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UNITED STATES STEEL CORPORATION V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

UNITED STATES STEEL CORPORATION,
APPLICANT

Application for Review

Docket No. HOPE 79-121

v.

Order No. 253265

October 17, 1978

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Gary No. 14 - 3 Seam Portal

UNITED MINE WORKERS OF AMERICA,
RESPONDENT

DECISION

Appearances: Billy M. Tennant, Esq., United States Steel Corporation,
Pittsburgh, Pennsylvania, for Applicant
Joseph M. Walsh, Esq., Office of the Solicitor, Department
of Labor, Arlington, Virginia, for Respondent MSHA
Mary Lu Jordan, Esq., and Joyce A. Hanula, Legal
Assistant, United Mine Workers of America, Washington,
D.C., for Respondent UMWA

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 105(d) of the Federal Mine Safety and Health Act of 1977 by United States Steel Corporation to review an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 104(b) of the Act for an alleged failure to abate a citation.

By notice of hearing dated February 16, 1979, this case was set for hearing on April 17, 1979, in Charleston, West Virginia. The hearing was held as scheduled. The operator, MSHA, and the United Mine Workers appeared and presented evidence (Tr. 7-100).

Applicable Statute

Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds

(1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Bench Decision

At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law (Tr. 100). Instead, they agreed to make oral argument and have a decision rendered from the bench. Upon consideration of all documentary evidence and testimony, and after listening to oral argument, I rendered the following decision from the bench (Tr. 115-120):

This case involves the validity of a section 104(b) withdrawal order issued for an alleged failure to abate a citation for a violation of section 75.523. The original citation dated October 12, 1978, set forth that the deenergization device provided on the 18 Left, 009 Section scoop, was inoperative in that part of the lever (bar) was missing, and one side of the device would not actuate the deenergization of the switch. On October 16, 1978, an extension of time was issued until October 17, reciting that the deenergization device provided on the scoop required additional work and that more time was needed to rebuild the bars and levers. On October 17, 1978, the subject withdrawal order was issued on the ground that no apparent effort was made on the part of the operator to repair the deenergization device on the scoop. The order was terminated on October 18.

There is no dispute the panic bar did not work on October 12, 1978, and that the original citation was properly issued. However, subsequent events are a subject of conflict and dispute among the witnesses heard today.

The inspector testified that when he returned on October 16, some work had been done in that a missing piece on the panic bar had been installed and some welding had been done. However, the panic bar still would not work if it was hit on the right side and on the front side, but would only work if it were hit on the left side. According to the inspector, the switch was sticking, but the switch was not the basis for any of his actions.

The inspector granted an extension until October 17. On October 17, the inspector issued the subject order on the ground that, as already noted, no effort had been made to abate.

The inspector first testified on direct testimony that he did not see that any work had been done between October 16, when the extension was granted, and October 17, when he issued the order. However, when recalled to the stand on rebuttal, the inspector stated the panic bar had been worked on between October 16 and October 17, and that there was evidence of welding and new parts during that interval of one day. Nevertheless, because the panic bar still was not working, the inspector expressed the view that issuance of the order was proper.

The operator's witnesses tell a different story. According to them, when the operator's inspector escort tried to work the panic bar on October 16, he broke several welds. The testimony of the operator's witnesses is that this happened in the inspector's presence and that he saw it. According to the operator's witnesses, the switch was not sticking on October 16, and the problem with the panic bar on that day was the broken welds. According, once more, to the operator's witnesses, the welds were fixed and springs replaced between October 16 and October 17.

The operator's maintenance foreman explained that a new problem arose on October 17, which was the sticking switch and which was the reason the panic bar did not work on that day, the day, of course, the inspector issued the order. The maintenance foreman stated that he, himself, fixed the switch, and that immediately thereafter, the panic bar worked. The maintenance foreman's testimony is that nothing else was done to the panic bar between October 17, when the withdrawal order was issued, and October 18, when the order was terminated.

The issue here is one of credibility. After carefully listening to and observing the witnesses, I accept the version offered by the operator's witnesses. The inspector contradicted himself with respect to whether any work had been done between October 16, when he issued the extension, and October 17, when he issued the subject order. In fact, the inspector's testimony on rebuttal that work had been done on the panic bar is directly contrary to what he wrote on the order. Moreover, the inspector's statement, when recalled to the stand, to the effect that between October 16 and October 17 there was evidence of new welding, supports the testimony of the operator's witnesses that on the sixteenth the operator's inspector escort had broken several of the welds. I find the inspector's testimony on recall more persuasive on these points than his original testimony.

I also find considerable confusion in the inspector's recital of what occurred between 9 a.m. on October 17, when he first saw the scoop, and 10 a.m., when he said he issued the order. The inspector first testified that he saw the scoop at 9 a.m., and that he waited until 10 a.m., because he had been told two mechanics were on the section, but that when nothing was done, he issued the order at 10 a.m. When recalled to the stand, the inspector testified he did not check the scoop when he first saw it at 9 a.m. If the inspector did not check the scoop when he first saw it, then the presence of the two mechanics which he referred to in his testimony would have had no significance to him at that time. More persuasive in this respect is the testimony of the operator's inspector escort that 30 minutes after checking the scoop, the inspector issued the order.

Indeed, based upon my observations of the witnesses and in light of the foregoing, I accept the testimony of the operator's witnesses in all respects where evidentiary conflicts are involved. Accordingly, I find the operator worked on the panic bar between October 12 and October 16; that the inspector escort broke the welds on October 16 when he was trying out the panic bar; that between October 16 and October 17, the problem of welds on the panic bar was repaired; that on October 17, the inspector escort operated the panic bar once, as he testified, but could not operate it thereafter; that the only reason the panic bar did not work on October 17 was the switch, which the maintenance foreman repaired after the order was issued,

causing the panic bar to work again; and that nothing except the maintenance foreman's switch repair, was done to the panic bar between the time the withdrawal order was issued on October 17 and the time it was terminated on October 18.

Having seen on October 17 that in the day since he issued the extension, there had been new welding and new parts on the panic bar, the inspector was not reasonable in issuing the subject order, when the bar did not work after the first time the inspector escort tried it. As already noted, the inspector's own testimony on recall is contrary to the reason given on the order, that no effort at repair had been made. Having seen that additional work had been done on the machine in the intervening day, the inspector should have inquired whether there was another reason why the panic bar did not work properly. Had the inspector done so, the order would not have been issued because of the testimony which I have accepted here today. Accordingly, the order is vacated and the application for review is granted.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 253265 is VACATED and that the operator's application for review is GRANTED.

Paul Merlin
Assistant Chief Administrative Law Judge