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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JIM WALTER RESOURCES, INC.
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. SE 89-18-R
Citation No. 3188009; 10/26/88

AND

Mine No. 7

UNITED MINE WORKERS OF
AMERICA, (UMWA),
INTERVENOR

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. SE 89-39
A.C. No. 01-01401-03734

AND

Mine No. 7

UNITED MINE WORKERS OF
AMERICA (UMWA),
INTERVENOR

v.

JIM WALTER RESOURCES, INC.,
RESPONDENT

DECISION AND ORDER DISMISSING PROCEEDINGS

On May 26, 1989, an Order to Show Cause was issued in these proceedings stating as follows:

At issue in the captioned cases is a citation alleging as follows:

A citation is hereby issued in that the mine operator is intending to adopt System, Methane and Dust Control Plan dated 8/15/88 which has not been approved by the MSHA District Manager. (Refer to cover letter 9-1V-52 dated September 29,

1988 and response cover letter 9-1V-52
delivered to the mine operator 10-25-88.

The violation charged is thus one of "intending" to violate the cited regulation. Accordingly the Secretary is directed to establish on or before June 8, 1989, what legal authority she relies upon to provide the basis for a violation of "intending" to violate a regulatory standard and why the citation should not be vacated and this case be dismissed.

On June 6, 1989, the Secretary responded to the show cause order stating as follows:

The subject citation was issued in accordance with MSHA's policy regarding Mine Plan Approval Procedures which was sent to all coal mine operators. . . . In general, this policy sets forth basic principles that are to be applied in the administration of each District's mine plan and program approval responsibilities.

The policy also describes several scenarios wherein disputed plan provisions can be challenged by operators with the resulting violation being "technical" in nature. Such a policy provides a vehicle for operators to contest disputed plan provisions while maintaining the stability of continued, safe mining operations under an approved and familiar plan.

With respect to a contest of mine plan approval actions, such as occurred in this case, the policy states as follows:

In the case of an operator-proposed change to an existing approved mine plan, if approval of the change is denied, the operator could notify the District that, as of a certain date, the mine's existing approved plan is no longer adopted by the operator, and that the operator intends to adopt the proposed change which is not approved. On that date, a 104(a) citation would be issued for the operator's failure to have and adopt an approved plan. Abatement would be achieved by the operator promptly adopting the provisions of the most

recently approved plan for the mine.
Again, there need not be any changes made
in the actual mining procedures, and the
violation would be "technical" in nature.
(emphasis added)

Here, the operator, on September 29, 1988, submitted a supplement to its ventilation system, methane and dust control plan for approval by MSHA. The supplement was reviewed by MSHA but was not approved for incorporation into the operator's existing ventilation plan. As set forth on the face of the subject citation, MSHA's determination with respect to the supplement was communicated to the operator on October 25, 1988 by letter identified as 9-1V-S2.

On October 26, 1988, JWR informed MSHA that it no longer adopted its existing approved plan for the No. 7 mine. Since the operator's explicit statement constituted a violation of 30 CFR 75.316, the subject citation was immediately issued. The operator promptly abated the violative condition by readopting its ventilation plan that had become effective in August, 1988.

Although the wording of the subject citation is not a model of clarity, the foregoing sequence of events makes clear that the subject citation was issued because the operator unequivocally stated that, as of October 26, 1988, it no longer adopted its existing ventilation plan which had previously been approved by MSHA. . . . Irrespective of the operator's "intentions" to adopt the unapproved supplement, JWR's action in not adopting an approved plan constituted violation a of 30 CFR 75.316 since the regulation requires an operator to do so.

Thus, the use of the words "intending to adopt" on the face of the citation should not be construed as an allegation that MSHA is charging the operator with a speculative violation which hinges on JWR's future actions. Rather, the citation, when viewed in the context of MSHA policy and the documents attached hereto, properly charges JWR with not adopting an approved ventilation plan pursuant to 30 CFR 75.316. The violation is admittedly technical in nature and permitted the operator to safely continue its mining operations uninterrupted under a familiar, approved plan while

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enabling the specific supplement to be addressed in another forum.

The Secretary's response to the show cause order is, in essence, that she did not mean what she said when charging the operator with "intending" to violate the cited regulatory standard. She does not however seek to amend the citation so that it reflects the apparent intended meaning. Since the cited regulatory standard does not create a violation of "intending" to violate it there can be no violation as charged. The citation is accordingly vacated.

I further note that the proceedings described in the Secretary's response to the Order to Show Cause are a clear attempt to accomplish indirectly what the Commission has forbidden directly i.e. obtain a declaratory judgment. In Kaiser Coal Corporation, 10 FMSHRC 1165 (1987), the Commission held that it does not have jurisdiction to entertain an application for declaratory relief independent of any of the enforcement or contest proceedings or other forms of action authorized under the Federal Mine Safety and Health Act of 1977. In this case the citation was simultaneously "issued" and "abated" and according to the Secretary, the mine operator continued its mining operations uninterrupted under its approved plan--thereby contradicting any claims of a violation. Thus in effect the parties in this case are seeking a declaratory judgment that cannot be obtained under existing law. For this additional reason then these cases must be dismissed.

ORDER

Contest Proceeding Docket No. SE 89-18-R and Civil Penalty Proceeding Docket No. SE 89-39 are dismissed. The hearings previously scheduled in these cases are accordingly cancelled.

Gary Melick
Administrative Law Judge
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