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ENFORCEMENT PROVISIONS OF THE 1969 FEDERAL COAL MINE HEALTH AND SAFETY ACT

INTRODUCTION: THE DEVELOPMENT OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

KEN HECHLER*

In Statuary Hall at the Capitol in Washington, D.C., West Virginia is represented by a statue of Francis H. Pierpont of Fairmont, the man who did a great deal to bring statehood to West Virginia. In 1886, Mr. Pierpont became incensed at the heavy loss of life due to an explosion in a mine at Newburg, W.Va. He penned a critical article which appeared in many West Virginia newspapers, noting that the state mine safety law "lacked teeth." Pierpont added that "the whole legislation looks like a grim joke gotten up to pacify the miners." History records that at the next session of the West Virginia State Legislature "a much tougher mining law was passed."

Mine safety legislation has been enacted in steady waves, following major disasters.¹ The Federal Coal Mine Health and Safety

*U.S. Congressman, 4th District of West Virginia; A.B., Swarthmore College, 1935; A.M., Columbia University, 1936; Ph.D., Columbia University, 1940. Congressman Hechler has represented his district in the House of Representatives since his first election in 1958. He played an active part in the passage of the Federal Coal Mine Health and Safety Act of 1969.

¹ See HOUSE COMM. ON EDUCATION AND LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY: FEDERAL COAL MINE HEALTH AND SAFETY ACT 3-6 (Comm. Print 1970). The 1952 Act was prompted by a 1951 mining disaster at West Frankfurt, Illinois, and the establishment of the Bureau of Mines in 1910 was encouraged by a series of coal-mine tragedies. This history merely illustrates the application of the old adage that "dead miners have always been the most powerful influence in securing passage of mining legislation." *Id.* at 7.

Act of 1969, as the following symposium points out, rode to victory because of the shock reaction to the Farmington disaster of November 20, 1968, that killed seventy-eight miners. Authors Halle-rud, Kohn, and Meredith note “the passion and emotion which precipitated its formulation and enactment”, and it is doubtful if any legislation would have passed in 1969 absent that atmosphere.²

The courtroom provides a well-lit stage for good trial lawyers to run up and down the octaves of emotion, yet the legal profession has its members who tut-tut when passions become too inflamed on behalf of strong social legislation. As with fair labor standards, pure food and drugs, and other forms of social legislation, mine safety laws were bitterly fought at the federal level by an industry which insisted, for obvious reasons that states rights should prevail. The 1969 law was a tremendous victory for those advocating aggressive federal legislation. Hence, the battleground was created for the complex struggles described in the articles that follow.

The legislative history of the 1969 Act was dramatic and decisive. The pattern of development of the Act was familiar, yet inter-spersed with some startling nuances.³

THE UMWA AND MINE SAFETY

John L. Lewis, lionized by coal miners, actually accomplished very little in the area of mine safety. His successor, Tony Boyle, did even less, and shocked the nation by his remarks over national television at the mouth of the still-smoking Farmington mine. Boyle joined the politicians and bureaucrats who soothingly attempted to reiterate that there were always hazards like explosions in coal mining, and the safety of the coal industry was pretty good considering.

During the national debate over mine safety legislation in 1969,⁴ the Boyle-led United Mine Workers of America unsuccessful-

² Though the Farmington disaster no doubt provided the impetus for passage of the Federal Coal Mine Health and Safety Act, public awareness of the disastrous health hazards in coal mining and the lack of action by the federal government on this problem had been growing. This was evident in the publicity of the high prevalence of coal miners' pneumoconiosis (“black lung” disease), which is irreversible once contracted. *Id.* at 6-7.

³ For an excellent discussion of the factors that led to the passage of the 1969 Act and a summary of its major provisions, see LEGISLATIVE HISTORY, *supra* note 1, at 1-43.

⁴ Hearings on the proposed legislation before the Subcommittee on Labor, Committee on Education and Labor, began Feb. 27, 1969.

fully attempted to quiet the furor and dampen the fiery demand for tough federal legislation. Early in 1969, the UMW sent word to me and to other coal-field Congressmen that separate bills should be introduced on health and safety with the understanding that the UMW would not push for enactment of any legislation on coal dust standards or pneumoconiosis.

In shocked disbelief, I telephoned the UMW Headquarters to protest, and was blandly assured that UMW had “taken a poll” and were sure that Congress would not pass any legislation dealing with pneumoconiosis in 1969. They told me that I should simply work for mine safety legislation of a modest sort and forget about miners’ health.

Two dramatic events shook the UMW leadership from its torpor. First, early in 1969 a strike of West Virginia miners demanding state legislation on black lung focused attention on federal legislation. Second, “Jock” Yablonski declared his candidacy in May, throwing down an insistent challenge to Boyle’s lack of leadership on legislation and internal management of the union.

A good example of how the UMW’s internal struggle strengthened the legislation is the story of the Federal Coal Mine Health and Safety Board of Review—a five-man board dominated by coal operators with one UMW member and one member representing small coal operators. Yablonski and I joined in publicly attacking the stacked power of the Board of Review, while the Nixon Administration, Boyle, and the coal operators vigorously defended the power of veto over mine inspectors that was installed in the Board.

Prior to the start of debate in the House of Representatives, Boyle, feeling the heat of our campaign criticism of the Board of Review, suddenly withdrew his support for the Board. Boyle’s friends in Congress were furious and were left mumbling to themselves in a frantic effort to make a 180-degree turn in their public statements. Needless to say, the Board of Review died and was never resurrected.

In addition to its fight for the Board of Review, the Nixon Administration tried long and hard to raise the coal dust standards from 3.0 milligrams per cubic meter of air to 4.5 milligrams and opposed any effort to include compensation payments for pneumoconiosis. In addition, the Nixon Administration fought stolidly against any congressional effort to strengthen the enforcement standards in the bill.

STRENGTHENING AMENDMENTS

When the bill emerged from the House Committee on Education and Labor, I was disgusted and depressed about some of its weak provisions and loopholes. Members of the Committee started an immediate drive to line up co-sponsors, and they signed up over a hundred members of the House, including nearly every coal-state Congressman. But by insisting that a number of strengthening amendments were necessary to make this an effective piece of legislation, I believe we succeeded in materially improving the bill on the floor of the House. Among the provisions which were added on the floor were the following: (1) abolition of the Board of Review; (2) reassignment of miners to a 1.0 milligram atmosphere when they have beginning stages of pneumoconiosis; (3) liberalized payments to miners disabled with lung disease, as tested by pulmonary function tests as well as x-rays; (4) shortening of time within which mines must obtain permissible equipment; (5) prohibit discharge or discrimination against miners reporting violations of health or safety standards; (6) federal payment for autopsies with consent of next of kin; (7) limits on noise levels within coal mines.

VETO THREATS

On December 17, 1969, Richard T. Burress, Deputy Assistant to the President for Domestic Affairs, appeared on Capitol Hill and passed the word that President Nixon might be required to veto the bill unless the entire title covering black lung compensation was taken out and rewritten. Republican Floor Leader Gerald Ford started rounding up votes to send the mine safety bill back to conference. Fortunately, the Southern Congressmen held their support of the bill; only future President Ford and eighty-two others voted to recommit the conference report.

As the bill went to the White House in the waning days of December, the drama heightened over whether the President would sign or veto the bill. The small, independent coal operators insistently demanded a veto. Other coal operators, perhaps impressed with the fact that every delay seemed to make the bill stronger rather than weaker, were sending up smoke signals that they would just as soon get the bill off their backs with the President's signature, accompanied by a cautionary statement on enforcement.

As Christmas came and went, the miners started to get impatient with the President's long delay—his ten day period expired

December 30. On Saturday, December 27, I spent all day trying to assess how the critical need for the mine safety bill could be dramatized to the nation and its Chief Executive. Plane reservations were booked solid over the Christmas holidays, so I chartered two small planes from Morgantown to fly seven widows of the Farmington disaster to Washington. They telegraphed President Nixon for an appointment prior to their departure and telephoned the White House on their arrival December 30.

The Farmington widows were told to come to the White House southwest gate at 12:15 P.M. In his oval office in the west wing, seven fountain pens were neatly lined up on the President's desk. The signing of the bill seemed imminent, but suddenly the signals changed, and the widows were shunted off to Richard T. Burrell, Deputy Assistant to the President, who carefully explained the negatives of the bill, how it was inflationary and would interfere with coal production, how bad the black lung features were and so forth. Meanwhile, I was waiting in the cold at the White House gate, being advised that my presence inside the White House was not exactly welcome.

THE BILL IS SIGNED

As the tension mounted, my administrative assistant, Dick Leonard, drove up and said he had just heard over his car radio that Senator Jennings Randolph had announced that the President was signing the bill. An accompanying statement by President Nixon was dominated by his "reservations" about the mine safety act and the "confusion" and "problems of administration" the Act created.

The Federal Coal Mine Health and Safety Act of 1969 was signed behind closed doors. No photographers were present. There was no ceremony. The bill which had aroused front-page interest across the nation, and carried deep significance for the future of many thousands in the coal fields, was signed into law almost surreptitiously. The President immediately boarded his helicopter for Andrews Air Force Base and a jet flight to San Clemente.

The basic, underlying theory of the 1969 Act is that the assessment and enforcement procedures should make it more expensive for a coal operator to have an unsafe mine than a relatively safe one. The long struggle over enforcement began before the ink was dry on the President's signature. Much of that struggle and its legal implications is set forth in the accompanying articles.

O'LEARY'S ROLE

Exactly one month prior to the Farmington disaster, on October 20, 1968, John F. O'Leary had been named by President Johnson as Director of the Bureau of Mines. O'Leary stayed on through the legislative battle to enact the 1969 Act, supported by coal miners and opposed by coal operators, and he tried to walk a tight rope with the Nixon Administration. One Saturday in late February of 1970, while O'Leary was working in his office on the forthcoming rules and regulations under the 1969 Act, he received a curt telephone call from the White House asking if he would be in his office for a while. The phone call was to pave the way for a hand-delivered White House note telling him to clean out his desk and get out of the office by Monday.

O'Leary had been a symbol of vigorous enforcement during his tenure. He started the practice of spot, unannounced inspections and put an end to the old scheme of letting coal operators know when the inspectors were to appear. He breathed new life and vigor into the Bureau of Mines.

The Bureau of Mines was in a shambles in the period following Director O'Leary's departure. Administration of the new law was a combination of literal over-enforcement without intelligent flexibility and gross under-enforcement. The President appointed Dr. J. Richard Lucas as the new Director, but Dr. Lucas made a disastrous appearance before the Senate Interior Committee. His testimony pointed to his primary loyalty to the coal industry, and he failed to display a good grasp of the complexity of the problems he would encounter in enforcing the new law.

BREAKDOWN OF ENFORCEMENT

Meanwhile, back at the Bureau of Mines, an average of twenty inspections per week were being made during the summer of 1970. For the two hundred mines with a history of hazardous conditions, the 1969 law requires one spot inspection per week. The Bureau of Mines was adopting a posture of benign neglect, bending to the pressure of coal operators for more production rather than protection for the miners. In response to miner and congressional criticism, the Bureau of Mines stepped up its inspection rate, but it had reached only ninety-four per week at the end of June, 1970.

POLITICS ENTER INTO MINE SAFETY

Dr. Elburt F. Osborn was named Director of the Bureau of

Mines in October, 1970, but the record of enforcement of the 1969 Act failed to improve. During 1970, 256 coal miners were killed, contrasted with 203 in 1969. Coal mine safety administration hit a new low with the appointment of Edward D. Failor, a political fund-raiser and lobbyist for the coin-operated laundry industry, as the chief mine safety enforcement officer. Morale sagged in the mine safety enforcement area. Among dedicated, professional coal inspectors, a sigh of some relief came when Mr. Failor was promoted out of the coal mine safety field to assume a high position in the Committee to Re-elect the President.

But the politicizing of mine safety was far from over. Between February and May of 1971, Harry W. Treleaven, Jr., a New York advertising executive and top publicity man in the 1968 Nixon campaign came aboard as a \$121-a-day consultant with the job of improving the image of the Interior Department. Treleaven proposed an all-media saturation campaign to cost between a quarter and half a million dollars, aimed at convincing coal miners that they should adopt safer work habits. The propaganda campaign included television, radio, billboards, lapel buttons, and bumper stickers.

To bolster my contention that the new propaganda effort to put the blame for mining accidents on the back of the coal miner was terribly wrong, I cited a report of the General Accounting Office that nine out of every ten underground coal mine accidents can be traced to the failure of coal operators to take proper safety precautions. At the same time, I interviewed Comptroller General Elmer B. Staats concerning claims by coal operators that the 1969 Act was hindering production.

“The evidence to date does not indicate that enforcement of the Act has had any significant bearing, if any, on the production of coal,” said the Comptroller General. “Actually, in 1970, the Nation’s coal output increased by nearly thirty million tons, which was the largest single year-to-year increase since 1964.”

With the establishment of the Mining Enforcement and Safety Administration and the transfer of mine safety activities from the Bureau of Mines to MESA, it was hoped that the politicization of the mine safety function would cease. However, James Day, a Republican campaign official, was named to head MESA, and his lack of mining experience met opposition from the United Mine Workers of America and others. The U.S. Senate, however, failed to confirm Mr. Day, and he submitted his resignation as MESA Acting Director effective July 1, 1975.

INEFFICIENCIES IN ASSESSMENT

In a report dated July 5, 1972, the General Accounting Office found gross inefficiencies in the assessment and collection of civil penalties by the Bureau of Mines under the 1969 Act. Subsequent investigations and hearings by the House Government Operations Committee established that only about one-fourth of a potential \$48 million in fines levied under the law had been collected. Until March, 1975, the Internal Revenue Service permitted mine operators to deduct these fines from their income taxes.

TRANSFERRING MINE SAFETY TO THE LABOR DEPARTMENT

Since the current debate over the 1969 legislation commenced after the Farmington disaster, I have consistently advocated the transfer of mine safety enforcement functions from the production-oriented Department of the Interior to the employee-oriented Department of Labor. Starting early in 1969 and each year thereafter, I have introduced legislation to accomplish this objective. Senator Harrison Williams (D-N.J.), the Chairman of the Senate Committee on Labor and Public Welfare, as well as a large number of congressional leaders now share this view.

My bill, H.R. 5555, assumes that location of an employee safety program in an agency charged with developing natural resources creates a conflict of interest. The bill also provides for the representatives of miners to participate in civil penalty proceedings, including conferences. It also does away with the de novo review of civil penalty cases in the district courts and substitutes review by the United States Courts of Appeals, based on the record at the administrative hearings. This latter provision has been recommended by the Administrative Conference of the United States.

NEED FOR MORE LEGAL TALENT

Whatever the outcome of this pending legislation, it should be apparent from the articles in this symposium that there is a crying need for more legal talent dedicated to the public interest. The United Mine Workers of America has long suffered in this respect. The Department of the Interior, which is charged with protecting the public interest, is pressured every day to bend the manner in which the law is enforced in an area highly charged with economic interest. The coal industry does not seem lacking in legal talent, nor in its ability to obtain good legal support.

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One of the most heartening developments in recent years has been the insistence of young lawyers to devote their time and effort to public service cases or public service firms. It is in areas like the Federal Coal Mine Health and Safety Act of 1969 that the public interest requires the legal talent to protect the rights of all parties concerned, including those who cannot readily afford or have access to that talent.

