

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

5 SEP 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding  
**MINE SAFETY AND HEALTH** :  
ADMINISTRATION (**MSHA**), :  
Petitioner : Docket No. SE 79-10  
: A/O No. 01-01492-03005 V  
**v.** :  
: **Blocton** Strip Operation  
BURGESS MINING AND CONSTRUCTION :  
CORPORATION, :  
Respondent :

DECISION

ORDER OF DISMISSAL

Appearances: Murray A. Battles, Esq., Office of the Solicitor,  
U.S. Department of Labor, Birmingham, Alabama, for  
Petitioner, **MSHA**;  
**W. E. Prescott III**, Burgess Mining and Construction  
Corporation, Birmingham, Alabama, for Respondent,  
Burgess Mining and Construction Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by  
the Government against Burgess Mining and Construction Corporation. A hear-  
ing was held on August 20, 1980.

At the hearing, the parties agreed to the following stipulations (Tr.  
4-S):

1. The operator is the owner and operator of the **sub-  
ject** mine.
2. The operator and the mine are subject to the **juris-  
diction** of the Federal Mine **Safety** and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over  
these proceedings.
4. The inspector who issued the subject citation and  
termination was a duly authorized representative of the  
Secretary of Labor.

5. **A true** and correct copy of the subject citation and **termination** were properly served upon the operator in accordance with the Act.

6. Copies of the subject citation and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the truthfulness or the relevancy of any statements asserted therein.

7. The operator is medium in size.

8. The alleged violation was abated in a timely manner and the operator demonstrated good faith in obtaining abatement.

9. The assessment of a civil penalty **in** this proceeding will not affect the operator's ability to continue in business.

At the hearing, documentary exhibits were received and witnesses **testified** on behalf of **MSHA** and the operator (Tr. 10-96). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 96). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 105-107).

#### BENCH DECISION

The bench decision is as follows:

**This** case is a petition for the assessment of a civil penalty. The alleged violation is of section 77.1301(a) which provides as follows: "Detonators and explosives other than blasting agents shall be stored **in** magazines."

The subject citation sets forth, in pertinent part, that a box-type magazine used to store explosives or detonators in the work areas was not provided in the drilling and hole loading area of the coal pit where three men were working at drilling and loading holes, and that there were five caps and five primers and approximately 100 ammonium nitrate fuel oil bags in the cargo space of a flatbed truck located within 50 feet of holes already loaded and the men working in the area on the drill bench.

The **MSHA** inspector testified that he did not know how the caps, primers, and ammonium nitrate bags were brought to the pit area from their permanent storage magazines, which

magazines had .4 inches of steel around them. At the time the inspector saw these materials in the pit area, the hopper truck, which was the approved means to transport them, was being used elsewhere and the materials were lying on the flatbed truck referred to in the citation. According to the inspector, when the citation was issued the holes were being drilled and the caps, primers, and ammonium nitrate would be used in a short period of time, i.e., a matter of minutes.

The Solicitor argues that 1301(a) applies because **every-**thing is stored until it is actually used. I am unable to accept this argument.

First, the verb to "store" is defined as "to put aside, or accumulate, for use when needed;" Webster's New World Dictionary, Second Edition. These articles were not put aside. On the contrary, they had been taken from the storage magazine, where they had been put aside, and now had been brought to the pit area where they were just about to be used.

Secondly, application of 1301(a) to this case would ignore the entire **scheme and** sequence of subpart "N" which deals with "Explosives and Blasting." Section 1301, with its many subparts, obviously deals with explosives when they are not going to be immediately used. Section 1302 deals with the transportation of explosives and, finally, section 1303 sets forth the many requirements for the handling of explosives as they are about to be used. In particular, section 1303(f) provides that "Explosives shall be kept separated from detonators until charging is started."

The Solicitor admitted that 1303(f) and 1301(a) might overlap. However, I do not believe I should attribute needless overlapping and sloppy drafting to the regulations where it is neither necessary nor appropriate. The sequence set forth in subpart "N" is clear. Accordingly, I conclude section 1301(a) does not apply and that the instant petition must be dismissed.

I must state, **however**, that the operator hardly covers itself with glory in this matter. The juxtaposition of these materials on the flatbed truck appears to have been hazardous. It may be that, despite the time lapse, consideration should be given by the Secretary to amending the citation by changing the cited mandatory standard and to filing another petition.

In light of the foregoing, therefore, the instant petition is dismissed and no penalty is assessed.

DENIAL OF MOTION TO AMEND

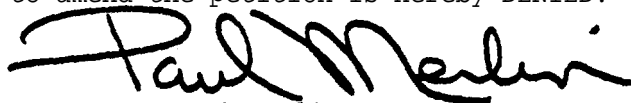
After the close of the hearing and rendition of the bench decision, the Solicitor on August 25, 1980, filed a written motion to amend the instant petition for civil penalty to substitute section **77.1303(f)** instead of section 77.1301(a). The operator then filed a vigorous objection. I find the Solicitor's motion wholly without merit. At the hearing in this case, the operator defended itself only against a charge of violating section **77.1301(a)**. As set forth above, **the bench** decision raised only the possibility that another petition for assessment of a civil penalty might be filed in the future based upon an amended citation. If the citation were amended by **MSHA** and a new petition filed by the Solicitor, the operator would then be entitled to all the Secretary of Labor's prehearing procedures with respect to any alleged violation including the assessment conference. The bench decision here did not and indeed, could not decide that there was a violation of section 77.1303(f). To grant the Solicitor's request would result in a denial to the operator **of** fundamental due process. This I cannot do. The motion is denied.

ORDER

The foregoing bench decision is **hereby** AFFIRMED.

The petition to assess a civil penalty in the above-captioned proceeding is DISMISSED.

The **Solicitor's** motion to amend the petition is hereby DENIED.



**Paul Merlin**

Assistant Chief Administrative Law Judge

Distribution:

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