

CCASE:

REPUBLIC STEEL v. SOL (MSHA)

LOCAL UNION # 688 (UMWA) v. REPUBLIC STEEL

SOL (MSHA) v. REPUBLIC STEEL

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

REPUBLIC STEEL CORPORATION,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Contest of Order

Docket No. PENN 80-56-R

Clyde Mine

LOCAL UNION NO. 688,
DISTRICT 5, UNITED MINE
WORKERS OF AMERICA,
COMPLAINANT

v.

Complaint for Compensation

Docket No. PENN 80-112-C

Clyde Mine

REPUBLIC STEEL CORPORATION,
RESPONDENT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

Civil Penalty Proceeding

Docket No. PENN 81-29

A.C. No. 36-00967-03059

Clyde Mine

REPUBLIC STEEL CORPORATION,
RESPONDENT

DECISION

Appearances: B. K. Taoras, Esq., Republic Steel Corporation, Coal
Mining Division, Meadow Lands, Pennsylvania for Republic
Steel Corporation;
David E. Street, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania, for
Secretary of Labor;
Mary Lu Jordan, Esq., United Mine Workers of America,
Washington, D.c. for Local Union 688, District 5, United
Mine Workers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by Republic Steel Corporation (hereinafter Republic) on November 13, 1979, to contest an order of withdrawal issued by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(b) (hereinafter the Act). On January 3, 1980, the Contest of Order was dismissed without prejudice by Administrative Law Judge Joseph B. Kennedy. On October 9, 1980, the Federal Mine Safety and Health Review Commission (hereinafter Commission) vacated the order of dismissal and remanded the matter for further proceedings. Thereafter, the Contest of Order proceeding was consolidated with the Complaint of Compensation brought by Local Union 688, District 5, United Mine Workers of America (hereinafter UMWA) against Republic arising out of the order in controversy. At the time of the hearing and over Republic's objection, the civil penalty proceeding involving the underlying citation was also consolidated with the other two cases.

A hearing was held on these cases in Pittsburgh, Pennsylvania, on January 20-21, 1981. The following witnesses were called to testify on behalf of MSHA: Lawrence Merella, Robert Swarrow, William Thistlewaithe, and Robert Semancik. The UMWA called Gary Mylan as a witness. Republic called no witnesses.

ISSUES

1. Whether the order and citation were properly issued.
2. Whether Republic violated the Act or regulations as alleged by MSHA and, if so, the amount of the civil penalty which should be assessed.
3. Whether employees at the mine were idled by the order in question entitling them to receive compensation and, if so, the amount of compensation to which they are entitled.

APPLICABLE LAW

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

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, 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.

Section 111 of the Act, 30 U.S.C. 821, provides as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift,, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations,

the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. Republic operates the Clyde Mine.
2. The products or operations of Republic's Clyde Mine affect interstate commerce.
3. Republic is an operator for purposes of section 111 of the Act.
4. Inspectors Robert Swarrow, Lawrence Merella, and William Thistlewaithe were duly authorized representatives of the Secretary of Labor at all times relevant to this proceeding.
5. At 1:45 p.m., on September 24, 1979, Inspector Lawrence Merella issued to Republic at its Clyde Mine Citation No. 624247 pursuant to section 104(a) of the Act.
6. Citation No. 624247 alleged a violation of 30 C.F.R. 75.200 as follows:

There was a violation of the roof control plans as hanging bolts, legs knocked out from cross bars and the roof above cross bars that had fallen away was not lagged to support broken roof on the main track haulage from 2 West to 2 Flat switch at the following locations: (1) from pump no. 22 -- 75 feet outby there were 23 hanging bolts; (2) two hanging bolts on the wire side just inby shelter hole no. 156; (3) 50 feet outby shelter hole no. 151 -- needs lagging over the cross bar on the wire side; (4) 300 feet inby the Jacuzzi pump -- the loose rock on the cross bars taken down and roof bolted; (5) 300 feet outby 3 East switch -- the area needs to be bolted or lagged above the cross bars; (6) 25 feet outby shelter hole no. 150 (near telephone) -- two bolts need to be installed; (7) just outby shelter hole no. 149 -- the left side above the cross bars needs lagging; (8) 20 feet outby shelter hole no. 148 -- a cracked cross bar needs replaced; (9) 300 inby 2-1/2 West switch -- two legs need be replaced two under cross bars and needs bolted; (10) 50 feet outby the bottom of 3 East switch -- two bars need replaced under cross bars and one leg replaced just outby 3 East switch; (11) inby no. 136 shelter hole -- 20 feet of coal rib

and broken rock on the wire side taken down; (12) replace broken cross bar -- 75 outby 3 East wreck latch; (13) replace four legs under cross bars -- outby shelter hole no. 1; (14) at shelter hole no. 129 -- replace three legs under cross bars; (15) 20 feet outby shelter hole no. 122 -- replace four hanging bolts; and (16) replace four hanging bolts outby shelter hole no. 126.

7. The parties stipulated and I find that the inspector was mistaken when he alleged a "violation of the roof control plans" because the area in question was driven prior to the enactment of the Federal Coal Mine Health and Safety Act of 1969.

8. The condition of the roof and rib in the Clyde Mine on September 24, 1979, was as stated in Citation No. 624247.

9. Citation No. 624247 establishes a termination due date of October 9, 1979, at 8 a.m.

10. During the period of time between the issuance of Citation No. 624247 and October 10, 1979, Republic took no action to abate the citation.

11. At noon on October 10, 1979, Inspector Robert E. Swarrow issued to Republic, at its Clyde Mine, withdrawal Order No. 624051 pursuant to the provisions of section 104(b) of the Act. The withdrawal order stated that it was issued because "no apparent effort was made by the operator to correct the roof conditions" in the 16 areas along the main track haulage listed in Citation No. 624247.

12. Republic presented no evidence concerning its inability to abate the citation within the time allowed by the citation.

13. On September 18 and 19, 1979, MSHA inspector, William Thistlewaithe, issued other citations for conditions along the haulage at Republic's Clyde Mine. These citations had not been abated prior to Inspector Merella's issuing Citation No. 624247. Inspector Thistlewaithe and the management of Clyde Mine had a discussion regarding the sequence or order of abatement of the citations. Prior to the issuance of Citation No. 624247, Inspector Thistlewaithe told Republic that if good faith was shown and an honest effort was performed toward getting the most hazardous conditions abated first, the time for abatement of other citations would be extended. On October 9, 1979, Inspector Thistlewaithe terminated one citation and extended the time for abatement of two others.

14. During all periods of time relevant to this proceeding, Republic regularly operated three daily shifts at its Clyde Mine. The shifts are commonly referred to as the midnight shift, the day shift, and the afternoon shift.

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15. As a direct result of Order No. 624051, certain miners scheduled to work from 4 p.m. to midnight were idled for the entire afternoon shift of October 10, 1979.

16. Such miners, except for Mr. Bundy, have been compensated for 4 hours of such afternoon shift as indicated on Joint Exhibit No. 1.

17. As a direct result of Order No. 624051, certain miners scheduled from midnight to 8 a.m., on October 11, 1979, were idled for their entire 8 hour shift.

18. Joint Exhibit No. 2 identifies those miners who were idled during the midnight to 8 a.m. shift on October 11, 1979.

19. As a direct result of Order No. 624051, certain miners scheduled to work the day shift on October 11, 1979, were idled for their entire 8 hour shift.

20. Joint Exhibit No. 3 identifies those miners who were idled during the day shift of October 11, 1979.

21. The parties stipulated that if Order No. 624051 was affirmed, miners listed in Joint Exhibit Nos. 1, 2, and 3 are entitled to compensation for the period of time set forth in paragraphs 15 through 20 of the Findings of Fact herein.

22. In the 2 years prior to the issuance of Citation No. 624247, Republic was assessed 429 violations in 952 inspection days.

23. Republic's Clyde Mine is a large underground coal mine.

24. Republic is a large operator.

25. Order No. 624051 was modified on October 11, 1979, at 2 p.m., to allow use of the main track haulage because of the abatement efforts made by Republic up to that time.

DISCUSSION

I. Citation No. 624247

It appears that the area of the mine in controversy was driven in the late 1940's or early 1950's when there was no requirement of an approved roof control plan. Indeed, MSHA has now stipulated that the roof control plan does not apply to this citation. Republic contends that the citation is defective in that it alleges violations of the inapplicable plan. Republic goes on to assert that the inspector's "mere recital of the facts stated in the notice of violation without some recollection of the details of the pertinent facts are not sufficient to sustain MSHA's burden of proof." No authority is cited in support of Republic's arguments.

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MSHA asserts that the inspector's reference to the roof control plan is of no consequence since the citation specifically alleges a violation of 30 C.F.R. 75.200 which applies to all active mines. This regulation requires 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." MSHA asserts that Republic has not claimed any prejudice resulting from the inspector's error and that even where a condition does not violate the approved roof control plan, an operator may be liable for a violation of 30 C.F.R. 75.200. MSHA cites the decision of Judge John F. Cook in Peabody Coal Company, 1 FMSHRC 1121, 1 BNA MSHC 2218 (August 29, 1979). In Peabody Coal Company, Judge Cook held as follows:

It is unnecessary to address the ambiguities in the roof control plan, if it is indeed ambiguous, because the plan is not the basis for the violation presented herein. In Zeigler Coal Company, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973), the Board of Mine Operations Appeals held "that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of the mandatory safety standard of [30 CFR 75.200]." 2 IBMA at 222.

Accordingly, where the evidence presented is sufficient to establish that the mine's roof was not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of 30 C.F.R. 75.200.

Id. at 1150.

I agree with MSHA's contention that the inspector's error in charging a violation of the roof control plan is of no consequence in this proceeding. The citation specifically alleged a violation of 30 C.F.R. 75.200. Republic does not claim that it was misled or prejudiced in any way by the error. The unrefuted testimony of the three MSHA inspectors fully establishes numerous areas of inadequately supported roof and one area of inadequately controlled rib along the main haulage track of the Clyde Mine. The uncontroverted evidence of record also establishes that miners traveled in these areas and were exposed to injuries from falling material.

I also agree with Judge Cook's decision in Peabody Coal Company, supra, that where the evidence establishes that the mine's roof was inadequately supported to protect persons from falls, it is unnecessary to prove a violation of the approved roof control plan in order to establish a violation of 30 C.F.R. 75.200. This is particularly true in the instant case where the area in question was driven prior to the time approved roof control plans were required by law.

Republic's arguments, that the citation is defective because

it alleged a violation of the roof control plan and that MSHA did not establish the

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violation of 30 C.F.R. 75.200 by a preponderance of the evidence, are rejected. Republic violated 30 C.F.R. 75.200 as charged by MSHA and Citation No. 624247 is affirmed.

II. Order No. 624051

On September 24, 1979, MSHA issued the citation to Republic for inadequately supported roof and rib. That citation allowed a period of 15 days, until October 9, 1979, for Republic to abate the violation alleged. On October 10, 1979, Inspector Swarrow went to the Clyde Mine to determine whether the violation had been abated or the time for abatement should be extended. Inspector Swarrow determined that Republic had performed no work to abate the citation. Thereupon, he issued Order of Withdrawal No. 624051 pursuant to section 104(b) of the Act.

Since Republic's challenge to the underlying citation has been rejected herein, Republic's sole remaining argument is that the order is invalid "because the citation should have been extended." Republic asserts that Inspector Swarrow acted unreasonably in refusing to extend the period for abatement and in issuing the order of withdrawal. Republic also claims that the time for abatement of this citation should have been extended because it was abating another more hazardous condition along the haulage and that MSHA Inspector Thistlewaithe had previously stated that if Republic showed good faith and an honest effort to abate the most hazardous conditions first, other times for abatement would be extended.

The testimony of the MSHA inspectors establishes that the termination due date or abatement date for the citation was reasonable. Since Republic presented no evidence to the contrary, the testimony of the inspectors is accepted. Likewise, Republic did not controvert the testimony of Inspector Swarrow that on October 10, 1979, 16 days after the citation was issued, no work had been performed by Republic to abate the 16 conditions listed in the citation. Accordingly, MSHA has established that the violation cited was not abated on October 10, 1979.

In its brief, Republic argues that the order of withdrawal pursuant to section 104(b) of the Act should be vacated because of the "inflexible and adamant position" of Inspector Swarrow. Republic cites Peter White Coal Mining Corporation, April, 1979, FMSHRC 255 (April 24, 1979), where Judge William Fauver vacated an order of withdrawal issued under section 104(b) of the Act because of the inspector's failure to consider the operator's explanation for failure to abate. In that case, an electrician mistakenly repaired a different splice at another location in the mine and there was confusion regarding the location of the violation. Peter White Coal Mining Corp., supra, is clearly distinguishable from the instant case because the evidence of record establishes that there was no confusion regarding the locations of the alleged violations in the citation and Republic failed to show that it took any action, mistaken or otherwise, to correct the violation. Republic failed to establish that Inspector Swarrow acted improperly because of his alleged

"inflexible and adamant position."

The primary thrust of Republic's assertion that the time for abatement of the citation should have been extended, is its contention that it was utilizing its resources to abate more hazardous conditions in the area which required "more immediate attention." In this regard, Republic relies upon a statement made by Inspector Thistlewaithe prior to the time the instant citation was issued, that if Republic demonstrated good faith and an honest effort to correct the more hazardous conditions, the time for abatement of citations issued by Inspector Thistlewaithe would be extended. Inspector Thistlewaithe testified that, in his opinion, Republic did not demonstrate good faith or an honest effort to correct the previously cited violations but that his supervisor ordered him to extend the earlier citations. Although not articulated as such, Republic appears to raise estoppel as a defense against MSHA. Suffice it to say that the Government cannot be estopped by the statements of an MSHA inspector. However, if Republic can establish that it committed maximum resources to abate violations, beginning with the most hazardous, this would be considered in deciding whether the time for abatement should be extended. Unfortunately for Republic, it has failed to establish anything beyond a token effort towards abatement of the outstanding citations prior to the issuance of the order in question. The mine employed more than 300 miners. On the day this order was issued, Inspector Swarrow saw three miners working to abate the citations issued on September 18 and September 19. As noted earlier, Republic elected to present no testimony at the hearing.

In the instant case, the citation was issued for 16 areas of inadequately supported roof and rib. These conditions presented a safety hazard to all miners traveling in the area. During the 16 days from the time the citation was issued until the day the order of withdrawal was issued, Republic took no action to abate any of the cited conditions. Republic failed to establish any justification for its refusal to abate the violation. The evidence clearly shows a lack of diligence by Republic in its response to this citation. I find that Republic failed to establish that the time for abatement of Citation No. 624247 should have been extended. MSHA has established that Order No. 624051 was properly issued. Order No. 624051 is affirmed.

III. Miner's Claim for Compensation

A. Lost Wages

Section 111 of the Act provides that where a coal mine is closed by a valid order issued under section 104 for a failure of the operator to comply with a mandatory health or safety standard, "all miners who are idled due to such order shall be fully compensated ... for lost time at their regular rates of pay for such time as the miners are idled by such closing...." In this case, the order under section 104(b) was issued at noon on October 10, 1979. The order was modified at 2 p.m., on October 11, 1979, and no working shifts thereafter were idled. The parties stipulated the identities, rates of pay, and lost wages of the miners who were idled by the order in question. Joint

Exhibit Nos. 1, 2, and 3 are incorporated herein and attached as an Appendix to this Decision and Order. Republic failed to comply with mandatory safety standard 30 C.F.R. 75.200. The section 104(b) order was issued

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because of this failure. The miners who were idled as a result of the order are entitled to that rate of pay which they would have received on the days in question had the withdrawal order not been issued. Therefore, Republic is ordered to pay each miner listed in the Appendix attached hereto the amount of compensation owed including, where applicable, shift differential and the rate of pay for the grade at which the miner was scheduled to work on the days in question.

B. Interest

The UMWA contends that the miners are entitled to 12 percent interest on the compensation owed. It urges that the Commission should follow the lead of the National Labor Relations Board in *Florida Steel Corp.*, 231 N.L.R.B. 651 (1977). The UMWA presented the same argument to me in *Local Union 9690 v. Itmann Coal Company*, 2 FMSHRC 1986 (1980). In that decision, I stated:

I am aware that other judges of the Commission have awarded interest in excess of 6 percent per annum. Although the UMWA presents a persuasive argument in support of its position in favor of higher interest, I am constrained to follow the decision of the Commission in *Peabody Coal Company*, Docket No. VINC 77-50, November 14, 1979, where it modified a judge's decision on interest to a rate of 6 percent per annum from the date compensation was due up to the date on which payment is made. If this policy is to be changed, it is for the Commission to make the change.

Id. at 2011.

Although the Commission's decision in *Peabody Coal Company*, supra, involved an order of withdrawal under the 1969 Act, the UMWA is unable to cite any legislative history of the 1977 Act which would support a higher rate of interest for the award herein. At the UMWA request, I have reconsidered my prior ruling on the amount of interest to be awarded in compensation cases brought under the 1977 Act. However, I continue to believe that the Commission's decision in *Peabody Coal Company*, supra, is controlling on this issue. Therefore the amount of interest payable on the compensation award herein shall be at 6 percent per annum from the date the compensation was due until the date payment is made.

IV. Civil Penalty

MSHA initially proposed a civil penalty of \$500 for the violation herein. However, the Solicitor's posthearing brief states that "MSHA recommends a penalty of \$5,000 in the instant proceeding."

In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. The parties stipulated that Republic was assessed 429 violations and 952 inspection days at this mine and the

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Solicitor characterizes this as a "moderate" history of violations. Republic is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

Republic is chargeable with ordinary negligence in its failure to discover and correct the numerous areas of inadequately supported roof and rib in its main track haulage. The uncontradicted testimony of the MSHA inspectors established a void, which required lagging between cracked roof and the crossbar below; loose material resting on a crossbar; loose rib; and hanging roof bolts. The evidence established that more than 300 miners traveled through this area every day. Those miners were exposed to possible injury from a roof fall. I conclude that the gravity of this violation was serious.

As noted above, Republic failed to exercise good faith in abating the cited conditions. During the 16 days from the time the citation was issued until the order of withdrawal was issued, Republic took no action to correct the conditions. Republic failed to establish any reason for its lack of good faith compliance.

Based upon all of the evidence of record and on the criteria as set forth in section 110(i) of the Act, I conclude that a penalty of \$1,000 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. Republic and its Clyde Mine are subject to the Act.
3. Citation No. 624247 issued on September 24, 1979, charging a violation of mandatory safety standard 30 C.F.R. 75.200, is affirmed.
4. Republic failed to establish that the time to abate Citation No. 624247 should have been extended.
5. Order No. 624051 issued on October 10, 1979, for failure to abate Citation No. 624247 pursuant to section 104(b) of the Act, is affirmed.
6. Order No. 624051 was issued pursuant to section 104(b) of the Act because Republic failed to comply with a mandatory health or safety standard.
7. The miners listed in Joint Exhibit Nos. 1, 2, and 3, attached hereto and incorporated herein, were idled for the times specified due to Order No. 624051.
8. Those miners described in the foregoing conclusion of law are entitled to the compensation listed in the above

documents at the rate of pay which they would have received had the order not been issued including,

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where applicable, shift differential and the rate of pay for the grade at which the miner was scheduled to work on the days in question.

9. Interest on the amount of compensation awarded herein shall be payable at 6 percent per annum from the date such compensation was due to the date payment is made.

10. Considering the criteria specified in section 110(i) of the Act, Republic is assessed a civil penalty in the amount of \$1,000 for the violation of 30 C.F.R. 75.200.

ORDER

WHEREFORE IT IS ORDERED that Republic's contest of Order No. 624051 is DENIED and Order No. 624051 is AFFIRMED.

IT IS FURTHER ORDERED that the miners listed in Joint Exhibit Nos. 1, 2, and 3, attached hereto and incorporated herein, are entitled to the compensation listed therein, with interest at 6 percent per annum from the dates such compensation was due to the dates such compensation is paid, and where applicable, shift differential and the rate of pay for the grade at which the miner was scheduled to work on the days in question.

IT IS FURTHER ORDERED that Republic pay the sum of \$1,000 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. 75.200.

James A. Laureson Judge

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Appendix - Joint Exhibit 1

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Appendix - Joint Exhibit 2

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Appendix - Joint Exhibit 3