CCASE:
SOL (MSHA) v. MID-CONTINENT RESOURCES
DDATE:
19850926
TTEXT:

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 85-17 A.C. No. 05-00469-03548
v.	Dutch Creek No. 2 Mine
MID-CONTINENT RESOURCES, INC., RESPONDENT	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Carlson

This civil penalty proceeding, tried under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., (the Act), arose out of a federal inspection of the Dutch Creek No. 2 Mine of Mid-Continent Resources, Inc. (Mid-Continent). On September 13, 1984, mine inspector Louis Villegos issued a citation charging that Mid-Continent violated a safeguard issued pursuant to 30 C.F.R. 75.1403-5(g).(FOOTNOTE.1)

The record shows that MSHA inspector Louis Villegos, during an inspection of Mid-Continent's Dutch Creek No. 2 underground coal mine on September 8, 1983, issued a safeguard because coal sloughage allegedly obstructed a part of the 24 inch travelway on one side of the 202 longwall strike belt.

The "condition or practice" portion of the safeguard written by the inspector reads:

> A clear travelway at least 24 inches wide was not provided on the upper side of the 202 longwall strike belt. The location was from the stage loader transfer point and continued outby for a distance of 150 feet.
>
> A clear travelway at least 24 inches wide shall be provided on both sides of all conveyor belts at this mine.

The "action to terminate" portion of the same document was filled in the same day. It reads:

> The travelway was cleaned up of the coal sloughage to provide the travelway.

At a subsequent visit to the mine on September 13, 1984 Inspector Villegos issued a citation under section 104(a) of the Act charging a violation of 30 C.F.R. 75.1403-5(g). The improper "condition or practice" was described thusly:

> A clear travelway at least 24 inches wide was not provided on the uphill side of the 5th north double entry

> strike conveyor belt. The lack of clearance was at numerous locations starting 200 feet outby the two air lock doors and inby to the section dump point. The obstructions were timber at 5 inches from the belt, coal sloughage within one foot, and parts of the travelway being through a trench one foot in width.

The Secretary seeks a civil penalty of $119.00 for the violation. The proposed penalty was duly contested by Mid-Continent and was heard on July 19, 1985, at Glenwood Springs, Colorado. Both parties declined to file briefs or other post-hearing submissions; both argued the matter on the record.

REVIEW AND DISCUSSION OF THE EVIDENCE

There is virtually no dispute concerning the pertinent facts. The Secretary offered the testimony of Inspector Villegos. Mid-Continent presented no witnesses.

In its answer to the Secretary's petition proposing penalty, Mid-Continent urged that the safeguard should be vacated because 30 C.F.R. 75.1403-5(g) applies only to conveyors used to transport persons or materials. (It is undisputed that the belts here in question were used exclusively to move coal.) After the filing of the pleadings in this case, however, the Commission ruled that section 75.1403-5(g) applied to conveyors used solely for coal-carrying, as well as those used to transport materials or miners. Jim Walter Resources, Inc., 7 FMSHRC 493 (April 1985); Jim Walter Resources, Inc., 7 FMSHRC 506 (April 1985). Respondent thus no longer questions that its conveyors are covered by the criterion cited by the Secretary.

Mid-Continent now maintains that the safeguard written by Inspector Villegos was not broad enough to cover the subsequent citation, and that the citation is therefore void. For support in this contention Mid-Continent looks to Southern Ohio Coal Company, 7 FMSHRC 509 (April 1985). In that case the Commission noted that the safeguard provisions of the Act confer upon the Secretary "unique authority" to promulgate the equivalent of mandatory safety standards without resort to the formal rule-making procedures demanded elsewhere in the Act. It therefore held that safeguards, unlike ordinary standards, must be strictly construed. The safeguard notice, that is to say, "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." Fundamental to this concept is the notion that the operator must have clear notice of the conduct required of him.

Mid-Continent's position is best summarized in this statement by counsel:

> Our contention under Southern Ohio is that the safeguard which was originally written was not broad enough to include these specific items. The original safeguard required construction of belts, 24 inch clearance. That was accomplished. The subsequent instructions [sic] were not specifically addressed. Therefore, and properly, the subsequent obstructions have to be themselves the subject matter of a second safeguard. That essentially is our case. (Transcript at 17-18).

As I perceive it then, Mid-Continent's argument is that the underlying safeguard notice mentioned none of the obstructions specified in subsequent citation: timbers, coal sloughage and a trench. Mid-Continent also appears to suggest that the original safeguard was directed at a failure of the operator to construct the conveyor so as to leave a 24 inch space between the rib and the outer edge of the conveyor.

The information elicited in the testimony of Inspector Villegos, however, gives little support to Mid-Continent's arguments. He testified that he saw coal sloughage beside the conveyor which reduced the area of clear passage to less than the 24-inches required in 30 C.F.R. 75.1403-5(g). He maintained that he told this to Mid-Continent's representative at the scene, Mr. Elmer Smallwood, to whom he delivered the safeguard. Mr. Smallwood agreed to get two men to clean up the coal, Villegos testified, and the cleanup was done by 11:00 a.m., an hour and a half after the safeguard's issuance (Tr. 21-24). Villegos also testified that the coal was his sole concern at the time; he had no objection to the way the conveyor was constructed.

Villegos was the only witness to testify. I find his representations to be true. They are, among other things, consistent with the abatement notation on the face of the safeguard which declares, "The travelway was cleaned up of the coal sloughage to provide the travelway."

In deciding the scope of the original safeguard I first note that the inspector completed the block on the form desginated "condition or practice" with very broad language which essentially repeats the operative words of 30 C.F.R. 75.1403-5(g). It names no specific hazards or causes of hazards. Under Southern Ohio, supra, one must question whether a mere repetition of a regulatory criterion can, alone, stand as a valid safeguard. That question need not be resolved here, however, since I am convinced that Inspector Villegos's safeguard document, read in its entirety, conveyed an unmistakeable picture of the proscribed hazard: an accumulation of coal sloughage which partially obstructed the 24-inch travelway.

In reaching this conclusion I necessarily hold that a safeguard notice should be read in its entirety to determine its proper scope. The "action to terminate" portion of the notice in this case makes clear to any reasonable reader that the hazard was coal sloughage. Moreover, there can be no question that actual misunderstanding of the true aim of the safeguard existed; the evidence shows that the sloughage was cleaned up under the direction of a management official who discussed the nature of the notice with the inspector.

Put another way, the Commission's insistence upon a narrow construction of safeguard notices does not require the hyper-technical reading urged by Mid-Continent. In Southern Ohio the Commission recognized as much when it said:

> The requirements of specificity and narrow interpretation are not a license for the raising or acceptance of purely semantic arguments. . . . We recognize that safeguards are written by inspectors in the field, not by a team of lawyers. (Southern Ohio, supra, N. 2 at 521.)

I do, however, accept certain parts of Mid-Continent's argument. Under the Commission's reasoning in Southern Ohio, I am not convinced that either the shallow trench or the timbers in the 24-inch travelway were encompassed within the limits of the underlying notice to provide safeguards. The specification of "coal sloughage" in the original notice was broad enough to embrace the casual presence or accumulation of coal or similar solid objects in the travelway. It was not, however, broad enough to include a wholly dissimilar impediment to travel such as a shallow trench. The trench differed from such solid objects in much the same way as accumulated water in Southern Ohio differed from the rocks and construction debris which were covered by the previous safeguard.

The status of the timbers which allegedly impinged on the walkway space is not so clear. Had the timbers been left on the floor to join the coal sloughage as tripping-and-falling hazards, they should logically be treated as a "similar" hazard covered by the underlying safeguard. The inspector's testimony, however, indicated that the timbers were not merely a loose impediment lying on the floor. Rather, they were upright timbers installed as a part of the roof control system (Tr. 29). The timbers therefore constituted what may be referred to as an essential part of the underground mine structure. In that sense they represented an abatement problem far different from the mere removal of random obstacles left on the travelway floor. They differed enough from the class of objects akin to coal sloughage to remain outside the reasonable scope of inspector's notice of safeguard.

Consequently, I conclude that the citation issued to Mid-Continent was valid with respect to the coal sloughage, but was invalid with respect to the shallow trenches and timbers. The citation will be affirmed as to the former and vacated as to the

latter.

A further matter deserves brief mention. The conveyor referred to in the inspector's notice of safeguard was a different conveyor located in a different part of the mine from the conveyor referred to in the subsequent citation. This difference is of no legal significance. The safeguard issued on September 8, 1983 was directed to "all conveyors in this mine." The evidence shows that both conveyors were of the sort covered by 30 C.F.R. 75.1403-5(g).

PENALTY

We now turn to the matter of an appropriate civil penalty. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The parties stipulate that payment of the Secretary's proposed penalty of $119.00 would not impair Mid-Continent's ability to continue in business. They further stipulate that the company produced 743,844 tons in all its operations in 1983, and 463,504 tons in the mine in question. Finally, they stipulate that abatement was prompt. The government presented no evidence concerning Mid-Continent's history of prior violations. Such history must therefore be treated as favorable in this proceeding.

I must conclude that the gravity of the violation was low. The Secretary's original $119.00 penalty proposal was in part predicated upon the presumed hazards presented by the upright timbers and the shallow trenches in the travelway. These hazards cannot be considered in the present penalty, however, since they were outside the reach of the safeguard notice. More important, however, the exposure of miners to the established hazard--coal sloughage--was quite low. The inspector's testimony revealed that miners would seldom use the travelway next to the conveyor; their presence would tend to be limited to inspections of or maintenance on the conveyor itself.

Considering all these elements, I conclude that the proposed $119.00 is excessive. I hold that a civil penalty of $40.00 is reasonable.

CONCLUSIONS OF LAW

Upon the entire record herein, and consistent with the findings contained in the narrative portion of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this case.

~1463

(2) Mid-Continent violated the safeguard issued on September 8, 1983 under 30 C.F.R. 75.1403-5(g) as charged in that part of the citation alleging an unlawful accumulation of coal sloughage within the 24-inch-wide travel space required to be maintained next to the 5th north double entry strike conveyor belt.

(3) Mid-Continent did not violate the safeguard with respect to the presence of timbers or trenches as alleged in the citation because such hazards or conditions were not within the scope of the safeguard.

(4) A civil penalty of $40.00 is appropriate for the violation established.

ORDER

Accordingly, the citation, as modified in this decision, is ORDERED affirmed; and Mid-Continent is ORDERED to pay a civil penalty of $40.00 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
FOOTNOTES START HERE:-

~Footnote_one

1 Section 75.1403-5(g) is a "criterion" regulation issued by the Secretary under authority of section 314 of the Act. The statutory section survives from the 1969 Coal Act and provides special enforcement procedures for hazards involving transportation of men and materials. It provides:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1(b) sets forth the conditions under which the Secretary's representatives may issue citations for an operator's failure to comply with a safeguard. It provides:

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice [citation] shall be issued to the operator pursuant to section 104 of the Act.

> The inspectors' authority in writing safeguards is circumscribed by the "criteria" regulations which define the limits within which the safeguards may issue. Section

75.1403-5(g), the criterion relied upon in this case, applies to belt conveyors. It provides:

> A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.