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BISHOP COAL V. SOL (MSHA) & (UMWA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

BISHOP COAL COMPANY,	CONTESTANT	Contest of Order
		Docket No. HOPE 79-241
	v.	Order No. 254429
SECRETARY OF LABOR,		January 29, 1979
MINE SAFETY AND HEALTH		
ADMINISTRATION (MSHA),	RESPONDENT	Bishop No. 33-37 Mine
	AND	
UNITED MINE WORKERS OF AMERICA,	RESPONDENT	

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent
Joyce A. Hanula, Esq., United Mine Workers of America, Washington, D.C., for Respondent

Before: Judge Stewart

Bishop Coal Company filed a timely contest of Order No. 254429, pursuant to the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). MSHA and the United Mine Workers of America (UMWA) subsequently filed answers denying the allegations set forth in the contest of order and asked that the proceeding be dismissed. Subsequent to the hearing in this matter, posthearing briefs were filed by MSHA, the UMWA, and the Contestant. Proposed findings of facts and conclusions of law which are inconsistent with this decision are rejected.

A citation issued pursuant to section 104(a) of the Act alleged a violation of section 103(f) of the Act and described the pertinent condition or practice as follows: "Due to severe weather conditions, this inspector was late arriving at the mine (8:10 a.m.), January 29, 1979. The operator refused to notify the representative of the miners who had already entered the mine."

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In an order of withdrawal issued pursuant to section 104(b) (FOOTNOTE 1) of the Act, the inspector stated that "[n]o effort was made to abate this citation."

The primary issues presented are (a) whether a representative of miners was afforded an opportunity to accompany an inspector during an inspection as required by section 103(f) (FOOTNOTE 2) of the Act and (b) whether the inspector exercised his authority reasonably in the issuance of 104(b) Order No. 254429.

On January 29, 1979, Federal coal mine inspector Tommy F. Robbins, accompanied by trainee inspector William H. Uhl, arrived at the Bishop Coal Company's No. 33-37 mining complex to continue a regular health and safety inspection of the No. 33 Mine. Since January 1, 1979, Inspector Robbins had spent approximately 10 days at the No. 33 Mine conducting the inspection. The inspectors did not arrive at the mine until about 8:10 a.m., approximately 10 minutes after the miners on the shift had proceeded underground.

Inspector Robbins asked Arnold Shrader, company safety inspector, to notify a union representative that they were about to continue the underground inspection of the No. 33 Mine. Mr. Shrader went to the office of Mr. Camp, superintendent at the No. 33 Mine, where they called the portal office and found that the men had already gone underground. Mr. Shrader returned to the office at the respirable dust room and told Inspector Robbins that the men had gone underground and he did not have the authority to call anyone out of the mine to go with him. The travel time

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between the portal and working section was approximately 30 minutes. At approximately 8:27 a.m., the inspector informed Mr. Shrader that a citation would be issued and that it must be abated by 8:45 a.m.

Mr. Camp was then told by Mr. Shrader that the inspector had issued the citation and was considering the issuance of an order. Mr. Camp proceeded to the office where he was told in a conversation with Inspector Robbins that the time set for abatement was 15 minutes and that an order would be issued if abatement was not achieved within that time. When asked about the terms of the order, the inspector stated that the order would not result in the closure of any mine areas.

During this time, inspector Eugene Mounts and a miner representative, Mr. Armond Smith, were present in the mine office. These two were preparing to conduct an inspection of the No. 34 Mine. Mr. Camp told Inspector Robbins that he was notifying Mr. Smith of the inspection of No. 33 Mine at that time. He then informed Mr. Smith that an inspection of the No. 33 Mine was to be undertaken. Under the mistaken belief that by doing so he had complied with the requirements of section 103(f) of the Act, Mr. Camp argued with Inspector Robbins, telling him that he did not have a right to issue the citation because "the union had been notified."

Most of the miners on the list of walk around representatives UMWA Local Union 6025, dated December 17, 1978, worked at Mine No. 34. Mr. Harold Bland was the only person on the walk-around list who worked in the No. 33 Mine on the day shift. In his testimony, Mr. Camp stated that "[H]e would have had to notify a man in No. 33 if Mr. Smith would have asked him." Mr. Camp also testified that as he read the law, "[e]very member of Local Union 6025 is a representative of the United Mine Workers at Bishop Coal Company" and that if he "[W]ould have talked to any of those 721 men [so far as he was concerned] that is notifying the United Mine Workers * * *."

Effect of Notification of Representative of Miners Already Committed to Accompany Another Inspector on Inspection of Different Mine

Contestant's position is that it notified one of the miners' representatives, Mr. Armond Smith, of the inspection to be conducted at the No. 33 Mine and that this complied with the requirements of section 103(f) of this Act, even though Mr. Smith had already been assigned to accompany another inspector on an inspection of the No. 34 Mine.

Section 103(f) of the Act requires that a representative of miners shall be given an opportunity to accompany an inspector during an inspection pursuant to section 103(a) of the Act. In order for the opportunity to be afforded, a representative must, of course, be notified of the impending inspection. Although notification of the impending inspection must be given in order to allow the requisite opportunity to accompany, notification alone may not meet the requirements of the Act.

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Mr. Smith was already committed to join in an inspection of No. 34 Mine. Neither the notification of Mr. Smith nor Mr. Smith's failure to specifically request that someone else be afforded the opportunity to accompany one of the inspectors serves as a valid excuse for Respondent's failure to provide a representative when requested by Inspector Robbins. From the record, it is clear that Contestant did not give a representative authorized by the miners an opportunity to accompany the inspector. Mr. Harold Bland, a representative of miners who was able to accompany the inspector, was made available only after a citation had been issued. This failure to notify and, hence, to provide the requisite opportunity to accompany, was in violation of section 103(f) of the Act.

Time Of Inspector's Arrival

As a result of delays caused by adverse weather conditions and difficulty in purchasing gasoline with a Government credit card, the inspectors did not arrive at the mine until about 8:10 a.m., approximately 10 minutes after the miners on the shift had proceeded underground. The normal starting time for the day shift was 8 a.m.; however on some mornings there were delays, and starting time might be as late as 8:10. It was sometime between 8:25 and 8:30 when Mr. Shrader went to Mr. Camp's office and said that Mr. Robbins and Mr. Uhl were in the dust room and had notified him that they wanted to continue their inspection of the No. 33 Mine. The mine foreman has a small office next to the drift mouth located about 500 feet from the mine office at the dust room. When Mr. Camp called the foreman to see if there was any one outside to accompany the inspectors as a miner representative, the mine foreman told Mr. Camp that all of the mantrips had gone and that there was no one outside on the hill available.

Although the inspector had arrived on previous days at 7:30 a.m., there is no requirement in the Act or in the regulations that he appear at the mine at any specific time. Section 103(a) of the Act is explicit in requiring that no advance notice of an inspection shall be provided to any person when the inspection is for the purpose of determining whether there is compliance with the mandatory health or safety standards. Therefore, there may be occasions when an inspector will begin an unannounced inspection at a time after the miners have gone underground at the beginning of a shift. While there may be a saving in time benefiting both MSHA and the operator if the inspector arrives early enough to allow him to go underground with the miners' representative, there is no requirement that he do so. The late arrival of the inspectors did not provide a valid excuse for the failure of the operator to afford representatives an opportunity to accompany the inspectors.

Requirement to Notify Representatives of Miners Who Had Already Gone Underground

The operator was verbally notified that a citation would be issued at 8:27 a.m. The order of withdrawal was issued orally at

8:45 a.m. The citation was issued in writing shortly before 9:00
a.m. The order was issued in writing at approximately 9:00 a.m.

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After arrival at the mine at about 8:10 a.m., Inspector Robbins asked that a miner's representative be notified. Mr. Schrader misunderstood the inspector's request and believing that he had requested that a representative be brought back to the surface, went to the office of Mr. Camp. Mr. Camp was also under the erroneous impression that the inspector had demanded that a representative of miners be brought out of the mine when he proceeded to the respirable dust office and spoke with Inspector Robbins.

In asking that a miner's representative be notified in order that he could accompany the inspectors, Mr. Robbins did not use the explicit words "out to the surface." Mr. Schrader took the inspector's words to mean "to bring them out of the mine, because they were already underground". The initial misunderstanding on the part of Mr. Schrader and Mr. Camp should have been corrected by the subsequent events. The inspector allowed the operator 15 minutes to notify the representative by telephone. This should not have been misconstrued as a requirement to bring him to the surface which would have taken 30 minutes. On cross-examination, Mr. Camp testified that realistically a 15-minute period would not have been sufficient time to bring a man to the surface.

To travel to the inspection site, the inspector would pass by the section where the miners' representative was working and he would have been satisfied to have the representative brought out to meet him at the main line switch. Arrangements had been made on previous occasions to have the miners' representative meet the inspector underground. The inspector testified that, had the representative been notified, he would have been willing to meet him on route to the section which was to be inspected. As an alternative, the representative could have met the inspection party at the section to be inspected.

While it had been company policy to take an inspector to the section where the miners' representative was located or pick up the representative on the way to the inspection site, the operator on this occasion refused to take the required initial step in notifying the miners' representative in the belief that it had fulfilled the requirements of the Act by notifying Mr. Armond Smith. It was not until after the refusal to notify the miner's representative that the operator decided to allow him to meet the inspector underground on this occasion. Mr. Camp had been keeping his superior, Mr. Trump, informed as to the course of events. When he talked this situation over with Mr. Trump, they decided, "[W]e'll even go beyond what we've done. We will offer the opportunity for him to meet the man at the panel switch on the section, or wherever he wants to go."

Mr. Camp testified that he then went and told Inspector Robbins that he would bring "that man down there." Mr. Bland, however, was not notified until after the order was issued. The circumstances were such that they did not dispel Mr. Robbins' understanding that the operator was refusing to call on the telephone and notify a representative.

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The written order of withdrawal was handed to Mr. Camp at approximately 9:02 a.m., at which time he went to the telephone and told the mine foreman that the order of withdrawal had been issued and that he should call the section foreman and get Mr. Bland out of the mine. Mr. Camp testified that he did not explain to his superior that the citation alleged only a failure to notify because he did not have a copy of the citation at the time the order was issued. It was normal practice for orders and citations to be issued verbally and then written out at a later time. While he did not have a copy at the time of the oral order, the record clearly establishes that at the time Mr. Camp called the mine foreman at 9:02 a.m., he had both the citation and the order.

Not knowing that Mr. Bland had been summoned, the inspectors changed clothes in preparation for going underground without a representative. They were delayed for a short while because of unavailability of transportation. When Mr. Bland unexpectedly appeared on the surface at approximately 9:50 a.m., Inspector Robbins terminated the order.

The fact that Mr. Bland was brought to the surface by the operator does not mean that the inspector required him to be brought from the mine. It is obvious that Mr. Bland was not brought from the mine on the basis of what the written citation and the order stated. Before Mr. Camp made his call to get Mr. Bland out of the mine, he had been afforded the opportunity to read the specific allegation on the face of the citation and he had, in fact, read the citation. This allegation simply stated that the operator had refused to notify the miners' representative. Even though the operator might have previously misunderstood the nature of the inspector's oral citation, it most certainly should have questioned such an obvious discrepancy before bringing Mr. Bland to the surface.

Since a requirement by the inspector that the miners' representative be brought to the surface is not established by the record, the issue as to the reasonableness of such a requirement by an inspector is not presented. It should be noted, however, that Section 103(a) of the Act provides for unannounced inspections and Section 103(f) of the Act requires that a miner's representative be given an opportunity to accompany the inspector to participate in pre- or post-inspection conferences as well as to aid in the inspection.

ORDER OF WITHDRAWAL

Section 104(b) of the Act requires that an inspector shall issue an order under that subsection when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. As noted above, mine management did not abate the violation within the 15 minutes set by the inspector. The test as to whether a

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104(b) order was properly issued was enunciated by the Board of Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). (FOOTNOTE 3) It was stated therein that "the inspector's determination to issue a section 104(b) order must be based on "facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed." The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

After arriving late, the inspector found the operator unwilling to call an available representative of the miners on the telephone. Such a call would have been necessary in order to arrange a meeting at the switch along the inspector's way to the inspection site even if Mr. Camp and Mr. Trump had agreed that Mr. Bland could have met the inspectors there prior to the oral citation. The failure of the operator to take the initial requisite step in calling and notifying the representative was a failure to afford an opportunity to accompany.

The abatement effort requested by the inspector and the time set by the inspector for abatement were reasonable. It is accepted here that the inspector did not demand that a representative be brought out of a mine, but only that the representative be notified. It is probable that Mr. Shrader misunderstood Inspector Robbin's request and relayed an incorrect message to Mr. Camp, thereby setting the chain of events in motion.

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The testimony of Petitioner's witnesses to the effect that Inspector Robbins did not demand that a representative be brought out of the mine is supported by the allegation contained in the citation, as well as by the length of time set by the inspector for abatement. In his description of the condition, the inspector stated that the operator failed to notify a representative. He did not allege a failure on the part of the operator to bring a miner out of the mine. Moreover, although the inspector was aware that it took 30 minutes each way to travel between the portal and working section, he provided only 15 minutes for the abatement of the citation. There is no evidence that the inspector set this time period in bad faith. Given the shortness of the period for abatement, the inspector could not have intended that management bring a miner to the surface.

The inspector testified that, had the representative been notified, he would have been willing to meet the representative on the way to the section which was to be inspected. As an alternative, the representative could have met the inspection party at the section to be inspected. The 15-minute period set by the inspector was an adequate length of time in which to notify the representative and afford him the opportunity to rendezvous with the inspector underground.

No purpose would have been served in this instance by an extension of time in which to achieve abatement. Mine management made no effort to achieve abatement within the original 15-minute period. Although management in the past had been generally cooperative in providing miner representatives with the opportunity to accompany inspectors, the inspector was given no reason to believe that an extension of time was necessary in this instance or that management would attempt abatement if an extension of time was granted. In view of the facts with which he was confronted, the inspector reasonably exercised his authority. Not only was an extension of time specified for abatement unnecessary, but it was not requested. Order No. 254429 was properly issued.

ORDER

It is ORDERED that the above-captioned contest of order is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE 1

Section 104(b) of the Act reads as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection 104(a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended,

and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

~FOOTNOTE 2

Section 103(f) of the Act in pertinent part reads as follows:

"Subject to regulations issued by the Secretary, a representative of the operator and representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103(a)] for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."

~FOOTNOTE 3

The Board was addressing section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970), which reads as follows:

"(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

This section of the 1969 Act and section 104(b) of the 1977 Act are substantially similar with respect to the requirements each imposes on an inspector confronted with an operator's failure to abate a violation within the time specified.