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SIXTH CIRCUIT INTERPRETS "AGENT" UNDER SURFACE MINING ACT

MINES—PERMITTEES, AGENTS, OPERATORS. The Court found that a man who was an operator of a mine, who assumed the role of spokesman, used his equipment on the job, was a relative of the President of the mining company, and was guarantor of a note for the mining company could be held responsible for violations as an "agent." *U.S. v. Dix Fork Coal Co., 692 F.2d 436 (6th Cir. 1982).*

INTRODUCTION

In April 1979, Dix Fork Coal Co. was granted a "Surface Disturbance Mining Permit" by the Commonwealth of Kentucky.[1] Immediately thereafter Dix Fork began a strip mining operation in Knott County, Kentucky, on a site which had been mined previously by another mining company, and which was considered "ravaged" but "relatively stable."[2]

Dix Fork Coal was a relatively new company, owned by three men. Ricky Niece, the president, owned 52% of the company. Joe and Bennett Breeding owned the remaining 48%. Wilfred Niece, Ricky Niece's father, owned Niece Mining Company. Wilfred supervised the use of his equipment in performing the mining operations in Knott County. Dix Fork had agreed to give Niece Mining Company all the coal that was "faced up" as payment for use of the mining company's equipment.[3]

In May 1979, an inspector from the Office of Surface Mining visited the mining site at Wilfred Niece's request, and advised Niece that shale could not be used to surface the access road because shale was not a durable material as required by the Surface Mining Control and Reclamation Act of 1977.[4] Shale would break down over time and cause landslides.

On June 1, 1979, an inspector for the Office of Surface Mining visited the site and issued a Notice of Violation to Dix Fork for failing to post signs, for failing to provide adequate drainage for the access road, and for failing to surface the access road with durable material.[5] The Notice was issued to Dix Fork only, not to Wilfred Niece. The inspector also issued a Cessation Order, requiring Dix Fork to cease the mining oper-

1. The permit authorized Dix Fork Coal Co. to disturb 1.84 acres of ground surface in Knott County, Kentucky. Brief for Defendants-Appellants, p. 3.

2. Four landslides existed at the site before Dix Fork began its operation.
U.S. District Court Opinion, U.S. v. Dix Fork Coal Co., U.S. District Court, Eastern District of Kentucky, Pikeville. Finding of Fact #4.

3. Brief for Defendants-Appellants, p. 4.

4. 30 U.S.C. § 1201 (1977), P.L. 95-87. U.S. District Court Opinion, Finding of Fact #5.

5. U.S. District Court Opinion, Finding of Fact #9.

ations until it corrected the violations. Again no order was given to Wilfred Niece. Dix Fork stopped mining, but failed to perform its affirmative duties under the Act[6] to properly surface roads or provide drainage. In addition the inspector issued a second Cessation Order on June 1, 1979 for Dix Fork's contribution to the instability of the "lower slide"—an area just below the minesite—because of broken pieces of shale which spilled down the slide area. Still no order was issued to Wilfred Niece. These conditions created an imminent danger to the health or safety of the public, according to the Cessation Order. A minesite hearing, held on June 6, 1979, upheld the Notice of Violation and the Cessation Order. Ricky Niece, Wilfred Niece, Joe Breeding, and Roger Begley, the OSM inspector, were all in attendance at the hearing.[7] There was no administrative review of the Cessation Order or Notice of Violation[8] because Dix Fork did not ask for review and Wilfred Niece was not given the chance to request it.

The U.S. Secretary of the Interior, through the U.S. Attorney General, filed suit in Federal District Court to obtain a court order directing Dix Fork *and* Wilfred Niece to comply with the Cessation Orders and Notice of Violation. The District Court ordered Dix Fork *and* Wilfred Niece, as Dix Fork's agent,[9] ". . . to provide adequate drainage for the access road, to remove the shale deposited on the access and haul roads, and to surface the road with a durable material."

On appeal, Dix Fork asserted that there was no federal jurisdiction to hear this case according to the Surface Mining Control and Reclamation Act,[10] because less than two acres were involved in the mining operation. Thus, according to Dix Fork, the State should have resolved the matter through similar proceedings which were pending in the Kentucky Department of Natural Resources.

Wilfred Niece also asserted the same defenses as well as two others: (1) he was not an agent of Dix Fork and should not have been named in the suit, and (2) he had not been named as contributory agent in the Office of Surface Mining's Notice of Violation or Cessation order; thus he was denied his right to administrative review because he had not been charged with any liability by the inspector. The 6th Circuit found these arguments without merit for several reasons: Wilfred Niece had been present for all proceedings; the issue of pending State Department review could not be raised for the first time on appeal; and the trial court found

6. The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*
7. Brief for Defendants-Appellants, p. 5.
8. Brief for Plaintiff-Appellee, p. 6.
9. 692 F.2d 436, 438 (6th Cir. 1982).
10. "The provisions of this chapter shall not apply to . . . the extraction of coal for commercial purposes where the surface mining operation affects two acres or less . . . ," 30 U.S.C. § 1278.

that more than two acres were "affected" by the mining operation.[11] The appellate court held that Niece was an "agent" of Dix Fork Coal Company within the intent of the Act because of his relationship with the Company.

The decision presents numerous issues of interest. This casenote, however, will address only the Sixth Circuit finding with respect to agency and the finding regarding the existence of Federal Jurisdiction because of their importance in defining terms for future litigants.

A. Federal Jurisdiction

1) *Findings of Fact.* The Surface Mining Control and Reclamation Act of 1977 does not apply to any surface mining operation which "affects two acres or less."[12] The permittee was Dix Fork Coal Company. It had applied for and received a permit to disturb 1.84 acres of land in Knott County, Kentucky.[13] The District Court construed the word "affect" to mean any land "actually affected"[14] by the mining operation as opposed to any land authorized to be affected. That court found that 2.89 acres actually were affected.[15] The 6th Circuit refused to disturb that finding.

The appellate court referred to Rule 52(a), Fed. R. Civ. P. as authority for the contention that findings of fact by the trial court must be "clearly erroneous" before they may be disturbed on appeal. In the 1981 case of *Louisville and Nashville R.R. Co. v. C.I.R.*,[16] the 6th Circuit had held that this "clearly erroneous" standard should be applied to the review of the trial court's record.[17] If the court is not left with the "definite and firm conviction that a mistake has been committed,"[18] it may not overturn the trial court's finding. *U.S. v. Jabara*[19] re-established that the 6th Circuit follows Rule 52(a), Fed. R. Civ. P. as announced in the U.S. Supreme Court opinion in *U.S. v. U.S. Gypsum Co.*[20] Under a 6th Circuit analysis of Fed. R. Civ. P. 52(a), it would be extremely difficult to ever reverse for error asserted in fact finding by the trial court.

2) *Suit Pending in State Court.* The 6th Circuit summarily dealt with the argument that the trial court should have stayed its proceedings until a ruling was issued by the Kentucky Department of Natural Resources. In the State case, the same mine and many of the same issues were involved. The issue of jurisdiction was first raised on appeal. The 6th

11. 692 F.2d 436.
12. 30 U.S.C. § 1278.
13. 692 F.2d at 438.
14. *Id.*
15. U.S. District Court Opinion, Finding of Fact #3.
16. 641 F.2d 435 (6th Cir. 1981).
17. *Id.*
18. 692 F.2d at 438.
19. 644 F.2d 574 (6th Cir. 1981).
20. 333 U.S. 364, 395 (1948).

Circuit looked to its previous decisions to find that issues not raised at the trial level may not be raised for the first time on appeal. *Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc.*[21] In that case, the 6th Circuit had held that there may be an exception to the rule if it can be shown that "injustice might otherwise result."[22] The 6th Circuit did not find that the exception applied in the instant case. The court does not state what factors would need to be present to find an exception.

The Surface Mining Control and Reclamation Act of 1977[23] specifically states that it is the duty of the U.S. Secretary of the Interior to "cooperate with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement, and administration" of the chapter.[24] Additionally, one purpose of the Act is to "assist the States in developing and implementing a program"[25] to achieve the goals of the Act. The legislature apparently intended the states to carry the primary burden of enforcing mining controls, and the duty of the federal government is to assist, not to take over, sole or primary responsibility for inspections and corrections. Congress presumably designed the Act so that policing could be done more quickly, efficiently and effectively, as well as promote State policies, by having the States deal with their own residents rather than have the federal government oversee all operations on a national level. However, because the 6th Circuit felt that the issue was not properly before it, it did not address the rationale for allowing state proceedings to conclude before federal proceedings begin.

B. Agency and Appropriate Order

The Notice of Violation (NOV) and the Cessation Order (CO) were sent in the name of Dix Fork Coal Company only. When the site was not cleaned up and access roads not resurfaced as directed, however, the Secretary instituted a suit which named Wilfred Niece as a co-defendant with Dix Fork Coal Company. Niece objected on the grounds that he was not an agent and, even if he were, he did not have adequate notice which would enable him to pursue review of the administrative agency representative's decision.[26] The Sixth Circuit found that Niece was "pragmatically provided as much notice as was Dix Fork of the violations"[27] but did not explain how that notice should have made Niece aware of his potential liability.

21. 666 F.2d 1005 (6th Cir. 1981).
22. *Id.* at 1007.
23. 30 U.S.C. § 1201 *et seq.*
24. *Id.* at § 1211(c)(12).
25. *Id.* at § 1202(g).
26. Brief for Defendants-Appellants, p. 6.
27. 692 F.2d at 441.

The legislative history of the Surface Mining Control and Reclamation Act of 1977[28] points out that if the inspector deems a situation so serious as to require work stoppage, a Cessation Order must be issued, ordering the *operator* of the mining operation to correct the situation.[29] That procedure was not followed in this case. When the COs and the NOV were issued on June 1, 1979, there was no representative of the mining operation on site as no work was going on that day.[30] The notices were issued to "Dix Fork Coal Company," by the inspector from the Office of Surface Mining.

The Surface Mining Control and Reclamation Act grants standing to request administrative review to permittees against whom COs and NOVs have been issued and "persons having an interest which is or may be adversely affected by such notice or order."[31] Wilfred Niece had no such interest until he was named in the suit in District Court. He had no way to predict that he could be held liable.

The Act does not define the term "agent."[32] Both the United States and Niece suggested definitions. Wilfred Niece contended that the Office of Surface Mining must use the ordinary definition of an agent. According to agency law, the agent must act as fiduciary, be subject to control by his principal and be empowered to alter the legal relationships of the principal.[33] The U.S. asserted that agency is the fiduciary relationship where one person consents that another act in his behalf or in his stead and may transact business for him by authority from him.[34] The 6th Circuit rejected each of these definitions and "transplanted" a definition from another mining statute, the Coal Mines Health & Safety Act.[35] The reasoning used to supplant the definition in the Coal Mines Health and Safety Act is twofold: (1) since there exists no legislative intent, "an overly restrictive common law definition of 'agent' which would subvert the purpose of the statutory framework in which it is employed is to be avoided"[36] and (2) the definition comes from an Act which the court felt "parallels in purpose, policy, and structure, the instant Act."[37]

The purpose of the Coal Mine Health and Safety Act is to promote the

28. Pub. L. 95-87, at 129.

29. A Notice of Violation (NOV) is issued to a permittee and gives him time to correct a situation which is not as serious as one for which a Cessation Order (CO) is issued. An NOV is issued where there is a violation of the Act or permit, but such violation is not so serious as to cause imminent danger to the public or environment.

30. Brief for Defendants-Appellants, p. 4.

31. Pub. L. 95-87, at 131.

32. 692 F.2d at 439.

33. *Id.* at 439, n. 1.

34. *Id.*

35. 30 U.S.C. § 802(e).

36. 692 F.2d at 439.

37. *Id.*

health and safety of miners.[38] As part of that purpose, "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such [adverse] conditions and practices in such mines."[39] An "agent" under the Coal Mine Health and Safety Act of 1977 is ". . . any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine."[40] That is the "transplanted" definition of "agent" used by the 6th Circuit.

By comparison, the Surface Mining Control and Reclamation Act of 1977 states no such parallel purpose. It does not state who is responsible to prevent inadequate or sloppy conditions. Rather than placing blame, the Act states that its purpose is, in part, "to assist the States in developing" a program which will achieve goals such as "encouraging full utilization of coal resources," and stimulating research in extraction and production of minerals.[41] Consequently the purpose and policy of the two Acts do not appear similar as the 6th Circuit found. Because of the disparity in purposes, it is questionable whether the court should have transplanted the definition as it did.

After stating which definition the court chose to use for agency, the court stated that Wilfred Niece acted as "spokesman for and advisor to" the corporation (Niece says he acted as a father), but gave no examples of specific acts or words where he acted as agent.

The trial court stated rather that (1) Dix Fork has no assets or equipment, (2) Dix Fork still owes a debt to Wilfred Niece, and (3) Dix Fork is likely to plead it does not have the equipment and money to correct the violations, but Wilfred Niece has the necessary equipment and sufficient funds for such corrections.[42]

The decision in the instant case was based on the 6th Circuit's conclusion that Wilfred Niece was not acting in good faith, but trying to hide a "sham" corporation.[43] The court did not attempt to support this conclusion. The Court could only get at the source of funds through Wilfred Niece, because it was his company which owned the equipment. Dix Fork Coal Company was a rather young company with few assets and was, in essence, "judgment proof." The Office of Surface Mining representatives never found Wilfred Niece liable for any of the violations. Deference is normally given to administrative findings.[44] Rather than

38. 30 U.S.C. § 801(g)(1).
39. *Id.* at § 801(e).
40. *Id.* at § 802(e).
41. *Id.* at § 1202(g), (k), (l).
42. U.S. District Court Opinion, Finding of Fact #22.
43. 692 F.2d at 441.
44. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

remand this case for an administrative determination of agency and of Wilfred Niece's role within the context of the violations, or dismiss the case because a key term was not defined, the trial court found a definition to fit its holding and the 6th Circuit accepted it.

CONCLUSION

The court fails, as does the Act, to define the difference between agent and operator or supervisor in a mining operation. In large companies, the agent is probably an employee of the permittee who goes from site to site. Is there a counterpart in smaller mining operations?

If this decision were extended to all mining operations, it would impose undue burdens on the permittee to clean up after his operators or supervisors, when the permittee may be far away and not have the chance to inspect the mines with any frequency. The supervisor, on the other hand, may unknowingly open himself to liability by following contract stipulations. The violations and resulting Cessation Orders occurred in less than three weeks in this instance. If distance is a factor, it may make it burdensome to keep the needed constant watch this opinion would seem to demand.

The 6th Circuit adds confusion to the problem because it did not remand the case to the Office of Surface Mining to define the terms to be applied. Since the term "agent" was not defined prior to this cae, the defendant could not have known he would be held liable. The court did not restrict its definition to the case where it felt there was a "sham" corporation, nor did it state that this definition of agent will apply in future cases. The court never stated exactly what actions make a defendnat an "agent," thus leaving the waters muddier than they were before this case arose. Miners and mining companies have no guidance as to what behavior exactly constitutes responsibility ("agency") under the Surface Mining Control and Reclamation Act of 1977. Use of the Miner's Safety Act definition of agent could make *any* supervisor of mining operations liable for possibly large sums.

In dealing with a later case, the due process of an operator or supervisor would definitely be affected according to § 1271 of the Surface Mining Control and Reclamation Act if he is denied the administrative review granted him in the Act, and hauled into court as his first notice of any potential liability.[45]

The Court did not address its reason for refusing to allocate responsibility among the three mining companies which had disturbed the same mining site by the time trial was commenced. The United States, the defendants and the trial court agreed that the area was "ravaged" before

45. 30 U.S.C. § 1271.

Dix Coal began mining.[46] No explanation or authority is given for the resulting order that Dix Fork must clean up, in part, after others.

Problems remain as a result of this decision: several terms still need to be defined in the Act. Also, there is no provision directly giving notice to each party who is or may become liable for another's actions. If only the permittee is notified, and the "agent" or operator may be sued, due process problems arise. The agent or operator or supervisor may be deprived of property without due process, especially if no hearing or trial is had. Thus this court did not adequately answer the problems before it, so little guidance can be gleened from this opinion to use in application to the next case.

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46. Brief for Defendants-Appellants at p. 4; Brief for Plaintiff-Appellee at p. 5; U.S. District Court Opinion, Finding of Fact #4.