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

ERIE MINING COMPANY, CONTESTANT	Contest of Citation Docket No. DENV 79-23-M
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 290475 September 20, 1978 Erie Mine
UNITED STEELWORKERS OF AMERICA, RESPONDENT	

DECISION

Appearances: Philip D. Brick, Esq., Erie Mining Company, for Contestant Leo J. McGinn, Office of the Solicitor, U.S. Department of Labor, for Respondent

Before: Judge Lasher

This proceeding arose when Contestant filed a notice of contest under the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Hibbing, Minnesota, on June 26, 1980, at which both parties were represented by counsel. Shortly after the hearing commenced, counsel for MSHA moved on the record for dismissal on the grounds that Contestant's notice of contest was not timely filed. After lengthy discourse and analysis of the problem on the record (Tr. 9-35), it was determined that the filing of the notice of contest with the MSHA District Office in Duluth, Minnesota, by Contestant's attorney, Philip Brick, on the 30th day after the citation was issued was timely. My ruling in this respect, in its entirety, follows (Tr. 31-35):

> "MSHA has filed a motion to dismiss the application for review in this proceeding on the basis that it was not filed within 30 days after the mine operator received the [citation involved].
>
> The citation in question was issued on September 20, 1978. The evidence reveals that the mine operator's counsel, Philip D. Brick, personally delivered to the District Director of MSHA at the Federal Building in Duluth, Minnesota, a

copy of the document entitled "Application for Review" on or before 2 p.m. on October 20, 1978, which was the 30th calendar day after the citation was issued. One does not count the first day, that is, the day on which the citation was issued, as part of the 30-day time period in computing the 30-day period. The first day is not to be counted as per the provisions of 29 C.F.R. 2700.11(c) of the so-called Interim Procedural Rules, which I find were applicable to all the events which are pertinent to the motion to dismiss. On the other hand, the document entitled "Application for Review" was not received in the Office of Administrative Law Judges of the Federal Mine Safety and Health Review Commission until October 23, 1978, all of which is established by the date stamp appearing on the first page of the original document which I find would have been placed there in the normal course and routine of business.

Several questions are raised by the motion. One is whether or not service on the Secretary of Labor within the 30-day period is sufficient to toll the 30-day statute of limitations. Another question is whether or not this document entitled "Application for Review" is in effect a "notice of contest" as that term is used in the 1977 Act.

I note that under the 1969 Act all such requests for review were designated "Applications for Review," but that this terminology was changed in the 1977 Act. I find, in order to clear up the confusion, that although labeled "Application for Review," the document in question was the initial pleading which initiated the notice of contest and that there is no question but that the provisions of 29 C.F.R. 2700.18 and 19 are both applicable, although in places there is reference to such documents as being "Applications for Review." The implementing regulations cannot validly affect the rights and provisions of the Act itself in the sense that rights of any of the parties are materially reduced or eliminated.

Section 105(d) of the 1977 Act does permit the operator to notify the Secretary within 30 days of receipt of a citation of the operator's desire to contest the citations and further it provides that upon being notified by the mine operator, the Secretary "shall immediately advise the Commission of such notification."

The proviso to Rule 2700.18(b) appears to be the implementation of the statutory provision contained in 105(d) of the Act. Thus, it states:

> Provided, however, that these rules shall not foreclose the party's right to file the Notice of Contest with the Secretary under section 105(d) of

> the Act and such notice, if timely, shall be deemed to satisfy the jurisdictional requirements of section 105(d) of the Act. In that event, the Secretary shall be required to notify the Commission immediately upon receiving a notice from an operator of an intention to contest a citation issued under section 104 of the Act.

I thus conclude that notification to the Secretary within 30 days after receiving the citation by the operator tolls the limitation period.

The question thus remains whether the District Manager of MSHA is an agent for such service or notification.

I would indicate, before answering this question, that I find a conflict between Interim Rule 2700.11 and the proviso to section 2700.18(b) insofar as the circumstances of this case are concerned. Section 2700.11(a) indicates that all initial pleadings in a proceeding such as this one shall be filed with the Commission and provides an address therefor. The proviso, however, preserves the right of the party to file a notice of contest with the Secretary, even though the paragraph previously indicates that the filing of an application with the Commission would be deemed to be timely service on the Secretary.

Thus, the right to serve the Secretary or to notify the Secretary provided in the Act is preserved in the regulation as I understand its meaning.

I find that in view of the situation which existed in the fall of 1978, that it was entirely proper for the mine operator in this case to have filed its contest with the District Director and that apparently in implementing the regulations someone in the MSHA office forwarded the document to the Commission where it was received on October 23, 1978.

I am not certain of this latter finding, but as I recall Mr. Brick's testimony, he indicated he himself did not mail a copy to the Commission and that the only service he effected was that shown on the certificate of service, namely to the District Director and to one Robert Rojeski of the local union.

I find that the 30-day filing period was met by the Contestant in this case and that there is no merit to the motion to dismiss. It is accordingly denied."

A second preliminary matter proved to be dispositive of the case.

In its June 19, 1980, response to a prehearing order, Contestant first questioned the adequacy of the description of the violation in the subject citation, as follows:

> Does Citation No. 290475 allege a violation of 30 C.F.R. 55.12-14 in that it does not state that the cables in question were energized?

Upon consideration of this question, the broader issue of the general legal sufficiency of the citation became apparent. My ruling thereon, delivered from the bench, appears below as it appears in the record (Tr. 55-65) aside from grammatical corrections and the deletion of obiter dicta:

> "The question to be decided is one which I view to be preliminary in the sense that it must be dealt with prior to hearing the merits of this proceeding since it may be dispositive, (1) of the whole case; or (2) of the issue first raised by the Contestant, Erie Mining Company, in its prehearing submissions.
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> * * * * * * *
>
> The Federal Mine Safety and Health Act of 1977, section 104(a), provides, "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the * * * regulation * * * alleged to have been violated." This is (comparable to) the statutory provision contained in the 1969 Act, that is, section 104(e) thereof, which provided, "Notices and orders, * * * shall contain a detailed description of the conditions or practices which constitute a violation * * *.
>
> The citation, No. 290475, is dated September 20, 1978, and reflects that it was issued at 13:15 hours. It cites as the regulation violated, 30 C.F.R. 55.12-14, and describes the condition or practice as follows: "Power cables in excess of one hundred fifty volts were being moved manually without the use of insulated hooks, tongs, ropes or slings." A termination due date of October 20, 1978, was established by the inspector who issued the citation. [Because] this is the only document which was served on the mine operator since * * * there were no attachments or extensions thereto, the question generally is whether the citation does describe with particularity the nature of the violation. The nature of the violation, to paraphrase it, is that hooks and tongs, etc., shall be used when energized cables are moved manually unless suitable protection for persons is provided by other means. The word "unless" ties the two sections of the regulation together. The requirement for the use of hooks and tongs, etc., is conditional on the absence of other suitable protection being available. For there to be a

violation, it must appear that the cables were being moved manually without the use of hooks, tongs, etc., and that other suitable protection was not being

employed. We have a congressional mandate, as far as I am concerned, that citations shall describe with particularity the nature of the violation. There seems to be a liberality and a looseness going on in this particular area with respect to charging persons, whether they be corporate entities or individuals, with violations which can result in the imposition of fines up to the amount of $10,000. The citation in question is really nothing more than a repeat of the regulatory language. Other than the date and time, it provides no real factual details. The fact that it fails to mention that the cables were energized is minor to say the least, but also one detail, among many others, which is left out of the citation. The citation does not indicate how many cables are involved, it does not mention where the cables were, what areas they were, who was exposed to this condition, (or) how many miners were involved manually carrying these cables. There is no description of the cables in terms of length, where they are connected, and the like and I could go on for a long time with the lack of particulars which are conspicuously lacking in the citation.

Even so, this lack of particularity is a minor discrepancy compared to what I view as its major defect and that is that in dealing with this particular regulation, which has two inseparable parts, it only generally and vaguely describes the failure of one of the two prerequisites of the standard. It not only does not indicate that suitable protection was not provided by other means, but it does not indicate why.

The question arises, where is the burden here for establishing a violation? This regulation must not be confused with other regulations which are more simplistic. I find that the failure to deal with the alternate means of suitable protection is a fatal defect. The prejudice to the operator, in turn, is a minor part of the general prejudice which the failure to particularize a citation creates. To begin with, * * * one would certainly have a general instinct of wanting to know precisely what it is (he is) charged with. This is a general political right that I find was envisioned by Congress.

* * * * * * *

I find that in this case there is a prejudice that first starts with that of the problem it created for the mine operator--by not having the particulars, much less an indication, that its alternate system of providing protection was insufficient. The burden in this case was shifted to the operator to * * * file a petition for modification. I construe the mandatory standard allegedly violated as placing the burden on MSHA to first determine whether or not there was suitable protection available and to specify and to state whether

or not that it was or was not adequate and to state why, if MSHA contended that it was inadequate. I am specifically addressing the regulation in question. There may be other regulations and the like where that burden is somewhere else, but I do not find it in this regulation. [There is] substantial prejudice because the * * * whole burden of proof is shifted from MSHA in this case to the mine operator in its modification proceeding. That is one respect in which I find the operator was prejudiced by the lack of specificity contained in the citation.

Secondly, the operator has been prejudiced since its options in achieving abatement in this case are lessened. If it were charged with this regulation properly, that is, allowing cables to be manually moved without the use of hooks and tongs, etc., and not providing suitable protection by other means, the mine operator would have various means of proceeding to achieve abatement. It could then make an informed choice of whether to abate the condition one way or another either using tongs or ropes or by correcting the defect that it was found to have in its alternate system which it refers to as a ground-fault protection system. There is a general prejudice to any party when it is charged with a violation and not given details. I notice that the Commission in MSHA v. Jim Walters Resources, Inc., and Cowin and Company, Docket Nos. BARB 77-26-P and 77-465-P, dated November 21, 1979, indicated that one of the factors which must be considered in determining the validity of the citation is whether or not it prejudices the party charged with the infraction. I think, very generally speaking, [that not being given] details of what you are charged with is a prejudice and that a party should not be forced to go to court to find out with what it is being charged when it can receive a $10,000 penalty. The Commission rightfully recognized that * * * the objective of healthy and safe mines may be advanced when miners, their representatives, and state mine officials are fully informed of mine conditions by notices and orders utilizing specific written descriptions on the pertinent conditions or practices. That can be expanded upon. If a violation is discovered by an inspector, it is certainly helpful to the miners to know precisely what that violation is--and not only the miners but also to the safety representatives, to the union officials, to the foremen and the superintendents at the mine to know precisely what is involved. Indeed to all those people and each and every one of them who have some responsibility toward making the mine safe and who have responsibilities for each others' welfare. There is nothing to be praised or praise-worthy in an order or citation which has just the very bottom line of details in it. Are we to head downhill as fast as we can in some game wherein gold medals are to be handed out by

law enforcement officials to those who put the very least

amount of detail into something that someone is to be charged with? I think not. And I think the Commission has recognized this to some degree, in any event, in the Jim Walters' decision. It did decline to follow the decision of the Interior Department Board of Mine Operations Appeals in Armco Steel Corporation, 8 IBMA 88, decided August 17, 1977, wherein the Board held that where an imminent danger withdrawal order failed to give any description of the conditions or practices, such order should be vacated. [Even] in the case of an imminent danger withdrawal order, there is more excuse, more justification present, for [not] providing details than there is in a citation such as the one before us and indeed the typical citation. Where an inspector confronts an imminent danger, it is more understandable why he does not stop and fill in reasonable details and particulars of the violation he is charging the party with. Even so, there is no reason why such details should not be supplied subsequently.

I conclude that there is manifest prejudice to an operator by the failure to provide particulars, generally speaking, and that in this case there is specific prejudice which is apparent from the face of the record itself and that such prejudice to the operator is of a substantial nature. The interest of safety is frequently given as an excuse for lowering the standard of performance of law enforcement officials in providing particulars of the offense charged. This does not stand up under scrutiny. The more details that are required to be provided, the better informed are those involved in safety. That is particularly true here. Furthermore, the psychology inherent in any work place would mandate that if a positive approach is to be taken in correcting and dealing with safety the specifics of alleged violations must be provided. From the standpoint of the party charged, to receive a vague, general, undetailed citation would promote a more negative reaction than a positive one. Health and safety in the last analysis depends upon open, good faith exchange and dealings between law enforcement, mine operators and miners.

[I am unable to] conceive any possible good which comes from a weakening of the procedural requirements and a weakening of the administrative due process requirements of advising a party charged with an infraction precisely what is involved. In the instant case, vacating the citation will cause no great shaking of the system of enforcing the safety standards. The respondent, with the tacit consent of MSHA, continues to implement its alternate ground-fault protection system during the interim period while a Labor Department Administrative Law Judge, Frysiak, is adjudicating the operator's petition for

modification. I believe that this case can provide the Commission with an opportunity to expand and clarify its decision in Jim Walters Resources, Inc., and thereby accomplish a positive result."(FOOTNOTE 1)

ORDER

Contestant's position having been found meritorious, Citation No. 290475 is VACATED.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE_ONE

1 Adding two or three sentences, sometimes one sentence and sometimes one word, to citations and withdrawal orders can make a significant input to a positive, constructive safety and health enforcement program. This is the foundation of every legal proceeding which follows the issuance of citations and orders. In this connection, it should also be noted that there are no formalized complaint and answer proceedings or procedures in the mine safety and health field.