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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 Proceeding  Docket No. PENN 82-13 A.C. No. 36-00970-03108  Maple Creek No. 1 Mine
v.	
U. S. STEEL MINING CO., INC., RESPONDENT	
U. S. STEEL MINING CO., INC., CONTESTANT	Contest of Citation  Docket No. PENN 82-57-R Citation No. 1050753 12/21/81
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Robena No. 1 Mine

DECISION

Appearances: David Street, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner/Respondent,  
MSHA Louise Q. Symons, Esq., U. S. Steel  
Mining Company, Inc., Pittsburgh,  
Pennsylvania, for Respondent/Contestant,  
U. S. Steel Mining Company, Inc.

Before: Judge Merlin

Statement of the Case

Docket No. PENN 82-13 is a petition for the assessment of a civil penalty. At the hearing the Solicitor moved to withdraw this petition. I granted the motion and dismissed the petition.

Docket No. PENN 82-57-R is a notice of contest filed by U. S. Steel to review a citation and an underlying notice to provide safeguards issued by an inspector of the Mine Safety and Health Administration under Section 104(a) of the Act.

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By notice of hearing dated February 3, 1982, this matter was set for hearing on March 3, 1982. The hearing was held as scheduled. At the hearing the parties agreed to 24 stipulations which I accepted and made part of the record.

#### Applicable Statute and Regulations

Section 314(b) of the Act which also appears as 30 C.F.R. 75.1403 provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

#### Notice to Provide Safeguards and Citation

The subject notice to provide safeguards dated September 10, 1981 provides as follows:

Notice to provide a safeguard for each station where mine cars are moved by means of a hoist (or car spotter). Two separate and independent methods of stopping the movement of the mine car. The second method shall provide control in case the main control fails because the contactor or the switch fails in the run position. Area all sections.

The subject citation dated December 21, 1981, provides as follows:

Action was not taken to provide a second means of deenergizing the main power on the car spotters in case the contractor sticks. This notice covers all car spotter winches in the entire mine. (10 car spotter winches).

#### Discussion and Analysis

On March 5, 1981, a fatality occurred at the Banning Mine of Republic Steel Corporation. Coal was being loaded from a shuttle car by means of the shuttle-car's discharge boom onto a trip of mine cars. At Banning a locomotive brings the mine car trip to the designated location and is supposed to disengage. The mine car trip then is moved along by a car spotter. The spotter at Banning has an electric motor which drives a hydraulic pump which in turn

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powers hydraulic jacks positioned between the rails to catch the axle of each mine car on the trip and push the car forward. The activation of the spotter and therefore the movement of the mine car trip is controlled by the shuttle-car operator who has an electrical pull-type switch on each side of the loading ramp. By controlling the movement of the mine car trip the shuttle-car operator can achieve even distribution of coal from the shuttle car into the mine cars. On March 5, the shuttle-car operator could not stop the movement of the mine cars and this caused the discharge boom of the shuttle car to become caught on the top of one of the moving mine cars, pulling the shuttle car itself sideways. At the time, the shuttle-car operator shouted that he could not stop the mine car trip, had his head outside of the canopy of the shuttle car and was caught and crushed between the canopy and a post. The mine cars continued to move forward and then stopped.

The evidence of record including the testimony of MSHA's witnesses indicates that during the investigation on the day of the Banning fatality the contractors in the spotter's circuitry were alright and not sticking but that the electrical system did not work properly, apparently because a State inspector had pulled out a wire. Five days after the fatality the car spotter was checked again and at that time the mine car trip continued to run after the release switch had been turned off. Examination of the car spotter's electrical circuitry revealed that the contactors were "hanging up" in the closed position thereby keeping electric current flowing, allowing the spotter to continue operating and pulling the mine car trip forward. The contactors were not burnt. They subsequently disengaged on their own, falling out.

As a result of its investigation MSHA attributed the fatality to two causes. The first, the amount of clearance between the shuttle-car discharge boom and the mine cars, is not involved in this case. The second, stuck contactors in the electrical circuitry, in MSHA's opinion caused the spotter to continue to run and move the mine cars after the release switch had been pulled, resulting in the discharge boom falling on top of the mine cars and skewing the shuttle

car sideways, crushing the shuttle-car operator. The District Manager of District 2 thereafter issued the following memorandum dated March 27, 1981:

Each station where mine cars are moved by means of a hoist, spotter, or other device shall be provided with two separate and independent methods of stopping the movement of the mine cars. The second method shall provide control in case the main control fails because the contractor or the switch fails in the run position.

The foregoing memorandum applies to all mines in District 2 which load coal in the same manner as the Banning Mine including U. S. Steel's Robena No. 1 Mine. At Robena a locomotive is not used to position the mine car trip and the car spotter does not have a hydraulic motor and jacks as at Banning. Instead, the electrically powered winch or hoist pulls the cars forward by means of a steel cable. However, the configuration of the contactors which participate in the generation and supply of electric power to the car hoist is the same.

The issue to be decided is whether the notice to provide safeguards and the citation based upon it issued to U. S. Steel at Robena were proper under 30 C.F.R. 75.1403. This section deals with transportation of men and materials. Coal was being transferred from the shuttle car to the mine cars on the way from the face to the surface. This transfer was an integral part of the transportation of the coal. I conclude the circumstances here constitute transportation of materials within the meaning of 75.1403. The specific subsections of 75.1403 which follow are merely examples and not exclusive.

Beyond the definition of what constitutes transportation is the inquiry whether this notice to provide safeguards is in accordance with the basic characteristics of safeguards and the principles which should govern their use. Safeguards are designed to cover situations where conditions vary on a mine-to-mine basis. Mandatory standards cannot anticipate every possible physical condition in every mine and therefore with respect to the transportation of men and materials the Act allows flexibility. By means of a safeguard MSHA can impose certain requirements on a particular mine which are peculiar to that mine because of its physical configuration and circumstances. However, in order to be fair to the operator by giving due notice, the requirements being imposed

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upon its mine are set forth first in the safeguard notice which carries no civil penalty. Only in the subsequent citation based upon the safeguard can a penalty be imposed. In the area of transportation of men and materials, safeguards embody and effectuate flexibility and adaptability to individual circumstances in the administration of the Act. However, the potential scope of safeguards is very broad and accordingly, care must be taken to ensure that they are employed only in the proper context and do not become a means whereby the normal rule-making process is ignored and circumvented.

As already noted, the memorandum upon which the instant safeguard was based covered all mines in District 2 which load coal by means of a shuttle-car discharge boom and a mine car trip. The testimony at the hearing indicated that in District 2 three mines out of 17 load coal in this manner. The issuance of this safeguard and citation has nothing to do with conditions peculiar to the Robena No. 1 Mine as opposed to all other mines. Rather the safeguard applies to the method used at Robena to load and transport coal. This method might be employed in all, in a majority or as here in a significant minority of mines in the district. This is not what the safeguard device was designed to be used for. I conclude therefore that the safeguard and the citation based upon it were improperly issued and are invalid. If MSHA believes certain back-up requirements should be imposed for this type of coal loading process to make sure that contactors in the circuitry of car spotters disengage, electric current stops, and mine car trips do not run after the release switch is pulled, MSHA should undertake rulemaking. This is not to say that MSHA was not justified in having serious concerns after the fatal accident at the Banning Mine. However, such concerns cannot be satisfied through a blanket use of safeguards which disregards the rulemaking procedure. And this is especially so where, as here, the requirements imposed by the safeguard and citation in question apply in only one MSHA district but no other. Such uneven enforcement is irrational, unfair and does little if anything to advance the purposes of the Act. If MSHA believes remedial action is necessary as well it may be, MSHA must propose a uniformly applicable course of action and give operators and other interested parties appropriate opportunity to comment.

The subject safeguard and citation must be invalidated for other reasons also. After reviewing all the exhibits and testimony, I conclude the evidence falls far short of showing that a safeguard at Robena was warranted. First, MSHA's own evidence at the hearing shows that stuck contactors could not in fact be identified as the cause of the fatality at Banning. The MSHA fatality investigator testified that contactors were not stuck on the day of the fatality and that the cause of the accident could have been stuck contactors, a malfunctioning switch, or something else. It was only five days later upon testing that the contactors for the car spotter at Banning stuck so that the spotter's motor continued to run and move the mine trip. Solely from the fact of stuck contactors at Banning five days after the fatality, the requirements embodied in the subject safeguard and citation were applied to all other mines in District 2 which load coal like Banning. However, no attempt was made to determine whether the circumstances in those other mines in District 2, of which Robena was one, were the same. The MSHA electrical inspector who issued the subject safeguard and citation at Robena expressly admitted that the contactors at Robena had never been tested, and that a car spotter which did not stop could be due to a defective switch as well as a defective contactor. He also testified that insofar as he knew there had been no problem with contactors at Robena. Therefore, even if the requirements of the safeguard could have been properly imposed at Banning, MSHA had no basis to apply those requirements to Robena. Indeed, the evidence presented at the hearing showed that relevant conditions at the two mines were not the same. MSHA's own electrical expert testified that the contactors used at Banning and Robena were different makes. Ohio Brass contactors were used at Banning whereas Joy contactors were used at Robena. The expert who was familiar with both kinds testified that Joy contactors stick less than Ohio Brass contactors and he was not aware of Joy contactors ever sticking in a car hoist. Further, both MSHA and operator expert testimony demonstrated that amperage capacity is greater in the contactors at Robena than at Banning reducing the chances of sticking contactors at Robena. Gravity in the armature assembly also is a factor in the Joy contactor decreasing the likelihood of sticking and increasing the possibility of disengagement of contactors as opposed to Ohio Brass contactors. Finally, the MSHA electrical expert stated that he believed the contactors could have caused the accident at Banning because of the different nature of the two contactors used at Banning and Robena. The expert's

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subsequent attempt to retract or diminish the effect of his initial testimony regarding contactors is not found credible. I have not overlooked the testimony of the UMW safety inspector who based upon his employment at Robena in the mid-1970's stated that he knew of stuck contactors in car hoists. However, in light of the other evidence already set forth I do not find the safety inspector's testimony persuasive with respect to what allegedly happened several years ago. The record demonstrates so many significant differences between the circumstances at Banning and Robena that there was no basis to apply conclusions from an event occurring at Banning to Robena. On this basis also the subject safeguard and citation must be invalidated.

Both parties have filed briefs which I have carefully reviewed. As I stated at the hearing, the presentations of counsel were most helpful in understanding the technical aspects of this case.

ORDER

It is Ordered that the petition for civil penalty in PENN 82-13 be and is hereby DISMISSED.

It is hereby Ordered that the notice of contest in PENN 82-57-R be and is hereby Granted and that the subject notice to provide safeguards and citation be and are hereby VACATED.

Paul Merlin  
Chief Administrative Law Judge