



U.S. Department of Justice

*United States Attorney
Eastern District of Kentucky*

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606/233-2661
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May 6, 1983

Mr. Gary Davis
U.S. Probation Office
United States Court House
Main Street
Pikeville, KY 41501

Re: United States v. Scotia Coal Company,
Criminal No. 79-6, USDC ED KY at Pikeville

Dear Mr. Davis:

The United States hereby recommends that a fine of \$80,000 be imposed upon the Scotia Coal Company. The United States recommends this near maximum fine in view of the seriousness of the allegations involved in this matter and the fact that fines are the only punishment provided against corporate defendants.

The Court should also note that the United States agreed to dismiss all counts as to Blue Diamond Coal Company and the second count as to Scotia Coal Company upon the guilty plea by Scotia, a fully owned subsidiary of Blue Diamond, due to the complexity of the case, its age, and evidentiary considerations.

This is a serious matter in that it resulted in the death of 15 miners, and although Congress has acted to strengthen mine safety laws as a result of this disaster, it is the position of the United States that the \$80,000 figure is justified because of the seriousness of the indictment.

Sincerely,

Louis DeFalaise
United States Attorney

LD/nr

Criminal Action 79-6, US. v. BLUE DIAMOND/SCOTIA

HEARING - 2:00 PM, 19 January 1983 (*STATUS CONF?*)

PENDING MOTIONS:

MOTION of defendants to exclude from evidence all allegations or statements made by Blue Diamond in its 12 August 1977 Answer filed in the Boggs civil action. (Record #76). *It will not, per se, consider in the criminal action matters from the civil action.* Defendants argue that these statements are not admissible as admissions of a party. Evidently, inconsistent statements made in the Answer are prejudicial, and defendants rely on FRCP 8(e)(2):


...A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds ...

Defendants also cite New York v. Sherman, 439 F.2d 1294 (CA5, 1971)

As a general rule the pleading of a party made in another action ... are admissible as admissions of the pleading party to the facts alleged ...

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strictly applied, however, this rule would place a litigant at his peril in exercising the liberal pleading and joinder provisions of the (rules) in that inconsistent pleadings could be used ... as admissions...

 Thus, as a necessary exception to the general rule, there is ample authority that one of two inconsistent pleas cannot be used as evidence in the trial of the other ...

They cite also McFormick on evidence:

... it can be readily be appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission.

US argues that the portions of the Answer they seek to introduce are not statements of inconsistent theories of liability, but are statements of particular facts which describe the relationship between Blue Diamond and Scotia.

This motion was taken under advisement pending the submission of supplemental authority. None has been submitted so far.

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MOTION of plaintiff to admit the movie "Coal Miner Today" was taken under advisement in sustaining defendant's objection. Court will view the movie at the pre-trial conference and rule then.

MOTION of defendants to admit evidence of Kenneth Kiser, deceased (record # 83).

Defendants argue that his ~~xxxxxx~~ statements are admissible under Rule of Evidence 801(a) in that:

The statements will be offered only as evidence that the utterance was made and not as evidence of the truth of the contents of the statement,

That the utterance was a verbal act that is not hearsay,

That the statement merely illustrates the declarant's state of mind with respect to his knowledge or notice of matters directly related to his statutory duties as mine inspector.

They set out at length (26-page brief) as to why this statement is admissible.

The statement: Allegedly, when the Superintendent and Mine Foreman notified Mr. Kiser (as the inspector) of their move to the other part of the mine, and of the removal of the permanent removal of the permanent stoppings, Mr. Kiser said that the company "could go ahead and do it."

US argues that this is a "figleaf", that it is a way to get the statement in to show the truth of the matter, and not to show what was said or to show conduct or state of mind.

US states that the only possible way to get the statement in is by the Rule 804(b)(5) exception if it can be shown that the statement has the equivalent circumstantial guarantees of trustworthiness, and they ramble on for 10 pages.

I feel the US has the better of this argument, for whatever it is worth.

MOTION of US for continuance - unopposed.

Law is no respecter of persons - every one entitled to equal opportunity to be heard and considered - if a Corp is the same as a person in the eyes of the law.

*the Court
feels that 701(a) and
404(b) are not
used as to lead to
a hatched job
show Rule 403*

INFORMATION EXCLUDED FROM THE PRESENTENCE REPORT AS
POTENTIALLY EXEMPT FROM DISCLOSURE: RULE 32 (c) (3) (A)

RECOMMENDATION:

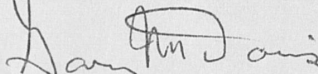
As requested, we have conducted an investigation into civil service non profit organizations which contributed their time, money and equipment to the disaster relief at the Scotia Mine during the disaster in question.

It appears from those interviewed that the principals involved were:

1. Letcher Volunteer Fire and Rescue, Inc., located at Box 61, Jeremiah, Kentucky. Their Chief Robert Adams has advised that they had equipment and men present during the entire situation and have received no funds in the form reimbursement for their expenses.
2. Tri City Emergency and Rescue, Inc., Box 545, Cumberland, Kentucky, headed by Chief Tom Scott. Chief Scott advised that his unit responded to the Scotia disaster by sending equipment and men to assist in above ground operations. He advises that they have received no form of reimbursement for this service.
3. Neon Fire and Rescue, Box 516, Church Street, Neon, Kentucky. They advise that an initial response was given by sending men and equipment; however, upon arrival it was determined that enough rescue assistance was already available and they returned to their regular post after approximately two hours duty.
4. Churches and Volunteer Groups. We have been advised that churches and volunteer groups in the community supplemented the effort by contributing food, clothing and finances to the families involved.

It is recommended that instead of attempting to reimburse the individual churches that a facility named the Letcher County Food Closet be substituted, as this facility incorporates all denominations under one roof and makes available food and clothing to the Oven Fork-Letcher County area which includes Letcher and Harlan Counties where the majority of those killed in the explosion lived.

Respectfully submitted,



Gary M. Davis
U. S. Probation Officer

KRS 505.020 (1) An offender can be prosecuted for each of several offenses arising out of a single course of conduct.

(2) An offender cannot be convicted of included offenses that are

- a. established by proof of the same or less than all the facts required to establish the offense charged, or
- b. it is an attempt to commit the charged or lesser included offense, or
- c. a lesser culpability is required, or
- d. there's less injury involved.

Comment re: included offenses:

"If the proof necessary to establish the greater offense will of necessity establish every element of the lesser offense, the latter is an included offense." (for which he can be prosecuted: however, he can be convicted on only the greater offense, or on only the lesser offense - a jury decision)

1 September 1982 Pre-Trial Motions

PRE-TRIAL MOTIONS (no problems)

- (74) Defendant Blue Diamond moves to exclude its Response to a Request for Admissions in the Boggs civil action on the Scotia disaster.

Plaintiff's response: Agrees that the Response is not admissible under FRCP 86(b).

- (81) Defendants move to admit hearsay statement of dead miner under "present sense impression" exception.

Plaintiff's response: agrees that the statement is admissible.

- (80) Defendants move to limit the conditions under which the MSHA model of the Scotia mine may be offered, in LIMINE.

Plaintiff's response: agrees that should be heard. No real contention here. Defendants say that when the model is presented the differences between the model and the real mine can be explained by expert testimony.

PRE-TRIAL MOTIONS (contended)

- (86) Plaintiff moves to exclude all references or testimony regarding the second explosion as irrelevant to the charges in the indictment.

Defendant's response: (1) Important evidence was gathered after the second explosion, so can't avoid referring to it. (2) A hearsay witness the defense will rely on was killed in the second explosion. (see below).

- (83) Defendants move to admit the hearsay statement of Kenneth Kiser (MESA inspector) to show (apparently) that they had the permission of the inspector/declarant to alter the ventilation system in some way contrary to mining rules. The declarant Kiser was killed in the second explosion.

Plaintiff's response:

1). The only witnesses to the alleged hearsay statement are Scotia's mine foreman and superintendent, not disinterested witnesses.

2). Defendants intend to introduce the statement to show the truth of the matter, and not to show only it was made.

3). Statement of Kiser not trustworthy, no indicia of reliability: the statement was not preserved in notes, etc, he was not under oath, only part of the conversation was heard, the witnesses have credibility problems, the statement was made a considerable time ago, there's no corroborating circumstances.

- (87) Plaintiff moves to change situs of trial due to publicity.

Defendants' response: Pikeville has received less publicity on this matter than any other site in eastern Ky.

PRE-TRIAL MOTIONS (with problems)

(76) Defendants move to exclude Blue Diamonds's allegations and statements in its answer in the Boggs civil action on two grounds:

- 1). Scotia was not a party in the Boggs action.
- 2). The allegations and statements in their answer are not admissible as admissions of a party.

Defendant argues that the answer contains alternative pleadings and that they cannot be used as admissions of a party because they do not possess the characteristics of admissions against interest, citing Atlantic Paint v. Conti, 381 A.2d 1034 (R.I., 1977), and McCormick on Evidence,

" . . . it can readily be appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission."

(79) Defendants move to exclude testimony of witness in depositions and trial of the Boggs case on the grounds that:

- 1) The witnesses in the Boggs trial are available to testify in the present trial.
- 2). Scotia was not a party to the Boggs case.

Plaintiff's Response (consolidated) to these motions: (95)

1) At the time of the 1976 Scotia explosion, Jasper Cornett was vice-president of operations of both Scotia and Blue Diamond, and Gordon Bonnyman was president and chairman of the board of both companies, and they held these positions when they testified in Boggs.

2). Scotia operated the mines for the benefit of, and under the control and direction of Blue Diamond, and key decisions forming the basis of the criminal charges here were made by Cornett, Bonnyman, et al.

3). Cornett and Bonnyman were agents of Scotia and Blue Diamond and their testimony is admissible as admissions against both. FRCP 801(d)(2)(D). Statements of corporate officers are admissible as admissions of a party in a criminal case. U.S. v. Kahn, 472 F.2d 272 (CA2). Testimony of officers can be binding on corporations as admissions. Zenith Radio, 505 F.Supp. 1190 (E.D. Pa. 1980).

4). Plaintiff doesn't have to show that these officers are unavailable to introduce their testimony as admissions of a party. Rule v. International, 568 F.2d 558 (CA8, 1977)

MOOT MOTIONS

(88) Defendants moved for extension of time to respond to plaintiff's motion to change situs of trial

Response filed (97)

(89) Defendants moved for an extension of time in which to file responses to pre-trial motions.

Response filed (96)