

Not Intended for Print Publication

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

BRANDON ENTERPRISES LLC,)	
ET AL.,)	
)	Case No. 2:04CV00104
Petitioners,)	
)	OPINION AND ORDER
v.)	
)	By: James P. Jones
UNITED STATES OF AMERICA,)	Chief United States District Judge
)	
Respondent.)	

Melanie J. Kilpatrick, Wyatt, Tarrant & Combs, Lexington, Kentucky, for Petitioners; Anthony P. Giorno, Assistant United States Attorney, Roanoke, Virginia, for Respondent.

The petitioners were charged with the crimes of transmitting false information to the federal Mine Safety and Health Administration (“MSHA”) and with wilful violations of certain MSHA regulations relating to the sampling of respirable dust in underground coal mines. After a bench trial, the petitioners were acquitted of all such charges. Following the judgment of acquittal, they filed petitions pursuant to the Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (found as statutory note at 18 U.S.C.A. § 3006A (West 2000)), seeking awards of reasonable attorneys’ fees and other litigation expenses incurred in their defense. In order to make such awards, the court must find that the government’s position was “vexatious,

frivolous, or in bad faith.” *Id.* The procedures to be followed under the Hyde Amendment are those of the Equal Access to Justice Act, 28 U.S.C.A. § 2412 (West 1994 & Supp. 2004).

The government has filed a brief opposing the petitions and the parties have submitted portions of the record for the court’s consideration. In addition, the government has voluntarily provided to the petitioners certain agency documents from MSHA’s Norton, Virginia, district office relating to the coal mines that were the subject of the criminal prosecution. The petitioners seek further discovery, however, and specifically have requested all documents (including e-mails) created since May of 1999 by Ray McKinney, a former MSHA district manager, that relate to any mine that had common ownership with those that were involved in the criminal prosecution. It appears that there are six coal mines (two in Virginia and four in Kentucky) owned in part by an individual named Stanley Ditty. Ditty was the representative of the corporate defendants during the criminal trial.

The petitioners justify their discovery request on the ground that they wish to determine whether McKinney expressed any animus or bias toward Ditty. The petitioners contend that after May of 1999, MSHA engaged in greater than normal investigation of these coal mines, and they place that increased interest at McKinney’s door.

There is conflicting authority as to whether discovery is available to a petitioner under the Hyde Amendment. *See United States v. Schneider*, No. 03-1764, 2005 WL 78513, at *10 (2d Cir. Jan. 14, 2005) (reviewing cases). Assuming without deciding that discovery is potentially available, the better view is that it is a matter of discretion with the court, depending upon the nature of the discovery requested and the likelihood of liability. *See id.* at *11.

Exercising such discretion, I decline to order the government to produce the documents requested. Aside from the fact that the search by the government might well be burdensome in light of the lack of specificity of the request, it is clear that the petitioners are simply engaged in a fishing expedition, hoping that a helpful document might be uncovered. There is no evidence that any such document exists. The only basis for the request is the petitioners' supposition that because McKinney dealt with one of Ditty's coal mines in 1999 and thereafter there was increased inspection of Ditty's mines, some improper motive existed for the criminal prosecutions in question.¹ Under these circumstances, forced production of the government's documents is not justified.

¹ In 2002 McKinney transferred to MSHA's national office in Arlington, Virginia as the agency's Administrator for Coal Mine Health and Safety. However, the documents voluntarily disclosed by the government show that the case was referred to the U.S. Attorney for this district for possible prosecution in 2001 by a previous Administrator.

For the foregoing reasons, it is **ORDERED** as follows:

1. The oral motion by the petitioners for an order requiring the government to produce documents is DENIED; and
2. The petitioners are granted leave to file a brief in response to that of the government, provided that the petitioners' brief is filed within 20 days of the date of entry of this Opinion and Order.

ENTER: January 26, 2005

/s/ JAMES P. JONES
Chief United States District Judge