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

UNITED STATES STEEL CORPORATION, CONTESTANT	Contest of Order
v.	Docket No. PENN 80-318-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Order No. 841730
AND	
UNITED MINE WORKERS OF AMERICA (UMWA), RESPONDENTS	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. PENN 81-48 A.C. No. 36-05018-03060V
v.	
UNITED STATES STEEL CORPORATION, RESPONDENT	Cumberland Mine

DECISION

Appearances: Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Contestant-Respondent; David Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent-Petitioner.

Before: Judge Melick

Expedited hearings were held in these cases in Meadow Lands, Pennsylvania, on January 29 and 30, 1981, pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," and in accordance with Commission Rule 52, 29 C.F.R. 2700.52. A bench decision was rendered following those hearings. That decision, which I now affirm, is set forth below with only non-substantive modifications.

The contest of Order No. 841730 and the civil penalty case associated with that order have been consolidated for hearing. The validity of the order of withdrawal issued under the provisions of section 104(d)(1) of the Act (FN.1) is therefore before me as well as the question of whether there have been any violations of mandatory standards. If I find that there have been such violations, then I must also determine the amount of civil penalty that should be assessed considering the criteria under section 110(i) of the 1977 Act.

Because these cases have been heard on an expedited basis (indeed the parties agreed to proceed with only 2 days' notice), some evidence relating to the penalty criteria is not yet available. I will not, therefore, be in a position to make a final determination as to the amount of any penalty at this time, but I will nevertheless make whatever findings I can based on the evidence that is available.

The order at issue here actually charges eight separate violations which appear to fall within three categories. (FN2)

The first category involves loose and overhanging ribs which are alleged to have existed in violation of the mandatory standard at 30 C.F.R. 75.200. That section, in relevant part, provides that the roof and ribs of all active underground roadways, travelways and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The second and third categories of alleged violations concern the operator's roof-control plan. Although the relevant part of the standard at 30 C.F.R. 75.200 requires only the filing of a roof-control plan that is approved by the Secretary, those provisions have been construed to also require that the operator comply with that plan. The second category of violations charge more particularly that the entry widths in certain areas of the mine were in excess of 16 feet as called for in the roof-control plan. The third category of violations charge more particularly that excessively long diagonal distances existed at various intersections.

For the reasons I am going to set forth later in this decision, I conclude that none of the violations in these cases was caused by "unwarrantable failure." "Unwarrantable failure" has been defined as the failure by an operator to abate a condition that he knew or should have known existed or the failure to abate because of indifference or lack of due diligence or reasonable care. Zeigler Coal Corporation, 2 IBMA 280 (1977).

I find however that violations nevertheless did exist here with respect to the first and second of the eight

charges--those relating to loose and overhanging ribs. The testimony of the two inspectors is entirely credible and I find from their testimony that significant portions of the cited ribs were cracked, that 2- to 3-foot sections of rib extended into the entry from 6 to 12 inches and that these conditions existed sporadically throughout 300 to 400 feet of the No. 3 entry between crosscuts No. 31 and No. 27 and in the West Mains parallel track haulage entry from the No. 31 crosscut to the No. 1 switch entry.

This evidence of the rib conditions is indeed even supported by the testimony of the operator's own witnesses. For example, the company inspector-escort, Charles Lemunyon, admittedly saw portions of the cited rib fall to the floor after being tapped by a sounding stick. Other witnesses for the operator claimed not to have seen the conditions described by the inspectors but that evidence certainly does not contradict the affirmative findings by the inspectors. Much of the difficulty these witnesses were having was clearly only one of semantics. According to their definition an unlawful "overhanging rib" is only an overhanging rib that is above head level. No authority has been offered such a narrow interpretation and I find it to be totally erroneous. That explains, however, why the operator's witnesses could never reach the conclusion that any of the ribs cited here were in fact "overhanging."

In dealing with the question of unwarrantable failure and negligence, I am not convinced that management was aware of the existence of overhanging or loose ribs. The testimony of union safety committeeman Robert Sollar and safety committee chairman Gregory King in this regard is inconclusive. Although Sollar and King had complained to mine superintendent Sullivan about various general safety problems, neither sought to have the ribs scaled. They asked only to have management look at various conditions to see if management thought they warranted attention. That indicates to me that there was no specific or serious concern with any obvious rib condition. They apparently could not reach the conclusion themselves that the ribs were, indeed, overhanging or loose but merely requested management to have a look. Furthermore, while I do not doubt that Art Guty, a miner assigned to clean up sloughage along the ribs in the West Main haulage, may have also made various complaints to management about conditions in the mine, it is not that clear that he had complained specifically about the overhanging and loose ribs at issue in the order at bar. Guty admitted that before the order was issued, he had indeed already scaled those ribs he thought posed a danger as he cleaned up sloughage alongside the ribs.

I am also persuaded by the testimony of the operator's witnesses that the cited rib conditions were not very unusual when compared to other uncited sections in this mine and, indeed, in other mines in the Pittsburgh seam. Although, as I say, I believe violations did occur here, I do not believe that the violative conditions were so obvious and clear that the operator could be charged with having knowledge that the violations existed or that it should have known of the conditions before they were cited in the order. I do not therefore find that the violations were the result of "unwarrantable failure" or any significant negligence.

I find the gravity of the hazard created by these rib conditions to have been moderate to serious. Mr. Guty testified that he continued shoveling sloughage alongside some ribs that purportedly were overhanging without apparent serious concern for his safety. Moreover, the persuasive evidence in this case is that the overhanging portions of the ribs were not above head level where clearly the most dangerous hazard would exist. Neverthless, the overhanging portions here did create a hazard of serious injury to someone who might be bending over and to the lower portions of the body of someone working adjacent to the ribs. There is no question that there was rapid good faith abatement of these violations.

The next series of violations related to provisions on page 4 of the roof-control plan which specify that entry widths shall be 16 feet. As I stated when the motion to dismiss was filed and throughout this proceeding, I believe that the operator is bound by the plain meaning of the language in its roof-control plan and must strictly comply with its terms. It is not the province of the Administrative Law Judge to create a new roof-control plan or rewrite the plan under the guise of construction. Thus, when the roof-control plan calls for entries not to exceed 16 feet, the entries must not exceed 16 feet. If the entries are wider than 16 feet it is at least a technical violation of the plan.

There is no dispute that the widths of the cited entries were in excess of 16 feet where noted by the inspector. There is no question about that and therefore the violations have been proven as charged. The gravity of the violations and the negligence of the operator must then be considered. In this regard, the inspector himself indirectly admitted that these conditions were not necessarily a hazard under the facts of this case because of the operator's roof-bolting practices. Indeed the inspector admitted that the pattern of four roof bolts set across the entry that was in fact followed here would have been an acceptable method of abating the cited condition had

those bolts been installed after the excess

width violations had been discovered by him. Inexplicably, the inspector concluded that because the roof bolts here had been inserted before his discovery of the excess widths, it was not therefore an acceptable mode of abatement. Under the circumstances I cannot conclude that the excess widths created any hazard.

Under the circumstances, I also cannot conclude that U.S. Steel was negligent or that the violation was the result of "unwarrantable failure." It certainly was operating under the reasonable belief that its four-roof-bolt pattern provided adequate roof support even where the entry widths slightly exceeded 16 feet. Moreover, MSHA now appears to concede that such a bolting pattern did indeed provide the necessary support. The foregoing discussion points out one of the many problems I have with this roof-control plan. I believe that clarification is needed with respect to exactly what is going to be required of the operator where sloughage (which everyone concedes is going to occur) causes these entries to exceed 16 feet. The plan as it now exists unfortunately does not deal with that problem.

With respect to the final series of charges in the order at bar, I find that there are actually two possible violations of this section of the roof-control plan. The last paragraph on the page containing drawing No. 4 states that the sum of diagonals A and B (which are the diagonals in the intersections) shall not exceed 56 feet. That is an unconditional requirement of the plan and no exceptions are set forth. In examining the relevant exhibits, I find as a matter of fact that the sum of the diagonals in each and every cited intersection exceeds 56 feet. Now, with respect to these measurements, I observe that the notes of the inspector made at the time he was underground differed in many cases from the measurements on the corresponding exhibit submitted by MSHA. However, in either case, regardless of which measurement you take, the sum of the diagonals is in excess of 56 feet. The operator has not produced any affirmative evidence of its own to contradict these measurements so I find for purposes of the violations here, that the differences in the inspector's notes are immaterial. So again I must find that at least technical violations of intersection widths have been proven as charged.

I observe, however, that the plan also specifies that if either diagonal A or diagonal B exceeds 31 feet, then additional support consisting of posts or cribs may be provided to abate that condition. I find that in each of the cases cited that, indeed, such additional support was provided within the general vicinity of the intersection. The Government seeks to

have me write into the roof-control plan

a requirement that this additional support must be located precisely within the direct line of the diagonals. I find no such requirement in the roof-control plan and I do not intend to write such a requirement into the plan. As I said before, I believe it is improper in construing these plans to consider the secret beliefs, the secret intentions or the uncommunicated interpretations that either party has regarding the plan. I observe that in any event MSHA admitted that it could produce no scientific or empirical evidence to support its contention that the additional support in these wide intersections should be placed in the direct line of the diagonals to provide maximum support or that the support actually provided by the operator was in any way less safe. This is also an area where amendments to the roof-control plan ought to be made to obviate future litigation of this issue and so that the operator knows exactly what is required of it.

Under all the circumstances, although I conclude that the sum of the diagonals was in excess of 56 feet and that therefore there was at least a technical violation of the roof-control plan, I believe the operator had made good faith efforts to do what it understood to be required to abate such a condition i.e. install additional support using cribs and timbers. It was not an unreasonable interpretation of what the roof-control plan called for so I do not find that the operator was negligent in any of these circumstances. For the same reason I do not find that the violation was the result of "unwarrantable failure."

Since MSHA could not say that the location of the added support in these intersections was not at least as good as within the direct line of the diagonals, I cannot find that the condition here was hazardous. In the absence of any such scientific or empirical evidence that there was any greater hazard created by the actual location of these cribs and posts, I am unable to assess gravity.

I find in accordance with the stipulations entered at the beginning of this case that the operator and this mine are certainly of large size. There is no evidence that the operator would be unable to pay any penalties that I might impose in this case.

As I say, I will not issue a final order regarding the amount of penalty until such time as I see the history of any prior violations. (FN.3)

ORDER

Order of Withdrawal No. 841730 is vacated. The following penalties totaling $406 shall nevertheless be paid within 30 days of this decision for violations of the cited mandatory standard. Secretary v. Island Creek Coal Company, 2 FMSHRC 279 (1980).

Violation No.	Penalty
1	$200
2	200
3	1
4	1
5	1
6	1
7	1
8	1

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

~FOOTNOTE_TWO

2 The order reads as follows:

"The approved roof control plan was not being complied with in the Nos. 3 and 4 West Main track haulage entries. Loose and overhanging ribs were observed by this inspector and George

Rantovich, inspector on both sides of the No. 3 entry from No. 31 crosscut to No. 27 crosscut where mantrips and supply wagons were parked, and on both sides of the West Main parallel track haulage entry from No. 31 crosscut to the No. 1 track switch. The width of the West Mains parallel track entry between No. 31 crosscut and the No. 1 track switch was measured to be 18 feet or more in width for approximately 15 hundred feet. The diagonal distances of 4-way intersections located in the West Main parallel track entry were measured as follows: No. 9 intersection 34-1/2 ft. by 26 feet; No. 8 intersection 36 ft. by 22 ft.; No. 3 intersection 40 ft. by 21 ft.; No. 2 intersection 32 ft. by 27 ft.; intersection at sta. No. 1283 measured 37 ft. by 38 ft. The approved roof control plan requires that the roof and ribs of all active underground roadways be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs, and that the width of entries not exceed 16 feet. The plan also states that the total diagonal distance of 4-way intersections not exceed 56 feet and that neither diagonal distance exceed 31 feet. Additional supports had not been set to reduce the width of the entries or intersections to allowable limits. This area is traveled daily by assistant mine foreman and miner examiners who should have observed the conditions."

~FOOTNOTE_THREE

3 A computer printout entitled "Assessed Violation History Report" which was submitted posthearing indicates a significant history of violations at the Cumberland Mine including 28 violations between August 11, 1978, and August 10, 1980, of the standard here at issue.