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

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

CIVIL PENALTY PROCEEDING

Docket No. YORK 89-28  
A. C. No. 18-00621-03663

v.

Mettiki Mine

METTIKI COAL COMPANY,  
RESPONDENT

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor,  
U.S. Department of Labor, for the Secretary;  
Timothy M. Biddle, Esq., and Susan E. Chetlin,  
Esq., for the Respondent.

Before: Judge Fauver

This case was brought by the Secretary of Labor for a civil penalty under 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

After an evidentiary hearing on the citation and the filing of post-hearing briefs, the Secretary moved to vacate the citation. Respondent has requested that, if the motion is granted the order "note that the standard at issue . . . is 75.512 . . . and . . . that standard must be among those" conceded by the Secretary to be "applicable only to electric-powered equipment and not diesel-powered equipment."

Rather than exploring further the parties' interpretation of 75.512, this Decision is being issued on the merits of the issue that was originally tried and fully briefed. The Decision was written and completed before receiving the Secretary's motion to vacate.

Having considered the hearing evidence and the record (FOONOTE 1) as a whole, I find that a preponderance of the substantial,

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reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion below:

#### FINDINGS OF FACT

1. In January, 1989, the Mettiki Mine used diesel track-mounted locomotives underground to pull supply cars and mantrips.
2. The Nos. 2 and 3 diesel locomotives were diesel-powered and nonpermissible. (FOOTNOTE 2) Their lights, gauges and starters were operated off of a 12-volt electrical generator.
3. Company policy required that, at the start of each shift, each diesel locomotive operator examine, inter alia, the brakes, sanders and general condition of the locomotive according to a pre-operational checklist to be sure the locomotive was in safe operating condition. In addition, each week a mechanic was to make a thorough examination of each diesel locomotive "just to try to keep the equipment in tiptop shape," as Mettiki Safety Inspector Alan Rohrbaugh testified. Tr. 55,63.
4. Mettiki policy also required that a record of these weekly maintenance examinations of diesel locomotives be maintained; for convenience, the results of these examinations were kept in the book in which the results of the required examinations of electrical equipment were recorded.
5. On January 5, 1989, MSHA Inspector Robert Calvert began his regular quarterly inspection of the Mine by checking the examination books.
6. He noted that no examination of the Nos. 2 and 3 diesel locomotives had been recorded for the week of December 24, 1988. Based on this finding, he issued Citation 3110574, alleging a violation of 30 C.F.R. 75.512.

#### DISCUSSION WITH FURTHER FINDINGS

The controlling issue is whether Locomotives Nos. 2 and 3 are "electrical equipment" within the meaning of 30 C.F.R. 75.512. That regulation, which is a reprint of 305(g) of the Act, provides in pertinent part:

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions . . . . A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Section 75.512 refers only to electrical equipment, not to diesel equipment or diesel equipment with electrical components. The plain meaning of the language of 75.512, as well as its relationship to other regulations, does not indicate that a diesel locomotive is covered by the regulation. For example, 75.512-1 and 75.153 require that, to be a "qualified person" within the meaning of 75.512, an individual must be a qualified mine electrician. Unless expressly provided in a regulation, one would not expect a mechanic to be additionally trained and certified as a mine electrician in order to make a safety inspection of a diesel locomotive. Also, 75.512 is included in Subpart F, entitled, "Electrical Equipment." Subpart F is extremely detailed and imposes numerous requirements with respect to electrical devices, cables, wires and various types of electrical equipment. See, e.g., 30 C.F.R. Part 75, Subpart F, App. A. However, nowhere does Subpart F mention or require periodic inspections of "diesel equipment" or nonpermissible "electrical components on mobile diesel-powered transportation equipment." Similarly, "diesel equipment" or "electrical components on mobile diesel-powered transportation equipment" are not mentioned in the explanation of 75.512 in MSHA's Policy Manual.

Moreover, the language in the Secretary's other regulations indicates that where it is intended to apply a standard to "mobile diesel-powered transportation equipment" or "electrical components on mobile diesel-powered transportation equipment," those words are stated. See, for example, 30 C.F.R. 36.2(a), 36.3 - 36.6, 36.9, 36.28 - 36.31, 36.41 ("mobile diesel-powered transportation equipment"), and 30 C.F.R. 36.32 ("electrical components on mobile diesel-powered equipment"). Where Congress, or an administrative agency, has included a term in one regulation and excluded it in another, it should not be implied where excluded. *Marshall v. Western Union Telegraph Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980). Thus, because the Secretary used terms relating to "diesel equipment" elsewhere in her regulations, such terms are not reasonably implied in 75.512.

"[I]n statutory construction the primary dispositive source of information is the wording of the statute itself." *International Union, United Mine Workers of America v. Federal Mine Safety and Health Review Commission*, 840 F. 2d 77, 81 (D.C. Cir. 1988) (quoting *Association of Bituminous Contractors v. Andrus*), 581 F. 2d 853, 861 (D.C. Cir. 1978). See also *Asarco, Inc.-Northwestern Mining Department v. Federal Mine Safety and Health Review Commission*, 868 F.2d 1195 (10th Cir. 1989). In matters of statutory and regulatory construction, non-technical terms "are to be given their usual, natural, plain, ordinary and commonly understood meaning." *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (1989) (quoting *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932)). Where the meaning of language in a

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regulation is plain, "the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning." *Western Fuels-Utah, supra* (citing *Old Colony R.R.*, 284 U.S. at 560). See also *Emery Mining Corp. v. Secretary of Labor*, 783 F.2d 155, 159 (10th Cir. 1986). In coal mines, there are two basic kinds of mobile equipment -- equipment powered by electric engines and equipment powered by diesel engines. Although the words "electric equipment" in 75.512 are not defined, their meaning is plain from the context of the regulation. Mobile "electric equipment" reasonably means equipment driven by an electric engine;(FOOTNOTE 3) those words do not reasonably imply equipment powered by a diesel engine.

Even if one looks beyond the plain language of the regulation, the Secretary has provided no indication that when she said "electric equipment" in 75.512 she meant to include "diesel equipment." There is no reference to "diesel equipment" in 75.512, or, indeed, anywhere in 30 C.F.R. Part 75.(FOOTNOTE 4) The Secretary has produced no legal authority, MSHA policy memoranda or MSHA training instruction to its inspectors indicating that electrical examinations required by 75.512 must be performed on nonpermissible diesel equipment. The Secretary may not enforce a regulation based on what she intended to, but did not say. *Gates & Fox*, 790 F.2d at 156.

Finally, I note that on October 4, 1989, the Secretary issued proposed rules regarding, inter alia, the use of diesel equipment in underground coal mines. 54 Fed. Reg. 40950 (1989). These proposed rules are inconsistent with the position which the Secretary has taken in this case -- that 30 C.F.R. 75.512 applies to diesel-powered equipment.

The proposed regulation requires that "all diesel-powered equipment [in underground coal mines] shall be examined and tested weekly . . . ." 54 Fed. Reg. at 40995 (proposed 75.1914). By proposing such a regulation the Secretary has

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effectively conceded that no regulation currently exists to require the weekly inspection of diesel equipment. Indeed, in the preamble to these proposed rules, the Secretary states:

The proposed rules would also seek to amend certain equipment safety standards in existing part 75 that are now applicable only to electric-powered equipment so that such standards would apply, where necessary, to diesel powered equipment as well.

Because the locomotives at issue were diesel-powered, the requirements of 75.512 did not apply to them and no violation of that regulation occurred. If the Secretary desires to include diesel-powered locomotives in 75.512, she must use the rulemaking procedures in 101 of the Act, not litigation.

CONCLUSION OF LAW

1. The judge has jurisdiction over this proceeding.
2. Section 75.512 does not apply to the two diesel-powered locomotives cited in Citation 3110574.
3. The Secretary failed to prove a violation of 30 C.F.R. 75.512.

ORDER

WHEREFORE IT IS ORDERED that Citation 3110574 is VACATED and this proceeding is DISMISSED.

William Fauver  
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE\_ONE

1. The transcript and exhibits are consolidated in Docket Nos. YORK 89-10-R, YORK 89-12-R, YORK 89-5, YORK 89-6, YORK 89-16, YORK 89-17, YORK 89-18, YORK 89-26, and YORK 89-28.

~FOOTNOTE\_TWO

2. In an underground coal mine, "nonpermissible" equipment may not be used in by the last open crosscut in any working section.

~FOOTNOTE\_THREE

3. The legislative history of the 1969 Act confirms that Congress was concerned about the kind of equipment driven by electricity. It explained the purpose of Subpart F of the regulations: "New and improved standards have been provided to reflect the growing sophistication of electrical systems in underground coal mining and the higher voltages used on machines that become larger each year." Legislative History at 1126 (emphasis added).

~FOOTNOTE\_FOUR

4. As noted, Part 36 of the regulations addresses the use of permissible diesel equipment, but only in gassy noncoal mines and tunnels. 30 C.F.R. 36.1.