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POCAHONTAS FUEL v. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

POCAHONTAS FUEL COMPANY,  
APPLICANT

Application for Review

v.

Docket No. HOPE 75-680

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

Notice of Violation 1 LAK  
December 31, 1974

Maitland Mine

AND

UNITED MINE WORKERS OF AMERICA  
RESPONDENT

DECISION AFTER REMAND

The Notice of Violation in the above case was issued when the Company paid Mr. Mullins at the laborer's rate of pay rather than the roof bolter's rate after he transferred to a non-dusty area of the mine, pursuant to section 202 of the 1969 Act. The Act provides that after such a transfer, the miner shall be paid "at not less than the regular rate of pay" prior to the transfer. Just prior to the transfer Mr. Mullins had acted as and been paid at the rate of a temporary roof bolter during a substantial percentage of his working hours.

The Government contended at the trial that a roof bolter's rate of pay was appropriate and the Company contends that only a laborer's pay (Mullins was classified as a laborer under the Union contract) was his regular rate of pay before transfer. I agreed with the Company and vacated the notice. The Interior Board of Mine Operations Appeals agreed with me and affirmed my decision.

On December 31, 1980, the United States Court of Appeals for the District of Columbia Circuit reversed the Board (D.C. Cir. No. 77-1086). It held that the laborer's rate was not the correct rate, but it did not go so far as to say the full roof bolter rate was proper either. It indicated that the proper rate might be in between these rates.

The case was remanded to me on September 22, 1981.

Inasmuch as Pocahontas was paying the laborer's rate to Mr. Mullins and inasmuch as the court has said this was not the correct rate, it follows that the company was in violation and that the notice was properly issued.

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The Notice of Violation is accordingly affirmed. It is assumed that the parties can agree to the proper pay rate during abatement proceedings. If not, I presume a closure order will be issued and further review will be sought.

Charles C. Moore, Jr.  
Administrative Law Judge