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

SOUTHERN OHIO COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 86-190-R Order No. 2705915; 2/19/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 86-194-R Order No. 2705881; 2/20/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-254 A.C. No. 46-03805-03723
v.	
SOUTHERN OHIO COAL COMPANY, RESPONDENT	Martinka No. 1 Mine

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Contestant/Respondent;
James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Southern Ohio Coal Company (SOCCO), has filed notices of contest challenging the issuance of Order No. 2705915 (Docket No. WEVA 86-190-R) and Order No. 2705881 (Docket No. WEVA 86-194-R) at its Martinka No. 1 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $2,100 for the violations charged in the above two contested orders as well as that violation charged in Order No. 2705918 which was the subject of Docket No. WEVA 86-192-R. (FOOTNOTE 1)

At the hearing on these cases, which was held on August 19, 1986, in Morgantown, West Virginia, the parties jointly moved for approval of their settlement of that portion of the civil penalty case that pertained to Order No. 2705918. I approved a reduction from $600 to $400 of that part of the civil penalty assessment and granted the motion on the record (Tr. 5).

The general issues before me concerning each of the remaining individual orders and its accompanying civil penalty petition are whether the orders were properly issued, whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. 6-7):

1. The Martinka No. 1 Mine is owned by respondent, Southern Ohio Coal Company.

2. The Martinka No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject orders and terminations were properly served by a duly authorized representative of the Secretary of Labor on an agent of respondent on the dates, times, and places stated therein and may be admitted into evidence for purposes of establishing their issuance without waiving any objections as to their truthfulness and the relevancy of the statements contained therein.

5. The alleged violations were abated in a timely fashion.

6. The respondent's annual production for the year 1985 was approximately 7 million production tons. The subject mine had 2,495,783 production tons in 1985.

7. Respondent had 2,773 assessed violations during the 24-month period prior to the issuance of the orders at the subject mine.

8. Respondent received a section 104(d)(1) order on September 1, 1981, issued by Federal Mine Safety and Health Inspector Frank Bowers. Martinka No. 1 has had no clean inspections of the mine from the issuance of that order to February 20, 1986.

I. Docket No. WEVA 86-190-R; Order No. 2705915

Order No. 2705915, issued pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), alleges a violation of the regulatory standard at 30 C.F.R. 75.1403 (FOOTNOTE 2) and charges as follows:

> In the 2 east C section, there was less than 24 inch clearance between the left coalline rib and the Stamler belt coal feeder for approximately 6 to 7 feet, only 12 inch clearance was between the Stamler and ribline and the start and stop switch was installed for the belt conveyor in this area. Coal and slate was being dump on the right side of the Stamler instead of the front and the fire warning box was installed outby the Stamler Feeder. Mechanics, electricians, and belt cleaners use this area. Jim Kincell and Robert Molshan, belt foremen. Safeguard No. 2034480 - issued 11-03-82. FDB.

The above-referenced safeguard provides in pertinent part: "24 inches of clearance shall be provided on both sides of the coal feeders in this mine."

As a factual matter, the witnesses for both parties were able to agree that the coal feeder in question was indeed closer than 24 inches to the left coal line rib on the morning of February 19, 1986, at the time the instant order was issued.

However, a threshold legal issue raised by SOCCO is whether the safeguard which is Government Exhibit No. 2 constitutes a valid and enforceable notice to provide safeguards. If the safeguard is not valid, then the (d)(2) order which purports to enforce it would likewise be invalid.

Normally, mandatory safety standards are developed and promulgated in accordance with section 101 of the Act and the rule-making provisions contained in the Administrative Procedure Act, 5 U.S.C. 551, et seq. SOCCO maintains that the requirements set forth in the instant safeguard should have properly been the subject of such rule-making, rather than a safeguard notice issued under section 314(b) of the Act. (FOOTNOTE 3)

Section 314(b) of the Act grants the Secretary the extraordinary authority to essentially create mandatory safety standards on a mine-by-mine basis without resorting to the normal rule-making procedures contemplated by the Act. However, this authority is not without bound. The Secretary cites Southern Ohio Coal Co., 7 FMSHRC 509 (1985) for the proposition that the Commission has approved the issuance of safeguards without rule-making for a particular mine and that the Commission has stated that the operator's interest is nevertheless protected by narrowly construing the terms of the safeguard to assure that the operator understands the hazard sought to be regulated. However, SOCCO's position in this case is not that they didn't understand the terms of the safeguard at bar, but rather that the Secretary is not authorized to issue safeguards of a universal nature on a mine-by-mine basis in the first instance.

The operator contends that the subject matter of the instant safeguard is of general applicability. It simply requires 24 inches of clearance on both sides of coal feeders. Inspector Delovich testified that the hazard involved if the feeder is closer than that to the rib line is that a miner could conceivably be crushed between the feeder and the rib if the feeder should be bumped by a shuttle car dumping coal into it. The company's argument is that there is nothing unique about the Martinka No. 1 Mine that would increase this hazard at that mine and no others; rather, the hazard sought to be eliminated by the safeguard exists equally in all mines using coal feeders.

SOCCO also makes the point that the previous Southern Ohio Coal Co. case which the Secretary relies on here as authority concerned a notice to provide safeguards issued pursuant to 30 C.F.R. 75.1403-5(g), one of the specific criteria set forth in the Code of Federal Regulations. The point being that the specific criteria set forth in 30 C.F.R. 75.1403-2 through 30 C.F.R. 75.1403-11 were established via the rule-making process. Whereas in the instant case, Safeguard No. 2034480, which is the underlying safeguard in the (d)(2) order at bar, was not issued pursuant to and does not relate to any of those specific criteria.

It is noteworthy that the other case relied on by the Secretary, Zeigler Coal Co. v. Kleppe (FOOTNOTE 4), although cited for the court's holding that violations of an approved ventilation plan may properly be considered a violation of a mandatory safety and health standard even though such plans are approved without rulemaking, had more to say on the subject of when rulemaking would be required. The Court went on to state that:

> It [section 303(o) of the Act] was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine.
>
> Thus an operator might contest an action seeking to compel adoption of a plan, on the ground that it contained terms relating not to the particular circumstances of his mine, but rather imposed requirements of a general nature which should more properly have been formulated as a mandatory standard, under the provisions of 101. This would appear to render all but inconsequential the actual circumvention of 101 resulting from the enforceability of ventilation plans. For insofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application. (FOOTNOTE 5)

While the Secretary concedes that the particular safeguard at issue here may have application beyond the Martinka No. 1 Mine, he argues that it cannot be held on its face to have such a general and universal application so as to compel rulemaking. The operator's position is that it is abundantly clear that the requirements of the safeguard are of a general nature applicable to all coal mines and therefore should have been formulated as a mandatory standard under the provisions of section 101 of the Act. Reading the record as a whole, I believe that a clear inference may be drawn that the requirements of the instant safeguard are applicable to at least a significant number of coal mines which employ coal feeders and shuttle cars to transport coal. Importantly, there is no reason given in this record why the 24 inch clearance requirement should be imposed only in the particular mine herein involved and not in mines using coal feeders generally.

The Act provided for flexibility by creating safeguards to cover those situations where conditions vary on a mine-to-mine basis. Through the use of safeguards, certain requirements can be imposed on a particular mine because of its peculiar physical lay-out or circumstances. "However, the potential scope of safeguards is very broad and accordingly, care must be taken to ensure that they are employed only in the proper context and do not become a means whereby the usual rule-making process is ignored and circumvented." U.S. Steel Mining Co., Inc., 4 FMSHRC 526, 529-530 (1982). In that case, Judge Merlin held that the safeguard had nothing to do with conditions peculiar to that mine as opposed to other mines. He concluded that the safeguard and subsequent citation based upon it were improperly issued and invalid.

I conclude that where, as here, the safeguard is not issued under any of the specific criteria for safeguards contained in 30 C.F.R. 75.1403-2 through 75.1403-11, then the requirements of that safeguard must be demonstrably related to some mine-specific hazard or unsafe condition sought to be corrected. In the instant situation, I find that the requirements set forth in Safeguard No. 2034480 and the hazards sought to be protected against are of a general nature applicable to at least a significant number of other coal mines utilizing coal feeders and therefore should have properly been promulgated using the rule-making procedures contained in 101 of the Act. Therefore, I find that Order No. 2705915, being based on an invalid safeguard was improperly issued and will be vacated.

II. Docket No. WEVA 86-194-R; Order No. 2705881

Order No. 2705881, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 75.400 (FOOTNOTE 6) and charges as follows:

> On the B-6 longwall belt conveyor there was 23 bottom rollers turning in wet to dry coal dust, 11 bottom rollers frozen, damaged, in wet coal dust under the belt takeup and the front bottom roller at the belt drive was turning in coal dust directly outby the belt drive roller drums and the bottom belt for approximately 10 feet at the belt drive, running in coal, bottom belt was running

> out of line and rubbing the steel leg stands cutting into the leg stands 1/4 to 1/2 inch in the area where the rollers were turning in the coal, frozen bottom rollers under the belt takeup were shining. Conditions present a fire hazard. Larry Morgan, longwall foreman, Dave Williams, longwall coordinator foreman.

MSHA Inspector Harry C. Markley issued the instant order during an AAA inspection of the Martinka No. 1 Mine on February 20, 1986. He observed accumulations of coal starting to build up under the rollers of the B-6 longwall belt conveyor, and the further he walked toward the section, he saw the rollers running in dry to wet coal. Finally, when he got to the tailpiece and saw the muddy conditions there, he told Mr. Resetor, the operator's safety inspector for the mine, that he was under a (d)(2) order. These accumulations and conditions existed for a distance of approximately 300 feet outby the tailpiece. Mr. Markley further opined that there was an average accumulation of from one to two bushels of dry to wet coal under each roller, of which 23 were involved in this violation. He modified his original description of the condition of the coal somewhat in response to later questioning. He stated that the coal was dry or would dry in those areas where the water would run-off and leave the solids at the rollers.

Inspector Markley testified that the hazard presented by the situation he observed was that the belt and rollers were turning in this accumulation of fine coal and coal dust and the belt was rubbing the stands causing friction. He testified that heat was thereby produced, the coal was or could be dried by the heat, and in his opinion a mine fire could result.

The condition of the coal, vis-a-vis its wetness or dryness, is a critical initial issue in this case because the cited regulation speaks to accumulations of combustible materials. If the coal accumulation was not combustible as a factual matter, then it follows that there can be no violation of 30 C.F.R. 75.400. The Secretary contends that the coal around at least some of the 23 rollers was dry and could present a fire hazard. The operator contends that the coal was too wet along the entire 300 foot section cited to constitute either an accumulation of combustible materials or a fire hazard.

Mr. Mugmano, the Belthead Man at the time the order was issued, testified that at the time this order was issued he believed they were mining under a creek because his area was always wet and muddy. He testified that the coal under

the belt was damp to wet under each of the 23 rollers cited in the order, and the area around the rollers was saturated. Because of these extremely wet conditions, he opined that the rollers in question could not become dry. Additional water comes from the sprays on the longwall shear and the crusher. Approximately 60 to 75 gallons of water per minute are sprayed on the coal that is cut and goes on the belt, making it a very wet belt in the opinion of this witness. When asked if there was any wet to dry coal dust in the area cited he replied that the only dry area would have been where an accumulation of mud came off the rollers and was heated by the friction of the running belt touching the steel leg stands. It would get warm there and form a crust of an inch or two. The rest of the area he described as resembling chocolate pudding, and being too wet to even shovel. SOCCO Exhibit Nos. 8, 9, 10, and 11 are photographs that bear this out, at least insofar as it appears to be an accurate description for the areas they depict, which I take note is obviously not the entire 300 feet at issue.

Mugmano agreed with the inspector that the bottom belt was running out of line and rubbing the steel leg stands and when it does that, and the belt is so saturated with water, it causes a big mudpile to form where it rubs mud off the belt. Mr. Mugmano disagreed, however, with the characterization of the material as "coal". He stated it was more properly called a mixture of coal dust, water and rockdust, of which he uses approximately thirty (30) 50-pound bags each day.

The Commission has held that:

> [I]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe. Thus, we hold that an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary [subject to challenge before the administrative law judge] it likely could cause or propagate a fire or explosion if an ignition source were present. Old Ben Coal Co., 2 FMSHRC 2806, 2808 (1980).

When evaluated against that standard the Secretary's case fails of proof. The Secretary has the burden of proving that a sufficient quantity of combustible material existed which could cause or propagate a fire or an explosion were an ignition source present. I am not convinced by the evidence in this record that enough dry coal or dry coal mixture existed to amount to anything. I find as a fact that the overwhelming majority of the accumulation cited was a damp to water saturated mixture of coal dust, rock dust and

~281
water. I further find that the only dry part of this accumulation was as Mr. Mugmano testified where accumulations of mud formed a crust an inch or two thick in those spots heated by the friction of the running belt touching the steel leg stands. The remainder of the material in question I find as a fact was too wet to be considered "combustible." Ultimately, therefore, I conclude that there was not a violation of 30 C.F.R. 75.400 proven.

ORDER

On the basis of the foregoing findings and conclusions, Southern Ohio Coal Company's contests ARE GRANTED, Order Nos. 2705915 and 2705881 ARE VACATED, and MSHA's related civil penalty proposals ARE REJECTED.

The respondent IS ORDERED to pay to MSHA a civil penalty in the amount of $400 in satisfaction of that portion of the civil penalty case that pertains to Order No. 2705918 within thirty (30) days of the date of this decision and order. Upon payment, the civil penalty proceeding IS DISMISSED.

Roy J. Maurer
Administrative Law Judge

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~FOOTNOTE_ONE
1 Docket No. WEVA 86-192-R was disposed of by a separate Order of Dismissal dated April 16, 1986.

~FOOTNOTE_TWO
2 30 C.F.R. 75.1403 provides as follows:
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.

~FOOTNOTE_THREE
3 Section 314(b) of the Act consists of the identical language contained in 30 C.F.R. 75.1403 as fully set out in fn. 2.

~FOOTNOTE_FOUR
4 536 F.2d 398 (D.C.Cir.1976).

~FOOTNOTE_FIVE
5 Id. at 407.

~FOOTNOTE_SIX
6 30 C.F.R. 75.400 provides as follows:
Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.