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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.

JIM WALTER RESOURCES, INC.,  
RESPONDENT

Civil Penalty Proceeding

Docket No. BARB 78-652-P  
A.C. No. 01-00758-02023V

No. 3 Mine

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S.  
Department of Labor, for Petitioner  
Robert W. Pollard, Esq., Birmingham, Alabama, for  
Respondent

Before: Administrative Law Judge Michels

This is a civil penalty proceeding brought under section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 820(a). The petition for assessment of civil penalty was filed by the Mine Safety and Health Administration (MSHA) on August 24, 1978, alleging a violation of 30 CFR 75.1403. Respondent answered on September 13, 1978, and denied that the alleged violation occurred. A hearing was held on May 3, 1979, in Birmingham, Alabama, at which both parties were represented by counsel. Posthearing briefs and proposed findings and conclusions have been filed. The proposed findings which have not been adopted herein are rejected as immaterial or not supported by fact. (Footnote 1)

Statement of the Case

The facts in this proceeding are not in serious dispute. The principal issue is whether Respondent was properly charged under the "safeguard" provisions of the regulations. A safeguard notice is issued by an inspector where he believes a transportation hazard exists which is not covered by published standards. Thereafter, the safeguard becomes, in effect, a mandatory standard applicable only to

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the mine cited. In this case, the mine was originally placed under a safeguard notice for the failure to have a derail or stop block "near" the mine shaft. The safeguard notice was issued and then was abated by the placement of a derail 71 feet from the collar at the top of the mine shaft. Two and one-half years later, another inspector observed a rail car between the derail, which was still in place, though inoperative, and the mine shaft. Thereupon, this second inspector cited Respondent for a violation of 30 CFR 75.1403 alleging that the safeguard notice was not complied with because a flat car was left unattended without a derail, stop block or dead man which would have prevented the car from falling into the shaft bottom.

#### ISSUES

The issues, as the Respondent has appropriately phrased them, are as follows:

1. Does 30 CFR 75.1403 have any application to the surface work areas of an underground mine?

2. If 30 CFR 75.1403 does apply to the surface work areas of an underground mine, does the fact that a loaded supply car parked between a derail, required by a previously-issued Notice to Provide Safeguards, and the collar of a mine shaft constitute a violation of the previously-issued Notice to Provide Safeguards, which only required that a derail be installed on the track leading to the mine shaft?

#### FINDINGS OF FACT

Respondent's No. 3 Mine is an underground coal mine located in Jefferson County, Alabama (Tr. 21). A supply yard is located on the surface of this underground facility. Within the confines of the supply yard and running for approximately 200 feet along the surface is a rail track (Tr. 76). This track travels through the yard up to the collar of the shaft. It goes over fairly level ground for the first 100 feet and then for the remainder of the stretch runs up a slight incline towards the shaft (Tr. 72-74, 77). Its purpose is to serve as a means upon which men and supplies can be transported in cars to the mine shaft for entry into the mine. A tow motor or forklift is used to move these supply cars along the entire length of the track to the shaft. A gate is located at the end of the track in front of the shaft which is equipped with certain protective devices (Tr. 84, 86-87). Upon the cars reaching this point, the gate is opened and they are then loaded into an elevator and taken from the surface down through the shaft into the mine (Tr. 9-10). The shaft is approximately 1,300 feet deep (Tr. 9, 48).

The following references to the testimony are virtually undisputed with some exceptions which are noted.

Petitioner's first witness, MSHA Inspector Harlan Blanton, testified that he issued the underlying safeguard notice while he was conducting a spot inspection at Respondent's No. 3 Mine on January 9, 1975 (Tr. 7-8). (Footnote 2) During this inspection, he observed a supply car located on the surface track just outby the manshaft where supplies and men are transported to the underground section of the mine (Tr. 8). Normally, these cars go the entire length of the track along the surface until they come to the collar (Tr. 21). Such cars are lowered into an elevator at the manshaft and then lowered into the mine or later hoisted out (Tr. 9-10). Cars go directly from the track into the shaft. Inspector Blanton estimated the shaft is approximately 1,300 feet deep (Tr. 9). Petitioner's second witness, Inspector Whalen, also stated the shaft was 1,300 feet deep (Tr. 48).

Inspector Blanton examined both the supply car and the track it was located upon and he testified that the car was located in the neighborhood of 50 to 100 feet from the collar of the mine shaft (Tr. 10). He thought it was a regular mine supply car, but he could not recall whether it was loaded or empty. He described the car as being "unattended" and he defined this term to mean not hooked or secured to some other machine, such as a locomotive (Tr. 22-23) (this is not consistent with Inspector Whalen's definition of the term referred to below). The inspector testified that when he observed the car, a Mr. Griffin, whom he identified as Respondent's safety director, and Mr. Wayne Kirtz, the chairman of the safety committee, were present. Inspector Blanton asked if there was a derail to keep the car from "accidentally being pushed into the mine or rolling into the mine" (Tr. 11). Thereupon, he and the other members of the group looked up and down the track, but their search did not uncover a derail. After determining that a derail was not present on this stretch of surface track and after concluding that such a safety device was necessary, the inspector issued Safeguard Notice No. 1 HEB pursuant to section 314(b) of the Federal Coal Mine Health and Safety Act of 1969. (Footnote 3) This safeguard notice states: "The track on the surface to the manshaft was not provided with stop blocks or derails. Positive stop blocks or derails should be installed on the track near the manshaft. Served to J. M. Griffin, safety director at the mine office at 9:30 a.m. January 9, 1975" (Exh. G-1). The inspector claimed that he explained to the company's safety director and the chairman of the safety committee the need for such a safety device and they immediately began preparations to install a derail on the track. Inspector Blanton described what this derail was:

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In this case, they undone a joint in the track and put a piece of rail that would open up the track in case a car started to down the track it would derail the car and wouldn't let it proceed on the rail. It would throw it off the rail onto the ground. And that way, it wouldn't roll on down into the shaft.

(Tr. 11).

Inspector Blanton recalled that this derail was installed within 50 or 75 feet of the collar of the shaft. He did not tell the Respondent where to put this device; however, once it was installed, he did approve the derail and its location as he thought it was a sufficient distance from the collar to prevent a car from going into the shaft (Tr. 16-17, 22). He testified that this derail would be left open when cars were on the track and these cars would have to be located outby the derail if they were unattended (Tr. 12). The inspector indicated his belief that if cars were located inby the derail--towards the shaft--the derail was ineffective for its purpose of preventing cars from falling, accidentally or otherwise, into the shaft (Tr. 13).

On cross-examination, Inspector Blanton stated that he did not write on the safeguard notice anything about where or where not the Respondent was to park supply cars (Tr. 13-14). However, he did specifically testify that he told Mr. Griffin, the Respondent's safety director, that it would no longer be allowable for Respondent to park supply cars between or inby the derail and the shaft (Tr. 14-15). Respondent's witness, Mr. Burchfield, who is the maintenance superintendent at the No. 3 Mine, indicated he was aware of the purpose of the derail although he denied he knew that such parking of cars would be a violation.

Inspector Blanton emphasized that the purpose of this safety mechanism was to "throw the car off the track to keep it from going down the shaft" (Tr. 15, 21). He gave his opinion that parking a supply car between the derail and the shaft was in disregard of the derail altogether. He indicated his belief that cars located inby the derail could be accidentally bumped or knocked into the shaft by the tractors, trucks, and locomotives which were around it (Tr. 20). The inspector did not consider such an occurrence to be a remote possibility.

Inspector Blanton further testified that there was a gate at the end of the track in front of the shaft which was the entire width of the shaft (Tr. 17). He could not tell by observation that the track was on an uphill incline (Tr. 18). He testified that locomotives and diesel-powered tractors pushed the cars and he thought it possible that they could be pushed by manpower.

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Petitioner's second witness, MSHA Inspector Clarence E. Whalen, testified that he issued the notice of violation while he was making a spot inspection on September 13, 1977, at the No. 3 Mine. (Footnote 4) He had been to the mine at different times before. When he issued this notice, he was in the company of Mr. Bobby Taylor, who he identified as the safety director at the No. 3 Mine (Tr. 28-29). Inspector Whalen was going to go underground to observe the perimeter of the shaft. For several minutes, he and Mr. Taylor waited for the return to the surface of the cage. While waiting, he looked across the shaft and observed the track and car in question (Tr. 29).

Inspector Whalen knew from his previous inspections at the No. 3 Mine that there was a derail on this track. Also, from observing the position of the flat car, he determined that the car was loaded with material and located inby the track (Tr. 29-30, 65). He did not measure the distance, but estimated that the loaded car was within 30 to 35 feet from the entrance to the shaft. After observing this condition, he issued a notice of violation to Respondent which describes the condition or practice which constitutes the alleged violation as follows:

The operator was not complying with a previously issued safeguard (No. 1, H.E.B. 75.1403, 1-9-75) at the entrance to the service shaft hoist way-east side -- in that a flat car loaded with material was left unattended, without a derail, stop block, or dead man that would have prevented such flat car from falling into the shaft bottom as the service shaft conveyance was in the bottom.

(Tr. 28, Exh. G-3).

Inspector Whalen told Mr. Taylor that the derail would have to be put back in operation. Thereupon, Mr. Taylor notified Mr. James Burchfield, Respondent's maintenance supervisor. Mr. Burchfield directed some workers to move the loaded car outby the derail. Over a 30- to 40-minute period, the workers proceeded with picks and shovels to make the derail operative (Tr. 31).

The inspector testified that the car was left unattended; there were no automatic brakes or braking devices on it (Tr. 32). He thought the condition was dangerous, stating:

A runaway car in addition to the car being unattended -- there was a road -- material road -- vehicles of the yard travelled between the derail and the entrance to the

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shaft at this particular location there. They could have -- hypothetically speaking, anything movable could have come along and bumped it.

(Tr. 32).

Also, he stated that this service shaft is the only one way out of the mine and the substructure on top of the man conveyance would not withstand the impact of a falling car or object into it (Tr. 34-35).

Inspector Whalen testified that tow motors are used to move these supply cars on the track (Tr. 40). He stated that the car he had observed was heavy and substantially loaded. He thought that perhaps half a dozen men would be necessary to push the car. By looking at the track which runs toward the service shaft, he determined that it runs uphill to some degree (Tr. 41). However, the inspector discounted this by reiterating that with motor cars it could still be shoved over the hill.

Inspector Whalen further testified that he was aware of the existence of the safeguard notice issued by Inspector Blanton since the MSHA office has a posting board on which, among other things, are posted all safeguards which are outstanding at a mine (Tr. 41). Although he was aware of the existence of the safeguard notice and that the Respondent had been required to install a derail, he testified that he had never read the original safeguard notice before he wrote the notice of violation (Tr. 42).

On cross-examination, this inspector agreed that the derail was present, however, he determined that the Respondent was not complying with it since the derail was inoperative. He did not know, when he wrote the notice of violation, whether the safeguard notice contained wording which would prohibit the parking of cars at specific places along the track (Tr. 43).

Inspector Whalen did not issue a safeguard notice for the condition he had observed, as it was his view that a safeguard notice had already been issued for the same track (Tr. 46). Although Inspector Whalen observed that the derail was not in operating condition, he did not cite Respondent for this fact. Rather, he made a determination that the positioning of a car beyond the derail was in disregard of the purpose of that safety device. He thought that the sole purpose of the derail was to prevent runaway cars (Tr. 52-53). It was his opinion that if a car was placed in by the derail, there was no way that it could be effecting its purpose (Tr. 54).

Inspector Whalen testified that the car he saw did not have a braking system. It was stationary when he made his observation and he agreed that nothing was blocking the car. Also, this inspector

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testified that the car was not spragged and was unattended. He defined "spragged" as the process of taking either a metal or wooden object and inserting it between the spokes of a moving car. The inserted object will then lock the wheel and slide it (Tr. 62). By "unattended," he meant that no workers were present at the time he made his observation (Tr. 62). This is a different definition than that of Mr. Blanton. This inspector thought it was important for a person to be present in order to sprag the car.

Respondent's first witness, Mark P. Hinton, a resident engineer at the No. 3 Mine, testified that he and one other person made a survey of the track leading from the supply yard to the service shaft. Mr. Hinton found the distance from the shaft to the derail to be 71 feet and 1 inch. The elevation drop between the shaft and the point of the derail was 88 feet. He stated that he measured a 1.23-percent downhill grade away from the shaft. Mr. Hinton thought this grade was significant in that cars would not roll up hill with ease. He did not consider this to be a steep grade (Tr. 72-74).

Respondent's second witness was James Burchfield. Mr. Burchfield was the maintenance superintendent at Respondent's No. 3 Mine when the notice of violation was issued. He testified that Bobby Taylor, the safety director, told him of the inspection which Inspector Whalen was undertaking and he joined the group when they were investigating the derail (Tr. 75).

Mr. Burchfield described how the derail was inoperative at the time of Mr. Whalen's inspection and he estimated that it took the men 10 to 15 minutes to make the switch operative. Mr. Burchfield said that tow motors are used to move the supply cars around. He stated that the first 100 feet of the supply yard is not level and there is an incline to the shaft. He did not think that there would be any runaway cars at this point (Tr. 77, 87). He said that there would have to be some sort of vehicle ramming. He explained this by saying that someone would have to be pushing another supply car with a tow motor before there could be a runaway car. He agreed that it takes tremendous force to move such a car, even when empty. Additionally, Mr. Burchfield testified that two employees are within 50 to 75 feet of the shaft at all times (Tr. 78).

He showed that they have now moved the derail closer to the shaft (Tr. 80). It has been placed 17 to 18 feet from the gate at the shaft entrance. The cage is 9 feet, 6 inches and the gate swings out roughly 14 feet over the track (Tr. 80). The derail is tied in automatically with the hoist by pneumatic air (Tr. 79(b)). (Footnote 5)



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Mr. Burchfield has testified that he was aware of the safeguard notice and its wording (Tr. 81). However, he claimed he did not have any idea that parking a car between the derail and the shaft would be a violation (Tr. 81). The car so parked was 13 inches high and approximately 19 feet long. It was loaded with cinder blocks and was clearly visible to those in the supply yard (Tr. 82). Mr. Burchfield thought any ramming would have to be deliberate. Tow motors will travel at 5 miles per hour. If such an act were to occur, Mr. Burchfield could only foresee danger to the cage and hoist; the miners would be inside the mine (Tr. 84). Mr. Burchfield was not unaware of the purpose of the derail (Tr. 85).

## DISCUSSION AND CONCLUSIONS

### I.

The first issue, as phrased above, is whether 30 CFR 75.1403 has any application to the surface work areas of an underground mine. Respondent argues that Part 75 of Title 30 CFR, which is entitled "Mandatory Safety Standards-Underground Coal Mines" is applicable only to conditions in the underground portion of underground mines. It argues that only in a few places do these regulations affect the surface operations and that in these it is plainly stated within the regulation that its application is to the surface area of the mine and that section 75.1403 makes no such statement. Finally, it contends that Part 77 of Title 30 CFR, which covers surface mines and surface work areas of underground mines, should properly govern this condition which the evidence shows occurred in a surface area.

MSHA contends that the scope of Part 75, as set forth in 30 CFR 75.1, is stated as including "some standards are also applicable to surface operations." MSHA makes no attempt to specify which of the standards are so applicable, how this is to be determined and, finally, whether the specific standard here involved, 30 CFR 75.1403, is one that is intended to be applicable to surface areas of underground mines.

A review of the mandatory standards set forth in Part 75 reveals that some are made specifically applicable to the surface areas of underground mines. For instance, 75.705 states specifically that it is applicable "both on the surface and underground." This also is a statutory provision. Other standards also mention activity which is to be conducted on the surface, such as 75.1200, which relates to the keeping of maps; 75.1708, which refers to the fire-proofing of surface structures and is also a statutory provision; and 75.1808, which relates to the maintenance of books and records on the surface. (Footnote 6)

Thus, it is clearly apparent that certain provisions in Part 75, even though it relates primarily to conditions within underground mines, also cover some surface conditions relating to underground mines. Furthermore, some of these are statutory provisions. These provisions are applicable to surface areas of underground mines even though Part 77 of the standards are specifically mandatory standards for surface coal mines and surface work areas of underground coal mines.

The sole remaining question, therefore, on this issue is whether 75.1403 and its subparts are applicable to the surface areas of underground mines. The test that I would apply is either (a) that the standard itself expressly states that it is applicable to surface areas, or (b) that it is clear from its language that it is applicable to both underground and aboveground. As to the former, examples are those cited above. The latter would be found mainly in subpart (O) which refers to hoisting and mantrips.

For example, 75.1400 in subpart (O) is a statutory provision covering hoisting equipment used to transport persons at a coal mine. Such hoists, especially when used to transport men into and out of the mines, will come to the surface or may even be controlled from the surface. Thus, even though the standard does not expressly refer to the surface, it is clear that the surface of the underground mine is involved. This also would be true with 75.1402, which relates to communications.

Section 75.1403, referring to "other safeguards," is likewise in such a category, at least as it has been interpreted in the subsection's designated criteria. The "other safeguards" are those which may be applied on a mine-by-mine basis "to minimize hazards with respect to transportation of men and materials." As specifically defined in the criteria, "other safeguards" may include and do include, conditions having to do with hoist-transporting materials, automatic elevators, belt conveyors, mantrips, and track haulage roads. Some of these may not and probably do not concern the surface areas of underground mines. Others, however, do concern such areas either specifically or because of their obvious application to the surface areas. An example of criteria applying to the surface, though not specifically so stating, would be 75.1403-11 covering safety gates for the entrances to shafts. Others have more express application to the surface, such as 75.1403-3(f), which requires that an attendant be on duty at the surface where men are being hoisted or lowered. Section 75.1403-8(e) which is closely related to the subject matter of this case is also in the explicit category. It is a criterion which states that "[p]ositive stop blocks or derails should be installed on all tracks near the top or at the landings of shafts, slopes, and surface inclines." Thus, the scope of safeguards, as indicated by the criteria, is sufficiently broad to cover stop blocks or derails in surface areas.

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While I do not hold that 75.1403, which provides for safeguards with respect to the transportation of men and materials, can be read to mean that a safeguard may be written for any condition at the surface of an underground mine, I believe it is clear that it applies to at least some surface conditions and specifically, to the condition of installing derails or stop blocks at tracks near the top.

Accordingly, I hold as to this issue that 75.1403 does have application to surface work areas of an underground mine and, in particular, to the condition which is the subject of this proceeding.

## II.

The second question is whether if 75.1403 applies to surface work areas, does the fact that a loaded supply car was parked between the derail and the collar of the mine shaft constitute a violation of the safeguard notice which requires only that a derail be installed on the track leading to the mine shaft?

This question was raised repeatedly in the proceeding, twice in motions for summary judgment, and once in a motion to dismiss at the close of MSHA's case-in-chief. These motions were all denied. Now having had the opportunity to study the issue in light of the full and complete record, I have reached the conclusion that Respondent's position is correct and that the notice of violation should be vacated and the petition for civil penalty be dismissed.

The safeguard notice, as previously noted, issued by Inspector Blanton on January 9, 1975, provided that positive stop blocks or derails should be installed on the track near the manshaft. Inspector Blanton appeared to be guided by the specific criteria, 30 CFR 75.1403-8(e), but he claimed that he had issued the notice on the authority of section 314(b) of the Federal Coal Mine Health and Safety Act of 1969. A derail was thereafter placed on the track approximately 70 feet from the collar of the shaft and this was approved by the inspector for abatement.

Subsequently, about 2-1/2 years later, another inspector, Clarence E. Whalen, inspected the same site and issued a notice of violation for failure to comply with the safeguard notice, specifically because a flat car was left unattended without a derail, stop block or dead man that would have prevented such car from falling into the shaft bottom.

Among the facts as disclosed and not in serious dispute are that the derail, which was originally installed to abate the safeguard notice, was still in place at the time of the second inspection, that it was inoperative because it was filled with dirt, and that the inspector did not cite the ineffective condition as a violation of the safeguard notice. The derail in question was 71 feet

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from the collar of the shaft and was in the location which had been approved by the first inspector, Mr. Blanton. The latter had not only approved of the location, but he believed it to be correct on the theory that if the derail was too close to the shaft and a car was bumped, it would go down into the shaft (Tr. 16, 22). Mr. Whalen, the second inspector who issued the notice of violation, disagreed with Mr. Blanton on this matter of the distance. He testified that had he issued the safeguard notice, he would have required the operator to put the derail as close to the shaft as possible (Tr. 50).

This matter of disagreement over the location of the derail is an important consideration in the decision in this case. It shows, I believe, that Inspector Whalen was not particularly concerned with whether the derail, as originally required, was in place and maintained; rather, his concern was with an unattended car standing on the track without the protection of a derail between it and the shaft. As his testimony so clearly indicates, he believed the latter to be the purpose of the safeguard notice. The difficulty is, as I see it, that the safeguard notice does not cover the condition of an unattended car which is not protected from rolling by either stop blocks or derails. It does not in fact state the purpose which Inspector Whalen read into it. (Footnote 7)

By way of background, it is helpful to consider that notices to provide safeguards under the Mine Act are procedurally unusual. I am not aware that the Board of Mine Operations Appeals or the Commission has dealt with this subject in any depth, if at all. Prior rulings by other administrative law judges appear to point out the uncertainties in this area leading to apparent inconsistent results. Compare the decision of Judge Richard Steffey in Oakwood Red Ash Coal Corporation, Docket No. NORT 75-261-P (January 26, 1976), with the decision of Judge George Koutras in Jim Walter Resources, Inc., Docket No. BARB 77-103-P (July 5, 1977).

The statutory provision has been promulgated into 30 CFR 75.1403. This provision permits an inspector to write what is in effect a mandatory standard with respect to transportation applicable only to a particular mine. Under section 75.1403-1, the general criteria for

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safeguards are set forth in subsection (a). This subsection states that 75.1403-2 through 11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring safeguards and it also mentions that other safeguards may be required. Subsection (b) of 75.1403-1 details the procedure to be followed in enforcing this mandatory standard.

Because a safeguard notice, which for the particular mine in effect becomes a mandatory standard, it seems obvious that it should be written precisely and exactly so that there will be no question about the performance required by the operator. In this case, precision does not seem to be a problem except as the second inspector construed the notice. On its face, the notice clearly requires what the first inspector intended, that is, a derail or stop block be installed "near" the manshaft. "Near" is a relative term and the inspector by approving a derail at 71 feet, in effect, construed his own notice as requiring a derail at that distance. A derail was so installed. However, the second inspector now has interpreted the safeguard notice as encompassing a condition not expressly set forth in the terms of such notice, but included within what he deemed to be the purpose.

Part of the difficulty is that the first inspector apparently failed to take into account the possibility that a car could be placed between the derail and the shaft collar because of the large distance permitted between the derail and the shaft. It seems fairly clear that the purpose of the derail was to prevent a car from accidentally falling into the shaft and Respondent's maintenance superintendent recognized that to be the purpose. The safeguard notice, however, by its terms, does not apply to stop blocks or derails for cars. It applies only to a derail for the track, which derail was installed and approved and further was in place on the day the notice of violation was written. Inspector Blanton, had he so intended, could have originally written or have amended his notice to provide a safeguard not permitting a car between the derail and the shaft collar. The safeguard notice was not so written, however, and therefore lacks sufficient specificity to cover the condition which the subsequent inspector found to be a hazard. It is not enough, it seems to me that the purpose was violated if that purpose is not expressly stated in the notice. (Footnote 8)

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Accordingly, I find that the Respondent was not in violation of the safeguard notice according to the specific terms of that notice and that the notice of violation should be vacated and this proceeding dismissed.

There is evidence that the derail was, in fact, not maintained in an operable condition, but that circumstance was not included within the charge in the notice of violation.

Finally, it should be noted that changes have been made to correct the condition so that the same hazard cannot occur in the future. The derail has been placed at the approval of the second inspector, Mr. Whalen, 17 to 18 feet from the shaft collar and it is tied in some automatic way with the hoist by pneumatic air. It is impossible now to get a car between the derail and the gate at the shaft collar (Tr. 79(b)).

ORDER

It is ORDERED that the notice of violation issued herein, No. 1 CEW, September 13, 1977, is hereby VACATED and this proceeding is hereby DISMISSED.

Franklin P. Michels  
Administrative Law Judge

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Respondent's exhibits are identified with a capital "R" and a number; MSHA's with a "G" and a number.

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2 Mr. Blanton has been an MSHA inspector since approximately 1970. He has approximately 16 years' experience in the industry and holds foreman papers issued by the State of Alabama.

~Footnote\_three

3 This section remains unchanged as section 314(b) of the Federal Mine Safety and Health Act of 1977.

~Footnote\_four

4 Mr. Whalen has been an MSHA inspector since October 1, 1971. He has State of Alabama mine foreman certification and had 16 years' of industry experience before joining MSHA.

~Footnote\_five

5 Because there are two page 79's in the transcript, one is designated 79(a) and the other 79(b).

~Footnote\_six

6 Other sections in Part 75 which encompass surface areas include 75.300-2, 75.1702, 75.1712, 75.1600 and 75.1806.

~Footnote\_seven

7 It appears to me that the inspector, rather than issuing a notice of violation of a prior safeguard notice, had other options. He could have either (a) issued another safeguard notice specifically covering the condition found to be a hazard, or (b) issued a notice of violation under 30 CFR 77.1605(p) which also appears to be applicable to this condition. Part 77 of the standards cover surface mines and surface areas of underground mines. Section 77.1605(p) provides that "[p]ositive-acting stop-blocks, derail devices, track skates, or other adequate means shall be installed wherever necessary to protect persons from runaway or moving railroad equipment."

~Footnote\_eight

8 This conclusion is not fully consistent with the determination made in my ruling on the second motion for summary judgment issued April 20, 1979. My final decision is made with the benefit of a full record. To the extent that the summary decision is inconsistent, it is hereby reversed.