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

THE NACCO MINING COMPANY, CONTESTANT v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	CONTEST PROCEEDING Docket No. LAKE 84-60-R Citation No. 2206677; 2/29/84
UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	Docket No. LAKE 84-61-R Order No. 2206678; 2/29/84 Docket No. LAKE 84-62-R Citation No. 2326373; 2/29/84 Docket No. LAKE 84-63-R Order No. 2326374; 2/29/84 Powhatan No. 6 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. THE NACCO MINING COMPANY, RESPONDENT	CIVIL PENALTY PROCEEDING Docket No. LAKE 84-79 A.C. No. 33-01159-03599 Powhatan No. 6 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the parties filed on November 30, 1984, in the above-entitled consolidated proceeding a motion for approval of settlement. Under the parties' settlement agreement, The Nacco Mining Company (Nacco) has agreed to withdraw its notices of contest and Nacco has agreed to pay civil penalties totaling $40 for two alleged violations of section 103(f) of the Federal Mine Safety and Health Act of 1977, instead of the penalties totaling $360 proposed by MSHA.

The issues involved in this proceeding relate to the issuance on February 29, 1984, of Citation Nos. 2206677 and 2326373 alleging that Nacco had violated section 103(f) by refusing to allow persons selected by UMWA as miners' representatives to accompany two different inspectors who were engaged either in holding a close-out conference or in making an inspection. In each instance, the person designated to be the miners' representative was classified as a mechanic. Orders of withdrawal

were issued under section 104(b) of the Act when Nacco failed to allow the mechanics to accompany the inspectors in the performance of their work. The position taken by Nacco in its notices of contest was that UMWA was abusing its discretion to select miners' representatives by designating only miners having the job classification of "mechanic" as the representatives to aid the inspectors. Nacco did not object to UMWA's selecting miners' representatives to assist the inspectors, but claimed that UMWA's choosing of more than one employee from each job classification for that purpose unduly interfered with Nacco's ability to operate its mine safely, if at all, while inspections were being made.

The parties engaged in extensive discovery procedures which culminated on August 15 and 16, 1984, when counsel for the parties took the depositions of 16 persons totaling 513 pages of transcript. A hearing had been scheduled to begin on October 23, 1984. A copy of each deposition was mailed to me a short time prior to the hearing. After I had thoroughly reviewed the depositions, I issued on September 28, 1984, a procedural order which contained some findings of fact and conclusions based on the 16 depositions. The parties' settlement agreement (page 4) provides for the findings and conclusions set forth in the procedural order to be made a part of my decision approving settlement. The pertinent part of the procedural order of September 28, 1984, is quoted below:

> I have carefully read and summarized the statements made by the 16 persons who gave depositions under oath and it is difficult for me to understand why any further testimony is required to decide the issues raised in this proceeding. The depositions clearly show that the union and Nacco's management came to an impasse after management denied Roger Hickman's request to transfer from the position of mechanic to the position of helper to the operator of a roof-bolting machine. The union did not insist on designating only mechanics as the miners' representatives to accompany inspectors pursuant to section 103(f) of the Federal Mine Safety and Health Act of 1977 until after management denied Hickman's grievance (Baker, p. 18; Hoskins, pp. 36-37; Houston, p. 17; Marozzi, pp. 12; 22-24).
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> It is also clear from the statements of both management and union deponents that the union's designation as representatives on a single shift of up to four miners regularly classified as mechanics and one named as a substitute mechanic would have an adverse impact on safety and, if continued, would have curtailed both production and the ability to operate a safe mine (Kovacs, pp. 8-11; Clyde Reed, pp. 13-16; Vucelich, p. 25).

It was the position of the inspectors that Nacco is required to operate a safe mine regardless of how many persons the union may designate as representatives for purposes of section 103(f) and they believed that it was both the union's and management's obligation to solve their differences without involving MSHA in their dispute (Facello, p. 7; Minear, p. 7; William Reed, pp. 8; 20, 30; 33; Yudasz, pp. 15; 34; 38; Zitko, pp. 9; 18; 22). Both the union's and management's depositions show that the union and management ultimately did resolve their differences because management reversed its denial of Hickman's grievance and awarded him with the job he had requested after management had engaged in a 2-hour counseling session with Hickman and learned that the grant of his request would be in the best interest of all, management, the union, and Hickman (Baker, p. 15; Hoskins, p. 40; Marozzi, pp. 25-30).

The depositions further show that management withdrew its written policy which restricted the selection of representatives to one representative from each job classification, and that the union, after the withdrawal of the written policy, has exercised reasonableness in designating representatives (Forrelli, pp. 10; 15-16; Marozzi, p. 36; Miller, p. 41). Moreover, the general superintendent stated that the policy should at least have allowed the union to designate two representatives from a single job classification, assuming that such a policy was necessary (Marozzi, p. 35). Nacco's president stated that the policy did restrict the union's right to designate representatives under section 103(f) of the Act (Mller, p. 38). Finally, the deposition of Josiah Hoskins, who seems to have been one of the primary designators of mechanics as miners' representatives, stated that Nacco is no longer restricting the union's selection of more than one representative from a given single job classification (Deposition, p. 46).

The depositions also show that management did refuse to allow two of the three representatives designated by Hoskins on February 29, 1984, to accompany an inspector underground in one instance and to attend an inspector's close-out conference in another instance (Forrelli, p. 8; Yudasz, pp. 11; 38; Zitko, pp. 21; 24). So far as I can determine, section 103(f) does not permit me to consider equities in determining whether an inspector properly cites a violation of section 103(f) when a representative designated by the union is not permitted to accompany the inspector. Assuming, arguendo, that section 103(f) does permit me to consider the equities of management's refusal to allow representatives to accompany Inspectors Yudasz

and Zitko, neither the union nor management is entirely free from fault in the impasse which occurred after Hickman's grievance was denied.

The union was at fault in using only mechanics as a means of pressuring Nacco's management to reverse its decision regarding Hickman's grievance (Hoskins, p. 36). Management was at fault for agreeing to give the union to March 2, 1984, to consider the unreasonableness of its position and then arbitrarily imposing the "one-rep-per-classification" rule on February 29, 1984, without giving the union until the agreed-upon date to reply to management's request made in the communications meeting held on February 27, 1984 (Marozzi, p. 41; Vucelich, p. 23).

The parties also asked that their settlement agreement be made a part of my decision. The settlement agreement is set forth below:

SETTLEMENT AGREEMENT

This settlement agreement is made by and between The Nacco Mining Company ("Nacco"), the Mine Safety and Health Administration ("MSHA"), and the United Mine Workers of America ("UMWA") this 20th day of November 1984.

WHEREAS a dispute arose between Nacco and UMWA on February 29, 1984, regarding UMWA's designation of walkaround personnel at Nacco's No. 6 Mine; and

WHEREAS MSHA became involved in the dispute and issued two 104(a) citations, bearing numbers 2206677 and 2326373 ("the Citations"), to Nacco, and subsequently issued two related 104(b) orders, bearing numbers 2206678 and 2326374 ("the Orders"), to Nacco, all for alleged violations by Nacco of 103(f) of the Federal Mine Safety and Health Act ("the Act"); and

WHEREAS Nacco formally contested the validity of the Citations and the Orders in Notice of Contest proceedings bearing Docket Nos. LAKE 84-60-R, LAKE 84-61-R, LAKE 84-62-R, and LAKE 84-63-R ("the contest proceedings"), which are currently pending before Administrative Law Judge Richard C. Steffey; and

WHEREAS MSHA and UMWA are parties to the contest proceedings and have participated with Nacco in conducting 16 depositions of potential union, management, and MSHA witnesses; and

WHEREAS Judge Steffey had conducted a detailed review of the transcripts of those depositions and issued a Procedural Order dated September 28, 1984 ("the Procedural Order") setting forth his findings of fact based on the deposition records; and

WHEREAS the parties desire to settle the contest proceedings on an amicable basis and without need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises herein made and of the acts to be performed by the respective parties hereto, it is agreed as follows:

1. Nacco shall withdraw its Notices of Contest in the contest proceedings.

2. Judge Steffey has indicated his disposition to assess a civil penalty in the amount of $20 against Nacco for each of the Citations. No other penalties shall be sought or claims made against Nacco based on the Citations or the Orders.

3. Nacco shall promptly pay the civil penalties to be assessed by Judge Steffey, as referred to in paragraph 2 of this agreement, in full settlement and compromise of the contest proceedings. By making that payment, Nacco does not admit that it committed any violation of law. Moreover, Nacco's payment shall be made without prejudice to, and with full reservation of, all rights and defenses of Nacco respecting the alleged violations for which payment is made insofar as the same may to any extent be involved in any further or other proceedings.

4. Nacco acknowledges the right of UMWA under 103(f) of the Act to designate union walkaround representatives to accompany MSHA inspectors at the No. 6 Mine. UMWA acknowledges that its designation of only mechanics as walkaround representatives at the No. 6 Mine during the period from February 23, 1984, through February 29, 1984, was made for purposes unrelated to the Act's safety objectives and thereby constituted an inappropriate exercise of UMWA's designation right under 103(f).

5. UMWA will hereafter exercise its 103(f) designation right with reasonableness, having due regard for Nacco's safety and production objectives at the No. 6 Mine and endeavoring to avoid overuse of any

single job classification, unless clear and present safety needs so require. UMWA specifically agrees hereafter to address such labor grievances as it may have under the provisions of its collective bargaining agreement with Nacco and without resort to 103 of the Act. Nacco will fully respect UMWA's reasonable exercise of its 103(f) designation right.

6. Nacco and UMWA shall notify their respective constituencies at the No. 6 Mine of the terms and conditions of this settlement agreement and of their individual and collective obligations to abide by those terms and conditions.

7, The parties shall promptly move Judge Steffey to enter an order approving settlement of the contest proceedings on the basis of this agreement. This settlement is expressly conditioned on the entry of an Order by Judge Steffey which recites his findings of fact as set forth in the Procedural Order (see Annex 1) (FOOTNOTE 1) as well as incorporating the terms and conditions of this settlement agreement and directing the parties to comply with those terms and conditions.

IN WITNESS WHEREOF the parties acknowledge, by signature of their respective counsel, their agreement this 20th day of November 1984.

Mine Safety and Health Administration
By: Robert A. Cohen

United Mine Workers of America
By: Thomas A. Myers

The Nacco Mining Company
By: John A. Macleod

Although I gave some reasons in my procedural order of September 28, 1984, for my belief that a civil penalty of $20 would be appropriate for each of the alleged violations of section 103(f), I believe that the Act requires me to give a fuller exposition of the six assessment criteria listed in section 110(i) of the Act than the one provided in my procedural order. The proposed assessment sheet in the official file in Docket No. LAKE 84-79 shows that MSHA's proposed penalty of $180 for each violation was derived after giving an appropriate evaluation of the six criteria on the basis of the limited facts which were available to MSHA at the time the proposed assessments were made. The assessment sheet shows that Nacco's No. 6 Mine produces about 1,075,000 tons of coal annually and that Nacco's controlling company produces over 14,000,000 tons of coal per year. MSHA applied those production figures under the assessment formula described in 30 C.F.R. 100.3(b) and correctly assigned 13 penalty points under the criterion of the size of Nacco's business.

The assessment sheet indicates that Nacco has been cited for 712 violations during 2,229 inspection days for the 24-month period preceding the writing of the two citations involved in this proceeding. Using the aforesaid statistics to make the calculation described in section 100.3(c) of MSHA's assessment formula results in the assignment of two penalty points under the criterion of Nacco's history of previous violations.

There is no information in the official file, the pleadings, or the discovery materials pertaining to Nacco's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd. 736 F.2d 1147 (7th Cir.1984), that if an operator fails to furnish any evidence concerning its financial condition, a judge may presume that the operator is able to pay penalties. Therefore, I find that payment of civil penalties will not adversely affect Nacco's ability to continue in business. Consequently, it will not be necessary to reduce the penalty, determined pursuant to the other criteria, under the criterion of whether the payment of penalties will cause respondent to discontinue in business.

A brief discussion of the facts is required to evaluate the criteria of negligence and gravity. It is a fact that Nacco refused to allow two of the three mechanics designated by UMWA as miners' representatives to accompany inspectors (Forrelli, p. 8). On the other hand, Nacco did permit one mechanic to accompany an inspector as a miners' representative and Nacco's management was quite willing to permit miners from other job classifications to act as miners' representatives (Forrelli, pp. 7; 19), but the UMWA person who was designating miners' representatives declined to appoint any miners from other job classifications to act as miners' representatives when Nacco declined to allow two of the three mechanics to act

as miners' representatives (Hoskins, p. 39). UMWA claims that miners from other job classifications had already gone underground and that no substitute representatives could be selected (Hoskins, p. 40), but Nacco's management disputes that contention (Forrelli, pp. 41-42). In any event, UMWA made no attempt to appoint substitute representatives and simply insisted that management allow three mechanics to act as miners' representatives to accompany three different inspectors (Hoskins, p. 39; Forrelli, p. 20).

It is hardly surprising that Nacco took the intractable position that it did when one considers that on the previous day UMWA had named four regular mechanics and one miner whom Nacco had asked to work as a substitute mechanic to be miners' representatives to accompany five different inspectors who were making a "saturation" inspection on that day (Forrelli, p. 24). Nacco's management on that day permitted UMWA to use as miners' representatives an extreme number of persons from a single job classification. When one is in possession of some of the extenuating circumstances associated with Nacco's refusal to allow more than one mechanic to act as miners' representatives on the day following UMWA's use of five mechanics for that purpose, it hardly seems appropriate to assess any portion of the penalty under the criterion of negligence since UMWA was using its right to designate miners' representatives as a means of putting pressure on Nacco's management to reverse a decision it had made in a grievance case filed by one of the miners who wanted to transfer from his position of mechanic to the position of helper to the operator of a roof-bolting machine (Marozzi, pp. 11-12).

MSHA's proposed penalty of $180 results in large part from its having assigned 15 penalty points under the criterion of negligence. I believe that the unusual circumstances surrounding the citing of the violations warrant assignment of zero penalty points under the criterion of negligence.

Both of MSHA's inspectors correctly considered that the alleged violations of section 103(f) were nonserious and MSHA's penalties were appropriately proposed by assignment of zero penalty points under the criterion of gravity.

The final criterion to be considered is Nacco's good-faith effort to achieve rapid compliance after the violations were cited. It is a fact that Nacco refused to allow two of the three mechanics named as miners' representatives to act in that capacity. Since UMWA refused to name alternate miners' representatives, each inspector wrote a withdrawal order because of Nacco's refusal to abate the alleged violations within the time period established by the inspectors in their citations. If UMWA had named substitute miners' representatives in other job

classifications, the alleged violations would have been abated promptly and Nacco would have been given full credit for having shown a good-faith effort to achieve compliance. Inasmuch as both inspectors considered the violations to be nonserious, MSHA would have assigned penalties of only $20 for each violation under section 100.4 of MSHA's assessment procedures if the alleged violations had been abated within the time allowed by the inspectors. Therefore, MSHA's failure to find that Nacco had made a good-faith effort to achieve compliance caused MSHA to propose its penalties of $180 by using the assessment formula in section 100.3 instead of proposing $20 penalties under section 100.4.

I believe that UMWA should share the blame for the fact that the alleged violations were not promptly abated. UMWA could have contested Nacco's refusal to allow mechanics to accompany the inspectors just as well if it had named substitute miners' representatives so that the provisions of section 103(f) could have been met by use of substitute miners' representatives selected from other job classifications. For that reason, I believe that the penalty should be assessed by assigning zero penalty points under the criterion of whether the operator demonstrated a good-faith effort to achieve rapid compliance.

In short, since UMWA was equally at fault in bringing about the impasse which resulted in the issuance of the citations, I believe that assessment of more than token penalties in this instance would defeat the deterrent purposes envisioned by Congress for assessment of civil penalties. For the aforesaid reasons, I find that the parties' settlement agreement providing for the assessment of penalties of $20 for each violation should be approved and that the motion for approval of settlement should be granted.

WHEREFORE, it is ordered:

(A) The parties' motion for approval of settlement is granted and their settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, The Nacco Mining Company, within 30 days from the date of this decision, shall pay civil penalties totaling $40.00 for the violations of section 103(f) alleged in Citation Nos. 2206677 and 2326373 dated February 29, 1984.

(C) The Nacco Mining Company's motion to withdraw its notices of contest is granted, the notices of contest are deemed to have been withdrawn, and all further proceedings in Docket Nos. LAKE 84-60-R through LAKE 84-63-R are dismissed.

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(D) Approval of the parties' settlement agreement is conditioned upon the parties' compliance with the terms and conditions of the agreement.

Richard C. Steffey
Administrative Law Judge

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~FOOTNOTE_ONE

1 The settlement agreement submitted by the parties includes in an Annex to the agreement a quotation of the language from the procedural order which I issued on September 28, 1984. I have already included in this decision the relevant portions of my procedural order and they need not be repeated.