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SOL (MSHA) V. R&S 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

CIVIL PENALTY PROCEEDING

Docket No. CENT 82-106  
A. C. No. 03-01384-03018

v.

J & B No. 1 Mine

R & S COAL COMPANY, INC.,  
RESPONDENT

PARTIAL APPROVAL/DISAPPROVAL OF SETTLEMENT  
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements with respect to the four citations involved in this matter. The proposed settlements are for \$20 apiece.

In my opinion, \$20 is a nominal penalty which indicates a lack of gravity. Citations Nos. 1025765 and 1024911 are record-keeping violations. They are, therefore, on their face not serious, and I approve the proposed settlements of \$20 each for these violations. However, I will not issue an order for the operator to pay these violations until additional information is submitted with respect to the remaining two violations.

Citation No. 1025764 involves an inadequate braking system on the front end loader. Citation No. 1025767 was issued because the grader did not have an audible warning device. The Solicitor represents that the negligence of the respondent was low and that there were no employees on foot in the area, thereby reducing the probability of occurrence. I accept these representations. Nevertheless, it appears that some degree of gravity may have been present and that therefore a \$20 penalty for each of these violations would be inappropriate.

In addition, the Solicitor states that the violations were not considered significant and substantial.

This motion does not specifically mention section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4, which provides for the assessment of a \$20 single penalty for a violation which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The rationale advanced by the Solicitor is, however, the same as appears in the regulation since the Solicitor relies upon the fact that the violations were not significant and substantial. The regulation and the rationale expressing it are not binding upon this Commission. Indeed,

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they are not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather than in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that this violation is not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the proposed settlements for Citations No. 1025765 and No. 1024911 are hereby Approved.

It is further Ordered that the proposed settlements for Citations No. 1025764 and No. 1025767 are hereby Denied. It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlements warranted for these two violations. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin  
Chief Administrative Law Judge