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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: KENT 85-67
A.O. No: 15-03987-03507

v.

River Queen Surface Mine

PEABODY COAL COMPANY,
RESPONDENT

SUMMARY DECISION AND ORDER

Before: Judge Maurer

STATEMENT OF THE CASE

This case concerns the petition for civil penalty filed by the Secretary of Labor pursuant to 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act", for a violation of the regulatory standard at 30 C.F.R. 48.30. The case is before me on stipulated facts for a ruling on Cross Motions for Summary Decision, filed pursuant to 29 C.F.R. 2700.64.

Citation No. 2337820 was issued on August 24, 1984 by MSHA Inspector Hubert Sparks pursuant to 104(a) of the Act, and the "condition or practice" cited is described as follows:

A violation of this section exists in that employees regularly working on the third shift (12 midnight to 8 A.M.) were required to receive annual refresher training on the first shift (8 A.M. to 4 P.M.) on March 30, 1984. The River Queen Mine does not rotate or cross-shift employees as a normal practice.

APPLICABLE REGULATORY PROVISIONS

The cited regulatory standard, 30 C.F.R. 48.30(a) reads as follows: "Training shall be conducted during normal working hours; miners attending such training shall receive the rate of pay as provided in 48.22(d) (Definition of normal working hours) of this Subpart B."

Section 48.22(d) referred to above provides as follows:

"Normal working hours" means a period of time during which a miner is otherwise scheduled to work. This definition does not preclude scheduling training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice. Miners shall be paid at a rate of pay which shall correspond to the rate of pay they would have received had they been performing their normal work tasks.

STIPULATIONS

1. Peabody Coal Company owns and operates the River Queen surface coal mine located in Muhlenberg County, Kentucky.
2. River Queen surface mine is subject to the Federal Mine Safety and Health Act of 1977.
3. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.
4. River Queen surface mine operates daily, the times for said shifts being: 1st shift--8:00 A.M. to 4:00 P.M.; 2nd shift--4:00 P.M. to 12:00 P.M.; 3rd shift--12:00 A.M. to 8:00 A.M.
5. In August, 1984, the total numbers of miners working each shift were as follows: 1st shift--169; 2nd shift--124; 3rd shift--66; stagger--4.
6. Management at River Queen surface mine does cross shift employees; cross shifting is the practice of changing a previously scheduled work shift during the week.
7. From January 1, 1984 to August 24, 1984, the following employees were cross shifted for reasons other than training:

Name	Normal Shift	Shift Worked	Date
Wm. Bartlett	2nd	1st	03/12/84
Jerry Bean	2nd	3rd	01/14/84
Bill Whitaker	2nd	1st	08/16-21/84
Mike Thorpe	2nd	1st	08/13-19/84
Rick Allen	3rd	2nd	01/24/84
Bill Drake	2nd	3rd	08/84
Bill Johnson	2nd	1st	01/26/84

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Harold Frost	3rd	1st	02/23-3/5/84
Lee Stone	3rd	1st	All 1984
Welby Sellers	2nd	1st	All 1984
D. Stevens	3rd	1st	08/19/84
B. Fleming	1st	3rd	08/19/84
B. Larkins	3rd	2nd	05/20/84
G. Baggett	3rd	2nd	05/06/84
L. Browning	2nd	1st	08/19/84
D. Stevens	3rd	2nd	07/01/84
G. Stewart	1st	3rd	06/17/84
W. Munday	2nd	1st	05/27/84

8. On August 24, 1984, MSHA Inspector Hubert Sparks issued a 104(a) citation to Peabody Coal Company alleging a violation of 30 C.F.R. Section 48.30 at River Queen surface mine in that employees working on the third shift were required to receive annual refresher training on first shift on March 30, 1984.

9. In fact, four (4) third shift employees were required to receive annual refresher training on first shift on March 30, 1984.

10. Payment of the penalty assessed by the Mine Safety and Health Administration for the citation involved in this case would not affect the ability of Peabody Coal Company to remain in business.

ISSUE

The question presented is whether or not Peabody Coal Company had a "common practice" of cross-shifting at the River Queen Surface Mine on March 30, 1984, the date of the alleged violation.

DISCUSSION AND FINDINGS

The facts in this case are not in dispute. Four third shift employees were admittedly cross-shifted for purposes of obtaining required annual refresher training on the first shift on March 30, 1984. Peabody maintains that the operator has the right to cross-shift miners for the purpose of obtaining this required training if cross-shifting is a common practice at the mine. There is some support for this position. See, e.g., Consolidation Coal Company, 4 FMSHRC 578 (1982) (ALJ). However, the threshold question is whether such a common practice existed at this mine in March 1984. "Common practice" to the undersigned administrative law judge means that which is generally done, the prevalent practice.

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While it is acknowledged that Peabody did cross-shift workers before March 1984 for purposes other than training, the issue is whether this was of such frequent and ordinary occurrence so as to rise to the status of a "common practice". I conclude that it did not. In the three months prior to March 30, 1984, three second shift employees out of 124 worked one day each on a different shift and two third shift employees out of 66 worked a different shift during that period--one man for one day and the other for approximately two weeks. No first shift employee of which there were 169 was cross-shifted during this time period. In making this finding, I am cognizant of the fact that two workers were stipulated to have been cross-shifted for the entire period of time covered by the stipulation, i.e., January 1 to August 24, 1984, but I find that this amounts to a de facto change of shift rather than cross-shifting. Accordingly, I find as a fact that of 363 miners working at this mine, only five were cross-shifted during the three-month period prior to March 30, 1984. Therefore, I find that Peabody Coal Company did not have a "common practice" of cross-shifting miners at the River Queen Surface Mine for reasons other than training on, or during the three months prior to, March 30, 1984.

In view of the foregoing findings, I conclude that the petitioner here has established a violation of 30 C.F.R. 48.30(a) inasmuch as the required training was not conducted during normal working hours, and the citation is therefore AFFIRMED.

Further, considering the criteria in section 110(i) of the Act, I conclude that a penalty of \$20, as proposed, is appropriate.

ORDER

Respondent IS ORDERED to pay the \$20 civil penalty assessment within thirty (30) days of the date of this decision.

Roy J. Maurer
Administrative Law Judge