No. 14-688

IN THE

Supreme Court of the United States

SHAMOKIN FILLER COMPANY, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioner Shamokin Filler Company, Inc. ("Shamokin") respectfully submits this brief in Reply to the Secretary of Labor's brief in Opposition to Shamokin's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

ARGUMENT

I. THE THIRD CIRCUIT'S INTERPRETATION OF SECTION 802(i) OF THE MINE ACT IS CLEARLY IN CONFLICT WITH THE EIGHTH CIRCUIT'S DECISION.

The Secretary of Labor ("Secretary") has claimed that there is no conflict between the Third Circuit's interpretation of 30 U.S.C. Section 802(i) of the Mine Act in the decision below, and the decision by the Eighth Circuit in *Herman v. Associated Electric*, 172 F.3d 1078 (8th Cir. 1999), because, according to the Secretary, the basis for the Court's decision in *Associated Electric* was that "the plant functioned primarily as a utility that processed the coal for its own combustion, rather than as a coal mine that prepared coal for other customers." (Br. in Opp. at 13).

The Secretary misstates the Eighth Circuit's reason for denying MSHA jurisdiction. The Eighth Circuit did not deny the Mine Safety and Health Administration ("MSHA") jurisdiction in *Associated Electric* because Associated Electric was a utility processing coal for its own combustion. After citing evidence that the coal was extracted and processed in Wyoming before it was shipped to Associated Electric's power plant in Missouri, the

Eighth Circuit stated that it was denying MSHA's claim of jurisdiction of Associated Electric because "Associated purchased coal that was processed into a marketable form by the mine. Associated did not participate in transporting the coal from the mine, nor were its processing activities necessary to make the coal marketable. Therefore, its coal-handling operations are more properly characterized as 'manufacturing' than 'mining.'" *Associated Electric*, 172 F.3d at 1083.

The Eighth Circuit's decision was clearly not based on the fact that Associated Electric was a utility using coal for combustion. The Eighth Circuit, in fact, recognized that in other situations, coal processing operations at utilities would fall under MSHA's jurisdiction and cited cases upholding MSHA's jurisdiction "where the utility maintains a presence at a mine to assist in transporting coal to its generating facility," or "where the utility performs all processing tasks necessary to convert coal refuse into a marketable product." *Associated Electric*, 172 F.3d at 1083.

Had the Eighth Circuit meant to say what the Secretary now claims was the basis for the decision in *Associated Electric* (that MSHA's jurisdiction was rejected because Associated Electric was a utility), the Eighth Circuit surely would have said so. Decisions by other courts of appeals prior to the Eighth Circuit's decision in *Associated Electric*, in *Pennsylvania Electric Co. v. Federal Mine Safety and Health Review Comm'n*, 969 F.2d 1501 (3d Cir. 1992)(on reconsideration) and *United Energy Services, Inc. v. Federal Mine Safety and Health Review Comm'n*, 35 F.3d 971 (4th Cir. 1994), had squarely addressed the argument by utilities that

coal preparation operations at a utility were not subject to MSHA jurisdiction, regardless of whether the coal involved was unprocessed. Both of those decisions upheld MSHA jurisdiction, on the grounds that it was not the identity of the entity involved (utility vs. coal mine or coal preparation plant) that determined whether MSHA had jurisdiction. Rather than expressing disagreement with those decisions, the Eighth Circuit distinguished those cases because the coal processing at those utilities was the processing of raw coal and coal refuse, not coal that had already been processed. *Associated Electric*, 172 F.3d at 1082. In contrast, the Eighth Circuit said, coal handling at Associated Electric was of coal that was previously processed "into a marketable form." "Therefore," the Eighth Circuit stated, Associated Electric's "coal-handling operations are more properly characterized as 'manufacturing' than 'mining.'" *Associated Electric*, 172 F.3d at 1083.

This distinction, between processing raw coal and handling already processed coal, which was followed by the Eighth Circuit in *Associated Electric*, is consistent with the statute's language, and was previously the interpretation held and advocated by the Secretary of Labor. In fact in proceedings before the Commission in *Pennsylvania Electric,* the Secretary argued that the fact that Pennsylvania Electric was a utility did not bar MSHA jurisdiction, but also asserted that MSHA's jurisdiction would be limited to the facilities at the power plant "that handle 'run of mine' coal." *Sec'y of Labor v. Pennsylvania Electric Company*, 12 FMSHRC 1562, 1573 (Aug. 1990) (dissenting op., citing to Secretary's Brief), *aff'd* 969 F.2d 1501 (3d Cir. 1992)(observing that the Secretary asserted before the Commission that "all fuel handling facilities at

the Generating Station that handle 'run of mine' coal are subject to Mine Act jurisdiction and MSHA enforcement while all facilities handling processed coal are subject to OSHA jurisdiction and enforcement.").

The Secretary of Labor has, so far, continued to hold to that interpretation in cases under the Black Lung Benefits Act, 30 U.S.C. §§ 901, 902(d), (as the Secretary seems to acknowledge in the Brief in Opposition) while arguing that a different interpretation of Section 802(i) of the Mine Act should apply in cases involving MSHA's jurisdiction, even though both MSHA jurisdiction and Black Lung are governed by Section 802(i) of the Mine Act. 30 U.S.C. § 802(i).

Contrary to the decision by the Eighth Circuit in *Associated Electric*, the Third Circuit's decision below holds that the fact that the coal has been previously processed into a marketable form is irrelevant. In the Third Circuit's interpretation of "preparing the coal" in Section 802(i) of the Mine Act, the coverage of the Mine Act is far more open-ended in how far down the stream of commerce the Mine Act applies. 30 U.S.C. § 802(i). The only limit to MSHA jurisdiction, under the Third Circuit's interpretation, is handling of coal that is "too far attenuated from the actual processing of coal and [is] not 'critical' or 'integral' in preparation of receipt by the end user." *Shamokin Filler Company v. Federal Mine Safety and Health Review Comm'n,* 772 F.3d 330, 337 (3d Cir. 2014). (Appx. B).

The Secretary also cites the recent decision by the Court of Appeals for the Fourth Circuit, *Power Fuels, LLC v. Federal Mine Safety and Health Review*

Comm'n, __ F.3d __, 2015 WL 332128 (4th Cir., Jan 27, 2015). That case does not address the same issue. Power Fuels mixes and prepares coal and coal mining refuse (gob) for a power plant located on adjoining property and operated by Power Fuels' customer, Dominion Virginia Power. Power Fuels did not assert that the coal that it handled had been previously processed into marketable form, as was the basis for the Eighth Circuit's decision in *Associated Electric* relied upon by Shamokin in this case. The issue of whether the Mine Act extends to coal handling activities even though the coal was previously processed into marketable form was not presented in the *Power Fuels* case. *Power Fuels*, 2015 WL 332128.

II. THE PRINCIPLE THAT THE COURT OF APPEALS SHOULD REMAND THE CASE RATHER THAN EVALUATE EVIDENCE *DE NOVO* IS NOT LIMITED TO SITUATIONS IN WHICH THE COURT OF APPEALS DISAGREES WITH THE OUTCOME OF THE CASE AT THE ADMINISTRATIVE AGENCY.

Although the issue is presented to this Court as an evidentiary issue, the underlying question is whether Shamokin Filler Company ("Shamokin") will be allowed to argue in a meaningful way that the Secretary of Labor acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 500, 706, by treating Shamokin differently, in terms of agency jurisdiction, than were other companies in the same industry (carbon products) and with similar operations.

Shamokin was not allowed to make that argument at the administrative agency level, because the ALJ and the

Commission said the issue of "disparate treatment" was not relevant, and barred any evidence that would show that the Secretary's actions were arbitrary and capricious.

The Court of Appeals disagreed with the ALJ and the Commission insofar as the relevance of the issue. The Court of Appeals should therefore have remanded the case to the Commission to review the evidence on this issue: "if the agency has not considered all relevant factors…, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light v. Nuclear Regulatory Comm'n*, 470 U.S. 729, 744 (1985). However, rather than remanding, the Third Circuit considered evidence (a Department of Labor memorandum regarding Keystone Filler Company) that had not been allowed by the Administrative Law Judge, and on that basis concluded that the evidence did not support Shamokin's argument of "disparate treatment."

The Secretary argues that the Court of Appeals did not commit error in considering evidence regarding Shamokin's claim that it was treated differently than similar companies *de novo* because the Court of Appeals upheld the Commission's decision regarding jurisdiction. (Br. in Opp. at 19). However, such a limit on the general rule or practice that the Court of Appeals should remand, rather than consider new evidence, flies in the face of this Court's explanation for the rule regarding the respective roles of the administrative agency and the reviewing court: "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can through informed discussion and analysis, help a court later

determine whether its decision exceeds the leeway that the law provides." *INS v. Ventura*, 537 U.S. 12, 17 (2002).

This case demonstrates the soundness of this Court's explanation for the rule in *Ventura*. The memorandum on Keystone Filler Company was never examined in a proceeding where the witnesses could testify to and be questioned about its content. Moreover, the Court of Appeals' reading of the memorandum focused only on the Department of Labor's conclusion, rather than on the more important discussion in the memorandum regarding the factors that led to the Department of Labor's conclusion, and whether those factors are similarly applicable to Shamokin. Having determined that the issue of disparate treatment was relevant, the Court of Appeals should have allowed Shamokin the opportunity to show whether this was a case of disparate treatment, by remanding the case to the Commission to allow consideration of the evidence on that issue.[1]

The genesis of this litigation was that new owners of Shamokin, who took over the company in 2009, found that their company was one of the few plants in their industry being regulated by MSHA, and there appeared to be

1. The Court of Appeals also said that the exclusion of *any* evidence of "disparate treatment" by the ALJ was warranted because of the concern that "introduction of this evidence could have opened up a "stream of requests for comparisons to facilities all around the country" and delayed the trial. Shamokin had not prepared a "stream of requests" but if there was a concern about this issue causing undue delay in the completion of the hearing, the ALJ could of course exclude evidence that caused "undue delay" or was "needlessly presenting cumulative evidence." Federal Rule of Evidence 403.

no reason for being treated differently than the other companies.[2] However, at every level, Shamokin has not been allowed to make the argument that the Secretary of Labor acted arbitrarily and capriciously by treating it differently, without good reason, from similar companies, because of evidentiary rulings that barred Shamokin from being able to present evidence to show that was the case. The protections afforded to citizens by the Administrative Procedure Act against arbitrary and capricious actions should not be denied because of an evidentiary ruling that prevented even the consideration of evidence regarding whether there was basis "in fact or in logic" for treating Shamokin differently than the other companies.[3] 5 U.S.C. § 706.

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2. The Secretary suggests for the first time that MSHA should have jurisdiction of Shamokin's plant because MSHA's regulation of coal is more specific and comprehensive than is OSHA's. (Br. in Opp. at 3). Not only has the Secretary not made that argument previously, but the argument ignores the fact that the Secretary has previously removed other carbon products plants (which also use coal as an ingredient) from MSHA jurisdiction. In addition, there is no dispute that Shamokin uses a number of other materials in addition to coal to produce carbon products, including carbon black, graphite, and other carbon containing materials. At the hearing, MSHA disavowed having interest in safety and health hazards that may result from other materials. *Shamokin Filler Company, Inc.,* 34 FMSHRC 1897, 1905 (Aug. 28, 2012).

3. *Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1243 (D.C. Cir. 2007) ("The Order under review is arbitrary and capricious in that it provides no basis in fact or in logic for the Commission's refusal to treat Westar as it has treated KCPL.").

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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