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SOL (MSHA) V. NORTH AMERICAN COAL CORP.
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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	Civil Penalty Proceedings Docket No. VINC 79-164-P A/O No. 33-00939-03010
v.	
NORTH AMERICAN COAL CORPORATION, RESPONDENT	Docket No. VINC 79-165-P A/O No. 33-00939-03011 Powhatan No. 3 Mine

DECISION

Appearances: William B. Moran, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner MSHA
Fred S. Souk, Esq., Crowell & Moring, Washington, D.C., for Respondent

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110 of the Act by the Secretary of Labor, petitioner, against North American Coal Corporation, respondent.

These cases were duly noticed for hearing and were heard as scheduled on November 6, 1979. At the hearing, pursuant to agreement of the parties and in accordance with the regulations, the subject docket numbers were consolidated for hearing and decision.

Citation Nos. 285305, 285130, 285559, 280749, 280751, 280754, 281801, 281803, 280757, 281804, 281806, 284116, 284117, 280759, 284119, 281807, 280764, 284120, 284121, 280767, 281814, 281815, 281816

Prior to the hearing, the Solicitor filed a motion to approve settlements for the above-captioned 104(a) citations. All the recommended settlements were for the originally assessed amounts in the total amount of $3,827. At a prehearing conference held on November 2, 1979, I advised the Solicitor that his motion was inadequate and requested him to submit an amended motion at the hearing. The Solicitor subsequently presented an amended motion which set out a detailed explanation for each of the recommended settlements. After a careful

review of the Solicitor's motion, the recommended settlements for the originally assessed amounts for these citations were approved from the bench.

Citation Nos. 280752, 280755, 281802, 280756, 281805, 284115, 280758, 284118, 280760, 281808, 280763, 284112, 280766, 284123

Each of these 104(a) citations alleges a violation of 30 CFR 75.514. At the hearing, the Solicitor and the operator introduced documentary exhibits and testimony with respect to these citations (Tr. 1-292). Upon conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 292-312):

> This involves 14 citations for alleged violations of 30 CFR 75.514. The parties have agreed to a set of joint stipulations admitted as Court Exhibit No. 1 which in setting forth all the undisputed facts in detail, recites a multiplicity of locations along the main track haulage of the subject mine where bonds were missing or loose, or where fish plates were missing or loose.
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> 30 CFR 75.514 requires, inter alia, that all electrical connections be electrically efficient. The Solicitor contends that this mandatory standard requires that every bond and fish plate be in perfect condition, i.e., that each and every one of them be bolted or joined where they are supposed to be. The operator's counsel argues on the other hand, that this mandatory standard does not apply to track haulage bonds and fish plates, and moreover, that even if it does, it applies to them not as individual components, but as part of a total system which must then be viewed in its entirety for electrical efficiency.
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> After careful consideration of the parties' position I have concluded that the operator is correct. I do so because after listening to the testimony from MSHA's own experts, I am convinced that MSHA has not properly faced the difficulties presented, and that these difficulties cannot be met by attempting to apply 75.514 which when applied as MSHA now is doing, does not solve the problem, but rather creates confusion and unfairness not only among operators but among MSHA's own personnel.
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> A literal reading of 75.514 could support an interpretation that each and every rail bond and fish plate is an electrical connection. However, as the operator

has pointed out, the legislative history refers to electrical connections "in wiring." There is no reference in the legislative history or mandatory standard to track haulage or to bonding although such references easily could have been made if this had been what Congress intended. Moreover, as the operator further points out, bonding and track haulage is dealt with separately in the metal and non-metal regulations. I recognize that the metal and non-metal regulations are not binding here, but by the same token I should not decide this case with blinders on. It is significant and not to be ignored that this matter is covered by a specific regulation in a companion situation.

That 75.514 does not apply to this case is further made clear by the testimony of MSHA's own witnesses. This testimony pointed out that in the 1953 Code, bonding of tracks had been specifically provided for, but that this provision had been inadvertently left out of subsequent enactments. To be sure, MSHA now has bonding requirements in its inspector's manual, but it is hornbook law at this late date that these manuals are not binding on anyone outside MSHA. The former Board of Mine Operations Appeals so held in North American Coal Corporation, 3 IBMA 93 at 103-106, and in Kaiser Steel Corporation, 3 IBMA 489 at 498. When confronted with a situation where track bonding and related matters no longer were specifically covered by the statute or regulations, MSHA should have undertaken appropriate rulemaking to bring the situation under control in coal mines just as it did with respect to metal and non-metal mines.

The solution does not lie in trying to apply 75.514. Quite the opposite is true. The impossibility and impracticability of applying 75.514 to this case is demonstrated by the subject citations. MSHA contends that 14 violations exist here. However, in no instance can MSHA determine the gravity or did it attempt to do so with respect to any of these violations. Nevertheless, the original assessed penalties for these violations ranged up to $170. In my view, $170 is a substantial penalty. Accordingly, this type of approach by MSHA simply does not make sense. On the contrary, it indicates to me that the mandatory standard was not intended to, does not, and cannot work under these circumstances.

A further problem exists with upholding these citations because 75.514 requires that electrical connections be "electrically efficient." Nowhere is the

term "electrically efficient" defined. The Solicitor contends that every time a bond or fish plate is loose or broken it is not electrically efficient. However, the Solicitor's first electrical expert, an electrical inspector, testified that where a bond at a joint is loose or missing, the fish plate could be electrically efficient, and that conversely, where the fish plate is loose, the bond can be electrically efficient. Moreover, this electrical inspector testified that the return feeder cable here was the most efficient electrical conductor of all because of the size of its diameter. There is no allegation that there was anything wrong with the return feeder cable in this case. I accept this testimony from the first MSHA electrical expert on these points although I recognize that, as in some other respects, it is in conflict with testimony from MSHA's second expert. Assuming 75.514 would otherwise be applicable, I believe that the electrical connection referred to therein means the entire configuration at the joint including the rails, bonds, fish plates and return cable and that electrical efficiency cannot be determined by looking at single elements of the joint such as one bond or one fish plate. As the evidence adduced by MSHA itself makes clear, it makes no sense to look at these individual places because one by one they give no idea of any hazard from heating or arcing. Here it has been stipulated that there was no heating or arcing. The testimony of MSHA's first expert is a sufficient basis in and of itself to decide that the individual joints consisting of bonds, rails, fish plates, and return cables were electrically efficient.

In addition, I decide that the system as a whole should be looked at to determine electrical efficiency once again assuming the applicability of 75.514. I believe Judge Moore's decision in Knisley Coal Company (PITT 73-210-P), dated October 22, 1974, was correct.

If as the Solicitor says, it is impossible for MSHA to test individual bonds and fish plates for electrical efficiency, then MSHA can adopt new regulations which like the metal and non-metal regulations require a certain type of bonding at given intervals. MSHA is not powerless to deal with this situation. It merely wants to handle this matter as painlessly as possible for itself.

One final point must be made. The testimony makes clear that MSHA itself does not enforce the interpretation of 75.514 it is asking me to accept in this case. MSHA's first expert, the electrical inspector, admitted that often he does not cite an individual broken bond as a violation. Obviously, he thinks the policy is unworkable. Plainly, from his testimony he is not alone among those in the field who think this way. Even more importantly, both MSHA's experts made clear that MSHA does not require that both rails be bonded on secondary track haulage roads. The reason for this is that the loads on secondary track haulage roads are lighter than those on main track haulage roads. I recognize that the subject 14 citations cover only the main track haulage roads. However, I cannot ignore the fact that if I adopted MSHA's position in this case, bonding on both rails on secondary track haulageways as well as main haulageways would be required although this is contrary to what MSHA actually does at the present time, and MSHA has never indicated that it will change its present policy regarding secondary track haulage roads. Once again, I should not and will not decide this case with blinders on. I can only conclude that MSHA itself does not really believe 75.514 applies to track haulage bonds and fish plates, but is selectively applying this mandatory standard only where it wants to. The Act simply cannot be administered in this fashion. It is obviously illegal, patently unfair and makes no sense.

To be sure, the problems regarding the electrical integrity and safety of track haulage systems must be faced. However, such problems are not met, and certainly are not solved by trying to persuade an administrative law judge to stretch a mandatory standard beyond its logical, sensible, historic and legal limits.

The operator did not present much evidence. It did not have to. The utter disarray in MSHA's present enforcement policy in this area was manifested most clearly through the confusion and discomfiture of its own witnesses whose candor and sincerity only served to heighten the unfortunate situation. Rule-making may be a long and arduous process, but I have neither the authority nor the inclination to substitute myself for it.

In light of the foregoing, the subject citations are vacated, and no penalty is assessed.

ORDER

It is hereby ORDERED that as set forth herein, the dismissal of certain citations from the bench be AFFIRMED and that the imposition of penalties from the bench with respect to other citations, as is also set forth herein, be AFFIRMED.

In accordance with the foregoing determinations, the operator is ORDERED to pay $3,827 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge