CCASE:
GREENWICH COLLIERIES V. SOL (MSHA)
DDATE:
19870731
TTEXT:

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

GREENWICH COLLIERIES, CONTESTANT	CONTEST PROCEEDING
	Docket No. PENN 86-17-R
v.	Order No. 2549665; 9/16/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Greenwich No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 86-56 A.C. No. 36-02404-03610
v.	Greenwich No. 2 Mine
GREENWICH COLLIERIES, DIV/PA MINES CORP., RESPONDENT	

DECISION

Appearances: Joseph T. Kosek, Jr., Esq., Greenwich Collieries, Ebensburg, Pennsylvania; Joseph Yuhas, Esq., Greenwich Collieries, Ebensburg, Pennsylvania; B. Anne Gwynn, Esq., Office of the Solicitor, Arlington, Virginia

Before: Judge William Fauver

These consolidated cases were brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The Company seeks to vacate a withdrawal order charging a violation of a safety standard. The Secretary seeks to uphold the order and to have a civil penalty assessed for alleged violations.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. Greenwich No. 2 Mine is an underground coal mine that produces coal for sale or use in or affecting interstate commerce.

2. Around 8:45 a.m., on September 16, 1985, in the PÄ7 section of the mine, Federal Inspector Samuel Brunatti observed certain deviations from Respondent's approved ventilation plan in that there was no check curtain across the last crosscut between entries RÄ1 and RÄ2 and the RÄ2 face canvas extended from the face to the inby corner of the belt entry in a manner that he believed closed off air to the faces of the belt and RÄ1 entries. He took an air reading at the face end of the canvas in RÄ2 entry and found no air movement.

3. There was no power on the section at the time, except for a roofbolting machine, and there was no mining going on.

4. When he began his inspection of this area Inspector Brunatti first went to the face in RÄ2 entry, where he found there was no air movement. He did this before he noticed any deviations from the ventilation plan. When he made the air test, he told a crew member, Ron Nagle, that they did not have enough air to mine coal. Someone told the section foreman, David Benamati, about the air problem and he came up to the face area. Inspector Brunatti told the foreman, "You don't have enough air in the mine, right here" pointing toward the RÄ2 face. The foreman told the inspector they had used the same ventilation system on Friday, September 13, and had adequate air then. The inspector doubted this statement, and told the foreman that, if he had had adequate air on Friday he should have no problem getting adequate air then, and gave the foreman some time to bring the ventilation up to the standard, i.e., 5,000 cfm at each face. The foreman checked the air, saw there was inadequate air, and then had his men tighten the air curtains. He testified that the curtains had been loosened or repositioned before the inspector arrived, because they were going to install a run-through curtain in the crosscut between RÄ1 and RÄ2 entries before mining coal. After the curtains were tightened, the foreman took another air reading at RÄ2 face, and found 3,800 cfm, still not enough air. The foreman then went to the return air entry, several crosscuts away, to try to find the cause of the air problem.

5. While the foreman was away trying to find the cause of the air problem, the inspector started investigating the problem near the RÄ2 face and crosscut between RÄ1 and RÄ2 entries. The inspector then discovered deviations from the approved

ventilation plan which he assumed were the cause of the air problem. He found that there was no check curtain in the crosscut between RÄ1 and RÄ2 entries and that the canvas from the face in RÄ2 entry extended to the inby corner of the belt entry. He believed that the canvas was too near the rib to allow adequate air to reach the faces and that this condition prevented adequate ventilation of the RÄ2 face.

6. Meanwhile, the foreman discovered a dislodged post blocking an air curtain in the belt entry which he believed to be the cause of the air problem. The foreman reset the post and rehung the curtain in the belt entry, and returned to the RÄ2 face area. He rechecked the air there and found over 5,420 cfm.

7. While the foreman had been over to the belt entry, the mine foreman, Paul Somagi, instructed miners to install the run-through curtain in a different place (from the place where the foreman was going to install it) and to reposition the curtains to comply with the ventilation plan.

8. The inspector assumed that the new, adequate air reading taken by the foreman was due to the ventilation curtain changes made by Somagi; he did not know about the foreman's discovery of a dislodged post blocking a curtain in the belt entry or his repair of that problem. The foreman assumed the improved air reading was due to his resetting of the dislodged post and rehanging of the curtain in the belt entry.

9. The inspector and the foreman never effectively communicated their views to each other with respect to the ventilation problem and how it was solved.

10. The inspector issued a 104(d)(2) order (No. 2549665) charging a violation of the ventilation plan and therefore a violation of 75 C.F.R. 75.316, based upon the following allegations of fact:

> The approved ventilation and methane and dust control plan was not being complied with at PÄ7, active working section, in that mining was being conducted in the RÄ2 entry. However, no check or other device was erected across the crosscut, RÄ1 to RÄ2, thus allowing the air to short circuit back to the return and not properly ventilate the RÄ2 face while coal was being mined. Also the canvas extended from the face of the RÄ2 entry outby to the inby corner of the belt entry, closing off all the entries to the faces of the belt and RÄ1, thus providing little or no ventilation to these faces. This condition occurred on the 4:00 p.m. to 12:00 p.m. shift on September 13, 1985, which was under the supervision of Dave Benamati.

11. The inspector had not been at the mine on September 13, 1985, and no witness for the Secretary had been in the PÄ7 section on that date. The only eye-witness (of September 13 conditions) who testified at the hearing was the foreman, who testified that there was no air problem in the PÄ7 section on September 13. He also testified that the check curtain between RÄ1 and RÄ2 entries was in place on September 13, and the canvas in RÄ2 entry was also in place, both as required by the ventilation plan.

DISCUSSION WITH FURTHER FINDINGS

The Secretary did not put the entire ventilation plan in evidence but presented a ventilation diagram from the plan and the testimony of the inspector, who testified that the plan required a minimum of 5,000 cfm at each working face while coal was being mined.

There was no mining in section PÄ7 at the time of the inspection on September 16, 1985. The foreman testified that some of the air curtains were out of place because he was preparing to do construction work, i.e., installing a plank in the roof and hanging a run-through curtain on the plank. Since there was no mining at the time, I find that the Secretary did not prove a violation of the ventilation plan on September 16. Apart from this conclusion, I find that Order No. 2549665 does not adequately charge a violation on September 16 and therefore cannot support a finding of a violation on that date. The order states that the deviations from the ventilation plan occurred during mining in RÄ2 entry and that "This condition occurred on September 13, 1985."

The Act provides that each charge of a violation of a safety or health standard "shall be in writing and shall describe with particularity the nature of the violation . . . " (104(a)). I conclude that Order No. 2549665 does not give sufficient notice of a violation on September 16, 1985, and therefore the Secretary's contention of a violation on that date is not cognizable in this proceeding.

The order sufficiently charges a violation on September 13, 1985, but the Secretary did not meet his burden of proof as to this charge. The only hearing witness who was an eye-witness to the conditions on September 13 was the foreman, and he testified that there was no ventilation problem on that date and there was sufficient air at the faces. The Secretary attempted to prove a violation by two elements of proof: (1) the foreman's statement to the inspector to the effect that he had used the same ventilation system on September 13 as he used on September 16 and

(2) the hearsay statement of of Ron Nagle to the inspector that they had "no air" on September 13.

The foreman's statement about the ventilation system used on September 13 was not clear. The foreman testified that he meant that the same ventilation system used on September 13 was going to be used on September 16 after the construction work and before mining was to begin on September 16. The inspector and the foreman did not communicate clearly on this point. Their misunderstanding is not a sufficient basis for finding a management admission or acknowledgement of a violation or a statement of undisputed facts that would support a determination of a violation.

The statement attributed to Ron Nagle is a hearsay opinion statement that does not purport to be based on actual air readings or an attempt to measure the velocity of air in the PÄ7 section on September 13. Without that specificity and without the opportunity of Respondent to cross-examine Nagle as to the basis of his opinion, I find that the hearsay opinion is not subtantial evidence and is not sufficient to substantiate the charge of a violation of the ventilation plan on September 13.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. The Secretary did not meet his burden of proving a violation of 75 C.F.R. 316 on September 13, 1985, as charged in Order No. 2549665.

3. The Secretary's contention that Respondent violated 75 C.F.R. 316 on September 16, 1985, is not cognizable in this proceeding because such charge is not sufficiently alleged in Order No. 2549665. In addition, the Secretary failed to prove such a violation on the facts.

ORDER

WHEREFORE, IT IS ORDERED that:

1. Order No. 2549665 is VACATED.

2. The petition for a civil penalty is DENIED.

William Fauver
Administrative Law Judge