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SOL (MSHA) V. TRIPLE T COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

v.

TRIPLE T COAL COMPANY, INC.,
RESPONDENT

Civil Penalty Proceeding

Docket No. NORT 78-317-P
Assessment Control
No. 44-00546-02005

No. 1 Mine

DECISION GRANTING MOTION TO DISMISS

Appearances: Lawrence W. Moon, Jr., Esq., Office of the Solicitor, Department of Labor, for Petitioner
Eugene K. Street, Esq., Street, Street and Street, Grundy, Virginia, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to written notice dated June 8, 1978, a hearing in the above-entitled proceeding was held on August 24, 1978, in Richlands, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977. The subject of the hearing was a Petition for Assessment of Civil Penalty filed on April 27, 1978, seeking assessment of a civil penalty for an alleged violation of 30 CFR 80.32 by respondent.

MSHA's Petition was based on a notice of violation in the form of a letter to respondent dated December 7, 1977, advising respondent that it had failed to submit a Monthly Coal Production and Employment Report for the month of September 1977 and that such failure was considered to be a violation of section 80.32. Respondent's answer to the Petition for Assessment of Civil Penalty was filed on May 18, 1978. While the answer admitted that the report for September 1977 had been filed late, the answer claimed that the report for September had been filed and that the notice of violation, or letter of December 7, 1977, was incorrect in alleging that respondent had failed to submit a report for the month of September 1977.

MSHA's direct presentation at the hearing consisted of a statement by MSHA's counsel. He said that Monthly Production and Employment Reports are required to be submitted to MSHA's computer center in Denver, Colorado. If the reports are not received, a list of the companies which fail to submit the reports is compiled by the computer. On the basis of the computer's printout, MSHA's personnel send out letters to the coal operators advising them that their reports have not been received. Counsel for respondent stipulated that such a computer printout was received

by MSHA's Richlands Subdistrict Office and that on the basis of that computer printout, the aforementioned letter of December 7, 1977, was prepared advising respondent that it had failed to submit a report for the month of September 1977 (Tr. 4-6).

Counsel for respondent called its bookkeeper, Delores O'Quinn, as a witness. Ms. O'Quinn testified that she was in charge of submitting reports for approximately eight coal companies and that she had received about three different notices advising her that the report for September 1977 had not been received and that she had submitted three different copies of the September report to the Denver office. She said that she could not make a mistake in addressing such reports because the only printing on the back of the forms was the address of MSHA's computer center in Denver, Colorado. She further testified that it was not unusual for her to receive a notice that reports had not been submitted when she knew that they had been submitted. She was unable, however, to say for certain that a report for September 1977 had been submitted earlier than November 14, 1977, because she did not have in her file a report with a date on it earlier than November 14, 1977 (Tr. 6-8; 11-12; 24-25).

Counsel for respondent moved that the Petition for Assessment of Civil Penalty be dismissed because the Petition was based on a letter charging respondent with failure to submit a report for September 1977 when respondent's evidence showed unequivocally that a report for September 1977 had been submitted. Respondent's counsel agreed that MSHA was actually claiming at the hearing that the violation was in failing to submit the September 1977 report by the 15th of October, but respondent's counsel said that it would be improper and unfair to find that respondent had violated section 80.32 on a claim of untimeliness when respondent had not been charged with a violation of untimely filing but solely with an alleged failure to submit a report for the month of September (Tr. 14; 19-21; 40).

MSHA's counsel argued that the letter of December 7, 1977, referred to section 80.32 which requires the filing of the reports by the 15th of the month and that respondent knew that it was the timeliness of submission which is important because the reports are needed promptly so that the information in them can be included in the compilations which the Department of Labor is obligated to prepare. MSHA's counsel agreed that the language of section 80.32 is somewhat ambiguous but he argued that the instructions on the cover of the forms issued to the coal companies is not ambiguous because that cover clearly states that "[a] report on each mine must be submitted to MESA on or before the 15th day of each month for the immediately preceding month" (Exh. G-1). MSHA's counsel stated that respondent's bookkeeper agreed that she had received such forms and that respondent therefore knew that the report for September 1977 had to be submitted to MESA on or before October 15, 1977, or be considered a violation of section 80.32 (Tr. 16-18; 21; 29; 32).

The notice of violation in this case consists of a letter dated December 7, 1977, which reads as follows:

> Your failure to submit a Monthly Coal Production and Employment Report is a violation of Subsection 111(b) of the act as implemented by Subpart D, Section 80.32 of 30 C.F.R. Part 80.
>
> According to a report from the Health and Safety Analysis Center, the required report was not submitted for the month (s) of September 1977.
>
> You are notified that you are liable to a civil penalty under Section 109 of the Act. The Assessment Office of the Mining Enforcement and Safety Administration will be so informed of this violation.

The pertinent part of section 80.32 referred to in the letter of December 7, 1977, reads as follows:

> On or before the 15th day of each month, the operator of a coal mine in which one or more men are employed on any calendar day of the month shall file with the Mining Enforcement and Safety Administration a Monthly Coal Employment and Production Report (Form 6-348). * * *

The record in this proceeding contains nothing to explain Form 6-348 which is referred to in section 80.32, but Exhibit G-1 in this proceeding consists of a copy of Form 3000-2 and a cover over the form containing instructions for executing Form 3000-2. That instruction cover clarifies the language in section 80.32 to provide:

> A report on each mine must be submitted to MESA on or before the 15th day of each month for the immediately preceding month.

The issue raised in this proceeding is simply whether MSHA can charge one thing in a notice of violation and then prove another thing at the hearing. In the notice of violation, MSHA clearly advised respondent that it was being assessed a civil penalty because it had failed to submit a Monthly Coal Production and Employment Report for the month of September 1977. Respondent submitted a timely answer to the Petition for Assessment of Civil Penalty in which respondent clearly conceded that it had been late in submitting the report, but it claimed that no penalty should be assessed because it had in fact submitted a report for September 1977.

Counsel for MSHA was therefore apprised over 3 months prior to the hearing that respondent's defense at the hearing would consist of a claim that it had submitted the required report for the month of September 1977. Yet MSHA did not file a motion to amend its Petition to allege that the

charge was failure of respondent to file a timely report rather than a failure of respondent to file any report at all. If MSHA had filed a motion to amend its complaint so as to clarify for respondent the exact charge which was going to be argued at the hearing, respondent might well have decided to pay the proposed penalty of $46 rather than hire an attorney to represent respondent at the hearing.

In the absence of a motion to amend filed prior to the hearing, respondent had no way to know that MSHA would change the alleged violation at the hearing to charge that the report had not been timely submitted, that is, by the 15th day of October 1977. After the hearing had been completed, respondent knew what MSHA was charging, but it would have been difficult for respondent to have determined prior to the hearing that the charge at the hearing would become one of untimely submission of the required report.

For instance, suppose that respondent, prior to the hearing, had obtained a copy of 30 CFR 80.32 and had read it. From the quotation of section 80.32 set forth above, it is obvious that the language in the section is ambiguous because it refers to the submission of a report "on or before the 15th day of each month" but there is no reference to what that really means. It could be a requirement that the report for a given month cover the period from the 15th day of one month to the 15th day of the following month, or it could refer to the fact that the report for any given month should be submitted by the 15th day of the following month. Moreover, section 80.32 refers to Form 6-348 as the report which is required to be submitted under that section. At the hearing, however, MSHA introduced as Exhibit G-1 a form with No. 3000-2 on it and MSHA claimed that Form 3000-2 is the one which is referred to by section 80.32. Form 3000-2 contains nothing to show that it is the report which is required by section 80.32, but at the hearing MSHA produced a compilation, or "book" of Forms 3000-2. A single page of instructions was attached to each book of forms (Exh. G-1). Those instructions state that Form 3000-2 is required to be completed by section 80.32, but at no place in the instructions is there a statement that Form 3000-2 has been devised to take the place of Form 6-348 referred to in section 80.32.

If respondent's representative had been able to comprehend all of the confusing aspects of section 80.32, as explained in the instructions accompanying Form 3000-2, he might have realized that he would be confronted at the hearing with a claim that his report for September 1977 had not been submitted in a timely fashion, and that it was not his failure to submit the form at all which constituted the violation being charged, but that the charge really was his failure to submit the form by October 15, 1977.

I do not think that a respondent should have to go through the tortuous reasoning process described above in order to know

what violation is being charged. I think that respondent reasonably believed that it was going to be assessed a civil penalty solely because it had not sub

mitted any report at all for the month of September 1977. The testimony of respondent's witness clearly showed that it was defending itself against the charge that it had failed to submit any report for the month of September 1977.

At the hearing counsel for MSHA stressed the importance of receiving the reports in a timely fashion and stated many times that if the information was not received in a timely fashion, the reports prepared by MSHA would not be accurate. If time was the essence of the alleged violation, surely MSHA could have examined its notice of violation prior to the hearing and could have moved that the notice be amended to allege that respondent had failed to submit a timely report for the month of September 1977.

The former Board of Mine Operations Appeals held in Peggs Run Coal Company, Inc., 3 IBMA 421 (1974), that MSHA could not cite section 75.307-1 for an alleged violation when, in fact, the actual violation being charged was set forth in section 75.307. The Board stated with respect to the strictness of its holding that "we believe that precise charges of the violations MESA expects to prove provide a keener tool for enforcement of safety standards and also serve to expedite penalty proceedings" (3 IBMA at 429). I believe that the Board's holding in the Peggs Run case is applicable for disposition of the issue in this proceeding.

MSHA had ample time prior to the hearing to make clear to respondent the precise charge which would be made at the hearing, namely, that MSHA was charging respondent with a violation of section 80.32 because its reports had been submitted late and not with a failure to submit them at all. Since respondent's evidence at the hearing showed that it had submitted a report for the month of September 1977, respondent succeeded in showing that it had not violated section 80.32 as charged in MSHA's notice of violation. Therefore, I find that MSHA failed to prove the specific violation of section 80.32 alleged in its notice. Consequently, respondent's motion to dismiss should be granted.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

Respondent's motion to dismiss is granted and MSHA's Petition for Assessment of Civil Penalty in Docket No. NORT 78-317-P is dismissed.

Richard C. Steffey
Administrative Law Judge