CCASE:
SOL (MSHA) v. PEABODY COAL
DDATE:
19810205
TTEXT:

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. CENT 80-298 A.O. No. 03-00286-03006
v.	Ozark Surface Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION AND ORDER

On the basis of a stipulation of material facts not in dispute the operator has waived an evidentiary hearing and moved for summary decision and an order of dismissal. The agreed upon facts show that at the time the TD-25 International Bulldozer in question was cited it was provided with adequate rollover (ROPS) and falling object protective structures (FOPS). Stip. Para. 13. Nevertheless, the Secretary opposed the motion on the ground that additional FOPS in the form of brush guards or sweeps should have been installed to provide further or additional protection from "falling material from the trees" that were being cleared from the site of a surface coal mine.

Unable to point to any specific requirement for such additional structures, MSHA relies on the inspectors' belief that the absence of such additional devices may be treated as "equipment defects affecting safety" within the meaning of 30 C.F.R. 1606(c) of the mandatory safety standards relating to the inspection and maintenance of loading and haulage equipment.

The Mine Safety Law and the mandatory safety standards having the force and effect of law are remedial. They are, therefore, to be liberally construed. But because they are also penal the due process clause prohibits the imposition of sanctions without fair warning of the acts and conduct prohibited. Cape & Vineyard Division v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); General Dynamics Corporation v. OSHRC, 599 F.2d 453, 464 (1st Cir. 1979). An objective appraisal of the evidence, including the depositions of the inspectors, is persuasive of the fact that the operator did not know and had no reason to know that if its equipment was provided with adequate ROPS and FOPS, as the government has stipulated, it should have anticipated that an inspector on the basis of information entirely extraneous to that germane to the regulatory

process or any administrative or judicial interpretation might "believe" that brush guards or sweeps should also be required. There is no dispute about the fact that as previously applied 1606(c) was interpreted as applying only to defects "affecting" devices already affixed to machinery in service and not to the necessity of providing additional safeguards. The same considerations led the inspectors to reject the use of 30 C.F.R. 77.404(a) as the basis for requiring installation of sweeps (Dorton Deposition, 8). As so applied, of course, the standards are permissibly intelligible and valid.

The novelty of the inspectors' interpretation in this case was underscored by the Assessment Conference Officer who noted:

> This is considered a very technical violation in that protection was provided for the equipment operator (cab) and the probability and degree of injury is not very severe, a borderline violation in that this standard pertains to equipment defects not safeguard inadequacies.

Thus not only did the operator not know or have reason to know of the inspectors' interpretation or of any industry practice but so also the Assessment Office was surprised to learn of that interpretation and viewed it as "borderline". Indicative of the subjective nature of the inspectors' interpretation is the fact that Inspector Newport got the idea for expanding the scope of the standard from a newspaper article about a friend who was killed pushing down trees (Newport Deposition 8-9). Nothing in the newspaper article, however, referred to the lack of a brush guard as a cause of the fatality (Newport Deposition 9-10). This is not to say that brush guards or sweeps should not be required on dozers clearing trees. A simple notice to provide safeguards or an interpretive bulletin from MSHA to the operators may easily cure the deficiency in the standard's present coverage. All that I hold in this decision is that the standard as applied to the facts of the violation alleged is impermissibly vague. Thus, unlike a finding of facial vagueness, which results in a standard being declared unenforceable against all operators, the finding that the interpretation urged renders the standard impermissibly vague as applied to these facts results only in a vacation of the citation.

If we are to have a government of laws and not of men, an inspector's subjective belief, no matter how sincerely held, cannot be made the basis of a finding of civil or criminal violation. This is fundamental to any system of orderly regulation. As Professor Bickel has so trenchently noted:

> With an administered statute, there is no duty to obey and no peril to the individual before the administrator acts, and his action is ample warning. A decisive consideration here . . . is, rather, that a loosely worded statute allows latitude for discontrol,

> irrationality, for erratic, prejudiced, discriminatory, or overreaching . . . exercises of authority. The danger is greatest from administrative officials -- particularly from petty officials -- but it should be guarded against as well with prosecutors, who have power to harrass, and with judges and juries. Hence this is a relevant consideration in self-enforcing criminal statutes as well as in administered ones.
>
> The evil at the root of the risks . . . is irresponsibility. A vague statute delegates to administrators, prosecutors, juries, and judges the authority of ad hoc decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact. In addition, such a statute delegates authority away from those who are personally accountable, at least for the totality of their performance, to those who are not, at least not directly. In both aspects, it short-circuits the lines of responsibility that make the political process meaningful. And so it is far from sterile conceptualism to say that a vague statute delegates power to make decisions that do not derive from a prior legislative decision and that do not, therefore, represent the soverign will, expressed as it should be. Of course, differences of degree are vital. Much will depend on what sort of decision is delegated, how much of it, and to whom. Be that as it may, when the Court finds a statute unduly vague, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision. It does not hold that the legislature may not do whatever it is that is complained of but, rather, asks that the legislature do it, if it is to be done at all. A. M. Bickel, The Least Dangerous Branch 151 (1962). (FN.1)

The operator was also cited for not recording in its on-shift examination book the claimed violation of 77.1606(c). 30 C.F.R. 77.1713(a). Since I find there was no violation of 1606(c), it follows that the violation of 1713(a) alleged did not, in fact, occur.

Accordingly, and for the additional reasons so ably tolled in the operator's supporting brief, I find (1) there is no genuine issue of material fact and (2) that the operator is entitled to summary decision as a matter of law. It is ORDERED THEREFORE that the motion for summary decision be, and hereby is, GRANTED and the captioned matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 See also, A. G. Amsterdam, The Void for Vagueness Doctrine In the Supreme Court, 109 U. Pa. L. Rev. 67, 80, 90, 108 (1960); J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L. J. 575, 582-586 (1972); Secretary of Labor v. Massey Sand and Rock Company, 1 FMSHRC 545, 554-555 (June 1979). Compare, Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952).