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SOL (MSHA) V. PHELPS DODGE & TYRONE BRANCH
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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. CENT 85-19-M
A.C. No. 29-00159-05508

v.

Docket No. CENT 85-37-M
A.C. No. 29-00159-00509

PHELPS DODGE CORPORATION/
TYRONE BRANCH,
RESPONDENT

Tyrone Mine & Mill

DECISION

Appearances: Eve Cnesbro, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas for
Petitioner;
Stephen W. Pogson, Esq., Evans, Kitchel and
Jenckes, P.C., Phoenix, Arizona for Respondent;

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Federal Mine Safety and Health Act ("the Act") by the Secretary of Labor against Phelps Dodge Corporation/Tyrone Branch, for alleged violations of the mandatory safety standards.

Stipulation

At the hearing, the parties agreed to the consolidation for hearing and decision of the two docket numbers (Tr. 3).

They also agreed to the following stipulations (Tr. 4):

(1) Phelps Dodge, Tyrone Mine and Mill, are subject to the Act and that MSHA has safety and health jurisdiction over them;

(2) the citations were duly issued and served by MSHA;

(3) there were 57,120,000 tons of ore and waste from the mine at the Tyrone Mine during the calendar year 1984;

(4) the Tyrone Mine and Mill is a large open pit operation;

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(5) imposition of a penalty in either or both cases would not impair Phelps Dodge's ability to remain in business.

Based upon the print-out submitted (MSHA Exhibit PÄ3) I find the operator's prior history of violations is good.

Cent 85Ä19ÄM

Citation No. 2092265

The subject citation dated October 10, 1984, describes the allegedly violative condition or practice as follows:

The company posted a list "miner representative" dated 10/4/84 on top of the miner representative list received by MSHA dated 10/1/84. The company list has two additional names dated April 7, 1980 and the other 12/26/83. A copy of the most current status list presented to the company and MSHA is only posted at the safety office bulletin [sic] board where not all employees can observe the list of the miners representing them. Tony Trujillo said he made up this list.

30 C.F.R. 40.3 provides as follows:

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current.

(1) The name, address and telephone number of the representative of miners. If the representative is an organization, the name, address and telephone number of the organization and the title of the official or position who is to serve as the representative and his or her telephone number.

Section 40.4 provides that:

Posting at Mine

A copy of the information provided the operator pursuant to 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

The facts are undisputed. On the bulletin board of the mine safety office was a list of miner representatives and alternates dated October 4, 1984 (MSHA Exhibit PÄ5; Operator's Exhibit RÄ18). This list has three miner representatives and sixteen alternates. Directly underneath this list on the board was another list dated October 1, 1984 which was the same as the one on the top except that it had only one of the three miner representatives and it had a certification by the one named miner representative that the list had been submitted to MSHA (MSHA Exhibit PÄ6; Operator's Exhibit RÄ17). It is agreed that the two additional miner representatives on the top list were proper miner representatives who had submitted the appropriate designation forms to MSHA (MSHA Exhibits PÄ8 and PÄ9). The top list was therefore, a composite put together by the operator from the separate forms it had received from its miners which they had sent to MSHA.

The regulation does not specifically address the situation where multiple forms are separately submitted to MSHA and individually given to the operator. I conclude that the list compiled by the operator and placed on the top on the safety office bulletin board, was a sensible, fair and permissible way of handling such a situation. The MSHA inspector admitted he had no quarrel with the accuracy of the top list (Tr. 12). And the company played no part in selecting the representatives. It merely compiled on one piece of paper the eparate pieces of paper each of which had been sent to MSHA individually. Its actions were purely ministerial and added nothing of substance. The only alternative would have been for the operator to post separate pieces of paper side by side all over the bulletin board. This would not have aided the process of miner representation. On the contrary, it would have been complicated and confusing. The operator used good judgment and good sense. If MSHA wants the matter handled differently, it can amend the regulation to specify what it wants done. But as matters now stand, the operator must be held to have acted reasonably and efficaciously. Accordingly, I hold the composite list posted on the top in the safety office bulletin board was acceptable.

The next issue is the required posting location for the appropriate list. The regulation requires that the list which must be maintained in a current status be posted on the mine bulletin board. In this case there were three bulletin boards. One, as already discussed was inside the safety office ("A" on MSHA Exhibit PÄ14). The second board was glassed in and secured on the outside wall of the building which housed the mine office and changing room (Tr. 20Ä22; 57Ä59; "B" on MSHA Exhibit PÄ14). On the door of this building was a sign "Mine Office" and on the top of the board itself was a sign "The Mine Bulletin Board" (Tr. 57). On this bulletin board was posted a list of miner representatives dated September 15, 1980 with some updating notations (Tr. 17, 22, 70, MSHA Exhibit PÄ7). A comparison with the 1984 list posted

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on top in the safety office reveals that the 1980 list was out of date. The third board was glassed in on the outside of the mill building where the change room for the mill workers was located (Tr. 58, "C" on MSHA Exhibit PÄ14). The same 1980 list was on this board as on the board on the mine office building (Tr. 23).

I conclude the 1980 list was not current and therefore, not acceptable under the regulations. The question then becomes: was the posting in the safety office sufficient? I conclude it was not. The regulation requires posting on the "mine bulletin board". There was just such a place in this case. The second board ("B") was entitled "Mine Bulletin Board" and was mounted next to a door marked "Mine Office" (Tr. 57). Admittedly, mill employees regularly do not pass by the mine bulletin board but mine employees do so regularly on their way to the changing room which is in the same building (Tr. 58). There is no requirement that every employee pass by the designated location nor is there a requirement for multiple postings. The safety office is where employees would only go for training or if they have dealings with the safety department (Tr. 50). Posting the current list on the safety office bulletin board did not meet the requirements of the regulations. Accordingly, I find the operator violated this aspect of the mandatory standard.

The violation was nonserious. Negligence is low. As already set forth, I find the operator's prior history is good and I accept the stipulations regarding the other criteria.

A penalty of \$20 is Assessed.

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Citation No. 2092266

The subject citation dated October 10, 1984, describes the allegedly violative condition or practice as follows:

"The lime slaker area at this time was not kept clean of slick spilled wet lime. An injury was reported on 9/20 with the injured employee still off on lost time because of a slip and fall which resulted with a back injury.

An employee, Gilbert A. Romero "helper", stated that this area is cleaned each shift and that at this he was not cleaning at this time.

30 C.F.R. 55.203 provides as follows:

55.203 Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

There is no dispute that when the inspector arrived, the floor of the lime slaker area was covered with waste material from the slaker and that the drains were clogged (Tr. 107). The evidence further indicates that in accordance with established procedures the lime slaker helper had intentionally emptied the contents of the slaker chamber onto the floor because the chamber had become plugged (Tr. 151). The helper was supposed to clean up the floor immediately but he had to leave to go to the bathroom (Tr. 110). At this time the inspector arrived and issued the subject citation. MSHA's witness and the operator's witness agreed that the condition which the inspector found could have occurred during the brief interval the helper was gone (Tr. 146, 154). In the absence of evidence on the point, I cannot accept the unsupported suggestion that the helper could have gone to the bathroom before he emptied the slaker chamber (Tr. 147). I appreciate the inspector's concern over the condition he saw. However, a little common sense would not be amiss in a case such as this. Under the circumstances presented I cannot find the operator failed to comply with the mandatory standard.

Citation No. 2092266 is Vacated.

ORDER

In light of the foregoing, the operator is ORDERED TO PAY \$20 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge