

CCASE:

MSHA V. METTIKI COAL

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

September 7, 1988

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

v.

Docket Nos. YORK 87-2-R

YORK 87-3-R

METTIKI COAL CORPORATION

YORK 87-5

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act"), the issue is whether Mettiki Coal Corporation ("Mettiki") violated 30 C.F.R. § 75.305 at its underground coal mine by failing to examine at least once each week a minimum of one entry of each intake and return aircourse in its entirety. 1/ Commission Administrative Law Judge Gary Melick held that Mettiki had not violated the standard. 9 FMSHRC 1088 (June 1987)(ALJ). For the reasons that follow, we affirm Judge Melick's decision.

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1/ 30 C.F.R. § 75.305, a mandatory safety standard for underground coal mines restates section 303(f) of the Mine Act, 30 U.S.C.

§ 863(f). Section 75.305 provides in part:

In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in ... at least one entry of each intake and return air course in its entirety.... The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the

operator promptly.... Any hazardous condition shall be corrected immediately....

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The conditions alleged by the Secretary of Labor ("Secretary") to constitute violations of section 75.305 occurred at Mettiki's mine located in Garrett County, Maryland. There are ten parallel entries in the main portion of the E-mains section (the "E-mains entries"). The crosscuts ("breaks") are numbered sequentially from the portals. See Exh. C-1. The mine is ventilated by an exhaust fan located at the portal of the No. 7 E-mains return, which exhausts air from the mine. At the same time, fresh air is pulled into the mine through the No. 4 and No. 5 portals. In the early 1980's, as a result of squeezing 2' in the E-mains entries, Mettiki drove three additional entries (the "Skipper entries") parallel to the E-mains entries. A block of coal (the "barrier block"), approximately 300 feet wide and 2,000 feet long, separates the E.mains entries from the Skipper entries and extends from Break 11 to Break 39. Intake air flows into the Skipper No. 1 entry from the E-mains intake entries at Break 11, courses the length of the barrier block, is reunited with the intake air in the E-mains entries at Break 40 and Break 50, and flows inby to ventilate the E-1 working section. Having crossed the working face, the air is then exhausted through the E mains return entries. The Skipper No. 3 entry also exhausts return air and, at the intersection of Break 4 and E-mains No. 7 return entry, the return air from both the E-mains and Skipper No. 3 entry mix and the combined return air flows 600 or 700 feet to the No. 7 portal and out of the mine. (Skipper No. 2 entry is ventilated by neutral air.) See Exh. C-1.

On September 10 and 11, 1986, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted inspections at the mine. At this time, it was Mettiki's daily practice to examine the E mains No. 5 intake entry and the E-mains Nos. 7 and 9 return escapeway for hazardous conditions. These entries were the only intake and return entries that Mettiki examined in their entirety at least once each week. Because the inspector believed that the Skipper intake and return entries were aircourses separate and distinct from the E-mains intake and return entries, he cited Mettiki for the alleged violations of section 75.305 in orders of withdrawal issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. § 814(d)(2).

Subsequently, Mettiki contested the orders and the Secretary sought civil penalties for the violations. At the hearing on the consolidated matters, the parties disputed whether the Skipper intake and return entries were separate aircourses subject to section 75.305.

The Secretary argued that the E mains section contained two discrete sets of aircourses -- an intake and return aircourse on the E-mains side of the barrier block and an intake and return aircourse on the Skipper side of the barrier block. Mettiki maintained that the intake and

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2/ "Squeezing" is defined as "the slow increase in weight on pillars or solid coal eventually resulting in such things as crushing of the coal, heaving of the bottom and the driving of pillars into soft floor or top." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1062 (1968).

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return entries on both sides of the block were part of the same aircourse. The parties agreed that Mettiki had examined the E-mains No. 5 intake entry escapeway and the E-mains Nos. 7 and 9 return escapeway as required by section 75.305. Therefore, the question before the judge was whether the cited Skipper intake and return entries were an aircourse separate and distinct from the E-mains intake and return entries rather than part of the same aircourse.

In his decision the judge rejected as "completely arbitrary" the Secretary's assertion that the Skipper No. 1 intake entry constituted a separate and distinct aircourse. 9 FMSHRC at 1093. The judge stated that the assertion was "not based on any definition of the term 'air course' in any relevant statute, regulation, MSHA policy, or industry past usage" and that the Secretary "presented no evidence of any prior consistent enforcement ... establish[ing] that Mettiki was on notice regarding the Secretary's interpretation [of section 75.305]." *Id.* The judge held that the Secretary did not prove that Mettiki violated section 75.305. He further stated that language of section 75.305 makes clear that an aircourse may consist of more than one entry and that in examining on a weekly basis at least one entry in each aircourse in its entirety, Mettiki complied with the standard. *Id.* For the same reasons, the judge also rejected the Secretary's argument that the Skipper No. 3 return entry constituted a separate and distinct aircourse. *Id.* Therefore, he vacated the contested orders of withdrawal. We granted the Secretary's petition for discretionary review.

We agree with the judge that the Secretary failed to prove the alleged violations. At the hearing, counsel for the Secretary maintained that the physical separation of the E-mains entries from the Skipper entries, caused by the barrier block, created separate aircourses. Tr. 10-11. MSHA supervisor Barry Ryan testified that while an aircourse may contain one or more entries, if the entries are "common" with one another they constitute a single aircourse, but if they are "split" they constitute separate aircourses. Tr. 98.

On review, the Secretary paraphrases Ryan's testimony and argues that "if the air is divided, if the entries are not 'common with each other' and if there is no intermingling of air, then the entries or sets of entries constitute separate 'aircourses.'" S. Br. 7. The Secretary does not explain what is meant by entries that are "common with each other." Further, and as the judge noted, the Secretary offers no evidence regarding any relevant statutory or regulatory definition of aircourse, nor any evidence of custom, practice, or usage from which a meaning can be gleaned.

Mettiki maintains that section 75.305 contemplates that an aircourse may be comprised of many entries and that as long as the entries are ventilated by the same air they constitute a single aircourse. See Tr. 13. Mettiki's witnesses consistently testified that the E-mains and Skipper intake entries and the E-mains and Skipper return entries were all parts of the same aircourse and therefore examination of only one intake and one return entry was required by section 75.305. MSHA supervisor Ryan's testimony agrees with that of Mettiki's chief engineer and its mine foreman that the intake air in the

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Skipper No. 1 entry mixes with the intake air in the E-mains entries at the bottom of the barrier block. Tr. 93-94, 102, 189, 191, 194-95; see also exh. C-1. Ryan's testimony also acknowledges that the intake air in the Skipper No. 1 entry mixes with the E-mains intake at Break 50. Tr. 102; see also Exh. C-1. The record further establishes that the return air in the Skipper No. 3 entry is pulled by the exhaust fan up the entry, that it traverses Break 9, flows up E-mains No. 2 and 3 return entries where it mixes with return air at the intersection of Break 4 and E-mains No. 7 return entry. The mixed air then courses 600 to 700 feet to the return portal. Tr. 115-16, 206-07, 212; see also Exh. C-1. Thus, substantial evidence of record supports the judge's finding that in fact the air in the Skipper entries mixes freely with that in the E-mains.

The judge adopted Mettiki's view that because the air in the E-mains and Skipper entries mixes, it is part of the same aircourse and held that Mettiki was in compliance with the standard. 9 FMSHRC at 1092-93. We agree. The plain requirement of section 75.305 is that "at least one entry in each intake and return aircourse be examined" (emphasis added). This obviously contemplates that an aircourse may consist of more than one entry. Thus, we conclude that the judge properly held that the Secretary did not prove that Mettiki violated section 75.305 and that Mettiki, by examining the E-mains No. 5 intake entry escapeway and the E-mains No. 7 and No. 9 return escapeway at least weekly in their entirety, complied with

section 75.305.

Our disposition is based on the record before us. We are not defining for all purposes the meaning of "aircourse" as used in section 75.305.

Accordingly, the decision of the administrative law judge is affirmed.

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