

^{Freedom to move to and from the right to stay to remain on the subject of}
Court equates public interest as
being the collective interest of
Dinos and the community in which
it is situated.

Tomorrow is Veterans day —
~~used to be stated~~
the lofty ideas for which soldiers
were fighting were at times reduced to
the price of real estate on which he
was standing and he was fighting
to stay alive

^{Remembering that} Tomorrow is Veterans day —
In considering the idealization
or principalization of the present actors
the Court is reminded of the practicality
of soldiers.

Who is going to be hurt the
most by the granting or refusal of
a stay ??

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT SCHEDULE FOR NOVEMBER 10, 1982 - HONORABLE G. WIX UNTHANK

9:30 CRIMINAL 82-23-1 - ARRAIGNMENT - United States vs: James Messer

10:00 82-99 *Mary DeFord vs Lince Coal, et al - Hearing
Oral Arguments as to Stay of Judgment.*

2:00 CIVIL 81-11 - PRE-TRIAL CONFERENCE - Eugene P. Cotterman vs:
Roy Holbrook, et al

3:30 CIVIL 82-110 STATUS CONFERENCE - Corbett Pelphrey, Et Al vs:
John Galt Energy. *3-2-83*

PLEASE NOTE:

WHEN MORE THAN ONE CASE IS SCHEDULED FOR THE SAME HOUR, THE CASES WILL BE CALLED BY THE CLERK IN NUMERICAL ORDER, UNLESS OTHERWISE DIRECTED BY THE COURT.

STANDING ORDERS OF THE COURT ARE AVAILABLE FROM THE CLERK IN RE:

- A. Motions in the Pikeville Division of this Court- CIVIL
- B. Format of briefs in the Pikeville Division of this Court
- C. Pre-trial conferences for civil actions-Pikeville Division
- D. Motions in the Pikeville Division of this Court- CRIMINAL
- E. Preliminary Conference Procedure-CIVIL

ALL PLEADINGS ARE TO BE FILED WITH THE CLERK'S OFFICE, DO NOT SEND PLEADINGS DIRECTLY TO JUDGE UNTHANK

MESSAGES- It is the policy of the Clerk's Office to take necessary messages for attorneys while they are in attendance at our Court. These messages will be placed on the Counter of the Clerk's Office, please check this pad at frequent intervals for any incoming calls.

CIVIL COVER SHEETS, MARSHAL'S 285 FORMS, ETC. ARE AVAILABLE UPON REQUEST FROM THE CLERK'S OFFICE.

7000

estimate

Aug 77 Jan 78

3 men working - Payroll
Investment.

\$240⁰⁰ per day
\$300,000⁰⁰

April - May 77
Jan - Feb 78

Dinos moved in

Law went into effect
about this time.

1. Injurious injury
2. Likelihood of success on merits
3. balancing of harm on

- Court recognizes it
is a legitimate controversy
that ~~is~~ - infallible
the of funds

OSM - Only water pollution

Air pollution controlled
but difference in the
standards

ASSIGNED FOR ORAL ARGUMENT AT PIKEVILLE, KENTUCKY
ON NOVEMBER 10, 1982 AT 10:00 A.M.

PIKEVILLE CIVIL ACTION NO. 82-99

MARY DEBORD, ET AL

David Rubinstein
Tom Fitzgerald
Robert Jordan

VS:

JAMES WATT, SECRETARY OF INTERIOR
AND DINCO COAL SALES, INC.

U. S. Attorney
David C. Short
William H. Gorin
Clifford B. Latta

ORAL ARGUMENT ON MOTION FOR STAY OF JUDGMENT PENDING APPEAL

4/14/82 #1 COMPLAINT

5/19/82 #2 RESPONSE(ANSWER), of Dinco Coal Sales, Inc.

6/15/82 #5 ANSWER, of deft, James G. Watt, Sec. of Interior

9/29/82 #15 MEMORANDUM OPINION (GWU).

#16 ORDER:(GWU) (1) Mot. of plff for S/J SUSTAINED; (2) Mot. for S/J of deft. Sec. Int. DENIED; (3) Decision REVERSED; (4) Matter REMANDED to Secretary of Interior for proceedings not inconsistent w/memorandum opinion (5) MATTER DISMISSED & STRICKEN from docket.

10/8/82#18NOTICE OF APPEAL

10/8/82#19APPLICATION, of deft, Dinco Coal Sales, Inc. to STAY execution of Judgment pending appeal

10/15/82#20 MEMORANDUM, of plffs n/opposition to application for stay

10/25/82 #24 AMENDED TO MEMORANDUM, of plffs in opposition to applica. for stay

10/28/82 #25 MEMORANDUM, of deft Dinco Coal Sales in suppt. applica for Stay

ORAL ARGUMENTS TO BE ADDRESSED TO FOLLOWING POINTS Per Order 11/4/82

- (a) The probability of deft prevailing upon the merits;
- (b) the irreparability of any injury to plffs that might occur as a result of allowing the stay;
- (c) the nature & extent of the public interest in this matter;
- (d) The existence & extent of any substantial harm to the parties & to the public as a result of the stay or its denial;

Civil Action No. 82-99 Debord v. Dinco & Secy

Oral Arguments 10:00 AM 10 Nov 82

Dinco has moved for a stay following the court's judgment in favor of plaintiffs, homeowners in the area of Dinco's tipple.

The court has asked the parties to argue the four points set out in the court's order of 4 November, Record # 26.

Issued Stay —
Superseding bond in sum of
\$300,000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 82-99

MARY DEBORD, ET AL.,

PLAINTIFFS,

VS.

ORDER

DINCO COAL SALES, INC., and
SECRETARY, DEPARTMENT OF
THE INTERIOR,

DEFENDANTS.

* * * *

On May 16, 1984, the United States Court of Appeals for the Sixth Circuit issued a mandate which affirmed in part and reversed in part the decision herein by this Court.

The Sixth Circuit affirmed this Court's judgment in defining the meaning of the "at or near" language of §1291(28); however, the Sixth Circuit reversed this Court's ruling that Dinco's coal tipple was a "processing" plant, on the grounds that that particular issue was not properly before this Court because the Secretary had not ruled on that question.

The appellate Court also found that since the Secretary had not ruled on the issue of whether the operation in question is conducted "in connection with a surface coal mine" (30 U.S.C. §1291(28)(A)), this Court's reference to the Secretary's findings in that respect was without foundation.

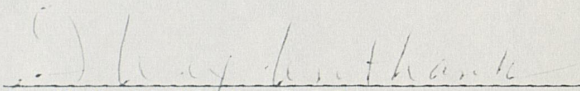
Therefore, pursuant to the foregoing mandate of the United States Court of Appeals for the Sixth Circuit,

IT IS HEREBY ORDERED, as follows:

1. This action is now REMANDED to the Secretary for further proceedings wherein the Secretary shall determine if (a) Dinco's coal tipple was a "processing" plant, and (b) the operation in question was conducted "in connection with a surface coal mine" according to 30 U.S.C. §1291(28)(A).

2. This action is now DISMISSED and STRICKEN from the active docket of the Court pending completion of the administrative proceedings.

This the 23rd day of May, 1984.


G. WIX UNTHANK, JUDGE

Nos. 82-5617
82-5725

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAR 15 1984

JOHN P. HEHMAN, Clerk

MARY DEBORD; IVAN DEBORD;
WANDA GREGORY; EVERETT HUNTER;
SADIE HUNTER; GEORGIA KEANS;
DANNY MOORE; DOUGLAS MOORE;
WANDA MOORE; MARY MOORE; TIM
PACK; DEBBIE PACK; McINTIRE
RISNER; LORETTA RISNER; JAMES
WARD, JR.; VERONICA WARD,

Plaintiffs-Appellees

v.

DINCO COAL SALES, INCORPORATED,

Defendant-Appellant (82-5617)

SECRETARY, DEPARTMENT OF THE
INTERIOR,

Defendant-Appellant (82-5725)

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF KENTUCKY

Judge Unthank
INFORMATION COPY
DIS. CT # 82-99

Before: MERRITT and CONTIE, Circuit Judges; POTTER,* District
Judge

MERRITT, Circuit Judge. This appeal requires that we determine the extent of the authority of the Secretary and his delegates under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq., to regulate coal tipples which are not located "at or near" mine sites. We agree with the District Court's construction of 30 U.S.C. § 1291(28), consistent with our opinion in Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981), and with the plain language and the legislative history of that provision, that "processing" tipples, as distinguished from "loading" facilities, need not be located "at or near the mine site" in order to be subject to the

*The Honorable John W. Potter, Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

jurisdiction of the Secretary. The Secretary now concedes this point on appeal, although it contested the issue in the court below.

The District Court also proceeded, however, to characterize the tipple operations of appellant Dinco Coal Sales, Inc., in question, as "processing," and, thus subject to the Secretary's regulation under 30 U.S.C. § 1291(28) (A). Although it is not clear whether the District Court intended to make a clear and deliberate ruling that Dinco's coal tipple was a "processing" plant, its opinion does so state. That particular issue was not properly before the District Court because the Secretary had not ruled or made a record on that question. Likewise, the District Court's reference to the Secretary's findings that the operation is in connection with the mine is without foundation. Then the Secretary has not ruled on the issue of whether the operation in question is conducted "in connection with a surface coal mine." 30 U.S.C. § 1291(28) (A).

Accordingly, we affirm that portion of the District Court judgment defining the meaning of the "at or near" language of § 1291(28) but reverse its decision to the extent that it rules on other issues and remand to the District Court with instructions to remand the Secretary for further proceedings.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 82-99

MARY DEBORD, et al,

PLAINTIFFS

VS:

O R D E R

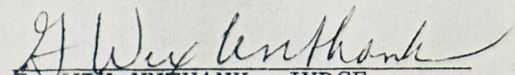
JAMES G. WATT, Secretary
of the Interior, et al,

DEFENDANTS

Defendant-Appellant Dinco Coal Sales, Inc., having moved
the court for leave to withdraw without prejudice its
Application for Stay Pending Appeal, and the court being
sufficiently advised,

IT IS HEREBY ORDERED that defendant's Application for Stay
Pending Appeal is WITHDRAWN, and that the court's order of
30 November 1982 holding said application in abeyance is
.SET ASIDE.

The 18th day of January 1983.


G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 82-99

MARY DEBORD, et al,

PLAINTIFFS

VS:

O R D E R

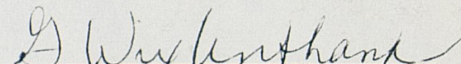
JAMES G. WATT, Secretary
of the Interior, et al,

DEFENDANTS

The court having been moved to grant leave to the Hon. David
C. Short to withdraw as counsel of record for defendant Dinco
Coal Sales., Inc., and the court being sufficiently advised,

IT IS SO ORDERED.

The 18th day of January 1983.


G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-99

MARY DEBORD, ET AL

PLAINTIFFS

VS:

JAMES WATT, Secretary of the
United States Department of
Interior, Et Al

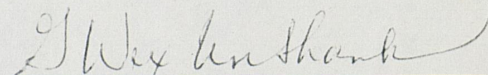
DEFENDANTS

O R D E R

Upon the Court's own motion,
IT IS HEREBY ORDERED:

That the Clerk of the District Court retain the
record in the above-styled case for a period of 30
days for use by the parties.

This the 4th day of January, 1983.


G. WIX UNTHANK, JUDGE

423-EDKy.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

STATUS REPORT OF CASE ON APPEAL

Docket: PIKEVILLE

Date: November 29, 1982

To: Judge G. Wix Unthank

Re: (style) Mary Debord, et al vs; (No.) 82-99
James G. Watt, Sec. Interior, Et Al

Date of Entry of Order/Judgment appealed: 9/29/82

Date Notice of Appeal filed: 10/29/82

By: Plaintiff - Defendant - Both

James G. Watt,
Sec. U.S. Dept. Interior

Appeal dismissed on motion of: Appellant - By Agreement

6CCA Action:

Judgment - Date filed District Court: _____

Order - Date filed District Court: _____

Mandate - Date filed District Court: _____

Affirmed - Reversed - Modified _____
(date filed)

Dismissed for lack of prosecution: _____
(date filed)

Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 82-99

MARY DEBORD, ET AL,

PETITIONERS,

VS.

ORDER

JAMES G. WATT, SECRETARY,
OF THE INTERIOR, and
DINCO COAL SALES, INC.

DEFENDANTS.

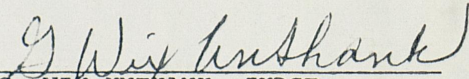
* * * * *

It appears that on the 11th day of November, 1982, the Court granted the motion of the defendant, Dinco Coal Sales, Inc., for a stay of a judgment entered on the 29th day of September, 1982, in the above-styled action. Such stay of judgment was to be for the time during which an appeal is pending, and the defendant, Dinco Coal Sales, Inc., was ordered to post a supersedeas bond in the amount of Three Hundred Thousand Dollars (\$300,000.00) as one of the conditions of the stay granted by this Court.

It further appears that the defendant, Dinco Coal Sales, Inc., has failed to post the required supersedeas bond, which is mandatory before this Court will continue the aforementioned stay of judgment.

The Court being duly advised, IT IS HEREBY ORDERED, that said STAY be HELD IN ABEYANCE pending the posting of such supersedeas bond by the defendant, Dinco Coal Sales, Inc.

This the 30th day of November, 1982.


G. WIX UNTHANK, JUDGE

(EDky-111)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKYPIKEVILLECIVIL MINUTES -- GENERALCase No. 82-99 At PIKEVILLEDate NOVEMBER 10, 1982Style MARY DEBORD, ET AL VS: JAMES WATT, SECRETARY OF THE UNITED STATES
DEPARTMENT OF INTERIOR AND DINCO COAL SALES, INC.

DOCKET ENTRY

PRESENT:

HON. G. WIX UNTHANK, JUDGEM. Bevins
Deputy ClerkS. Lindstrom
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

David Rubinstein
Tom Fitzgerald
Robert Jordan

ATTORNEYS PRESENT FOR DEFENDANTS:

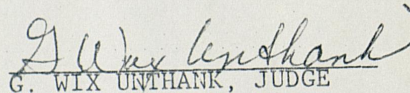
Thomas L. Self, Assistant
United States Attorney
David C. Short
William H. Gorin
Walt Morris

PROCEEDINGS: ORAL ARGUMENT ON MOTION FOR STAY OF JUDGMENT PENDING APPEAL

The matter was called for proceedings with counsel present as noted. The Court heard counsel and being sufficiently advised,

ORDERED HEREIN:

- (1) Application for a stay of judgment pending appeal, of the defendant, Dinco Coal Sales, Inc., be, and hereby is, GRANTED;
- (2) The defendant, Dinco Coal Sales, Inc., shall post Supersedeas Bond in the amount of Three Hundred Thousand (\$300,000.00) Dollars with good and sufficient surety.

This the 11th day of November, 1982.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 82-99

MARY DEBORD, et al,

PETITIONERS,

VS:

O R D E R

JAMES G. WATT, Secretary
of the Interior, and
DINCO COAL SALES, Inc.,

DEFENDANTS

A motion has been filed for a stay of judgment entered in the above named and numbered action pending appeal. Such stay has the effect of permitting operation of a coal tippie which is otherwise precluded from operation by said judgment. The court is of the opinion that this matter is governed by F.R.C.P No. 62 and 30 U.S.C. 1276. The court is further of the opinion that it should consider the following in making a decision on whether or not to grant such stay:

- a. The probability of defendant prevailing upon the merits.
- b. The irreparability of any injury to the plaintiffs that might occur as a result of allowing the stay.
- c. The nature and extent of the public interest in this matter.
- d. The existence and extent of any substantial harm to the parties and to the public as a result of the stay or its denial.

The parties hereto have submitted excellent memoranda upon these issues. However, the court is not convinced with the arguments and showing of the specific harm or injury to parties and/or the public so far advanced to justify or deny the stay requested.

Oral arguments on these points will be heard by the court
on 10 November 1982 at the hour of 10:00 A.M. in the United
States District courtroom, Pikeville, Kentucky.

This the 4th day of November 1982.

G. Wix Unthank
G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION O. 82-99

MARY DEBORD, IVAN DEBORD,
WANDA GREGORY, EVERETT HUNTER,
SADIE HUNTER, GEORGIA KEANS,
DANNY MOORE, DOUGLAS MOORE,
WANDA MOORE, JARY MOORE,
TIM PACK, DEBBIE PACK,
McINTIRE RISNER, LORETTA
RISNER, JAMES WARD, JR.,
VERONICA WARD

PETITIONERS,

VS:

ORDER

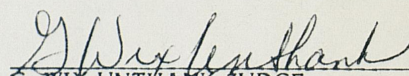
JAMES G. WATT, Secretary of
the Interior, and
DINCO COAL SALES, INC.

DEFENDANTS.

* * * * *

It appers that defendant has not complied with the Court's standing order to submit memorandum of points and authorities with any motion or response filed before the above named Court. It may be that defendant is not aware of this Court's standing orders. By reason thereof the defendant is given ten days to file its memorandum of points and authorities in support of its application for a stay and this action will be re-submitted to the Court by the clerk upon the expiration of said period.

This 18th day of October, 1982.


G. WIX UNTHANK, JUDGE

Judge L. Coffey

FILED OCT 28 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 82-99

MARY DEBORD, IVAN DEBORD,
WANDA GREGORY, EVERETT HUNTER,
SADIE HUNTER, GEORGIA KEANS,
DANNY MOORE, DOUGLAS MOORE,
WANDA MOORE, MARY MOORE,
TIM PACK, DEBBIE PACK,
MCINTIRE RISNER, LORETTA
RISNER, JAMES WARD, JR.,
VERONICA WARD

PETITIONERS

VS.

JAMES G. WATT, Secretary
of the Interior, and
DINCO COAL SALES, INC.

DEFENDANTS

* * * * *

STATEMENT OF AUTHORITIES

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Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).	2,4,7
Blackwelder Furniture Company of Statesville, Inc. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 195 (4th Cir. 1977)	2
Shawnee Coal Company v. Andrus, 661 F.2d 1083 (1981).	3
Hamlin Testing Laboratories, Inc. v. U.S. Atomic Energy Commission, 337 F.2d 221, 222 (6th Cir. 1964)	4
Virginia Surface Mining & Reclamation Association v. Andrus, 604 F.2d 312 (4th Cir. 1979)	6
Claypool Construction Co., Inc., 2 IBSMA 81, 87 I.D. 168 (1980). . . .	6,7
White Winter Coal, Inc., 1 IBSMA 305, 86 I.D. 675 (1979)	6,7
Gilley v. U.S., 649 F.2d 449 (6th Cir. 1981)	7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 82-99

MARY DEBORD, IVAN DEBORD,
WANDA GREGORY, EVERETT HUNTER,
SADIE HUNTER, GEORGIA KEANS,
DANNY MOORE, DOUGLAS MOORE,
WANDA MOORE, MARY MOORE,
TIM PACK, DEBBIE PACK,
MCINTIRE RISNER, LORETTA
RISNER, JAMES WARD, JR.,
VERONICA WARD

PETITIONERS

VS.

MEMORANDUM IN SUPPORT OF
APPLICATION FOR STAY PENDING APPEAL

JAMES G. WATT, Secretary
of the Interior, and
DINCO COAL SALES, INC.

DEFENDANTS

* * * * *

Comes the defendant, Dinco Coal Sales, Inc., referred to hereinafter as "Dinco", and in support of its Application for Stay Pending Appeal herein, submits the following memorandum.

On July 20, 1981, the respondent, Dinco Coal Sales, Inc., was issued a cessation order styled "Notice of Violation No. 81-2-71-12" which, on its face, required Dinco to immediately cease all operations. Dinco sought and received administrative review of that order, and on December 14, 1981, the Administrative Law Judge held and on March 26, 1982, the Interior Board of Surface Mining Appeals affirmed that the Dinco tipple operation in question is not a "surface coal mine operation" as that term is defined in 30 USC 1291 and that the Dinco tipple operation is therefor not subject to the provisions of the Surface Mining Control and Reclamation Act of 1977, 30 USC 1201-1328, referred to hereinafter as the "Act". (The Board acted for the Secretary of the Interior.)

The individual parties who had intervened in the administrative proceeding appealed to this Court from the order of the Secretary of the Interior which had been announced by the Interior Board of Surface Mining Appeals on March 26, 1982. The respondent, Dinco Coal Sales, Inc., and James G. Watt, Secretary of the Interior, responded to that appeal. On September 29, 1982, this Court entered its order reversing the order of the Secretary of the Interior.

Dinco has now filed a Notice of Appeal from the judgment entered on September 29, 1982, and has applied for a stay pending appeal.

Dinco is entitled to a stay which is necessary to maintain the status quo and to prevent irreparable injury. Dinco is entitled to a stay under every test which might be applicable to the question.

The first test applicable to an application for a stay is generally stated as a "likelihood of prevailing on the merits". The phrase "likelihood of success" does not mean, however, a mathematical probability of success. Judge Frank, speaking for the Second Circuit, explained that phrase by his famous formulation:

[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation, and thus for more deliberative investigation. Hamilton Watch Company v. Benrus Watch Company, 206 F.2d 738, 740 (2nd Cir. 1953).

Judge Frank's rule considers the seriousness of the question raised in connection with the other considerations involved in an application for stay. The rule which he announced, *supra*, is quoted and followed by the D.C. Circuit in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977) and Blackwelder Furniture Company of Statesville, Inc. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 195 (4th Cir. 1977).

If the rule were otherwise and the movant were required to show a strict or absolute likelihood of prevailing on the appeal, it would amount to a full hearing of the merits on the application for a stay. That, however, is not the function of an application for a stay. The Fourth Circuit went further in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., *supra*, at 844 to demonstrate what the results of such an application of the rule would be. The Fourth Circuit said:

There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Another weakness of adherence to a strict "probability" requirement is that it leads to an exaggeratedly refined analysis of the merits at an early stage in the litigation. If, to use Judge Frank's phrase, there exists a "fair ground for litigation and thus for more deliberative investigation," a court should not be required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. The endeavor may be necessary in some circumstances— when interim relief would cause substantial harm to another party or person, or when the balance of equity may come to require a more careful heft of the merits. However, it is not required in all cases.

Dinco certainly presents "a fair ground for litigation and thus for more deliberative investigation." The order of this Court from which the appeal has been

taken is based on the opinion of the United States Sixth Circuit Court of Appeals in Shawnee Coal Company v. Andrus, 661 F.2d 1083 (1981). In its memorandum opinion, this Court treats Shawnee Coal Company v. Andrus as announcing a substantive rule of law. The position of Dinco, both before this Court and on appeal, is that Shawnee enunciates a procedural rule that a tippie operation such as is involved here must exhaust its administrative remedies. It is the position of Dinco, however, that the Court erred in its holding that the rule of Shawnee is that all tippies are subject to the Act.

It is the position of Dinco that the holding of Shawnee Coal Company v. Andrus is stated not in the language quoted in the Memorandum Opinion but in the statement that:

...the statutory interpretation of the jurisdictional issue is better left to the agency itself for initial consideration and application of its specialized expertise, [and]... that whether an operation is an activity connected with surface coal mining operations 'depends on the particular factual circumstances of each case'. Shawnee Coal Company v. Andrus, 661 F.2d 1083, 1094-1095 (6th Cir. 1981).

To regard any other statement as the holding of Shawnee would be inconsistent with the action of the Sixth Circuit in that case. In Shawnee, the Sixth Circuit simply dissolved an injunction which had prohibited the agency from enforcing a cessation order against Shawnee. The effect of dissolving the restraining order was to allow the matter to return to the agency for an administrative determination of whether or not the Shawnee tippie was or was not subject to the act. Though the opinion in Shawnee goes into great detail in explaining the Act, its holding is no more than that under the facts of that case, an exhaustion of the administrative remedies is required before any substantive determination can be made.

Dinco has exhausted its administrative remedies, and if its view of the holding in Shawnee is correct, then it is entitled to have the order of the Interior Board of Surface Mining Appeals affirmed and the Order of this Court reversed.

In any event, Dinco certainly presents a "fair ground for litigation and thus for more deliberative investigation" in this matter.

The effect of the order of this Court of September 29, 1982, is to require Dinco to cease its entire operation at least until this matter is finally resolved on appeal. The order does not require Dinco to refrain from some single particular practice or from doing some aspect of its business in a particular way. The effect of the order is that Dinco must cease its entire operation. There is, first of all, no

certainty that Dinco would be able to resume its business after having been out of business for the duration of the appeal, or if it could, whether it could regain its lost customers.

In any event, the injury to Dinco is clearly distinguishable from the insufficient injury claimed by Hamlin Testing Laboratories, Inc. v. U.S. Atomic Energy Commission, 337 F.2d 221, 222 (6th Cir. 1964) was the denial of the opportunity to solicit other new business pending appeal. In a case much more analogous to the situation of Dinco and the injury that it will suffer is Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). In that case, the D.C. Circuit upheld a stay of the action against Holiday Tours where "The harm to Holiday Tours in the absence of a stay would be its destruction in its current form as a provider of bus tours." *Supra* at 843. The D. C. Circuit explains that statement in further detail in Footnote 2 where it states:

"The destruction of a business is, of course, an essentially economic injury. It is not, however, one of the 'mere' economic injuries which, under Virginia Petroleum Jobbers are insufficient to warrant a stay. The economic injuries disparaged in that case were the necessary expenditure of funds pending appeal and the temporary monetary loss for which "adequate compensatory or other corrective relief will be available at a later date." 259 F.2d at 925.

By that criterion, Dinco would suffer an irreparable injury which will warrant a grant for the stay pending appeal.

If a stay were granted, it would result in no substantial harm to any other interested party. The Secretary of the Interior would not be harmed by the stay of an order reversing his own order. The only other parties involved in this action, petitioners on the appeal, would not suffer any substantial harm if a stay were granted.

Four of the sixteen petitioners testified about various ailments or medical conditions which they, or members of their families, have. That testimony of Mary Debord (Tr. Vol. I, 54-63), Douglas Moore (Tr. Vol. I, 64-75), McIntyre Risner (Tr. Vol. I, 78-81), and Everett Hunter (Tr. Vol. I, 82-85) makes no specific showing of any substantial injury of any kind. The ailments of which they complain are not substantiated or supported by any medical testimony or medical evidence of any kind, and their complaints of fumes and dust are unmeasured and inspecific. In any event, the record shows no causal connection between any physical condition described and the operation of the tipple.

It is clear that the petitioners do not like the Dinco tipple, and as Mary Debord says, "The coal trucks, the sound, that gets on my nerves" (Tr. Vol. I, 60). That, however, is not substantial harm that would justify closing down an entire business operation pending the resolution of a substantial and important question of law on appeal.

The petitioners attempted to show some connection between the ailments which the above-named witnesses complained and the Dinco tipple through the testimony of Dr. Ellen Joyce (Tr. Vol. I, 85-93). Taking Dr. Joyce's testimony in the most favorable light possible, her entire testimony could be called nothing other than a hypothetical. She testified on cross-examination that she had never treated any of the persons, Mary Debord, McIntyre Risner, Everett Hunter, Mary Moore or Ivan Debord, about whose ailments testimony had been given (Tr. Vol. I, 93-94). Dr. Joyce has done no study of the tipple's operation as the basis of her "opinion" (Tr. Vol. I, 95). She also testified that her only knowledge of coal tipples was what she gained from seeing three tipples as she drove past them on the road. In answer to the question "Are you familiar with the operation of a coal tipple generally?", she answered:

"Well, by traveling by it on the way to the clinic, I go by the Island Creek one, which is a big place. I've seen the Dinwood one from the road at Martin. There's one at Allen between—which I pass on my way into Prestonsburg from home." (Tr. Vol. I, 94).

Dr. Joyce's description of her experience with coal tipples would hardly qualify her as an expert in the subject of tipples or the affect of their operations.

Dr. Joyce has had no independent knowledge of the medical condition of any person complaining to have an ailment in this matter, nor did she have any independent knowledge of either the Dinco tipple or of any tipple on which to base an opinion. With no independent knowledge on which to base an opinion, she did not have an opinion, expert or otherwise. Taken most favorably, her testimony amounts to nothing more than a tipple, not necessarily the tipple in question, might emit sufficient amounts of dust to aggravate at least some of the conditions which the witnesses claim that they or members of their families have. Her testimony is too speculative to amount to a showing of a substantial injury that would require a denial of the stay.

A stay of the Court's order in this matter would not cause any harm, substantial or otherwise, to the public interest.

The petitioners seem to imply that their interest and the public interest is one in the same. It is, of course, not the same. The petitioners have all intervened in this matter pursuant to the provisions of 33 CFR 4.1110(c)(2) which allows one to come into a proceeding to assert his own interest which is not otherwise protected by the parties in the proceeding. See also 43 CFR 4.1110(d)(2). Except for the claim of harm to the petitioners, there has been no genuine claim in this matter of any harm at all. If the public interest is viewed as something more than the personal interest of these sixteen petitioners, then at no time in this proceeding has there been any claim of a harm to the public interest. All enforcement of the Act itself would not be enjoined as was the case in Va. Surface Min. & Reclamation Ass'n v. Andrus, 604 F.2d 312 (4th Cir. 1979). Only these parties now before the Court would be affected by either a grant or denial of a stay. The public would not be affected.

It is not sufficient to reason in a circular fashion that the Act was adopted by Congress to protect the public, and therefore, whenever a question arises under the Act, a stay must be denied to protect the public interest. The Act operates through specific requirements and it cannot be invoked in the public interest, except through attention to and application of those specific requirements. The Act cannot be used as a mere shibboleth to promote an otherwise unsupported claim.

Dinco has applied for a stay pursuant to FRCP 62. It has applied for a stay pursuant to that provision out of caution. If, however, the provisions of 30 USC 1276(c)(Section 526(c) of the Act) does apply to the issuance of a stay in the circumstances of this case, it specifies that the harm to any other interested person or to the public "...will not adversely affect the public health or safety or cause significant or imminent environmental harm to land, air or water resources." 30 USC 1276(c)(3). All parties have been heard on this issue (Tr. Vol. I), and Dinco has met all elements of the test provided by 30 USC 1276(c).

The "imminent danger" which must be found to prevent the issuance of a stay under that provision has been defined by the Secretary of the Interior through the Interior Board of Surface Mining Appeals in Claypool Construction Co., Inc. 2 IBSMA 81, 87 I.D. 168 (1980), and White Winter Coal, Inc., 1 IBSMA 305, 86 I.D. 675 (1979).

In the Claypool and White Winter cases, the violation involved was a failure to obtain the requisite permits. In this case, the only violation alleged to have occurred is likewise the failure to have obtained a permit for which certain waivers are a prerequisite. The Interior Board of Surface Mining Appeals held in both the Claypool and White Winter cases that operation without having obtained a permit does not constitute any "imminent danger" which would require the cessation of the operation in question pending the outcome of the proceedings on the matter.

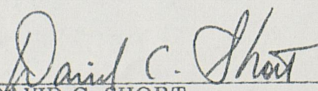
Claypool Construction Co., Inc., supra, requires that "imminent harm" be not merely speculative but that it be susceptible of objective observation and measurement.

In this case, there is no "imminent harm". There have been no objective observations or measurements. There have only been allegations that there are emissions of an unspecified amount occurring with an uncertain frequency. Dinco has never been charged with violating any emission standard of any state or federal agency (Tr. Vol. I, 101-103, 118). The bare assertions on which the petitioners rely for their claim of harm of some kind are not uncontroverted. Persons who live near the tipple testified that the conditions which the petitioners claim do not exist. (See testimony of Charles Stumbo at Tr. Vol. I, 137-145, Christine Adams, Tr. Vol. I, 145-151, and Fred Bishop, Tr. Vol. I, 153).

The object of a stay is to protect the status quo pending the appeal. Gilley v. U.S., 649 F.2d 449 (6th Cir. 1981); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

In order to preserve the status quo and to prevent irreparable harm to Dinco and because there is a substantial likelihood that Dinco will prevail on appeal, and because no substantial harm would occur to any other party or to the public, Dinco respectfully moves the Court for these reasons and all the reasons stated above to stay the execution of the judgment entered herein on the 29th day of September, 1982.

Respectfully submitted,

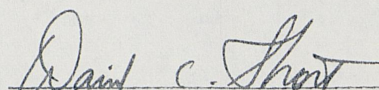


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COAL SALES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Application for Stay was served by mail, postage pre-paid this 28th day of October, 1982, on Hon. David Rubinstein, Appalachian Research and Defense Fund of Kentucky, Inc., 205 North Front Street, Prestonsburg, Kentucky 41653, Hon. Thomas J. Fitzgerald, Appalachian Research and Defense Fund of Kentucky, Inc., 630 Maxwellton Court, Lexington, Kentucky 40508, Hon. Robert Jordan, P.O. Box 474, Inez, Kentucky 41224, Attorneys for Petitioners, and Hon. Jane Graham, Federal Building, Lexington, Kentucky 40507, Attorney for Defendant, James G. Watt.



COUNSEL FOR DEFENDANT,
DINCO COAL SALES, INC.

reason for refusing employment was unrelated to the conditional nature of the offer. And if Sendejas knew of the union-security provisions of the AFL contract and if this was his reason for refusing employment, it is hard to see why he did not so testify. While there might be doubt if the matter were left here, Sendejas further testified: " * * * if he would have called me before then I would have went * * *. I was already working, and I thought I was pretty well off where I was at." Thus we have Sendejas' express testimony that he would have accepted the offer had he not already obtained satisfactory employment. We think this evidence as a whole is inconsistent with the conclusion that Sendejas refused employment on account of the implicit condition in the offer. The cases cited by the Board are distinguishable. *N. L. R. B. v. Cowell Portland Cement Co.*, 9 Cir., 148 F.2d 237, 245, certiorari denied 326 U.S. 735, 66 S.Ct. 44, 90 L.Ed. 438; *Eagle-Picher Mining & Smelting Co. v. N. L. R. B.*, 8 Cir., 119 F.2d 903, 914; *N. L. R. B. v. National Motor Bearing Co.*, 9 Cir., 105 F.2d 652, 658-659. Sendejas is entitled only to be made whole for loss of pay from the time of the discrimination to the time of respondent's offer of reinstatement.

[11,12] The final questions concern respondent's application for leave to adduce additional evidence. The evidence pertains in part to the alleged Communist membership of Local 576 officials, the failure of such officials to file non-Communist affidavits with the Board, and certain unfair labor practice proceedings brought against Local 576. This evidence is irrelevant to any issue in the case. The remainder of the evidence is to the effect that after the hearing and issuance of the intermediate report respondent employed or offered to employ persons ordered reinstated by the Board. Such facts run to the question of compliance and are relevant only in post-decree proceedings. *N. L. R. B. v. Mexia*

7. Respondent in its brief argued that the quarterly basis or Woolworth formula for computing back pay which was prescribed by the Board's order was not sanctioned by the Act. After respondent had written

Textile Mills, 339 U.S. 563, 567-569, 70 S.Ct. 826, 94 L.Ed. 1067; *N. L. R. B. v. Swift & Co.*, 8 Cir., 129 F.2d 222, 224.

Respondent's application for leave to adduce additional evidence is denied. The petition for enforcement will be granted, but with modification as to the employee Sendejas in accordance with this opinion. The Board may submit an amended decree.



**HAMILTON WATCH CO. v. BENRUS
WATCH CO., Inc.**

No. 283, Docket 22736.

United States Court of Appeals
Second Circuit.

Argued June 2, 1953.

Decided June 30, 1953.

Plaintiff corporation brought action under the Clayton Act to restrain corporate defendant from acquiring additional shares of plaintiff's stock, and to divest itself of shares previously acquired upon the ground that purchase of the shares might substantially lessen competition in the line of commerce. The United States District Court for the Southern District of Connecticut, Carroll C. Hinkle, J., 114 F.Supp. 307, granted temporary injunction enjoining defendant from voting the shares of stock pending full hearing on the matter and defendant appealed. The Court of Appeals, Frank, Circuit Judge, held that plaintiff had raised sufficient question to permit the issuance of a temporary injunction until a more mature deliberation upon the matter could be had upon full hearing.

Affirmed.

1. Injunction ⇨136(1)

In order to justify the issuance of a temporary injunction it will ordinarily be enough that plaintiff has raised question

its brief the validity of this formula was upheld in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 73 S.Ct. 287, as respondent conceded in oral argument.

HAMILTON WATCH CO. v. BENRUS WATCH CO.

Cite as 206 F.2d 738

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going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.

2. Injunction $\Rightarrow$ 132

A "preliminary injunction" is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.

See publication Words and Phrases, for other judicial constructions and definitions of "Preliminary Injunction".

3. Monopolies $\Rightarrow$ 24(7)

In action to restrain defendant corporation from acquiring additional shares of corporate plaintiff's stock, trial court's determination, justified by evidence, that acquisition of control of plaintiff by defendant would substantially lessen competition in commerce and that purchase of shares by defendant was not made solely for investment but with purpose of obtaining control justified temporary injunction, since hardship that might be caused to plaintiff by failure to grant a preliminary injunction outweighed harm which would result to defendant from temporary injunction. Clayton Act, § 7, 15 U.S.C.A. § 18.

Thomas G. Meeker, New Haven, Conn., Stephen Ailes and Richard A. Whiting, Washington, D. C. (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn., Steptoe & Johnson, Washington, D. C., and Richard J. Blakinger, Lancaster, Pa., of counsel), for plaintiff-appellee.

Wiggin & Dana, New Haven, Conn., Proskauer, Rose, Goetz & Mendelsohn, New York City (Joseph M. Proskauer, Milton C. Weisman, J. Alvin Van Bergh

and Eugene Eisenmann, New York City, of counsel), for defendant-appellant.

Before SWAN, Chief Judge, and CLARK and FRANK, Circuit Judges.

The complaint of Hamilton Watch Company alleges that, in violation of Section 7 of the Clayton Act, 15 U.S.C.A., Section 18,¹ the defendant, Benrus Watch Company, Inc., has bought a large block of shares of the common (voting) stock of Hamilton, a competitor, for the purpose of obtaining control of Hamilton, and that, should Benrus succeed in achieving such control, it would control so considerably larger a percentage than it had previously of the interstate industry in which both companies are competitively engaged as to substantially lessen competition in a "line of commerce". The complaint prayed, *inter alia*, that Benrus be required to divest itself of all its Hamilton shares and be restrained from acquiring additional Hamilton shares; and that, pending final disposition of the suit, a preliminary injunction issue enjoining Benrus from voting its Hamilton shares. Plaintiff moved for a preliminary injunction. It filed affidavits, and defendant filed counteraffidavits. Plaintiff, then, at a hearing on the motion before the district judge, introduced oral testimony through two of its officers who appeared as witnesses; defendant called no witnesses. The trial judge, having filed findings of fact and legal conclusions, entered an order enjoining defendant, pending a trial and a final order, from voting such Hamilton stock, provided defendant gave bond in the sum of \$10,000. Defendant has appealed from this order.

FRANK, Circuit Judge.

The trial judge's opinion, findings of fact and conclusions of law are reported in D.C., 114 F.Supp. 307. As the facts are

of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * *

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

1. This section reads in part as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section

there fully set forth, we do not repeat them in detail.

[1] 1. Defendant argues that it appears unmistakably that defendant did not violate Section 7 of the Clayton Act. Were that true, we would now know that plaintiff could have no final relief, and that therefore the granting of the preliminary injunction was an obvious error; indeed, we might direct dismissal of the complaint. But we think that the present record sufficiently discloses that the court, after a trial, may be required to conclude that Benrus was not innocent of a Section 7 violation. To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i. e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.²

2. See, *e. g.*, *City of Newton v. Levis*, 8 Cir., 79 F. 715; *Pratt v. Stout*, 8 Cir., 85 F. 2d 172, 176-177 and cases there cited; *Doernhoefer v. United States*, 8 Cir., 190 F.2d 358, 353, 361; *Wing v. Arnall, Em. App.*, 198 F.2d 571, 574; *City of Louisville v. Louisville Home Telephone Co.*, 6 Cir., 279 F. 949, 956; *Fordson Coal Co. v. Maggard*, 6 Cir., 2 F.2d 708; *Harriman v. Northern Securities Co.*, C.C. N.J., 132 F. 464, 475-478, and cases there cited; see also note 10 *infra*.

3. Cf. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162; *United States v. Oregon State Medical Society*, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978; *Goshen Manufacturing Co. v. Hubert A. Myers Manufacturing Co.*, 242 U.S. 202, 37 S.Ct. 105, 61 L. Ed. 248; *Swift & Co. v. United States*, 276 U.S. 311, 326, 48 S.Ct. 311, 72 L.Ed. 587; *United States v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894; *United States v. Aluminum Co. of America*, 2 Cir., 148 F.2d 416, 448.

Section 7 refers to the acquisition of "the whole or any part of the stock".

Without resting our opinion on them, we note the following facts: There are 387,109 outstanding voting—*i. e.*, common—shares of Hamilton. When there

As here the trial judge's findings derived from evidence presented at a preliminary hearing, they may perhaps be altered after a full-dress one. Yet, although we recognize them as necessarily tentative, they have such support in the oral testimony that we cannot possibly declare them "clearly erroneous"; we must therefore accept them on this appeal. Nor, on the basis of those findings, can we hold that the judge erred in temporarily holding, in effect, as follows: (a) The acquisition of control of Hamilton by Benrus very probably would substantially lessen competition in "a line of commerce" within the meaning of Section 7. (b) The purchases by Benrus of Hamilton shares were not made "solely for investment" but for the primary purpose of obtaining such control; had this purpose not been frustrated by action of Hamilton's management, Benrus would successfully have carried it out. (c) Those purchases therefore violated Section 7. (d) Purchases thus unlawfully made do not cease to be unlawful—so as to preclude an order of divestment—because the purpose is balked.³

were sure to be in the voting trust but 45,478, Benrus had acquired about 70,000. When the preliminary injunction issued, Benrus had 92,000; there were 154,908 sure to be in the voting trust, and about 139,000 in other hands of which enough were friendly to the management to give it, together with the shares in the voting trust, a majority. However, it does not appear that, except for the injunction, Benrus might not have gained a majority by buying all or most of the 139,000 shares and/or all or most of the 34,900 non-voting preferred shares each of which at the holder's option is convertible into four shares of (voting) common.

In his opinion, the trial judge said: "In the situation here, I incline to the view that the acquisition if made only with intent to obtain minority representation constituted a violation of Section 7: having in mind the probable effect on the relevant 'line of commerce' of the competitive practices of these two competitors and the practical considerations that confront the board of directors of any corporation in a competitive enterprise, I think it fairly inferable that minority representation, because of the opportunity thereby afforded to persuade

Although conclusion Section 7 violations—*F. T. C. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 907, 164

to compel Hamilton within the peak & chase, 27 minority railroad would provide situation restricted in right appeal, we whether, I correct.

4 See 64 H. 52 COLLEGE No. 1191, 11.

5 Sen. Rep. N. (1950), de reads in pa "General Tests of the

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Although we now indulge in no ultimate conclusion, we believe the amendment of Section 7 in 1950 certainly casts doubt on decisions—including *International Shoe Co. v. F. T. C.*, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431, and *United States v. Columbia Steel Co.*, 334 U.S. 495, 68 S.Ct. 1107, 92

L.Ed. 1533—interpreting that section as it stood previously.⁴ The Senate Committee Report stated that the intent of the amendment was "to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding."⁵ In-

to compel a relaxation of the full vigor of Hamilton's competitive effort would come within the ban of Section 7. In *Chesapeake & Ohio Railway Company Purchase*, 271 I.C.C. 5, it was held that even minority representation by a petitioning railroad on the board of a competitor would probably so disturb the competitive situation that the petitioner was restricted in the exercise of the electoral right appurtenant to its stock." On this appeal, we need not and do not consider whether, in this respect, the judge was correct.

4. See 64 Harv.L.Rev. (1951) 1212, 1213; 52 Col.L.Rev. (1952) 769, 773; H.Rep. No. 1191, 81st Cong., 1st Sess., pp. 10-11.

5. Sen.Rep.No.1775, 81st Cong., 2d Sess. (1950), dealing with the amendment, reads in part (pp. 4-5) as follows:

"General History of H.R. 2734 and Tests of the Effect on Competition."

"The present wording of H.R. 2734 is intended to cover more than is prohibited by the Sherman Act and yet to stop short of the stated test of the present section 7 of the Clayton Act. Section 7 of the Clayton Act was originally written to reach effects beyond those prohibited by the Sherman Act, extending to the reduction of the competition which had previously existed between the acquiring and acquired companies. This latter feature, namely the effect on competition between the acquiring and acquired corporations, has been regarded as the distinctive 'Clayton Act test,' insofar as it relates to section 7 of the Act.

"The purpose of H.R. 2734 was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act. But here a problem presented itself. While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies. The present wording of H.R. 2734, but beginning with H.R. 515, introduced on April 24, 1947, represents an attempt to solve this problem. Several steps have been taken in order to achieve a solution.

"Principal among them was the deletion of any reference to the effect on competition between the acquiring and acquired firms. The first versions of the bill to amend section 7 were S. 615, introduced on February 26, 1945, and its companion measure, H.R. 4519, introduced on October 29, 1945. These bills simply extended the present wording of the Clayton Act to cover acquisitions of assets. The test of competition between the acquiring and acquired firms was left in the bill and made applicable to assets, as well as to stock. However, in the course of hearings on this bill in the House Judiciary Committee, this wording was objected to on the grounds that it might be so construed as to prevent all acquisitions between competitors. Accordingly, subsequent versions of the bill, including the present H.R. 2734, deleted any reference to the effect on competition between the acquiring and acquired firms.

"Another step which had the same general effect is also to be found in the legislative history of the present bill. As the bill originally stood, it was to be violated if, among other things, competition was substantially lessened ' * * * in any community * * * of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence, the word 'community' was dropped from the subsequent versions of the bill.

"The committee believe that the excessive sweep that has been given to section 7 of the present Clayton Act by these two features of that section has been largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test. By eliminating the provisions of the existing section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts

terference at an early stage, if possible, seems the paramount aim.

[2] The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness. It serves as an equitable policing measure to prevent the parties from harming one another during

the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began.

For the foregoing reasons, we cannot hold that the judge should have dismissed the complaint on the merits.

[3] 2. There remains the question whether the judge—assuming, as he did, for the time being, that the complaint was not without merit—went outside the bounds of his discretion in ordering a preliminary injunction. We read Section 15 of the Clayton Act, 15 U.S.C.A. § 20,⁶ as declaratory of the usual rule relative to the

of the Clayton Act, is to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding.

"The type of problem to which this bill is addressed was described by the Federal Trade Commission in these words: 'Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them. . . . Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival. . . . (The Merger Movement, A Summary Report, pp. 6-7).'

"To make clearer the intent to give the bill broad application to acquisitions that are economically significant, its wording has been broadened in certain respects. Thus, the phrase 'in any section of the country' was made applicable to both the lessening of competition and the tendency to create a monopoly. As the bill originally stood, it applied only to the former. Hence, an acquisition is not to be interpreted merely in terms of either its

effect on competition or its tendency to create a monopoly 'in the Nation as a whole.' The act is to be violated if as a result of an acquisition, there would be a substantial lessening of competition or a tendency to create a monopoly in any section of the country.

"Similarly, the phrase 'in any line of commerce,' was also made applicable to both as above. As the bill originally stood, the phrase applied only to the tendency to create a monopoly. It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.

"These various additions and deletions—some strengthening and others weakening the bill—are not conflicting in purpose and effect. They merely are different steps toward the same objective, namely, that of framing a bill which, though dropping portions of the so-called Clayton Act test that have no economic significance, reaches far beyond the Sherman Act."

6. So far as pertinent, 15 U.S.C.A. § 20 reads as follows:

"Injunctive relief for private parties, exception

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss of damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted to

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exercise of such discretion: The judge must consider whether irreparable harm is likely to result to plaintiff if *pendente lite* (i. e., "immediately")⁷ the injunction is denied, and against this harm he must balance the harm to defendant likely to result if the relief is granted. The "hardship plaintiff will suffer * * * may make interlocutory relief imperative where the same showing at a final hearing would not outweigh the hardship the defendant would suffer from a permanent injunction. Thus in view of the character and extent of the emergency presented, of the provisional and temporary character of the relief sought, of the probable period of its duration, and of the court's tentative opinion on the substantive issues involved, the factor of relative hardship is measured, on an

application for interlocutory injunction, with a different yardstick from that used at final hearing."⁸ Here no substantial harm from the injunction to defendant is perceptible; but the hardship to plaintiff, were there no injunction, would be very considerable.⁹ We agree with the trial judge that the private harm to plaintiff required as a condition of granting injunctive relief under Section 16 need not be at all the same as the public harm condemned by Section 7. In the light of the evidence before the judge and his findings not unreasonably derived therefrom, we hold that he surely did not "abuse" his discretion.¹⁰

Affirmed.

SWAN, C. J., concurs in the result.

courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *."

⁷ See Restatement of Torts, Section 938, comment d.

⁸ Restatement of Torts, Section 94, comment f.

⁹ See especially Findings Nos. 14, 47, 51, 53, 54, 55, 56.

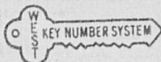
¹⁰ See, e.g., *All American Airways v. Village of Cedarhurst*, 2 Cir., 201 F.2d 273, 276; *Benson Hotel Corp. v. Woods*, 8 Cir., 168 F.2d 694, 696; *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815, 49 S.Ct. 256, 73 L.Ed. 972.

The *Ohio Oil* case cites with approval *Love v. Atchison T. & S. F. Ry. Co.*, 8 Cir., 185 F. 321, 331-332, where the court said: "But the granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and where, as in the case in hand, that court has not departed from the equitable principles established for its guidance, its orders may not be reversed by the appellate court, without clear proof that it has abused its discre-

tion. * * * An appeal from an order granting or refusing an interlocutory injunction does not invoke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion? * * * The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irreparable if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may, be indemnified by a bond, the injunction usually should be granted."

Court for further proceedings not inconsistent with this opinion.

So ordered.



WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION, Appellant,

v.

HOLIDAY TOURS, INC., et al.

No. 77-1379.

United States Court of Appeals,
District of Columbia Circuit.

July 5, 1977.

The United States District Court for the District of Columbia, Aubrey E. Robinson, J., granted transit commission a permanent injunction and, on motion, stayed its injunction pending appeal; transit commission filed motion to vacate the stay. The Court of Appeals, Leventhal, Circuit Judge, held that: (1) a court, when confronted with a case in which the other three factors listed in *Virginia Petroleum Jobbers Association v. FPC*, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958), strongly favor interim relief, may exercise its discretion to grant a stay pending appeal if the movant has made a substantial case on the merits; court is not required to find that ultimate success is a mathematical probability and may grant stay even though its own approach may be contrary to movant's view of merits; (2) the necessary "level" or "degree" of possibility of success, in determining propriety of stay pending appeal, will vary according to the court's assessment of other factors; and (3) notwithstanding that a more searching inquiry into merits might compel tentative conclusion that appellant was less likely than not to prevail on merits, in light of balance of equities, fact that case was a difficult one warranted stay of permanent

injunction restraining operation of a motor coach sight-seeing service without a certificate of public convenience and necessity.

Motion to vacate order staying permanent injunction denied.

1. Federal Courts ⇌ 684

Injunction ⇌ 151

Factors involved in determination of motion to stay an administrative order also apply to motions for preliminary injunctions and motions for stays of district court orders pending appeal.

2. Federal Courts ⇌ 685

Destruction of business in current form as a provider of bus tours, together with absence of harm to other parties or public interest from issuance of stay, militated in favor of grant of a stay, pending appeal, of permanent injunction restraining operator of tour service from operating a motor coach sight-seeing service without a certificate of public convenience and necessity.

3. Federal Courts ⇌ 685

In the absence of substantiation of severe economic impact, the mere existence of competition is not irreparable harm as factor in favor of stay of injunction pending appeal.

4. Federal Courts ⇌ 685

A court, when confronted with a case in which the other three factors strongly favor interim relief, may exercise its discretion to grant a stay pending appeal if the movant has made a substantial case on the merits; court is not required to find that ultimate success is a mathematical probability and may grant stay even though its own approach may be contrary to movant's view of merits. Fed.Rules App.Proc. rules 8, 18, 28 U.S.C.A.

5. Federal Courts ⇌ 685

The necessary "level" or "degree" of possibility of success, in determining propriety of stay pending appeal, will vary according to the court's assessment of other factors. Fed.Rules App.Proc. rules 8, 18, 28 U.S.C.A.

6. Federal Courts ⇐684

Tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained. Fed.Rules App. Proc. rules 8, 18, 28 U.S.C.A.

7. Federal Courts ⇐685

Notwithstanding that a more searching inquiry into merits might compel tentative conclusion that appellant was less likely than not to prevail on merits, in light of balance of equities, fact that case was a difficult one warranted stay of permanent injunction restraining operation of a motor coach sight-seeing service without a certificate of public convenience and necessity. Fed.Rules App.Proc. rules 8, 18, 28 U.S.C.A.

On Motion to Vacate Stay (Civil Action 76-1500).

Gregory P. Barth, Gen. Counsel, and Gregory M. Murad, Asst. Gen. Counsel, were on the motion for appellant.

John D. Grad and Philip J. Hirschkop, Alexandria, Va., were on the opposition to the motion for appellees.

Before WRIGHT, LEVENTHAL and ROBB, Circuit Judges.

LEVENTHAL, Circuit Judge:

The District Court granted the Washington Metropolitan Area Transit Commission a permanent injunction restraining Holiday Tours from operating a motor coach sightseeing service without a certificate of public convenience and necessity. Then, on motion of Holiday Tours, the District Court stayed its injunction pending appeal. We deny the Commission's motion to vacate the District Court's stay, and in doing so find it necessary to refine the discussion in *Virginia Petroleum Jobbers Association v. FPC*, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958).

1. Although *Virginia Petroleum Jobbers* involved a motion to stay an administrative order, the factors enumerated therein also apply to motions for preliminary injunctions and mo-

On the merits, this appeal turns on the proper interpretation of *Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission*, 125 U.S.App.D.C. 336, 372 F.2d 401 (1967), in which we affirmed the Commission's ruling that Holiday Tours was not entitled to a certificate of public convenience and necessity under the "grandfather clause" of the pertinent statute. In our concluding paragraph of that opinion, we stated (at 402):

Finally, we note that the Commission concedes that appellant may continue to operate in the future a sightseeing business by limousine, as well as with buses and drivers supplied by licensed bus operators.

This language is central to the current dispute because Holiday Tours, which was primarily a limousine tour service when our earlier opinion was rendered, has recently transformed itself into primarily a bus tour service. Holiday Tours contends that this conversion is authorized by the quoted language so long as the buses are rented from licensed operators rather than owned by Holiday Tours itself. The Commission, however, argues that the language is merely the court's observation that no certificate is required if Holiday Tours occasionally rents buses to accommodate additional customers as an adjunct to its primary business of providing limousine tours. The Commission emphatically rejects an interpretation which sanctions Holiday Tours' conversion from a limousine to a bus tour service.

[1] The District Court adopted the Commission's interpretation but stayed the permanent injunction pending appeal. Although the District Court did not make detailed findings, it recited that all four of the *Virginia Petroleum Jobbers* factors favored a stay.¹

These factors are by now familiar to both the bench and bar in this Circuit.

tions for stays of district court orders pending appeal. See, e. g., *A Quaker Action Group v. Hickel*, 137 U.S.App.D.C. 176, 421 F.2d 1111 (1969).

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?

Virginia Petroleum Jobbers Ass'n, supra, at 925.

[2, 3] Despite the Commission's protestations to the contrary, the final three factors enumerated above clearly favored the District Court's grant of a stay. The harm to Holiday Tours in the absence of a stay would be its destruction in its current form as a provider of bus tours.² In contrast to this irreparable harm, there is little indication that a stay pending appeal will result in substantial harm to either appellee Commission or to other tour bus operators.³ As to harm to the public interest, this is not a case where the Commission has ruled that the service performed by appellant is contrary to the public interest. Indeed for all that the record discloses, appellant might obtain a certificate, perhaps not precisely for the operation it prefers, if it made application. The interest of the Commission and of the riding public is largely the same as that of the general public in having legal questions decided on the merits, as correctly and expeditiously as possible. But the question is whether there is a further interest, that precludes maintaining the status

2. The destruction of a business is, of course, an essentially economic injury. It is not, however, one of the "mere" economic injuries which under *Virginia Petroleum Jobbers* are insufficient to warrant a stay. The economic injuries disparaged in that case were the necessary expenditure of funds pending appeal and the temporary monetary losses for which "adequate compensatory or other corrective relief will be available at a later date." 259 F.2d at 925.

quo while the merits are being decided on appeal.

In this context, Holiday Tours was undoubtedly not entitled to a stay on a showing "that it is likely to prevail on the merits of its appeal."⁴ Implicit in the Commission's argument against the stay is the view, commonly shared by litigants interpreting *Virginia Petroleum Jobbers*, that a stay is never appropriate unless the movant can show that success on appeal is "probable." Adherents of this view maintain that a lesser showing, of, say, a chance of prevailing that is only fifty percent or less is insufficient even though the "balance of equities," as determined by a consideration of the other three factors, clearly favors a stay.

[4, 5] Although this approach adopts a linguistically permissible interpretation of *Virginia Petroleum Jobbers*, it is mandated only if one assumes that the Court was using language in an exceedingly precise, technical sense. In light of the unnecessarily harsh results sometimes engendered by this approach, we decline to entertain this assumption. Instead, we hold that under *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

3. The Commission has alleged that the stay "seriously undermined . . . the stability of the motor coach tour service industry throughout the Metropolitan District." It is not clear whether this is intended as an outright allegation of harm to other tour bus operators. If so, this allegation is entirely unsubstantiated. The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact.

4. *Virginia Petroleum Jobbers, supra* at 925.

This approach is reflected in the *Virginia Petroleum Jobbers* opinion at 925, where the court wrote:

But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.

The view that a 50% plus probability is required by that opinion, although frequently encountered, is thus contrary to both the language and spirit of that opinion.

Our holding is generally in accord with the movement in other courts away from a standard incorporating a wooden "probability" requirement and toward an analysis under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors.⁵ In a leading case, Judge Frank, speaking for the Second Circuit, stated:

To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i. e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits: so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (footnote omitted). More recently, the same court declared:

One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam). To the same effect, see also *Costandi v. AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941 (9th Cir. 1972).

We believe that this approach is entirely consistent with the purpose of granting interim injunctive relief, whether by preliminary injunction or by stay pending appeal. Generally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit. An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Another weakness of adherence to a strict "probability" requirement is that it leads to an exaggeratedly refined analysis of the merits at an early stage in the litigation. If, to use Judge Frank's phrase, there exists "a fair ground for litigation and thus for more deliberative investigation," a court should not be required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. The endeavor may be necessary in some circumstances—when interim relief would cause substantial harm to another party or person, or when the balance of equities may come to require a more careful heft of the merits. However, it is not required in all cases.

[6] The doctrine thus stated is congruent with Rules 8 and 18 of the Federal Rules of Appellate Procedure, which state that motions for stay "must ordinarily be made in the first instance" to the district court or agency which issued the challenged order. Prior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question

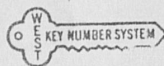
5. See generally 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948 (1973).

and when the equities of the case suggest that the status quo should be maintained.

[7] Applying this standard to the instant motion, we cannot say that the District Court abused its discretion in staying its permanent injunction. Although a more searching inquiry into the merits might compel the tentative conclusion that Holiday Tours is less likely than not to prevail on the merits, we have satisfied ourselves that the case is a difficult one warranting plenary review. In light of the balance of equities in this case, that suffices to sustain the stay.

The Commission's motion to vacate the District Court's order staying its permanent injunction is denied.

So ordered.



NATIONAL TANK TRUCK CARRIERS,
INC., Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and United States of
America, Respondents,

Traffic Executive Association—Eastern
Railroads, and Western Railroad
Association et al., Intervenor.

No. 76-1522.

United States Court of Appeals,
District of Columbia Circuit.

Argued June 8, 1977.

Decided July 12, 1977.

Review was sought of orders of Interstate Commerce Commission dealing with the issuance of special certificates for motor service carriers authorized by special certificates to transport waste products for recycling in furtherance of recognized pollution

control programs. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that evidence sustained ICC findings that existing carriers would not or could not meet the demand and that proposed service would not result in a material diversion of business from existing motor or rail carriers.

Affirmed.

1. Commerce ⇐108

Evidence that existing carriers had not furnished Interstate Commerce Commission with sufficient data upon which it could be found that proposed motor carrier shipments of recyclable materials would be performed by existing carriers and evidence that need for transportation would grow substantially and that existing carriers could not or would not completely meet that need was sufficient to sustain ICC determination that existing carriers could not provide needed transportation services for recyclable waste materials.

2. Commerce ⇐85.28(4)

Requirements of Interstate Commerce Commission for detailed description of pollution control program and letter of support from sponsors of the program as a prerequisite for issuance of special certificate to motor carriers for carrying recyclable waste products were sufficient to insure that traffic moving pursuant to special certificate would not be diverted from existing modes of transportation.

3. Commerce ⇐85(2)

Even if Interstate Commerce Commission's regulations worked to the disadvantage of a particular segment of the trucking industry more than others, that fact would not change generalized nature or affect the validity of ICC regulations relating to special certificates for motor carriers transporting recyclable waste products.

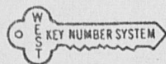
4. Carriers ⇐8

Evidence that scrap to be transported pursuant to special certificate for carriers of recyclable waste products was less valuable than the industrial waste and processed scrap currently handled by railroads was

present practice of opening attorney mail addressed to inmates, with particular reference to whether letters are read and whether copies are made for subsequent examination; (2) whether such correspondence is handled at a place and in such a manner that it is subject to observation by others; (3) what basis, if any, there is for inmate apprehension that their correspondence from attorneys is being read; (4) whether it is reasonably practicable for the warden to permit any form of random observation of the opening procedure to quiet fears that information is being gleaned from such correspondence; and (5) whether the search for contraband can be accomplished in a less intrusive manner by use of electronic or photographic equipment or even by examination of configuration and thickness of envelopes. After resolving factual questions such as these and others that may occur to counsel or to the court, the district judge should then determine whether or not it is reasonably necessary in order to protect the inmates' Sixth Amendment right to counsel to alter the present practice of handling incoming mail from attorneys to assure that contraband is not introduced into the prison.⁵

Our recitation of the decisions of other circuits is for the guidance of the district judge. Difficult questions such as this one cannot be decided rationally in a vacuum. The correct decision will depend upon the facts and the feasible alternatives, and we therefore express no opinion as to what, if anything, ought to be done by way of reconciling the right to counsel with the right of the State to assure the internal security of the institution.

REVERSED AND REMANDED.



5. Because the question is not briefed, we do not decide whether the convening of a three-judge court will be necessary. But we hold that a single district judge can conduct the evidentiary hearing, and thereafter decide whether he

BLACKWELDER FURNITURE COMPANY
OF STATESVILLE, INC.,
Appellant,

v.

SEILIG MANUFACTURING COMPANY,
INC., Appellee.

No. 76-2288.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 6, 1976.

Decided Feb. 16, 1977.

In action alleging that termination of plaintiff's furniture dealership by defendant violated the antitrust statutes, the United States District Court for the Western District of North Carolina, at Statesville, Woodrow W. Jones, C. J., refused to issue preliminary injunction, and plaintiff appealed. The Court of Appeals, Craven, Circuit Judge, held that District Court erred in holding that plaintiff had to first show "likelihood of success" in order to be entitled to preliminary relief and in treating factors relevant to grant of preliminary injunction as a defense in depth to be overcome, each and every one, before entitlement to preliminary relief should be decreed; that the correct trial court standard for interlocutory injunctive relief is the balance-of-hardship test; the first step is to balance the likelihood of irreparable harm to plaintiff against likelihood of harm to defendant, and if a decided imbalance of hardship should appear in plaintiff's favor, likelihood-of-success test is displaced by formulation that it is ordinarily enough that plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation; that the factors to be considered

should request the convening of a three-judge court depending upon his interpretation of the recent act repealing 28 U.S.C. § 2281 and his view of the merits.

Reversed and remanded.

Since finding facts from conflicting affidavits on application for preliminary injunction is not always possible, district court may in its discretion require live testimony where everything turns on what happened and that is in sharp dispute. Fed. Rules Civ.Proc. rules 52(a), 65(d), 28 U.S.C.A.

A judge's discretion on application for interim injunctive relief is not boundless and must be exercised within the applicable rules of law or equity.

Review of lower court's application of the law in ruling on application for preliminary injunction is not limited by the "clearly erroneous" rule, and where decision below was entered on conflicting affidavits and agreed facts, ordinary deference to district court's findings of fact is less appropriate. Fed.Rules Civ.Proc. rule 23(a)(7), 28 U.S.C.A.

It is sufficient to grant motion for preliminary injunction if the court is satisfied that there is a probable right and probable danger and that the right may be defeated unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant. Fed. Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

Federal Courts 685

Standard requiring, inter alia, a strong showing of probable success on the merits is standard appropriately to be applied to the question of issuance of an appellate stay pending review of an administrative order or a trial court decision that dealt with the merits of the controversy, and is not one for

use in the trial court on application for preliminary injunction. Fed.Rules Civ. Proc. rule 65(a), 28 U.S.C.A.

The trial court standard for interlocutory injunctive relief is the balance-of-hardship test whereunder, if serious issues are before the court, it is considered a sound idea to maintain the status quo ante litem provided that can be done without imposing too excessive an interim burden on the defendant. Fed.Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

On application for preliminary injunction, district court erred in holding that plaintiff had to first show "likelihood of success" in order to be entitled to preliminary relief; first step should be to balance the likelihood of irreparable harm to plaintiff against the likelihood of harm to defendant, and if a decided imbalance of hardship should appear in plaintiff's favor, the likelihood-of-success test is displaced by formulation that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberate investigation. Fed.Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

On application for preliminary injunction, the importance of probability of success on the merits increases as the probability of irreparable injury diminishes, and where the latter can be characterized as simply "possible," the former can be decisive, but even so it remains merely one "strong factor" to be weighed alongside both the likely harm to defendant and the public interest. Fed.Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

When a district court has before it a motion for preliminary injunction, although it may properly consider the four factors of probability of success on the merits, irreparable injury to plaintiff, harm to other interested parties, and public interest, the

two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to defendant with a decree, and if that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented, and plaintiff need not show a likelihood of success, but the public interest should always be considered. Fed.Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

10. Injunction ⇐136(3)

Insofar as a trial court is concerned on motion for preliminary injunction, requirement of irreparable harm must be evaluated within the basic context of the balance-of-hardship test, and thus while "irreparability" may suggest some minimum of probable injury which is required to get the court's attention, the more important question is the relative quantum and quality of plaintiff's likely harm, as opposed to cost to defendant, and even a "possible" irreparable injury may suffice if there is a strong probability of success on the merits. Fed. Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

11. Injunction ⇐17

Since the factors to be considered on application for preliminary injunction are intertwined and each affects in degree all the others, it is error to treat the factors as a defense in depth to be overcome, each and every one, before entitlement to preliminary relief should be decreed. Fed.Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

12. Federal Courts ⇐870

In connection with denial of preliminary injunction against termination of plaintiff's furniture dealership, finding that plaintiff would suffer no irreparable harm, on the basis that any injury would be readily calculable and collectible, was clearly erroneous, as harm posed to plaintiff's general goodwill by inability to fill orders was not calculable.

13. Injunction ⇐136(3)

Irreparability of harm, for purposes of preliminary injunctive relief, includes the impossibility of ascertaining with any accuracy the extent of the loss. Fed.Rules Civ. Proc. rule 65(a), 28 U.S.C.A.

14. Monopolies ⇐24(7)

For purposes of interlocutory injunctive relief, there is public interest in preserving the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court, and that basic public interest is further enhanced where the private controversy may possibly vindicate public policy, as in the enforcement of federal antitrust laws. Fed.Rules Civ.Proc. rule 65(a), 28 U.S.C.A.

15. Monopolies ⇐24(7)

Where plaintiff, seeking preliminary injunction against termination of its furniture dealership, had pleaded a prima facie case of violation of antitrust statutes, had sufficiently shown that without preliminary relief it would be irreparably injured in that damage to its goodwill would be incalculable, and possible harm to defendant was negligible and easily indemnifiable by a bond, and since public interest lies in vindication of the antitrust laws, which expressly authorize interlocutory injunctive relief, preliminary injunction should issue. Fed. Rules Civ.Proc. rule 65(a), 28 U.S.C.A.; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, §§ 4, 5, 15 U.S.C.A. §§ 15, 16.

George L. Little, Jr. and Norwood Robinson, Winston Salem, N.C. (Douglas G. Eisele, Statesville, N.C., Hudson, Petree, Stockton, Stockton & Robinson, Winston Salem, N.C., Raymer, Lewis, Eisele & Patterson, Statesville, N.C. on brief), for appellant.

J. Melville Broughton, Jr., Raleigh, N.C. and Don G. Nicholson, Miami, Fla. (Broughton, Broughton, McConnell & Boxley, Raleigh, N.C., on brief), for appellee.

Before CRAVEN, BUTZNER and RUSSELL, Circuit Judges.

CRAVEN, Circuit Judge.

This is an appeal by Blackwelder Furniture Company of Statesville, Inc., from the refusal of the district court to issue a pre-

liminary injunction under Rule 65(a). Fed. R.Civ.P. 65(a). At the same time we heard the appeal, we considered a Rule 8 motion and granted a temporary injunction pending our decision on the appeal. Fed.R. App.P. 8. Blackwelder's complaint seeks treble damages and injunctive relief under the Clayton Act, 15 U.S.C. §§ 15 & 16, on the theory that a decision by Seilig Manufacturing Company, Inc., to terminate Blackwelder as an authorized dealer violated the federal antitrust statutes. For reasons to be stated, we think the district court applied incorrect principles in undertaking to exercise its discretion to grant or deny a preliminary injunction and further that the application of correct principles requires that a preliminary injunction issue, restoring Blackwelder to its status as a Seilig dealer pending trial on the merits.

I.

[1] Blackwelder contends that Seilig has violated Section 1 of the Sherman Act by combining to fix prices, rig retail territories, and oust a discounteer from the competitive market. 15 U.S.C. § 1. From affidavits and certain agreed facts, it seems fair to say Blackwelder will be able to offer competent evidence at trial tending to show the following:¹

Blackwelder was a successful distributor of Seilig furniture for over a decade; its purchases of Seilig furniture accounted for about 35% of its total purchases of "contemporary upholstered furniture"; Seilig was one of its top three lines of contemporary upholstered furniture; from January to June 1976, it ordered more than \$52,000 worth of furniture from Seilig. Part of Blackwelder's sales were to mail-order customers in the Washington, D. C. area, who took advantage of Blackwelder's discount prices, ranging up to 30% below Seilig's

suggested retail prices. Such potential customers often visit the showrooms of a local D. C. retailer, select a piece of furniture, and then place their order with Blackwelder—to the great displeasure of the local retailer. Blackwelder alleges that as a result Seymour Woodnick of W. J. Sloane's, a large D. C. retailer of Seilig furniture, threatened to see to it that Blackwelder lose its Seilig line unless it quit the D. C. market. While Woodnick denies the threat, he admits his sales personnel were greatly aggravated over time wasted on Blackwelder customers.

In April of 1974 Seilig's regional sales director, Jim Robinson, on the authority of Jerrold Wexler, Executive Vice President of Seilig, warned Blackwelder that because of pressure from D. C. dealers like Sloane's it would be forced to terminate Blackwelder's dealership unless it stopped sales in the D. C. area. Robinson denies the threat, but he admitted to having asked Blackwelder to reduce the customary number of its salesmen at the Seilig space at the upcoming High Point Furniture market lest they "irritate" Seilig salesmen from D. C. The threats are said to have been repeated.

On May 4, 1976, Seilig wrote Blackwelder that it would be terminated on June 1 because "it occasionally becomes necessary to make certain changes in a company's distribution policy in order to better develop a particular area." No other or more concrete reason was given. Despite Seilig's contention that it acted unilaterally and that some 300 other dealers were terminated at the same time, the names of those dealers and a comparison of their respective sales records with Blackwelder's were not furnished the court.

The district court, in denying Blackwelder's motion for interlocutory relief, relied

1. The district court opinion recites the allegations of the pleadings, affidavits and counter-affidavits but does not resolve conflicts. We observe sympathetically that Rules 52(a) and 65(d) require findings of fact, albeit tentative. We agree with Judge Friendly that finding facts from conflicting affidavits is not always possible and endorse the Second Circuit suggestion

that a perplexed district judge may in his discretion require live testimony "where everything turns on what happened and that is in sharp dispute." *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1204 (2 Cir. 1970). Here, both parties willingly joined in the battle of affidavits.

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on the fourfold equitable rule of thumb set forth in *Airport Comm. of Forsyth Co., N.C. v. CAB*, 296 F.2d 95 (4th Cir. 1961):

- 1) Has the petitioner made a *strong showing* that it is likely to prevail upon the merits?
- 2) Has the petitioner shown that without such relief it will suffer irreparable injury?
- 3) Would the issuance of the injunction substantially harm other interested parties?
- 4) Wherein lies the public interest?

296 F.2d at 96 (emphasis added). Accord, *First-Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481, 483 (4th Cir. 1970). It reasoned that a single adverse determination on any of the four questions would be fatal to the movant. The court found first that "neither side" had made a "strong showing" that Seilig's actions were either collaborative or unilateral for purposes of the Section 1 requirement of a contract, combination or conspiracy. 15 U.S.C. § 1. For this reason alone the court reasoned that relief should be denied; nonetheless, it also found that denial of interlocutory relief would occasion no irreparable harm to Blackwelder—since its damages, if any, would be readily calculable and collectible. The court felt unable to decide the remaining two factors, viz., the public interest and the potential harm to the defendant, but did note that "it is hard to conceive" how Seilig could be economically damaged by continuing its business relationship with Blackwelder.

[2, 3] When the grant or denial of interim injunctive relief is reviewed, it is simplistic to say or imply, as we sometimes do, that it will be set aside only if an abuse of discretion can be shown. *Singleton v. Anson Co. Bd. of Education*, 387 F.2d 349, 351 (4th Cir. 1967); *Meiselman v. Paramount Film Distributing Corp.*, 180 F.2d 94, 97 (4th Cir. 1950). For there is, of course, the possibility that the court below has either failed to exercise its discretion in some re-

spect, compare *Paine v. St. Paul Union Stockyards Co.*, 35 F.2d 624 (8th Cir. 1929), with *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892), or else exercised it counter to established equitable principles. *Prendergast v. N.Y. Tel. Co.*, 262 U.S. 43, 50-51, 43 S.Ct. 466, 67 L.Ed. 853 (1923); *Security Metal Products Co. v. Kawneer Co.*, 14 F.2d 569, 572-573 (8th Cir. 1926). A judge's discretion is not boundless and must be exercised within the applicable rules of law or equity. *Petersen v. John Hancock Mutual Life Insurance Co.*, 116 F.2d 148, 151 (8th Cir. 1971). And our review of the lower court's application of the law is not limited by the same "clearly erroneous" rule which restricts our review of its findings of fact under Rule 52(a). Fed.R.Civ.P. 52(a). *Delaware & Hudson Ry. Co. v. United Transp. Union*, 146 U.S. App.D.C. 142, 450 F.2d 603, 620 (1971).

[4, 5] We reverse the district court because it failed to apply the settled principles which govern consideration of a Rule 65(a) motion in this circuit, as set forth in *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42 (4th Cir. 1932):

It is sufficient [to grant the motion] if the court is satisfied that there is a probable right and a probable danger, and that the right may be defeated, unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant.

55 F.2d at 45 (emphasis added). Accord, *West Virginia Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 235 (4th Cir. 1971). The district court's reliance on the different standards of *Airport Comm'n of Forsyth Co.* and *Camp*, see p. 192 *supra*, was misplaced—though understandably so. Even the treatise writers have mistakenly equated the stringent standards of those cases with the more flexible rule of *Sinclair Refining*, *supra*. See, e.g., 7 Moore's Federal Practice, ¶ 65.04[1] at 65-39 n.7 (1975). But there is a difference. The cases relied upon by the district court deal with the question of the issuance *vel non* of an appellate stay

pending review of an administrative order or a trial court decision that dealt with the merits of a controversy.² Hence they propound an appellate standard—and not one for use in the trial courts.

In cases like *Airport* and *Camp* a judicial or quasi-judicial body has already passed upon the merits of a question and typically has also denied a discretionary stay of its decision; only then is the motion made for an appellate stay. For a stay to issue under such circumstances, we adopted in *Airport Comm'n of Forsyth*, *supra*, 296 F.2d at 96, the requirement of *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958), that a "strong showing" of probable success on appeal be made, for otherwise there is "no justification for the [appellate] court's intrusion into the ordinary processes of administrative and judicial review." 259 F.2d at 925.

Likewise, *Long v. Robinson*, 432 F.2d 977 (4 Cir. 1970), another "strong showing" case from this circuit, involved a stay-pending-appeal situation, in which the district court had fully considered the merits of the controversy, rendered its final decree, and refused the request for an interim stay. Judge Winter explained in *Long* that the petitioner's burden in seeking injunctive relief is substantially greater on appeal. 432 F.2d at 979. See, e. g., *Railway Express Agency, Inc. v. United States*, 82 S.Ct. 466, 7 L.Ed.2d 432, 434 (1962) (Harlan, J.) (a "strong showing . . . must be made to justify reversal of the District Court's discretionary action"); *Breswick & Co. v. United States*, 75 S.Ct. 912, 100 L.Ed. 1510, 1513 & n.1 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 164, 43 S.Ct. 531, 67 L.Ed. 922 (1923). And this is especially so where the lower court has adversely determined the merits of the controversy.

Therefore, the district court erred in guiding itself by an appellate standard inappropriate at the trial level.

2. While the appellate origins of the fourfold rule have been noted, the proper implications thereof have not. See 11 Wright & Miller,

III.

A.

[6] The correct trial court standard in this circuit, as declared in *Sinclair Refining Co. v. Conway*, 279 U.S. 813, 49 S.Ct. 256, 77 L.Ed. 972 (1929), where the Supreme Court laid down the rule "generally to be applied" by trial courts in the exercise of their discretion in Rule 65(a) situations. *Alabama v. United States*, 279 U.S. 229, 231, 49 S.Ct. 266, 73 L.Ed. 675 (1929). That rule is the balance-of-hardship test as it was then formulated by the Eighth Circuit, see, e. g., *Love v. Atchison, T. & S. F. Ry. Co.*, 185 F.321, 331-332 (1911):

Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

Ohio Oil Co. v. Conway, *supra*, 279 U.S. at 815, 49 S.Ct. at 257 (emphasis added).

Like the present case, *Conway* was an appeal from the denial of a preliminary injunction. And there, too, the original application was submitted upon *ex parte* affidavits which, by creating "a real dispute over material questions of fact," rendered impossible any accurate determination by the trial court of the merits of the controversy. 279 U.S. at 814, 49 S.Ct. at 256. Nonetheless, because a "grave" question was raised—and the balance of hardship decisively favored the movant—the Court concluded that the petition for interlocutory order should have been granted and reversed the lower court.

The balance-of-hardship test correctly emphasizes that, where serious issues are

Federal Practice and Procedure, § 2948 at 444 (1973).

before the court, it is a sound idea to maintain the *status quo ante litem*, provided that it can be done without imposing too excessive an interim burden upon the defendant, *Munoz v. Porto Rico Light & Power Co.*, 83 F.2d 262, 269 (1st Cir. 1936); *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948); *Pratt v. Stout*, 85 F.2d 172, 177 (8th Cir. 1936); *Sinclair Refining Co. v. Midland Oil Co.*, *supra*, 55 F.2d at 45 (citing *Blount v. Societe Anonyme Du Filatre*, 53 F. 98, 101 (6th Cir. 1892)), for otherwise effective relief may become impossible:

The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irreparable injury to some of the parties before their claims can be investigated and adjudicated.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 n.10 (2d Cir. 1953) (quoting *Love v. Atchison, T. & S. F. Ry. Co.*, *supra*, 185 F. at 332).

[7, 8] The district court below erred in holding that plaintiff must first show "likelihood of success" in order to be entitled to preliminary relief. Instead, the first step in a Rule 65(a) situation is for the court to balance the "likelihood" of irreparable harm to the plaintiff against the "likelihood" of harm to the defendant; and if a decided imbalance of hardship should appear in plaintiff's favor, then the likelihood-of-success test is displaced by Judge Jerome Frank's famous formulation:

[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair

3. By contrast, in *Davis v. Crown Central Petroleum Corp.*, 483 F.2d 1014 (4th Cir. 1973) (an order granting preliminary relief was vacated), the court found that the balance of hardship stood at equipoise: "the plight of the defendant was not substantially different from that of the plaintiffs." 483 F.2d at 1016. It is in just such a case that the probability of success begins to assume real significance, see p. 195 *supra*; for if the factors of harm to the parties cancel

ground for litigation and thus for more deliberate investigation.

Hamilton Watch Co. v. Benrus Watch Co., *supra*, 206 F.2d at 740, 743; *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970). The importance of probability of success increases as the probability of irreparable injury diminishes, *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 923 (3d Cir. 1974); *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974); *District 50, United Mine Workers v. United Mine Workers*, 134 U.S. App.D.C. 34, 412 F.2d 165, 168 (1969); *Packard Instrument Co. v. ANS, Inc.*, 416 F.2d 943 (2d Cir. 1969); and where the latter may be characterized as simply "possible," the former can be decisive. Even so, it remains merely one "strong factor" to be weighed alongside both the likely harm to the defendant and the public interest. *Dino De Laurentiis Cinematografica, SpA. v. D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966) (quoting 3 Barron & Holtzoff, *Federal Practice & Procedure*, § 1433 at 493 (1958)).

B.

We have expressly reaffirmed our *Sinclair Refining* rule in *West Virginia Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (1971). See also *Phillips v. Crown Petroleum Corp.*, 376 F.Supp. 1250, 1253 (D.Md.1973). Finding that the balance of hardship favored the plaintiff, the *Island Creek* court readily upheld a grant of interlocutory relief.³ Judge Winter treated the "likelihood of success" factor in this fashion:

While we express no opinion on [the merits of the issues], we can say that their resolution is not immediately apparent. That is enough to say that Conservancy

each other, then "greater significance must be placed on the likelihood that each party will ultimately succeed upon the merits." *Delaware River Port Authority v. Transamerican Trailer Transports, Inc.*, 501 F.2d 917, 924 (3d Cir. 1974). For that reason the *Davis* court took notice that North Carolina's Statute of Frauds appeared to be a complete bar to the action and overturned the grant of relief. 483 F.2d at 1016.

has not embarked on frivolous litigation, and thus interlocutory relief is not improper if Conservancy can also show a need for protection which outweighs any probable injury to [the defendant].

441 F.2d at 235 (emphasis added).

[9] Thus in this circuit the trial court standard for interlocutory injunctive relief is the balance-of-hardship test. Whenever a district court has before it a Rule 65(a) motion, although it may properly consider the four general factors enumerated in *Airport*, see p. 192 *supra*, it should give them the relative emphasis required by the *Sinclair* rule: The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

Here the district court erroneously required a *strong showing of success* as a prerequisite to relief.

IV.

A.

[10] The district court also found that interlocutory relief was barred by plaintiff's failure to show that without it it would be irreparably injured. But that requirement was also taken from the list of essentially independent factors that an appellate court ought to consider before staying an order entered after consideration of the merits below. Its emphasis is that of deference to a decision involving discretion, as well as greater attention to the facts than is possible on appeal. *Airport Comm'n of Forsyth Co. v. CAB*, see p. 192 *supra*. Insofar as a trial court is concerned, the requirement of irreparable harm must also be evaluated within the basic context of the balance-of-hardship test.

Therefore, while "irreparability" may suggest some minimum of probable injury which is required to get the court's attention, the more important question is the

relative quantum and quality of plaintiff's likely harm. The decision to grant preliminary relief cannot be intelligently made unless the trial court knows how much the precaution will cost the defendant. If it costs very little, the trial court should be more apt to decide that the threatened injury is "irreparable" for purposes of interlocutory relief. In addition, as we have noted above, even a "possible" irreparable injury has been held to suffice if there is strong probability of success on the merits.

[11] The decision to grant or deny a preliminary injunction depends upon a "flexible interplay" among all the factors considered. *Cf. Packard Instrument Co. v. ANS, Inc.*, *supra*, 416 F.2d at 945. The district court erred in treating the four *Airport* factors as a defense in depth—to be overcome, each and every one, before entitlement to preliminary relief should be decreed. Its error was compounded by failure to decide the last two questions in the *Airport* test, for all four are intertwined, and each affects in degree all the others. The failure to find that Seilig would not be harmed—although remarking that any such harm is hard to conceive—inevitably increased Blackwelder's burden of persuasion on the other questions—especially as to what degree it had to show irreparable injury. We agree with the district court's intimation, short of a finding, that the possible harm to Seilig, in light of the history of past, profitable dealings between the parties, is negligible. *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 650 (5th Cir. 1962). Moreover, what little risk might be posed to Seilig is easily indemnifiable by a bond. See *Ohio Oil Co. v. Conway*, *supra*, 279 U.S. at 81, 49 S.Ct. 256; *cf.* 15 U.S.C. § 26.

B.

[12, 13] We view the trial court's finding that Blackwelder will suffer no irreparable harm (on the basis that any injury to it would be readily calculable and collectible) as clearly erroneous. Blackwelder's past profits on Seilig furniture afford a

plausible basis for calculating some of the damages from any wrongful termination. But not all. Word-of-mouth grumbling of customers can convert Blackwelder's inability to honor Seilig orders into a reputation for general unreliability as a merchant. Losing Seilig can set back Blackwelder's efforts to become known as a "full-line" furniture discounter. Cf. *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962). The harm posed to Blackwelder's general goodwill by its inability to fill outstanding and accumulating orders in excess of \$15,000 for furniture listed in its catalogues is incalculable—not incalculably great or small, just incalculable. See Note, *Developments in the Law—Injunctions*, 78 Harv.L.Rev. 994, 1002–1003 (1965); cf. *Semmes Motors, Inc. v. Ford Motor Co.*, supra, 429 F.2d at 1205. And, as Learned Hand observed, irreparability of harm includes the "impossibility of ascertaining with any accuracy the extent of the loss":

That has always been included in its meaning; and I cannot see how the plaintiff will ever be able to prove what sales the defendant's competition will make it lose, to say nothing of the indirect, though at times far-reaching, effects upon its good will . . .

Foundry Servs., Inc. v. Beneflux Corp., 206 F.2d 214, 216 (2d Cir. 1952) (Hand, J., concurring) (emphasis added).

V.

[14] The last of the *Airport* criteria is: "Wherein lies the public interest." One reason for the more lenient interlocutory relief standards, as opposed to those governing motions for stays pending appeal, is the "public interest" in preserving the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court. The right to a stay after the merits have once been unfavorably determined is quite a different thing. That basic "public interest" is further enhanced where, as here, the private controversy may possibly vindicate public policy. Private actions are an important means of enforcing federal antitrust policies. *Bergen Drug Co.*

v. Parke, Davis & Co., supra, 307 F.2d at 727–728.

The presence of a federal statute both prohibiting the alleged acts of the defendant and supplying the gravamen of the complaint aligns Blackwelder, if only provisionally, on the side of the public interest and constitutes added weight in favor of precautionary relief. *West Virginia Conservancy v. Island Creek Coal Co.*, supra, 441 F.2d at 236; *Vanadium Corp. of America v. Susquehanna*, 203 F.Supp. 686, 696 (D.Del.1962); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944). This is so especially where, as here, the statute expressly authorizes interlocutory injunctive relief. 15 U.S.C. § 26. See 11 Wright & Miller, *Federal Practice & Procedure*, § 2948 at 462 (1973); *United States v. Nutrition Serv., Inc.*, 227 F.Supp. 375 (W.D. Pa.1964), *aff'd per curiam*, 347 F.2d 233 (3d Cir. 1965).

VI.

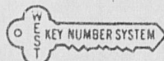
Since decision below was entered upon conflicting affidavits, and some agreed facts, our ordinary deference to the district judge's findings of fact is less appropriate. *Aetna Cas. & Sur. Co. v. Hunt*, 486 F.2d 81, 84 (10th Cir. 1973); *Shumaker v. Groboski Industries, Inc.*, 352 F.2d 837, 840 (7th Cir. 1965).

[15] We have already noted our agreement with the district judge's statement that "it is hard to conceive how the defendant can be economically damaged by a continued business relationship with the plaintiff." We also think that what we have said hereinbefore strongly suggests that Blackwelder has sufficiently shown that without preliminary relief it will likely be irreparably injured.

Blackwelder has pleaded a prima facie case. Cf. 11 Wright & Miller, *Federal Practice & Procedure*, § 2948 at 452 (1973). Moreover, the references we have made hereinbefore to the admissions of Seilig tend at least to partially support the allegations of the complaint. And it is clear that the public interest lies, as we have already said, in vindication of the antitrust laws.

It appears to us that the plaintiff has made a sufficiently strong showing that it is likely to prevail on the merits in light of the disparity of probable harm as between the plaintiff and the defendant and the location of the public interest. Since the issues are grave, and the balance of hardship substantially favors Blackwelder, the denial of relief in the district court will be reversed, and the case is remanded with instructions that an appropriate preliminary injunction issue. On remand, the district court should consider whether Blackwelder should be required to post a bond conditioned upon: (1) indemnification of Seilig against harm if decision on the merits goes against Blackwelder, *cf.* 15 U.S.C. § 26, and (2) Blackwelder's expeditiously proceeding to prosecute its suit to a final decree. See *Ohio Oil Co. v. Conway*, *supra*, 279 U.S. at 81, 49 S.Ct. 256.

REVERSED AND REMANDED.



EASTEX, INCORPORATED,
Petitioner-Cross
Respondent,

v.

NATIONAL LABOR RELATIONS
BOARD, Respondent-Cross
Petitioner.

No. 74-4156.

United States Court of Appeals,
Fifth Circuit.

April 7, 1977.

On petition for review and cross application for enforcement of an order of the National Labor Relations Board, the Court of Appeals, Brown, Chief Judge, held that whatever is reasonably related to employees' jobs or to their status or condition as employees in the plant may be the subject of union handouts, distributed on plant premises in such manner as not to interfere

with work, to the full range permitted by the National Labor Relations Act's language, valid local laws, and the First Amendment; and that both disputed parts of union-sponsored circular, the part dealing with "right-to-work" laws and the part of "big business" to place such a law on the Texas Constitution, and the part relating to politics and inflation and especially to a national minimum wage, were sufficiently related to employment conditions to merit protection under the National Labor Relations Act.

Enforcement granted.

1. Labor Relations ⇐281

In determining whether concerted activity of employees is protected by the National Labor Relations Act, the test is whether the activity pertains to some matter over which the employer has power or authority to change or control is too narrow. National Labor Relations Act, § 157, as amended 29 U.S.C.A. § 157.

2. Labor Relations ⇐286

The key to determining what the National Labor Relations Act permits employees to say inside the plant gates does not lie in restricting the scope of Congress' language employed in the Act or in requiring a more deferential and a subject matter more restricted than the First Amendment permits; instead, it lies in consulting the purpose for which the employees are invited inside the gates at all, namely, to work their jobs in the plant. National Labor Relations Act, § 7 as amended 29 U.S.C. § 157; U.S.C.A. Const. Amend. 1.

3. Labor Relations ⇐286

Whatever is reasonably related to employees' jobs or to their status or condition as employees in the plant may be the subject of union handouts, distributed on plant premises in such manner as not to interfere with work, to the full range permitted by the National Labor Relations Act's language, valid local laws, and the First Amendment. U.S.C.A. Const. Amend. 1. National Labor Relations Act, § 7 as amended 29 U.S.C.A. § 157.

not explore these difficult matters here, however, since it is apparent that if the court fell into error, it was led there by Page and his trial counsel.

[3] We are entitled, as was the trial court, to accept the chambers representations of trial counsel that he and Page had conferred at length and deliberately made a considered, tactical decision that a bench trial would be to Page's advantage and that he therefore wished the jury discharged and the case tried by the court alone.⁵ The truth of these representations is further borne out by Page's own conduct—observed by the trial court and noted in its minute entry—that of a learned, articulate man suffering neither language nor perceptive difficulty. The court granted his request and did as he wished. Neither Page nor his counsel ever objected at trial or requested a new trial, waiting instead until now to urge correction of this oversight. It follows ineluctably that Page cannot complain to us of the manner in which the trial court carried out his wishes. "A defendant cannot complain on appeal of alleged errors invited or induced by himself, particularly where, as here, it is not clear that the defendant was prejudiced thereby." *United States v. Lewis*, 524 F.2d 991, 992 (5th Cir. 1975), cert. denied, 425 U.S. 938, 96 S.Ct. 1673, 48 L.Ed.2d 180 (1976), and cases cited. The court did what Page, explicitly by counsel and implicitly by his own conduct, asked it to do. Page will not now be heard to say that the court fell into technical error in the process of effectively carrying out his request. To do so would be to make of the

muster to waive the twelfth juror must suffice to waive all. We neither accept nor reject this contention today since we need not, and therefore should not, do so. We do note that the language and structure of Rule 23(a) differ from those of Rule 23(b), that the provisions of Rule 23(a) can be and probably are more stringent than constitutional requirements, and that a bench trial in a criminal case is far more different from a jury trial, whether to eleven jurors or to twelve, than a jury trial to ten or eleven jurors is from one to a full jury.

5. E. g., *Castilleja v. Southern Pacific Co.*, 445 F.2d 183 (5th Cir. 1971) (within trial court's

courtroom a bear-garden, casting the trial judge as the bear.

AFFIRMED.



SHAWNEE COAL COMPANY,
Plaintiff-Appellee,

v.

Cecil D. ANDRUS, Secretary of the Interior, et al., Defendants-Appellants.

No. 80-3220.

United States Court of Appeals,
Sixth Circuit.

Argued June 8, 1981.

Decided Oct. 5, 1981.

Secretary of the Interior appealed from an order of the United States District Court for the Southern District of Ohio, Kinneary, J., enjoining Secretary from enforcing cessation orders issued against coal company's tipping operations. The Court of Appeals, Celebrezze, Senior Circuit Judge, held that: (1) coal company was required to exhaust its administrative remedies by seeking review and relief pursuant to section of the Surface Mining Control and Reclamation Act of 1977 which authorizes temporary relief before obtaining judicial review; (2) Congress intended the Act to encompass

discretion to accept and rely on counsel's representation of witness's unavailability). Considering the nature of the charges, that Dr. Page, a professor at a renowned university, had defrauded the university by submitting false travel vouchers and the United States by making false statements to it, a tactical reason for the maneuver is readily apparent, for there was at least a plausible reason for Page and the experienced counsel who then represented him to conclude that a judge might approach the case more objectively and dispassionately than a jury.

off-site processing operations, such as company's tipping operation; (3) company was an "operator" under the Act where at the time the cessation orders were issued, company was still reclaiming its mine sites; and (4) the exhaustion requirement was not waived on ground that company was subject to irreparable harm, in that the availability of effective relief from the Secretary precluded conclusion that company was faced with imminent, irreparable harm.

Reversed and remanded.

1. Mines and Minerals ⇌ 92.11

District court did not have jurisdiction to review and enjoin Secretary of the Interior's issuance of cessation orders against coal company's tipping operation, in that coal company was required to exhaust its administrative remedies by seeking review and relief pursuant to section of Surface Mining Control and Reclamation Act of 1977 which authorizes Secretary to grant temporary relief from a cessation order before obtaining judicial review pursuant to the Act. Surface Mining Control and Reclamation Act of 1977, §§ 521(a)(2-5), 525(c), 526(c), 30 U.S.C.A. §§ 1271(a)(2-5), 1275(c), 1276(c).

2. Administrative Law and Procedure ⇌ 229

Exception to exhaustion doctrine is that a litigant may bypass available administrative procedures where there is a readily observable usurpation of power not granted to the agency by Congress.

3. Administrative Law and Procedure ⇌ 229

Even when issue of agency jurisdiction is raised, exhaustion doctrine generally requires that an agency be accorded an opportunity to determine initially whether it has jurisdiction.

4. Mines and Minerals ⇌ 92.9

Secretary of Interior correctly asserted jurisdiction over coal company's tipping operation, which processed coal removed from coal mine, under Surface Mining Control and Reclamation Act of 1977, in that scope

of surface coal mining operations covered by Act is exceptionally broad, and thus Congress intended Act to encompass off-site processing operations, such as company's tipping operation. Surface Mining Control and Reclamation Act of 1977, § 701(28), 30 U.S.C.A. § 1291(28).

5. Mines and Minerals ⇌ 92.9

Coal company against whose tipping operations Secretary of Interior issued cessation orders was an "operator" within definition of such term under Surface Mining Control and Reclamation Act of 1977 where from a period exceeding 12 months after Act's inception, company unquestionably qualified as an operator, and at time cessation orders were issued, company was still reclaiming its mine site, in that Secretary retains jurisdiction over an operator who has ceased removing coal until the reclamation activities are completed. Surface Mining Control and Reclamation Act of 1977, §§ 507, 515, 518, 701(13), 30 U.S.C.A. §§ 1257, 1265, 1268, 1291(13).

See publication Words and Phrases for other judicial constructions and definitions.

6. Mines and Minerals ⇌ 92.11

Requirement that coal company exhaust administrative remedies prior to seeking judicial relief from cessation orders issued against company's tipping operation by Secretary of the Interior under Surface Mining Control and Reclamation Act of 1977 was not waived on basis that exhaustion would have resulted in irreparable harm to company due to choice company was faced with of shutting down or incurring a \$750 per day penalty for each violation, in that Act expressly provides for application for temporary relief first with Secretary and subsequently, if necessary, in district court, and even if the prospect for obtaining relief appeared doubtful, such would not, by itself, warrant evasion of the exhaustion requirement. Surface Mining Control and Reclamation Act of 1977, §§ 521(a)(2-4), 525(c), 526(c), 30 U.S.C.A. §§ 1271(a)(2-4), 1275(c), 1276(c).

James E. Rattan, Asst. U. S. Atty., Columbus, Ohio, Nancy B. Firestone, Michael A. McCord, James W. Moorman, Dept. of Justice, Land Division, Washington, D. C., for defendants-appellants.

C. William O'Neill, Thomas B. Ridgley, Vorys, Sater, Seymour & Pease, Columbus, Ohio, for plaintiff-appellee.

Before ENGEL and JONES, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge.

The issue in this case is whether the district court erred in asserting jurisdiction over an action to enjoin the Secretary of the Interior from enforcing certain provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, *et seq.* In response to the Secretary's issuance of cessation orders against its tipping operations and without exhausting administrative remedies, Shawnee Coal Co. sought an injunction and declaratory relief in the district court to prohibit the Secretary from taking any action to enforce the administrative orders. After concluding that Sections 525 and 526 of the Act, 30 U.S.C. §§ 1275 and 1276, provide a parallel structure for review by the Secretary or in a district court, the court assumed jurisdiction and concluded that Shawnee had satisfied the traditional standards for the issuance of injunctive relief. Accordingly, the court enjoined enforcement of the cessation orders. We now reverse.

I.

BACKGROUND

The Surface Mining Act is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." § 102(a), 30 U.S.C. § 1202(a). Title II of the Act creates the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior, and the Secretary of the Interior, acting through OSM, is charged with the primary responsibility for

administering and implementing the Act. § 201, 30 U.S.C. § 1211.

The Act's principal regulatory and enforcement provisions are contained in Title V, which establishes a two-tiered regulatory program to achieve the purposes of the statute. The two tiers consist of an interim regulatory program and a permanent regulatory program. § 501(a) of the Act, 30 U.S.C. § 1251(a), requires the Secretary to promulgate interim regulations for surface coal mining and reclamation operations within ninety days of the statute's enactment. After a notice and comment period, the Secretary promulgated and published final interim regulations on December 13 and 16, 1977, and the interim regulations were made effective as of those dates.

§ 502(c) of the Act, 30 U.S.C. § 1252(c), delineates the performance standards that the interim regulatory program must contain. Those performance standards include, among other things, requirements for restoration of land to its prior condition after mining, restoration of land to its approximate original contours, segregation and preservation of topsoil, minimization of hydrologic disturbances from mining, construction of coal mine waste piles used as dams or embankments, utilization of explosives, revegetation of mined areas, reclamation of mountaintop mines, and soil disposal for steep-sloped mines. See §§ 515(b)(2), (3), (5), (10), (13), (15), (19), 515(c), and 515(d), 30 U.S.C. §§ 1265(b)(2), (3), (5), (10), (13), (15), (19), 1265(c), and 1265(d). Surface coal mining operations, excluding those on "Federal lands" or "Indian lands," commencing on or after February 3, 1978 must comply with the provisions of the interim regulatory program when operations start; and surface coal mining operations begun before that date are required to adhere to the interim regulations by May 3, 1978. §§ 502(b), (c) and 701(11), 30 U.S.C. §§ 1252(b), (c) and 1291(11). By February 3, 1978, the Secretary is required to implement a federal enforcement and inspection program in each state, including the examination of surface coal mines by a federal

inspector once every six months. § 502(e), 30 U.S.C. § 1252(e). During the interim phase, the Secretary and the states share responsibility for enforcement of the regulatory program with the primary responsibility resting with the Secretary. The statute contemplates that the Secretary will not issue mining permits during the interim phase, but the states may continue to issue mining permits so long as the permits mandate compliance with the requisite performance standards. § 502(b), 30 U.S.C. § 1252(b). The Secretary has the authority, however, to inspect mine sites and order the correction of any violation by action "to be implemented pursuant to the federal enforcement provisions of this title." § 502(e)(1), 30 U.S.C. § 1252(e)(1). The "federal enforcement provisions" are the notice of violation provisions and cessation order provisions of § 521, 30 U.S.C. § 1271, and the civil penalty provisions of § 518, 30 U.S.C. § 1268.

The second tier of regulation contemplated by the Surface Mining Act, the permanent phase, is provided for in § 501(b), 30 U.S.C. § 1251(b), which commands the Secretary to promulgate, within one year of the statute's enactment, a permanent regulatory program establishing procedures and requirements for preparation, submission, and approval of "State programs" and for development and implementation of "Federal programs." In the event a State program is not approved, the Secretary must then implement a "Federal program" within that state. § 504(a), 30 U.S.C. § 1254(a).¹ In addition, the permanent regulations must require adherence to all provisions of Title V of the Surface Mining Act, including all the performance standards set forth in § 515, 30 U.S.C. § 1265, and not just those applicable to the interim regulatory program pursuant to § 502(c), 30 U.S.C. § 1252(c). § 501(b), 30 U.S.C. § 1251(b).

During the permanent phase, a state may seek to assume primary jurisdiction over the regulation of surface coal mining on

"non-Federal lands" within its borders by submitting a proposed "State program" of regulation to the Secretary. § 503(a), 30 U.S.C. § 1253(a). The Secretary must approve or disapprove a proposed "State program," in whole or in part, within six months after the program is submitted to him. § 503(b), 30 U.S.C. § 1253(b). If a "State program" is approved by the Secretary, that state assumes the responsibility for issuing mining permits and for enforcing the provisions of its regulatory program. However, if a state fails to submit a proposed program, fails to resubmit an acceptable program within sixty days after disapproval of its proposed program, or at any time fails to implement, enforce, or maintain an approved program in accordance with the Act, the Secretary is directed to prepare and implement a "Federal program" or regulation within that state no later than June 3, 1980. § 504(a), 30 U.S.C. § 1254(a). When a "Federal program" is promulgated for a state, the Secretary constitutes the regulatory authority administering the Act within that state and continues as such until a "State program" is approved. No later than eight months after approval of a "State program" or implementation of a "Federal program," all surface coal mining and reclamation operations on "non-Federal lands" within the state must obtain a new permit issued in accordance with the applicable regulatory program. § 506(a), 30 U.S.C. § 1256(a).

Under § 521(a)(2), 30 U.S.C. § 1271(a)(2), if an inspector determines that a violation of the Act or any permit condition creates an imminent danger to the public health or safety or can reasonably be expected to cause significant imminent environmental harm to land, air or water resources, the inspector must order an immediate halt to the mining operation or the portion thereof contributing to the danger. Under § 521(a)(3), if the inspector determines that there is a violation of the Act or the permit, but that there is no imminent danger to health, safety or the environment, the in-

1. At the time of this litigation the State of Ohio had submitted a proposed state program to the Secretary of the Interior for approval, but the

Secretary had not yet acted on that proposal. Thus, the interim regulatory program was in effect.

spector must issue a notice of violation, allowing the operator up to 90 days to correct the condition. In the event the violation is not corrected within that time, the inspector must immediately order a cessation of the mining operation or the portion thereof relevant to the violation. The cessation order must outline the steps necessary to correct the violation. Finally, under § 521(a)(4), if the inspector determines that a permittee has committed a pattern of violations, the inspector must issue an order to show cause why the permit should not be suspended or revoked.

Under § 518, 30 U.S.C. § 1268, once the operator has been charged with a violation, the Secretary has 30 days in which to determine whether to assess a civil penalty and to inform the operator of the amount of the proposed penalty. If a cessation order is issued, however, a civil penalty must be assessed. § 518(a), 30 U.S.C. § 1268(a). Where an operator is issued a notice of violation and fails to correct the condition within the period prescribed for its correction, a civil penalty of not less than \$750.00 per day must be assessed for each day the violation continues unabated. § 518(h), 30 U.S.C. § 1268(h).

Section 525 of the Act, 30 U.S.C. § 1275, provides that a person adversely affected by a notice or order may apply for administrative review by the Secretary of the Interior. Where the application for review involves a cessation order under § 521(a)(2) or (3), the Secretary must issue his written decision within 30 days of receipt of the application. In addition to this formal review procedure, an operator may also simultaneously seek informal review of any notice or order requiring cessation of mining activities pursuant to § 521(a)(5). That subsection provides that any such notice or order will automatically expire within 30 days "unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing."

An operator may also apply to the Secretary for temporary relief from any notice or

order. The Secretary may grant such temporary relief if there is a substantial likelihood that the applicant will prevail on the merits, and the relief will not adversely affect the public health or safety or cause significant, imminent environmental harm. § 525(c), 30 U.S.C. § 1275(c). When the applicant requests temporary relief from a cessation order, the Secretary must rule on the request within five days.

If temporary relief from a cessation order is denied by the Secretary, the applicant may seek immediate review directly in the United States District Court for the district in which the surface mine is located. § 526(c), 30 U.S.C. § 1276(c). In addition, the applicant may bypass the Interior Board of Surface Mining Appeals, 43 C.F.R. 4.1267. Under § 526(c), the district court may then grant temporary relief pending completion of the administrative process. Temporary relief under § 526(c) may be granted where the applicant can show that he has a substantial likelihood of success on the merits and that such relief will not adversely affect the public health, safety or the environment. If temporary relief is granted by either the Secretary under § 525(c) or the district court under § 526(c), the operator will not be assessed any penalty under § 518(h) (for failing to correct the violation) until a final order is issued by the Secretary after the administrative review process is completed. § 518(h), 30 U.S.C. § 1268(h). Once the administrative process is completed and a final order is issued by the Secretary, the district court, upon application, may review the Secretary's final decision "on the record" made before the Secretary. § 526(b), 30 U.S.C. § 1276(b).

B.

Pursuant to a mining permit issued by the State of Ohio, Shawnee Coal Co. operated a surface coal mine in Perry County, Ohio, until December, 1978. At the same site Shawnee operated a coal tippie—a processing operation consisting of machinery that crushed and prepared coal for transport. Although Shawnee terminated its mining operations at the site relevant here

in December, 1978, it continued to operate the tippie to process coal removed from the Shawnee mine, and also from other mines owned or leased by the President of Shawnee, James Graham. The tipping operation requires that the coal be stored in piles both before and after processing. Graham admitted at the hearing for a preliminary injunction that toxic runoff from these coal piles exists.

On September 5, 1979, federal mine inspectors from the Interior Department's Office of Surface Mining Reclamation and Enforcement inspected the Shawnee mine site and tippie operation. That inspection led to the issuance of notices of four violations of the Act.² In their final form the notices charged Shawnee with operating a surface mining operation within 100 feet of a road and with failing to meet certain water quality standards in the effluent discharge leaving the tippie site area. Under the notices Shawnee was to abate the violations by November 5, 1979. This period was subsequently extended until December 5, 1979, giving Shawnee the full 90 days permitted under the Act for abating the violations. After that period, § 518(h) of the Act, 30 U.S.C. § 1268(h) would require that Shawnee, as an operator who has failed to abate the violations, be assessed a

minimum civil penalty of \$750.00 per day for each day the violations remained unabated.

The Act also provides that the violations notices specify the measures necessary for abating the violations and the procedures necessary for obtaining administrative review of the notices. See 30 U.S.C. § 1271(a)(3). The Secretary's representatives suggested the installation of sedimentation ponds and treatment facilities to abate the water quality violations.³ At Shawnee's request, a conference was scheduled for November 28, 1979, for the parties to review the notices of violations and the abatement efforts made by Shawnee. The conference was followed by negotiations in which Shawnee's officers maintained that the company considered the Secretary's proposals unfeasible and that it could only abate the water quality violations by ceasing operations. Another meeting was conducted on December 10, 1979 in which Shawnee's representatives reiterated their conclusions and requested alternative solutions.⁴

The Shawnee tippie was reinspected on December 13, 1979 and cessation orders issued for the same violations noticed in Sep-

vent additional contributions of suspended solids to streamflow or to runoff outside the permit area"

The fourth claimed violation was vacated by the Secretary on December 7, 1979.

2. The notices were issued pursuant to §§ 521(a)(3) and 522(e)(4) of the Act, 30 U.S.C. §§ 1271(a)(3) and 1272(e)(4). The notices cited the following violations and required that the following steps be taken:

"1. Violation of (§ 1272(e)(4))

Remove coal mines and sediment from (within 100 feet of) S.R. 155 feet drainage ditch between C.R. 44 and TWP RD 275 and either; (2) pull back all operations beyond 100 feet . . . or obtain permission from State of Ohio.

2. Violation of § 715.17(a) of Federal Interim Regulations

Pass all drainage . . . through a sedimentation pond or series of sedimentation ponds before leaving permit area.

3. Violation of § 715.17(a) of Federal Interim Regulations

Install . . . facilities to treat any water discharged (which violate certain unspecified effluent limitations)"

4. Violation of § 715.17(1)(4), Federal Interim Regulations

"Failure to construct access and haul roads associated culverts and ditches so as to pre-

3. Shawnee contended that the citation for a § 522(e)(4) violation, (operating a mining facility within 100 feet of a road) was invalid because that section of the Act did not apply to operations, such as Shawnee's, in existence on the effective date of the Act, August 3, 1977. At the district court hearing the Secretary did not challenge this contention.

4. It appears that Shawnee considered the water quality violations impossible to abate because the main water line supplying the Village of Shawnee ran under the only area available for construction of sedimentation ponds and treatment facilities. The water quality problem apparently resulted from the coal fines (an inferior coal product) stored near the tippie; the market for fines was depressed, and the fines would not be removed until at least June, 1980.

tember. The orders directed the cessation of the tippie operation and abatement of the water quality violation in the same manner described in the September 5, 1979 notices. The orders further advised that the mandatory \$750.00 per day assessments would begin to accrue commencing December 13, 1979. Also included in the orders was a description of the procedures for obtaining administrative relief from the orders.

Shawnee then filed the instant action on December 19, 1979, in the United States District Court for the Southern District of Ohio, seeking preliminary and permanent injunctive relief against the Secretary's enforcement of the orders. In its complaint Shawnee alleged: 1) that its tippie operation was not covered by the Act because it was no longer affiliated with its coal removal operation; 2) that by imposing the \$750.00 per day penalties the Secretary, in effect, was forcing Shawnee to surrender its right to appeal; 3) that the abatement methods required by the Secretary were unreasonable; and 4) that the Secretary's decision to apply the Act to tipples formerly associated with a surface mine but not to tipples operating independently from any surface mine violated Shawnee's equal protection and due process rights. In response to the complaint the district court granted a temporary restraining order on December 19, 1979. On December 26, 1979, the Secretary moved to dismiss the complaint and dissolve the TRO on the grounds that Shawnee had failed to exhaust its administrative remedies. The Secretary argued that before Shawnee could seek relief in a district court, it was required to seek temporary relief from the Secretary under § 525(c) of the Act, 30 U.S.C. § 1275(c).

5. In considering the issuance of injunctive relief, the district court employed the traditional criteria for such relief, see *Mason County Medical Association v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977), rather than the specific statutory criteria spelled out in the judicial review provision of the Act. § 526(c), 30 U.S.C. § 1276(c), of the Act sets forth the following prerequisites for temporarily enjoining any order or decision issued by the Secretary:

On December 28, 1979, the district court conducted a hearing on Shawnee's motion for a preliminary injunction. Following the hearing the court granted an injunction enjoining enforcement of the cessation orders against Shawnee until the court rendered a final disposition on the merits of Shawnee's claims. The district court rejected the Secretary's contention that Shawnee had failed to exhaust proscribed administrative remedies. Instead, it held that the Act established alternative avenues for review of administrative orders and that under § 526(c) of the Act, 30 U.S.C. § 1276(c), any order or decision in a civil penalty proceeding was subject to judicial review. The court also considered the present case particularly inappropriate for exhaustion because the central question was one of statutory interpretation concerning the jurisdiction of the Secretary.

In the district court's view, the administrative review provisions of the Act were insufficient to prevent irreparable harm to Shawnee because the Secretary was not required to act for five days and even then the Secretary could render temporary relief only after finding that the public would not suffer any significant harm. Finally, the court concluded that § 10(c) of the Administrative Procedure Act, 5 U.S.C. §§ 704 *et seq.*, permitted judicial review of any final agency action that is not stayed pending appeal within the agency. In summarizing the reasoning underlying its grant of an injunction, the court found that Shawnee was likely to prevail on the merits of its claim that the Secretary had exceeded his authority; that Shawnee would suffer irreparable harm if an injunction did not issue, and that the public interest dictated the issuance of an injunction.⁵ The Secretary then filed a timely notice of appeal.

(1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(2) the person requesting such relief shows that there is substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(3) such relief will not adversely affect the public health or safety or cause significant

II.

[1] The only issue with which we must deal is whether the district court had jurisdiction to review and enjoin the Secretary's issuance of cessation orders under the circumstances present here. The relevant provisions of the Act providing for judicial review state in pertinent part:

Section 1276

(a)(2) Any order or decision issued by the Secretary in a civil penalty proceeding or any other proceeding required to be conducted pursuant to Section 554 of Title 5 shall be subject to judicial review on or before 30 days from the date of such order or decision in accordance with subsection (b) of this section in the United States District Court for the district in which the surface coal mining operation is located. * * *

(b) The court shall hear such petition or complaint solely on the record made before the Secretary. Except as provided in subsection (a) of this section, the findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(c) In the case of a proceeding to review any order or decision issued by the Secretary under this chapter, including an order or decision issued pursuant to subparagraph (c) or (d) of Section 1275 of this title pertaining to any order issued under subparagraph (a)(2), (a)(3), or (a)(4) of Section 1271 of this title for cessation of

environmental harm to land, air, or water resources.

The chief difference between these criteria and the traditional standards is that the statute does not specify any consideration of irreparable harm to the plaintiff but rather contains a distinct preoccupation with the public health and environmental consequences. The district court below acknowledged the existence of the statutory criteria but did not explain its reasons, if any, for disregarding them.

In a comparable case, *Virginia Surface Mining and Reclamation Ass'n. v. Andrus*, 604 F.2d 312, 315 (4th Cir. 1979), the court reversed the district court's decision to apply the traditional

coal mining and reclamation operations, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if—* * *

The district court held that §§ 1275 and 1276 establish "parallel" avenues for review of a cessation order; such an order may be reviewed by either the administrative process (§ 1275), in a district court after exhaustion of administrative remedies (§ 1276(a)(2), (b) or (c)), or in a district court without any exhaustion of administrative remedies (§ 1276(c)). It was this final grant of jurisdiction—§ 1276(c)—which the court below relied upon.

Section 1276(a)(2) clearly provides for judicial review of "any order or decision issued by the Secretary in a civil penalty proceedings," but that review is conditioned upon compliance with the requirements of subsection (b). That subsection provides that a court's review of an order or decision of the Secretary shall be based "solely on the record made before the Secretary" and that "the findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive." The Secretary argues that this statutory scheme makes clear that Congress envisioned judicial review "on the record" compiled before the administrative agency.⁶ Shawnee contends that the thrust of § 1276(c) is evident from its phraseology: "any order or decision" in a civil penalty provision is subject to judicial review in the district court, thereby permitting immediate

criteria rather than the standards expressly provided in the Act. In light of our conclusion, *infra*, that the district court was without jurisdiction here, we do not decide whether the district court committed reversible error by failing to apply the criteria of § 526(c).

6. Unfortunately, the legislative history of the Surface Mining Act offers no insight into the relationship between the Secretary's actions in issuing cessation orders and the scope of district court jurisdiction contemplated by Congress. See H.R.Rep.No. 218, 95th Cong., 1st Sess., reprinted in 1977 U.S.Code Cong. & Ad. News 593.

ate review of any cessation order without resort to the temporary relief provisions directed at the Secretary. § 525, 30 U.S.C. § 1275. We find the Secretary's interpretation more persuasive.

In upholding the Act's cessation order and temporary relief provisions against due process challenges, the Supreme Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, — U.S. —, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), stated its understanding of the relationship between administrative action and judicial review:

A mine operator aggrieved by an immediate cessation order issued under § 521(a)(2) or by a cessation order issued after a notice of violation and expiration of an abatement period under § 521(a)(3) may immediately request temporary relief from the Secretary, and the Secretary must respond to the request within 5 days of its receipt. § 525(c), 30 U.S.C. § 1257. [Sic.] Section 526(c) of the Act, 30 U.S.C. § 1276(c), authorizes judicial review of a decision by the Secretary denying temporary relief. In addition, cessation orders are subject to informal administrative review under § 521(a)(5), and formal administrative review, including an adjudicatory hearing, under § 525(b), 30 U.S.C. § 1275(b). The Secretary's decision in the formal review proceeding is subject to judicial review pursuant to § 526(a)(2), 30 U.S.C. § 1276(a). (footnote omitted) (emphasis added).

This synopsis of the Act accurately describes the function and operation of § 526(c), 30 U.S.C. § 1276. § 526(c) authorizes judicial review when the Secretary has issued an order or decision denying temporary relief from a cessation order issued under § 521(a)(2), (3) or (4), 30 U.S.C. § 1271(a)(2), (3) or (4). It is not, as Shawnee contends, an independent jurisdictional grant permitting intervention by a federal court prior to a party's resort to the admin-

istrative process. Rather, the statute's authorization of judicial review is inextricably intertwined with the administrative review procedures of § 525(c), 30 U.S.C. § 1275(c). This functional aspect of § 526(c) is evident from the structure of the Surface Mining Act.

Section 525 of the Act reflects Congress' desire to assure expeditious review and due process for parties seeking administrative relief of enforcement decisions of the Secretary under the provisions of § 521. It sets forth clear and definitive review procedures for all notices of violation and cessation orders. § 525(a)(1) allows a permittee or person adversely affected by an order of the Secretary to apply to the Secretary for relief, and in that event requires the Secretary to conduct an appropriate investigation. The complaining party is provided a public hearing at which information relating to the notice or order may be presented. After the investigatory process is completed the Secretary must make findings of fact in issuing a written decision. Where the application for review concerns an order for cessation of surface coal mining and reclamation operations, the Secretary is obligated to issue a written decision within thirty days of receipt of the application for review. § 525(b).

Congress recognized that certain circumstances would not permit even so much as a thirty day process. Thus, in § 525(c), it provided for more immediate relief. Pending completion of an investigation by the Secretary, any applicant may petition the Secretary for temporary relief from any order; the Secretary must respond by issuing an order granting or denying relief expeditiously. When the applicant requests relief from any order for cessation of coal mining and reclamation operations, an order responding to the request must be promulgated within five days.⁷ In the event

7. The district court below concluded that this form of administrative relief was "insufficient" because the Secretary need not act for five days and even then must refuse relief unless it appears that the applicant will prevail on the merits and there will be no significant environ-

mental harm caused by granting the relief. The Supreme Court in *Hodel, supra*, squarely rejected a similar indictment aimed at the adequacy of the administrative relief provisions. After concluding that the statutorily prescribed time was satisfactory, the Court closed with

that the Secretary denies relief, § 526(c) authorizes the district court to grant temporary relief from a cessation order pending completion of the administrative process. Once the administrative process is complete, the Secretary's final order is reviewable "on the record" under §§ 526(a) and (b). To conclude, as did the district court, that a party may seek judicial review of a cessation order under § 526(c) without first attempting to obtain temporary relief from the Secretary pursuant to § 525(c) would render the administrative relief provisions superfluous. Congress would not have imposed such stringent time deadlines on the Secretary if it intended that affected parties would be permitted to bypass an available opportunity to obtain adequate administrative relief from the Secretary.

The logic of the operation of the Act's administrative relief procedures is clear when applied to the cessation orders issued against Shawnee. When the notices of violations were issued on September 5, 1979, Shawnee became entitled to seek administrative review before the Secretary. Had it sought such relief it may well have received a decision on the merits before it was ordered to abate the violations or cease operations. More importantly, had it sought temporary relief under § 525(c) when the cessation orders issued on December 13, 1979, the Secretary would have been forced to grant or deny relief within five days. Thus, Shawnee could have received the relief it ultimately sought, administratively, before it filed this lawsuit on December 19, 1979.

The ready availability of adequate administrative relief also dictates that an aggrieved party exhaust its administrative remedies before procuring judicial review. *Seepe v. Dept. of the Navy*, 518 F.2d 760, 762 (6th Cir. 1975). It is axiomatic that one must exhaust administrative remedies before resorting to judicial review. *FTC v. Standard Oil of California*, 449 U.S. 813, 101 S.Ct. 62, 66 L.Ed.2d 16 (1980); *Myers v.*

language equally appropriate here: "In these circumstances, there simply is no basis for the District Court's decision to substitute a judicial

Bethlehem Shipbuilding Co., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *Robinson v. Dow*, 522 F.2d 855, 857-58 (6th Cir. 1978). The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise and to correct its own errors so as to moot judicial controversies. *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S.Ct. 815, 817, 31 L.Ed.2d 17 (1972). By limiting judicial interruption of agency proceedings, the doctrine also promotes a sensible division of tasks between the agency and the courts: parties are discouraged from weakening the position of the agency by flouting its processes and the courts' resources are reserved for review and resolution of those matters where a dispositive solution is unavailable in the administration process. "Thus, the doctrine serves interests of accuracy, efficiency, agency autonomy and judicial economy." *Ezraty v. Comm. of Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981).

In the Surface Mining Act Congress has provided a well-defined administrative system for resolution of enforcement actions stemming from cessation orders. Given this machinery, we are reluctant to permit a district court to interrupt the Secretary's determinations. Bypassing the administrative remedies would impair the expeditious resolution of disputes and result in the forfeiture of administrative expertise. By circumventing the proscribed procedures, quick resort to the district court could easily preclude the Secretary from building a factual record, from clarifying or narrowing the dispute, or from resolving the controversy altogether so as to obviate the necessity for judicial intervention. Accordingly, we conclude that Shawnee was required to exhaust its administrative remedies by seeking review and relief pursuant to Section 525 before obtaining judicial review under Section 526(c).

Although exhaustion of administrative remedies is typically required as a condition

policy preference for the scheme adopted by Congress."

for judicial review, the requirement is not absolute. See, e. g., *White Mountain Broadcasting Co. v. FCC*, 598 F.2d 274, 278 (D.C.Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979). The doctrine must be applied in each case with an understanding of its purposes and the particular administrative scheme involved. *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969). Where pursuit of administrative remedies does not serve the purposes behind the exhaustion doctrine, the courts have allowed a number of exceptions. Thus, exhaustion is not required if administrative remedies are inadequate or not efficacious, see *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1081 (D.C.Cir.1978); where pursuit of administrative remedies would be a futile gesture, see *Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle*, 571 F.2d 359, 363 (7th Cir.), cert. denied, 439 U.S. 834, 99 S.Ct. 115, 58 L.Ed.2d 130 (1978); where irreparable injury will result unless immediate judicial review is permitted, *Rhodes v. United States*, 574 F.2d 1179, 1181 (5th Cir. 1978); or where the administrative proceeding would be void, see *Winterberger v. Teamsters, Local Union 162*, 558 F.2d 923, 925 (9th Cir. 1977).

[2] Another exception to the exhaustion doctrine is that a litigant may bypass available administrative procedures where there is a readily observable usurpation of power not granted to the agency by Congress. *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). Shawnee contends that this exception applies here; regardless of the statutory provisions, exhaustion was not required here because the Secretary's jurisdiction over the tippie operation was challenged.

[3] The *Leedom* jurisdiction exception to the exhaustion doctrine is not automatically invoked whenever a challenge to the scope of an agency's authority is raised. On the contrary, it is a narrow anomaly reserved for extreme situations. See *American General Ins. Co. v. FTC*, 496 F.2d 197, 200 (5th Cir. 1974). Thus, even when the

issue of agency jurisdiction is raised, the exhaustion doctrine generally requires that an agency be accorded an opportunity to determine initially whether it has jurisdiction. *West v. Bergland*, 611 F.2d 710, 719 (8th Cir. 1979), cert. denied, 449 U.S. 821, 101 S.Ct. 79, 66 L.Ed.2d 23 (1980); *Marshall v. Burlington Northern Inc.*, 595 F.2d 511, 513 (9th Cir. 1979); *In re Restland Memorial Park*, 540 F.2d 626, 628 (3rd Cir. 1976); *Casey v. FTC*, 578 F.2d 793, 798 (9th Cir. 1978); cf. *United States v. City of Painesville, Ohio*, 644 F.2d 1186, 1190 (6th Cir. 1981) (agency's interpretation of its own regulations is controlling unless plainly erroneous). See also *Public Lands Institute, Inc. v. Andrus*, 497 F.Supp. 482, 486 (D.C.C. 1980).

In many circumstances it is easier to theorize than to discern when an agency's action is so far out of bounds, so beyond the realm of its delegated authority that the *Leedom* exception should be invoked. In grappling with this problem the courts have employed three criteria for determining whether the exhaustion requirement should be waived: 1) is the agency's jurisdiction conspicuously lacking; 2) will the agency's expertise assist in resolving the jurisdictional issue; and 3) will exhaustion of administrative remedies result in irreparable harm to the claimant. See *Marshall v. Burlington Northern, Inc.*, 595 F.2d 511, 513 (9th Cir. 1979) and authorities cited therein.

[4] In deciding the "jurisdictional appearance" issue, the initial focus is on Shawnee's contention that the Secretary exceeded his authority because Shawnee's tippie is not an "activity . . . in connection with a surface coal mine . . ." 30 U.S.C. § 1291(28) and as such is immune from the Secretary's regulation. At first blush it might seem difficult to understand how a tipping operation which processes coal removed from a coal mine is not an activity connected with the mine. The gravamen of Shawnee's argument, however, is that its tipping operation is not connected to its coal mine, but only processes coal removed from other, non-adjacent mines. Shawnee's tippie operations have continued since its

coal mining operations ceased, and the termination of its surface mine, Shawnee submits, is sufficient to remove its tipping operation from the Secretary's jurisdiction.

The scope of surface coal mining operations covered by the Act is exceptionally broad. Section 701(28), 30 U.S.C. § 1291(28), delineates the activities specifically determined by Congress to be encompassed within and adjunct to the term "surface coal mining operation:"

Activities conducted on the surface lands in connection with a surface coal mine Such activities include . . . the cleaning, concentrating, loading of coal for interstate commerce at or near the mine site. . . . and the areas upon which such activities occur (including) stockpiles . . . processing areas . . . and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

This provision leaves little doubt that Congress intended tipping operations to fall within the Act's ambit. And for the reasons outlined in *In re Permanent Surface Mining Regulation Litigation*, (D.D.C.1980) (No. 79-1144) we conclude that Congress intended the Act to encompass off-site processing operations, such as Shawnee's tipping operation. On this point then, there is every indication that the Secretary correctly asserted jurisdiction over Shawnee.⁸

[5] In the district court Shawnee also argued that it is not an "operator" as that term is defined in § 701(13), 30 U.S.C. § 1291(13). Under that section an operator is defined as anyone who removes or intends to remove 250 tons of coal within twelve consecutive calendar months in any one location. From the Act's inception in August, 1977, until it ceased operations in

December, 1978, a period exceeding twelve months, Shawnee unquestionably qualified as an operator. At the time the cessation orders were issued, Shawnee was still reclaiming its mine site. It is beyond cavil that the Secretary retains jurisdiction over an operator who has ceased removing coal until the reclamation activities are completed. See §§ 507, 515, 518. Whether the Secretary retains jurisdiction over a company which has ceased mining and finished reclamation but which still conducts activity in connection with a surface mining operation, i. e., a tipping operation, is a question not clearly before us today. Our observations on the issue are relevant only to whether it is clear that the Secretary is without jurisdiction. We must reject Shawnee's argument because to accept it would deny the Secretary jurisdiction over parties who have ceased mining but which are still actively engaged in reclamation, a result clearly not countenanced by the Act.

The second prong of the test examines whether the agency's expertise will be helpful in deciding the jurisdictional challenge. In this case the jurisdictional answer will be provided by applying the statute to the facts. Agency expertise is particularly helpful when a question turns on such analysis. *McKart*, *supra*, 395 U.S. at 198, 89 S.Ct. at 1665; *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978). This expertise is especially appropriate in the context of an agency interpreting a new and complex statute. *Train v. NRDC*, 421 U.S. 60, 87, 95 S.Ct. 1470, 1485, 43 L.Ed.2d 731 (1975). Specifically, the Interior Board of Surface Mining Appeals has held that whether an operation is an activity connected with a surface coal mining operation "depends on the particular factual circumstances of each case." *Ross Tipple v. OSM*, 1 IBSMA 303, 304 (1979). Accord-

8. The district court relied on the decision of the Board of Surface Mining Appeals in *Western Engineering, Inc.*, 1 IBSMA 202 (1979). There, the IBSMA held that a wholly independent coal transportation company which never removed or owned any of the coal it processed was not covered by the Act. This decision would not, without more, protect Shawnee because Shawnee has mined coal and owns the coal it

processes. Moreover, in a subsequent decision the IBSMA limited *Western Engineering* to its facts in refusing to hold that all independent tipple operators are excluded from the Act. *Ross Tipple v. OSM*, 1 IBSMA 303 (1979). This holding was reaffirmed in *Drummond Coal Co.*, 2 IBSMA 96 (1980), and in *Bethlehem Mines Corp.*, 2 IBSMA 215 (1980).

BEVERLY ENTERPRISES v. N. L. R. B.

1095

Cite as 661 F.2d 1095 (1981)

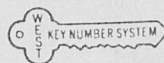
ingly, the statutory interpretation of the jurisdictional issue is better left to the agency itself for initial consideration and application of its specialized expertise. See *Marshall v. Burlington*, supra, 595 F.2d at 513.

[6] Finally, we must consider whether exhaustion of administrative remedies would have resulted in irreparable harm to Shawnee. The district court found that Shawnee would suffer such harm because upon receipt of the cessation order it was faced with the choice of shutting down or incurring a \$750.00 per day penalty for each violation. That analysis ignores the temporary relief provisions expressly provided in the Act; first with the Secretary and subsequently, if necessary, in district court, Shawnee could have sought suspension of the cessation orders. If either the Secretary or the court had granted temporary relief, not only could operations continue, but any penalty assessed, as here, under § 518(h), 30 U.S.C. § 1268(h), is suspended pending a final decision by the Secretary. The availability of effective relief from the Secretary thereby precludes the conclusion that Shawnee was faced with imminent, irreparable harm. Even if the prospect for obtaining relief appeared doubtful, that would not, by itself, warrant an evasion of the exhaustion requirement. Congress considered the competing interests of the operators and the environment and in prescribing the standards which apply to the Secretary and courts alike in administering temporary relief and it chose to place greater weight on environmental protection. See *Virginia Surface Mining and Reclamation Ass'n. v. Andrus*, 604 F.2d 312, 315 (4th Cir. 1979).

Shawnee has also argued that exhaustion was not required because Section 10(c) of the Administrative Procedure Act, 5 U.S.C. Section 704, authorizes judicial review of all "final" orders regardless of whether there has been an appeal to a superior agency authority. In light of our conclusion that the Surface Mining Act requires exhaustion of administrative remedies before resorting to judicial review, this contention is without

merit. See *Nor-Am Agricultural Products, Inc. v. Hardin*, 435 F.2d 1151, 1158 (7th Cir.), cert. denied, 402 U.S. 935, 91 S.Ct. 1399, 28 L.Ed.2d 870 (1970). See also *Monterey Coal Co. v. Federal Mine Safety and Health Review Commission*, 635 F.2d 291, 293 (4th Cir. 1980).

The decision of the district court is reversed and the case is remanded to the district court for vacation of the injunction entered against the Secretary.



BEVERLY ENTERPRISES, dba Beverly
Manor Convalescent Centers,
Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD, Respondent.

No. 79-1323.

United States Court of Appeals,
Sixth Circuit.

Argued April 15, 1981.

Decided Oct. 8, 1981.

Employer sought review of order by National Labor Relations Board directing employer to cease and desist from refusing to bargain with certified exclusive collective bargaining representative of certain employees at nursing home operated by employer. The Court of Appeals, Rice, District Judge, sitting by designation, held that where regional director failed to clearly articulate whether he had determined that licensed practical nurse activities respecting patient care either did not involve independent judgment or did involve independent professional judgment not in interest of employer and thereby left impression that he considered the "conjunction with patient care" alone sufficient for nonsupervisory

HAMLIN TESTING LAB., INC. v. UNITED STATES ATOMIC ENERGY COM'N 221

Cite as 337 F.2d 221

It may be that Obrist has been grievously wronged, but his rights are not now and have not been under Section 32.

The order of the district court affirming the referee's order overruling the objections to the discharge is affirmed.



HAMLIN TESTING LABORATORIES,
INC., Petitioner,

v.

UNITED STATES ATOMIC ENERGY
COMMISSION, Respondent.

No. 16055.

United States Court of Appeals
Sixth Circuit.

Oct. 9, 1964.

Proceeding on motion by applicant for renewal of a Byproduct Material License for an order staying enforcement of an order of the Atomic Energy Commission denying renewal of the license. The Court of Appeals, O'Sullivan, Circuit Judge, held that a stay of the order would be denied in view of lack of showing of strong probability that applicant would succeed on the merits, in view of lack of showing of irreparable injury, and in view of lack of showing that stay would not be harmful to the public interest as involved in use of material subject to regulation by the commission.

Order in accordance with opinion.

I. Administrative Law and Procedure
§ 674

Three major factors to be considered in passing on a motion to stay an administrative order pending judicial review are likelihood of petitioner prevailing on its petition for review after full hearing thereon, whether irreparable

damage would be suffered by petitioner if a stay was denied, and whether public interest calls for denial of the stay.

2. United States § 53(6)

A stay pending review of order of the Atomic Energy Commission denying renewal of a Byproduct Material License would be denied in view of lack of showing of strong probability that applicant would succeed on the merits, in view of lack of showing of irreparable injury, and in view of lack of showing that stay would not be harmful to the public interest as involved in use of material subject to regulation by the commission.

Anthony B. Roshak, Detroit, Mich., for petitioner.

William M. Orrick, Jr., Asst. Atty. Gen., Lionel Kestenbaum, Gerald Kadish, Attorneys, Department of Justice, Washington, D. C., Joseph F. Hennessey, General Counsel, Sidney G. Kingsley, Asst. General Counsel (Solicitor), Troy B. Conner, Jr., Trial Counsel, Felix Albert, Attorney, Office of the General Counsel, United States Atomic Energy Commission, Washington, D. C., for respondent.

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

O'SULLIVAN, Circuit Judge.

Petitioner Hamlin Testing Laboratories, holder of a Byproduct Material License authorizing it to perform industrial radiography, has moved to stay enforcement of an order of the Atomic Energy Commission denying its application for renewal of that license, pending this Court's consideration of its petition for review of such order. Authority for such a stay is found in Section 189(b) of the Atomic Energy Act, 42 U.S.C.A. § 2239(b), and in the Administrative Procedure and Administrative Orders Review Acts, 5 U.S.C.A. §§ 1009(d), 1039 (b). This Court granted a temporary stay pending our consideration of the motion. Upon consideration of the arguments advanced, we now conclude that the stay must be denied.

[1] The major factors to be considered in passing on a motion to stay an administrative order pending judicial review have recently been enumerated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 104 U.S.App.D.C. 106, 259 F.2d 921, 925 (1958). See also *Liberty Nat'l Bank & Trust Co. of Oklahoma City v. Board of Governors*, 312 F.2d 392 (C.A. 10, 1962); *Associated Sec. Corp. v. SEC*, 283 F.2d 773 (C.A.10, 1960); *Eastern Air Lines, Inc. v. CAB*, 261 F.2d 830 (C.A.2, 1958). Three of the factors enumerated in *Virginia Petroleum* are relevant to the motion before us, first, the likelihood of petitioner prevailing on its petition for review after full hearing thereon, second, whether irreparable damage will be suffered by petitioner if a stay is now denied, and third, whether the public interest calls for our discretion to be exercised to deny the stay.

1) *Merit of the Petition for Review.*

[2] Hamlin's application for license renewal was denied on the basis of its conceded repeated violations of Commission regulations adopted to protect health and safety. A trial examiner, while finding such violations, exonerated Hamlin on his view that its violations were not wilful. The Commission did not follow the recommendations of its Hearing Examiner. It has not been shown to us that lack of wilfulness would necessarily bar the Commission from refusing renewal to a licensee which had repeatedly violated its regulations. Without full review of the record of the case, the material before us does not demonstrate such a strong probability that petitioner will succeed on the merits as to prompt us to stay the Commission's order. See *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 635, 650 (C.A.6, 1962).

2) *Irreparable Injury.*

In its amended motion and a brief filed August 20, last, Hamlin relied almost exclusively for its showing of injury upon a single contract with a large ship-building firm. It averred that without a license it cannot perform such contract. With its opposition to the motion for

stay, the Commission on September 4th submitted an affidavit from an official of that company, stating that its contract with Hamlin had been terminated on August 20, 1964. Hamlin has made no response to that showing. It does not appear that such termination was the result of the Commission's order. In this state of the proceedings, therefore, we can only surmise what may be the injury to Hamlin from denial of the opportunity to solicit other business pending appeal.

3) *The Public Interest.*

In *Virginia Petroleum Jobbers Ass'n*, supra, the Court said:

"In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes." 259 F.2d 925.

It will be obvious that the public interest is critically involved in the use of materials subject to regulation by the Atomic Energy Commission. The Commission's order here involved discloses its view that renewal of Hamlin's license would not be compatible with the public interest. In *Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (C.A.10, 1960), the Court concluded that a stay must be denied whenever the petitioner fails to carry the burden of establishing that it will not be harmful to the public interest. Congress in enacting the Atomic Energy Act specifically found that "[t]he * * * utilization of * * * byproduct * * * material must be regulated in the national interest and in order * * * to protect the health and safety of the public." Section 2(d) of the Act, 42 U.S.C.A. § 2012(d). Without fully understanding the dangers involved in the use of "by-product material" by careless or unskilled hands, we can fairly infer such danger. The Commission in this proceeding has vigorously opposed petitioner's request for a stay and we consider it proper, with the limited knowledge we now have, to give at least interim respect to the ex-

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pert judgment of the Commission as a coordinate agency of government specially created to further public purposes in this area. Compare *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10, 15, 62 S.Ct. 875, 86 L.Ed. 1229, 1234, 1237 (1942).

It might be that no one of the above considerations, standing alone, calls for denial of a stay, but taken together they urge us to deny the stay.

An order in conformity herewith will be entered.



Harvey Thomas SMOOT, Jr., Appellant,
v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY et al.,
Appellees.

Katie Mae DONALDSON and William M.
Donaldson, Appellants,

v.

Harvey Thomas SMOOT, Jr., et al.,
Appellees.

Nos. 20923, 21129.

United States Court of Appeals
Fifth Circuit.

Oct. 15, 1964.

Proceeding on assured's claim that insurer was liable for excess of judgment obtained against him over policy limits. The United States District Court for the Southern District of Georgia, Frank M. Scarlett, J., entered judgment on jury finding of accord and satisfaction and appeal was taken. The Court of Appeals held that under Georgia law there was no accord and satisfaction as result of conduct of judgment creditors where there was no condition of payment express or implied.

Reversed and remanded with directions.

Accord and Satisfaction ⇨(1)

Under Georgia law, there was no accord and satisfaction of judgment against assured as result of conduct of judgment creditors, where there was no condition of payment express or implied.

No. 20923:

Alton D. Kitchings, Savannah, Ga., for
Harvey T. Smoot.

Alex A. Lawrence, James W. Head,
Luhr G. C. Beckmann, Jr., Savannah, Ga.,
Kirk McAlpin, Atlanta, Ga., Hitch, Mil-
ler, Beckmann & Simpson, Savannah, Ga.,
Bouhan, Lawrence, Williams & Levy,
Savannah, Ga., for appellees.

No. 21129:

Anton F. Solms, Jr., James W. Head,
Savannah, Ga., for Katie M. and W. J.
Donaldson.

Kirk McAlpin, Atlanta, Ga., Alton D.
Kitchings, Alex A. Lawrence, Luhr G.
C. Beckmann, Jr., Savannah, Ga., for ap-
pellees.

Before BROWN and BELL, Circuit
Judges and SPEARS, District Judge.

PER CURIAM.

By our prior decision in 1962, *Smoot v. State Farm Mutual Auto. Ins. Co.*, 5 Cir., 1962, 299 F.2d 525, we reversed and remanded the case for a trial of the Assured's claim that the Insurer was liable for the excess of the damage-claimant's judgment over the policy limits. On the eve of that trial, the Insurer, under F.R. Civ.P. 19(b), sought to bring in the Donaldsons, the damage-claimant-judgment creditors, as necessary parties. The theory asserted in this amended answer was that by conduct of the judgment creditors there had been an accord and satisfaction of the judgment against the Assured Smoot. If that were so, there would then be nothing to try in the suit of the Assured *vis-a-vis* the Insurer. Though objecting to this unorthodox transmutation of the Assured's suit into a trial of rights as between the Assured

AFFIRMED.



V

The United States District Court for
the Western District of Virginia, Glen M.

2. Mines and
Although
Mining Con
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cases, the c

MINING AND
 RECLAMATION, INC.,
 James Ridge Coal
 Inc., Big Fork
 Coal Co., Bossco,
 Coal Co., Brushy
 & Sons, Burn-
 Corp., Cardinal
 Mining Co., Inc.,
 Claude Yeary
 Coal Co., Con-
 coal Co., Curt's
 Double D Coal
 Enterprises, Five
 Mining Co.,
 Coal Co., Inc.,
 Coal Co., H. B.
 Coal Co., Inc.,
 Highland Enter-
 prise Construc-
 Enterprises, J.
 Co., Inc., Lyons
 Coal Co., M & M
 Developers, Inc.,
 York Coal Co.,
 Mount Mining
 Coal Corp., P
 Coal Corp.,
 Coal Co., S & M
 Mining Co., Ster-
 Coal Co., Tridale
 Ranch Coal Co.,
 Sea Dock Com-
 Charles J. Lowry,
 E. Kelly, Town
 Commonwealth

ary, U. S. De-
 Appellant.
 Reclamation,
 St. Charles
 Virginia.

Appeals,

1979.

1979.

istrict Court for
 Virginia, Glen M.

Williams, J., granted interlocutory injunc-
 tion restraining Secretary of Interior from
 enforcing interim performance standards
 of Surface Mining Control and Recla-
 mation Act, and the Secretary appeal-
 ed. The Court of Appeals, Butzner, Circuit
 Judge, held that: (1) it was reversible error
 to apply the *Blackwelder* standards rather
 than the Act's prerequisites for temporarily
 enjoining an order or decision of the Secre-
 tary and to fail to give any consideration to
 congressional findings set forth in the Act;
 (2) although statutory criteria for an inter-
 locutory injunction refer to review of orders
 and decisions of the Secretary in individual
 cases, the congressional policy which they
 implement requires their application where
 the Secretary is enjoined from issuing any
 orders or decisions; and (3) statement of
 congressional findings must be given due
 consideration in determining whether the
 public interest will be adversely affected by
 interlocutory relief.

Reversed with directions.

1. Mines and Minerals § 92.6

Interlocutory injunction restraining
 Secretary of Interior from enforcing inter-
 im performance standards of Surface Min-
 ing Control and Reclamation Act was im-
 properly issued where trial court applied
 the *Blackwelder* criteria rather than the
 Act's own prerequisites for temporarily en-
 joining an order or decision issued by Secre-
 tary and failed to give any consideration to
 the congressional findings set forth in the
 Act. U.S.C.A. Const. Amend. 5; Surface
 Mining Control and Reclamation Act of
 1977, §§ 101, 502-522, 502(c), 515(b)(2, 3, 5,
 10, 13, 15, 19), (d), 526(c), 30 U.S.C.A.
 §§ 1201, 1252-1272, 1252(c), 1265(b)(2, 3, 5,
 10, 13, 15, 19), (d), 1276(c).

2. Mines and Minerals § 92.6

Although criteria specified in Surface
 Mining Control and Reclamation Act for
 temporarily enjoining any order or decision
 issued by Secretary of Interior refer to re-
 view of orders and decisions in individual
 cases, the congressional policy which they

implement requires their application where
 the Secretary is enjoined from issuing any
 orders or decisions enforcing the Act. Sur-
 face Mining Control and Reclamation Act
 of 1977, §§ 502-522, 526(c), 30 U.S.C.A.
 §§ 1252-1272, 1276(c).

3. Injunction § 134

The *Blackwelder* criteria for granting a
 temporary injunctive relief were formulat-
 ed for private litigation and were not in-
 tended to supplant the criteria for injunc-
 tive relief that may be prescribed by Con-
 gress for the administration of a regulatory
 statute.

4. Mines and Minerals § 92.6

Although congressional findings set
 forth in Surface Mining Control and Recla-
 mation Act do not conclusively establish the
 Act's constitutionality, a court considering
 the propriety of an injunction prohibiting
 enforcement of the Act must give them due
 consideration in determining whether the
 public interest will be adversely affected by
 its interlocutory order. Surface Mining
 Control and Reclamation Act of 1977,
 §§ 101, 102, 526(c), 30 U.S.C.A. §§ 1201,
 1202, 1276(c).

Michael A. McCord, Dept. of Justice,
 Washington, D. C. (William M. Eichbaum,
 Jr., Associate Sol., Marcus P. McGraw,
 Dept. of the Interior, James W. Moorman,
 Asst. Atty. Gen., Carl Strass, Alfred T.
 Ghiorzi, Carol Green, Dept. of Justice,
 Washington, D. C., on brief), for appellant.

John L. Kilcullen, Washington, D. C. (Kil-
 cullen, Smith & Heenan, Washington, D. C.,
 on brief), for appellees Virginia Surface
 Mining and Reclamation Association, et al.

Roger L. Chaffe, Richmond, Va., Asst.
 Atty. Gen., for appellee The Commonwealth
 of Virginia.

Stephen C. Greenberg, St. Paul, Va., Vir-
 ginia Citizens for Better Reclamation, Inc.,
 Robert T. Copeland, Abingdon, Va., Counsel
 for the Town of St. Charles, Virginia, on
 brief, for intervenors amicus curiae Virgini-
 a Citizens for Better Reclamation, Inc., and
 the Town of St. Charles, Virginia.

Before BUTZNER, HALL and PHILLIPS, Circuit Judges.

BUTZNER, Circuit Judge:

The Secretary of the Interior appeals an order of the district court granting Virginia Surface Mining and Reclamation Association, a number of coal companies, individual landowners, and the Town of Wise, Virginia an interlocutory injunction against enforcement of §§ 502-522 of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. §§ 1252-1272]. The complaint against the Secretary sought declaratory and injunctive relief to prevent enforcement of the Act on grounds that it is an unconstitutional assumption of authority under the commerce clause and a violation of the fifth and tenth amendments. The district court applied the criteria set forth in *Blackwelder Furniture Company v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189 (4th Cir. 1977) for determining when a preliminary injunction should be issued. It ruled:

[U]nless the court grants a temporary injunction now, plaintiffs will suffer irreparable injury; on the other hand, the defendant has introduced scant evidence to show that the issuance of the temporary injunction would substantially harm other interested parties or that the public interest would be adversely affected. Therefore under the *Blackwelder* test, it is not necessary for this court to determine whether the plaintiffs are likely to succeed on the merits of their suit.

Nevertheless, the court went on briefly to discuss the plaintiffs' constitutional challenge to the Act's reclamation requirements and its authorization for cessation orders. With respect to these provisions, the court concluded that the plaintiffs were likely to prevail on their allegation that the Act violated rights secured to them by the fifth amendment. The Court did not address the

other constitutional objections alleged by the plaintiffs. The court's order enjoined the Secretary:

from taking any action to enforce (by cessation order, permanent suspension or revocation, violation citations or notices, penalty, prosecution or otherwise) any and all provisions of §§ 502 through 522 [of the Act].

[1] We believe that the district court applied an improper standard for granting relief and that it erred by failing to give any consideration to the congressional findings set forth in § 101 of the Act [30 U.S.C. § 1201]. Accordingly, we reverse the judgment and dissolve the interlocutory injunction.

The Surface Mining Act is a comprehensive statute designed, through interim and permanent measures, to establish nationwide, uniform regulations for surface coal mining operations in cooperation with the states. The Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement, is charged with the primary responsibility of administering and implementing the Act by promulgating regulations and enforcing its provisions.¹ The performance standards required by the Act during the interim phase now in effect include: requirements for restoration of land to its prior condition, restoration of land to approximate original contour, segregation and stabilization of top soil, minimizing disturbances to hydrologic balance and to water quality, the construction of coal mine waste piles used as dams and embankments, the use of explosives, revegetation of mined areas, and spoil disposal for steep slope mines. §§ 502(c), 515(b)(2), (3), (5), (10), (13), (15), (19), and (d) [30 U.S.C. §§ 1252, 1265(b)(2), (3), (10), (13), (15), (19), and (d)]. The principal effect of

1. The interim regulations currently in effect are published in 30 C.F.R. §§ 700-837 (1978). A district court has denied preliminary relief on the principal challenges to the Act's enforcement. *In re Surface Mining Regulation Litigation*, 452 F.Supp. 327 (D.D.C.), *aff'd*, *National Coal Assoc. v. Andrus*, No. 78-1406 (D.C.Cir. 1978). Subsequently the court upheld the validity of pertinent sections of the interim regulations. *In re Surface Mining Regulation Litigation*, 456 F.Supp. 1301 (D.D.C.), *appeal docketed*, *Atlantic Richfield Co. v. United States Dept. of Interior (In re Surface Mining Regulation Litigation)*, Nos. 78-2190, 78-2191, 78-2192 (D.C.Cir. 1978).

the injunction enforcing the

Section 522(c) [§ 1276(c)] sites for temporary decision issued

(1) all parties have been notified by the Secretary

(2) the parties show that the proposed action is in the public interest

(3) such action is necessary to prevent irreparable injury to the public interest

[2] Although an interlocutory view of order is not binding on the Secretary, it requires approval of the Secretary in order to be effective.

[3] Our criteria, rather than applicable in *Yakus v. United States*, 344 U.S. 660, 80 S.Ct. 1068, 18 L.Ed.2d 103 (1953), with the *Price Control* case, 321 U.S. 1 (1944).

[W]here a party is adversely affected by the injunction, the court may grant relief until the rights of the plaintiff are protected. The application of the 'Courtly do, go withhold public interest go when involved.'

objections alleged by court's order enjoined

action to enforce (by permanent suspension or citations or notices, or otherwise) any §§ 502 through 522

at the district court standard for granting and by failing to give the congressional findings of the Act [30 U.S.C. we reverse the judgment interlocutory injunction

Act is a comprehensive through interim and to establish national standards for surface coal cooperation with the of the Interior, act of Surface Mining enforcement, is charged responsibility of administering the Act by promulgating and enforcing its performance standards during the interim phase of requirements for its prior condition, approximate original and stabilization of topographic features to hydrologic quality, the construction of piles used as dams the use of explosives, areas, and spoil disposal mines. §§ 502(c), (13), (15), (19), and (d) 5(b)(2), (3), (10), (13), the principal effect of

of the interim regulatory Mining Regulation Litigation (D.D.C.), appeal dock Co. v. United States Surface Mining Regulation 8-2190, 78-2191, 78-

the injunction is to bar the Secretary from enforcing these provisions of the Act.

Section 526(c) of the Act [30 U.S.C. § 1276(c)] sets forth the following prerequisites for temporarily enjoining any order or decision issued by the Secretary:

- (1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
- (2) the person requesting such relief shows that there is substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and
- (3) such relief will not adversely affect the public health or safety or cause significant environmental harm to land, air, or water resources.

[2] Although these statutory criteria for an interlocutory injunction refer to the review of orders and decisions of the Secretary in individual cases, we believe that the Congressional policy which they implement requires application where, as here, the Secretary is enjoined from issuing any orders or decisions.

[3] Our conclusion that the statutory criteria, rather than *Blackwelder's*, are applicable is based on the principles expressed in *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), which dealt with the constitutionality of the Emergency Price Control Act of 1942. There the Court said, 321 U.S. at 440-42, 64 S.Ct. at 675:

[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. . . . This is but another application of the principle that 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'

Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest.

The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions.

The criteria for the grant of an interlocutory injunction set forth in *Blackwelder* were formulated for private litigation. They were not intended to supplant the criteria for interlocutory relief that have been prescribed by Congress for the administration of a regulatory statute.

The district court did not comply with the second requirement set forth in § 526(c). It expressly held that under the *Blackwelder* test it was not necessary to determine whether the plaintiffs are likely to succeed on the merits of their complaint that the Act is unconstitutional. Moreover, in its discussion of the plaintiffs' claims about the reclamation and cessation provisions, the court did not advert to the judicial and administrative remedies provided by the Act. It did not determine the extent to which these remedies satisfied the plaintiffs' constitutional claims.

The district court did not comply with the third requirement of § 526(c). It made no finding that its injunction "will not adversely affect the public health or safety or cause imminent environmental harm to land, air, or water resources." Instead, applying the *Blackwelder* test it attempted to balance the harm to the plaintiffs with respect to the harm suffered by the defendant and the public. But even in doing this, it wholly ignored the Congressional findings set forth in § 101 of the Act. [30 U.S.C. § 1201]. In this section Congress found and declared:

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(h) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality;

(j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner.

[4] In *FPC v. Texaco Inc.*, 417 U.S. 380, 400, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974), the Court said:

It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the mul-

tifaceted points of view of the representational process.

Sections 101 and 102 of the Act [30 U.S.C. §§ 1201 and 1202], which set forth the Congressional findings and purpose, together with the legislative history² disclose that Congress considered the competing interests affected by the Act. While these declarations do not conclusively establish the Act's constitutionality, a court considering the propriety of an injunction prohibiting enforcement of the Act must give them due consideration in determining whether the public interest will be adversely affected by its interlocutory order.

The judgment of the district court is reversed, and the injunction it entered February 14, 1979 is dissolved. The Clerk is directed to issue the mandate forthwith.



Robert C. NEWSON, Plaintiff-Appellant,

v.

FIRST ALABAMA BANK OF HUNTSVILLE, N. A., Defendant-Appellee.

No. 78-3272.

United States Court of Appeals,
Fifth Circuit.

June 19, 1979.

Appeal was taken from an order of the United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., J. Following dismissal of appeal, and on petition for rehearing, the Court of Appeals held that where day on which period for filing appeal would have ended was a legal holiday, party received an additional day in which to file, and appeal filed on the following day was timely filed.

2. See, e. g., H.R.Rep.No. 95-218, 95th Cong., 1st Sess. (1977), U.S.Code Cong. & Admin. News 1977, p. 593.

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ORDER
CATED and

ication in accordance with the provisions of 43 CFR 2650.7.

As to Kokhanok Lake and Gibraltar Lake, the subjects of this appeal, the BLM is hereby Ordered to publish an amendment to the DIC reflecting BLM's redetermination of the water bodies as navigable. Said amendment shall include notice that an appeal may be taken therefrom.

Publication need not delay conveyance of the lands unaffected by redetermination. Water bodies subject to redetermination and publication shall be excluded from conveyance, and the remaining lands conveyed immediately. Exclusion shall be by named water body rather than by sections. The acreage of the excluded submerged lands found to be navigable shall not be charged against the acreage entitlement under ANCSA of BBNC, Kokhanok, or APC.

As to Kokhanok's request that a redetermination of Gibraltar Creek as navigable not result in new easements, it should be noted that public easements are established pursuant to statutory and regulatory requirements, and are not a matter which can be disposed of through stipulation by parties to an appeal. The BLM is authorized and obligated, upon redetermination, to establish any additional easements required by law.

Further, the Board hereby dismisses the above-designated appeal.

JUDITH M. BRADY
Chief Administrative Judge

CLAYPOOL CONSTRUCTION CO., INC.

2 IBSMA 81

Decided May 16, 1980

Appeal by the Office of Surface Mining Reclamation and Enforcement from the amended decision of Administrative Law Judge Tom M. Allen (Docket Nos. CH 9-9-R and CH 9-22-R), issued on Oct. 30, 1979, which upheld Notices of Violation Nos. 78-I-3-15, 78-I-3-18, and 78-I-3-19, and vacated Cessation Orders Nos. 78-I-3-1 and 78-I-3-3.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Significance

A cessation order is not properly issued under sec. 521(a)(2) of the Act unless the environmental harm alleged to be significant may be described objectively on the basis of observations or measurements.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Imminence

A cessation order is not properly issued under sec. 521(a)(2) of the Act when the evidence does not support a finding that significant environmental harm may reasonably be expected to occur before the expiration of an abatement period that would be set pursuant to sec. 521(a)(3) of the Act.

APPEARANCES: Billy Jack Gregg,
Esq., Office of the Field Solicitor,

Charleston, West Virginia, Mark S. Wallace, Esq., and James B. Weber, Esq., Office of the Solicitor, Washington, D.C., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) appealed from the amended decision of Administrative Law Judge Tom M. Allen, issued on Oct. 30, 1979, which upheld Notices of Violation Nos. 78-I-3-15, 78-I-3-18, and 78-I-3-19, and vacated Cessation Orders Nos. 78-I-3-1 and 78-I-3-3. Only the validity of the cessation orders was placed in issue in this appeal. We agree with the result reached by the Administrative Law Judge and affirm his decision.

Factual and Procedural Background

The cessation orders which are the subject to this appeal were issued by OSM to Claypool Construction Co., Inc. (Claypool), pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. (a)(2) (Supp. 13:7), on the basis of OSM's finding that Claypool failed to secure from the State of West Virginia a permit required for surface coal mining operations.

Decided May 16, 1980

Office of Surface Mining and Enforcement
Decided decision of Administrative Law Judge Tom M. Allen
CH 9-9-R and CH 9-10-R
Oct. 30, 1979, which
of Violation Nos. 78-1-3-18, and 78-1-3-19,
Cessation Orders Nos. 78-1-3-3.

ing Control and Reclamation Act of 1977: Cessation Orders:
Mining Control Act of 1977: Environmental
Significance

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Mining Control Act of 1977: Environmental
Significance

is not properly issued
(2) of the Act when the
support a finding that
harm may be expected to occur before
an abatement period
pursuant to sec. 521

Billy Jack Gregg,
the Field Solicitor,

Charleston, West Virginia, Mark Squillace, Esq., and James B. Weber, Esq., Office of the Solicitor, Washington, D.C., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) appealed from the amended decision of Administrative Law Judge Tom M. Allen, issued on Oct. 30, 1979, which upheld Notices of Violation Nos. 78-1-3-15, 78-1-3-18, and 78-1-3-19, and vacated Cessation Orders Nos. 78-1-3-1 and 78-1-3-3. Only the validity of the cessation orders was placed in issue in this appeal. We agree with the result reached by the Administrative Law Judge and affirm his decision.

Factual and Procedural
Background

The cessation orders which are the subject to this appeal were issued by OSM to Claypool Construction Co., Inc. (Claypool), pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1271 (a)(2) (Supp. I 1977), on the basis of OSM's finding that Claypool had failed to secure from the State of West Virginia a permit required for surface coal mining operations con-

ducted by the company. In his initial review of these enforcement actions, the Administrative Law Judge upheld the cessation orders.¹ This ruling was appealed by Claypool.²

On Sept. 26, 1979, the Board remanded the case to the Administrative Law Judge for a determination whether Claypool's failure to secure a State permit for its activities caused or could be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources.³ In response to this remanded order, the Administrative Law Judge held that there was insufficient evidence of actual or impending environmental harm to warrant OSM's issuance of cessation orders to Claypool and, therefore, he vacated the orders.⁴

¹ Decision of Apr. 18, 1979, Docket Nos. CH 9-9-R and CH 9-22-R, at 2-5.

² OSM also filed an appeal with the Board, concerning the ruling of the Administrative Law Judge that he did not have jurisdiction to review the three notices of violation issued to Claypool. In response to this appeal the Board held that the Administrative Law Judge did have such jurisdiction. *Claypool Construction Co., Inc.*, 1 IBMSMA 259, 270-271, 86 L.D. 486-492 (1979).

³ *Claypool Construction Co., Inc.*, 1 IBMSMA 259, 272, 86 L.D. 486, 492 (1979). The Administrative Law Judge also was instructed to rule on the validity of Notices of Violation Nos. 78-1-3-15, 78-1-3-18, and 78-1-3-19. These the Administrative Law Judge upheld, except for Violations No. 3 (failure to maintain a copy of the mine permit at or near the minesite) and No. 4 (failure to post a mine identification sign at the entrance to the minesite) of Notice of Violation No. 78-1-3-15. Amended Decision of Oct. 30, 1979, Docket Nos. CH 9-9-R and CH 9-22-R, at 3. The Administrative Law Judge vacated these charges in the notice on the grounds that they were included in the cessation orders. *Id.* Neither party appealed this ruling.

⁴ Amended Decision of Oct. 30, 1979, *supra* at 2, n. 3.

OSM filed a notice of appeal from the Administrative Law Judge's amended decision on Nov. 30, 1979. OSM filed a brief; Claypool did not respond.

Issue

The issue in this appeal is whether Claypool's failure to have a State permit in and of itself constituted a condition, practice, or violation which caused or could reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Discussion

A cessation order is properly issued when an OSM inspector observes a condition, practice, or violation of the Act or regulations which is determined to be causing or can reasonably be expected to cause significant, imminent environmental harm.⁶ When review is sought of a cessation order issued under such circumstances, OSM must be prepared to supply prima facie proof: (1) of the violation, practice, or condition identified in the order; (2) of significant, imminent environmental harm or a reasonable expectation thereof; and (3) of a causal link between such reasonably expected or existing

harm and the proven violation, practice, or condition.⁶

By its evidence in the case OSM established that Claypool conducted surface coal mining operations without a requisite State permit, in violation sec. 502(a) of the Act, 30 U.S.C. § 1252(a) (Supp. I 1977), and 30 CFR 710.11(a)(2)(i).⁷ Thus, the first requirement of proof, identified above, was met by OSM. Lacking, however, is proof of the existence or reasonable expectation of significant, imminent environmental harm related to this violation.⁸

[1] Significant, imminent environmental harm to land, air, or water resources is described in 30 CFR 700.5 (1978):⁹

(i) An environmental harm is any adverse impact on land, air, or water resources, including but not limited to plant and animal life.

⁶ See 43 CFR 4.1171(a); *White Winter Coals, Inc.*, 1 IBSMA 305, 311-312, 86 L.D. 675, 678 (1979).

⁷ See Tr. 8 (stipulation by counsel for Claypool that the company did not have a State mining permit for its operations); W. Va. Code §§ 20-6-8 and 20-6-18(a).

⁸ Because the Board was not presented with sufficient evidence of reasonably expected or existing harm to uphold the cessation orders to Claypool, we need not and do not in this decision address OSM's arguments concerning a causal relationship between the failure to secure a mine permit and environmental harm.

⁹ No description of the phrase "significant, imminent harm to land, air, or water resources" appears in the 1979 publication of 30 CFR 700.5. The phrase is described, however, in essentially the same language quoted in this decision in 30 CFR 701.5 (1979) (Permanent Regulatory Program: Definitions), and the Board perceives no reason at this time to assign a meaning to the phrase different from that described originally in the initial regulatory provisions and that now appearing in the permanent regulatory provisions. The Board reaches this conclusion without regard to whether the lack of a description of the phrase in 30 CFR 700.5 is the result of editorial oversight or intentional deletion.

(ii) An environmental harm exists if a condition, practice, or violation exists which (a) is causing or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement that would be set under section 503 of the Act.

(iii) An environmental harm is significant if that harm is appreciable and not immediately repairable.

In this description, "significant harm" is indicated to mean "appreciable" harm, which leads us to conclude that "significant" is that which at least has been observed and/or measured.¹⁰ The record evidence of observed and measured harm is that concerning the quality of water derived from the area of Claypool's activity and the condition of the piles found there. In view of these circumstances OSM's notices of violation to Claypool indicating OSM's judgment that this existing environmental harm did not warrant the issuance of cessation orders. The Board has no reason to reject this.

[2] The remaining relevance concerns environmental conditions attributable to mining activity preceding that of Claypool.

¹⁰ This is in accord with the meaning assigned to "appreciable" by graphers (see, e.g., *Webster's Third International Dictionary* (G. & C. 1971) at 105), and adopted by the court, see, e.g., *Noland v. Woolan*, 192 F.2d 143 (1957).

¹¹ See *Claypool Construction Co. v. IBAMA*, 259, 263-264, 86 L.D. 675 (1979) (description of the notice issued to Claypool).

¹² See *id.* at 262, 86 L.D. at 675 (summary of evidence concerning preexisting Claypool's mining activity).

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on mining operations
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CFR 710.11(a) (2) (i).⁷
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(ii) An environmental harm is im-
minent if a condition, practice or violation
exists which (a) is causing such harm
or (b) may reasonably be expected to
cause such harm at any time before the
end of the reasonable abatement time
that would be set under section 521(a)
(3) of the Act.

(iii) An environmental harm is sig-
nificant if that harm is appreciable and
not immediately repairable.

In this description, "significant"
harm is indicated to mean "appreci-
able" harm, which leads the Board
to conclude that "significant" harm
is that which at least may be ob-
served and/or measured.⁹ The only
record evidence of observed or
measured harm is that concerning
the quality of water discharged
from the area of Claypool's mining
activity and the condition of spoil
piles found there. In response to
these circumstances OSM issued no-
tices of violation to Claypool,¹⁰ thus
indicating OSM's judgment that
this existing environmental harm
did not warrant the issuance of ces-
sation orders. The Board perceives
no reason to reject this judgment.

[2] The remaining relevant evi-
dence concerns environmental con-
ditions attributable to mining activ-
ity preceding that of Claypool.¹²

⁹ This is in accord with the range of mean-
ing assigned to "appreciable" by lexico-
graphers (see, e.g., *Webster's Third New Inter-
national Dictionary* (G. & C. Merriam Co.
1971) at 105), and adopted by many courts.
See, e.g., *Island v. Wootan*, 102 Ariz. 102, 427
P.2d 143 (1967).

¹⁰ See *Claypool Construction Co., Inc.*, 1
IBSMA 259, 263-264, 86 I.D. 486, 488-489
(1979) (description of the notices of viola-
tion issued to Claypool).

¹² See *id.* at 262, 86 I.D. at 487-488 (1979)
(summary of evidence concerning conditions
preexisting Claypool's mining activity).

The Board acknowledges that the
environmental harm resulting from
this earlier activity could be com-
pounded by Claypool's mining oper-
ations and thus become significant.
However, even assuming that sig-
nificant environmental harm could
be expected in the future under
these circumstances, such harm was
not shown by OSM to be imminent.
In 30 CFR 700.5, quoted above, "im-
minent" harm is described as that
which may reasonably be expected
to occur before the end of a reason-
able abatement time that would be
set under sec. 521(a) (3) of the Act,
30 U.S.C. § 1271(a) (3) (Supp. I
1977). This period may not exceed
90 days. The record indicates that
Claypool had conducted mining
operations in the area under con-
sideration for a period of approxi-
mately 8 months previous to OSM's
issuance of orders to cease these
operations.¹¹ Yet, as was indicated
above, OSM's inspectors did not find
significant environmental harm at
the times of their inspections of
Claypool's operations. Indeed, it ap-
pears from the evidence that the en-
vironmental conditions existing
prior to Claypool's operations were
improved in some respects by the
company's partial reclamation of
areas of preexisting mine work-
ings.¹³ Under these circumstances
the Board does not hold any antie-

¹¹ Tr. 180, 229.

¹³ See, e.g., Tr. 256-269. This is not to sug-
gest that Claypool's activities were in com-
pliance with applicable performance stand-
ards; rather, this observation relates merely
to the reasonableness of OSM's expectation of
imminent harm from Claypool's activities.

ipated significant environmental harm to have been proven imminent.

Because we have not been presented with evidence of the existence or reasonable expectation of environmental harm adequate to support the cessation orders, the decision of the Administrative Law Judge is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

EASTOVER MINING CO.

2 IBSMA 70

Decided May 16, 1980

Appeal by Eastover Mining Co., from an Oct. 5, 1979, decision by Administrative Law Judge David Torbett in Docket No. NX 9-78-R sustaining Notice of Violation No. 79-II-53-2 and Cessation Order No. 79-II-53-3 issued to Eastover for failure to permit an inspector from the Office of Surface Mining Reclamation and Enforcement to take photographs during an inspection.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

An inspector may document conditions or practices discovered during an inspection

that are believed to violate the Act or regulations by taking photographs.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Interference

A permittee's refusal to allow OSM to take photographs is an interference with the inspection that is sanctionable under the Act.

3. Surface Mining Control and Reclamation Act of 1977: Inspections: Interference—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Since no provision in the regulations makes interference with an inspection administratively sanctionable, a notice of violation is not proper.

4. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Generally—Surface Mining Control and Reclamation Act of 1977: Inspections: Interference

Since the reviewing authority may use interference with an inspection against the permittee in any way deemed appropriate, a permittee who interferes with an inspection does so at the risk of severely prejudicing its own case.

APPEARANCES: Karl S. Forester, Esq., Forester & Forester, Harlan, Kentucky, for Eastover Mining Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Frank J. Ruswick, Jr., Esq., Walton D. Morris, Esq., Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE BOARD OF SURFACE AND RECLAMATION APPEAL

On June 20, 1979, from the Office of Surface Reclamation and (OSM), were conducted inspection at Eastover's (Eastover's) in Kentucky, pursuant to Mining Control and Reclamation Act of 1977 (Act). Inspector attempted to take photographs at the site of violation. She was informed policy prohibiting of photographs on property by anyone except employees. She was further that Eastover would not provide copies available to her. She issued Notice of Violation No. 79-II-53-2 to Eastover for violation of sec. 502(c)(3) U.S.C. § 1252(c) (8) by "refusal to allow for inspection by refusing to allow to take photographs." Four hours were given for compliance period.

On her return the inspector was again from taking photographs. Subsequently she issued Cessation Order No. 79-II-53-3 to Eastover.

¹ On Mar. 29 and June 15, 1979, the Board issued a notice of violation order to Eastover. These are the basis for the appeal.

² 30 U.S.C. §§ 1201-1328.

³ Notice of Violation No.

December 4, 1979

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

JOSEPH A. BALDWIN,
Administrative Judge.

WHITE WINTER COALS, INC.

1 IBMSA 305

Decided December 4, 1979

Appeal by White Winter Coals, Inc., from a July 5, 1979, decision by Administrative Law Judge David Torbett in Docket Nos. NX 9-34-R and NX 9-35-R sustaining a cessation order issued for mining without a permit, a notice of violation for an alleged violation of the requirement to pass surface drainage from the permit area through a sedimentation pond, and a cessation order issued for failure to abate the conditions listed in the notice of violation.

Affirmed in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Effect of

Although, when a matter is appealed to the Board, OSM cannot take further action in the matter except to advise the Board whether the requested relief should or should not be granted, OSM can at any time move the Board to take what OSM feels is appropriate action.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders--

Surface Mining Control and Reclamation Act of 1977: Environmental Harm--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety

A cessation order is not properly issued under sec. 521(c)(2) of the Act when there is no suggestion in the record that the cited violation was creating an imminent danger to public health or safety or was causing or could reasonably be expected to cause significant, imminent environmental harm.

3. Surface Mining Control and Reclamation Act of 1977: Hearings

Any objection to the location of a mine-site review hearing must be made before or at the time of the mine-site hearing.

4. Surface Mining Control and Reclamation Act of 1977: Abatement

A refusal to grant an extension of time for abatement is not necessarily an abuse of discretion when the request for an extension was made after the abatement time had expired.

5. Surface Mining Control and Reclamation Act of 1977: Variances--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

Any exemption from the requirements of 30 CFR 715.17(a), concerning sedimentation ponds, must be sought from the appropriate regulatory authority.

APPEARANCES: Jerry Shattuck, Esq., Clinton, Tennessee, for White Winter Coals, Inc.; Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., and Charles Gault, Esq., Office of the Field Solicitor, Knoxville,

Tennessee, both for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY INTERIOR
BOARD OF SURFACE
MINING AND
RECLAMATION APPEALS*

White Winter Coals, Inc. (White Winter), has sought review of the decision of Administrative Law Judge (ALJ) David Torbett sustaining Cessation Orders No. 79-11-12-3 and 79-11-12-5 and Violation 1 of Notice of Violation No. 79-11-12-4 issued to White Winter by the Office of Surface Mining Reclamation and Enforcement (OSM), under the provisions of secs. 521(a)(2) and (a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).¹

Although we disagree with the ALJ's conclusion that Cessation Order No. 79-11-12-3 was properly issued, we agree with his findings as to Violation 1 of Notice of Violation No. 79-11-12-4 and that portion of Cessation Order No. 79-11-12-5 issued for failure to abate Violation 1 of the Notice. We therefore reverse his decision in part and affirm it in part.

Background

On Feb. 14, 1979, three inspectors from OSM inspected White Winter's surface coal mine in Claiborne County, Tennessee. This mine

was opened in 1977 pursuant to a State mining permit. As a result of the inspection OSM issued to White Winter Cessation Order No. 79-11-12-3 for mining without a current State permit in violation of sec. 502(a) of the Act, 30 U.S.C. § 1252 (a), and Notice of Violation No. 79-11-12-4, listing two violations of the initial regulatory program regulations. Violation 1 alleged failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before it left the permit area in violation of 30 CFR 715.17 and Violation 2 charged failure to retain all overburden and spoil material on the solid portion of the existing bench in violation of 30 CFR 715.14. White Winter was given until March 7 to abate the two violations listed in the notice.

During a March 8 follow-up inspection, the inspectors found that the two violations cited had not been corrected, and, in accordance with sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3), issued Cessation Order No. 79-11-12-5 for failure to abate the violations.

On March 15 a minesite hearing was held in Norris, Tennessee. Although no one from White Winter attended the meeting, a letter received from Tom N. Shattuck, the owner and operator of the mine, was made part of the hearing record. The hearing officer upheld the issuance of the cessation order.²

On March 19 White Winter filed application for review of both ces-

¹30 U.S.C. § 1271(a)(2), (a)(3) (Supp. 1 1977). The Act can be found at 30 U.S.C. §§ 1201-1328 (Supp. 1 1977). All further citations to the Act are to the 1977 Supplement to the United States Code.

²Mine site review report, Exhibit 4 to Applicant's brief.

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sation orders and of the notice of violation. A hearing was held on June 21 before an ALJ. At the close of that hearing, the ALJ rendered a decision from the bench upholding the cessation order for mining without a permit and those parts of the notice of violation and second cessation order relating to failure to pass all surface drainage through a sedimentation pond. He vacated that portion of the notice of violation that alleged improper spoil placement. This oral decision was confirmed in writing on July 5.³

White Winter filed a timely notice of appeal of this decision on August 8 and filed its opening brief on September 6. Following the granting of a request for an extension of time, OSM filed its reply brief on October 5. On October 12 White Winter filed a request for oral argument. That request was granted on October 23 and the oral argument was held on November 20.

Issues on Appeal

The following issues raised by this appeal will be addressed:

- (1) Whether OSM can vacate a cessation order after it has been appealed to the Board;
- (2) If not, whether, on the facts of this case, a cessation order was properly issued for mining without a permit;
- (3) Whether the notice of violation for failure to pass all surface drainage through a sedimentation pond was properly issued;

³In the written confirmation, the ALJ appeared to sustain both cessation orders in their entirety. Decision at 2.

(4) Whether the location of the mine-site hearing in this case failed to comply with the requirements of the regulations;

(5) Whether additional abatement time should have been granted to the operator; and

(6) Whether OSM should have granted White Winter an exemption from 30 CFR 715.17(a).

Discussion and Conclusions

11 On page 2 of its brief, OSM stated that it had vacated Cessation Order No. 79-11-12-3, issued for mining without a permit. As we indicated in *Apache Mining Co.*, 4 B.S.M.A. 11, 85 L.D. 395 (1978), once a matter is appealed to the Board, OSM cannot take further action in the matter except to the extent that it can advise the Board whether the requested relief should or should not be granted. If, however, after a review of the record, OSM feels that an appellant is entitled to the relief requested or makes its own determination that some other relief should be given, it can at any time *move* the Board to grant that relief.⁴

In this case, although OSM determined that the portion of its case against White Winter for mining without a permit should be dismissed, it failed to make a motion for dismissal. In following *Apache*, *supra*, we find that OSM's at-

⁴This conclusion does not preclude OSM from taking other action not about 30 U.S.C. § 1271.

⁵At oral argument, OSM urged that the Board could dismiss this cessation order. We decline to construe this suggestion as a motion to dismiss.

tempted vacation of the cessation order was ineffective.

[2] TL is we reach the issue of whether a cessation order was properly issued in this case for mining without a valid State permit. It is important to note first that White Winter had been operating under a State permit that was due to expire. Renewal procedures were begun by the company in what would normally have been adequate time to secure a new permit before the old one expired. Because of circumstances beyond the control of White Winter, the permit was not renewed before the expiration date. The company, however, remained subject to other environmental regulations. There is no suggestion in the record that White Winter's operations were creating an imminent danger to public health or safety or were causing or could reasonably be expected to cause significant, imminent environmental harm. See, 521 (a) (2) of the Act, 30 U.S.C. § 1271 (a) (2), requires one or both of these conditions as a basis for the issuance of a cessation order.⁶ We therefore hold that Cessation Order No. 79-11-12-3 for mining without a permit was not validly issued. That cessation order is vacated.

The ALJ also sustained Violation 1 of Notice of Violation No. 79-11-12-4 which alleged failure to pass all surface drainage from the disturbed area through a sedimen-

tation pond or series of sedimentation ponds before it left the permit area. On appeal, as before the ALJ, the parties raise factual questions.

43 CFR 1.1171 places the burden of establishing a prima facie case as to the validity of a notice of violation on OSM. Once OSM has established its prima facie case, the operator bears the ultimate burden of persuasion. See *Burgess Mining & Construction Co.*, 1 IBSMA 293, 86 L.D. 656 (1979); *Island Creek Coal Co.*, 1 IBSMA 285, 86 L.D. 623 (1979); *Dean Trucking Co.*, 1 IBSMA 229, 86 L.D. 437 (1979). The ALJ found that the testimony of OSM's inspectors and the photographic exhibits established at least a prima facie case that runoff from one outslope would not pass through a sedimentation pond.⁷ He apparently found unconvincing the testimony of White Winter's president to the effect that all runoff from that outslope drained back into the active pit and from there into sedimentation ponds. Thus, he held that OSM had carried the ultimate burden of persuasion.⁸ We find no compelling reason to disturb that conclusion. Therefore, Violation 1 of Notice of Violation No. 79-11-12-4 is sustained. Likewise, that portion of Cessation Order No. 79-11-12-5 issued for failure to abate this violation is sustained.

[3] White Winter raised several other issues that we think should be addressed. White Winter contends that the minesite hearing on its

⁶ Cessation orders issued under 30 U.S.C. § 1271(a)(2) must be distinguished from those issued under sec. 1271(a)(3). Sec. 1271(a)(3) authorizes the issuance of a cessation order when the violations listed in a notice of violation have not been properly abated, regardless of actual or potential effects on the public or the environment.

⁷ Tr. 174-180.

⁸ Tr. 180-71 found the OSM's carried the ultimate burden of persuasion, which is more than they are required to do.

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* Tr. 18
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December 4, 1979

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 during the course of public hear-
 ing." 30 U.S.C. § 1271(a)(5); 30
 CFR 722.15(a). Appellant's first
 objection to the location of the hear-
 ing was made some 4 months after
 the hearing.⁹ Whatever merits this
 objection may have had were waived
 by appellant's failure to object be-
 fore or at the time of the minesite
 review.

[4] Appellant also urges that the
 time given to abate the violations
 listed in the notice of violation
 should have been extended because
 of adverse weather conditions and,
 in failing to grant an extension
 when requested to do so, OSM
 abused its discretion. The record in-
 dicates that White Winter did re-
 quest an extension of time when
 OSM conducted its follow-up in-
 spection.¹⁰ That inspection, how-
 ever, occurred after the initial time
 set for abatement had expired. We
 are not prepared to offer an opinion
 on whether it would be an abuse of
 discretion to deny an extension
 when the request was timely made
 and compelling reasons for an ex-
 tension were advanced. But when
 the operator waits until after the
 time for performance has expired
 to make that request, we are pre-
 pared to say that OSM does not
 abuse its discretion by not granting
 an extension.

⁹ Tr. 16.

¹⁰ Based on our reading of the record, we
 disagree with the ALJ's finding that White
 Winter did not request an extension of time
 (Tr. 181-182).

[5] Finally, White Winter sug-
 gests that the inspector should have
 granted it the exemption from the
 sedimentation pond requirement
 contemplated in 30 CFR 715.17(a).
 This section allows the regulatory
 authority to grant exemptions when
 the drainage area is small and it is
 shown that ponds are not required
 to meet the effluent limitations and
 water quality standards estab-
 lished in the regulations. In this
 context, the regulatory authority as
 defined in 30 CFR 700.5 is the state
 department with primary responsi-
 bility for administering the Act
 during the initial program, not
 OSM. Thus, we conclude that any
 relief from this requirement should
 have been sought from the State.¹¹
See Alabama Ry Products Corp., 1
 IBSMA 239, 86 I.D. 446 (1979).

Therefore we hold that Cessation
 Order No. 79-11-12-3 was improper-
 ly issued and is vacated and that
 Violation 1 of Notice of Violation
 No. 79-11-12-1 and that portion of
 Cessation Order No. 79-11-12-5 is-
 sued for failure to abate violation 1
 of Notice of Violation No. 79-11-
 12-1 were properly issued and are
 sustained. Judge Torbett's July 5,
 1979, decision is thus affirmed in
 part and reversed in part.

HEALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MERRIN,
Administrative Judge.

¹¹ The ALJ noted that state approval might
 have led him to vacate the sedimentation pond
 violation (Tr. 180).

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632, 652, 70
50). See also
N.L.R.B.,
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tax allowances claimed, amount desired to be deducted each payday, exemptions from withholding claimed and the ground for the exemptions. To avoid this disclosure of private information, this court modifies the order of the district court so as to permit the Hospital, in lieu of furnishing the original W-4 forms to the Board, at the option of the Hospital to provide legible copies of W-4 forms of its employees during the period specified in the subpoena, made by a copying machine, obliterating all information on the form except the full name and address, social security number and signature of the employee and the date the W-4 form was signed. With this modification, the judgment of the district court in case No. 79-3408 is affirmed.

III

[3] The district court correctly held that the union authorization cards sought by the Hospital are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552. *N.L.R.B. v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978); *Howard Johnson Co. v. N.L.R.B.*, 618 F.2d 1 (6th Cir. 1980); *Madeira Nursing Center, Inc. v. N.L.R.B.*, 615 F.2d 728 (6th Cir. 1980); *N.L.R.B. v. Harde-man Garment Corp.*, 557 F.2d 559 (6th Cir. 1977). Authorization cards, like the witness statements in *Robbins Tire*, are investigatory records in the possession of the Board for enforcement purpose. Authorization cards are not discoverable by an employer under the rules of the Board, and discovery cannot be attained under the Freedom of Information Act.

[4] The Hospital contends that the district court failed to protect the Hospital's fifth amendment right to substantive due process by permitting the Board to engage in pre-trial discovery while denying the Hospital equal discovery. We hold this contention to be without merit. *N.L.R.B. v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir.), cert. denied, 429 U.S. 824, 97 S.Ct. 77, 50 L.Ed.2d 86 (1976).

If the current investigation conducted by the General Counsel should result in the

filing of a complaint, the Hospital will be entitled to a due process hearing, including an opportunity to compare signatures on authorization cards with signatures on the W-4 forms, and to introduce evidence in opposition to any effort on the part of the General Counsel to obtain a *Gissel* bargaining order. Any failure on the part of the Board to conduct a due process hearing can be challenged in proceedings before the Board and, if necessary, by petition to review filed in this court. *ITT v. Electrical Workers*, 419 U.S. 428, 448, 95 S.Ct. 600, 612, 42 L.Ed.2d 558 (1975); *N.L.R.B. v. Valley Mold Co., Inc.*, supra, 530 F.2d 693 (6th Cir.), cert. denied, 429 U.S. 824, 97 S.Ct. 77, 50 L.Ed.2d 86 (1976).

The judgment of the district court in case No. 79-3408 is modified as hereinabove set forth, and affirmed as modified. The judgment of the district court in case No. 79-3409 is affirmed. No costs are taxed. Each party will bear its own costs in this court.



Jerry Alan GILLEY, Plaintiff-Appellee,
v.

UNITED STATES of America, Acting by
and through Norman A. Carlson, Di-
rector, Federal Prison Systems, Depart-
ment of Justice, Defendant-Appellant.

No. 80-1072.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 11, 1981.

Decided May 27, 1981.

Rehearing and Rehearing En Banc
Denied Aug. 25, 1981.

Appeal was taken by the Government
from an order of the United States District
Court for the Western District of Tennes-
see, Robert M. McRae, Jr., Chief Judge,

granting a preliminary injunction prohibiting transfer of a tenured correctional employee to a new duty station. The Court of Appeals, Lively, Circuit Judge, held that:

(1) provision of the Civil Service Reform Act authorizing the special counsel to the Merit Systems Protection Board to seek a stay of any personnel action for 15 days upon a determination that reasonable grounds to believe that the action was taken as a result of a prohibited personnel practice was not the only means of maintaining the status quo pending appeal by correctional employee from his transfer by the Bureau of Prisons and did not have effect of depriving district court of its power to intervene when employee sought traditional equitable relief in form of an injunction to prevent immediate irreparable injury which he claimed he would suffer if transfer order were carried out prior to completion of administrative review, and (2) however, tenured correctional employee was not entitled to preliminary injunctive relief prohibiting his transfer by Bureau of Prisons on basis of disruption of his family life or on basis of deprivation of his right to perfect an appeal. Injunction dissolved, remanded with directions.

1. Prisons ⇐6

Provision of the Civil Service Reform Act authorizing the special counsel to the Merit Systems Protection Board to seek a stay of any personnel action for 15 days upon a determination of reasonable grounds to believe that the action was taken as a result of a prohibited personnel practice was not the only means of maintaining the status quo pending appeal by correctional employee from his transfer by the Bureau of Prisons and did not have effect of depriving district court of its power to intervene when employee sought traditional equitable relief in form of an injunction to prevent immediate irreparable injury which he claimed he would suffer if transfer order were carried out prior to completion of administrative review. 5 U.S.C.A. § 1208.

2. Officers and Public Employees ⇐72(1)

The traditional equitable relief in form of an injunction and the relief provided by the Civil Service Reform Act in form of a stay are two avenues of relief provided to a federal employee which are not mutually exclusive. 5 U.S.C.A. § 1208.

3. Administrative Law and Procedure ⇐651

In the absence of a clear showing of congressional intent to do so, courts will not infer that the enactment of a particular statute containing provisions of judicial review has the effect of withdrawing from the courts their traditional equitable powers.

4. Officers and Public Employees ⇐72(1)

Congress did not intend to deprive district courts of their traditional power to prevent irreparable harm by providing for judicial review in another forum of final personnel actions and for limited temporary stays of administration orders at the behest of an officer of the executive branch. 5 U.S.C.A. § 1208.

5. Administrative Law and Procedure ⇐674

Stays are ordinarily granted by a court which has jurisdiction to review the orders of the court or administrative agency whose actions it has asked to stay, that is, they are granted by a reviewing court in order to maintain the status quo pending its own review of the actions in question. F.R.A.P. Rule 8, 28 U.S.C.A.; 28 U.S.C.A. § 1331.

6. Federal Courts ⇐192

Since the district court had no jurisdiction to review final personnel orders under the Civil Service Reform Act, it was not acting in aid of its own appellate jurisdiction when it granted a preliminary injunction prohibiting the transfer of a tenured correctional employee by the Bureau of Prisons, but was acting in the traditional role of an equity court with the jurisdiction vested in it by the "federal question" statute. F.R.A.P. Rule 8, 28 U.S.C.A.; 28 U.S.C.A. § 1331.

7. Injunction ⇐14, 1

The fundamental injunction in the federal system is that one party will not be harmed unless the other party is first given an opportunity to be heard from taking a threat. There is no adequate remedy at law.

8. Officers and Public Employees ⇐72(1)

The rule in *Sam* that preliminary injunctions are not available to prevent irreparable financial losses nor damages to reputation constitute irreparable harm in personnel cases applicable to all cases where federal district court injunctive relief is sought to prevent completion of their administrative review.

9. Prisons ⇐6

Preliminary injunctions are not available to prevent transfer of tenured correctional employee by Bureau of Prisons where the employee has no ground that transfer would deprive him of his right to administrative appeal and where the employee is not entitled to no greater relief than that charged federal employee in *Arnett*, is not entitled to discharge. 5 U.S.C.A. Const. Amend.

10. Prisons ⇐6

Tenured correctional employee is not entitled to preliminary injunction prohibiting his transfer by Bureau of Prisons on basis of disruption of his family life or on basis of deprivation of his right to perfect an appeal, where a stay of the action would not constitute irreparable harm and employee had sufficient opportunity to provide ample opportunity to his attorney and to a hearing. 5 U.S.C.A. § 1208.

W. J. Michael Cody,
Dycus, Asst. U. S. Att.
William Kanter and H.

* The Honorable Patricia
States District Court for

Cite as 649 F.2d 449 (1981)

7. Injunction ¶14, 16

The fundamental requirements for an injunction in the federal courts are a showing that one party will suffer irreparable harm unless the other party is restrained from taking a threatened action and that there is no adequate remedy at law.

8. Officers and Public Employees ¶72(1)

The rule in *Sampson* that neither financial losses nor damage to reputation will constitute irreparable harm sufficient to support a preliminary injunction in federal personnel cases applies to probationary as well as tenured employees and is applicable to all cases where federal employees seek district court injunctive relief prior to completion of their administrative appeals.

9. Prisons ¶6

Preliminary injunctive relief to prohibit transfer of tenured correctional employee by Bureau of Prisons was not warranted on ground that transfer impermissibly burdened employee's right to an effective administrative appeal and, hence, was violative of due process where employee was entitled to no greater rights than a discharged federal employee who, under rule in *Arnett*, is not entitled to a hearing prior to discharge. 5 U.S.C.A. § 7701 et seq.; U.S.C.A. Const. Amend. 14.

10. Prisons ¶6

Tenured correctional employee was not entitled to preliminary injunctive relief prohibiting his transfer by Bureau of Prisons on basis of disruption of his family life or on basis of deprivation of his right to perfect an appeal, where alleged disruption did not constitute irreparable harm and where employee had sufficient accumulated leave to provide ample opportunity to confer with his attorney and to attend any required hearing. 5 U.S.C.A. § 7701 et seq.

W. J. Michael Cody, U. S. Atty., Joe A. Dycus, Asst. U. S. Atty., Memphis, Tenn., William Kanter and Howard S. Scher, Ap-

*The Honorable Patricia Boyle, Judge, United States District Court for the Eastern District of

pellat Staff, Civ. Div., Depart. of Justice, Washington, D. C., for defendant-appellant.

Mitchell J. Notis, Washington, D. C., for plaintiff-appellee.

Before LIVELY and KEITH, Circuit Judges; and BOYLE,* District Judge.

LIVELY, Circuit Judge.

In this case the government appeals from an order granting a preliminary injunction which prohibits the transfer of a tenured federal employee to a new duty station.

I.

The plaintiff was a Correctional Supervisor at the Federal Correctional Institution (FCI) in Memphis, Tennessee with more than eleven years of service with the Bureau of Prisons. The plaintiff was involved in an incident in which he went to the aid of another staff member who was being assaulted by an inmate. Following an investigation the warden of FCI Memphis advised the plaintiff that he proposed disciplinary action because the plaintiff had used excessive force in subduing the inmate and had failed to preserve evidence. Finding that plaintiff's credibility and effectiveness as a supervisor had been destroyed, the warden concluded that demotion and reassignment would be warranted.

Though he was advised in writing of his right to respond, the plaintiff did not do so. Thereafter the recommendation of the warden was accepted by the Bureau and plaintiff was demoted and reassigned to the United States Penitentiary at Leavenworth, Kansas. The plaintiff filed an appeal with the Merit Systems Protection Board (MSPB) pursuant to 5 U.S.C. § 7701 et seq. Plaintiff's attorney sought a stay of the reassignment order from the Director of the Bureau of Prisons and from the Special Counsel to the MSPB. When both of these requests were denied the plaintiff sought, and was granted a temporary restraining order in the district court. This order en-

Michigan, sitting by designation.

joined the involuntary transfer of Gilley to Leavenworth.

7. The plaintiff then filed a complaint seeking preliminary and permanent injunctions on the same grounds relied upon for the temporary restraining order. The defendant moved for dissolution of the restraining order and the district court ordered a hearing on this motion and the plaintiff's application for a preliminary injunction. At the conclusion of the hearing the district court ruled from the bench, denying the motion to dissolve the restraining order and granting a preliminary injunction. An order was then entered which enjoined the defendant from requiring the plaintiff "to remove himself to a duty station outside Memphis, Tennessee, while his present appeal is pending before the Merit Systems Protection Board" and from requiring plaintiff to use accumulated leave or assume a leave status without pay while the injunction remained in effect. The government appealed from this order and from a subsequent order of the district court denying its motion to dissolve the preliminary injunction.

II.

In support of his claim of irreparable harm the plaintiff testified that his wife needed to continue treatment with a Memphis physician who had recently delivered their child by Caesarian section. He testified that he had purchased a home in Memphis with an 8½ per cent mortgage and that the interest rate on any home he might purchase in Leavenworth would be higher. Gilley also stated that he believed it was necessary for him to remain an employee of the Bureau in order to pursue his appeal. He emphasized the necessity for close contact with his Memphis attorney during the course of his appeal to the MSPB and the unreimbursable expenses which would be involved in maintaining this contact if he should be transferred. Though he stated he would probably resign and live in Memphis if his appeal were unsuccessful, the plaintiff testified that if he moved to Leavenworth and later resigned he would suffer financial losses consisting of the cost of moving both

ways and of maintaining two homes during the pendency of his appeal. His basic claim was that he was entitled to a hearing on his appeal to the MSPB before he was required to move to any other federal institution. On cross-examination he agreed that transfers are a regular part of life for Bureau employees, but maintained they are usually for promotion. He also conceded that his wife had been released for travel by the time of the hearing, but testified it would be desirable for her to be attended by the same Memphis physician if they should decide to have another child.

The district court found that it was necessary for the plaintiff to remain an employee of the Bureau in order to perfect his appeal and that if he is transferred he will be at a "serious disadvantage" in preparing for the appeal. The court found that the entire action of the Bureau, including the reassignment, was punitive since transfers seldom accompany demotions. No irreparable injury was found in the disruption of the plaintiff's family life and community ties, in the separation of Mrs. Gilley from her physician or in the loss of a favorable mortgage interest rate. However, the court found irreparable injury in the effect the punitive transfer would have of "depriving" the plaintiff of his right to perfect an appeal. "So, I find that if he was transferred it would be a violation of his due process rights." The district court also found that the threatened injury to the plaintiff outweighed that to the defendant and that the public interest would not be disserved by issuing an injunction. It found that Gilley was likely to succeed on the merits. The court specifically rejected the defendant's argument that an injunction was improper because the plaintiff had failed to exhaust his administrative remedies.

III.

[1] On appeal the government contends that the district court was without authority to enjoin plaintiff's transfer because the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 et seq. (1976 ed., Supp. III), contains

the exclusive procedural review of federal. The statutory scheme for judicial review of final orders of the court of appeals. 5 U.S.C. § 704. judicial review, however, is not a completion of administrative action. In a review of MSPB. *Id.* The Act also provides for a review by which the Special Board of MSPB may seek a stay of its action for 15 days upon showing of reasonable grounds to believe that the action was taken as a result of personnel practice." 5 U.S.C. § 704. government argues that the authority to the Special Board is the only means of maintaining the pending appeal from a final action, and that its review is in the district courts of any other. We disagree.

[2] Though the Representative a comprehensive federal civil service system within the statute legislative history, of a district courts of their powers. The plaintiff of the refusal of the Special a temporary stay on the authority of the Special Court is purely discretionary and a temporary provision for review this discretion. What was and received from the traditional equitable relief injunction to prevent injury which he claimed the transfer order were completion of administrative action of the Bureau. The different degree of judicial that provided by the Act of relief are not mutual

[3, 4] In the absence of congressional intent, we do not infer that the enacted statute containing provisions

two homes during his life. His basic claim was that he was required to live in a federal institution. He agreed that transfer of life for Bureau employees is usually required for travel by the Bureau but testified it would not be attended by the Bureau if they should decide to transfer him.

The district court found that it was necessary for Mrs. Gilley to remain an employee in order to perfect his claim. His transfer would be a "disadvantage" in preparing for the trial. The court found that the Bureau, including the unitive since transfers are common. No irreparable harm was done in the disruption of his life and community. The loss of a favorable transfer rate. However, the injury in the effect of his right to perfect his claim and that if he was transferred it would be a violation of his due process. The district court also found that the defendant's interest would not be injured by an injunction. It was likely to succeed on its claim. The court specifically rejected the argument that an injunction was not warranted because the plaintiff had not shown that his administrative remedy was exhausted.

III.

The government contends that the district court was without authority to grant the plaintiff's transfer because the Reform Act of 1978, 5 U.S.C. § 7703 (1976 ed., Supp. III), contains

the exclusive procedure for obtaining judicial review of federal personnel actions. The statutory scheme of the Act provides for judicial review of final personnel actions in the Court of Claims or the appropriate court of appeals. 5 U.S.C. § 7703. This judicial review, however, follows the completion of administrative procedures, culminating in a review of the action by the MSPB. *Id.* The Act also contains a provision by which the Special Counsel to the MSPB may seek a stay of any personnel action for 15 days upon a determination of reasonable grounds to believe the action was taken as a result of "a prohibited personnel practice." 5 U.S.C. § 1208. The government argues that this grant of authority to the Special Counsel provides the only means of maintaining the status quo pending appeal from a federal personnel action, and that its effect is to deprive district courts of any power to intervene. We disagree.

[2] Though the Reform Act of 1978 represented a comprehensive overhaul of the federal civil service system, we find no indication within the statutory language, or the legislative history, of an intent to deprive district courts of their traditional equitable powers. The plaintiff did not seek review of the refusal of the Special Counsel to seek a temporary stay on his behalf. The authority of the Special Counsel in this regard is purely discretionary and there is no statutory provision for review of the exercise of this discretion. What the plaintiff sought and received from the district court was traditional equitable relief in the form of an injunction to prevent immediate irreparable injury which he claimed he would suffer if the transfer order were carried out prior to completion of administrative review of the action of the Bureau. This was an entirely different degree of judicial protection than that provided by the Act. The two avenues of relief are not mutually exclusive.

[3,4] In the absence of a clear showing of congressional intent to do so, courts will not infer that the enactment of a particular statute containing provisions for judicial re-

view has the effect of withdrawing from the courts their traditional equitable powers. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). This rule is related to the more general "doctrine disfavoring repeals by implication . . ." *TVA v. Hill*, 437 U.S. 153, 190, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117 (1978); *Morton v. Mancari*, 417 U.S. 535, 549, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974). We find no support for the argument that Congress intended to deprive district courts of their traditional power to prevent irreparable harm by providing for judicial review in another forum of final personnel actions and for limited temporary stays of administrative orders at the behest of an officer of the executive branch. Such a limitation on a long recognized power of the district courts could be found only in explicit language not present in the Reform Act.

[5,6] Though the district court granted a preliminary injunction, it referred to the four criteria required for issuance of a stay. See *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Such stays are ordinarily granted by a court which has jurisdiction to review the orders of the court or administrative agency whose actions it is asked to stay; that is, such stays are granted by a reviewing court in order to maintain the status quo pending its own review of the actions in question. Rule 8, Fed.R. App.P.; *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942); *Virginia Petroleum Jobbers Association, supra*. Since the district court has no jurisdiction to review final personnel orders under the Reform Act, it was not acting in aid of its own appellate jurisdiction when it granted the injunction in the present case. Rather, we believe, it was acting in the traditional role of an equity court and that its jurisdiction was founded on 28 U.S.C. § 1331 (1976), the "federal question" provision. According to the complaint, the plaintiff's action is one which "arises under the

Constitution, [or] laws . . . of the United States . . ." *Id.*¹

IV.

[7] The government next argues that if the Reform Act did not withdraw authority to do so, nevertheless the district court erred as a matter of law in issuing a temporary injunction in this case. The fundamental requirements for an injunction in the federal courts are a showing that one party will suffer irreparable harm unless the other party is restrained from taking a threatened action and that there is no adequate remedy at law. *Beacon Theatres v. Westover*, 359 U.S. 500, 506-07, 79 S.Ct. 948, 954, 3 L.Ed.2d 988 (1959). The Supreme Court has established standards for judging claims of irreparable harm in federal personnel cases which are more stringent than those applicable to other classes of cases. In *Sampson v. Murray*, 415 U.S. 61, 91, 94 S.Ct. 937, 953, 39 L.Ed.2d 166 (1974), the Supreme Court found that the showing by a probationary federal employee seeking to enjoin her discharge fell "far short" of the type of irreparable injury required to justify an injunction. Neither financial losses nor damage to reputation was found to constitute irreparable harm sufficient to support a preliminary injunction. At least when the plaintiff is a probationary employee, irreparable injury sufficient to justify an injunction will be found only in "extraordinary cases." 415 U.S. at 92 n.68, 94 S.Ct. at 953 n.68.

The plaintiff argues strenuously that *Sampson* applies only to probationary employees, and that tenured employees such as he need only meet the less stringent "traditional" standards of irreparable injury. It is true that some of the language in *Sampson* applies only to situations involving probationary employees, who have fewer procedural rights than permanent employees. 415 U.S. at 80-82, 94 S.Ct. at 948-49. Nevertheless, the Supreme Court was referring to all federal employee cases, not just those of probationary employees, when it wrote:

1. The plaintiff alleged several constitutional violations in his complaint.

The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process. When we couple with this consideration the historical denial of all equitable relief by the federal courts in cases such as *White v. Berry*, 171 U.S. 366, [18 S.Ct. 917, 43 L.Ed. 199] (1898), the well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896, [81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230] (1961), and the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee, 5A A. Corbin, *Contracts* § 1204 (1964), we think that the Court of Appeals was quite wrong in routinely applying to this case the traditional standards governing more orthodox "stays." See *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U.S.App. D.C. 106, 259 F.2d 921 (1958). Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases.

415 U.S. at 83-84, 94 S.Ct. at 949-50 (footnote omitted).

[8] Our conclusion that *Sampson* states rules applicable to all cases where federal employees seek district court injunctive relief prior to completion of their administrative appeals is fortified by holdings of other courts. In *Morgan v. Fletcher*, 518 F.2d 236 (5th Cir. 1975), the court of appeals concluded that the district court had erroneously found irreparable injury consisting of a loss of salary which would probably lead to foreclosure of a mortgage on the plaintiff.

home and the loss of . . . which would be injurious . . . tiff's "overwrought condition" . . . this conclusion the court . . . on *Sampson*, along with other . . . stated that the distinction . . . and probationary employees . . . different procedural rights, . . . there has been irreparable i . . . at 239 n.3. In *Diliberti v. . .* 950, 951 (7th Cir. 1978), the . . . the case of a permanent en . . . injunctive relief prior to co . . . administrative appeal was . . . *Sampson*. See also *Wallace . .* F.2d 1186, 1187 n.3. (D.C. C . . . *lips v. Klassen*, 502 F.2d 362, . . . cert. denied, 419 U.S. 996, 9 . . . L.Ed.2d 269 (1974). Gilley . . . of district court decisions in . . . argument that *Sampson* does . . . tenured federal employees. T . . . distinguishable, however, in t . . . either a denial of a statutor . . . hearing or there was no possi . . . ering back pay.²

V.

[9] We conclude that the . . . failed to apply correct legal . . . Gilley's claim for injunctive rel . . . ing of a due process violation i . . . based on a determination that . . . signment to Leavenworth in . . . burdened his right to an effect . . . trative appeal. We find no ba . . . conclusion. The plaintiff was e . . . greater rights than a dischar . . . employee. Yet it is clearly est . . . a federal employee is not entit . . . ing prior to discharge. *Arnett . .* 416 U.S. 134, 94 S.Ct. 1633, 40 . . . (1974). If an employee may be . . . suffer the ultimate sanction of . . . prior to hearing, it follows that . . . right to postpone the effective d . . . serious punishment until after h . . . trative appeal is concluded.

2. E. g., *Keyer v. Civil Service Comm. City of New York*, 397 F.Supp. 1362 (1975); *American Fed. of Gov. Emp. Local 1858 v. Callaway*, 398 F.Supp.

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home and the loss of medical insurance which would be injurious given the plaintiff's "overwrought condition." In reaching this conclusion the court of appeals relied on *Sampson*, along with other decisions, and stated that the distinction between tenured and probationary employees relates to their different procedural rights, not to whether there has been irreparable injury. 518 F.2d at 239 n.3. In *Diliberti v. Brown*, 583 F.2d 950, 951 (7th Cir. 1978), the court held that the case of a permanent employee seeking injunctive relief prior to completion of his administrative appeal was controlled by *Sampson*. See also *Wallace v. Lynn*, 507 F.2d 1186, 1187 n.3. (D.C. Cir. 1974); *Phillips v. Klassen*, 502 F.2d 362, 368 (D.C. Cir.), cert. denied, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 263 (1974). Gilley cites a number of district court decisions in support of his argument that *Sampson* does not apply to tenured federal employees. These cases are distinguishable, however, in that there was either a denial of a statutory right to a hearing or there was no possibility of recovering back pay.²

V.

[9] We conclude that the district court failed to apply correct legal standards to Gilley's claim for injunctive relief. Its finding of a due process violation appears to be based on a determination that Gilley's reassignment to Leavenworth impermissibly burdened his right to an effective administrative appeal. We find no basis for this conclusion. The plaintiff was entitled to no greater rights than a discharged federal employee. Yet it is clearly established that a federal employee is not entitled to a hearing prior to discharge. *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). If an employee may be required to suffer the ultimate sanction of discharge prior to hearing, it follows that he has no right to postpone the effective date of a less serious punishment until after his administrative appeal is concluded.

2. *E. G. Keyer v. Civil Service Commission of City of New York*, 397 F.Supp. 1362 (E.D.N.Y. 1975); *American Fed. of Gov. Employees, Local 1858 v. Callaway*, 398 F.Supp. 176 (N.D.

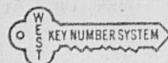
[10] If the plaintiff had disobeyed the transfer order and failed to report to Leavenworth on the specified date, presumably he would have been discharged. He would then have had the right to appeal his discharge, and if successful, would have been fully reimbursed for lost wages and benefits under the Back Pay Act, 5 U.S.C. § 5596 (1976). *Sampson, supra*, 415 U.S. at 75, 94 S.Ct. at 945. The injury which he claimed as a result of the transfer order consisted of the difficulty of working with his attorney on his appeal to the MSPB and the personal inconveniences and expenses involved in being temporarily separated from his family and in breaking community ties. The district court declined to find that the claims of disruption of family life and related matters constituted irreparable harm. This was clearly correct. However, we find no basis for the holding that there was a "deprivation" of Gilley's right to perfect his appeal. True, it would be more difficult if he were in Leavenworth, yet it would in no sense be impossible. Gilley had sufficient accumulated leave to provide ample opportunities to confer with his attorney and to attend any required hearing. In fact, he could have sought transfer of his appeal to the field office with jurisdiction over claims originating in Kansas. 5 C.F.R. § 1201.4(e). The investigation and any hearing could then have been conducted as if the action complained of had occurred at Leavenworth rather than Memphis.

Careful examination of the entire record on appeal convinces us that the district court failed to consider "the well established rule that the Government has traditionally been granted the widest latitude" in such matters and erred "in routinely applying to this case the traditional standards governing more orthodox 'stays.'" *Sampson, supra*, 415 U.S. at 83-84, 94 S.Ct. at 949-50 (citation and footnote omitted). The consequences of the transfer order which Gilley sought to escape were such as

Ala.1975), dismissed sub nom. *American Fed. of Gov. Employees v. Hoffinan*, 427 F.Supp. 1048 (N.D.Ala.1976).

to evoke sympathy for his predicament, but they did not constitute irreparable injury.

The preliminary injunction is dissolved and the case is remanded to the district court with directions to dismiss the complaint.



**SOUTHERN OHIO BUILDING
SYSTEMS, INC., Petitioner,**

v.

**OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION and
Ray Marshall, Secretary of Labor, Re-
spondents.**

No. 79-3352.

United States Court of Appeals,
Sixth Circuit.

Argued March 31, 1981.

Decided May 28, 1981.

Employer filed a petition to review an order of the Occupational Safety and Health Review Commission holding that the general duty clause of the Occupational Safety and Health Act of 1970 was violated when two employees of employer worked at an eave of the roof of a building under construction without any fall protection. The Court of Appeals, Lively, Circuit Judge, held that: (1) the evidence was insufficient to establish a violation of the general duty clause; (2) the evidence was insufficient to establish a violation of the regulation requiring employer to provide personal protective equipment "in all operations where there is an exposure to hazardous conditions or * * * the need for using such equipment to reduce the hazards to the employees"; and (3) violation of the general duty clause could not be found where the roof on which employees were working was nearly flat, having a rise or slope of only

one inch in 12 inches, and Secretary of Labor had promulgated a specific regulation which requires a safety device for the protection of workers on roof when the roof had a slope greater than four inches in 12 inches.

Order vacated.

1. Labor Relations ⇌ 30

In proceeding brought against employer on basis of allegation that the general duty clause of Occupational Safety and Health Act of 1970 was violated when two employees worked at an eave of the roof of a building under construction without any fall protection, evidence was insufficient to establish a violation on such basis. Occupational Safety and Health Act of 1970, § 5(a)(1), 29 U.S.C.A. § 654(a)(1).

2. Labor Relations ⇌ 30

In proceeding brought against employer under Occupational Safety and Health Act of 1970 based on allegation that two employees of employer worked at an eave of roof of a building under construction without any fall protection, evidence was insufficient to establish violation of regulation requiring employer to provide personal protective equipment "in all operations where there is an exposure to hazardous conditions or * * * the need for using such equipment to reduce the hazards to the employees." Occupational Safety and Health Act of 1970, § 5(a)(2), 29 U.S.C.A. § 654(a)(2).

3. Labor Relations ⇌ 29

Employer could not be found to have violated general duty clause of Occupational Safety and Health Act of 1970 based on allegation that two employees of employer worked at an eave of the roof of a building under construction without any fall protection where such roof was nearly flat, having a rise or slope of one inch in 12 inches, and Secretary of Labor had promulgated a specific regulation which required a safety device for the protection of workers on roof when the roof had a slope greater than four inches in 12 inches. Occupational Safety

and Health Act of 1970, § 5(a)(1), 29 U.S.C.A. § 654(a)(1, 2).

Gary W. Auman, Smith & S
ton, Ohio, for petitioner.

Ray H. Darling, Exec. Sec.
tional Safety and Health R
Michael H. Levin, Allen H. Fe
late Litigation, John R. Bradle
of Labor, Robert E. Kopp
Glancz, U. S. Dept. of Justi
Sec., Civil Division, Marleigh
Washington, D. C., for respon

Before LIVELY and KE
Judges, and PHILLIPS, S
Judge.

LIVELY, Circuit Judge.

This is a petition to review
of the Occupational Safety and
view Commission (OSHRC or
sion) holding that the petiti
Ohio Building Systems, Inc. (S
violated the Occupational
Health Act of 1970, 29 U.S.C.
(1976) (the Act). The specific
that the general duty clause, s
of the Act, 29 U.S.C. § 654(a)(1)
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when it failed to grant Sou
petition for discretionary review
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I.

The citation upon which the
this case was based was filed
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Ohio working at an eave of t
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 82-99

MARY DEBORD, IVAN DEBORD,
WANDA GREGORY, EVERETT HUNTER,
SADIE HUNTER, GEORGIA KEANS,
DANNY MOORE, DOUGLAS MOORE,
WANDA MOORE, MARY MOORE,
TIM PACK, DEBBIE PACK,
MCINTIRE RISNER, LORETTA
RISNER, JAMES WARD, JR.,
VERONICA WARD,

PETITIONERS

VS:

JAMES G. WATT, Secretary
of the Interior, and
DINCO COAL SALES, INC.,

DEFENDANTS

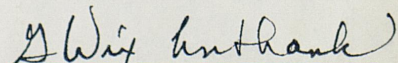
O R D E R

In accordance with the Memorandum Opinion issued herewith,

IT IS HEREBY ORDERED

1. That the motion for summary judgment of the plaintiffs is SUSTAINED.
2. That the motion for summary judgment of the defendant Secretary is DENIED.
3. That the decision below is REVERSED.
4. That this matter is REMANDED to the Secretary for proceedings not inconsistent with the Memorandum Opinion herein.
5. That this matter is DISMISSED and STRICKEN from the docket.

This the 29th day of September 1982.


G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 82-99

MARY DEBORD, IVAN DEBORD,
WANDA GREGORY, EVERETT HUNTER,
SADIE HUNTER, GEORGIA KEANS,
DANNY MOORE, DOUGLAS MOORE,
WANDA MOORE, MARY MOORE,
TIM PACK, DEBBIE PACK,
MCINTIRE RISNER, LORETTA
RISNER, JAMES WARD, JR.,
VERONICA WARD,

PETITIONERS

VS:

JAMES G. WATT, Secretary
of the Interior, and
DINCO COAL SALES, INC.,

DEFENDANTS

MEMORANDUM OPINION

Defendant Dinco Coal Sales, Inc. ("Dinco") owns a coal processing facility in Floyd County, in the eastern district of Kentucky, which crushes and loads coal produced from coal mines in the surrounding area. Plaintiffs are individual citizens living near this facility.

On 20 July 1981 the Secretary issued a notice of violation to Dinco for conducting a surface mining operation within 300 feet of occupied dwellings without having obtained written waivers from the owners as required by 30 C.F.R. §761.11. Most of the plaintiffs are residents within 300 feet of this facility and did not grant Dinco the required waivers. The notice required that Dinco suspend the operations until it had obtained the waivers and had reclaimed the areas within 300 feet of the dwellings nearby.

Dinco applied for review of the notice and for temporary relief, which was granted by the administrative law judge (ALJ). Two of the plaintiffs, Ivan and Mary Debord, intervened and appealed the decision granting the relief. Other plaintiffs intervened following the decision of the Board of Surface Mining Appeals to set aside the order granting temporary relief to Dinco, pending Dinco's demonstration of its compliance with 30 U.S.C. 1275 (c), Temporary relief; order on decision; hearing. On 14 December 1981 the ALJ issued his decision vacating the notice of violation.

The decision found that the Dinco facility and a coal mine regulated under the Surface Mining Act are owned by the same individual. The mine is located approximately 25 miles from the tipple facility, and had crushed and loaded coal from the mine in the past. However, by the terms of an agreement offered in evidence at the hearing, the future use of the tipple was limited almost exclusively to other mines. The ALJ ruled, accordingly, that the Dinco facility was neither operated in conjunction with a mine site, nor was it at or near the mine site, and that, therefore, the Office of Surface Mining lacked jurisdiction and the citation was vacated.

Plaintiffs appealed after the Board affirmed the decision of the ALJ, which ruled that because the facility in issue is not "at or near the minesite".

The matter is now before the court on cross-motions of plaintiffs and the Secretary for summary judgment pursuant to the court's jurisdiction under 30 U.S.C. 1276 (a) (2).

This decision turns on an interpretation of Section 701(28), 30 U.S.C. 1921(28), which lists the activities included within "surface coal mining operations" as, inter alia:

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal . . . the use of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, or preparation, loading or coal for interstate commerce at or near the mine site . . . (emphasis added by court).

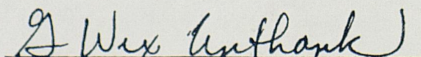
Plaintiffs argue that the controlling language is "in connection with". That is, if the activity in question is operated in connection with a mine site, it is regulable and the Secretary erred in denying its jurisdiction over the Dinco facility.

Defendant Secretary argues that the controlling language is "at or near the minesite". That is, the activity in question is regulable and within the Secretary's jurisdiction only if it is at or near a minesite.

This is clearly erroneous.

On a similar question of the Secretary's jurisdiction over an off-site tipping operation the United States Sixth Circuit Court of Appeals in Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (1981) interpreted this statute to encompass off-site processing operations such as here, finding that Congress intended for tipping operations to fall within the Act's gambit. Id at 1094.

The Secretary having found that Dinco's operation is conducted in connection with mines, and it being clear from Shawnee and a reading of 30 U.S.C. 1921 (28) that the Secretary has the jurisdiction to regulate such operations, the decision below must be REVERSED and REMANDED to the Secretary for further proceedings not inconsistent with this opinion.


G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-99

MARY DeBORD, et al

PLAINTIFF

VS

ORDER

JAMES WATT, Secretary of the
INTERIOR and DINCO COAL SALES, INC.

DEFENDANT

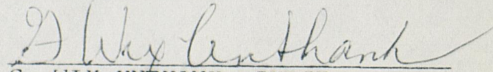
All responsive pleadings having been filed, the above-styled action is hereby set for preliminary conference to be held in the Courtroom of the United States Courthouse, Pikeville, Kentucky, on the 7th day of December, 1982, at the hour of 4:00 P.M.

On or before the 17th day of November, 1982, each party shall prepare and file with the Court a preliminary trial memorandum as set forth by standing order of this Court, dated the 22nd day of September, 1980, a copy of which is attached hereto.

The Court suggests the presence of both party and counsel at the preliminary conference, but same is not mandatory if inconvenient to the party.

Failure to comply with the terms of this order will result in appropriate sanctions.

ORDERED this 22nd day of June, 1982.


G. WIX UNTHANK, JUDGE

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PLAINTIFFS

DEFENDANTS

MARY DEBORD;
WANDA GREGORY;
EVERETT HUNTER;
SADIE HUNTER;
GEORGIA KEANS;
DANNY MOORE;
DOUGLAS MOORE;
WANDA MOORE;
MARY MOORE;
TIM PACK;
DEBBIE PACK;
McINTIRE RISNER;
LORETTA RISNER;
JAMES WARD, JR.;
VERONICA WARD;
IVAN DEBORD

JAMES WYATT, Secretary of the
Interior and
DINCO COAL SALES, INC.

CAUSE

30 U.S.C. §1276
Cause to determine (CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)
whether vacating a citation issued by OSM to a coal tipple operating in a
residential area, w/out waivers, was arbitrary, capricious & contrary to law. M

ATTORNEYS

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INEZ, KY 41224

CHECK HERE CASE WAS FILED IN RMA UPERIS	FILING FEES PAID			STATISTICAL CARDS	
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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 7/80)