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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 79-123

v.

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

Order No. 252426

October 25, 1978

Gary No. 14-4 Mine

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 107(e) of the Federal Mine Safety and Health Act of 1977, by United States Steel Corporation to review an order of withdrawal issued by two inspectors of the Mine Safety and Health Administration (MSHA) under section 107(a) of the Act for imminent danger.

By notice of hearing dated February 16, 1979, this case was set for hearing on April 17, 1979, in Charleston, West Virginia. The notice of hearing required the filing of preliminary statements on or before April 9, 1979. The parties filed preliminary statements, and the case was heard as scheduled. The operator, MSHA, and the United Mine Workers appeared and presented evidence (Tr. 7-106).

Applicable Statute

Section 107(a) of the Act provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

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. 107). 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. 117-121):

The issue presented is the validity of a withdrawal order issued under section 107 of the Act for imminent danger. The term "imminent danger" is defined in the Act as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The order challenged by the operator here today sets forth that the operator's practice of daily examining its portal buses does not provide a proper weekly examination as required by section 75.512, and that the condition of the braking system cannot be observed unless the portal buses are raised up or taken over a pit. I find the order adequately informs the operator of the situation presented and of the circumstances which led the inspectors to issue the order. There is no dispute with respect to how the operator examines the braking system on its portal buses. I would note here two inspectors testified on behalf of MSHA. The first inspector testified in detail, the

second inspector corroborated the opinions of the first inspector, but added little of substance. References to the inspector which follow are to the first inspector. The inspector and the operator's general maintenance foreman agreed that between each shift a mechanic goes to the yard when the portal buses come above ground. According to the general maintenance foreman, the mechanic on each shift inspects the brakes by working the lever to see if it holds while the portal bus is placed in the first point, that is moving slowly. In this way, the four caliper brakes and the one drum brake which make up the hydraulic braking system are tested. The parking brake is also tested in this manner on each shift by a mechanic. The inspector's testimony is not in conflict with that of the general maintenance foreman regarding the foregoing. The inspector's own description of the braking system on portal buses of the Lee-Norse type such as are involved in this case was given in detail. The operator's general maintenance foreman did not disagree with the inspector's description.

The inspector believed an imminent danger existed because the working parts of the braking system he described in such detail could not be seen during the between-shift examinations, when the portal buses were just standing in the yard. According to the inspector, the only way a proper examination could be performed would be to put the portal bus over a pit so its metal frame could be seen and a determination made whether, inter alia, the mountings were in place, the splines were not split, and the brake linings were not worn or missing.

The inspector's testimony on the foregoing is uncontradicted. In fact, the operator's general maintenance foreman agreed that parts of the four caliper brakes could not be seen during the between-shift examinations and that brake linings and mounting pins also could not be seen during this examination. Accordingly, it is clear and I conclude that examinations of the portal buses in the way in which the inspector would have them done would reveal much more than the present method which relies upon the mechanic or the operator realizing he does not have a full lever.

The issue remains whether the operator's present practice of examinations between shifts constitutes an imminent danger. Upon searching examination from the bench, the inspector stated that the practice of not

adequately examining the portal buses would lead to undiscovered deterioration in the portal buses, which deterioration would not be found until an accident occurred. The inspector testified that if the portal buses are not examined over a pit regularly there is a reasonable expectation of a malfunction in these portal buses while people are in them, thereby creating a reasonable expectation of death or serious injury.

I am persuaded by the inspector's testimony. Upon listening to the description of how examinations are conducted presently, the danger appeared to me to be stark, real, and imminent. In addition, I am persuaded by the inspector's testimony, especially in view of the fact that this mine has steep grades which places more wear and tear on the braking systems of the portal buses. I recognize that the order does not refer to steep grades. However, the operator obviously knows about the grades in its own mine. Indeed, the operator's general maintenance foreman made clear that the operator knew the effect of the steep grades on the braking systems because he testified, like the inspector, that brakes on portal buses in this mine are replaced often "every 4 to 6 weeks" because of steep grades. The testimony of the general maintenance foreman only confirms the inspector's fears of what would happen if these portal buses do not undergo more complete examination than they now are given. In view of the conditions in this mine, I hold that the failure to adequately inspect the braking systems on these portal buses created a reasonable expectation of death or serious injury before abatement could be accomplished.

I am cognizant of the fact that based upon the evidence received in this case today, issuance of the subject order may thus far be an individual instance, and that although other inspectors have been told of this order and the reasons for it, the Secretary of Labor may not have implemented a general policy to this effect. It is not my function or that of the Commission to operate a mine safety and health program in place of the Secretary. My responsibility is to decide this case which is now before me in accordance with what I conceive to be a proper interpretation of the law and the regulations. Since, however, the Secretary has chosen to defend this order in an administrative hearing before an administrative law judge of the Commission, I would assume the Secretary will insure that the principles espoused in the order which I have now approved become general policy. Otherwise, everyone's time here today will have been wasted.

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In light of the foregoing, I conclude an imminent danger existed as charged in the order. The order is upheld, and the application for review is dismissed.

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order No. 252426 is UPHELD and that the operator's application for review is DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge