

Civil Action No. 82-383

DEPT. OF LABOR v. DEEP RIVER COAL CO.
(mining violations)

Prelim. Conf. 23 June, 10 AM

Motion (w/affidavit) of plaintiff for Summary Judgment/

Deep River has been charged with numerous violations. Labor has assessed \$10,567.00 in civil penalties. The record shows that the procedures were proper, notice given, etc.

Defendant denies generally on the ground of lack of knowledge, and raises (without authorities) these issues:

1. Did violations describe with particularity the nature of of violations charged? (Yes, sufficiently so)
2. Did defendant receive notice of civil penalties? (Yes)
3. Did assessments of civil penalties take into consideration defendant's history of previous violations? (Don't think this is a requirement . . . haven't read any thing that says Labor must consider record. Anyway, defendant had an opportunity for a hearing, and passed on it).

Pleadings, exhibits, and the Affidavit seem to be sufficient to award summary judgment in favor of the plaintiff.

GLP

4-28-83

Judge,

82-390 is a collection for civil penalties case. The defendant coal company has failed to exhaust its administrative remedies, and the assessments have become final.

PC was held on 3-25-83, and the matter was continued until the status conference on 4-29-83.

No pending motions.

Donald

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PLAINTIFFS

UNITED STATES OF AMERICA

DEFENDANTS

C & N COAL COMPANY, INC.

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

30 USC §1268(d) Surface Mining Control and Reclamation Act of 1977 - act
to recover Civil Penalties

ATTORNEYS

(LETCHER)

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ROBERT S. MORE
SPEC. ASST U. S. ATTY
U. S. DEPT. OF INTERIOR
P. O. BOX 15006
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S. O. 10/20/82

<input type="checkbox"/> CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATIST
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Judge 'P
copy
FILED MAR 14 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 82-390

UNITED STATES OF AMERICA,
PLAINTIFF,

VS:

PRELIMINARY CONFERENCE
MEMORANDUM

C & N COAL COMPANY, INC.,
DEFENDANT.

§ § § § §

I. JURISDICTION OF THE COURT

Jurisdiction is conferred upon this court pursuant to 30 U.S.C. §1268(d), 28 U.S.C. §1345, and 28 U.S.C. §1355.

II. KIND OF ACTION

This is a lawsuit which seeks to enforce civil penalty assessment orders issued under the Surface Mining Control

and Reclamation Act of 1977, 30 U.S.C. §1201, et seq., sometimes hereafter "the Act", which Defendant allegedly owes to the United States Department of the Interior in accordance with 30 U.S.C. §§1268(b) and (c).

III. STATEMENT OF FACTS

Defendant is a duly organized and existing Kentucky corporation, and, at relevant times herein, maintained a strip mining operation in Letcher County, Kentucky. During the period 1979-80, four (4) civil penalties were assessed under the Act by representatives of the Secretary of the U. S. Department of the Interior (sometimes hereafter "the Secretary") in the total amount of One Hundred Three Thousand One Hundred Dollars (\$103,100.00), as follows:

1.	NOV	80-2-89-37	\$ 5,300	7-24-80
2.	NOV	79-2-56-48	\$ 1,800	7-27-79
3.	NOV	80-2-86-5	\$ 6,000	3-12-80
4.	CO	80-2-86-9	\$90,000	3-25-80

Defendant admits the issuance of each of these penalties but as to NOV 80-2-86-5, and CO 80-2-86-9, denies that the Secretary properly served notice of the proposed assessment after conference and by reason thereof, defendant has not been afforded its right to an administrative hearing; and as to all penalties, supra, asserts the unconstitutionality of 30 U.S.C. §1268(c), as applied to this Defendant.

IV. ISSUES OF LAW (SUBSTANTIVE)

1. WHETHER THE PROVISIONS OF 30 U.S.C. §1268(c) REQUIRING DEFENDANT TO PAY PENALTIES PRIOR TO ADJUDICATION OF FAULT ARE AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS.

The procedures followed by the Secretary in assessing civil penalties, and the administrative and judicial appeal rights afforded mine operators, are set forth in 30 U.S.C. §§1268, 1275-76; 30 CFR §§723.1, et seq.; and 43 CFR §§4.1100, et seq. These procedures and appeal rights become applicable whenever a mine operator or permittee is issued a notice of violation or an assessment order under 30 U.S.C. §1271(a).

Within ten (10) days of service of a notice of order, the permittee may submit written information concerning the violations to the Office of Surface Mining (hereafter OSM). Any such information must be considered by the assessment office in determining whether to assess a civil penalty and how large a penalty to assess. 30 CFR §723.16(a). Within thirty (30) days of the issuance of the notice or order, the assessment office must inform the permittee of its decision to assess a penalty and must serve on the permittee a copy of the proposed assessment. 30 U.S.C. §1268(c); 30 CFR §723.16(b).

Within thirty (30) days of the issuance of any notice or order, the permittee may apply for formal review of the citation under 30 U.S.C. §1275; 43 CFR §§4.1160, et seq. The permittee may receive a full, adversarial, evidentiary hearing before an impartial administrative law judge, who re-

views the validity of the notice or order and has the power to vacate, affirm, or modify the citation. Temporary relief may be requested under 30 U.S.C. §1275(c); 43 CFR §§4.1260, et seq. Appeals to an administrative review board and judicial review rights are also available. 43 CFR §§4.1271, et seq.; 30 U.S.C. §1276(a)(2).

Within fifteen (15) days of receipt of a notice of proposed assessment of civil penalty, the permittee may request an informal conference to review the amount of the penalty. 30 CFR §723.17(a). The conference is conducted by an OSM employee (an inspector comparable in position to the one writing the violation), who has had no previous connection with the case. Any information presented by the permittee at the conference must be considered by the assessment office in deciding whether to affirm, vacate, raise, or lower the penalty. 30 CFR §723.17(b).

Finally, either within fifteen (15) days of the conclusion of the assessment conference (if one has been requested) or within thirty (30) days of receipt of the notice of proposed assessment of civil penalty (if no conference has been requested), the permittee may apply for formal review of both the validity of the citation and the amount of the proposed penalty. 30 U.S.C. §1268(c); 30 CFR §723.18; 43 CFR §§4.1150, et seq. As a precondition of this final administrative remedy only, the permittee is required to pay the amount of the proposed penalty

into an escrow account, 30 U.S.C. §1268(c); 43 CFR §4.1152. If the permittee succeeds in having the penalty reduced or eliminated in this formal review process, any amount determined not to be owed must be refunded to the permittee with interest. Appeals to an administrative review board and judicial review are available here as well. 43 CFR §4.1270; 30 U.S.C. §1276(a)(2).

However, the Act requires the operator, prior to exercise of his right to a full adjudicatory hearing, on either the amount of the penalty or the fact of the violation, to pay into escrow the full amount of the proposed penalty. Absent the funds to do so, the only justice available to an operator is the review of one (1) inspector's handiwork, by another inspector.

Obviously, the real question is whether the alleged violator can afford due process, a question that cannot be permitted in any honorable society.

30 U.S.C. §1268(c) conclusively presumes that all mine operators can in fact afford to prepay their civil penalties, no matter how erroneously they may have been assessed. The statute, by inference, also conclusively presumes that prepayment discourages frivolous appeals, in which civil penalties will be contested. At the trial of this case, the Defendant intends to prove that it could not afford to prepay the civil penalties, at times relevant herein, and the law as applied to this Defendant, denies him the constitutional right

of due process. The presumption that all mine operators can afford to prepay, creates a "permanent irrebuttable presumption", which is invalid, "when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination", Cleveland Board of Education vs. LaFleur, 414 U.S. 632, 644 (1974). Certainly, a statute is invalid where it "rests on an irrebuttable presumption often contrary to fact" U.S. Department of Agriculture vs. Murray, 413 U.S. 508, 514 (1973) (Food stamp eligibility/reduction invalid where it rests upon presumption that you are indigent if a parent took you as a tax exemption in the prior year).

In the case of Virginia Surface Min. & Reclamation Ass'n, Inc. vs. Andrus, 483 F.Supp. 425 (1980), Section 1268(c) was held to be unconstitutional as denying due process. Without expressly deciding that issue, the U. S. Supreme Court found there was no case or controversy, and the due process challenge was premature when the parties did not allege that any of them had had civil penalties assessed, and there was no finding that they had been affected or harmed by any of the procedures complained of. Hodel vs. Virginia Surface Min. & Reclamation Ass'n, Inc., ___ U.S. ___ 101 S.Ct. 2352 (1981).

In the immediate case, the Defendant has been assessed penalties, and at relevant times herein, was unable to prepay the penalty as a condition to challenging the fact of the violation, and has been sufficiently affected to litigate the issue.

As recognized by the United States Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct.

1011:

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses. What we said in Greene v. McElroy, 360 U.S. 474, 496-497, 3 L.Ed. 2d 1377, 1390, 1391, 79 S. Ct. 1400 (1959), is particularly pertinent here:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross examination. They have ancient roots. They find expression in the Sixth Amendment This Court has been zealous to protect

these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

2. WHETHER DEFENDANT HAS BEEN AFFORDED DUE PROCESS WHEN IT WAS NOT GIVEN NOTICE OF THE PROPOSED ASSESSMENT AND/OR NOTICE OF THE RIGHT TO A FULL ADJUDICATORY HEARING BEFORE AN ADMINISTRATIVE BOARD AND JUDICIAL REVIEW.

Defendant's records indicate that no notice of proposed assessment was served subsequent to the mine conference relating to NOV 80-2-86-5, and the accompanying CO 80-2-86-9. By reason of this absence of notice, required by 30 U.S.C. §1268(c), and 30 CFR §§723.16-.18, Defendant has not yet been afforded his opportunity to be heard, and as to the violations so affected, Plaintiff's complaint should be dismissed.

V. ISSUES OF LAW (PROCEDURAL)

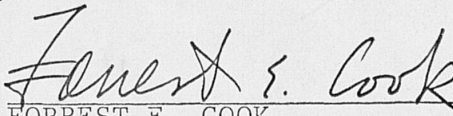
Defendant is unaware of any disputed procedural issue.

Respectfully submitted,

COUNSEL FOR DEFENDANT

COOK & WRIGHT

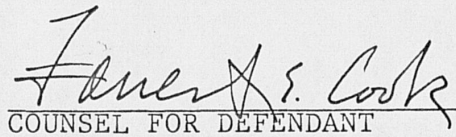
BY:



FORREST E. COOK
P. O. Box 909
Whitesburg, KY 41858
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Preliminary Conference Memorandum was mailed, postage prepaid, on this 10th day of March, 1983, to Hon. Robert S. More, Special Assistant U. S. Attorney, U.S. Department of the Interior, P. O. Box 15006, Knoxville, Tennessee 37901.


COUNSEL FOR DEFENDANT