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The Legality of Designating a Union Representative as the Miners' Walkaround Representative at a Non-Unionized Mine

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THE LEGALITY OF DESIGNATING A UNION REPRESENTATIVE AS THE MINERS’ WALKAROUND REPRESENTATIVE AT A NON-UNIONIZED MINE

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I. INTRODUCTION

Reflecting the need for miner participation in maintaining safe conditions in the nation’s mines, current federal law gives miners at each mining operation the right to appoint a representative to accom-
pany federal inspectors on periodic mine inspections.¹ The Federal Mine Safety and Health Act (Mine Act)² grants the miners the right to choose this "walkaround" representative, and provides that the walkaround representative shall be given an opportunity to accompany a federal agent during an inspection of a mine for the purposes of aiding the inspection.³

The Secretary of Labor (Secretary) has interpreted the provisions of the Mine Act broadly to allow any group of two or more miners to select a non-employee of the mine operator as their walkaround representative.⁴ This interpretation has been unsuccessfully contested in recent years.⁵ The Secretary has also allowed the designation of a non-employee union agent as the walkaround representative despite the fact that the mine is a non-union operation.⁶

The main problem arising under this interpretation is that union representatives who were previously unable to obtain official recognition as the miner's exclusive representative under the National Labor Relations Act (NLRA) can now obtain access to a non-union mine by finding two or more miners willing to designate a union agent as their walkaround representative. Because the walkaround position grants the representative limited access to the mine operator's property, it is possible that a union representative could use his or her position as the walkaround representative to further the union's organizational goals.⁷ Mine operators have tried to characterize this situation as a per se abuse of the walkaround rights granted by the Mine Act and a violation of the operator's property rights.⁸

³ Id.
⁵ See Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447 (10th Cir. 1990).
⁷ See Kerr-McGee, 40 F.3d at 1264. See also Thunder Basin, 56 F.3d at 1277.
⁸ See Kerr-McGee, 40 F.3d at 1263-64. See also Thunder Basin, 56 F.3d at 1279.
The inconsistency between the provisions for selection of walkaround representatives under the Mine Act and the rules governing collective bargaining under the National Labor Relations Act create yet another problem. The NLRA provides that representatives selected by a majority of employees shall be the exclusive representative of all employees for the purposes of collective bargaining over the terms and conditions of employment, which by law includes mine safety and health. However, the Mine Act permits the designation of a walkaround representative by any group of two or more miners. Thus, it has been hypothesized that an operator of a unionized mine may be faced with the dilemma of violating its duty to deal exclusively with a majority-selected representative by dealing with issues of mine safety and health with a minority-selected walkaround representative.

The issue of the propriety of a non-employee union walkaround representative at a non-union mine was recently addressed in Kerr-McGee Coal Corp. v. Federal Mine Safety & Health Review Commission (Kerr-McGee) and Thunder Basin Coal Co. v. Federal Mine Safety & Health Review Commission (Thunder Basin). Under these two decisions, a group of two or more miners may designate a non-employee union representative as their walkaround representative notwithstanding the possibility of motivations other than miner safety or the lack of majority approval of the selection by the remaining miners.

This Note will be devoted to a discussion of Kerr-McGee and Thunder Basin. However, it is important to first briefly review the

13. See Collyer & Klise, supra note 9, at 620.
14. 40 F.3d 1257 (D.C. Cir. 1994).
15. 56 F.3d 1275 (10th Cir. 1995).
16. See Kerr-McGee, 40 F.3d at 1264. See also Thunder Basin, 56 F.3d at 1277.
provisions of the federal statutes that gave rise to the controversy. The Note will then explain how the statutes were interpreted by the Kerr-McGee and Thunder Basin courts. A reading of the two decisions makes it apparent that any group of employees of a non-unionized mine are free to select a non-employee union agent as their walkaround representative. Finally, the Note will discuss the ramifications of the conclusions reached in Kerr-McGee and Thunder Basin on the future duties and behavior of mine operators, organized labor, and those designated as walkaround representatives.

II. BACKGROUND OF THE LAW

The two federal laws pertinent to the issues raised in this Note are the Mine Act and the National Labor Relations Act. The position of the miners’ walkaround representative originated in Section 103(h) of the Federal Coal Mine Health and Safety Act of 1969 (Coal Act). However, in 1977 the Federal Mine Safety and Health Act (Mine Act) was passed. The Mine Act broadened the duties of the miners’ representative and granted the representative certain additional privileges. It remains the primary federal law controlling the miners’ walkaround rights.

The NLRA is the primary federal statute concerning employee rights to organize and bargain collectively. The NLRA makes no mention of the miners’ walkaround representative. However, mine operators have attempted to use its provisions to prevent the selection of a non-employee union agent as the miners’ walkaround representative. The Supreme Court recently held that “the NLRA confers rights only on employees, not on unions or their nonemployee organizers.” Thus, non-employee union agents have only very limited access to the prop-

17. Pub. L. No. 91-173, 83 Stat. 742 (1969) (previously codified at 30 U.S.C. §§ 801-960 (1976)). The Coal Act provided that “[a]t the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.” 30 U.S.C. § 813(h) (1976).


property of mine operators. Mine operators have relied on this position in an attempt to restrict non-employee union agents from obtaining access to the operators’ property by virtue of a designation as the miners’ walkaround representative.


The right of miners to choose a walkaround representative was originally granted by Section 103(h) of the Coal Act which provided that “[a]t the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.”

In 1977, with the enactment of the Mine Act, Congress expanded the role of miner representatives to include mine safety functions. Congress passed the Mine Act to improve working conditions in the nation’s mines. In the findings and purpose section of the Mine Act, Congress stated that the first priority and concern of the mining industry must be the health and safety of its most precious resource, the miners themselves. Accordingly, “the existence of unsafe and unhealthful conditions and practices in the Nation’s coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated.” Section 103(f) of the Mine Act provides:

a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there

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21. See id.
is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine.\textsuperscript{28}

Although both statutes confer important rights on the miners’ walkaround representative,\textsuperscript{29} neither statute defines a procedure to select the representative or set forth any qualifications the representative must have. Instead, Congress empowered its agencies to establish guidelines pertaining to the walkaround representatives: under the Mine Act, the Mine Safety and Health Administration of the United States Department of Labor; and under the Coal Act, the Bureau of Mines and the Mining Enforcement and Safety Administration of the United States Department of the Interior.\textsuperscript{30} The MSHA regulations define a “miner representative” with virtually no limitation. Under the MSHA regulations, “[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the act” may be a walkaround representative.\textsuperscript{31} The Mine Act requires the Secretary of Labor to make frequent unannounced inspections and investigations of coal and other mines to obtain information on health and safety conditions at the mines, to determine if there is an imminent danger at the mine, to gather information on the applicable health and safety standards, and to determine if there is compliance with the health and safety standards.\textsuperscript{32}

The Mine Act also places certain rights and obligations on the walkaround representative. When the representative is chosen, he or she must provide the MSHA and the operator of the mine with the name, address, and telephone number of the representative, the mine where the represented miners work, and the mine’s MSHA identification number.\textsuperscript{33} The representative must also provide a copy of the document evidencing the designation of the representative of the miners.\textsuperscript{34} When a federal inspector inspects a mine, the representative has the right to

\textsuperscript{29} Miners’ representatives under the provisions of the Mine Act have been unofficially dubbed “walkaround” representatives.
\textsuperscript{30} See Collyer & Klise, supra note 9, at 619.
\textsuperscript{33} 30 C.F.R. §§ 40.2 to .3 (1995).
\textsuperscript{34} Id.
accompany him.\textsuperscript{35} If the representative believes there is a violation of the Mine Act or an imminent danger of injury, the representative has the right to obtain an immediate inspection.\textsuperscript{36} If the operator of the mine contests any citation, order, or penalty which results from an inspection, it must notify the representative of the miners.\textsuperscript{37}

The Mine Act does not specifically define who the representative may be. However, the regulations promulgated under this section define a miner’s representative as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act . . . ."\textsuperscript{38} This definition, by specifically including "organizations," appears to allow labor unions to serve as miner representatives.\textsuperscript{39} The Secretary’s position is supported by the preamble to the regulations, which considered and rejected the notion that walkaround representatives must be chosen by a majority of miners.\textsuperscript{40}

Furthermore, the text of the Mine Act appears to contemplate that non-employees of the mine may be chosen as the walkaround representative. Section 103(f) provides:

\begin{quote}
[s]uch representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. [The Secretary may also admit] additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.\textsuperscript{41}
\end{quote}

This section does not expressly bar non-employees from serving as the walkaround representative. By creating a subclass of representatives who are entitled to compensation while exercising their walkaround rights under Section 103(f), Congress clearly recognized that some walkaround representatives may be employees of the operator and some may not.\textsuperscript{42}

\textsuperscript{39} Kerr-McGee, 40 F.3d at 1262.
\textsuperscript{40} 43 Fed. Reg. 29,508 (1978).
\textsuperscript{42} Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447, 450 (10th Cir.)
The regulations also provide that after receiving notice that a walkaround representative has been selected by two or more miners, the mine operator is required to post the designation on the mine bulletin board.\textsuperscript{43} If the mine operator does not comply, the Secretary may issue a citation and may recommend civil penalties up to $50,000.\textsuperscript{44} The refusal of the operator to post this designation and "recognize" the selection of the walkaround representative led to litigation in both Kerr-McGee and Thunder Basin.\textsuperscript{45}

**B. Employee Representation Under the NLRA**

Congress enacted the NLRA to promote the free flow of commerce by "encouraging the practice and procedures of collective bargaining and by protecting the workers' right to exercise full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their own employment or other mutual aid or protection."\textsuperscript{46} It is important to note that the NLRA grants rights only to employees, not to unions or their non-employee organizers.\textsuperscript{47} The NLRA grants employees

\begin{quote}
[the] right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .\textsuperscript{48}
\end{quote}

The Act provides that it shall be an unlawful labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the above rights.\textsuperscript{49} The Act further provides that it is an unfair labor practice for an employer to "dominate or interfere with the for-

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\textsuperscript{43} 30 C.F.R. § 40.4 (1994).
mation or administration of any labor organization or contribute financial or other support to it."

The significance of the collective bargaining representative is established by Section 9 of the NLRA, which provides that:

[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Thus, under the NLRA, once a majority of employees selects a representative, the representative becomes the exclusive representative of all the employees. Both the employer and the exclusive representative have a common obligation to bargain in good faith over "wages, hours, and other terms and conditions of employment." If an employer negotiates with any other person or entity as a representative of the employee unit, it is in violation of the Act.

III. RECENT DEVELOPMENTS

A. Kerr-McGee Coal Corp. v. Federal Mine Safety & Health Review Commission

Kerr-McGee was the first decision to specifically decide whether a non-elected labor organization can serve as a miner's representative

52. Id.
54. See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) (stating: [I]t is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours, and working conditions . . . . The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or a majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained . . . .

Medo Photo Supply Corp. at 684.
at a non-unionized mine under the Mine Act. The petitioner, Kerr-McGee Coal Corporation, sought review of a decision by the Federal Mine Safety and Health Review Commission requiring Kerr-McGee to recognize the United Mine Worker’s of America (UMWA) and two of its employees as walkaround representatives.\(^5\) In July of 1990, seven miners employed at the Jacobs Ranch Mine designated the UMWA and two of its employees as their walkaround representative.\(^6\) Prior to this designation, there had never been a miner’s representative at the mine.\(^7\) It was stipulated by both parties that one of the UMWA employees had moved to Wyoming in order to unionize the coal miners at the Jacobs Ranch Mine.\(^8\)

The UMWA subsequently mailed copies of the designation form to the Jacobs Ranch Mine and the Mine Safety and Health Administration (MSHA).\(^9\) Kerr-McGee officials at the mine refused to post the designation form on the miners’ bulletin board.\(^10\) As a result, Kerr-McGee was issued a citation pursuant to 30 U.S.C. Section 814(a)\(^11\) for violating the provisions of 30 C.F.R. Section 40.4.\(^12\)

Kerr-McGee argued before a Commission Administrative Law Judge (ALJ) that neither the Mine Act nor the regulations required it to recognize the UMWA as a miner’s representative because the UMWA was neither a Jacob Ranch Mine employee nor an official collective bargaining representative under the NLRA.\(^13\) Kerr-McGee further argued that, given the UMWA’s express intent to unionize the mine, its use of the walkaround representative designation constituted \emph{per se} abuse of the rights and privileges granted to safety representa-
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According to Kerr-McGee, it was clear that the UMWA was using its designation to further its organizational goals rather than the safety objectives of the Mine Act. The ALJ rejected both arguments, finding that Kerr-McGee had violated 30 C.F.R. Section 40.4 by refusing to post the designation-of-miners form. The Commission affirmed the ALJ’s decision.

On appeal, Kerr-McGee contended that unions and other third parties may not serve as walkaround representatives unless they have been selected by a majority of miners as their exclusive collective bargaining representative under the provisions of the NLRA. Additionally, they argued that even if a selection of a non-employee walkaround representative was consistent with the NLRA, the Mine Act, and the regulations, the selection violated Kerr-McGee’s right to keep union representatives off their property under Lechmere, Inc. v. NLRB, which suggests that a balancing of the operator’s property interests against the safety objectives of the Mine Act is required.

1. Standard of Review

The Kerr-McGee court first found that the Mine Act did not expressly address whether or not a non-elected labor organization can serve as a walkaround representative at a non-unionized mine. If a court finds that Congress has not directly spoken in the precise question at issue, the court is to apply the highly deferential standard of review set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. Under this standard, the Secretary’s interpretation will

65. Id.
68. Kerr-McGee, 40 F.3d at 1259.
70. Kerr-McGee, 40 F.3d at 1261.
stand if it was a “permissible construction of the statute” and not “plainly wrong.”

The Kerr-McGee court explained that the regulations define a “representative of miners” to include “[a]ny person or organization which represents two or more miners at a coal or other mine . . . .” The preamble to the regulations expressly considers and rejects the notion that miner’s representatives must be selected according to the NLRA’s “majority selection” requirement. Thus, an organization such as a union can act as the walkaround representative for any group of two or more miners. Majority selection of a walkaround representative is not required.

Moreover, the legislative history of the Coal Act, the predecessor to the Mine Act, expressly stated that the designation of a walkaround representative need not meet the requirements of other labor laws. Thus, the Kerr-McGee court found that the Secretary’s interpretation was a “permissible construction of the statute”, and not “plainly wrong.” It reasoned that if Congress had intended to place requirements on exactly who could be a miners’ representative under the

72. Id. at 842-43.
When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Id. (internal citations omitted).


74. Kerr-McGee, 40 F.3d at 1262 (citing 30 C.F.R. § 40.1 (1994)).


76. Kerr-McGee, 40 F.3d at 1262.


79. Kerr-McGee, 40 F.3d at 1262.
Mine Act, it could have done so either in the statute or in the legislative history of the Act. Congress did neither, so the Secretary’s broad interpretation of the term was found to be consistent with the provisions of the Mine Act.80

2. Potential for Abuse

Kerr-McGee also tried an additional approach. It asserted that although unions that have collective bargaining responsibility under the NLRA may act as walkaround representatives, no non-employee that has not been approved by a majority of miners should be permitted to act as a walkaround representative.81 To allow such actions could undermine the safety objectives of the act by permitting unions to obtain access to non-unionized mines for primarily organizational purposes.82 In this situation, concerns over miner safety could be put on the “back burner” in favor of the organizational goals of the union, and the safety objectives of the Mine Act could be hampered.83

In support of this contention, Kerr-McGee relied on Utah Power & Light Co. v. Secretary of Labor84 in which the Tenth Circuit recognized that in some situations, a non-employee walkaround representative could abuse the representative position.85 Kerr-McGee argued that the use of the walkaround rights to further the goals of the non-employee organization constitutes a per se abuse of the Mine Act. Thus, if a walkaround representative had any motivation beyond miner safety in seeking his or her position, the representative would be disqualified.

However, the Utah Power & Light court expressly rejected such a position, finding that:

[the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walkaround rights altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them.86

80. Id. at 1263.
81. Id. at 1262.
82. See id.
83. See Kerr-McGee, 40 F.3d at 1264.
84. 897 F.2d 447 (10th Cir. 1990).
85. See id. at 452.
86. Id.
The *Kerr-McGee* court noted that if an operator suspects an abuse of the walkaround rights, it could obtain relief by refusing to post the representative’s designation and denying access to the mine.\(^8\) The Secretary could then decide whether the organization had abused its authority in a manner that would lead to its disqualification as the walkaround representative.\(^9\) Because Kerr-McGee offered no evidence that the UMWA abused its position as the miner’s walkaround representative by acting in a manner inconsistent with the safety measures of the Mine Act, the Commission could reasonably reject Kerr-McGee’s position that an organization’s improper organizational motivations could operate, by itself, to disqualify the union as the miner’s representative under the Mine Act.\(^10\)

3. Infringement on Operator’s Property Rights

Finally, the court decided that Kerr-McGee’s reliance on *Lechmere, Inc. v. NLRB*\(^11\) was misplaced. Kerr-McGee read *Lechmere* as requiring the Secretary to balance Kerr-McGee’s property interests against the safety interests of the Mine Act in determining whether the UMWA could serve as the miner’s walkaround representative. The dispute in *Lechmere* stemmed from the efforts of a local union to organize employees at a retail store owned and operated by Lechmere, Inc.\(^12\) However, *Lechmere* concerned rights of employers and employees under the NLRA, not the Mine Act.\(^13\) Under the NLRA, the union’s right to contact employees for organizational purposes is deriv-

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88. *Id.* at 1264.
89. *Id.*
91. *Id.* at 529-30. In *Lechmere*, the union began a campaign to organize the store’s 200 employees. Its initial strategy, a newspaper advertisement, failed, so non-employee union organizers entered Lechmere’s parking lot on repeated occasions and placed handbills on employees’ windshields. Lechmere enforced a “no soliciting” policy on its property. Each time the union organizers were asked to leave and the handbills were removed by Lechmere employees. The union then began to organize daily on a public grassy strip near Lechmere’s property. They also recorded the license plates of Lechmere employees, and through the Connecticut Department of Motor Vehicles, obtained addresses of employees. They then sent four mailings and attempted to contact the employees by phone or home visits. These visits resulted in one signed union authorization card. *Id.*
ative of the employees right to organize. The Lechmere Court placed importance on the fact that the NLRA gives rights to employees, not unions. Consequently, it held that Section 7 of the NLRA does not give non-employee organizers the right to enter an employee’s property for organizational purposes except when access to employees outside the employer’s property is “infeasible.” The Court then stated that it would not impede an employer’s property rights by allowing unions to conduct solicitations on an employer’s property unless it was absolutely necessary to ensure the protection of the employee’s right to organize.

In contrast to Lechmere, Kerr-McGee was asserting its property rights as they related to the Mine Act, not the NLRA. The Kerr-McGee court explained that the Mine Act expressly defines the rights of walkaround representatives and specifies the level of intrusion on private property necessary to advance the safety objectives of the Mine Act. Designation as a walkaround representative “does not convey an uncontrolled access right to the mine property to engage in any activity that the miners’ [walkaround] representative wants.” By specifying particular areas in which the walkaround representative may participate, each which is related to miner safety, Congress has already balanced the miner’s safety interests with the property interests of the employer. Since the balancing has already been conducted by Congress, there is no basis to apply the Lechmere balancing test to a walkaround representative’s access to mine operator’s property.

Finally, in Lechmere, the agency’s discretion was limited by a prior Supreme Court decision interpreting Section 7 of the NLRA. The Kerr-McGee court noted that the Supreme Court has not yet addressed the issue as to whether non-employee third parties may serve as a miner’s walkaround representative. Therefore, the Secretary’s interpretation of the Mine Act allowing non-employee union agents to act as a walkaround representative has not been precluded. Thus, the

94. Lechmere, 502 U.S. at 531.
95. Kerr-McGee, 40 F.3d at 1264 (citing Lechmere, 502 U.S. at 527).
96. Id. at 1265.
97. Id. at 1265 (citing Thunder Basin Coal Co v. Reich, 114 S. Ct. 771 (1994)).
98. Id. at 1265.
100. Id.
101. Id.
Kerr-McGee court ruled that it must adopt the Secretary’s interpretation as long as it was “permissible.”102 Because it found the interpretation “permissible”, the court denied Kerr-McGee’s petition.103

B. Thunder Basin Coal Co. v. Federal Mine Safety & Health Review Commission

Thunder Basin104 dealt with the same issue that was decided in Kerr-McGee. Specifically, the Tenth Circuit decided whether a Federal Mine Safety and Health Review Commission decision holding that the Mine Act permitted the selection of non-employee union agents as the miners’ representative was a permissible construction of the statute.105 Additionally, the Thunder Basin court decided if the Commission’s ruling deprived Thunder Basin of its rights under the NLRA106 and whether the mine operator’s constitutional rights were violated by the Commission’s interpretation and enforcement of the Mine Act.107

Thunder Basin Coal Company operates the Black Thunder Mine, a large non-unionized coal mine in Wyoming. In 1990, eight of the mine’s employees signed an authorization form designating two agents of the UMWA, who were not employees of the Black Thunder Mine, to be their walkaround representatives under the Mine Act. It was undisputed that the designees hoped their status as the miners’ representatives would further the organizing goals of the UMWA. Thunder Basin refused to post the designation form on the miners’ bulletin board and, therefore, was cited for violating the Mine Act.108

Thunder Basin brought its case before an ALJ, arguing that the designation of a non-employee union representative as a walkaround representative was an abuse of the Mine Act. The ALJ concluded that the Commissioner’s decision in Kerr-McGee controlled the disposition of Thunder Basin’s claim.109 Under Kerr-McGee, the motives of the

102. Id.
103. Id.
105. Id. at 1276.
106. Id.
107. Id. at 1277.
108. Id.
109. Thunder Basin Coal Co. v. Secretary of Labor, MSHA, 16 FMSHRC 1849, 1850
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miners' walkaround representative are irrelevant. Following Kerr-McGee, the ALJ held that the organizational motives of the non-employee walkaround representative at the Black Thunder Mine were immaterial. Thus, the ALJ denied relief to Thunder Basin. The Commission refused Thunder Basin's petition for discretionary review, so Thunder Basin Appealed to the United States Court of Appeals for the Tenth Circuit.

1. Standard of Review

In reviewing the interpretation of the Section 103(f) asserted by the Secretary of Labor and the Commission, the Tenth Circuit was bound by the directions of the United States Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. Chevron requires a court, if it finds a statute to be silent or ambiguous with respect to the issue before it, to adhere to an agency’s interpretation of the statute as long as that interpretation is based on a permissible construction of the statute. The Thunder Basin court ruled that Congress had not clearly spoken on the issues presented. Congress did not specify whether a non-employee union agent could act as a walkaround representative in a union mine or whether improper motivation could disqualify a potential representative.

The opinion then proceeded to the issue of whether the Secretary’s decision was based on a “permissible construction of the statute.” The court first analyzed its previous decision in Utah Power & Light. In Utah Power & Light, the Tenth Circuit held that the

(1994).

110. Kerr-McGee, 40 F.3d at 1264.
111. Thunder Basin, 56 F.3d at 1279.
112. Id.
113. See id.
115. Id. at 842-43 (footnotes omitted). See also Utah Power & Light, 897 F.2d. at 449-50.
116. Thunder Basin, 56 F.3d at 1277.
117. Id. at 1277.
118. Id. (citing Chevron, 467 U.S. at 843).
119. 897 F.2d 447 (10th Cir. 1990). The mine at issue in Utah Power & Light was already unionized, and the person seeking designated as the miners' representative was an agent of the UMWA. In Utah Power & Light, the federal mine inspector was met at the
walkaround rights established by Section 813(f) extended to miners’ representatives who are not employees of the mine operator.120

The Utah Power & Light court based its decision on the language of Section 813(f) which reads:

a representative authorized by miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section.121

It concluded that Section 813(f) gives the miners the right to choose a walkaround representative without any limitation upon the employment status of the representative.122 The Thunder Basin court applied this same reasoning to the facts before it, and held that, “here, there is no limitation in the statute restricting the walkaround right to only those persons who are not union members or union organizers.”123

2. Potential for Abuse

The petitioner in Utah Power & Light also argued that the Mine Act “presents an inherent temptation for abuse by non-employee union representatives.”124 This hypothetical became reality in Kerr-
McGee. The Kerr-McGee court held that the walkaround rights granted under Section 813(f) extend to non-employee union agents. It further held that the organization designated as the walkaround representative need not be selected by a majority of miners.

In reaching its decision, the Kerr-McGee court relied heavily on the Tenth Circuit’s reasoning in Utah Power & Light. In an effort to distinguish the two cases, Thunder Basin argued that the Kerr-McGee court misinterpreted Utah Power & Light. Thunder Basin maintained that Utah Power & Light limits the walkaround representative to one specific purpose: aiding in an inspection of the mine. Any other purpose, according to Thunder Basin, would constitute an abuse of the Mine Act. Thus, because the miners’ representatives in Thunder Basin were hoping to further their organizational goals through their designation as a walkaround representative, they may be disqualified under the holding in Utah Power & Light.

The Thunder Basin court rejected this notion, holding that Thunder Basin was reading the Utah Power & Light holding too narrowly.

Thunder Basin is in effect arguing for a mine operator’s privilege to bar certain designated miners’ representatives from the outset if there is evidence that multiple purposes may be part of the representatives’ agenda. We rejected that “potential for abuse” argument in Utah Power & Light, and we do so again here.

In Utah Power & Light, responding to the possibility of abuse by a union representative, the Tenth Circuit held that “the potential for abuse does not require a construction of the [Mine] Act that would exclude nonemployee representatives from exercising walkaround rights altogether.” It reiterated this position in Thunder Basin Coal Co. v.

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125. Kerr-McGee, 40 F.3d at 1263; see also discussion supra part III.A.2.
126. Id.
127. Id. at 1259.
128. Thunder Basin, 56 F.3d at 1279.
129. Id.
130. Id.
131. Utah Power & Light, 897 F.2d at 452.
Martin where the Tenth Circuit explained that being named the miners’ walkaround representative for motivations other than the safety of the miners would be an inappropriate exercise of the walkaround rights under Section 813(f). However, the proper action to take in this situation would not be to disqualify the representative. Instead, the mine owner should “take action against individual instances of abuse when it discovers them.”

The United States Supreme Court endorsed this analysis in Thunder Basin Coal Co. v. Reich where the court stated:

[although it is possible that a miner’s representative could abuse his privileges, we agree with the [Tenth Circuit] Court of Appeals that petitioner has failed to demonstrate that such abuse, entirely hypothetical on the record before us, cannot be remedied on an individual basis under the Mine Act.]

Moreover, the Supreme Court noted that the limited powers of the miners’ walkaround representative restricts the potential for abuse of the representative’s position. Because the representative does not have uncontrolled access to the operator’s property, the representative does not have free reign to do any activity he or she wants. Furthermore, the walkaround representative will likely be continuously accompanied by a federal mine inspector and officers of the mine during his or her time at the mine. Thus, it would be quite difficult for a walkaround representative to contact mine employees and conduct solicitations while performing his or her functions at the mine.

Under this line of reasoning, improper motivation in obtaining the walkaround designation does not constitute per se abuse of the Mine Act. Instead, the Supreme Court recognized that the alleged abuse of walkaround rights can be handled on a case-by-case basis under the Act. Accordingly, the Thunder Basin court held that the “[c]ommission’s interpretation of the Act to permit a nonemployee

132. Thunder Basin Coal Co. v. Martin, 969 F.2d 970, 976-77 (10th Cir. 1994).
133. Id. at 977 (quoting Utah Power & Light, 897 F.2d at 452).
134. 114 S. Ct. 771 (1994), aff'g Thunder Basin Coal Co. v. Martin, 969 F.2d. 970 (10th Cir. 1994).
135. Reich, 114 S. Ct. at 781.
136. Id.
137. Id.
138. Reich, 114 S. Ct. at 781.
union agent to function as a miner’s representative is a permissible construction of the statute.”

3. Infringement on Operator’s Property Rights

Thunder Basin next argued that the Commission’s ruling deprived it of its rights under the NLRA, and citing Lechmere, that its property interests should have been balanced with the provisions of the Act.\textsuperscript{140} The Thunder Basin court rejected this argument. Citing Reich\textsuperscript{141} and Kerr-McGee, it ruled that it is unnecessary to balance property and union interests in cases arising under the Mine Act because Congress, rather than an agency, has already conducted the balancing when it granted walkaround representatives only very limited and specific rights to mine operator’s property.\textsuperscript{142}

4. Due Process Violation

Finally, Thunder Basin argued that the citation it received for refusing to post the walkaround representative’s designation on the miners’ bulletin board violated its due process rights under the Fifth Amendment.\textsuperscript{143} The court quickly rejected this contention, citing its decision in Martin, where it held that the Mine Act adequately protects a mine operator’s due process rights.\textsuperscript{144} Thus, the court affirmed the decision of the Federal Mine Safety and Health Review Commission.\textsuperscript{145}

IV. ANALYSIS

The effects of Kerr-McGee and Thunder Basin on the mine industry will likely be substantial. Both cases make it apparent that a non-

\textsuperscript{139} Thunder Basin, 56 F.3d at 1280.
\textsuperscript{140} Id. at 1281.
\textsuperscript{141} Id. (citing Reich, 114 S. Ct. at 781).
\textsuperscript{142} See Kerr-McGee, 40 F.3d at 1265.
\textsuperscript{143} Thunder Basin, 56 F.3d at 1281.
\textsuperscript{144} Id. at 1281 (citing Martin, 969 F.2d at 975-76, explaining statutory procedure in detail and finding that a “full and complete hearing is provided before any penalty actually is imposed”).
\textsuperscript{145} Id.
employee union agent may be designated as a miners' walkaround representative according to the provisions of the Mine Act. Attacks on this type of designation on the grounds that it constitutes an impermissible or irrational construction of the Mine Act will probably fail. Additionally, any attempt to characterize the designation of a union agent with organizational motives as the miners' representative as per se abuse of the walkaround position will be equally unsuccessful. Finally, it will most likely be futile to attack such designations on the grounds that they violate the rights of mine operators to keep non-employee union agents off their property. Coal mine operators and their counsel will have to accept that a small group of miners can choose a non-employee union agent as their representative, and the only recourse available to the operator is a diligent monitoring of the representative's activities to ensure that the representative position is not abused.

The Mine Act does not address whether non-employee union agents can act as a miners' representatives at non-union mines.\textsuperscript{146} When Congress has not clearly spoken on an issue, the standard of review is whether the Secretary's interpretation is based on a permissible construction of the statute.\textsuperscript{147} It is apparent from \textit{Kerr-McGee} and \textit{Thunder Basin} that any attack on the rationality of the Secretary's interpretation will likely fail.

The Secretary has defined "representative of miners" to include, "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the act."\textsuperscript{148} The definition specifically includes "organizations," which indicates that labor unions may act as miners' representatives.\textsuperscript{149} No provision in the statute restricts the walkaround rights to those who are not union members or union organizers. Nor is there any limitation based on the employment status of the chosen representative. "Any," as used in the statute, appears to mean "any." The miners are free to choose their walkaround representative from a limitless pool of individuals and organizations.\textsuperscript{150}

\begin{table}
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\textsuperscript{146} & \textit{Thunder Basin}, 56 F.3d at 1278. \\
\textsuperscript{147} & See \textit{Chevron}, 467 U.S. at 842. \\
\textsuperscript{149} & \textit{Kerr-McGee}, 40 F.3d at 1262. \\
\textsuperscript{150} & See \textit{Thunder Basin}, 56 F.3d at 1275. \\
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\end{table}
Furthermore, a union walkaround representative need not be selected by a majority of miners. The selection procedure for a walkaround representative, whether it is a labor organization or not, is not the same as the procedure for the selection of an exclusive collective bargaining representative under the NLRA.\textsuperscript{151} Although the miners’ exclusive collective bargaining representative must be selected by a majority of miners, a Mine Act walkaround representative may be designated by any group of two or more miners.\textsuperscript{152} Thus, it is clear that a construction of the statute permitting an organization which represents less than 50 percent of the miners to act as a walkaround representative is neither inconsistent with the statutes and regulations nor irrational.\textsuperscript{153}

The Secretary has further interpreted this provision to allow the designation of a non-employee union agent as the walkaround representative despite the fact that the mine is a non-union operation.\textsuperscript{154} It is highly likely that \textit{any} union agent acting as a walkaround representative at a non-union mine will have \textit{some} organizational motives or goals. Designation as a miners’ representative could, hypothetically, give such an agent the ability to abuse the designation by pursuing organizational goals as well as the walkaround duties.\textsuperscript{155} Recognizing this possibility, counsel for both Kerr-McGee and Thunder Basin argued that a union’s use of the miners’ representative designation for organizational purposes constituted a \textit{per se} abuse of the Mine Act.\textsuperscript{156}

This argument failed in both cases. The \textit{Kerr-McGee} and \textit{Thunder Basin} courts, relying heavily on the Tenth Circuit’s decision in \textit{Utah Power \& Light}, each ruled that the mere potential of abuse does not require a construction of the Mine Act which would exclude all non-employee union agents from acting as walkaround representatives. Improper motivations are irrelevant in determining if the designation of a specific representative was proper.\textsuperscript{157} Instead, operators should moni-

\textsuperscript{151} \textit{Kerr-McGee}, 40 F.3d at 1262.
\textsuperscript{152} 43 Fed. Reg. 29,509 (1978).
\textsuperscript{153} \textit{Kerr-McGee}, 40 F.3d at 1259.
\textsuperscript{155} \textit{Kerr-McGee}, 40 F.3d at 1263-64.
\textsuperscript{156} \textit{See Thunder Basin}, 56 F.3d at 1279. \textit{See also Kerr-McGee}, 40 F.3d at 1264.
\textsuperscript{157} \textit{See Kerr-McGee}, 40 F.3d at 1264.
tor the actions of the representative and take action against individual instances of abuse after they are discovered.158

Counsel in Kerr-McGee and Thunder Basin also argued that the Supreme Court’s decision in Lechmere159 requires the Secretary to balance the operator’s property interests against the safety objectives of the Mine Act in deciding whether a union agent may serve as the miners’ walkaround representative.160 This position was rejected in both cases.161

Lechmere stands for the proposition that Section 7 of the NLRA does not give non-employee organizers the right to enter an employer’s property for organizational purposes unless access to employees outside the employer’s property is “infeasible.”162 However, the NLRA grants rights only to employees, not to unions or their nonemployee organizers.163 Thus, the exception to the employer’s right to exclude unions from its property was crafted to protect only the rights of employees who may be isolated from the normal flow of information that characterizes our society.164 Balancing the interests of these employees against the operator’s property rights is needed to ensure that the employees have access to the information needed to make organizational decisions.165

Unlike the NLRA, the Mine Act grants rights to the miners’ walkaround representative, not to the employees themselves.166 The Mine Act also specifically specifies the level of intrusion on private property interests that are necessary to advance the safety objectives of the Mine Act.167 Thus, there is no reason for a court to balance the rights of the walkaround representative against the property rights of

158. See Utah Power & Light, 897 F.2d at 452.
160. Kerr-McGee, 40 F.3d at 1264. See also Thunder Basin, 56 F.3d at 1281.
161. See Kerr McGee, 40 F.3d at 1265 (holding that it is not necessary to balance the property interests of mine operators and the organizational interests of unions because Congress, rather than the agency, has already conducted the balancing). See also Thunder Basin, 56 F.3d at 1281.
162. Lechmere, 502 U.S. at 538.
163. Id.
164. Id.
165. See id.
166. Kerr-McGee, 40 F.3d at 1265.
167. Id.
the mine operator. Congress conducted this balancing when it drafted the Mine Act.\footnote{168}

Under the reasoning adopted in \textit{Kerr-McGee} and \textit{Thunder Basin}, labor organizations can acquire a designation as a miners' representative even if they have purely organizational motives. Thus, operators who have been successful in keeping non-employee organized labor agents off their property can do nothing if any two of their employees decide to select an organized labor agent as their walkaround representative. However, the operators still have some power to stop abuse of the walkaround position. The walkaround position does not convey uncontrolled rights to the mine property to engage in any activity the miners' representative wants.\footnote{169} Rather, Congress has limited the activities of a miners' representative to very particular areas, all related to miner safety and health.\footnote{170} If a mine operator discovers that a walkaround representative is conducting any activities outside the scope of his or her limited powers, the operator may bring a legal action to stop the activity.\footnote{171}

\section*{V. Conclusion}

The \textit{Kerr-McGee} and \textit{Thunder Basin} decisions will likely have significant effects on the use of the walkaround representative position by labor unions. The Regulations permit "[a]ny person or organization which represents two or more miners at a coal or other mine . . . " to be designated as a walkaround representative.\footnote{172} Under the cases discussed above, "any" appears to mean "\textit{any}." The designation of a non-employee union agent is permissible. There is no basis in the legislative history of the Mine Act, or the statute itself, to hold that granting miners the right to choose "any" individual or group as their representative is an impermissible or irrational construction of the statute. Furthermore, any attempt to characterize the designation of a union agent with organizational motives as the miners' representative as \textit{per se} abuse of the walkaround position will not be successful. Thus, even if

\begin{itemize}
\item \textit{Id.}
\item \textit{See Reich}, 114 S. Ct at 781.
\item \textit{See Utah Power & Light}, 897 F.2d at 452.
\item 30 C.F.R. § 40.1(b)(1) (1994).
\end{itemize}
the representative has motives aside from the miners’ safety, such as a desire to unionize the mine, the representative will not be disqualified.

Instead, the operator has an opportunity to show, on a case-by-case basis, that the walkaround representative is abusing the position by undertaking activities outside the granted scope of authority. Finally, attacking the designation of a non-employee union agent as a miners’ representative on the grounds that the designation violates the rights of mine operators to keep non-employee union agents off their property will probably be futile. Congress took into account the interests of the mine operator, the miners, and the walkaround representative when it drafted the provisions of the Mine Act. The walkaround representative has both a limited function and scope of authority. The potential for an infringement on the operator’s property rights is minimal.

Operators and their counsel will likely have to accept that a small group of miners can choose a non-employee union agent as their representative, and the main recourse available to the operator is a diligent monitoring of the representative’s activities to ensure that the position is not abused.

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