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SOL (MSHA) v. YOUGHIOGHENY COAL
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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 Proceeding Docket No. LAKE 80-207 A.O. No. 33-01070-03066V
v.	
YOUGHIOGHENY AND OHIO COAL COMPANY, RESPONDENT	Allison Mine

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner
Robert C. Kota, Esq., Youghiogheny and Ohio Coal Company, St. Clairsville, Ohio, for Respondent

Before: Judge Edwin S. Bernstein

On November 19, 1980, I conducted a hearing pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 801 et seq., and 29 C.F.R. 2700.50 et seq., and issued the following decision from the bench:

> My bench decision is as follows: On August 15, 1979, Gary R. Gaines, an authorized representative of the United States Secretary of Labor, issued Respondent Order of Withdrawal No. 825305, pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977.
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> The order alleged a violation of the mandatory safety standard at 30 C.F.R. 75.1100-3. The order read:
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> > The firefighting equipment was not maintained in a usable and operative condition along the No. 3 main haulage track of main east, between the Nos. 1 and 65 crosscuts, a distance of 4,000 feet. Only two water outlet valves were found to be in a usable and operative condition. Two outlet valves found were not functional. The rest of the outlet valves could not be found because they were completely covered with stone and coal, which had fallen from the roof and ribs.

The order referred to a condition in Respondent's Allison Mine in Beallsville, Ohio, on August 15, 1979.

MSHA's Assessment Office recommended the assessment of a penalty of $1,000 for the alleged violation. Respondent challenged the validity of the order and assessment of penalty. At the hearing today, the parties stipulated, and I find the following:

1. At the time that the order was issued, the Allison Mine constituted a coal mine, and its products entered and affected interstate commerce.

2. From 1969 until and including the present time, Respondent owned and operated Allison Mine.

3. Respondent and every miner employed in Allison Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act).

4. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

5. During calendar year 1979, Allison Mine produced 527,843 tons of coal and overall, Respondent produced 1,490,929 tons of coal. It is accurate to conclude that based upon this, Respondent is a medium-sized coal producer. The Secretary of Labor characterized Respondent as a medium-to-large producer, and Respondent characterized itself as a medium-to-small producer. I find that it is a medium-sized producer.

6. On or about August 15, 1979, Respondent produced 300 or more tons of coal per shift.

7. As indicated by Exhibit G-1, a computer printout during the two-year period from August 16, 1977, to and including August 15, 1979, Respondent paid for 741 violations of the Act. The parties stipulated, and I find, that this is a moderate history of violations of the Act and its regulations.

8. The violation alleged in the order was abated in good faith.

MSHA contends that at the time and place of issuance of the withdrawal order in question, Respondent violated the mandatory safety standard at 30 C.F.R. 75.1100-3. That standard reads: "All firefighting equipment shall be maintained in a usable and operative condition. Chemical

extinguishers shall be examined every 6 months, and the date of the examination shall be written on a permit tag attached to the extinguisher."

The alleged violation is specifically based upon a violation of the standard at 30 C.F.R. 75.1100-2(c). Subparagraph (1) of that section reads:

> In mines producing 300 tons of coal or more per shift waterlines shall be installed parallel to all haulage tracks using mechanized equipment in the track or adjacent entry and shall extend to the loading point of each working section. Waterlines shall be equipped with outlet valves at intervals of not more than 500 feet, and 500 feet of firehose with fittings suitable for connection with such waterlines shall be provided at strategic locations. Two portable water cars, readily available, may be used in lieu of waterlines prescribed under this paragraph.

Mr. Gary R. Gaines, the MSHA inspector who issued the order, testified for Petitioner. Paul Wright, the Allison Mine's foreman, and John Scopel, Youghiogheny and Ohio Coal Company's safety and security manager, testified for Respondent.

Inspector Gaines stated that on August 15, 1979, he inspected the No. 3 main haulage track of main east, between the No. 1 and No. 65 crosscuts at the Allison Mine. The distance between the No. 1 and No. 65 crosscuts is approximately 4,000 feet, and is intersected by 65 crosscuts.

He found only four outlet valves. Two of these valves were found to be in a usable and operational condition. The other two were not usable and operational. He could not find any other outlet valves. He concluded that these were buried by stone and coal that had fallen from the ribs. He testified that 30 C.F.R. 75.1100-2(c) required outlet valves at intervals of not more than 500 feet, and that for this distance of approximately 4,000 feet, at least eight valves were required. He stated that he found no portable water cars in the area.

He testified that the haulage tracks were used to haul supplies, men, and materials, but were not used to haul any coal. He issued the order of withdrawal at 11:05 a.m. At about 2:05 p.m., he modified the order to allow resumption

of activity, because one water car had been brought onto the scene. He terminated the order on August 22, 1979, because Respondent then had two portable water cars.

During Mr. Gaines' testimony, the parties stipulated that there was a belt line parallel to the haulage tracks approximately 48 feet distant. Inspector Gaines stated that of the 65 crosscuts that intersected the length of the haulage track in question, only nine were passable. The others all were not passable because of coal and rock that had fallen from the roof and ribs and blocked passage through the crosscuts.

On cross-examination, he acknowledged that there was a portable fire extinguisher on the jeep that he used, and there may have been a second portable fire extinguisher in a vehicle in the area. He stated that there was loose coal along the track, but the area had been rock dusted.

He testified that the condition in question was especially serious because he found an excessive amount of air velocity along the track in question. He found between 270 and 322.5 feet per minute of air velocity upon testing with an anemometer. He indicated that another safety standard, 30 C.F.R. 75.327-1 prohibits velocity in excess of 250 feet per minute, and that such excessive velocity could increase the spread of fire. He stated that among materials carried along the haulage track was hydraulic fluid in drums, some types of which are flammable.

Mr. Wright testified that there were adequate water outlets along the belt line. He stated that he believed that 35 crosscuts between the length of haulage track in question and the parallel length of belt line were open. However, on cross-examination, he admitted that some of these 35 crosscuts did not have bolted roof above them. He stated that there were two portable rock dusters and one foam machine in the area, and that all vehicles carried 10-pound fire extinguishers and some vehicles carried 15-pound extinguishers, and that a foam car, which was quite effective in fighting fire, could reach the No. 1 crosscut in about three to four minutes and could reach the No. 65 crosscut in about eight to 10 minutes. He admitted that wood products and oil, which were carried along the haulage track, could ignite and burn.

He stated that the area had been well rock dusted. He stated that although at the time that the order was issued the air velocity was quite high as the inspector testified, Respondent was in the process of buying mine doors, which

would and subsequently did bring the air velocity down to acceptable limits.

He further testified that in the event of a fire, air velocity could be short circuited by the installation of stops or check curtains. He testified that on August 15, 1979, he saw no black areas on the track. This indicated that rock dusting was performed in a satisfactory manner. He stated that he had worked at the mine for four years and that although outlet valves had been installed along the length of the track in question, they were not maintained during the four years that he was there.

John Scopel testified that he felt that subsection (c) of 30 C.F.R. 75.1100-2 referred to coal haulage tracks, since the criteria of mines producing 300 tons or more were used. He stated that the more coal you haul on the track, the more you need firefighting equipment. He testified that the biggest hazard in igniting a fire is coal dust in suspension, combined with sparks of energized electrical equipment, such as trolley wires. On cross-examination, he conceded that the more coal you mine, the more supplies you transport to the face and the more traffic you have along a haulage track such as this.

Counsel for Respondent contended that 30 C.F.R. 75.1100-2(c) applies only to haulage tracks used for hauling coal, and that since in the Allison Mine the tracks in question do not haul coal, Respondent need not comply with that section. He stressed that subsection (b) of the standard covered belt conveyors, and that a belt conveyor was used in this mine to transport coal.

I disagree with this contention. I think the plain meaning of this language is that all haulage tracks using mechanized equipment in the track or adjacent entry are covered. The word "all" was used. I am also guided by the fact that this statute and the regulations enacted thereunder are remedial in nature, and remedial legislation should be liberally interpreted.

The fact that subsection (b) sets forth standards with respect to belt conveyors does not detract from the fact that similar requirements are mandated with regard to haulage tracks. Had it been intended that only coal haulage tracks were to have been covered by subsection (b), that could easily have been indicated in that subsection. The fact is that the word "all" was used.

I therefore find that Respondent violated this subsection, and the standard at 30 C.F.R. 75.1100-3. That latter section required that all firefighting equipment be maintained in a usable and operative condition, and, pursuant to the requirements of subsection (c) of 30 C.F.R. 75.1100-2, the equipment there was not maintained in a usable and operative condition. The parties have stipulated that the mine in question produced 300 tons or more of coal.

I find that this haulage track in question, even though it hauled supplies, equipment, and men, and not coal, was covered. The testimony is not challenged that the distance in question, approximately 4,000 feet between the No. 1 and No. 65 crosscuts, lacked outlet valves at intervals of not more than 500 feet. There was no dispute to the inspector's testimony that he found only two operative valves, and that at least eight should have been provided in operative condition.

Furthermore, it is not disputed that there were no portable water cars in the area on August 15, 1979. Therefore, Respondent violated these provisions as alleged. I also find that the issuance of the order of withdrawal, pursuant to Section 104(d)(1) of the Act was appropriate. That section indicates that such an order should be issued if an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and that such violation is caused by an unwarrantable failure of the operator to comply with such mandatory health or safety standards.

I find that the operator should have known that it violated this standard. The haulage track had been provided with outlets in the past, but these were rendered inoperable, and many of them were buried by coal and rock. This indicates that, at least in the past, the operator contemplated using such a system. Although Respondent's counsel has effectively raised a question of interpretation of the standard, and has done a good legal job of arguing that point. If the operator had a question as to the interpretation as to the application of that standard, it could have and should have requested an interpretation of that standard from MSHA. There is no evidence that the operator attempted to clarify that provision.

Therefore, it should have known and it could have determined its responsibility, and its failure to do this constituted an unwarrantable failure as that term is defined in Section 104(d)(1) of the Act.

Having found a violation of the standard, the next question is the amount of penalty to be assessed. The criteria to be considered are contained in Section 110(i) of the Act. There are six criteria: (1) Size of the operator. I find that the operator is a medium-sized coal producer. (2) History of previous violations. I find that Respondent had a moderate history of previous violations. (3) Whether the operator was negligent. For the reasons that I have indicated, I find that the operator was negligent. (4) The effect on the operator's ability to continue in business. Although the operator has contended that it has lost approximately five million dollars, or will lose this amount for the calendar year of 1980, the operator has offered no evidence to support the contention that the assessment of a penalty in the approximate amount recommended by the Assessment Office would affect its ability to continue in business. The burden of proof on this issue is on the operator. I therefore find that the assessment of such a penalty would not affect the operator's ability to continue in business. (5) The demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. In accordance with the parties' stipulation, I find that the operator did abate this violation in good faith.

The sixth and last criterion has to do with gravity. With regard to gravity, the length of the track in question was 4,000 feet covering 65 crosscuts, a substantial length of track. The evidence is that there was loose coal about, that there was excessive velocity in the area, which would tend to blow coal dust about, and which could aggravate and increase the spread of a fire. In terms of gravity, the fact that this track was being used to haul men was quite serious, in that men trapped in a fire in this area could be killed or seriously injured. On the other hand, the area was well rock dusted. There was one and perhaps two portable fire extinguishers on vehicles in the area, and Respondent's evidence that there were two portable rock dusters in the area is not disputed. Additionally, a foam car could have reached the area in between three and 10 minutes. As to the evidence that there were waterlines along the belt conveyor, which was 48 feet parallel at its closest point, I do not find that this would have been too helpful, since most of the intersections between the belt conveyor and the haulage tracks were not readily accessible.

I find quite credible the inspector's testimony that only nine of those crosscuts could be safely traveled. The operator's witness seemed less certain of the point, and I credit the inspector's testimony.

> Upon consideration of all of these criteria, I assess a penalty in the amount of $750 for this violation, and I uphold the withdrawal order that was issued. I will issue a written decision upon receipt of the transcript, accompanied with an order. Respondent will be required to pay the penalty assessed within 30 days of service of that written decision and order.

I hereby affirm this bench decision.

ORDER

Respondent is ORDERED to pay $750 in penalties within 30 days of the receipt of a copy of this Order.

Edwin S. Bernstein
Administrative Law Judge