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LOCAL UNION V. NACCO MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LOCAL UNION 1810, DISTRICT 6, UNITED MINE WORKERS OF AMERICA (UMWA), COMPLAINANT	COMPENSATION PROCEEDING
	Docket No. LAKE 87-19-C
	Powhatan No. 6 Mine
v.	
NACCO MINING COMPANY, RESPONDENT	

DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, DC, for Complainant Thomas C. Means, Esq., Washington, DC, for Respondent.

Before: Judge Fauver

This proceeding was brought by the UMWA under 111 of the Federal Mine Safety and Health of 1977, 30 U.S.C. 801 et seq., for compensation for miners idled by a modification of a 104(d)(2) order.

The parties have filed cross motions for summary decision. Oral arguments were heard on the motions and the parties have filed briefs.

The facts are not in dispute. On December 10, 1984, MSHA (the Mine Safety and Health Administration, United States Department of Labor) found that an intake escapeway in the north mains area was not being maintained to ensure safe passage of personnel, including disabled persons. The inspector issued Order No. 2329934 pursuant to 104(d)(2) of the Act, citing a violation of 30 C.F.R. 75.1704. The order closed all areas in the north mains inby the two main east junction. A civil penalty of $500 was assessed by MSHA and the fine was paid, without contest, in March, 1985.

The closure effect of the order was lifted about 30 minutes after its issuance on December 10, 1984, when the order was modified to permit Nacco to continue normal mining operations in "Main north while the work of rehabilitating the intake escapeway is being done." The modification also provided that: "The

operator is to work at least 25 manshifts per week on this effort until this work is completed." Normal mining operations resumed at this point, and all previously withdrawn miners returned to work; at least 25 manshifts of work were devoted to rehabilitating the intake escapeway each week thereafter. Neither the company nor the union contested the original order or any of its modifications.

On January 25, 1985, the Ohio Division of Mines ("DOM") issued Nacco its own order finding that the escapeway was not being maintained to a required width of six feet in certain locations and requiring that this condition be abated within 60 days. On March 22, 1985, the DOM issued a new order requiring the intake escapeway to be moved from the No. 4 entry where it had been to the No. 2 entry, requiring that Nacco continue working at least 25 manshifts per week on the new disignated escapeway on the old escapeway in the No. 4 entry.

Nacco continued to do rehabilitation work in the No. 2 entry, working at least 25 manshifts per week rehabilitating the intake escapeway. On October 2, 1986, MSHA issued a new modification of the 1984 order, requiring that the escapeway and all active sections inby be closed, because the MSHA inspectors found that the escapeway was still in violation in several locations and determined that the time for abatement should not be extended further. By reallocating the affected work force, Nacco was able to continue operating without idling any miners during the shift on which the modification was issued. However, on the next shift, and for the rest of the week, Nacco laid off 87 miners, on October 6, 7, and 8, as a result of the October 2, 1986, modification of the December 10, 1984, order. On Octobr 8, the job of reabilitating the intake escapeway was completed, and MSHA modified the 1984 order by providing that the intake escapeway and the active working sections inby could again be reopened.

This case arises on a complaint for compensation under 111 of the Act, claiming that 87 miners were idled on October 6, 7, and 8 as a result of of MSHA's October 2, 1986, modification.

111 of the Act provides:

> Sec. 111. If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the

> period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

Nacco makes the following principal arguments:

1. Section 111 does not provide a right to compensation to miners who are idled by a modification of a previous order.

2. The order was invalidated by the effect of the initial modification on December 10, 1984, because the Act does not authorize MSHA to impose affirmative duties on an operator in exchange for non-withdrawal of miners under 104(d).

3. MSHA's attempt to modify the order to require a withdrawal of miners 22 months after the order had been

modified to reopen the mine area exceeded MSHA's authority under the Act.

To understand the parties' actions and responses, and the effect on their statutory rights, one must look at the sequence of events. At 1:30 p.m., on December 10, 1984, MSHA issued a 104(d)(2) order to Nacco stating that the intake escapeway was not being maintained to ensure safe passage and therefore was in violation of 30 C.F.R. 75.1704. Thirty minutes later, MSHA modified the order to permit Nacco to continue normal mining operations while rehabilitation work on the intake escapeway was being done. The modification also provided that Nacco was to work at least 25 manshifts per week on the rehabilitation work until it was completed. The order was modified a number of times over a two year period. Neither Nacco nor the union contested the original order or any of the modifications. Also, Nacco paid a civil penalty of $500 for the violation cited in the order.

On October 2, 1986, MSHA determined that a violation still existed, that it should have been abated by then, and that the period of time for abatement should not be further extended. MSHA therefore modified the order to specify the existing violative conditions and to withdraw the miners from the affected area of the mine until the violative conditions in the escapeway were corrected. Neither party contested the October 2, 1986, modification.

In December, 1986, the union filed this claim. The claim arises under the third sentence of 111, which reads:

> If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

This language of 111 requires that an operator's contest rights under 105(d) be either exhausted or waived before the Commission may order compensation.

There are significant procedural differences between a hearing of a third-sentence claim and a claim under the first two sentences of section 111. In the latter case, the hearing may be

scheduled immediately because the miners' entitlement to compensation is independent of any subsequent review of the order upon which the claim is based. The hearing of a third-sentence complaint, however, may not be held until after the order upon which the claim is based has become "final." Thus, an award of one week's compensation may not be ordered by the Commission until either the operator has waived its contest rights or the underlying order has been upheld in a contest proceeding under 105(d). It is only when the underlying order becomes final that a third-sentence claim under 111 may be adjudicated by the Commission.

The Commission's review of all orders and modifications is governed by procedures provided by 105(d) and 107(e), not 111. Thus, in a third-sentence claim under 111, the validity of the order is not an issue, but it is the "finality" of the order that triggers jurisdiction to hear the claim. In such a proceeding, the Commission must determine whether or not an order is final. That determination must be based upon whether the order was contested under 105(d) and, if so, whether the subsequent review deemed it to be valid. If the underlying order was not challenged it is, as a matter of law, final and not subject to further review.

The finding of a violation of 30 C.F.R. 75.1704 became final when Nacco paid the civil penalty, since the fact of a violation cannot continue to be contested once the penalty proposed for the violation has been paid. Old Ben Coal Co., 3 FMSHRC 1685 (1985). In addition, since neither the order nor the subsequent modifications were contested by any party, they became final and are not subject to Commission review. See Pocahontas Fuel Co., 1 FMSHRC 1580, 1582Ä83 (1977); and Turner Brothers, Inc. 3 FMSHRC 1649, 1650 (1984). Nacco is therefore statutorily barred from contesting the validity of the order, its four modifications, and the charge of a violation of 30 C.F.R. 75.1704. Its arguments (summarized above) attacking the validity of the October 2, 1986, modification are thus not cognizable in this proceeding.

Since Nacco concedes that the lay-off of the 87 miners was caused by the modification of the order on October 2, 1986, there is no issue as to a nexus between the modification and the lay-off.

The union is therefore entitled to summary decision, and Nacco's motion for summary decision will be denied.

ORDER

WHEREFORE IT IS ORDERED that:

1. Nacco's motion for summary decision is DENIED. The Complainant's motion for summary decision is GRANTED.

2. The affected miners are entitled to compensation at their last regular pay rates for wages lost on October 6, 7, and 8, 1986, with interest computed from October 8, 1986, until paid.

3. Within 15 days of this Decision, the parties shall confer in an effort to stipulate a final order awarding compensation and interest, computed in accordance with the Commission's decision in Arkansas Carbona, 5 FMSHRC 2042 (1983). Within 5 days of their conference, the parties shall file a report of their conference with the Judge, submitting either a joint proposed order for relief or a statement of the issues between the parties as to the relief to be granted. Respondent's stipulation of the terms of a relief order will not prejudice its rights to seek review of this Decision.

4. This Decision shall not be made final until a Supplemental Decision on Compensation is entered herein.

William Fauver
Administrative Law Judge