FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

31 JUL 1980

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. WEVA 79-129-R
v.	:	Order No. 804918
	:	April 16, 1979
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Robinson Run No. 95 Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Applicant;
David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Cook

I. Procedural Background

On May 14, 1979, Consolidation Coal Company (Applicant) filed an application for review pursuant to section 105(d) 1/ of the Federal Mine Safety

1/ Section 105(d) provides:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof Issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

and Health Act of 1977, 30 U.S.C. § 815(d) (1978) (1977 Mine Act). Applicant seeks review of Order of Withdrawal No. 804918 issued at the Robinson Run No. 95 Mine on April 16, 1979, pursuant to the provisions of section 104(b) 2/ of the 1977 Mine Act. The application for review states, in part, as follows:

> 1. At or about 1400 hours on March 22, 1979, Federal Coal Mine Inspector, James D. Satterfield (A.R. 0502) representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter Inspector) issued Citation No. 0804951 (hereinafter Citation) pursuant to the provisions contained in Section 104(a) of the Act to Howard F. Watson, Safety Escort, for a condition he allegedly observed during an "AAA" inspection (Safety and Health Inspection) in the Robinson Run No. 95 Mine, Identification No. 46-01318 located in Northern West Virginia. A copy of this Citation is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.21(b).
>
> 2. Therein Inspector Satterfield cited Consol for a violation of 30 C.F.R. § 75.1403 and alleged under the heading captioned "Condition or Practice" the following:
>
> "Mud and water had accumulated in and along the load track near the Robinson Run Portal from No. 35 to No. 50 Block. The flanges on the wheels of the rolling stock were throwing mud and water on the rails, making them wet and slick."
>
> 3. Inspector Satterfield directed that the condition be abated by 0800 hours on March 30, 1979.
>
> 4. Inspectors Satterfield and Allen issued three extensions of time permitted for abatement on March 30, 1979, April 5, 1979, and April 12, 1979. Copies of the extensions are attached hereto as Exhibits "B", "C" and "D" respectively.*

2/ Section 104(b) provides:

"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 (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."

5. At or about *0905* hours on April 16, 1979, Inspector Bretzel W. Allen issued a Section 104(b) Order identified as No. 0804918 to Howard F. Watson, Safety Escort. Be determined that the alleged violation described in the above-mentioned citation had not been totally abated within the period of time as originally fixed therein and that the period of time for abatement should not be further extended. Inspector Al len stated:

> Although some work had been done to correct the condition, mud (mine refuse) still was present in the clearance space from 7 to 26 inches deep and the mine cars had been dragging in it and at 3 locations between the rails between number 35 and 50 blocks, in the loaded track entry.

He further demanded that all persons except those referred to in Section 104(c) be withdrawn from "The loaded track entry between 35 and 50 blocks." The Order hereinabove described is the subject of this Application, and a copy thereof is attached hereto as Exhibit "E".

6. At or about 0100 hours on April 17, 1979, Inspector Allen issued a termination of said Order. A copy of this termination is attached hereto as Exhibit "F".*

7. Consol avers that the Order is invalid and void, and in support of its position states:

(a) That the conditions and practices described in the Order are inaccurate;

(b) That no violation of mandatory health or safety standard 30 C.F.R. § 75.1403 occurred, as alleged;

(c) That the Order was not issued pursuant to the same condition described in the Citation.

(d) That Consol had made a good faith effort to abate the described conditions or practices within the prescribed time period; and

(e) That it was unreasonable for the Inspector not to further extend the time for abatement and that raid failure was an arbitrary and capricious act without basis in fact and without regard to the prevailing standards for the issuance of Section 104(b) Orders.

* * * * * * *

WHEREFORE, Consol respectfully requests that its Application for Review be granted and for all of the above and other

good reason, Cons01 additionally requests that the subject Order be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

In a footnote to paragraph 4 of the application for review, Applicant states the following:

> The extension of March 30, 1979, stated: "Additional time was granted to remove the mud and water from the load track,' from 35 to 50 blocks, because the mine was idle 2 shifts due to a work stoppage." [SEE: Exhibit "B"]
>
> The extension of April 5, 1979, stated: "Part of the water has been removed from the loaded track entry between numbers 35 and 50 blocks. Additional time is needed to complete the cleaning of the entry." [SEE: Exhibit "C"]
>
> The extension of April 12, 1979, stated: "A drain ditch has been dug from number 35 to 50 block to drain the water from the track haulage entry. Additional time is needed to complete the cleaning of the entry." [SEE: Exhibit "D"]

In a footnote to paragraph 6 of the application for review, Applicant states the following: "The termination stated: 'The (mine refuse) mud was loaded into mine cars and removed from the loaded track entry between number 35 and 50 blocks."'

The United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) filed answers on May 14, 1979, and May 25, 1979, respectively.

Pursuant to a notice of hearing issued on August 22, 1979, the first portion of the hearing was held on September 20, and September 21, 1979, in Washington, Pennsylvania. Representatives of MSHA and Applicant were present and participated. No one appeared to represent the UMWA (Tr. 4-6). 3/

During the hearing on September 21, 1979, it was noticed that the safeguard notice introduced into evidence by MSHA (Exh. M-4) was denominated 1 WSH, January 15, 1973, 30 C.F.R. § 75.1403 and that the safeguard notice referred to in the 104(a) citation underlying the subject order of withdrawal was denominated 2 WHB, January 15, 1973. Counsel for MSHA requested a continuance to permit the presentation of evidence to resolve the apparent ambiguity. The motion was granted.

3/ During the hearing on September 20, 1979, Applicant moved to dismiss the UMWA as a party to the proceeding (Tr. 6-7). An order granting Applicant's motion was issued immediately prior to the issuance of the decision in this case. Accordingly, the decision's caption reflects only the remaining parties.

On October 1, 1979, an order was issued continuing the hearing to reconvene on November 1, 1979, and, on October 10, 1979, a notice was issued designating a facility in the Somerset County Courthouse as the hearing site. On October 22, 1979, MSHA filed a motion for the issuance of two subpoenas duces tecum to require the production of documents at the November 1, 1979, hearing. Since the time permitted for filing a statement in opposition to the motion, 29 C.F.R. § 2700.8(b) and 2700.10(b) (1979), extended beyond November 1, 1979, telephone conferences were conducted on October 23, and 25, 1979, during which the undersigned Administrative Law Judge and representatives of the parties participated. Counsel for Applicant indicated that he would exercise his right to file a response to the motion but that his response would not be forthcoming until after November 1, 1979. Additionally, counsel for MSHA stated that he would request the hearing site be changed to Morgantown, West Virginia due to the ill health of an MSHA witness. The parties were unable to reach agreement on this point. In view of these considerations, an order was issued on October 26, 1979, cancelling the hearing and continuing the proceeding indefinitely.

Applicant filed its statement in opposition to MSHA's motion on November 1, 1979, and an order was issued on November 8, 1979, granting MSHA's motion for the issuance of subpoenas.

On November 19, 1979, MSHA formally requested a change of the hearing site, and no statement in opposition thereto was filed by Applicant. Accordingly, on December 18, 1979, an order was issued granting MSHA's request. Additionally, the order contained an amended notice of hearing scheduling the continued hearing to reconvene on January 29, 1980, in Morgantown, West Virginia. Subsequent thereto, an amended notice was issued changing the hearing date to January 28, 1980.

The continued hearing reconvened as scheduled with representatives of MSHA and Applicant present and participating. No one appeared to represent the UMWA. A schedule for the submission of posthearing briefs was agreed upon following the presentation of the evidence, but difficulties experienced by counsel necessitated a revision thereof. MSHA submitted its posthearing brief on April 17, 1980. Neither Applicant nor the UMWA filed posthearing briefs.

II. Witnesses and Exhibits

A. Witnesses

MSHA called as its witnesses James D. Satterfield and Bretzel W. Allen, MSHA inspectors; Nelson Starcher, chairman of the union safety committee at the Robinson Run No. 95 Mine; Neta Matthey, a secretary in MSHA's Clarksburg office; and Crystal Sharp, a supervisory clerk-typist in MSHA's Morgantown office.

Applicant called as its witnesses Richard Rieger, general superintendent of the Robinson Run No. 95 Mine; Donald Clover, shift safety inspector at the

Robinson Run No. 95 Mine; and Howard Watson, a safety inspector at the Robinson Run No. 95 Mine.

Roth Applicant and MSHA called Carl Trickett, safety supervisor at the Robinson Run No. 95 Mine, as a witness.

B. Exhibits

1. MSHA introduced the following exhibits into evidence:

M-l is a copy of Citation No. 804951, March 22, 1979, 30 C.F.R. § 7.1403.

M-3 is a copy of subsequent action No. 804951-l issued on March 30, 1979, extending the time for abatement to 4:00 p.m., April 3, 1979.

M-4 is a copy of notice to provide safeguards No. l-WSH, January 15, 1973, 30 C.F.R. § 75.1403.

M-5 is a copy of subsequent action No. 804951-2 issued on April 5, 1979, extending the time for abatement to 8:00 a.m., April 12, 1979.

M-6 is a copy of subsequent action No. 804951-3 issued on April 12, 1979, extending the time for abatement to 8:00 a.m., April 16, 1979.

M-7 is a copy of Order of Withdrawal No. 804918, April 16, 1979, 30 C.F.R. § 75.1403.

M-8 is a copy of the termination of M-7.

M-9 is a copy of M-4 placed in evidence to demonstrate that Applicant had in its possession notice to provide safeguards No. l-WSH, January 15, 1973, 30 C.F.R. § 75.1403.

M-10 is a copy of a document in Inspector Satterfield's possession on March 22, 1979, listing notices to provide safeguards issued at the Robinson Run No. 95 Mine.

M-11 is a copy of a three page document pertaining to a request for documents from the Federal Records Center.

2. Applicant introduced the following exhibits into evidence 4/:

4/ Exhibits O-5 and O-6 are copies of notices to provide safeguards issued to the Robinson Run No. 95 Mine on October 1, 1979. The exhibits were ruled irrelevant and immaterial to the issues presented herein and, accordingly, were not received in evidence. Roth exhibits have been placed in a separate envelope to be retained with the official record in this case in the event of appellate review (See Tr. 507-512).

O-1 is a general mine map of the Robinson Run No. 95 Mine.

O-2 is a blow-up drawing showing the area of the Robinson Run No. 95 Mine cited in M-l.

O-3 is a photograph of a track cleaning machine with the gathering arms closed.

0-4is a photograph of the machine depicted in O-3 with the gathering arms open.

III. Issues

A. Whether Citation No. 804951's misdescription of the underlying safeguard notice (Exh. M-4) deprived Applicant of legally adequate notice of the violation charged.

B. If the misdescription did not deprive Applicant of legally adequate notice of the violation charged, then whether the condition cited in Citation No. 804951, March 22, 1979, constitutes a violation of the safeguard notice in that there was excess water on the track haulage road.

C. If the condition cited in Citation No. 804951 constitutes a violation of the safeguard notice, then whether the condition as to excess water on the track haulage road had been abated when Order No. 804918 was issued on April 16, 1979.

D. If the condition cited in Citation No. 804951 constitutes a violation of the safeguard notice which had not been abated when Order No..804918 was issued on April 16, 1979, then whether Inspector Allen acted unreasonably in failing to further extend the time period for abatement.

IV. Opinion and Findings of Fact

A. Stipulations

1. Applicant owns and operates the Robinson Run No. 95 Mine (Tr. 19-20).

2. The Robinson Run No. 95 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Pub. L. No. 91-173, as amended by Pub. L. No. 95-164, 30 U.S.C. § 801 et seq. (Tr. 19-20).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105(d) of the 1977 Mine Act (Tr. 19-20).

4. The subject safeguard, notice, order, and any'extensions and/or terminations thereof, were properly served by a duly authorized representative of the Secretary of labor upon an agent of Applicant at the dates,.times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein (Tr. 20).

5. On April 16, 1979, the Robinson Run No. 95 Mine had only one track cleaning machine of the type shown in Applicant's Exhibits O-3 and O-4 (Tr. 25).

B. The Condition of the Loaded Track Entry

On March 22, 1979, Federal mine inspector James D. Satterfield issued 104(a) Citation No. 804951 at Applicant's Robinson Run No. 95 Mine addressing alleged accumulations of mud and water existing in the loaded track entry from No. 35 block to No. 50 block. (Exh. M-l). The cited section of track haulage road was approximately 1,500 feet in length and was located approximately 3,500 feet from the mine portal (Tr. 31-32). Three subsequent actions were issued by Inspector Satterfield and Federal mine inspector Bretzel W. Allen between March 36, 1979, and April 12, 1979, which ultimately extended the time period for abatement to 8 a.m., April 16, 1979. (Exhs. M-3, M-5, M-6). The subject 104(b) order of-withdrawal, Order No. 804918 (Exh. M-7), was issued by Inspector Allen at 9:05 a.m., April 16, 1979, after he came to the conclusion that the conditions described in Citation No. 804951 had not been abated and that the time period for abatement should not be further extended. Abatement was accomplished by 9 or 10 p.m. that evening, and the order was subsequently terminated. (Exh. M-8). The circumstances surrounding the issuance of the citation, extensions and order are set forth in detail in the following paragraphs.

Shortly after Inspector Satterfield began his tour of duty as a resident inspector at the Robinson Run No. 95 Mine In January, 1979, a meeting was held with top management officials to discuss the condition of the haulage tracks. In addition to Inspector Satterfield, Nelson Starcher, walkaround representative of the miners and chairman of the union safety committee; Tony Germondo, the general superintendent at the time; Carl Trlckett, the safety supervisor; Willard Starcher and Jimmy Germondo were present and participated. Inspector Satterfield apprised mine management that the haulage tracks were in very bad condition. Specifically, discussions were held as relates to mud and water in and along the load tracks. As a result of these discussions, the inspector received a verbal commitment from mine management to assign an adequate number of people per shift to rehabilitate the track. The rehabilitation work envisioned alleviation of the drainage problems, removal of the mud and any other debris from along the track, raising the tracks and tightening the loose joints in the rails. A total of eight employees per shift were to be assigned to the project, with four employees assigned to drainage and four employees assigned to jacking and leveling the track and performing the other necessary maintenance work. In addition to the first meeting, two or three additional meetings were held.

The section of the loaded track entry from No. 35 to No. 50 block was on a grade ascending toward the portal. Most of the 1,500-foot section was characterized by a 6-percent grade with the exception of one level area in the vicinity of No. 48 block. The ribs in the cited haulage entry were curved, a characteristic attributable to the fact that the entry had been cut with a boring type mining machine. Inspector Satterfield testified that the entry was probably 12-1/2 to 13 feet wide at the widest part

of the curvature and approximately 12 feet wide on the bottom (Tr. 51). Inspector Satterfield did not provide a precise figure as relates to the clearance between the sides of the mine cars and the ribs, but testified that Applicant was in compliance with the minimum clearance criteria, i.e., 12 inches on the tight side and 24 inches on the walkway side with a possible maximum of approximately 4 feet in places. 5/ Considering the type of rails used in the Robinson Run No. 95 Mine, it is approximately 8 inches from the railroad ties to the top of the rail. The best available evidence reveals that the flanges on the mine car wheels extend approximately one inch below the top of the rail.

The evidence presented reveals that Inspector Satterfield made the observations prompting the issuance of Citation No. 804951 on March 22, 1979, while riding to the surface on a type of personnel carrier known as a jeep traveling at a rate of speed estimated at between 5 and 10 miles per hour. The vehicle in which the inspector was riding was following approximately 500 feet behind another vehicle which was also heading toward the surface. The inspector testified that from his vantage point on the personnel carrier, looking down the mine floor to the rails, he was definitely able to observe water and mud along the track. He testified that the entire 1,500 feet of rail between Nos. 35 and 50 block was wet and muddy and expressed the opinion that the condition had to have been caused by the wheel flanges of the other vehicle depositing mud and water atop the rails. Inspector Satterfield testified that he had walked through the area on prior occasions and that the last time he had stopped and observed the area between Nos. 35 and 50 block was around the first week in March, 1979. He.testified that he decided to issue the citation because the area was getting progressively worse. The citation was issued at 4 p.m., Thursday, March 22, 1979, after arriving on the surface, and states that "[m]ud and water had accumulated in and along the load track near the Robinson Run Portal from No. 35 to No. 50 block. The flanges on the wheels of the rolling stock were throwing mud and water on the rails, making them wet and slick" (Exh. M-l).

Both the language of the citation and Inspector Satterfield's testimony reveal that the citation addresses itself solely to hazards posed to track mounted equipment as a result of wet or slick rails, an interpretation confirmed by the testimony of the other witnesses. The testimony of Inspectors Satterfield and Allen is rejected as unpersuasive to the extent it seeks to impose a broader interpretation. 6/

5/ It is understood that these figures are derived from 30 C.F.R. § 75.1403-8(b) and (c), which set forth criteria for other safeguards.

6/ Inspector Satterfield's testimony reveals two additional hazards posed to track mounted equipment by water saturated mine bottom'in that: (1) track mounted equipment using the rails would have a tendency to cause the track to sink farther into the bottom and work loose the fishplates securing the rails and bolts, and (2) the spikes holding the rails to the ties lose their holding power when the ties become saturated with water (Tr. 60, 93). Arguably, elimination of these additional hazards could require the removal of more water from the entry than would be required to prevent either wet

The citation sets forth 8 a.m., March 30, 1979, as the termination due date and alleges a violation of mandatory safety standard 30 C.F.R. § 75.1403 which the evidence reveals is based upon Applicant's failure to comply with the requirements of Safeguard Notice 1 WSH, erroneously referred to in the citation as No. 2 WHB, issued on January 15, 1973. The safeguard notice provides, in part, that "[w]ater was over the main haulage track at the Nos. 3 and 4 block inby by the drift opening on the loaded track. All track haulage roads in this mine shall be kept free of excess water" (Exh. M-4).

The testimony of Inspector Satterfield is at variance with the testimony of Mr. Trickett as relates to the conditions existing from No. 35 to No. 50 block. The inspector's testimony Identifies conditions existing in two distinguishable segments of the entry: the walkway side of the entry and the area that can be more narrowly identified as the area in and along the rails. As relates to the former, the Inspector testified that accumulations varying from approximately six inches to approximately two feet in depth 7/ were present at various locations along the walkway side and that such accumulations represented both material cleaned from under the track in connection with the blocking of various sections and mud that had been cleaned from the sumps. The walkway was not as wet as the area between the rails because the actual track was lower than the walkway.

Fn. 6 (continued)
or slick rails per se or the clogging of the equipment's sanding devices. If the citation can be construed as encompassing these additional hazards, then it materially affects the determination as to how much water had to be removed from the cited portion of the loaded track entry in order to abate the citation. For the reasons set forth below, I conclude that the citation cannot be so construed.

A mine operator cited for an alleged violation of the 1977 Mine Act or the mandatory safety standards is accorded adequate notice if the condition or practice is described with sufficient specificity to permit abatement and to allow adequate preparations for any potential hearing on the matter. Jim Walters Resources, Inc., 1 FMSHRC 1827, 1979 OSHD par. 24,046 (1979); Old Ben Coal Company, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975); Eastern Associated Coal Corporation, 1 IBMA 233, 79 I.D. 723, 1971-1973 OSHD par. 15,388 (1972). In determining whether adequate notice has been given, the inquiry need not be confined to the four corners of the citation. It is appropriate to consider other oral and written communications given to the operator. Jim Walters Resources, Inc., supra.

The citation, on its face, does not address itself to these additional hazards and there is no indication that either Inspector Satterfield or Inspector Allen ever expressly informed Applicant's agents that such hazards were, in fact, covered. Accordingly, the citation cannot be interpreted as encompassing these additional hazards.

7/ The inspector testified that he did not measure the depth of the water and mud on March 22, 1979. All estimates are based on visual observations made from the moving jeep (Tr. 69).

As relates to the actual track, the inspector testified that the mud and water did not extend from rib to rib, but that it definitely entailed the 6-foot width of the railroad ties. He provided a general description of the existing conditions at one point in his testimony by stating that the balls of the rails were level with the mine floor, but subsequently clarified the statement by asserting that for a distance of 1,000 feet only the balls of the rails were visible above the mud and water. However, he expressed the opinion that the flanges on the mine car wheels could actually touch mud for the entire 1,500-foot distance. Even the sections of blocked track were wet. In many areas, no clear cut distinction could be drawn between free flowing water and mud because what actually existed in those areas was a mixture having the consistency of a "slime-like gravy."

Inspector Satterfield testified that water paralleled the rails continuously, but was unable to establish the existence of any locations where water actually covered the track on March 22, 1979. His testimony reveals seven or eight swag areas where water from overflowing sumps would collect on occasion and sometimes cover the track in those areas.

Carl Trickett, the safety supervisor at the Robinson Run No. 95 Mine, walked along the track approximately 24 hours after the issuance of the citation and observed the existing conditions. 8/ He testified that he did not necessarily disagree with the basic information set forth in the citation, but testified that the entire area from No. 35 to No. 50 block was not in such condition that either the wheels or wheel flanges would deposit mud or water on the rails. He testified that he observed approximately three swag areas totaling approximately 75 or 100 feet in length where the wheel flanges could have picked up mud and/or water-and deposited it on the track. At one point he testified that he did not observe any areas at the time where the water was actually over the rails, but subsequently testified that it covered the track in some areas.

I am inclined to accept the inspector's characterization of the conditions existing in the subject section of the loaded track entry because on March 22, 1979, he actually observed wet and muddy rails while following the other vehicle out of the mine. Mr. Trickett was not afforded the opportunity to make a similar observation because he did not observe any trips going through the area. To a certain extent, it appears that Mr. Trickett's evaluation of the extent of the conditions was based upon the presence of drag marks in the pavement. It is significant to note that in many areas no clear differentiation could be drawn between free flowing water and mud because the material in those areas had the consistency of "slime-like gravy." Under such conditions it is highly conceivable that drag marks would not be present in such areas even though the rolling stock actually achieved contact with the accumulations.

8/ Although some abatement work had been performed when Mr. Trickett conducted his inspection (Tr. 234), I find it improbable that the conditions were materially different than on March 22, 1979. This determination is based upon the testimony describing the extensive efforts necessary to eliminate the conditions cited in the citation.

On Friday, March 30, 1979, Inspector Satterfield returned to the mine and extended the time period for abatement to 4 p.m., April 3, 1979. The extension was granted because the mine had been idled for two shifts due to an unauthorized work stoppage (Exh. M-3). Subsequent to the issuance of the extension, Inspector Satterfield was hospitalized. Accordingly, the issuance of the March 30, 1979, extension ended his personal involvement in the activities surrounding the issuance of the withdrawal order.

On Thursday, April 5, 1979, Inspector Allen extended the time period for abatement to 8:00 a.m., April 12, 1979, citing the following justification therefor: 'Part of the water has been removed from the loaded track entry between numbers 35 and 50 blocks. Additional time is needed to complete the cleaning of the entry" (Exh. M-5).

On Thursday, April 12, 1979, after walking the entire distance between No. 35 and No. 50 block, Inspector Allen extended the time period for abatement to 8 a.m., April 16, 1979, citing the following justifications therefor: "A drain ditch has been dug from number 35 to number 50 block to drain the water from the track haulage entry. Additional time is needed to complete the cleaning of the entry' (Exh. M-6). The inspector described the entry as "fairly wet," yet he found only three locations where, in his opinion, the wheel flanges could deposit water on the rails. Additionally, he testified that water covered the track for a distance of approximately ten feet in one area. 9/ Mud or mine refuse extended the entire distance from No. 35 to No. 50 block on the clearance side and a substantial portion, if not the vast majority, of this material had been placed there by the miners installing the drain ditch, which had been dug on the tight side of the entry. The material extracted during the ditch-digging operation had been deposited between the rails and between the rail and the rib on the clearance side such that the material was deepest in the vicinity of the rib. The inspector indicated that all of the mud or mine refuse would have to be removed from the clearance side, in addition to removal of the aforementioned water, before he would terminate the citation.

Applicant's witnesses testified that mine management intended to use the track cleaning machine over the weekend to remove the refuse, but was prevented from doing so because the machine burned out several motors.

At 9:05 a.m., on Monday, April 16, 1979, Inspector Allen issued 104(b) Order of Withdrawal No. 804918 in which he stated that: "[a]lthough some work had been done to correct the condition, mud (mine refuse) still was present in the clearance space from 7 to 26 inches deep, and the mine cars had been dragging in it at three locations between the rails between number 35 and 50 blocks, in the loaded track entry" (Exh. M-7).

9/ The inspector's testimony on this point appears to be at variance with the testimony of Messrs. Glover and Watson (Tr. 390-391, 411, 432-433). It is unnecessary to resolve this credibility issue due to the ultimate outcome of this case.

It appears that on April 16, 1979, no mud was actually in a position to be placed on the rails by the flanges of the mine car wheels. The mine refuse mentioned in the order of withdrawal appears to refer primarily to the material which had been placed in the clearance space on the walkway side of the entry, material that extended the entire distance from No. 35 to No. 50 block. The inspector testified that the mine cars could achieve contact with this material, drag it onto the track and precipitate a haulage wreck; However,.his testimony reveals that he was, in substantial part, requiring Applicant to remove the material from the walkway side because it posed a hazard to pedestrian traffic as opposed to hazards posed to track-mounted equipment.

Of greater significance is the absence of standing water on the-rails, the inspector's inability to recall any water over the rails on April 16, 1979, and his failure to mention the existence of wet or slick rails in the order of withdrawal.

c. The Validity of Citation No. 804951

A mine operator contesting the validity of a 104(b) order of withdrawal is entitled to challenge the existence of the violation set forth in the underlying 104(a) citation. United Mine Workers of America v. Andrus, 581 F.2d 888, 894 (D.C. Cir. 1978); Old Ben Coal Company, 6 IBMA 294, 301 n. 3, 83 I.D. 335, 1976-1977 OSHD par. 21,094 (1976). The language of sections 104(a) and 104(b) of the 1977 Mine Act indicate that the withdrawal order must be pronounced invalid where the underlying citation fails to describe a violation of either the 1977 Mine Act or a mandatory safety standard. In the instant case, the question as to whether a violation of 30 C.F.R. § 75.1403 occurred is governed by the language of the safeguard notice on which the citation is based.

Issues pertaining to the validity of the underlying 104(a) citation are set forth in Applicant's motion to dismiss and in the interpretation given to the safeguard notice.

1. Applicant's Motion to Dismiss

Citation No. 804951 states that it is based on Safeguard Notice No. 2 WHB, issued on January 15, 1973. Exhibit M-4, introduced in evidence as the safeguard notice referred to in the citation, bears identification number 1 W.S.H., January 15, 1973, 30 C.F.R. § 75.1403. During the hearing, Applicant cited this discrepancy as the basis for a motion to dismiss and advanced two arguments in support thereof. A ruling was held in abeyance.

Applicant's first argument asserts that MSHA introduced the wrong safeguard notice in evidence and, accordingly, failed to prove the correct underlying safeguard. MSHA's counterargument asserts that the reference in the citation is a clerical error because Safeguard Notice 1 W.S.H., January 15, 1973, 30 C.F.R. § 75.1403 was the only safeguard notice issued at the Robinson Run No. 95 Mine on January 15, 1973 (MSHA's Posthearing

Brief, pp. 11-12). Applicant's second argument asserts that any clerical error misdescribing the safeguard notice deprived Applicant of adequate notice and that the citation must stand or fall on the sole basis of the information appearing therein.

The evidence presented reveals that Exhibit M-4 is the correct safeguard notice underlying Citation No. 804951. Mr. Carl Trickett, appeared on behalf of MSHA pursuant to a subpoena duces tecum requiring him to produce "Safeguard Notice 2 WHB, issued January 15, 1973, if such document exists, and Safeguard 1 WSH of January 15, 1973." In response to the subpoena, Mr. Trickett caused a search to be made of Applicant's records. The search produced Safeguard Notice No. 1 WSH (Exh. M-9) but failed to produce a safeguard notice denominated 2 WHB, issued on January 15, 1973. Additionally, Inspector Satterfield searched MSHA's records and the search failed to produce a safeguard notice denominated 2 WHB, issued on January 15, 1973. Furthermore, the entries contained in Exhibit M-10 confirm MSHA's assertion that the citation's reference to Safeguard Notice No. 2 WHB, issued on January 15, 1973, is, in fact, a misdescription of Safeguard Notice No. 1 WSH, January 15, 1973, 30 C.F.R. § 75.1403.

The remaining question presented in this regard is whether the misdescription deprived Applicant of adequate notice. I answer this question in the negative because Applicant has shown no prejudice to the preparation or presentation of its case resulting from the clerical error. See, Jim Walters Resources, Inc., 1 FMSHRC 1827, 1979 OSHD par. 24,046 (1979); Old Ben Coal Company, IBMA No. 76-21 (FMSHRC, filed June 2, 1980). It could be argued that Applicant was prejudiced in its efforts to abate the citation as a result of the clerical error. The citation would appear to point to the existence of a safeguard notice requiring the removal of accumulations of both mud and water from haulage track entries in the Robinson Run No. 95 Mine whereas the actual safeguard notice, as construed in Part IV(C)(2) of this decision, requires only the removal of water from such areas (Exh. M-4).

Accordingly, it could be argued that the misdescription of the safeguard notice led Applicant to believe that the mud was in violation of a previously issued safeguard and that the mud had to be removed in order to avoid the issuance of a section 104(b) order or withdrawal. However, the evidence presented reveals that at the time of the hearing Applicant maintained records of safeguard notices issued at the Robinson Run No. 95 Mine during the month of January 1973. The testimony of Mr. Trickett reveals that no one at mine mine attempted to locate a safeguard notice denominated 2 WHB, issued on January 15, 1973, when Citation No. 804951 was issued. Such a search would have revealed not only the nonexistence of such safeguard notice but also the existence of the correct safeguard notice, and the results of such a search should have prompted Applicant to request the inspector to modify the citation to delete any reference to mud.

In view of these considerations, Applicant's motion to dismiss will be denied.

2. Construction of the Safeguard Notice

Safeguard Notice 1 WSH was issued on January 15, 1973, by Federal mine inspector Walter S. Hennis pursuant to the provisions of 30 C.F.R. § 75.1403 which provides that "[o]ther safeguards adequate, in the judgment of the authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 C.F.R. § 75.1403-1(a) provides that: "Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguard6 on a mine-bymine basis under § 75.1403. Other safeguards may be required." [Emphasis added.] MSHA concede6 that Safeguard Notice No. 1 WSH, January 15, 1973, 30 C.F.R. § 75.1403 was issued pursuant to the guideline set forth in the second sentence of 30 C.F.R. § 75.1403-1(a) (Tr. 18-19).

The safeguard notice requires only that "all track haulage roads in this mine shall be kept free of excess water", and contains no reference to mud. Citation No. 804951, however, cited Applicant for accumulations of both mud and water in the subject section of the entry. Additionally, the safeguard notice's statement that "water was over the main haulage track" indicates that the issuing inspector defined the term "excess water" as referring to either standing or flowing water.

A question is presented as to whether the safeguard notice can be construed as encompassing both mud and excess water. For the reasons set forth below, I answer this question in the negative.

I conclude that a safeguard notice must be strictly construed for two reasons. First, 30 C.F.R. § 75.1403 accord6 substantial power to a Federal mine inspector in that it authorizes him to write what are, in effect, mandatory safety standards on a mine-by-mine basis to minimize hazard6 with respect to transportation of men and materials in that mine. Failure to provide the safeguard within the time specified and the failure to maintain the safeguard thereafter render6 the mine operator susceptible to the issuance of a withdrawal order and to the assessment of civil penalties. 30 C.F.R. § 75.1403-1(b). In short, the operator must comply with the requirements of a de facto mandatory safety standard promulgated without the protections or the opportunity to submit comment6 afforded in the rule making process applicable to the promulgation of industry wide mandatory safety standards. Accordingly, the safeguard notice should be written precisely so that there will be no question as to the performance required by the operator. 10/

Second, 30 C.F.R. § 75.1403-1(b) requires, in part, that the authorized representative of the Secretary shall advise the operator in writing "of a specific safeguard which is required pursuant to § 75.1403." [Emphasis added.] The specificity requirement contained in the guideline6 provide6 an alternative basis for concluding that the safeguard notice must be strictly construed.

10/ See also Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. BARB 78-652-P, 1 FMSHRC 1317 (September 4, 1979) (Franklin P. Michels, J.)

In view of these considerations, I conclude that any reference to mud contained in Citation No. 804951 must be deemed surplusage insofar as it forms the basis for a charge that Applicant violated the provisions of the safeguard notice, and that Applicant was properly cited only for the accumulations of water. 11/ The presence of the aforementioned water on March 22, 1979, was a violation of 30 C.F.R. § 75.1403.

D. Order of Withdrawal No. 804918

Applicant was clearly in violation of the requirements of the safeguard notice when the citation was issued on March 22, 1979. On April 16, 1979, there was no actual violation of the technical requirement of the safeguard notice because no water was over the rails or could be deposited atop the rails by the wheels of haulage equipment. However, there was mud in the clearance area and some mud along the rail which could be deposited onto the rails. This was not an actual violation because the March 22, 1979, citation lawfully cited Applicant only for water. The mud condition, however, was still a danger and all future safeguard notices should refer to mud as well as water.

However, assuming for purposes of argument that a violation still existed when the April 16, 1979, order was issued, the evidence presented establishes that Inspector Allen acted unreasonably by failing to further extend the time period for abatement in view of the short amount of time required to complete the work that day and in view of the fact that he had seen fit to grant other more lengthy extensions in the past when conditions were worse.

A well-founded argument could be advanced for the proposition that Applicant was not acting as rapidly as it should have acted in its abatement efforts at various times between March 22, 1979, and April 16, 1979. Consequently, a Federal mine inspector might have been justified in issuing an order of withdrawal at an earlier time. It is unnecessary to make such a determination in the instant case because the scope of appropriate inquiry is considerably more limited, confined, as it is, to an assessment of the determinations that a reasonable man, given an inspector's qualifications, should have made in determining whether the issuance of an order of withdrawal was justified or whether the facts warranted the issuance of another

11/ The Robinson Run No. 95 Mine is located in the Pittsburgh coal seam, a coal seam having fireclay bottom mud (Tr. 33-34). Inspector Satterfield testified that mud exists wherever water accompanies such mine bottom in an attempt to substantiate his belief that mud was encompassed by the safeguard notice. However, he admitted that the safeguard notice contains no express reference to mud even though it was written for the same mine in the same coal seam with the same type of bottom as was Citation No. 804951, and, accordingly, conceded that the safeguard notice dealt "primarily" with water (Tr. 40-42).

I am unable to accept the inspector's broad interpretation of the safeguard notice because the document makes express reference only to standing water, a condition that in no way encompasses the existence of mud as a safety hazard at the time of its issuance.

extension. To this extent, a consideration of past events is appropriate because it provides valuable insight into the type of determinations that the inspector should have made prior to concluding that a further extension was unjustified. Facts material to this issue appear in the following paragraphs.

Approximately 1,300 feet of drainage ditch had been dug on the tight side of the entry by April 5, 1979. The material extracted from the mine bottom during the ditch-digging operation had not been removed from the entry. Considering the conditions existing on April 5, 1979, the inspector testified that a four-man crew could clean approximately 20 to 25 feet per shift and that an eight-man crew could clean approximately 40 to 50 feet per shift (Tr. 175-176). Therefore, it can be deduced that it would have required between 37.5 and 75 shifts for a four-man crew to clean the entry and that it would have required between 30 and 37.5 shifts for an eight-man crew to clean the entry (see, e.g., Tr. 176). It should be noted that Inspector Allen would have used an eight-man crew to perform this task, if he had been the foreman (Tr. 175). The inspector also provided testimony as to the possibility of using the loading machine to expedite the cleaning operation (Tr. 176-178), but the testimony of Respondent's witnesses proves that the use of the loading machine would have been infeasible (see, e.g., Tr. 247).

The inspector's testimony indicates that when he inspected the area on April 12, 1979, he determined that no material had been cleaned from the area since the last extension was issued (Tr. 185-186). The April 12, 1979, extension allotted Applicant greater than five but less that six shifts, excluding the intervening weekend, to complete abatement (Tr. 115), and the inspector apprised mine management at the time that no further extensions would be given (Tr. 160-161). The extension was granted to permit Applicant to clean the area over the weekend (Tr. 392). The same day, mine management scheduled the track cleaning machine to clean the area on Saturday, April 14, 1979 (Tr. 249). It should be noted that approximately 800 feet of track can be cleaned with the machine in one shift (Tr. 301). However, Applicant was able to clean only a minimal amount of the track on April 14, 1979, because the track-cleaning machine burned up several motors (Tr. 252-255, 335). Difficulties experienced in obtaining replacement parts meant that the machine was not operational when the order was issued, but steps were being undertaken to assure its prompt repair (Tr. 334-336). In fact, a motor had to be borrowed from another mine (Tr. 355).

When Inspector Allen arrived at the mine on April 16, 1979, he was informed by mine management as to the difficulties experienced with the track cleaner (Tr. 143144, 190-191, 255-256). He did not direct any inquiries to mine management to determine the nature and extent of its abatement efforts since the time of the April 12, 1979, extension (Tr. 157), and did not inquire as to the steps Applicant proposed to undertake on April 16, 1979, to abate the condition. Such an inquiry would have revealed Applicant's decision to use the track cleaner as soon as it was repaired and would have revealed that a short extension was justified in view of the short amount of time required to abate the condition using the track cleaner. In fact, an additional extension was requested by Mr. Richard Rieger, the general superintendent, and Mr. Donald Glover, the shift safety inspector,

during a meeting held with the inspector after the order was Issued. In requesting this extension, Mr. Rieger informed the inspector that an additional "shift or so" was needed to abate the condition (Tr. 352-353), while Mr. Clover apprised the inspector that the condition would be abated within 24 hours with the track cleaner. Instead, the inspector appears to have simply abandoned all hope that Applicant would abate the condition absent the issuance of a withdrawal order. He testified that, in his opinion, it would have been unreasonable to grant an additional extension because adequate time had already been given in the past, enough time, in his estimation; to have cleaned the area by hand (Tr. 154, 157-158).

However, the information available to the inspector when the April 12, 1979, extension was issued should have placed him on notice that Applicant could not be reasonably expected to hand clean the area by 8 a.m., April 16, 1979, because, by his own estimate, it would have required more than the intervening number of shifts to perform the task. The sole foreseeable methods of meeting the abatement deadline entailed the use of mechanized equipment only or the use of a combination of mechanized equipment and hand-cleaning crews. Yet, on April 16, 1979, Inspector Allen never attempted to ascertain the procedures Applicant was actually using to abate the condition. Such actions cannot be appropriately classified as those of a reasonable man. The appropriate inquiries would have apprised the inspector that a short extension was warranted, especially in view of the lengthy extensions granted in the past when conditions were worse. Accordingly, assuming that a violation existed on April 16, 1979, the order of withdrawal would have to be vacated based upon a finding that the inspector acted unreasonably by failing to further extend the time period for abatement for the short period as requested by Applicant.

In addition thereto, when the order was issued on April 16, 1979, the condition described in the citation for which Applicant was lawfully cited had been abated. 12/ The flanges of the mine car wheels would not have deposited water on the rails. Any water remaining in the cited 1,500-foot section of the loaded track entry posed no hazard of the type described in the original safeguard notice as relates to the track-mounted equipment using the rails. For this additional reason, the order of withdrawal would have to be vacated.

An additional consideration is worthy of mention at this time. The testimony reveals that the accumulations in the clearance space were more extensive on April 16, 1979, than on March 22, 1979, because the material extracted during the installation of the drainage ditch on the tight side of the entry had been deposited there. Inspector Allen's testimony reveals that the order of withdrawal addresses, in substantial part, hazards posed to pedestrian traffic using the walkway as a result of the accumulations deposited on the clearance side whereas Citation No. 804951 addresses only hazards posed to track mounted equipment. Section 104(b) of the 1977 Mine Act authorizes the issuance of an order of withdrawal based upon a finding

12/ In view of this finding, it is unneeessary to address Applicant's claim that the condition had been abated by April 12, 1979 (Tr. 12, 14).

by the authorized representative of the Secretary of Labor "(1) that a violation described in a citation issued pursuant to [section 104(a)] has not been totally abated within the time period as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended * * *" (emphasis added). The emphasized portion of the statute clearly indicates that a 104(b) order of withdrawal must be based on the continued existence of the same condition constituting the violation described in the underlying 104(a) citation. 13/ In substantial part, the mine refuse condition described in the 104(b) order of withdrawal falls within the safeguard notice issuance guideline set forth in 30 C.F.R. § 75.1403-8(d) which provides that "[t]he clearance space on all track haulage roads should be kept free of loose rock, supplies, and other loose materials," a guideline addressed to securing safe walkways for pedestrians using the haulage entries of underground coal mines. The 104(a) citation did not address such a problem. Since the condition termed "mine refuse" as described in the 104(b) order of withdrawal differs from the condition termed "mud * * * accumulated in and-along the load track" as described in the 104(a) citation, the order of withdrawal, if otherwise valid, would have to be modified to delete any reference to the conditions in the clearance area posing a hazard to pedestrian traffic. Other proper procedures should have been carried out by the inspector to deal with that problem. 14/

13/ See also, S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 618 (1978), which states, in part, as follows:

"The Committee believe [sic] that rapid abatement of violations is essential for the protection of miners. A violation of a standard which continues unabated constitutes a potential threat to the health and safety of miners. Therefore, if the violation is not eliminated by abatement in the specified period of time, the miners should be withdrawn from the area affected by the violation until the violation is abated. Section 105(b) provides the Secretary with such authority upon a determination that the violation has not been totally abated within the original or subsequently extended abatement period, and that the abatement period should not be further extended."

and S. Rep. No. 95-461, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 1326 (1978) (Conference Report), which states, in part, as follows:

"Section 105(b) (of section 201) of the Senate bill and the House amendment, adopting Section 104(b) of the Coal Act, established substantially similar authority for the issuance of "failure to abate" withdrawal orders. In both versions, the issuance of such orders was to be based on findings of the Secretary or his authorized representative of the existence of the same set of circumstances."

14/ The testimony of Inspectors Satterfield and Allen clearly demonstrates that accumulations of mud which can be deposited atop the rails of haulage tracks pose serious hazards to miners vis-a-vis track-mounted equipment. Logically, one can infer from the tenor of their testimony that such hazards are well known and that the condition cited by Inspector Satterfield occurs in other underground mines throughout the coal mining industry. In view of this, it appears inappropriate to rely on the issuance of safeguard notices dealing with these hazards on a mine-by-mine basis when a mandatory safety standard applicable to all underground coal mines in the mining industry is clearly necessary to deal effectively with these hazards.

V. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. Consolidation Coal Company and its Robinson Run No. 95 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

3. Federal mine inspectors James D. Satterfield and Bretzel W. Allen were authorized representatives of the Secretary of Labor at all times relevant to this proceeding.

4. Order No. 804918 was improperly issued and is therefore invalid.

5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

MSHA submitted a posthearing brief. Applicant did not submit a posthearing brief. Counsel for both parties set forth on the record various arguments and statements as to the issues. The brief, arguments and statements as to the issues, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they,are immaterial to the decision in this case.

ORDER

A. The prior determination granting Applicant's motion to dismiss the United Mine Workers of America as a party to the above-captioned case is REAFFIRMED.

B. Applicant's motion to dismiss, as set forth in Part IV(C)(l) of this decision, is DENIED.

C. Based on the findings of fact and conclusions of law set forth in Parts IV and V of this decision, the application for review is GRANTED and Order No. 804918 is herewith VACATED.

John F. Cook
Administrative Law Judge

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