CCASE: U.S.STEEL V. SOL (MSHA) DDATE: 19840501 TTEXT: Federal Mine Safety and Health Review Commission Office of Administrative Law Judges

U.S. STEEL MINING CO., INC., CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 83-124-R
	Citation No. 2001887; 3/4/83
SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH	Gary No. 50 Mine
ADMINISTRATION (MSHA),	
RESPONDENT	
SECRETARY OF LABOR,	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	Docket No. WEVA 83-219
PETITIONER	A.C. No. 46-01816-03519
v.	
	Gary No. 50 Mine
U.S. STEEL MINING CO., INC.,	

U.S. STEEL MINING CO., INC., RESPONDENT

UNITED MINE WORKERS OF AMERICA,

INTERVENOR

DECISION

Appearances: Louise Q. Symons, Esq., U.S. Steel Mining Co., Inc., Pittsburgh, Pennsylvania for Contestant/ Respondent; James B. Crawford, Esq., Office of the Solicitor U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner; Mary Lu Jordan, Esq., United Mine Workers of America, for Intervenor.

Before: Judge Kennedy

The captioned review-penalty proceedings came on for an evidentiary hearing in Pittsburgh, Pennsylvania on March 15, 1984. The gravamen of the charge was the operator's refusal to pay a union walkaround for time spent participating in a "Ventilation Technical Inspection" in violation of section 103(f) of the Mine Safety Law. The operator challenged the validity of the citation and the penalty assessed on the ground the activity was not an "enforcement inspection" within the meaning of section 103(a).

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During the course of his opening statement, the solicitor admitted MSHA gave advance notice of the "inspection" whereupon the operator moved to vacate and dismiss. In support of her argument counsel for the operator pointed out that section 103(a) prohibits advance notice of any enforcement inspection and section 110(e) makes it a misdemeanor punishable by a fine of up to \$1,000 and imprisonment for up to six months for any person to give advance notice of such an inspection.

The solicitor opposed the motion stating "there is advance notice of all inspections" and more particularly of the four quarterly inspections mandated by section 103(a) of the Act. The solicitor declared there has never been a prosecution for violating the advance notice prohibition and expressed confidence that the department would take no adverse action against an inspector for doing so. (FOOTNOTE 1)

Despite the solicitor's zeal to compel testimony that might violate the inspector's Fifth Amendment rights, the trial judge refused to allow the inspector to testify unless given appropriate use immunity. (FOOTNOTE 2) 18 U.S.C. 6002. Under the Omnibus Federal Immunity Statute, only the Attorney General or his duly authorized representative may approve issuance of an immunity order by administrative agencies of the United States. 18 U.S.C. 6001, 6002, 6004. Unfortuaately, the Federal Mine Safety and Health Review Commission is not an agency authorized to issue an immunity order.

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When it became apparent that neither the solicitor, the Secretary, nor anyone else in the Department of Labor or the Commission could grant the witness immunity and the trial judge refused to allow the solicitor to put the witness in jeopardy, the solicitor, after consultation with his superiors, moved to vacate the citation and dismiss the proposal for penalty. The operator having no objection, the trial judge entered an order from the bench granting the motion to vacate the citation and dismissing the proposal for penalty.

The premises considered, it is ORDERED that the bench decision of March 15, 1984, be and hereby is, AFFIRMED and the captioned matters DISMISSED.

Joseph B. Kennedy Administrative Law Judge

~FOOTNOTE_ONE

1 If the solicitor's statements accurately reflect MSHA policy, they would seem to confirm the widespread impression that MSHA is openly flouting the prohibition against giving advance notice of enforcement inspections. In my recent decision in Pontiki Coal Corporation, 6 FMSHRC ----, March 30, 1984, I called for an inspector general's investigation of what appeared to be a flagrant violation of the advance notice prohibition. I am advised that a "file" was opened but that no field investigation commenced because the investigator assigned to the matter went on "vacation". The matter seems to have been prejudged by the Assistant Secretary for Mine Health and Safety, Mr. Zegeer. On April 14, 1984, the press quoted him as saying "everything was done by the book" and that his investigation showed "the inspectors did everything exactly the way they were supposed to do it." If what the solicitor said is correct, "doing it by the book" may well be part of the problem.

~FOOTNOTE_TWO

2 While the Labor Department may feel the advance notice prohibition conflicts with its policy of "cooperative enforcement," I believe the department's policy conflicts with my sworn duty to uphold the law. I declined therefore the suggestion to join in what appears to be a concerted action to thwart the law.

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