CCASE:
CONSOLIDATION COAL V. SOL (UMWA)
DDATE:
19801106
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	Contest of Citations
v.	Docket No. PENN 80-224-R Citation No. 838781; 4/10/80
RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT	Docket No. PENN 80-225-R Citation No. 838782; 4/10/80
	Docket No. PENN 80-226-R
UNITED MINE WORKERS OF AMERICA, RESPONDENT	Citation No. 838783; 4/10/80
	Docket No. PENN 80-233-R Citation No. 838747; 4/9/80
	Renton Mine

DECISION

Appearances: William Dickey, Jr., Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant, Consolidation Coal Company;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent, MSHA

Before: Judge Merlin

These cases are Contests of Citations filed by Consolidation Coal Company. A hearing was held on October 28, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 4-5):

(1) The applicant is the owner and operator of the subject mine.

(2) The subject mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) I have jurisdiction of this case pursuant to section 105 of the Act.

(4) The inspectors who issued these subject citations were duly authorized representatives of the Secretary.

(5) True and correct copies of the subject citations were properly served upon the operator in accordance with the 1977 Act.

(6) Copies of the subject citations are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevance of any of the statements asserted therein.

(7) Docket No. PENN 80-224-R will be tried, and the decision with respect thereto will govern Docket No. PENN 80-225-R. Similarly, Docket No. PENN 80-226-R will be tried, and the decision reached therein will govern Docket No. PENN 80-233-R.

At the hearing, documentary exhibits were received and witnesses testified on behalf of the operator and MSHA (Tr. 5-121). 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. 121-122). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 134-139).

BENCH DECISION

The bench decision is as follows:

> The docket numbers in these cases are Penn 80-224-R, 80-225-R, 80-226-R and 80-233-R.
>
> These cases are notices of contest challenging section 104(a) citations for alleged violations of 30 CFR 75.1404-1. Counsel for both parties agreed to try 80-224-R and that the decision in that case would govern 80-225-R. Counsel further agreed to try 80-226-R and that the decision there would govern 80-233-R.
>
> The same inspector issued these citations in 80-224-R and 80-226-R. At issue in all these cases is the meaning of section 75.1404-1 of the mandatory standards. This section provides as follows:
>
> > A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of section 75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design

> capabilities and at speeds consistent with the condition of the haulage road. A trailing locomotive or equivalent device should be used on trains that are operated on ascending grades.

The specific question presented is whether the word "should" in the last sentence of section 75.1404-1 is mandatory or whether it is merely a recommendation or suggestion which the operator can follow or not as it wishes.

> After due consideration I conclude the language in question imposes a mandatory obligation upon the operator. I recognize that in the statutory sections contained in the mandatory standards the word "shall" appears and that in those sections of the mandatory standards which expand upon the original statutory provisions and which are only regulations, the words "shall" and "should" both are used. I have reviewed all the mandatory standards. I have found that the word "should" appears in many other standards besides section 75.1404-1, including roof control and ventilation sections. To hold that "should" is merely discretionary would, therefore, create a great gap in enforcement, which I do not believe was the intent of the drafters of the regulations. Where discretion is intended and allowed, the word "may" is used in the regulations. Accordingly, I hold that the word "should" in this section is mandatory.
>
> In addition, it must be noted that section 75.1404-1 is, itself, an exception to the requirements of section 75.1404 regarding automatic brakes in that it allows an alternative method of satisfying the primary statutory mandate for automatic brakes. For this reason, also, the allowance of dual braking systems on locomotives operated within their design capabilities and at appropriate speeds, together with trailing locomotives or equivalent devices, must be held a requirement of the operator.
>
> Admittedly, the language in question may not be as clear as it might be, but it is sufficiently clear for the operator to have understood that a trailing locomotive or equivalent device was required of it. Indeed, the operator's continued experimentation in this area demonstrates that this was so.
>
> The inspector's testimony that the dragging devices in both citations were not in operable condition is uncontradicted, and I accept it. I further conclude that both citations were based upon conditions which occurred on ascending grades. The inspector's testimony on this point is supported by the numerical grade specifications on the operator's own mine map. Moreover, the operator's assistant mine foreman

specifically testified that the grade involved in the citation in PENN 80-226-R was ascending. Section 75.1404-1 requires equivalent devices on ascending grades. It does not require any particular degree of ascent. These cases fall squarely within the express terms of the standard. Moreover, the inspector testified about the dangers presented by full mine cars ascending even a one percent grade. I find this testimony persuasive. Here the trips contained 30 cars each, which according to the operator's mine foreman, held 8 tons apiece. I further find, based upon both the inspector's testimony and that of the mine foreman, that with respect to both citations the inspector could see far enough to determine that trips were approaching on ascending grades.

I recognize that the operator was experimenting with equivalent devices. However, this does not create an exception to the mandatory standard. It does, however, indicate that the operator's negligence, if any, was minimal. This, of course, is a factor which should be taken into account in the penalty aspects of these cases when they arise between the parties. So too, the length of time the drags had not been in operable condition goes to negligence, not to the existence of a violation.

I further recognize that the Secretary has no published criteria with respect to equivalent devices. However, according to the mine foreman, after some experimentation the operator has now come up with an effective drag or equivalent device. The subject citations were issued because the drags then being used were not in an operable position, and the inspector made clear that if they had been in an operable position, he would not have issued these citations. I believe it preferable for operators to devise equivalent devices they can work with rather than have the Secretary get further into the business of telling operators exactly how they must meet the requirements of the law.

In light of the foregoing, the citations in these docket numbers are upheld, and the notices of contest are dismissed.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The four Notices of Contest contained in these cases are hereby DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge