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SOL (MSHA) V. BETTY COAL  
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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

v.

BETTY B. COAL COMPANY, INC.,  
RESPONDENT

Civil Penalty Proceeding

Docket No. VA 81-15  
A.C. No. 44-01647-03014

No. 3 Mine

DECISION

Appearances: James P. Kilcoyne, Jr., Esq., and David T. Bush, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for Petitioner  
John M. Carpenter, Clintwood, Virginia, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." The Secretary initially proposed penalties of \$122 for two alleged violations on August 5, 1980, of the mandatory safety standard at 30 C.F.R. 75.1710 charging that Betty B. Coal Company, Inc. (Betty B.), was operating two of its Fletcher roof-bolting machines without canopies in a section of the No. 3 Mine in which the mining height was 51 to 60 inches. The parties thereafter proffered an oral proposal for settlement of the case. In light of the unusual facts presented, however, I denied the proposal as inappropriate under the criteria set forth in section 110(i) of the Act. (FOOTNOTE 1)

The general issues in this case are whether Betty B. has violated the cited standard as alleged and, if so, the appropriate civil penalty to be assessed for the violations. The specific issue is whether there is a conflict between State and Federal regulations on the subject matter at bar and, if so, what is the effect of such conflict upon the resolution of the general issues. The operator has waived its right to a hearing, and the parties submit the issues on a joint stipulation of facts. The essential factual stipulations were submitted as follows:

1. On August 5, 1980, Manuel Hairston, a coal mine inspector for the Federal Mine Safety and Health Administration Department of Labor (MSHA), performed an inspection at the Betty B. No. 3 Mine. During the course of this inspection, Hairston observed that the protective canopies had been removed from the two roof bolters being used in the 3-Main 001 Section. The inspector noted that the coal height in this section of the mine ranged from 51 to 60 inches. As a result of these observations, Inspector Hairston issued valid section 104(a) citations for violations of 30 C.F.R. 75.1710 (Citation Nos. 0689415, A and B). (FOOTNOTE 2) The inspector opined that without such canopies the machine operators could be injured by a roof fall. He thought such an event was unlikely, however, because the subject mine did not have a history of roof falls.

2. On August 4, 1980, the day before the above-described Federal inspection, Jerald T. Hileman, a mine inspector with the Virginia Division of Mines and Quarries, had performed a regular inspection at the same mine. During this inspection, Hileman issued an Order of Closure which required the operator to remove the canopies from the subject roof-bolting machines because of insufficient clearance (See, Order of Closure, attached hereto as Exhibit A). (FOOTNOTE 3) Hileman noted that the two canopies were 58 inches in

~583

height while the height of the roof and roof support in this section of the mine was 52 inches.(FOOTNOTE 4) Hileman found that the canopies were disturbing the roof-control measures in many areas of this section. On August 4, 1980, State Inspector Hileman reinspected the section. He thereafter issued a Notice of Correction finding that the operator had complied with the Order of Closure by removing the canopies from the two roof bolters in question and allowed the operator to resume production. (See, Notice of Correction, attached hereto as Exhibit B.)

3. MSHA Citation Nos. 689415A and 689415B were abated after the operator replaced the canopies (at a height of 58 inches) on the two roof-bolting

machines in question. The violations were abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

4. As of this time, there is no agreement between the Virginia Division of Mines and Quarries and MSHA to resolve conflicts in the enforcement of their canopy standards. Each agency enforces its particular canopy standard as it sees fit without regard to the enforcement practices of the other agency.

5. Betty B. is a small operator within the meaning of the Act and assessment of a civil penalty in this proceeding will not adversely affect the operator's ability to continue in business.

#### Evaluation of the Evidence

It is not disputed that under the cited Federal regulation, Betty B. was required to provide its roof-bolting machines with "substantially constructed canopies, or cabs, to protect the miners operating such equipment from roof falls and from rib and face rolls." It is apparent, moreover, that the operator was in compliance with the cited standard on August 4, 1980, the day before the Federal inspection but, because of this compliance, was found in violation of an apparently conflicting State regulation. An inspector for the Virginia Division of Mines and Quarries had effectively compelled the operator to remove the Federally required canopies from the subject roof-bolting machines by a closure order issued on August 4. In other words, by complying with the State order on August 4, the operator was placed in a position of violating the Federal regulation. For purposes of determining whether there was a violation in the instant case, however, the question of such a conflict is immaterial. While limited concurrent State authority to regulate mine safety is recognized under the Act, it is clear that in the event of a conflict, the Federal regulation will supercede the State regulation. Section 506 of the Act. See also *Rice v. Board of Trade*, 331 U.S. 247, 91 L.Ed 1468, 67 S. Ct. 1160, and *H. P. Welch Company v. New Hampshire*, 306 U.S. 79, 84 L.Ed 560, 59 S. Ct. 438. Within this framework of law, I am compelled to find on the undisputed facts of this case that the Federal standard has been violated as charged.

Apparently the Federal and State regulators have not to this date been able to resolve their enforcement differences in this regard. In the future, in fairness to the operator, if such conflicts cannot be resolved and the Secretary is convinced that the interests of safety are best protected by compliance with the Federal standard, I would expect the Secretary to initiate injunctive proceedings to bar State interference with the enforcement of the Federal standard. Of course, the operators themselves are not without legal recourse and may wish to initiate modification of the application of the Federal standard under section 101(c) of the Act or seek injunctive remedies against conflicting State enforcement activities.

While it is no defense to the violation that the operator

was placed in a position of noncompliance because of State regulatory action, this factor is indeed a relevant consideration in determining whether the operator was negligent and the amount of penalty to be imposed. Since it is apparent from



equipment.

"Rule 4. Cabs or canopies must have a minimum of six inches of overhead clearance below the lowest projection of the roof or roof supports, if it extends above the machine on which it is mounted.

"A. The Mine inspector may require twelve inches (12" ) of overhead clearance if evidence is present that indicates that more clearance is needed.

"B. Where the seam height is less than seventy-two inches (72" ), special attention must be given to the design before any cabs or canopies are installed.

"Rule 5. The visibility of the operator shall not be obstructed by the design [sic] of the cabs or canopy to the extent that the operator must 'lean' out of the structure to see where he is going.

"Rule 6. The structure shall be wide enough to protect the operator from side obstructions such as ribs, overhangs, timbers, etc.

"A. The structure shall also be large enough so as not to restrict the operator to the extent that it would be hazardous for him to operate the machine.

"Rule 7. Cabs or canopies that are adjustable must have a minimum clearance between segments. The bolt or pin used must withstand more than the shear weight of the designated load capacity.

"Rule 8. The top plate must be 'beveled' in the direction of travel to lessen the likelihood of dislodging or loosening roof supports.

"Rule 9. Any other act or practice considered by the Mine Inspector to be hazardous to the operator of the equipment or other mine personnel will result in an order requiring corrective measures.

"Rule 10. Cabs or canopies for roof bolting machines will not be accepted as the sole means of temporary roof support unless they have been approved by the Chief Mine Inspector. They must be so designed as to be firmly positioned against the roof and mechanically held in place until permanent supports are installed. Unless the cab or canopy covers the entire area of unsupported roof to be bolted, safety jacks, or other adequate temporary supports, shall be installed in conjunction with the cab or canopy as prescribed in the roof support plan for the mine in which they are to be used.

"Any violations of the above discovered by the State Mine Inspector shall result in a closure order being issued stating what constitutes the unsafe condition observed and the order shall specify that the equipment in question is not to be



operated until the unsafe condition is corrected."

~FOOTNOTE\_FOUR

4 There was apparently an error in transposing these measurements.