing. (FOOTNOTE 1)

On the other hand, Congressman Gaydos found nothing intimidating about the judge's recommendation that the government withdraw four charges he considered unsupported by the evidence disclosed during settlement discussions. If that strikes one as being somewhat biased against even-handed enforcement it may only be attributable to the fact that the Congressman relied on an ex parte account from a disgruntled operator who so firmly believed he was coerced that his counsel failed to appeal the case to the Commission.

I have previously and publicly made clear that I do not consider it my function to "rubber stamp" settlement proposals. (FOOTNOTE 2) See, Pomerleau Bros., WILK 79-4-PM, D&O of February 13, 1979; Kaiser Steel Corporation, DENV 79-430-P, D&O of June 4, 1979; Alabama By-Products, BARB 78-2, et al., D&O of May 31, 1979. Certainly there is no purpose in discussing settlement with the parties if the judge is not prepared to be honest and forthright about his views or policy with respect to the issues.

When I disapprove a settlement, I think the parties are entitled to know why. And when I tell the parties that based on my evaluation of a violation I think the amount proposed is insufficient to deter future violations and ensure voluntary compliance but that I am prepared to approve an increased amount, I am not attempting to intimidate anyone.

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Furthermore,

1. When I tell the Solicitor I do not think a charge is warranted in view of the disclosures made during the course of settlement discussions, I consider I am doing only what fairness requires, and

2. When I tell the operator my evaluation leads me to believe a violation is more serious than he is willing to concede and warrants a penalty larger than that proposed, I consider I am doing only what section 110(k) of the Act requires, and

3. When I tell the operator that if he is not content with my evaluation he should realize the hearing is de novo and that I may be required by the evidence to assess a much larger as well as a much smaller penalty, I am again doing only what candor and the law requires.

And if a lawyer with that knowledge tells his client to settle because he feels coerced and intimidated and not because he believes he cannot win the case then I suggest the operator needs a new lawyer. Based on my feedback from counsel, I find it is in the interest of the parties and of fair and efficient enforcement for the judge to divulge his reasons for denying a settlement, including his views as to the amount of the penalty he would consider warranted if the operator is found guilty as charged.

After all, any competent lawyer knows that regardless of the judge's views or findings an arbitrary assessment is subject to reversal on appeal. What then is to be gained by ill-informed and intemperate threats to "stomp" judges who act in accordance with their conscientious view of the law?

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 The object of the Congressman's solicitude was John S. Lane & Son.,Inc., of Westfield, Massachusetts. The company operates 3 sand and gravel pits that produce 1,250,000 tons of aggregate annually. The operator admitted the violations charged and contested only the amounts of the penalties assessed. The operator paid $573.00 in settlement of seven violations for an average of $82.00 per violation. Four other violations were withdrawn at the suggestion of the presiding judge. The penalties for these violations totalled $136.00. Mr. Gaydos' informant was Leland B. Seabury, Esq. counsel for the operator.

~FOOTNOTE_TWO

2 In Pomerleau, I noted:

The plain language of section 110(k) and the legislative history of the Act convincingly establish that the Presiding Judge is charged with responsibility for making just such an independent evaluation and de novo review of proposed settlements. To approve settlements merely on

the basis of unsubstantiated representations of counsel with respect to gravity, negligence and the adequacy of penalties imposed by the Assessment Office would be violative of the Commission's duty "for reviewing the enforcement activities of the Secretary of Labor." Comments of Senator Williams at Confirmation Hearing, Federal Mine Safety and Health Review Commission, (Aug. 28, 1978), page 1.

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The sooner operators, and especially the noncoal operators, are disabused of the notion that they have nothing to lose and everything to gain by filing a notice of contest of every penalty assessed, the sooner the enforcement program will become more manageable and respected.