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SOL (MSHA) V. QUARTO MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. LAKE 79-119 A.O. No. 33-01157-03054
v.	Docket No. LAKE 80-190 A.O. No. 33-01157-03110
QUARTO MINING COMPANY	Docket No. LAKE 80-209 A.O. No. 33-01157-03116
	Docket No. LAKE 80-212 A.O. No. 33-00157-03118
	Powhatan No. 4 Mine
	Docket No. LAKE 80-246 A.O. No. 33-02624-03083
	Powhatan No. 7 Mine
NACCO MINING COMPANY	Docket No. LAKE 80-251 A.O. No. 33-01159-03079
	Docket No. LAKE 80-252 A.O. No. 33-01159-03080
	Powhatan No. 6 Mine
THE NORTH AMERICAN COAL CORPORATION, RESPONDENTS	Docket No. LAKE 80-182 A.O. No. 33-00939-03075
	Powhatan No. 3 Mine

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner, MSHA Timothy Biddle, Esq., and John Scott, Esq., Crowell and Moring, Washington, D.C., for Respondents, Quarto Mining Company, Nacco Mining Company, and The North American Coal Corporation

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Government against Quarto Mining Company, Nacco Mining Company, and The North American Coal Corporation. A hearing was held on September 8, 1980. Prior to the hearing, the parties had agreed to have Docket No. 80-251 heard first. At the outset of the hearing, I reserved a ruling on the operator's motion to consolidate these eight proceedings (Tr. 8). As appears, infra, in the bench decision, I granted the motion to consolidate so that the decision applies to all the cases (Tr. 129-130).

The parties agreed to the following stipulations when the hearing began (Tr. 5-6):

(1) The Nacco Mining Company is the owner and operator of the Powhatan No. 6 Mine.

(2) The operator and the Powhatan No. 6 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The presiding Administrative Law Judge has jurisdiction over this proceeding.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was properly served upon the operator.

(6) The annual coal tonnage produced by the Powhatan No. 6 Mine is between 1.1 and 2 million. The operator is large in size.

(7) The average number of violations assessed per year during the 2 years prior to the issuance of the citation was over 50. The average number of violations assessed per inspection day during the 2 years prior to the issuance of the citation was between 0.7 and 0.8. The operator's previous history is average.

(8) Imposition of any penalty in this proceeding will not affect the operator's ability to continue in business.

(9) The operator demonstrated good faith by correcting the condition within the time specified for abatement and took extraordinary steps to comply by using two men to correct the condition.

(10) All witnesses who will testify are accepted generally as experts in coal mine health and safety.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 10-124). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, oral argument, proposed findings of fact and conclusions of law. Instead, they agreed to have a decision rendered from the bench (Tr. 125). A decision was rendered from the bench setting forth findings of fact and conclusions of law (Tr. 125-130).

BENCH DECISION

The bench decision is as follows:

> This case is a petition for the assessment of a civil penalty for an alleged violation of the operator's dust-control plan adopted under 30 C.F.R. 75.316.
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> The provision of the dust-control plan at issue provides as follows: "All roadways will be kept cleaned and unless roadways are naturally damp or wet, water or calcium chloride will be applied to allay excessive dust that may be raised into suspension." In extensive prehearing filings, the operator contended that this provision is too vague to be enforced since it does not give the operator notice of what conduct is required of it. In particular, the operator has argued that the word "excessive" has not been defined, and that its meaning is unknown.
>
> The testimony of the witnesses at the hearing has borne out the operator's position. No-one has been able to explain satisfactorily what "excessive" means in terms of compliance with this plan. As a general matter, an excessive amount of anything connotes that some lower amount or lower level would be permissible. However, what has emerged from the testimony of the two MSHA inspectors and from most of the operator's evidence is that this is an individual judgment to be made in each instance by either the section foreman or the inspector as to whether there is "excessive" dust. A standard that leaves the entire matter wholly within the unbridled discretion of each and every individual who must deal with it is no standard at all.
>
> At one point, the operator's environmental control director expressed the view that "excessive" dust would be dust which exceeded 2 milligrams per cubic meter of air in an 8-hour period. This may or may not be a feasible approach but in any event, it is not in the plan as presently written and, as indicated hereafter, it most certainly is not the approach followed by the two MSHA inspectors who testified.

The testimony most damaging to the validity of the challenged provision came from the inspector who issued the citation. There is no question as to the inspector's conscienciousness and credibility. However, as already noted he did not know what "excessive" meant. But that did not hamper his issuance of the subject citation under this provision of the plan because he paid no attention to the word "excessive" when he cited the operator. Indeed, the inspector stated that as far as he was concerned, unless a roadway was naturally damp or wet, water or calcium chloride should be applied without regard for the rest of the plan's provision which has the stated purpose of allaying excessive dust that may be raised into suspension. Accordingly, the inspector issues citations whenever a roadway which is not naturally damp or wet is dry. By his own admission, the inspector requires the roadways to be wet.

A standard which is so incomprehensible to those charged with enforcing it that its relevant provisions are disregarded is not entitled to be upheld. If MSHA wishes to require that all active roadways be wet, it would be a simple matter for the plan to so provide. Whether requiring wet roadways all the time makes another matter which is not presented here.

The operator's environmental control director testified that when the language in issue was adopted as a joint undertaking between two of the operator's management people and an MSHA inspector, the operator specifically refused to apply water to the roadways on every shift. It appears to me that problems of interpretation and application were glossed over at the time the plan was adopted by the use of words such as "excessive" when, in fact, there was no agreement or understanding as to what was actually meant.

I have previously stated in other cases that the operator and MSHA cannot avoid difficult interpretative and operational problems by adopting plans containing terms which do not mean anything in and of themselves and which are wholly open-ended. When the parties fail to confront and resolve such issues at the appropriate time, the problems are merely postponed to a later day. That later day always seems to occur in a trial context which in my view is least suitable for an adequate solution. For example, as I have stated, "[t]he parties cannot expect the Administrative Law Judge to rewrite the plan for them or accept interpretations which either are not in the plan or are contrary to what it does contain." Consolidation Coal Company v. Secretary of Labor, MORG 78-331 (October 20, 1978).

In the instant case I will not undertake to rewrite this plan or to read into it something which is not there. The promulgation of a plan is a matter for negotiation between the parties. It is not a matter for judicial fiat. I will not, therefore, take upon myself the responsibility which the law places upon the operator and MSHA to formulate a plan mutually acceptable to them.

In light of the foregoing, I hold the subject provision of the plan is invalid, and that therefore the subject citation based upon it must be vacated.

In light of the foregoing, I hereby grant the operator's motion to consolidate Docket Nos. LAKE 80-209, 80-252, 80-182, 79-119, 80-212, 80-246, and 80-190. All these docket numbers involve the validity of this provision of the plan. I believe, therefore, that the determination set forth above is dispositive of all these docket numbers, although I recognize that there may be some inconsequential factual variations between them. However, in light of the invalidity of the provision of the plan, none of the citations can stand. Accordingly I vacate all the citations based upon section 75.316 contained in these additional seven docket numbers and to that extent I dismiss the Solicitor's petitions in those cases.

Addition to Bench Decision

Docket No. LAKE 80-190 contains two unrelated citations. The operator has advised with written reasons that it is agreeable to settling Citation No. 779973 for $255 and Citation No. 779975 for the original assessed amount of $445. I have been unable to contact the Solicitor and do not wish to delay issuance of this decision because of the press of other matters pending on my docket. However, the Solicitor had previously orally agreed to lower settlements so I assume she will not disagree with these higher amounts. The operator's recommended settlements are approved.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The citations in the above-captioned docket numbers which are based upon the provision of the plan discussed above are VACATED.

The petitions to assess civil penalties based upon the provision of the plan discussed above are DISMISSED.

The operator is ORDERED to pay $700 within 30 days from the date of this decision for two citations in LAKE 80-190.

Paul Merlin

Assistant Chief Administrative Law Judge