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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

v.

Docket No. HOPE 79-152

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

Order No. 253998
November 22, 1978

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
David F. Barbour, Esq., Office of the Solicitor, MSHA,
U.S. Department of Labor, for Respondent

Before: Administrative Law Judge Stewart

FINDINGS OF FACT AND CONCLUSIONS OF LAW

United States Steel Corporation (Applicant) filed a timely application pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. 801 et seq., requesting review of Order No. 253998, dated November 22, 1978.

ORDER NO. 253998

Order No. 253998 was issued on November 22, 1978, by inspector Joseph Barnett under section 104(d) of the Act. The inspector cited an alleged violation of 30 CFR 75.200. The condition or practice at issue was described as follows:

The approved roof control plan was not being followed in that the No. 5 chain pillar split was driven up to 22 feet wide and the right wing had cut through to gob and the place was driven 2 cuts inby. Turn timbers had not been set at mouth of place to meet requirements of the approved roof control plan.

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The order contains a finding that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

The order was terminated 2 hours later. The attempt to recover the No. 5 chain pillar was abandoned and it was timbered off.

Order No. 253998 was issued in the course of a regular inspection of the Gary No. 14-3 Seam Portal. The inspector proceeded to the 2 Right Pump Heading Section, in the company of Delbert Parks, mine inspector for Respondent, and Lloyd Kruger, a member of the UMWA Safety Commission.

The inspector observed what he believed to be two conditions or practices in violation of Respondent's roof control plan at the No. 5 Train Post Split. The first three cuts of the retreat mining sequence had been made. The inspector testified that the second cut in this sequence had been made to a width of 22 feet and that the wing had been cut through into the adjacent gob area. He also testified that the third cut had been taken before the required turn posts had been set.

Applicant submitted Proposed Findings of Fact which are set forth in substance as follows as additional findings of fact in this proceeding:

Inspector Barnett, a duly authorized representative of the Secretary, conducted an inspection of Gary No. 14 mine on November 22, 1978. Barnett, accompanied by Parks and Kruger, a UMWA representative, entered the mine at 8:30 a.m. and travelled to the 2 Right Pump Heading section. Although the section crew had preceded Barnett into the mine by 30 minutes, no mining had begun in the section when Barnett arrived at 8:45 a.m.

Barnett testified that a cut was driven in No. 5 chain pillar split to a width of 22 feet and the wing had been cut through into the gob; in fact, the cut was 20 feet wide but, because of a bump, a hole 3 feet long and 4 inches high had developed near the roof and had slid down to increase the width to 21 feet 5 inches.

Barnett testified that (a) the hole into the gob was 8 feet wide and from the bottom to the top of the coal seam, i.e., 6 feet, and (b) that the hole was circular, beginning about 2 feet from the bottom and having a diameter of 3 feet; in fact, the hole was 3 feet long and 4 inches high.

Barnett testified that no timbers had been installed along the rib where the hole into the gob was located; in fact, two or three timbers had been set there.

Barnett testified that there were bit marks to indicate that the miner had cut into the gob; in fact, there were no such bit marks. The hole into the gob could not have been cut by a continuous miner because of the location and dimensions of the hole.

Barnett testified that (a) breaker timbers had been installed but that no turn timbers had been installed; and (b) that no timbers were installed; in fact, both breaker timbers and turn timbers had been installed.

Barnett testified that the line brattice was installed on the right side and that no timbers were installed on the left side; in fact, the line brattice was hung on timbers installed along the left side and a check curtain was hung on timbers installed on the right side.

Barnett testified that he issued the unwarrantable failure order because the company did not seem very interested in correcting the condition and that he would have issued only a citation if the condition had been corrected within a reasonable period of time.

Parks told section foreman Hyatt to install crib blocks, which were delivered from the surface to the section and installed to breaker off the area later in the day. Barnett testified that he discussed the matter with Christian underground; in fact, Christian did not work that week and did not talk to Barnett that day because he was at a hospital with his mother.

Respondent's roof control plan contains the requirement that four turn posts be set after completion of the second cut. The inspector's testimony that these timbers had not been set was effectively refuted by that of Delbert Parks and David Hyatt, the foreman in charge of the section on the morning in question. Both testified that they observed four turn posts set as required. It is possible that the turn posts were obscured from view by the line brattice or by the check curtain which were hung on the timbers installed in the area.

Respondent's roof control plan requires that breaker posts be set in the area of the third sequential cut before starting wing extraction. The testimony of Respondent's witnesses established that the hole in the wing leading to the gob was caused by a "bump" or sudden bursting of the pillar wall. The hole had not been cut by the Respondent. The inspector's assertion that it was a circular hole approximately 3 feet in diameter and that it began 1-1/2 feet above the floor is rejected. The hole was approximately 3 feet long by 4 inches wide. Respondent did not attempt wing extraction out of sequence.

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Respondent did not violate its roof control plan or section 75.200 as alleged in Order No. 253998.

Underlying Citation

Citation No. 253245 was issued by inspector Joseph Barnett on September 5, 1978, during the course of a regular mine inspection. The inspection party included a representative of the UMWA and two members of Respondent's safety department, Delbert Parks and Richard Wooten. This group arrived at the 18 Left Section at approximately 8:45 a.m. At that time, the entire crew on the section was setting timbers. The inspection party proceeded up the shuttle car roadway to the working place, which was located in the 13 pillar space. There, the inspector noted what he believed to be a violation of 30 CFR 75.200. He alleged that the following condition or practice existed:

The approved roof control plan was not being followed in that the roadway leading to the No. 13 and 14 pillar splits was not timbered down to meet the requirement of the plan (16 to 20 feet wide and no additional roof supports were added) in the 18 Left Section.

The inspector issued a citation pursuant to section 104(d)(1) of the Act, thereby indicating a finding that the alleged violation was caused by an unwarrantable failure of Applicant to comply with the cited safety standard. He also found that the violation was significant and substantial.

Respondent's roof control plan requires that roadways outby pillars which are being mined be limited to a width no greater than 18 feet. If the roadway exceeds 18 feet, at least one row of posts are required to be installed so as to limit the width to 16 feet. The widths of two specific areas of roadway are at issue here: the first of these is that portion of the roadway which extended for one pillar outby No. 13 pillar (hereinafter, the roadway between pillars B and C), and the second is that portion which was immediately adjacent to pillar No. 13 (hereinafter, the roadway between pillar No. 13 and pillar C). The inspector issued Citation No. 253245 after taking several measurements in these two areas of roadway. At one point, the inspector testified that he took a total of six to nine measurements. Under cross-examination, he admitted that he had no specific recollection of the exact number of measurements taken.

The inspector testified that the roadway between pillars B and C was up to 20 feet in width. Delbert Parks took a total of some 15 measurements in this area and achieved different results. He found that the width of the roadway varied for the most part from 16 to 17-1/2 feet. At its widest, the roadway was only 18-1/2 feet. At that point, the continuous miner had taken a 4- to 6-foot long "nick" out of the rib.

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The inspector also testified that the roadway between pillar No. 13 and pillar C was up to 19 feet in width. Respondent's section foreman testified that this section of the roadway was within the 18-foot maximum.

The inspector testified that he examined the preshift-onshift examination record book for September 5, 1978, before he went underground that morning, and he observed therein an entry which noted the need to post a pillar split on the 18 Left Section. The inspector claimed to have made a notation on that particular page. Under cross-examination, he was confronted with a copy of the page. It contained neither the notation he claimed to have made nor any indication of a need to post the pillar split.

United States Steel Corporation submitted Proposed Findings of Fact to the effect that:

Inspector Barnett, the duly authorized representative of the Secretary, who conducted the inspection of Gary No. 14 mine on September 5, 1978, testified (1) that he examined the preshift book before going underground and that the fireboss had recorded therein that No. 13 pillar split in 18 Left section needed safety posts; when in fact, there was no such entry in the fireboss book (2) that Gary No. 14 Mine operated three production shifts daily; when in fact, the mine operated two production shifts and one construction shift daily (3) that Delbert Parks and Richard Wooten, members of the company safety department, and Buchanan, a UMWA safety committeeman, accompanied him underground; when in fact, Buchanan was not there but a UMWA representative named Walters was in the group.

The mine did not operate between August 30 and September 5, 1978, because of a shortage of railroad cars and the Labor Day holiday. The night shift was a construction shift so the day shift on September 5 was the first production shift since August 30. The production crew assigned to 18 Left section entered the mine about 30 minutes before Barnett entered the mine. On arrival at the section, Foreman White examined the working places prior to energizing equipment. White discovered that, at the remaining push block at No. 13 pillar where he planned to begin mining, the bottom was wet and muddy and several timbers were laying in the mud. It appeared likely that the continuous miner had knocked the timbers out as it backed out of the working place because the area was steeply sloped, the timbers were skinned as though they had been struck and there were prints on the roof caused by the timbers when they were installed and later dislodged. Mine foreman Christian instructed White to clean the area of

the mud, water and coal before replacing the timbers. The crew was hauling the mud and coal away in a shuttle car as Barnett arrived at about 8:45 a.m., and had already begun to reset the timbers. No mining had yet taken place on the shift. Barnett said that the area at the push block and the roadway outby the block were too wide; Parks and White disagreed. Barnett had made no comment about the roadway width as he traveled along it to No. 13 pillar and took no measurements then; White, Christian, and Parks traveled along the roadway and observed nothing unusual about its width or the condition of the roof. The roof support plan provides for roadways 18 feet wide, but requires that if said width is exceeded, a row of posts must be installed to limit the width of the roadway to 16 feet. Parks and Wooten took between 12 and 15 measurements along the roadway. All measurements were less than 18 feet except at one location where a nick in one rib resulted in a width of 18-1/2 feet. Barnett testified that he and Buchanan took six measurements along the roadway and found a width up to 20 feet; in fact, Buchanan was not there and Barnett took no measurements. Parks drew a yellow chalk line designating a width of 16 feet along the roadway. After a row of timbers was installed along the chalk line, it was not possible to walk between the rib and the row of timbers. The ribs were fairly straight. Generally the mine has good roof conditions; particularly, in 18 Left section the ribs were not sloughing and the rib rolls did not present a hazard there.

These proposed findings are accepted as additional findings of fact with the exception of Applicant's assertion that Inspector Barnett took no measurements. There is no evidence that the inspector did not testify truthfully and accurately to the best of his recollection in this proceeding. The inspector could have been mistaken in his belief that the mine operated three production shifts daily and, considering the large number of mines inspected, there was obviously room for honest error in attempting to recollect the names of persons accompanying the inspector and in attempting to reconstruct all of the notations that had been made in fireboss books. The difficulty in making measurements across the roadway accurate to within a few inches with no means to ascertain that the tape was perpendicular to the ribs was also obvious. In addition to the possibility that the measurements were not made in a manner to record the shortest distance across the roadway, there was the possibility that the measurements were made in the area of small nicks or even from nicks on each side. Although the ribs were fairly straight the record indicates that there was at least one large nick.

Some of the uncertainty as to the measurements and the method by which they were taken might have been eliminated if the conditions alleged by the inspector had been pointed out to the operator's

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representative at the time the inspector took his measurements. The results could have thereby been verified and any differences as to places and methods of taking measurements might have been reconciled by discussions between the parties.

The inspector's testimony with respect to the distance between pillar No. 13 and pillar C is suspect. The only measurement of width discussed by him in any detail was 16 feet. He did not identify the location of the 19-foot width. Moreover, his recollection of the extent to which pillar No. 13 had been mined was in error. He testified that only the first cut had been taken from the pillar. In fact, the pillar had been split and its wing extracted. Only the push remained.

The inspector's conclusion that this part of the roadway was too wide is further undermined when note is taken of the efforts required for abatement. Delbert Parks testified that posts were set only in the roadway between pillars B and C. The testimony of Respondent's witnesses is persuasive. The roadway in question exceeded the 18-foot maximum width requirement only in the area of the "nick."

The inspector's conclusion that unwarrantable failure existed on the part of Respondent had two bases, both of which are rejected here. He testified that the condition was visually obvious and, therefore, should have been observed by the section foreman. As noted above, the roadway was no more than 6 inches too wide for a distance of 4 to 6 feet. The amount by which the width exceeded the 18-foot requirement and the distance for which it did so will not support an inference that the condition was visually obvious.

The inspector had concluded that the operator had actual knowledge of the condition as evidenced by an entry in the preshift-onshift examination record book to the effect that further posting was needed on the section. As noted above, no such entry had been made.

The inspector also noted that the condition was abated by 11 a.m. that same morning and that Respondent took extraordinary steps to gain compliance by assigning the entire crew to correct the situation.

The record will not support a finding of unwarrantable failure on the part of Respondent. Citation No. 253245 was not properly issued under section 104(d) of the Act.

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ORDER

The application for review is GRANTED and Order No. 253998, issued November 22, 1978, is hereby VACATED.

Forrest E. Stewart
Administrative Law Judge