CCASE:
MSHA V. SO. OHIO COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
August 19, 1988
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
v. Docket Nos. WEVA 86-190-R
WEVA 86-194-R
SOUTHERN OHIO COAL
COMPANY

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
v. Docket No. WEVA 86-254
SOUTHERN OHIO COAL
COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION
BY THE COMMISSION:
At issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) ("Mine Act" or "Act"), is the validity of a notice to provide safeguard issued to Southern Ohio Coal Company ("Socco") pursuant to 30 C.F.R. $ 75.1403. 1/ Commission Administrative Law Judge

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1/ 30 C.F.R. $ 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. $ 874(b), and states:
Other safeguards adequate, in the judgment of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.
The procedures for issuing safeguards and citations for failure to maintain required safeguards are described in 30 C.F.R. $ 75.1403-1(b):
The authorized representative of the Secretary shall in writing advise the operator of a specific
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Roy J. Maurer concluded that because the safeguard in question contained a requirement that was "of a general nature applicable to at least a significant number of other [underground] coal mines,"

rather than a requirement specifically applicable to Socco's mine, it was invalid. 9 FMSHRC 273, 278 (February 1987) (ALJ). Accordingly, he vacated a withdrawal order issued to Socco that alleged a violation of the safeguard. On review, the parties dispute whether the general applicability of a safeguard requirement is a proper basis for invalidating a notice to provide safeguards. We do not reach this question of law because, in any event, substantial evidence of record does not support the judge's conclusion that the challenged safeguard was a generally applicable requirement rather than a mine-specific requirement. On this basis, we reverse.

On November 3, 1982, during an inspection of Socco's Martinka No. 1 underground coal mine, an inspector of the Department of Labor's Federal Mine Safety and Health Administration ("MSHA") issued to Socco a notice to provide safeguard which stated:

> 24 inches of clearance is not being provided on both sides of the feeder for the north main (122) section coal conveyor belt, in that only 15 inches is provided along one side.
> 24 inches of clearance shall be provided on both sides of the coal feeders in this mine.

Gov. Ex. 2. 2/

On February 19, 1986, another MSHA inspector issued to Socco a withdrawal order pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. $ 814(d)(2), alleging a violation of the above safeguard and, hence, of section 75.1403. The withdrawal order stated:

> safeguard which is required pursuant to $ 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard.
> If the safeguard is notprovided within the time fixed and if it is not maintained thereafter, a [citation] shall be issued to the operator pursuant to section 10[5] of the Act.

30 C.F.R. $ 75.1403-1(a) states that safeguards will be required "on a mine-by-mine basis." 30 C.F.R. $$ 75.1403-2 through 75.1403-11 set forth specific "criteria" by which authorized representatives of the Secretary are to be guided in requiring safeguards. Section 75.1403-1(a) further states that "[o]ther safeguards may be required." See generally Southern Ohio Coal Co., 7 FMSHRC 509 (April 1985).

2/ A "feeder" is part of a coal-carrying conveyor system and is Described as a "structure for delivering coal ... at a controllable rate." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 417 (1968).

In the 2 east C section, there was less than 24 inch clearance between the left coal line 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 & slate was being dump[ed] 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. ... Safeguard No. 2034480 - issued 11-03-82.

Gov. Ex. 1. The withdrawal order included findings that the violation of the safeguard notice and section 75.1403 was the result of Socco's unwarrantable failure to comply therewith (Tr. 21), and that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard. Gov. Ex. 1; 30 U.S.C. $ 814(d). Socco contested the order of withdrawal and the Secretary's proposed civil penalty for the alleged violation of section 75.1403, asserting that the alleged violation did not occur. Socco also challenged the inspector's significant and substantial and unwarrantable failure findings.

Before the administrative law judge, the Secretary's witnesses testified without contradiction that only a 12-inch clearance existed between the coal feeder and the left ribline at the time the inspector cited Socco for violating the requirement of the notice to provide safeguard that a 24-inch clearance be maintained. The testimony at the hearing focused upon the reasons for the lack of clearance and the Secretary's allegations that the violation of the safeguard significantly and substantially contributed to a mine safety hazard and resulted from Socco's unwarrantable failure to comply with the safeguard's requirement. No evidence was introduced addressing the circumstances under which the underlying 1982 notice to provide safeguard had been issued or the specific reasons why the requirement of the safeguard had been imposed at the Martinka No. 1 mine. In its post-hearing brief, however, Socco argued, among other things, that a notice to provide safeguards cannot properly address hazards that are of a more universal nature generally present in the underground coal mining industry rather than being mine specific.

The judge agreed. Pointing analogously to the principles enunciated in Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 407 (D.C. Cir. 1976), the judge stated that the Secretary's imposition of generally applicable safeguard requirements could amount to improper circumvention of the statutory rulemaking process. 9 FMSHRC at 277.78. The judge further stated:

Reading the record as a whole ... a clear inference may

be drawn that the requirements of the ... safeguard ... [for 24 inches of clearance on both sides of the mine's coal feeders] 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 ~966 th[e] 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.

9 FMSHRC at 277 (emphasis in original). The judge concluded that the requirement of the safeguard properly should have been promulgated pursuant to the rulemaking procedures of section 101 of the Mine Act, 30 U.S.C. $ 811, rather than imposed on Socco pursuant to a safeguard notice. Id. Therefore, he held that the notice to provide safeguard was invalid and he vacated the contested withdrawal order based thereon. We granted the Secretary's petition for discretionary review.

On review the Secretary asserts that the judge erred in invalidating the safeguard on the basis of his inference that the safeguard's requirement of 24 inches of clearance between the rib and the feeder is of a general nature applicable to a significant number of underground coal mines utilizing coal feeders. The Secretary also argues that the Mine Act does not mandate that a safeguard be mine-specific. According to the Secretary, it is enough if the transportation hazard addressed by the safeguard is not addressed by a generally applicable mandatory standard. Sec. Reply Br. at 5-6. Alternatively, the Secretary asserts that substantial evidence does not support the judge's conclusion that the requirement of the safeguard at issue was applicable to at least a significant number of mines using coal feeders.

Socco responds that the judge correctly held the safeguard to be invalid. Socco asserts that the intent of the statutory safeguard provision is to allow the Secretary to require an operator to address certain transportation hazards caused by peculiar conditions at a mine, not to address conditions common to a significant number of mines. Socco argues that the judge properly recognized that the requirement imposed by the safeguard at issue is generally applicable to a significant number of underground coal mines and therefore that its clearance requirement should have been promulgated through the Mine Act's rulemaking procedures.

The Commission has previously had occasion to examine the Act's safeguard provision. The Commission has noted that the broad language of the provision "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining."

Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985). The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power . authority to create what are, in effect, mandatory safety standards on a mine-by.mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal Co., supra, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is

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required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard. Id. These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him. They do not, however, resolve the important issue raised here for the first time --whether a notice to provide safeguard can properly be issued to address a transportation hazard of a general rather than mine-specific nature. The United States Court of Appeals :or the District of Columbia Circuit, in the context of the Mine Act's provision for mine-specific ventilation plans, has recognized that proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans. In Zeigler Coal Co., supra, the court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. $ 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "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." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370-72 (September 1985) (Carbon County II).

Whether, as the judge believed, a similar type of challenge may be made to a safeguard notice is a question of significant import under the Mine Act. Given the manner in which this important question

was raised and addressed in the present case, and the nature of the evidence in this record, it is a question that we do not resolve at this time.

In the present case Socco did not assert its right to challenge the validity of the safeguard notice based on the safeguard's asserted general applicability until the submission of its post-hearing brief to the judge. Thus, at the hearing Socco did not offer any evidence in support of this contention. Thus, even if we were to hold that an operator may challenge a notice of safeguard on the ground that it seeks to impose a requirement of a general nature applicable to all or a significant number of mines, the record at hand contains no evidence that this is the case here. Rather, the testimony of the witnesses focused on the cause of the February 19. 1986, violation of the notice to provide safeguard, whether the violation was significant and substantial. and whether the violation resulted from Socco's unwarrantable failure to comply with the safeguard.

The record contains no evidence concerning the quite distinct issue of the general or mine-specific nature of the safeguard requirement. No testimony was offered and no documents were introduced regarding the circumstances under which the underlying safeguard was issued, the existence of or need for similar safeguards at other mines,

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or any general MSHA policy regarding uniform clearance requirements around coal feeders. We note particularly that Socco failed to introduce any evidence as to whether the same or a similar safeguard had been issued at any of its other mines. Compare Carbon County II. 7 FMSHRC at 1372-75. There is no factual basis in this record supporting the judge's inference that the clearance requirement of the challenged safeguard is applicable to at least a significant number of other mines employing coal feeders and shuttle cars to transport coal. In failing to introduce any evidence supporting its contention, Socco failed to support its challenge to the safeguard. Therefore, substantial evidence of record does not support the judge's conclusion that the notice to provide safeguard was issued improperly. The judge's vacation of the contested order of withdrawal is reversed. This matter is remanded to the judge for consideration of Socco's contest of the Secretary's findings that the violation was significant and substantial and resulted from the operator's unwarrantable failure to comply with the notice of safeguard and for the assessment of an appropriate civil penalty.