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

SECRETARY OF LABOR, PETITIONER	Civil Penalty Proceedings
v.	Docket No. PENN 81-86 AC No. 36-00970-03080
UNITED STATES STEEL CORP., RESPONDENT	Maple Creek No. 1 Mine
UNITED STATES STEEL CORP., CONTESTANT	Contest of Citation and Order
v.	Docket No. PENN 81-47-R
SECRETARY OF LABOR, RESPONDENT	Maple Creek No. 1 Mine

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent
Louise Q. Symons, Esq., for Contestant

Before: Administrative Law Judge William Fauver

These proceedings involve the same citation and order. In PENN 81-86-P, the Secretary seeks a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.. In PENN 81-47-R, under section 105(d) of the Act the company seeks review and vacation of the citation and order involved in the penalty proceeding. The cases were consolidated and heard at Falls Church, Virginia.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACTS

1. At all pertinent times, United States Steel Corporation ("Respondent") operated Maple Creek No. 1 Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On July 11, 1974, Notice to Provide Safeguard Number. 1 RCM was issued at the mine by the Secretary's statutory predecessor, the Secretary of the Interior. The safeguard reads in pertinent part:

> The No. 13 self-propelled personnel carrier in 6 flat 20 Room Section was not provided with a lifting jack. All self-propelled personnel carriers at this mine shall be provided with a suitable lifting jack and bar.

3. On November 3, 1980, about 8:00 a.m. Federal Mine Inspector Joseph Reid inspected the Spinner Shaft bottom of the mine, where he discovered four jeeps, each missing a lifting jack. He was accompanied by David Leone, Respondent's Safety Inspector, and told him that citations would be written on the four jeeps and that Respondent would be required to provide a lifting jack for each. For three of the jeeps, lifting jacks were provided in short order, but a jack could not be found for the fourth jeep. Inspector Reid testified that then he told Leone that Respondent would have until 9:15 a.m. to abate the violation as to the fourth jeep. However, Leone testified that while underground Inspector Reid never mentioned an abatement time and did not give him anything in writing to show a time allowed for abatement.

4. After inspecting other parts of the mine, Inspector Reid returned to the Spinner Shaft bottom about 11:55 a.m., still accompanied by David Leone. Reid found the fourth jeep in the same position as he had left it, with no jack but a notation "Shop, no jack" chalked on the jeep. Finding that the jeep was still operable and connected to power, he determined that the abatement time should not be extended and issued a section 104(b) withdrawal order on the jeep. Reid testified he would not have issued the order if the jeep had been rendered inoperable, that is, removed from power. To disconnect the jeep from the trolley wire would have taken a few minutes. A red MSHA tag was put on the jeep showing that a government withdrawal order applied to it. Within about one hour the condition was abated and the withdrawal order was terminated. Later, at the mine surface Reid wrote Citation No. 844321, which specified a "Due Date" of "09:15" hours. His inpsector's note book apparently includes a note of abatement time of 9:15 a.m. for this citation.

5. A lifting jack for a jeep is necessary to return the jeep to the tracks in the event of a derailment. In such cases the time needed to get a jeep back on the track is likely to be in important safety factor, for example, to reduce the risk of collision with other vehicles or to remove a derailed jeep that may be blocking an effective and safe exit to miners in an emergency.

DISCUSSION WITH FURTHER FINDINGS

An adequately worded notice of safeguard was issued in 1974, requiring that each jeep (personnel carrier) be provided with a lifting jack. This safeguard was violated as charged in the citation on November 3, 1980.

However, the order of withdrawal was improperly issued because in the oral issuance of its antecedent citation there was no clear communication of an abatement time.

MSHA's procedure of orally notifying an operator's representative underground of a violation and writing a citation for it on the mine surface meets the notice requirements of the Act so long as the violation is described with sufficient specificity. However, to sustain a section 104(b) withdrawal order, MSHA must prove that an abatement time was specified and communicated clearly to the operator's representative and that the violation was not abated within such time. There is a bona fide dispute between the inspector and Respondent's representative as to whether an abatement time was orally communicated to Respondent's representative. I find that the government has not proven by a preponderance of the evidence that Inspector Reid communicated a specified abatement time to Leone while Reid and Leone were underground. As a result, MSHA has failed to meet its burden of proof of an essential element. In cases of oral communication of a citation underground, it would appear a sounder practice for the Federal mine inspector to deliver something in writing to the mine operator's representative as to the abatement time, rather than risking a dispute of testimony on that point.

The citation will be sustained, but the order of withdrawal will be vacated. A penalty will be assessed for the violation based on the condition proved under the citation but not for conduct alleged in the vacated order of withdrawal.

This was a serious violation because of substantial safety risks to miners in failing to equip a jeep with a lifting jack.

Respondent was negligent in not providing a lifting jack for the fourth jeep before the citation was orally issued.

The company's act of marking the jeep "Shop, no jack" was not sufficient to withdraw the jeep from service, because it was not disconnected from power or otherwise rendered inoperable. Such marking alone could not relieve the company of abating the violation. Cf. Secretary of Labor v. Eastern Associated Coal Corp., 1 FMSHRC 1473 (October 23, 1979). However, the government has failed to prove its allegation of untimely delay in abating the violation because it did not sufficiently prove that an abatement time was communicated to Respondent's representative.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of these proceedings.

2. In PENN 81-47-R, Respondent violated 30 CFR 75.1403 as charged in Citation No. 844321. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $200 for this violation.

3. In PENN 81-47-R, the Secretary proved the validity of the citation, but failed to prove the validity of the withdrawal order.

ORDER

WHEREFORE IT IS ORDERED:

1. In PENN 81-47-R, Respondent, United States Steel Corporation, shall pay the Secretary of Labor the above-assessed penalty of $200.00 within 30 days from the date of this decision.

2. In PENN 81-86, Citation No. 844321, November 3, 1980, is SUSTAINED, and Order of Withdrawal No. 844325, November 3, 1980, is VACATED.

WILLIAM FAUVER
JUDGE