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SOUTHERN OHIO COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SOUTHERN OHIO COAL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. WEVA 84-296-R
Citation No. 2420016; 6/19/84

Martinka No. 1 Mine

SUMMARY DECISION

Before: Judge Steffey

Counsel for the Secretary of Labor filed on December 7, 1984, in the above-entitled proceeding a "Motion for Partial Summary Judgment". Counsel for Southern Ohio Coal Company filed on December 24, 1984, a cross motion for summary decision.

Because I was in doubt as to certain procedural aspects of the parties' motion and cross motion, I issued an order on February 7, 1985, requesting that they clarify those points. The Secretary's reply to that order was filed on February 27, 1985, and explains that the word "partial" used in the title of the motion simply means that the Secretary is not requesting me to rule on any issues at this time which may later be raised with respect to the imposition of a civil penalty when and if the Secretary subsequently files a related civil penalty case with respect to Citation No. 2420016 which is the subject of SOCCO's notice of contest in this proceeding.

SOCCO filed its reply to my order on February 28, 1985. Both the Secretary's reply to the order and SOCCO's reply to the order state unequivocally that no genuine issues of material fact remain to be adduced beyond those which have been submitted by the parties in the form of replies to interrogatories and the depositions taken of three persons by SOCCO's counsel on September 20, 1984. SOCCO's reply (p. 2) to the order also states that to the extent that I encounter discrepancies in the information submitted by the parties, it will be necessary for me to "make factual conclusions based on the information in the file." The parties' replies to my order make it clear that they are requesting that I issue a summary decision pursuant to 29 C.F.R. 2700.64.

I have reviewed all of the information in the official file and I conclude that the materials in the file support the following findings of fact:

Findings of Fact

1. Jesse Lowell Satterfield lives in Fairmont, West Virginia (Dep. 4). (Footnote.1) He gave a deposition on September 20, 1984. At that time he had been unemployed for 3 days, but prior to that, he had worked for Consolidation Coal Company in various capacities from 1973 to 1984 (Dep. 6). He has been a member of the United Mine Workers of America since 1973. He is financial secretary of Local 4060 and was chairman of the mine safety committee from 1982 to 1984 (Dep. 8). He has often accompanied MSHA inspectors while they were inspecting Consolidation Coal Company's Mine No. 20 where Satterfield worked (Dep. 39; 70). Satterfield graduated from high school and lacks only one semester of having graduated from Fairmont State College (Dep. 6). Satterfield's experience as a coal miner resulted in his becoming acquainted with the mandatory health and safety standards and with several inspectors employed by the Mine Safety and Health Administration.

2. Satterfield is 35 years old and has always lived in Fairmont (Dep. 4). At the present time he lives in a house owned by his mother and his mother lives in another of her houses which is located only a short distance from the house occupied by Satterfield (Dep. 36; 49; Exh. 1). A bump appeared in the road about 1/4 mile from Satterfield's house (Dep. 10). People were observed checking the foundations of homes in the area where Satterfield lives and Satterfield assumed that the persons doing the checking were working for Southern Ohio Coal Company (SOCCO). Property owners in the area expressed the belief that SOCCO's Martinka Mine extended under their homes and Satterfield's mother asked him to find out where SOCCO was mining (Dep. 10-12).

3. Satterfield believed that SOCCO was required by the Federal Mine Safety and Health Act of 1977 to make its mine map available for inspection by interested persons. As a person living on the surface of the mine, he did not give SOCCO any prior notice of his wish to see the map because he believed that SOCCO was under a legal obligation to show him

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the mine map (Dep. 14). Satterfield was working at the election polls on June 5, 1984. About midday he was told that he could take 3 or 4 hours off because few persons were coming to the polls to vote at that time (Dep. 9).

4. Satterfield went to SOCCO's Martinka Mine about 1 p.m. on June 5, 1984, and was admitted by the guard to mine property after he had told the guard that he wanted to see the mine map. Satterfield then went to the mine office and told the receptionist that he wanted to see the mine map so as to determine whether SOCCO was mining near his house (Dep. 15). She made a phone call and advised Satterfield that John Riley, SOCCO's land manager, was not at the mine at that time and that he was the only person who could show him the map. Satterfield told the receptionist that he had come to the mine to see the map, not John Riley (Dep. 16). About that time, Satterfield saw an MSHA inspector named Wayne Fetty with whom he was personally acquainted. Satterfield explained to Fetty that he was having a problem because he had come to see the mine map and it looked as if no one would show it to him. Fetty suggested that Satterfield see someone else (Dep. 17). Lud Gowers, an employee in SOCCO's safety department, overheard Satterfield's remarks and volunteered to check in the Engineering Department to see if someone else might be able to show Satterfield the mine map. When Gowers returned, he stated that John Riley was the only person who could show Satterfield the map. Satterfield thereafter told the receptionist, whom he had known for several years, that SOCCO would be in violation of the Act for refusing to allow him to see the mine map (Dep. 18). The receptionist again stated that only John Riley could show him the map (Dep. 19).

5. Satterfield returned to his home about 2 p.m. on June 5, 1984. He then called Ron Keaton at MSHA's Morgantown Office and Keaton read some of the Mine Act to him and confirmed Satterfield's belief that SOCCO was obligated to show him the mine map. Keaton advised Satterfield that an MSHA inspector could be made available to meet Satterfield at the mine to assure that he would be shown the map, but Satterfield said he would try again to see the map without resorting to asking MSHA for assistance (Dep. 20). Satterfield thereafter called the receptionist at the mine and told her that he had checked with MSHA and that he was correct in stating that SOCCO was legally obligated to show him the mine map. The receptionist connected Satterfield with Wesley Hough in SOCCO's Engineering Department. Hough stated that since Satterfield had to work at the polls until late that day, he would get John Riley to show Satterfield the mine map to 7:30 p.m. (Dep. 21).

6. About 7:25 p.m. on June 5, 1984, Satterfield called the mine office and was advised that Riley had gone home for the day. Satterfield then called Riley at home who stated that he would not go to the mine that late to show Satterfield the mine map and that Satterfield could see the map at the mine between 8 a.m. and 4:30 p.m., but Satterfield stated that he worked the day shift and could not come to the mine between 8 a.m. and 4:30 p.m. Riley then volunteered to come in early before the day shift started, but Satterfield said that he had to leave for work at 6:30 a.m. and could not come to the mine before work. Satterfield also noted that he had already been to the mine between the hours of 8 a.m. and 4:30 p.m. and had not been able to see the map at that time (Dep. 22). Satterfield worked 2 hours overtime about 8 days out of 10 and did not leave the mine until 6 p.m. Satterfield also worked on Saturday and some Sundays. Satterfield said that if he did not work overtime, he could leave the mine at 4:30 p.m. and be at SOCCO's mine by 5:30 p.m. because it takes him an hour to drive home, but Riley declined to stay an hour late to show him the map. Satterfield's conversation with Riley resulted in an impasse because Riley was unwilling to stay as much as 1 hour late to show the map and Satterfield could not come to the mine before 8 a.m. or during normal working hours extending from 8 a.m. to 4:30 p.m. (Dep. 23-24).

7. After Satterfield had failed to reach an agreement with Riley as to a time when he could see the mine map, Satterfield called an MSHA supervisor of inspectors named Raymond Ash at his home and told him about his previous discussion with Ron Keaton mentioned in Finding No. 5 above and Ash told Satterfield that he would have another inspector, Dave Workman, check into the matter. Several days thereafter, Satterfield was told by an inspector named Homer Delovich at Consol's mine where Satterfield was employed that Workman had indicated to him that SOCCO would make available to Satterfield the information he needed (Dep. 28-29).

8. Relying on Delovich's statements, Satterfield again went to SOCCO's mine about 7 p.m. on June 19, 1984. When Satterfield told the guard at SOCCO's mine that he wanted to see the mine map, the guard called someone on the phone and then advised Satterfield that John Riley was not on mine property. Thereafter, the guard called Riley on the phone and Satterfield had another conversation with Riley which again resulted in no agreement as to a time when Satterfield could see the mine map without having to come to the mine between the hours of 8 a.m. and 4:30 p.m. (Dep. 26-27). Satterfield asked the guard if there was an MSHA inspector on mine property and the guard checked and found that an MSHA inspector named Frank Bowers was at the mine. Satterfield explained to Bowers the difficulties he had had in trying to

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see the mine map and that he had come to see the mine map again on the basis of statements by two other inspectors to the effect that SOCCO would make the map available. Bowers stated that he was not familiar with the problem and suggested that Satterfield discuss the matter with some of the inspectors whose help he had previously sought (Dep. 32-33).

9. After Satterfield had returned home on June 19 without being able to see the map, he again called Raymond Ash at home to inform him of his most recent unsuccessful efforts to see the mine map. Satterfield's call to Ash resulted in several other phone calls involving Frank Bowers, who was the MSHA inspector on mine property at that time, and Mike Resetar, a SOCCO employee who worked in SOCCO's Safety Department. Subsequently, Resetar called Satterfield to tell him that he was checking to see if someone would be available the next day to show Satterfield the map. Bowers then called Satterfield and told him to be at the mine at 7 p.m. the next day, June 20, and someone would show him the map (Dep. 34).

10. When Satterfield went to the mine on June 20, John Riley was near the gate with the map and other persons present were the security guard, Mike Resetar, Frank Bowers, and the UMWA walk-around representative, Henry Metz (Dep. 55). Riley laid the map on the hood of a pickup truck and pointed to two little squares on the map which had been placed there to indicate the location of his home and the house in which his mother lives. Riley would not answer any other question which Satterfield asked him, such as inquiries about the location on the map of a church, a new air shaft, and projection of the longwall panel. Satterfield subsequently discussed what he had seen on the map with his mother. Other people who live in the area or travel the road have asked him whether the longwall had mined under his house and he told them that SOCCO had mined under his house, but not with the longwall. One of Satterfield's neighbor's told him that a SOCCO official had contacted him and that he believed his house would be on the surface above SOCCO's next mining panel (Dep. 37-38).

11. As indicated in Finding No. 8 above, Frank D. Bowers is the MSHA inspector who was present at SOCCO's mine on June 19, 1984, when Satterfield came to the mine for the second time and was unsuccessful in being shown the mine map (Dep. 57; 59). Bowers talked to Satterfield on the phone after the guard refused to allow Satterfield to go on mine property. Satterfield wanted Bowers to issue a citation for SOCCO's refusal to show him the mine map, but Bowers declined to do so until he had obtained additional information. Satterfield became angry and hung up and Bowers "sort of forgot" (Dep. 59) the matter until he received a call from Ash, his supervisor, who told him to check into the map situation and

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see what he could do to take care of it. Bowers learned from Ash that Dave Workman had been to the mine to investigate the matter, so Bowers talked to Workman on the phone and Workman stated that he had arranged for SOCCO's personnel to set up a meeting so that the matter could be taken care of (Dep. 60-61). Bowers then engaged in conversations with Mike Resetar in SOCCO's Safety Department and Resetar talked to Jim Tompkins and John Merrifield who are mine officials (Dep. 62; 96). Bowers had great difficulty in getting SOCCO's personnel to agree upon a time when Satterfield could see the mine map (Dep. 63). SOCCO finally agreed to have someone show Satterfield the mine map at 7:30 p.m. the next day, June 20.

12. Bowers had decided to issue a citation for SOCCO's refusal to show the mine map to Satterfield on June 5, but Bowers did not actually issue the citation until after a time for seeing the map had been agreed upon (Dep. 65). Bowers said that his decision to issue the citation was based on the fact that Satterfield had been to the mine on June 5 at 1 p.m. to see the map and no one would show it to him. Then when a time of 7:30 p.m. was agreed upon for Satterfield to see the map on that same day, no one would show Satterfield the map. The citation Bowers wrote is No. 2420016, and was issued on June 19, 1984, at 10 p.m. under section 104(a) of the Act alleging that SOCCO had violated section 312(b) of the Act. The condition or practice described in the citation reads as follows:

According to Lowell Satterfield, a landowner on the surface of the Martinka No. 1 Mine, a request was made on June 5, 1984, to see the mine map. A meeting was set to see the map at 7:30 p.m. on June 5, 1984, with a company official, and no one would show him the map after 5 p.m.

A meeting has now been set with the Company and Lowell Satterfield for 7:30 p.m. on June 20, 1984, at the mine. The time set for the meeting is agreeable with both parties.

Bowers Deposition Exh. 1. Citation No. 2420016 was modified on August 24, 1984, to cite 30 C.F.R. 75.1203 which is identical in wording with section 312(b) of the Act. The modification was made because MSHA's computers are programmed to reject any citation which reflects a violation of a section of the Act if there is a parallel regulation pertaining to the violation being charged (Dep. 77; Bowers Deposition Exh. 3).

13. The deposition given by Raymond Ash, the MSHA supervisory inspector to whom Satterfield appealed for assistance in getting SOCCO to show him the mine map, does not disagree with the facts given by Bowers or Satterfield in any significant particulars. Ash's deposition is useful, however, in

revealing why SOCCO resisted showing the map to Satterfield except between the hours of 8 a.m. and 4:30 p.m. Ash was specifically told by John Riley just about 10 days prior to September 20, 1984, when Ash appeared to give his deposition, that SOCCO was not going to show their maps or anything else to people except by appointment during normal working hours between 8 a.m. and 4:30 p.m. Riley said that SOCCO is a business just like a courthouse is a business and should be open only during normal working hours (Dep. 105). Ash also said that John Merrifield had told him essentially the same thing about June 19 when he was engaged in conversations with SOCCO's personnel about getting SOCCO to show Satterfield the mine map (Dep. 108).

14. Ash's deposition also seems to support Satterfield's belief that he went to SOCCO's mine on June 19 about 7:00 p.m. because Ash thinks that Satterfield first called him about 8 p.m. after Satterfield had already been to the mine and had been refused admittance (Dep. 100).

Consideration of Parties' Arguments

The arguments in the Secretary's motion for summary decision are straight forward and to the point. The Secretary relies upon the literal meaning of the words of section 312(b) of the Act, or of section 75.1203 of the regulations which are identical with those of section 312(b), and asserts that since Satterfield was a person owning, leasing, or residing on the surface area of SOCCO's mine, that he was a person who is entitled to inspect the map. The Secretary then concludes that since SOCCO failed to make the map available to Satterfield when he went to the mine about 1 p.m. on June 5, 1984, and asked to see the map, SOCCO was necessarily in violation of section 75.1203 and that the inspector correctly issued Citation No. 2420016 on June 19, 1984, alleging that SOCCO had violated section 75.1203 (Secy's Motion, pp. 4-8).

SOCCO's cross motion for summary decision concedes that Satterfield was not shown the mine map on June 5 when he went to the mine to see the map, but SOCCO seeks to avoid being cited for a violation of section 75.1203 by arguing that SOCCO had a policy of showing the map to the persons designated in section 75.1203 so long as they ask to see the map during SOCCO's normal business hours of 8 a.m. to 4:30 p.m. and so long as they assure, in advance of coming to see the map, that John Riley, SOCCO's land manager, is also at the mine to show such persons the map. SOCCO argues that at no time did it refuse to make the map available to Satterfield and only insisted that Satterfield come to see the map during normal business hours, or come at some other time when John Riley was willing to show the map to Satterfield. SOCCO states that it is unreasonable for Satterfield or the Secretary

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to expect it to respond to the demands of a surface resident who insists on seeing the mine map on his terms and at his convenience (Cross motion, pp. 7-14).

Section 312(b) of the Act and section 75.1203 provide as follows:

The coal mine map and any revision and supplement thereof shall be available for inspection by the Secretary or his authorized representative, by coal mine inspectors of the State in which the mine is located, by miners in the mine and their representatives and by operators of adjacent coal mines and by persons owning, leasing, or residing on surface areas of such mines or areas adjacent to such mines. The operator shall furnish to the Secretary or his authorized representative and to the Secretary of Housing and Urban Development, upon request, one or more copies of such map and any revision and supplement thereof. Such map or revision and supplement thereof shall be kept confidential and its contents shall not be divulged to any other person, except to the extent necessary to carry out the provisions of this Act and in connection with the functions and responsibilities of the Secretary of Housing and Urban Development.

Legislative History

The Secretary's motion (p. 7) states that there is no legislative history pertaining to section 312(b) of the Act, but that is not entirely correct. Section 312(b) was not changed when the Federal Coal Mine Health and Safety Act of 1969 was amended and renamed the Federal Mine Safety and Health Act of 1977. Therefore, the legislative history pertaining to section 312(b) is contained in Part 1 of the LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 prepared for the Subcommittee of Labor of the Committee on Labor and Public Welfare, United States Senate. The discussion which follows cites pages in the 1969 History.

When Congress began considering the legislation which ultimately became the 1969 Act, the primary bill introduced in the House was H.R. 13950 and the primary bill introduced in the Senate was S. 2917. Section 215(b) of S. 2917 contained a provision that the mine map was to be made available to certain persons, but no reference was made to surface landowners. History, pp. 75; 208; 856. Section 312(b) of H.R. 13950 contained the same provision as section 215(b) of S. 2917, that is, the bill required the map to be made available to certain persons, but made no reference to surface landowners and the House bill also did not refer to the confidentiality of the map. History, pp. 1003; 1317; 1337.

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When S. 2917 was called up by the House, the bill had been renumbered so that section 312(b) of S. 2917 pertained to the same subject matter as section 312(b) of H.R. 13950, but the revised numbering of S. 2917 still did not contain any reference to making the map available to surface landowners. History, pp. 1402; 1427. The House, however, insisted that S. 2917 be amended to conform with H.R. 13950 and requested a conference with the Senate. History, p. 1438.

Conference Report No. 91-761, 91st Cong., 1st Sess. to accompany S. 2917 shows that the conferees had amended section 312(b) to add the confidentiality provision which is now contained in that section and also added the provision that the map was to be made available to "persons owning, leasing, or residing on surface areas of such mines or areas adjacent to such mines." History, p. 1486. The Conference Report explained the changes as follows:

Both the Senate bill and the House amendment required the maintenance of a mine map. The Senate bill required that the map be confidential except for disclosure for certain specified persons. The House amendment directed that the Secretary of Housing and Urban Development receive a copy. The conference substitute provides that the map shall be made available to the Secretary and his inspectors, the Secretary of Housing and Urban Development, the miners and their representatives, operators of adjacent mines, and to persons owning, leasing, or residing on surface areas of such mines or on areas adjacent to such mines, but that otherwise it shall be kept confidential.

History, p. 1529.

The section-by-section analysis of S. 2917 states with respect to section 312(b) that:

Subsection (b) requires that mine maps shall be available upon request, to the Secretary, State coal mine inspectors, the miners, operators of adjacent coal mines, persons owning, leasing or residing on surface areas and the Secretary of Housing and Urban Development.

History, p. 1618.

It is obvious from the above discussion of the legislative history that when the conferees added "persons owning, leasing, or residing on surface areas of such mines or on areas adjacent to such mines" that they did not distinguish the rights of the surface residents from the rights of the Secretary's inspectors to see mine maps. Section 312(b)

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provides that the mine map "shall be available for inspection" and there is no hint that the named persons who are entitled to see the map are required to make an advance appointment to see the map or make certain that any specific individual is present at the mine to show them the mine map.

While I sympathize with SOCCO's management that it should never have to show its mine map to any person who is demanding in his or her insistence upon seeing the map, the fact remains that Satterfield was among those persons who are entitled to see the map. Since section 312(b) does not specify any conditions which a surface resident must meet in order to see the mine map, the surface resident is in the same position as an inspector is when he asks to have the map made available for his inspection. Inspectors go to mines during all three working shifts to make their examinations. They are just as likely to ask that the mine map be made available at 3 a.m. on the midnight to 8 a.m. shift as they are to ask that the map be made available during a day shift between 8 a.m. and 4 p.m. If a surface resident should wake up in the middle of the night and find that his house is sinking into a coal mine, there is every reason to believe that he might want to see the mine map at 3 a.m. if he could find anyone at the mine at that time of night.

While SOCCO's land manager may tell an inspector that SOCCO is a business just like a courthouse and is entitled to keep regular hours just like any other business (Finding No. 13 above), it is a fact that courts do not dig tunnels under people's homes and courts are not likely to cause the apprehension which people experience when they see bumps in roads and see strangers examining the foundations of their houses (Finding No. 2 above). A surface resident who is disturbed by the condition of the ground under and around his home is likely to go to see the mine map in a state of agitation. At such times, he may forget to be polite when he is told by the coal company that he may see the mine map only when a single person is conveniently present to show him the map.

The fact that at least one of SOCCO's employees felt on June 5 that Satterfield ought to have been able to see the map, even though the land manager was not present to show him the map indicates that SOCCO's policy of allowing only the land manager to show a surface resident the map was not a well-known rule (Finding No. 4 above). Additionally, the fact that another of SOCCO's employees fixed an evening appointment of 7:30 p.m. when Satterfield could see the mine map indicates that SOCCO's policy of allowing only the land manager to show surface residents the map only during the hours of 8 a.m. to 4:30 p.m. was not well known (Finding No. 5 above).

SOCCO also seeks to make an issue of the fact that Satterfield did not offer any proof that he was a surface resident at the time he asked to see the map on June 5 (Cross motion, p. 8). There are defects in that argument. First, the receptionist was a person who was well known to Satterfield and she knew that he was a surface resident and did not need to ask for any proof. Second, SOCCO did not decline to show Satterfield the map on the ground that he had not proven he was a surface resident who was entitled to see the map. The sole ground given by SOCCO for refusing to show Satterfield the map was that SOCCO's land manager was not at the mine to show him the map (Finding No. 4 above). Third, when the land manager finally did show Satterfield the map on June 20, 1984, he had already drawn squares on the map to designate the location of the houses in which Satterfield and his mother lived (Finding No. 10 above).

There is no merit to SOCCO's argument that it ought to be able to designate the land manager as the sole person to show the mine map to surface residents because he would be the most knowledgeable person to perform such duties (Cross motion, p. 11). SOCCO does not challenge Satterfield's statement that when the land manager finally did show him the map the land manager refused to answer any of Satterfield's questions about the map, such as the location of a church in which Satterfield was interested (Finding No. 10 above).

SOCCO's Alleged Efforts To Accommodate Satterfield

SOCCO emphasizes the length to which its land manager went in his efforts to make the mine map available for Satterfield's inspection (Cross motion, pp. 9-10). SOCCO claims that the land manager offered to come to the mine before 8 a.m. to show Satterfield the map and also offered to stay late to show Satterfield the map. Satterfield agrees that the land manager offered to come in early to show him the map, but Satterfield explained that he was working the day shift at Consolidation Coal Company's No. 20 Mine and that he had to leave for work at 6:30 a.m. and that he could not come to the mine to see the map before 8 a.m. Satterfield additionally testified that he works overtime about 8 days out of 10 and did not leave the mine until 6:00 p.m. Satterfield also worked on Saturdays and some Sundays. Satterfield said that if he did not work overtime, he could leave the mine at 4:30 p.m. and be at SOCCO's mine by 5:30 p.m. because it takes him an hour to drive home, but the land manager refused to stay an hour late to show him the map (Finding No. 6 above).

Despite the above testimony given by Satterfield under oath, SOCCO's cross motion (pp. 9-10) emphasizes that the land manager volunteered to stay late to show Satterfield the map. The only factual reference cited by SOCCO to support its claim that the land manager agreed to stay late to show Satterfield

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the map is its Answer No. 9b to the Secretary's interrogatories. SOCCO's answers to the Secretary's interrogatories were prepared by SOCCO's counsel on September 10, 1984, which was 10 days prior to the time that SOCCO's counsel took Satterfield's deposition on September 20, 1984. I believe that there is more validity and credibility in the statements of a deponent made under oath than there is to a generalized statement made in an answer to an interrogatory. Therefore, I reject SOCCO's claim that its land manager volunteered to stay late after work to show Satterfield the mine map.

Other aspects of the facts support my conclusion that the land manager never agreed to stay late to show Satterfield the map. First, SOCCO's Answer No. 9b agrees that the land manager refused to stay late on June 5 to show Satterfield the map despite the fact that another of SOCCO's employees had advised Satterfield that he could come to the mine about 7:30 p.m. and see the map on June 5. Second, it is uncontroverted that Satterfield did come to the mine about 7 p.m. on June 19 in an effort to see the map and returned to the mine at 7:30 p.m. on June 20 at which time the land manager did show him the map. The fact that Satterfield came to the mine about 7:30 p.m. on two different occasions to see the map shows beyond any shadow of doubt that Satterfield was willing to come to the mine after work to see the map. If the land manager had been willing to stay late to show Satterfield the map, the two men would have had a meeting of minds on June 5 and no citation for failure of SOCCO to show Satterfield the map would ever have been written. Finally, if the land manager had been as accommodating as SOCCO's cross motion contends, Inspector Bowers would not have had to say in his deposition that "I couldn't get no one to set a time--one before 5:00 and one could be there after 5:00--okay? I went ahead and cited the citation to try to get this over with." (Deposition, p. 63).

SOCCO's Claim that the Map was "Available"

SOCCO's cross motion (p. 12) refers to section 312(b) of the Act and notes that the pertinent requirement of that section is that the "[t]he coal mine map * * * shall be available for inspection by * * * persons * * * residing on surface areas of such mines". SOCCO then states that the definition for "available" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) is "accessible" or "obtainable". SOCCO then contends that it could not have violated section 312(b) because it has a policy of having its land manager to show the mine map to persons residing on surface areas of its mine between the hours of 8 a.m. and 4:30 p.m. SOCCO claims that since the map is available for inspection during that period of time, it is "accessible" and "obtainable" by surface residents. SOCCO argues further that since its land manager went out of his way to make the map available to Satterfield before and after

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those hours, that it went far beyond its normal policy in trying to make the map available for inspection by Satterfield.

As I have already explained above and as I have shown in Finding Nos. 4 through 10 above, SOCCO did not make the map available for inspection by Satterfield when he came to the mine to see it at 1 p.m. on June 5. SOCCO did not make the map available for inspection at 7:30 p.m. on June 5 even though one of SOCCO's employees had told Satterfield it would be made available at that time. SOCCO did not make the map available for inspection when Satterfield again went to the mine to see it about 7 p.m. on June 19. Finally, SOCCO did make the map available for inspection about 7:30 p.m. on June 20 after SOCCO's management had been pressured by several MSHA inspectors and a supervisory inspector to make the map available. In the circumstances described above, one simply cannot find that SOCCO made its map available for inspection by Satterfield in conformance with the provisions of section 312(b) until after Citation No. 2420016 was written.

As I have pointed out above, SOCCO's policy of making the map available from 8 a.m. to 4:30 p.m. only if a single designated person is available to show the map is not a policy which can be accepted as compliance with section 312(b). The land manager, like any other person, is likely to take an annual vacation, get sick occasionally, be given assignments away from his regular office at various times during the year, and may often be out of his office to each lunch. Consequently, SOCCO's policy of permitting a person to see its mine map only if the land manager is present between the hours of 8 a.m. and 4:30 p.m. is not an acceptable way to comply with section 312(b). Congress did not differentiate between the right of a surface resident to see the map and the right of an MSHA inspector to see the map. No MSHA inspector is likely to sit and wait patiently while the land manager gets around to finding it convenient to make the map available for his or her inspection. Similarly, a surface resident like Satterfield is entitled to see the mine map when he comes to the mine for that purpose and SOCCO cannot successfully claim that the map is "available for inspection" when a surface resident is denied the right to see the map simply because SOCCO's land manager happens to be out of the office at the time the surface resident comes to see the map.

SOCCO's Claim of Confidentiality

SOCCO's cross motion (p. 13) quotes the following pertinent provision from section 312(b) of the Act:

Such map or revision and supplement thereof shall be kept confidential and its contents shall not be divulged to any other person, except to the extent necessary to carry out the provisions of this Act.

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SOCCO argues that the confidential provision of section 312(b) shows that Congress was aware of the importance of the information shown on the mine map and that SOCCO's policy of having the map available only during regular business hours, provided its land manager is present, is a fully reasonable requirement in light of its confidential nature. SOCCO then states that Satterfield readily admitted that he had divulged the contents of SOCCO's map to several individuals, some of whom were not even owners, lessors, or residents of the surface area of the mine (Satterfield's Deposition, p. 37). SOCCO then concludes that "Satterfield blatantly violated the express terms of the regulation he so adamantly wishes to strictly construe and enforce" (Cross motion, p. 13, n. 13).

There are defects in SOCCO's reliance on the confidential provision of section 312(b). The legislative history discussed above shows that Congress specifically stated:

that the map shall be made available to the Secretary and his inspectors, the Secretary of Housing and Urban Development, the miners and their representatives, operators of adjacent mines, and to persons owning, leasing, or residing on surface areas of such mines or on areas adjacent to such mines, but that otherwise it shall be kept confidential. [Emphasis supplied.]

The incriminating statements from Satterfield's deposition (pp. 37-38) on which SOCCO relies for its contention that Satterfield "blatantly violated the express terms" of section 312(b) are as follows: [The questions were asked by SOCCO's counsel.]

Q And who were these people, as best you can recall?

A I think I told Ernie Carpenter. Let's see--Paul Morrison. Let's see--I believe--I don't know whether I--I really don't recall who all had asked me but at different times, you know--since there was so much road damage, you know, they just wanted to know, asked me if they were going to go under my house.

Q Are these your neighbors?

A Oh, various people that--

Q That live in that area?

A Probably a couple of them live in that area. Probably a couple--just people who travel that road.

Q Who just wanted to know where they had been mining?

A Well, they just wanted to know if they were going under my house.

Q Going under your house?

A Yes, where I live.

Q Did anyone want to know if they were going under their own houses, if Southern Ohio Coal Company was going under their own house?

A No. One conversation with a neighbor, he said he thought his house was going to be in the next panel.

Q Had he seen the mine map?

A A Martinka official had contacted him.

Since Congress made it very clear in the legislative history that the confidential provisions of section 312(b) did not apply to surface residents of SOCCO's mine or to surface residents of "areas adjacent to such mines", it does not appear that Satterfield was required to refrain from discussing the small amount that he learned from seeing SOCCO's map with the persons with whom he discussed the contents of the map.

As I have indicated above, the land manager refused to answer any of Satterfield's questions about the map except to point out on the map the location of the houses in which Satterfield and his mother lived. The land manager's uncooperative attitude in discussing the map with Satterfield left Satterfield with scarcely any information obtained from the map for discussion with other persons who had not seen the map. Moreover, it does not appear that Satterfield discussed the map with anyone who might not have had a right to see the map if he had taken the time to go to SOCCO's mine for the purpose of asking that the map be made "available for inspection." All of the persons who asked Satterfield whether SOCCO was mining under his house at least traveled the road under which SOCCO had mined or was about to mine. The deposition fails to show whether those persons also resided on "areas adjacent to" SOCCO's Martinka Mine, but that probably accounts for their interest in the matter. In any event, SOCCO did not establish for certain that Satterfield discussed the mine map with persons who were not entitled to know about it under the express provisions of section 312(b).

SOCCO's Claims that Citation No. 2420016 Was Improperly Issued

SOCCO's cross motion (p. 14) contends that Citation No. 2420016 is invalid because it was written on June 19 for acts which SOCCO allegedly committed on June 5 in refusing to show Satterfield the map when he came to the mine office at 1 p.m. on that date (Finding No. 12 above). SOCCO argues that the citation is invalid because it is based on what the inspector was told rather than on what he personally observed.

There is no merit to SOCCO's contention that an inspector may issue a citation only on the basis of something which he has personally observed. Section 104(b) of the 1969 Act did provide that an inspector should issue a notice of violation if, "upon any inspection", he "finds" that a violation has occurred. When Congress amended the 1969 Act to promulgate the present Act, it considerably broadened the inspector's authority to issue citations by providing that he could do so "upon inspection or investigation" if he "believes" that a violation has occurred. Congress explained its reasons for enlarging the inspector's authority as follows:

Section [104(a)] provides that if, upon inspection or investigation, the Secretary or his representative believes an operator has violated this Act or any standard, rule, order or regulation promulgated pursuant to this Act, he shall with reasonable promptness issue a citation to the operator. There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. Citations shall describe with particularity the nature of the violation, and fix a reasonable time for the violation's abatement.

LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, July 1978, 618.

MSHA frequently is required to base its citations of violations on information obtained from interviewing eyewitnesses to violations rather than on information gained by an inspector's own observations of violations. Many citations issued after investigations of accidents are based on information obtained by inspectors who interview witnesses after the accidents occur. In cases involving explosions, it is sometimes too hazardous for inspectors to make personal examinations of actual sites of the explosions and they ultimately issue citations based on interviews of persons who observed the site of the explosion at the time or after the explosion occurred.

MSHA is not barred from issuing citations for a considerable time after a violation occurs if there is a reason for the delay. In *Old Dominion Power Co.*, 6 FMSHRC 1886, 1894 (1984), the Commission affirmed a judge's decision which had upheld the validity of a citation which did not cite Old Dominion for the violation there involved until 12 months after the violation had occurred. There was a reasonable basis for the delay in issuing the citation in the Old Dominion case just as there is in this case.

In this proceeding, Satterfield reported to MSHA on June 5 that SOCCO had refused to show him the mine map that day when he went to the mine at 1 p.m. to see the map. MSHA confirmed Satterfield's belief that SOCCO was required to show him the mine map because of his status as a surface resident, but Satterfield, at that time, declined MSHA's offer of assistance in getting to see the map and stated that he would make another attempt to see the map through his own efforts (Finding No. 5 above). The fact that Satterfield initially declined to ask MSHA to intercede actively on his behalf shows that he was at first inclined to be quite reasonable in giving SOCCO another chance to make the map available for inspection. If SOCCO's land manager had shown any flexibility in his willingness to stay late to show Satterfield the map, no citation would ever have had to be issued.

When the land manager again refused to show Satterfield the mine map on June 19 after Satterfield had gone to the mine under a mistaken impression that SOCCO had agreed to make the map available, Satterfield asked Inspector Bowers, who happened to be at the mine at that time, to issue a citation. The inspector declined to issue a citation at first because he had not investigated the facts. Subsequently, when he received a call from his supervisor requesting him to check into SOCCO's refusal to show Satterfield the map, he talked to another inspector who had already investigated the matter and Bowers thereafter personally experienced considerable difficulty in obtaining an agreement by SOCCO's management to show the map to Satterfield after 5 p.m.

Section 104(a) not only provides for an inspector to issue a citation on the basis of an investigation if he believes that a violation has occurred, but also provides that "the citation shall fix a reasonable time for the abatement of the violation." The inspector explained in his deposition that he did not issue the citation until SOCCO had agreed upon a time for showing Satterfield the map, that is, had agreed upon a time for abatement of the violation. The inspector then stated that he issued the citation "to try to get this over with" (Deposition, p. 63).

Using the inspector's statement that he issued the citation "to get this over with", SOCCO argues in its cross motion (p. 15), that the inspector's motive in issuing the citation

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was to resolve a difference of opinion between SOCCO and Satterfield rather than cite a violation of the Act which he believed had occurred. The inspector clearly stated that he had decided to issue the citation based on SOCCO's refusal to show Satterfield the map on June 5, but that he did not issue the citation until SOCCO had finally agreed upon a time for abatement (Deposition, pp. 63; 65). The discussion above shows that Citation No. 2420016 was properly issued under section 104(a) because it was based on an investigation of the facts underlying SOCCO's refusal to show Satterfield the map on June 5 and was issued after Inspector Bowers had finally obtained a time for abatement for insertion in the citation as required by section 104(a) of the Act.

SOCCO's cross motion (p. 15) cites two cases in support of its final argument that Citation No. 2420016 must be vacated because no violation of section 312(b) existed at the time the citation was issued. The first case on which SOCCO relies is one decided by Chief Administrative Law Judge Merlin in Republic Steel Corp., 5 FMSHRC 1158 (1983), in which Chief Judge Merlin held that no violation of 30 C.F.R. 75.604 existed in circumstances, based on credibility determinations, showing that the defective permanent splice described in the citation had been removed from a trailing cable before it was cited by the inspector as being defective. In the Republic case, Chief Judge Merlin specifically stated that his ruling did not apply to a violation which remained in existence at the time the violation was cited. 5 FMSHRC at 1162. The other case relied on by SOCCO is Consolidation Coal Co., 5 FMSHRC 1463 (1983), which involved an order by Chief Judge Merlin requiring MSHA to explain why Consol was being allowed to pay a \$20 penalty in a case in which MSHA had asked to withdraw its petition for assessment of civil penalty. Chief Judge Merlin's order stated that it was "inconsistent for the Solicitor to seek to withdraw his penalty petition and at the same time allow the operator to pay a \$20 penalty". 5 FMSHRC at 1463.

Obviously, the two cases cited by SOCCO do not support a claim that the citation in this case should be vacated because no violation existed on June 19, 1984, when the citation was issued. SOCCO refused to make its mine map "available for inspection" by Satterfield on June 5 (Footnote.2) and SOCCO continued to

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refuse to make the map available to Satterfield, despite requests by both Satterfield and MSHA's inspectors that the map be made available. Those refusals had continued to be made up to the very time the citation was issued (Finding Nos. 4 through 10 above). Consequently, SOCCO's contention that no violation of section 312(b) or of section 75.1203 occurred must be rejected as being contrary to the facts and unsupported by the cases cited in SOCCO's cross motion.

WHEREFORE, it is ordered:

(A) The motion for summary decision filed on December 7, 1984, by the Secretary of Labor is granted and the cross motion for summary decision filed on December 24, 1984, by Southern Ohio Coal Company is denied.

(B) The notice of contest filed on June 25, 1984, by Southern Ohio Coal Company, as supplemented on August 30, 1984, is dismissed and Citation No. 2420016 issued June 19, 1984, alleging a violation of section 75.1203, is affirmed.

(C) The issues raised in this proceeding in Docket No. WEVA 84-296-R are severed for purpose of separate disposition from the issues raised in Docket No. WEVA 84-281-R with which the issues raised in Docket No. WEVA 84-296-R were previously consolidated in a prehearing order issued on August 23, 1984.

Richard C. Steffey
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 Depositions of Jesse Lowell Satterfield, Frank Dowell Bowers, and Raymond Leon Ash were taken by SOCCO's counsel on September 20, 1984. All references are to pages in the depositions given by those three persons. The depositions were transcribed and placed in a single volume having consecutive page numbers.

~Footnote_two

2 As the Secretary's reply brief (p. 3) notes, "Besides the original copy of the map located in a vault (on mine property), there are at least 11 "500 scale" reproductions located throughout various mine offices and rooms". SOCCO's Answer No. 3(c)(ii) to the Secretary's interrogatories. When Satterfield finally saw the map, he was shown a "500 scale" reproduction. SOCCO's Answer No. 9b.