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SOL (MSHA) V. POTASH
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceedings
Docket No. CENT 81-210-M
A/O No. 29-00173-05021-V

v.

Docket No. CENT 81-211-M
A/O No. 29-00173-05022

POTASH COMPANY OF AMERICA,
DIVISION OF IDEAL BASIC
INDUSTRIES, INC.,
RESPONDENT

PCA Mine and Mill

POTASH COMPANY OF AMERICA,
DIVISION OF IDEAL BASIC
INDUSTRIES, INC.,
CONTESTANT

Notices of Contest

Docket No. CENT 81-87-RM

v.

Citation No. 161755
November 26, 1980

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

Docket No. CENT 81-88-RM

Citation No. 161756
November 26, 1980

Docket No. CENT 81-89-RM

Citation No. 173957
November 26, 1980

PCA Mine and Mill

DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicitor, U.S.
Department of Labor, Dallas, Texas, for the Petitioner
Charles C. High Jr., Esq., Kemp, Smith, Duncan and Hammond,
El Paso, Texas, and Roy H. Blackman, Esq., Carlsbad,
New Mexico, for the Respondent

Before: Judge Stewart

The civil penalty proceedings were filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act) (FOOTNOTE 1) to assess civil penalties against the Potash Company of America. The notices of contest filed by the Potash Company of America were brought under section 105 of the Act.

The position of Potash Company of America, a division of Ideal Basic Industries, Inc. ("hereinafter PCA"), was that Citation No. 161755, issued by the Secretary of Labor, Mine Safety and Health Administration ("Secretary" or "MSHA") on November 26, 1980, for allegedly failing to "immediately" report an "accident" in violation of 30 C.F.R. 50.10 is without merit and should be vacated. (FOOTNOTE2)

This case arises out of a special inspection by MSHA at PCA's potash Mine in Carlsbad, New Mexico, on November 24, 1980, following notification from Respondent that it incurred a partial loss of electrical power for a short period of time during the night of November 23, 1980. As a result of that inspection, PCA was issued three citations for alleged violations of various regulations, including Citation No. 161755 for failure to "immediately" notify MSHA of the incident.

Each of these citations were timely contested by PCA and assigned to Judge Virgil E. Vail with the following docket numbers:

Citation No.	Docket No.
161755	CENT 81-87-RM
161756	CENT 81-88-RM
173957	CENT 81-89-RM

These cases were subsequently consolidated and stayed by Judge Vail pending assessment of penalties. Thereafter, on July 14, 1981, the Secretary filed a complaint proposing penalty for each of these citations under the following docket numbers:

Citation No.	Docket No.
161756	CENT 81-210-M
173957	
161755	CENT 81-211-M

PCA answered the complaint on July 29, 1981, and the civil penalty cases were assigned to the undersigned. By agreement of the parties, the notice of contest cases pending before Judge Vail were consolidated with the civil penalty cases for hearing and decision. The hearing on these consolidated cases was held in Carlsbad, New Mexico, on October 7, 1981.

Disposition of Proceedings in Docket Nos. CENT 81-210-M,
CENT 81-88-RM, CENT 81-89-RM

At the beginning of the hearing, Docket Nos. CENT 81-210-M, CENT 81-88-RM, and CENT 81-89-RM were disposed of by stipulation and motion. The Secretary moved to vacate Citation No. 161756, Docket Nos. CENT 81-210-M, and CENT 81-88-RM (Tr. 5) for the reason that after further investigation,

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there appeared to be insufficient evidence to support the citation (Tr. 7). This motion was granted and the proceedings in regard to this citation were dismissed.

In addition, the Secretary moved to amend Citation No. 173957, Docket No. CENT 81-89-RM and Docket No. CENT 81-210-M, to change the characterization from an order of withdrawal to a citation issued pursuant to section 104(a) of the Act, to delete the language that the alleged violation was substantial and serious, and to change the language of the citation to read: "The power outage occurred on November 23, 1980 in the North Mine, the company failed to test air quality for compliance with 30 C.F.R. Part 57.5 within two hours of the power failure" (Tr. 5). PCA agreed to withdraw its notice of contest to the citation as amended and to pay the proposed penalty of \$250 (Tr. 5, 10). The terms of the agreement were approved at the hearing.

The dismissal of the proceedings in Docket Nos. CENT 81-210-M and CENT 81-88-RM with regard to Citation No. 161756 is AFFIRMED. The amendment of Citation No. 173957 in Docket No. CENT 81-89-RM and Docket No. CENT 81-210-M and the agreement that PCA will pay the full proposed penalty of \$250 are AFFIRMED.

Docket Nos. CENT 81-211-M and CENT 81-87-RM

Stipulations

The facts forming the basis of Citation No. 161755 were tried at the hearing; however, there was little material disagreement on what occurred. The disagreement centers on how to interpret what occurred.

The parties entered into additional stipulations that:

The violations as alleged and amended involved a mine that has products, that is, potash, which enter commerce.

The penalties assessed for the violation of 30 CFR Part 50.10 was \$66 and for 57.11-50 it was \$250. Payment of the assessed penalties would have no effect on the operator's ability to continue in business.

The PCA Mine and Mill is an underground potash mine owned and operated by PCA. The operation is located approximately 24 miles northeast of Carlsbad, New Mexico. It is a single-level mine located approximately 1,000 feet underground and it covers a 7- by 8-mile area. It is divided into two segments, the North and South Mines (Tr. 6). It employed 583 persons in 1979 and produced approximately 750,000 tons of ore (Tr. 7).

Citation No. 161755

In Citation No. 161755 alleging a violation of 30 C.F.R. 50.10, the inspector stated:

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This citation was issued after completion of the investigation 11-26-80. A fire under the power plant control room caused a power failure that affected the use of the No. 1 and No. 2 hoist for a period of more than 30 minutes. The power outage occurred at 2140 hours and was not restored until 2335 hours. The No. 2 man hoist (the one normally used to hoist men) was not energized until 0130 hours 11/24/80 due to circuit modification that was necessary to utilize outside power. Mr. Don Roberts, mine superintendent, stated [that] he felt that this was not criteria for immediate reporting.

In a subsequent action issued on November 26, 1980, the inspector noted that: "At 0730 hours on 11/24/80 Mr. Bob Snow called the local Mine Safety and Health Administration office to notify Sidney R. Kirk, Supervisory Mine Inspector, of the accident."

30 C.F.R. 50.10 provides:

If an accident occurs, an operator shall immediately contact the MSHA District or subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C. by telephone, toll free at (202) 783-5582.

An accident is defined in 30 C.F.R. 50.2 to mean:

- (1) A death of an individual at a mine;
- (2) An injury to an individual at a mine which has a reasonable potential to cause death;
- (3) An entrapment of an individual for more than thirty minutes;
- (4) An unplanned inundation of a mine by a liquid or gas;
- (5) An unplanned ignition or explosion of gas or dust;
- (6) An unplanned mine fire not extinguished within 30 minutes of discovery;
- (7) An unplanned ignition or explosion of a blasting agent or an explosive;
- (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

(9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;

(10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;

(11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and

(12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

It was not alleged by the Secretary, and in his testimony the inspector stated that it was not his contention, that there was an unplanned mine fire not extinguished within 30 minutes of discovery under the definition in paragraph (6). The principal issue addressed at the hearing was whether the power failure in the transmission line to the power substation constituted damage to hoisting equipment in a shaft which interfered with use of the equipment for more than 30 minutes as defined in paragraph (11). (FOOTNOTE3)

Mr. Earl Diggs, the MSHA inspector who issued the citation, indicated in his testimony that it was his understanding that an "accident" under 30 C.F.R. 50.2(h)(11) occurs any time a hoist is "down" for more than 30 minutes for any reason, without regard to damage (Tr. 38:15-18; Tr. 39:18-24) and that a hoist is "damaged" within the meaning of 30 C.F.R. 50.2(h)(11) whenever there is "an unplanned [hoist] outage for any reason" (Tr. 38:15-18).

The resolution of this case depends upon the specific facts developed rather than upon the broad and divergent contentions in the Secretary's posthearing brief and in the inspector's testimony.

PCA gets its power from two sources. It generates approximately 50 percent of its own power and it buys 50 percent of its requirements from Southwestern Public Service (Tr. 77). Southwestern Public Service power for the North Mine comes to PCA from Southwestern's Route 31 Substation.

There are five shafts and four hoists at PCA (Tr. 101). In the North Mine, there are two hoists; hoist No. 1 is normally used for production, hoist No. 2 is normally used to carry personnel (Tr. 102). Hoist No. 1 is normally powered by Southwestern Public Service power which is brought in at PCA's powerhouse and is controlled by breaker No. 3 (Tr. 88-89). Hoist No. 2 is normally powered by PCA-generated power. The hoists cannot be operated if power is absent.

On November 23, 1980, at 9:40 p.m. in the powerhouse, Mark Christesson noticed lights flashing, the generators pulling down, and smoke (Tr. 69). He immediately shut down the power plant and all of the power (Tr. 69). Then he went into the basement and discovered and put out a fire (Tr. 69). This meant there were no lights in the North Mine and that hoist No. 2 was inoperable (Tr. 70). In addition, because breaker No. 3 had been thrown, hoist No. 1 was inoperable (Tr. 76). Finally, Southwestern Public Service power had been tripped at the substation on Highway 31 (Tr. 75-76).

In order to restore power to the No. 1 substation and hoist No. 2, the circuitry was modified to allow hoist No. 2 to be powered by Southwestern Public Service power (Tr. 83, 116-118). Rather than power from the powerhouse going down into the North Mine through the shaft of hoist No. 2, Southwestern Public Service power was put up through the shaft from other parts of the underground mine where power was still available. Both the above ground and below ground electrical work was fairly simple (Tr. 93-94, 119); however, Mr. Duren who has been employed by PCA for 35 years and who was the mine maintenance foreman, testified he had never performed this changeover before (Tr. 118-119).

Southwestern Public Service was notified that the power had tripped so that they could restore their power. They restored power by 11:35 p.m. (Tr. 87, 97-98, 101, 120). Hoist No. 2 was energized at 2 p.m. (Tr. 100, 120). Only one witness was able to testify concerning when hoist No. 1 was energized. Mr. Kilgore testified that he was "pretty sure" hoist No. 1 was energized after hoist No. 2 had been energized (Tr. 114).

The fire referred to in the citation was discovered in PCA's powerhouse at approximately 10 p.m. on Sunday night, November 23, 1980, and extinguished within 15 to 20 minutes (Tr. 31:8-13; Tr. 68:18-21). Upon observing smoke

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in the powerhouse, and as a safety precaution, the powerhouse operator shut down all electrical power circuits entering or leaving the powerhouse prior to investigating the cause of the smoke (Tr. 69:2-22).

The mine has five shafts, four of which are equipped with hoists (Tr. 101:13-20). These hoists are known as the No. 1, No. 2, Eddy, and South Shaft hoists (Tr. 102:2-10; Tr. 107:14-18).

Mine Electrical Supply and Distribution Parallel Electrical Supply

The electrical power required for mining operations is provided by a combination of self-generated power and power purchased from Southwestern Public Service Company, the public utility serving the Carlsbad, New Mexico, area. About one-half of the required power is generated by PCA and the remaining one-half is purchased from Southwestern Public Service (Tr. 77:7-20).

The generators used by PCA are located in a powerhouse at the mine site and supply power to a 2300-volt electrical bus system in the powerhouse. This 2300-volt bus system provides power to various substations through 2300-volt feeder cables (Tr. 78:14-23).

The power purchased from Southwestern Public Service is synchronized and utilized in parallel with that generated by PCA (Tr. 92:7-12). This power is received at the mine through several feeder cables, some of which are independent from each other and PCA's own power supply.

The Southwestern Public Service power serving the North Mine area is provided through three separate feeder circuits all originating through a Southwestern Public Service substation located on Route 31 several miles from the mine site (Tr. 92:13-21; Tr. 121:1-16). One of these circuits enters the powerhouse and supplies power directly to the 2300-volt bus system in parallel with the power from PCA's generators. Another circuit bypasses the powerhouse and enters the North Mine area through what is known as 2 East Borehole and connects to the 12470 2 East Substation (Tr. 121:1-9]. Still another bypasses the powerhouse and enters the north area of the mine through the 24 East Borehole (Tr. 121:1-4).

The Southwestern Public Service power serving the south area of the mine, including the power for the Eddy and South Shaft hoists, is independent from circuits serving the north area of the mine and does not originate through the Southwestern Public Service substation on Route 31. Similarly, these circuits, like two of those serving the north area of the mine, bypass the powerhouse (Tr. 105:21-25; Tr. 106:1-20).

Electrical Distribution and Power Circuits
For the No. 1 and No. 2 Hoists

The parallel Company/Southwestern Public Service power (FOOTNOTE4) from the 2300-volt bus system in the powerhouse is distributed through feeder cables to similar 2300-volt bus bars in various substations on the mine site. Breakers to deenergize the substations are located in the powerhouse (see Joint Exh. 1).

One of these substations, substation No. 1, is located about 100 yards from the powerhouse and is powered through breaker No. 7 in the powerhouse with 2300 volts (Tr. 73:5-13; Joint Exh. 1). From this 2300-volt bus bar, numerous other circuits receive power ranging from 2300 volts to 480 volts. One circuit (No. 1 Bank on Joint Exhibit 2) passes through a transformer that reduces the 2300 volts to 480 volts and then provides power to the following locations:

1. Electric Shop;
2. Electrical Panel in No. 2 Hoist Room;
3. Commissary;
4. Research;
5. Carpenter Shop;
6. Office Machine Shop;
7. Pre-Fab Shop; and
8. Powerhouse auxiliary.

(Joint Exh. 2; Tr. 79:7-25; Tr. 80:1-5).

The electrical panel in the No. 2 hoist room, in turn, supplies power to numerous other circuits, including the No. 2 hoist, (FOOTNOTE 5) lighting, control circuits, and recharging circuits for miner headlamps (Tr. 80:20-25; Tr. 81:1-22).

Other circuits powered from the No. 1 substation include street lights and various electric motors. (Joint Exh. 2; Tr. 116:15-21; Tr. 117:12-20).

Other substations are similarly supplied with power (Tr. 86:15-23). However, the No. 1 hoist is not powered from a substation. The 2300 volts supplied from the powerhouse is reduced to 440/480 by a motor-generator set. The reduced voltage is then supplied to the hoist motor through a switch. (Joint Exh. 1; Tr. 23-25; Tr. 89:1-4; Tr. 89:5-13).

The Events of November 23, 1980

The Discovery of Smoke and Deenergizing of all Circuits

Around 9:40 p.m. on Sunday night, November 23, 1980, Mark Christesson, a powerhouse operator, observed smoke in the basement of the powerhouse and immediately began deenergizing all electrical circuits entering and leaving the powerhouse (Tr. 69:3-8). This was done as a safety precaution before entering the basement to determine the cause of the smoke (Tr. 69:13-14; 92:16-21). A small fire was thereafter discovered around 10 p.m. and quickly extinguished (Tr. 68:18-25; Tr. 69:1).

The deenergizing of all circuits by the powerhouse operator, which included the Southwestern Public Service circuit to the powerhouse, interrupted electrical power to the No. 1 substation (breaker No. 7), the No. 1 hoist (breaker No. 3), and all other circuits in the north area of the mine receiving power through the powerhouse (Tr. 70:5-12; Tr. 76:11-24).

In addition, when these circuits were deenergized, the breaker at the Southwestern Public Service substation on Route 31 tripped resulting in the loss of power originating through this substation and entering the north area of the mine directly through the 2 East Borehole and 24 East Borehole (Tr. 76:2-7; Tr. 121:18-25).

The south area of the mine, including the Eddy and South Shaft hoists, was unaffected by this interruption in power. Similarly, the direct current trolley power used for underground transportation was unaffected (Tr. 122:13-17).

Inspection of Electrical Cables and Restoration of Power

Shortly after discovery of the fire, Mr. John Wright, PCA's electrical shop foreman, along with other individuals also called in, arrived at the mine to assist on-duty employees in restoring power. Upon inspecting the cables, in the powerhouse, it was determined that the fire had damaged the 2300-volt cable feeding the No. 1 substation bus bar (Tr. 73:1-13). The 2300-volt cable supplying power to the No. 1 hoist was not damaged in any way (Tr. 84:15-21). Accordingly, the No. 1 hoist could have been energized by closing breaker No. 3, which had been opened along with other circuits by the powerhouse operator upon observing the smoke, as soon as the breaker at the Southwestern Public Service substation on Route 31 was reset (Tr. 92:22-25). Once this was done, the No. 1 hoist could have been restored to operation in 15 minutes at the most (Tr. 92:2-6; Tr. 91:1-22).

In an effort to restore power as soon as possible to the No. 1 substation, which, in turn, supplied power to the No. 2 hoist room and the No. 2 hoist, Wright testified that electricians were sent to the No. 1 substation to disconnect the 2300-volt feeder cable coming from the powerhouse. This involved nothing more than untaping and unscrewing a "kerny" and pulling the wires back from the 2300-volt bus bar (Tr. 83:14-25; Tr. 84:1-5). This was

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the only work required on the surface to restore power to the No. 1 substation and, in turn, the electrical panel in the No. 2 hoist room that provided power to the No. 2 hoist [Tr. 84:6-14].

Once this powerhouse feeder cable was disconnected, PCA planned to reenergize the No. 1 substation by bringing power from underground up the No. 2 shaft through the existing 2300-volt feeder cables between the No. 1 substation and underground (Tr. 117:6-20; Joint Exh. 2]. These feeder cables, prior to the fire, were used to provide power from the No. 1 substation down the No. 2 shaft to the underground electrical system (Tr. 117:15-17). The only work required to obtain power in this manner, as explained by Mr. Frances Duran, PCA's underground mine maintenance foreman, was to close some disconnects and the circuit breakers at the bottom of the No. 2 shaft (Tr. 117:21-25; Tr. 118:1-3). This would change the source of power and energize the No. 1 substation by using the Southwestern Public Service power that entered the mine through the 2 East Borehole. This feeder cable was already tied into the underground electrical system through the 12470 2 East Substation at the bottom of the 2 East Borehole and the 3 West Substation (Tr. 121:5-16). The total time necessary to reverse this electrical flow and energize the No. 1 substation from underground, as explained by Mr. Duran, who performed the task, was 10 to 15 minutes (Tr. 119:13-18). When this change was made around 10 p.m., Mr. Duran testified that there was no power from Southwestern Public Service through the 2 East Borehole circuit so he waited for this power to be restored before closing the breaker (Tr. 119:19-25; Tr. 120:1; Tr. 121:18-25).

Southwestern Public Service Temporary Substation And Delay in Restoring Power

The three Southwestern Public Service circuits providing power to the north area of the mine through the powerhouse, 2 East Borehole and 24 East Borehole, all originated through the Southwestern Public Service substation on Route 31 (Tr. 96:2-7; Tr. 121:1-4; Tr. 78:1-13). On November 23, 1980, this substation was under construction and power to the mine was fed from a temporary substation, "a truck mobile unit on the back of a tractor/trailer" (Tr. 98:1-7). For this reason, PCA was instructed by Southwestern Public Service not to reset the breaker if it ever tripped but, instead, to call them and they would dispatch someone to reset it (Tr. 98:8-14).

Accordingly, when it was discovered on November 23, 1980, that the Southwestern Public Service breaker had tripped, Mr. Ronald G. Kilgore, a surface electrician, testified that he arrived at the mine between 10:15 and 10:30 p.m. and called Southwestern Public Service to dispatch someone to reset the breaker (Tr. 112:25; Tr. 113:1-2; Tr. 113:18-21). This was a Sunday night so the individual on call had to be notified by Southwestern Public Service and then drive to the substation (Tr. 113:1-5).

This breaker was reset and Southwestern Public Service power

restored to the mine through the 2 East Borehole and 24 East Borehole circuits around 11:30 p.m. (Tr. 114:1-3). This power was then available to the No. 1 hoist

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by closing breaker No. 3 in the powerhouse and to the No. 2 hoist through the No. 1 substation by closing the breaker at the bottom of the No. 2 shaft (Tr. 89:14-18, Tr. 90:9-25; Tr. 91:1-12; Tr. 119:19-25; Tr. 120:1). Both breakers were thereafter closed and power to the hoists restored.

Notification to MSHA and Issuance of Citation

During the process of restoring power, Mr. Robert W. Snow, surface maintenance superintendent, testified that he discussed with Mr. Don Roberts, mine superintendent, whether the power outage was a reportable accident and both concluded it was not (Tr. 105:1-15). Similarly, it was concluded that the fire was not reportable because of its short duration (Tr. 105:6-8). (FOOTNOTE 6)

Definition of Accident

The Secretary urges that in a lay sense the fire and loss of power to the hoists were "accidental" and that the hoisting equipment was "damaged" because its usefulness was impaired. As support for this argument, the Secretary relies on The American Heritage Dictionary of the English Language (1976), which defines "accident" as: "1. An unexpected and undesirable event; a mishap. 2. Anything that occurs unexpectedly or unintentionally." It defines "damage" as "Impairment of the usefulness or value of person or property; loss; harm."

It is clear that it was not the intention of 30 C.F.R. 50.10 to require the reporting of every unexpected and undesirable event or mishap. The definition of "accident" in 30 C.F.R. 50.2(h)(11) as "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes" is not set forth in the abstract. That definition as well as the requirement for reporting accidents is included in Subchapter M, Part 50, entitled "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment, and Civil Production in Mines." Accidents of the 12 types listed in section 50.2(h) are clearly the kinds of accidents which must be reported and there is no requirement in section 50.10 to report accidents of other types. Even without reference to the headnote title of Part 50, it is obvious, when those two sections are read in context, that the only accidents required to be reported by section 50.10 are those defined in section 50.2(h).

Aside from the "lay definition" of accident, the posthearing brief of the Secretary urges that "[m]ost importantly the triggering alternative element for the definition of 'accident' as defined in the MSHA regulations,

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"or which interferes with use of the equipment for more than thirty minutes,' existed here because there was no power for the hoists from 9:40 p.m. to 11:35 p.m. and the hoists were not energized until 2 p.m."

Section 50.2(h)(11) does not define a reportable accident as an occurrence where there is no power for the hoists for a period of time. Its definition, as pertinent to this case, is damage to hoisting equipment in a shaft which interferes with use of the equipment for more than 30 minutes. There is no question that there was an interference with the use of hoisting equipment in a shaft for more than 30 minutes but the pivotal question is whether the interference was due to damage to the hoisting equipment.

In this case, it is undisputed, and even conceded, that neither the No. 1 nor No. 2 hoists were physically damaged as a result of the powerhouse fire and loss of power on November 23, 1980 (Tr. 50:12-16). Nevertheless, the Secretary contends that the loss of electrical power to the hoists, without more, was a reportable accident within the meaning of 30 C.F.R. 50.10 and 30 C.F.R. 50.2(h)(11) because the loss of power interfered with the use of the hoists for more than 30 minutes.

There is evidence that MSHA had promulgated guidelines which, in effect, indicated that not every occurrence causing a hoist to be shut down for more than 30 minutes is an occurrence which must be reported. A document with a caption including the phrase: "Information Report on 30 C.F.R. Part 50" (Respondent's Exh. 1), published by the MSHA Health and Safety Analysis Center in February 1980, indicated that a natural occurrence, such as ice in the shaft causing a hoist to be shut down for more than 30 minutes, is not a reportable accident.(FOOTNOTE 7)

Mr. Earl Diggs, the inspector who issued Citation No. 161755, identified PCA's Exhibit 1 as being published by the Department of Labor, Mine Safety

and Health Technical Support and stated that Technical Support "* * * is where we get support from. When we have problems, we go to them for assistance" (Tr. 41:14-18). However, he stated that he disagreed with the answer given by Technical Support in response to Question 28 (Tr. 45:9-12).

The guidelines in the publication by the MSHA Health and Safety Analysis Center are not binding in this proceeding in a determination of whether there was a reportable accident. They do indicate, however, that the inspector had no reason to be misled into believing that every occurrence causing a hoist to be shut down for more than 30 minutes was reportable. The inspector testified that he had not previously read the document. If he had, it is possible that he would not have testified so readily that he believed that every power failure for 30 minutes, for any reason, was reportable. While I cannot agree with PCA's characterization of a fire in the powerhouse as a natural occurrence no different from the disabling of a hoist due to an electrical failure, Exhibit 1 does establish that one branch of MSHA did not believe that without exception an occurrence causing a hoist to be shut down for more than 30 minutes must be reported.

The inspector testified that he subsequently referred the question involved in this case to the MSHA subdistrict office for an opinion. The answer to the July 2, 1981, memorandum (several months after the date of the citation) indicated in general that no time in addition to 30 minutes was allowed for troubleshooting but that personnel could be allowed to remain underground under certain conditions.(FOOTNOTE 8) It was not definitive as to whether interference with hoisting, other than by a hoist malfunction, for 30 minutes was reportable. Even if the memorandum had been prepared prior to the date the citation was issued, and even if it were deemed to have significant probative value, there would be a remaining issue as to whether a general power outage was a hoist malfunction.

Thus, the exhibit does not aid in the resolution of the question as to whether a remote power failure in a transmission line can be classified as damage of a nature to make the power outage a reportable accident. No basis can be found to support the inspector's belief that a power outage for any reason (which would have included even a failure of the commercial lines or equipment supplying high voltage to the mine) constitutes damage to the hoisting equipment when no physical damage to the equipment occurs as a result of the outage.

The power outage under the circumstances of this case is clearly not reportable under the requirements of 30 C.F.R. 50.10.

Here, 2300 volts were supplied through transmission lines from two sources, a commercial line and a PCA line. The high voltage supplied by the transmission line was reduced to 440 volts by transformers at a substation for use by one hoist and by a motor generator set for the other. It was established that there was no actual physical damage to either the hoist equipment or the 440-volt lines supplying the hoists. The record clearly establishes that the general power outage due to a failure in the transmission line is simply too remote to be considered as damage to a hoist in a shaft which would constitute a reportable accident. This determination leaves unanswered such questions as whether a failure of the 440-volt line at the point where it leads into the hoist motor or into the starting panel is a reportable accident or whether a failure of the 440-volt line 100 feet from the hoist is a reportable accident but it does dispose of this case in the only reasonable way that the specific issue involved herein can be resolved.

A violation of 30 C.F.R. 50.10 was not established by the preponderance of the evidence. Citation No. 161755 is VACATED. Proposed findings of fact and conclusions of law in the posthearing briefs filed by the parties which are not expressly or impliedly adopted herein are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

The proceeding in regard to Citation No. 161755 is DISMISSED. With regard to Citation No. 173957, Potash Company of America is ORDERED to pay the agreed upon sum of \$250 within 30 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

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~FOOTNOTE_ONE

1 Sections 110(i) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all

civil penalties provided in this Act. 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. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

~FOOTNOTE_TWO

2 Section 105(d) of the Act provides:

"(d) 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 hearing appeals of orders issued under section 104."

~FOOTNOTE_THREE

3 In a posthearing brief the Secretary stated that the issue presented is "[w]hether an unexpected fire causing disruption of power to a hoist for more than thirty (30) minutes is an 'accident' requiring immediate notification pursuant to 30 C.F.R.

50.10." That statement of the issue is too broad as it could encompass a fire at the hoist itself or in the 440-volt feeder

line to the hoist rather than in the 2300-volt transmission line to the mine voltage-reducing facilities. The broad issue urged by the Secretary is not reached in this decision. In its posthearing brief PCA stated this issue to be "was the power outage that occurred on November 23, 1980, an 'accident' within the meaning of 30 C.F.R. 50.2(h)(11)?" PCA contends that "where, as here, a hoist is not damaged but, instead, is simply disabled by a loss of electrical power that effects the mine in general, no 'accident' within the meaning of 30 C.F.R. 50.2(h)(11) occurs and, therefore, no obligation to immediately report the loss of power arises under 30 C.F.R. 50.10."

~FOOTNOTE_FOUR

4 The power generated by the company is sufficient without Southwestern Public Service power to operate the hoists (Tr. 96:19-22).

~FOOTNOTE_FIVE

5 The No. 2 hoist shaft is located about 75 to 100 yards from the No. 1 substation (Tr. 86:4-14).

~FOOTNOTE_SIX

6 An "accident" is defined in 30 C.F.R. 50.2(h)(6) as including "An unplanned mine fire not extinguished within 30 minutes of discovery." However, there is no contention in this case that the fire lasted 30 minutes [Tr. 31:11-13].

~FOOTNOTE_SEVEN

7 An information report on 30 C.F.R. Part 50 (revised February 1980), issued by the U.S. Department of Labor's Mine Safety and Health Administration (Technical Support) by the Health and Safety Analysis Center, Denver, Colorado, contains the following question and answer on page 28:

"Q. What constitutes "Damage to hoisting equipment . . . which interferes . . . for more than 30 minutes?"

"A. Damage may be caused (1) by some accident that includes the hoisting equipment or (2) damage may result from hoisting equipment failure. All of the mining community interested in preventing serious injuries and fatalities know that potential injuries may result from any hoisting accident or hoisting equipment failure. The real potential hazards make it imperative that the mining industry and MSHA learn about and analyze causes of hoisting accidents and failures of hoisting equipment to preclude future occurrences at the same or a different mine.

"A natural occurrence such as ice in the shaft may cause a shaft and hoist to be shut down for more than 30 minutes. However, where no accident occurs, equipment is not damaged, and no individuals were endangered, the natural occurrence would not of itself be reportable."

~FOOTNOTE_EIGHT

8 The text of the July 29, 1981, memorandum to the Supervisory Mine Inspector from the Subdistrict Manager

(Petitioner's Exhibit 7) was as follows:

"The questions raised in your July 2, 1981 memorandum were forwarded to the Chief of Safety (see attached memorandum) for determination.

"Concerning reporting hoist malfunctions, the Chief of Safety agrees that once hoisting has been interfered with for thirty minutes, the incident must be immediately reported to MSHA. No additional time is allowed for trouble shooting.

"Concerning compliance with Standard 57.11-50: When a mine has two hoists and one is down for repairs for more than thirty minutes, the Chief of Safety stated that a program directive has been prepared regarding this standard which has been forwarded to the Solicitor's office for approval. Therefore, until this program directive is released, continue the current policy of allowing personnel to remain underground the remainder of the shift providing that all personnel are notified and are in agreement but not to allow the next shift to go underground until the hoist is repaired.

"Feel free to distribute this memorandum to any interested party."