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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. WEST 82-184-M A.C. No. 48-00144-05010
v.	Sunrise Mine & Mill
C F & I STEEL CORPORATION, RESPONDENT	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor U. S. Department of Labor, Denver, Colorado for Petitioner
Allan R. Cooter, Esq., Pueblo, Colorado for Respondent

Before: Judge Carlson

The Secretary of Labor petitions this Commission for the affirmance of a penalty assessed against C F & I Steel Corporation (CF&I) for the alleged violation of 30 C.F.R. 57.19-124, (1982) a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (1976 and Supp. 1982). The cited regulation provides as follows:

> Mandatory. Hoist ropes other than those on friction hoists shall be cut off at least six (6) feet above the highest connection to the conveyance at time intervals not to exceed one (1) year unless a shorter time is required by standard 57.19-126, or by conditions of use. The portion of the rope that is cut off shall be examined by a competent person for damage, corrosion, wear and fatigue.

After notice to the parties a hearing was held on February 2, 1983, in Denver, Colorado. The parties stipulated to all the material facts. Certain of the stipulations were oral; others were based upon agreement that all factual representations contained in the pleadings and supporting documents already in the file were true. Both parties submitted post-hearing briefs.

THE FACTS

The material facts as revealed by the stipulations may be summarized as follows:

(1) CF&I's Sunrise mine is subject to the coverage of the Act.

(2) The Sunrise operation is large with an average history of citations.

(3) The mine hoist, a non-friction hoist, is the type of hoist described in 30 C.F.R. 57.19-124.

(4) On May 21, 1981, CF&I filed a petition for modification of the application of that standard, seeking to avoid the annual requirement for cutting off a six foot length of hoist rope for inspection.

(5) CF&I sought this modification from the Secretary because the mine was shut down on July 13, 1980, after which the hoist was used by eight to ten maintenance people with an approximate frequency of five percent of the normal operating use.

(6) The rope was last replaced on June 20, 1980.

(7) On January 21, 1982, while CF&I's petition for modification was pending, a representative of the Secretary inspected the mine and issued a citation for violation of 30 C.F.R. 57.19-124.

(8) In the year prior to inspection CF&I did not cut and examine the rope as required by 30 C.F.R. 57.19-124.

(9) At no time prior to the hearing did CF&I file an application for interim relief under 30 C.F.R. 44.16 et seq.

(10) On March 18, 1982, CF&I received notice that its petition for modification was denied.

(11) CF&I exercised good faith in abating the violation shortly after receiving the inspection citation.

ISSUE

Does the pendency of a petition for modification, filed in good faith, abrogate or limit the Secretary's authority to issue a valid citation for violation of the standard from which the petitioner seeks relief?

DISCUSSION

CF&I sought its modification of the hoist rope standard because the hoist in question received less-than-normal use and the hoist rope would therefore suffer less-than-ordinary wear. In defense against the Secretary's charge, CF&I basically argues that it was improper for the Secretary to issue the citation for violation of 30 C.F.R. 57.19-124 because it had a petition for modification pending on that very regulation. Because of its good faith in pursuing a variance in the application of the standard to the hoist in question, and a reasonable expectation that it would ultimately be granted, CF&I contends it should not be subject to a citation while a decision on the modification request was pending.

The difficulty with this argument is manifest. Neither the Act nor the Secretary's regulations relating to modifications provide for any suspension of the Secretary's enforcement powers or duties while a mere petition for modification is pending. The regulations do provide an avenue of relief, however, in the form of an application for interim relief, which may be filed under 30 C.F.R. 44.16. Such an application is adjunctive to the original petition and opens the way for an administrative suspension of enforcement pending a final determination on the petition itself. Unfortunately, CF&I failed to file an application for interim relief.

In this present proceeding CF&I suggests that its original petition for modification is the equivalent of an interim application, or includes one by implication. The argument cannot prevail. The provisions of 30 C.F.R. 44.16 require extensive special showings of fact beyond those specified for a petition for modification. Specifically, 30 C.F.R. 44.16(c) provides:

> Before interim relief is granted, the applicant must clearly show that (1) the petition seeking modification has been filed in good faith, and the applicant is not using the proceeding solely to postpone or avoid abatement; (2) the requested relief will not adversely affect the health or safety of miners in the affected mine; and (3) there is a substantial likelihood that the decision on the merits of the petition for modification will be favorable to the applicant.

According to 30 C.F.R. 44.16(d) these representations must be set out and supported in the application. In addition to the more burdensome special showings required, the interim relief mechanism provides procedural safeguards to insure that the enforcement powers of the Secretary are not suspended by unilateral action on the part of a petitioning party, to the possible detriment of the safety of miners. Section 44.16(f) allows all parties three days in which to respond to the interim application, and 44.16(h) allows for speedy hearings upon any of the issues raised. Thus, the regulations make a clear distinction between a petition for modification and an application for temporary relief. The former proceeds through the various procedural phases outlined in the Secretary's regulations in a way which does not affect the interim enforceability of the standard in question. On the other hand, the operator seeking temporary relief must supplement his modification efforts by special showings and must be prepared for a speedy hearing in which the facts pertaining to all issues may be aired in an adversarial setting. Only in this way can there be a reasonable assurance that the safety or health of miners will not be jeopardized by a precipitous and unwarranted suspension of the Secretary's enforcement duties. In short, the difference between the petition for modification and the application for interim relief is one of substance, not mere nomenclature or form. For that reason, CF&I's petition for modification cannot be construed to embody an implied request for interim relief.

CF&I places much emphasis upon its good faith approach to the hoist problem, and its reasonable expection of success in its quest for a

modification. The case for modification does indeed seem strong. These factors, however, are simply not material to the issues before me. That CF&I may ultimately have been successful cannot affect the outcome here. Its miners, the Secretary, and other potential parties in interest were entitled to notice of any intent to seek a suspension of the hoist rope standard pending final action on the modification petition. That notice was required to be in the form of a formal application for interim relief. No such application was filed, and that oversight cannot be remedied in this present penalty proceeding.

Similarly, it is not material that the petition for modification was prepared pro se. It is likely true that had the company been aided by counsel an application would have been filed. Pro se status, however, cannot transform a petition for modification into an application for interim relief.

A further matter deserves note. After the hearing, CF&I submitted copies of correspondence showing that the company had asked the Secretary for further consideration of its modification request in view of MSHA's proposal to eliminate the part of the standard which requires cutting of the rope for examination. A letter to CF&I's General Superintendent by MSHA's Administrator for Metal & Nonmetal Mines dated March 14, 1983 appears to waive the cutting requirement for March 29, 1983. This correspondence cannot influence the outcome of this present proceeding. First, it was submitted after the factual record was closed, and was accompanied by no motion to reopen the record. Second, even if given consideration, MSHA's later action as to respondent's 1983 responsibilities does not alter the previously discussed legal precepts which govern the resolution of the issue before me.

PENALTY

The parties stipulate that if CF&I does not prevail upon the legal issue presented here, the $90.00 proposed by the Secretary should be affirmed (Tr. 4). Since I find the citation valid, and conclude that the $90.00 proposed penalty accords with the statutory criteria set out in section 110(i) of the Act, CF&I shall be required to pay a civil penalty of $90.00

ORDER

CF&I is therefore ordered to pay to the Secretary a civil penalty of $90.00 within 30 days of this decision.

John A. Carlson
Administrative Law Judge