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U. S. STEEL v. SOL (MSHA)

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

UNITED STATES STEEL CORPORATION,  
CONTESTANT

v.

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

Notices of Contest

Docket No. WEVA 81-263-R

Citation No. 898068  
February 2, 1981

Gary No. 9 Mine

Docket No. WEVA 81-290-R

Citation No. 918432  
March 2, 1981

No. 20B Mine

DECISION

Appearances: Louise Q. Symons, Esq., United States Steel Corporation,  
Pittsburgh, Pennsylvania, for Contestant;  
Robert Cohen, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Stewart

The above-captioned contest proceedings were brought  
pursuant to section 105(d) of the Act (FOOTNOTE.1) by United States  
Steel Corporation (hereinafter,

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U.S. Steel). An expedited hearing was held in Falls Church, Virginia, on March 19, 1981. The parties were in agreement as to the facts herein and limited their presentations to stipulations of fact (FOOTNOTE.2) and oral argument.

Citation No. 898068 was issued on February 2, 1981, pursuant to section 104(a) of the Act, (FOOTNOTE.3) citing a violation of 30 C.F.R.

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75.303. (FOOTNOTE.4) The condition or practice which caused it to b  
issued was as follows:

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An examination of 9 Right (I.D. 039) section belt conveyor on which coal was being carried was not made, without delay, after the coal-producing shift had begun. The belt conveyor was started at 10:05 a.m. and the section foreman said that he planned to start the examination sometime after 1:00 p.m.

Citation No. 898068 was vacated on March 4, 1981. The justification given for this action was as follows: "Citation No. 898068 is hereby vacated due to advice from the Solicitor's Office that the citation was technically issued in error."

Citation No. 918432 was issued on March 2, 1981, pursuant to section 104(a) of the Act, also citing a violation of 30 C.F.R. 75.303. The condition or practice cited therein was as follows:

According to the records, February 6, 1981 was the last date of record that examinations were conducted without delay, after each coal producing shift had begun, of belt conveyors that coal is carried upon and the mine contains 4 (four) productive sections. Coal is produced on all 3 shifts at this mine.

Citation No. 918432 was vacated on March 9, 1981. The justification was given as follows: "According to instructions received from the Solicitor's Office and the Administrative Law Judge, this citation as refers to 30 C.F.R. 75.303 is hereby vacated." (FOOTNOTE.5)

The particular provision of section 75.303 directly at issue herein is the third sentence of the standard, reading: "Belt conveyor on which coal is carried shall be examined after each coal-producing shift has begun." It was the position of U.S. Steel that section 75.303 does not specify the particular time at which such inspection was to be carried out and that an examination at anytime during a shift would be sufficient for compliance. In a motion to dismiss, filed on March 17, 1981, MSHA agreed with the position of U.S. Steel as to the proper interpretation of the cited standard. (FOOTNOTE.6)

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In its oral presentation, MSHA reiterated that it agreed with the position of U.S. Steel as previously expressed in MSHA's motion to dismiss. Counsel for MSHA stated:

In the motion, \* \* \* we admitted that the violations were issued at the various mines, and we admitted that the violations were issued in error because they were issued because it appeared to the Federal mine inspectors when they came into the mine and looked at the examination books that the onshift examinations had not been made immediately after the start of the shift and, therefore, they issued citations because they believed in good faith that the MSHA policy was that the onshift examinations were required to be made immediately upon the start of the shift. \* \* \*

There is one decision on this matter. It was issued by Judge Merlin in Secretary of Labor v. Consolidation Coal Company, PENN 79-105. It was issued July, 1980, and stated that this standard only requires belt conveyors on which coal is being carried to be examined after each coal-producing shift has begun. There is no requirement that the examination take place immediately.

The actual words of the Judge in Consolidation Coal Company, 2 FMSHRC 1809 (1980) (hereinafter, Consolidation Coal Company), were:

I conclude that the mandatory standard requires only that belt conveyors on which coal is carried be examined after each coal-producing shift has begun. There is no requirement of immediate examination of belt conveyors after the start of a production shift. Indeed there is no time requirement at all except that the examination occur during the shift.

At oral argument, MSHA stated that it was presently following this policy, had informed its personnel that it was the policy that they should follow, and that it was a fair interpretation.

The MSHA Inspection Manual states that the examination of belts on which men are not transported shall be started without delay after each coal-producing shift which has begun. With regard to assertions that its MSHA's

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enforcement policy is currently under review and that new enforcement guidelines will be published, counsel stated:

We did not imply or did not mean to imply that we are going to change our policy and not follow Judge Merlin's decision. We just feel that our entire enforcement policy on this matter, including preshift examinations which were not the subject of this case, is under review.

We are not trying to change this decision or what the law is by new policy. It is a matter of interpretation and we feel that we have no disagreement with Judge Merlin's interpretation.

MSHA presented the following as background to the matter:

I think there is no question that we feel that the operator here did conduct an adequate preshift examination of the coal-carrying belts which was performed 3 hours before the beginning of the shift. A West Virginia law requires preshift examinations of coal-carrying belts 3 hours before the start of the shift and the operator is complying with that. So, in view of that, we now feel that the operator is meeting the requirements of 30 C.F.R. 75.303 if he examines the belts at some time during the shift and if that examination is completed.

MSHA acknowledged that if the conveyor were preshifted within 3 hours of the start of the shift, the requirement to examine the belt immediately after the start of the shift would in effect require two examinations within 3 hours and that such a requirement might be harsh. MSHA stated that because of the 40 miles of belts, there would be people walking belts all day long because as soon as they finished their preshift examination they would have to start their onshift examination. MSHA conceded that the language on its face does not require the operator to begin his onshift examination immediately upon the start of the shift and that it was his option to conduct the onshift examination along with the State-required preshift examination.

The citations have been vacated, but, when an operator contests a citation, the Secretary cannot deprive the Commission of jurisdiction by vacating such citation. *Climax Molybdenum Company v. Secretary of Labor, and Oil, Chemical and Atomic Union*, Local 2-244 1 MSHC 2538 (1980) (hereinafter, *Climax*). In *Climax*, the Secretary concluded that he could not prove that violations occurred. He vacated the citations and moved that the operator's notices of contest be dismissed as moot. The vacation of the citations was not challenged but the operator sought a declaratory order interpreting the standard alleged by the citations to have been violated. The Commission, in denying the operator's request for declaratory relief, stated that the Secretary's motion to dismiss the operator's notices of contest should have been granted only upon terms and conditions that the

judge deemed proper; however,



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the only appropriate relief which should have been granted by the judge in that case was to vacate the citations in question with prejudice. To erase any doubt as to whether the citations had been dismissed with prejudice the Commission entered an "adjudication on the merits and vacated the citations with prejudice." (FOOTNOTE.7)

The approach taken in Climax will also be taken here. Rather than simply granting MSHA's motion to dismiss, the citations are vacated with prejudice. It is found that Citation Nos. 890868 and 918432 issued to U.S. Steel were terminated on terms in accordance with the Act. MSHA conceded that section 75.303 does not require that coal-carrying belt conveyors be inspected without delay after a coal-producing shift has begun and that they may be examined at any time during the shift. MSHA's enforcement personnel have been instructed accordingly. The language of section 75.303 and the corresponding statutory provision do not specify the time at which inspections of belt conveyors on which coal is carried must be made, other than that such inspection must take place after the coal-producing shift has begun.

#### Declaratory Relief

At oral argument, counsel for U.S. Steel moved for leave to amend its notices of contest to include as relief requested a declaratory order interpreting section 75.303. (FOOTNOTE.8) Counsel for MSHA resisted the motion for a

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declaratory order and objected to the timeliness of the motion. MSHA argued that it had conceded that section 75.303 did not require an inspection of belt conveyors on which coal is carried without delay after the beginning of the shift, that the citations had been vacated, and that steps had been taken to insure that inspectors would no longer issue such citations pending revision of the Inspection Manual. While MSHA stated that there might be changes in the inspections regarding preshift examinations when review of the Inspection Manual was completed, it acknowledged that the decision in Consolidation Coal Company was correct and would be followed.

With the parties in accord on the provisions of the standard with respect to the time that inspections of belt conveyors carrying coal must be made, the remaining issue in this case involves to some extent the outdated provisions of the Inspection Manual which are now under review. The standard in issue is only one part of the statutory inspection scheme set forth in section 75.303 of the Act under the general heading "Ventilation." That section also requires certain inspections within 3 hours immediately preceding the beginning of any shift, at the start of each shift, at least once during each coal-producing shift, and at least once each week. Certain persons are prohibited from entering until the results of some of these examinations are reported to the surface. The section also prohibits the entry of persons under certain conditions unless some of the examinations have been made within 8 hours. These requirements should be considered in conjunction with any interpretation under which an inspection could be started at the beginning of one shift and the next inspection need not be completed until the end of the succeeding shift. Due to the possible impact of some of these provisions on others also contained in section 75.303, MSHA properly argues that a review is necessary before changes are made in inspection procedures. The standard prescribes the time for inspections of belt conveyors on which coal is carried in the general terms "after each coal-producing shift has begun." MSHA no longer considers this to mean "without delay" after each coal-producing shift has begun and it has taken appropriate steps to insure that Contestant is not again wrongfully cited for failure to make such inspections without delay. With the ruling by the Administrative Law Judge in Consolidation Coal Company and the concessions by MSHA in its motion and on oral argument, it would not be prudent to prescribe with more exactitude by declaratory order the time at which inspections of coal-carrying belt conveyors should be made. The record does not establish the harm, if any, to Contestant caused by the issuance of the citations and it is unlikely that Contestant will suffer harm from the same misinterpretation of the standard in the future. Moreover, no reason has been advanced which would warrant risking disturbances of the statutory scheme of inspections by additional interpretation. The record in these cases does not contain all of the relevant evidence to afford full consideration of the effects of any different interpretations. It is preferable that further interpretation of the standard involved herein be made on a case-by-case basis and that any changes in inspection procedures by MSHA within the bounds of the standard should be made only

after careful review. Of course, changes beyond the bounds of the standard should be made only by amendments to the standard.

U.S. Steel asserts that it needs the decision of another administrative law judge interpreting section 75.303 so that it has another piece of paper to hand to enforcement personnel to show them that the law does not require that the examination be started immediately after the shift has begun. After holding in Consolidation Coal Company that the mandatory standard requires only that belt conveyors on which coal is carried be examined after each coal-producing shift has begun, the judge stated that there is no requirement of immediate examinations of belt conveyors after the start of a production shift and indeed there is no time requirement at all except that the examinations occur during the shift. There is little more that a judge could do to interpret the standard more broadly in favor of the position of the operator even if that were to be his decision after consideration of a full record. The interpretation in Consolidation Coal Company has already been adopted by MSHA. A repetition of this interpretation in a declaratory order without the benefit of a full record, as now urged by U.S. Steel, would not only be inappropriate, but would have no significant effect on inspection procedures. As in Climax, where a request for a declaratory order was denied, a ruling by the judge "would [be] nothing more than an advisory opinion based upon a hypothetical state of facts." Furthermore, there are insufficient facts, either stipulated or hypothetical, in the instant cases of the precision and scope necessary to provide a proper basis for a meaningful interpretation.

U.S. Steel also urges that another administrative law judge's ruling in a declaratory order would give the Mine Safety and Health Administration another chance to decide if they want to seek discretionary review by the Commission. MSHA has conceded that the decision in Consolidation Coal Company was a fair interpretation of the standard and did not seek discretionary review so even if the interpretation in a declaratory order were to be as broad as in that decision, it is not likely that discretionary review would be sought by MSHA. At oral argument, MSHA stated that if it had wanted another decision, it certainly would not have vacated the citations, but would have put on testimony as to why the examination should have been conducted immediately after the start of the shift and would have made a full record by calling witnesses interested in the provision and how it is interpreted. MSHA asserted that it had not chosen to do so and had no intention of doing so. MSHA has stated that it is in agreement with U.S. Steel as to the requirements of section 75.303 and that it is unlikely that discretionary review by the Commission would be sought for vacation of the citations in this decision.

MSHA and U.S. Steel are in agreement on the current policy which has been disseminated to the inspectors and the Inspection Manual is under review. It is unlikely that similar citations will be issued. The issuance of a declaratory order is not necessary to afford U.S. Steel relief in this matter and would not be prudent at this time. Accordingly, Contestant's motion for leave to amend is DENIED.

ORDER

Citation Nos. 898068 and 918432 are VACATED WITH PREJUDICE.

Forrest E. Stewart  
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE\_ONE

Section 105(d) of the Act provides:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for for hearing appeals of orders issued under section 104."

~FOOTNOTE\_TWO

Before presenting oral arguments, the parties entered into the following stipulations on the record:

"We agree that the judge has jurisdiction over this case. We agree that United States Steel Corporation is categorized as a large operator under the Mine Safety and Health Administration Act. We agree that a citation was issued to the Gary No. 9 Mine on February 2, 1981 concerning a violation of 75.303, and we agree that that Citation No. 898068 was vacated by the Mine Safety and Health Administration on March 2, 1981.

"Another citation was issued to Gary No. 20 B Mine on March 2, 1981, and while the Mine has not received a copy of the notice of, vacating that citation, counsel has been given a copy of a notice vacating Citation No. 918432, dated March 9, 1981, today.

"At both mines during this period and continuing to the

present, an examination of the belts was made during each shift by certified people as required by 30 C.F.R. 75.303."

~FOOTNOTE\_THREE

Section 104(a) of the Act provides:

"If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

~FOOTNOTE\_FOUR

30 C.F.R. 75.303, a mandatory standard reproducing section 303(d) of the Act, reads as follows:

"(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such

place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

"(b) No person (other than certified persons designated under this 75.303) shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this 75.303 has been made within 8 hours immediately preceding his entrance into such area." (Emphasis added.)

~FOOTNOTE\_FIVE

In *Secretary of Labor v. Consolidation Coal Company*, 2 FMSHRC 1809 (1980), the judge held that 30 C.F.R. 75.303 did not require an examination of belt conveyors on which coal is carried immediately upon the start of a production shift.

~FOOTNOTE\_SIX

MSHA asserted the following in its motion:

"When the issuance of the citation came to the attention of National MSHA officials, they consulted with appropriate field offices and MSHA district managers and supervisory personnel in the affected areas were informed that MSHA's current policy does not require that onshift examinations begin immediately after the start of a shift, but only requires that such examination be completed during each shift.

"Instructions in the Coal Mine Inspection Manual, which indicate a different enforcement policy with regard to 30 C.F.R.

75.303, are not current. In fact, MSHA's enforcement policy with regard to 30 C.F.R. 75.303 is currently under review and once completed, new enforcement guidelines will be published and enforced. In the interim, because of these recent instructions now given to MSHA personnel in the affected areas, it is unlikely that recurring citations of this nature will be issued to mine operators."

~FOOTNOTE\_SEVEN

Section 104(h) of the Act states:

"Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106."

Commission Rule 1(b) states:

"Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the

Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

"Fed.R.Civ.P. 41(a)(2) states in part:

"(a) Voluntary dismissal: Effect Thereof.

\* \* \*

"(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. \* \* \* Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." (Emphasis added.)

~FOOTNOTE EIGHT

Section 105(d) states in part:

"If \* \* \* an operator of a \* \* \* mine notifies the Secretary that he intends to contest the issuance of [a] \* \* \* citation \* \* \* the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with [5 U.S.C. 554] \* \* \* ), and thereafter shall issue an order, based on findings of facts, affirming, modifying, or vacating the Secretary's citation \* \* \* or directing other appropriate relief \* \* \* ." (Emphasis added.)