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SOL (MSHA) V. PEABODY COAL
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March 25, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 91-179-R
	:	KENT 91-185-R
PEABODY COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The Secretary of Labor issued two citations to Peabody Coal Company ("Peabody") alleging violations of 30 C.F.R. 75.316 (1990)(Footnote 1) for operating mines without approved ventilation plans. Administrative Law Judge Gary

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1 30 C.F.R. 75.316 (1990), which adopted the language of 30 U.S.C. 863(o), provided as follows

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The Department of Labor's Mine Safety and Health Administration ("MSHA") revised its ventilation standards in 1992, superseding former section 75.316. Ventilation plan requirements are now set forth at 30 C.F.R. 75.370-.372 (1992).

Melick upheld the citations. 13 FMSHRC 1332 (August 1991)(ALJ). The Commission granted Peabody's petition for discretionary review.

Peabody raises the following issues on review: (1) whether a certain ventilation requirement related to "deep cut" mining that the Secretary insisted be included in Peabody's plans should have been issued pursuant to the Mine Act's notice and comment rulemaking procedures; (2) whether Peabody was required to negotiate in good faith with the Secretary over the deep cut ventilation provision in the plans; (3) if such an obligation existed, whether Peabody negotiated in good faith over the disputed provision; and (4) whether MSHA acted reasonably in requiring the provision at issue.

For the reasons that follow, we affirm the judge's decision that the ventilation plan provision was mine specific and that Peabody was obligated to negotiate in good faith. We reverse with respect to the third issue, i.e., we conclude that Peabody negotiated in good faith. We remand the case to the judge for a determination of whether the disputed provision was, in fact, suitable to these mines.

I.

Procedural and Factual History

A. Factual Background

Peabody operates the Martwick Mine in Muhlenburg County, Kentucky, and the Camp No. 2 Mine in Union County, Kentucky. Both are underground coal mines that utilize a method of continuous mining known as deep cut mining.(Footnote 2) MSHA's District 10 Office ("District 10") revoked Peabody's ventilation plans at the Martwick and Camp No. 2 Mines because Peabody refused to adopt a particular provision dealing with the ventilation of deep cuts. District 10 insisted that Peabody extend the line curtain during roof bolting to within 10 feet of the row of bolts being set and to provide a certain minimum air velocity. Under previously approved plans, the line curtain was not extended into deep cuts until after the roof was fully bolted. MSHA cited both Peabody mines for operating without approved ventilation plans in violation of section 75.316.

1. Martwick Mine

On December 4, 1990, District 10 informed the Martwick Mine that it was conducting its regular six-month review of the ventilation plan pursuant to section 75.316. Martwick submitted its plan on December 28, 1990. On January 10, 1991, District 10 rejected the Martwick plan and informed Peabody that it should include a provision outlining in detail the placement of line brattice and the volume of air reaching the end of the line brattice

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2 "Extended" or "deep cut continuous mining" is a method of mining that cuts deeper than 20 feet from the last full row of permanent roof supports. Remote-controlled continuous mining machines allow the operator to remain under permanent roof supports when making extended cuts.

in places where roof bolting was in progress. On January 17, District 10 and Peabody officials met. The parties discussed deep cut ventilation requirements. The particulars as to what Peabody was told were controverted.

On January 25, Peabody submitted a revised ventilation plan but failed to outline how it would ventilate deep cuts. The plan was rejected. Peabody then submitted a second revised ventilation plan that again did not provide for the ventilation of deep cuts. In explaining the omission in its transmittal letter, Peabody stated:

> This item has never been included in any previous plans. Peabody has operated under previous ventilation plans at this location without safety problems or conflicts concerning this issue. Therefore, Peabody feels this plan submitted today without this item included meets all applicable laws and regulations.

Peabody attached to its letter a decision by Administrative Law Judge William Fauver in Peabody Coal Company, 10 FMSHRC 12 (January 1988)(ALJ), dealing with ventilation requirements at another Peabody mine. In that decision, the judge found that MSHA's District 3 guideline calling for ventilation of 3,000 cubic feet of air per minute during the roof bolting process was not mine specific. Judge Fauver concluded that MSHA could not insist upon inclusion of the provision because MSHA failed to show "individual analysis, evaluation and negotiation" concerning each mine. 10 FMSHRC at 16. Peabody asserted that its current situation and the case decided by Judge Fauver were identical and that it should not have to include the deep cut ventilation provision in its plan.

On February 11, MSHA cited Peabody for violation of section 75.316, for operating without an approved ventilation plan. Peabody submitted a revised ventilation plan, under protest, containing the changes required by MSHA.

2. Camp No. 2 Mine

Peabody submitted its six-month plan for the Camp No. 2 Mine to District 10 on November 28, 1990, and that plan was rejected on December 17. Peabody submitted a revised plan on January 4, 1991. District 10 again rejected the plan, informing Peabody that it must include a provision for ventilation of the deep cuts during the roof bolting stage. Peabody then submitted another plan that included the following provision:

> Deflector curtains shall be used to ventilate deep cuts during the roof bolting cycle such that the current of air shall be of sufficient quantity to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases and dust, and smoke and explosive fumes.

MSHA found this provision unacceptable and rejected the plan.

By letter to District 10 dated February 13, 1991, Peabody requested a meeting and written notification of the reasons for the plan's rejection. A meeting between Peabody officials and MSHA ventilation specialists was held on February 19. Again, the particulars of MSHA's explanation to Peabody were controverted.

On February 19, Peabody resubmitted its ventilation plan. The plan contained no provision relating to the ventilation of deep cuts. MSHA replied that the plan was unacceptable because it failed to explain how deep cuts would be ventilated. On February 21, Peabody was again cited for operating without an approved ventilation plan. Under protest, Peabody submitted a revised plan complying with MSHA's demand.

B. Procedural History

Peabody filed notices of contests of both citations and moved for expedited hearings. The cases were consolidated and assigned for hearing. A hearing was held on August 7-8, 1991. The judge bifurcated the hearing and first heard the issue of whether the provision regarding the ventilation of deep cuts was specific to the particular conditions of the Peabody mines or was of such a general nature as to be subject to the notice and comment rulemaking process for mandatory safety and health standards set forth in section 101 of the Mine Act, 30 U.S.C. 811. The judge concluded that "MSHA's insistence upon the inclusion of these particular ventilation requirements ... is not a general requirement subject to the rulemaking procedures but rather is mine specific." 13 FMSHRC at 1335.

The judge based his conclusion on the testimony of the MSHA witnesses, who outlined criteria that were examined on a mine-by-mine basis to determine whether the deep cut ventilation provision would be required in a particular plan. 13 FMSHRC at 1335. The judge found compelling the testimony of Martwick Mine Superintendent Charles Jernigan that he was told by MSHA "that the reason for the new requirements implemented at the Martwick Mine was its high methane liberation and that mines with deep cuts were being examined on a mine-by-mine basis." Id. The judge also attached weight to evidence that two deep cut mines in District 10 that liberate comparatively low quantities of methane were not required to incorporate the provision at issue. Id.

After announcing this determination orally at the conclusion of the first stage of the hearing, the judge recessed the hearing until the following morning and requested that the parties negotiate with respect to the ventilation provision. When no resolution was forthcoming, the judge heard testimony on the issues of whether good faith negotiations over the disputed provision had occurred between the parties and whether the ventilation plan provision proposed by MSHA was valid.

The judge determined that Peabody had failed to negotiate in good faith, as required by Carbon County Coal Company, 7 FMSHRC 1367 (September 1985). 13 FMSHRC at 1336. The judge reasoned that Peabody's "good faith

reliance on a colorable legal position," i.e., Judge Fauver's decision in Peabody Coal, supra, did not excuse Peabody from "negotiating regarding the specific underlying safety issue." Id. The judge held that, given Peabody's failure to negotiate in good faith, it was "clearly premature for the Commission to intervene in the approval-adoption process." Id. Accordingly, he declined to rule on the validity of the deep cut ventilation provisions and affirmed the citations against Peabody. 13 FMSHRC at 1337.

II.

Disposition of Issues

A. Whether the deep cut ventilation requirement was mine specific

Peabody asserts that the provision in dispute was not mine specific and should have been implemented through the Mine Act's notice and comment rulemaking procedures set forth in 30 U.S.C. 811.

Section 303(o) of the Mine Act mandates the development of ventilation plans as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title....

30 U.S.C. 863(o)(emphasis added).

The legislative history of section 303(o) explains that mine ventilation plans must address the conditions of each mine:

> [I]n addition to mandatory standards applicable to all operators, operators are also subject to the requirements set out in the various mine by mine compliance plans required by statute or regulation. The requirements of these plans are enforceable as if they were mandatory standards. Such individually tailored plans, with a nucleus of commonly accepted practices, are the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like.

S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978).

The Commission and the courts have further emphasized the individual nature of roof control and ventilation plans. See Zeigler Coal Co. v.

Kleppe, 536 F.2d 398, 406-07 (D.C. Cir. 1976); Carbon County, 7 FMSHRC at 1370. See also Southern Ohio Coal Co., 14 FMSHRC 1, 10-11 (January 1992) ("SOCCO")(discussing Zeigler and Carbon County). Zeigler and Carbon County set forth limits on MSHA's authority by prohibiting MSHA from imposing general rules applicable to all mines in the plan approval process, but did not resolve the question of whether MSHA may require the inclusion of a provision that is applicable to a number of mines. In UMWA v. Dole, 870 F.2d 662, 669-72 (D.C. Cir. 1989), the D.C. Circuit, construing both Zeigler and Carbon County, clarified that mine plans need not "be confined exclusively to mine-specific conditions" but may contain generally applicable provisions so long as the provisions address the particular conditions of the mine to which they apply. 870 F.2d at 670. Dole recognized that the Secretary should utilize mandatory standards for requirements of "universal application." 870 F.2d at 672. Nonetheless, the court emphasized that the Secretary possesses "considerable authority" to determine which hazards are more properly addressed by the promulgation of mandatory standards under section 101 of the Mine Act. 870 F.2d at 671. The Court endorsed Carbon County for the proposition that the Secretary commits an abuse of discretion by requiring adoption of plan provisions without consideration of the particular conditions of a mine or by imposing plan provisions of "universal application" outside the mandatory standard promulgation process. 870 F.2d at 672.

Thus, mine ventilation or roof control plan provisions must address the specific conditions of a particular mine. Such conditions, however, need not be unique to the mine. Indeed, a general plan provision addressing conditions that exist at a number of mines may be permissible providing those conditions are present at the mine in question.

The judge determined that the deep cut ventilation provision at issue was mine specific. 13 FMSHRC at 1334. He found that District 10 insisted upon the new requirement at the Martwick and Camp No. 2 mines primarily because of the mines' high methane liberation rates.(Footnote 3) He credited the testimony of MSHA witnesses as well as Peabody's mine superintendent in determining that MSHA applied this requirement on a mine-by-mine basis.

Peabody asserts that the deep cut ventilation provision was being applied across the district. Peabody terms the Secretary's position "self-serving," alleging that any mine-by-mine examination began only after this litigation commenced, as shown by the Secretary's announcement at the hearing that the new ventilation requirement would not be applied in one seam at the Camp No. 2 mine. Tr. III 84; P. Br. 20. Further, the mine

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3 Martwick is subject to 15-day spot inspections under section 103(i) of the Mine Act, 30 U.S.C. 813(i), because it liberates more than 200,000 cubic feet of methane during a 24-hour period. One MSHA official testified that MSHA determined that ventilation of deep cuts was necessary at Martwick because of the mine's methane liberation levels. Tr. 73. Camp No. 2 liberates methane at a rate of over 500,000 cubic feet during a 24-hour period and is subject to a 10-day spot inspection, pursuant to section 103(i) of the Mine Act.

plans that would not be required to incorporate the provision had not yet been approved. Peabody also asserts that the criterion of total methane liberation is too simplistic a measure of safety.

We find that substantial evidence in the record supports the judge's finding that the required provision was mine specific. All MSHA witnesses testified that they addressed application of the new requirement in District 10 on a mine-by-mine basis. The Martwick Mine superintendent testified that MSHA officials explained to him that the plan provision was being implemented based on methane levels at individual mines. The judge found that two other deep cut mines in the district, which liberate low levels of methane, would not be required to include the provision. While, as Peabody argues, methane liberation is not the only relevant factor in evaluating mine ventilation, a number of factors were considered by MSHA before imposing the new plan provision. MSHA also took into account the depth of the cut, the size of the continuous miner and the height of the coal. Tr. 18-19, 121-27.

We conclude that the deep cut ventilation requirement was not applied by rote process, as condemned in Carbon County, 7 FMSHRC at 1373, but, instead, was based on specific conditions at the two mines. While the requirement may also be appropriate for similarly situated deep cut mines, its general application does not render it invalid. See Dole, 870 F.2d at 669-72. The record evidence does not suggest that the requirement is of such universal application that the Secretary committed an abuse of discretion by failing to promulgate it as a mandatory standard. Accordingly, we affirm the judge's finding that MSHA's deep cut ventilation requirement was mine specific.

B. Whether Peabody negotiated in good faith

Peabody asserts that, even if the provision was sufficiently mine specific in nature, it was nonetheless substantively invalid because it was not "suitable" to the conditions in Peabody's mines within the meaning of section 303(o) of the Mine Act and 30 C.F.R. 75.316. The judge did not reach the merits of the provision because he determined that Peabody had not fulfilled its duty of good faith negotiation with MSHA over the provision.

On review, Peabody urges that only MSHA, not an affected operator, is required to conduct good faith negotiations over plans but that, in any event, Peabody had so negotiated. In support of its argument, Peabody asserts that the good faith negotiation requirement is intended solely as a check on the Secretary's potential abuse of power. We disagree. The Commission's and the courts' longstanding view has been that both the Secretary and the operator are required to enter into good faith discussions and consultation over mine plans. As the Dole court noted, "[t]he specific contents of any individual mine [ventilation or roof control] plan are determined through consultation between the mine operator and the [MSHA] district manager." 870 F.2d at 667. In Carbon County, the Commission explained this process:

> The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission.

7 FMSHRC at 1371 (citation omitted)(emphasis added). See also Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 & n.8 (December 1981); Jim Walter Resources, 9 FMSHRC 903, 907 (May 1987).

Thus, we affirm the judge's determination that both Peabody and the Secretary were required to engage in good faith negotiations. However, we conclude that the record does not support the judge's finding that Peabody failed to negotiate in good faith. Rather, the record reveals that adequate discussion occurred between the parties. Judge Fauver's decision, on which Peabody relied, involved nearly identical facts. Peabody asserted that its previously approved plans were suitable to the conditions of the two mines and sought from MSHA the reasons for imposing the new requirement. Peabody requested and attended meetings with MSHA to discuss the ventilation provision and proposed an alternative.

Reliance on a cognizable legal position is not indicative of bad faith negotiation by an operator in the plan approval process. Peabody communicated its legal position to the Secretary and engaged in discussions concerning the disputed provision. Having presented to the Secretary a position that was arguably controlling, Peabody was not obligated to abandon its position. Accordingly, we reverse the judge's conclusion that Peabody failed to negotiate in good faith.

C. The merits of the disputed provision

We remand to the judge to decide whether the disputed provision was "suitable" to Peabody's mines, as contemplated by 30 U.S.C. 863(o). The Secretary bears the burden of proving that the plan provision at issue was suitable to the mines in question. See JWR, 9 FMSHRC at 907 (involving ventilation plans), and SOCCO, 14 FMSHRC at 13 (involving safeguards).

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that the ventilation plan provision was mine specific but reverse his conclusion that Peabody did not negotiate in good faith. We remand for consideration of whether the disputed provision was suitable to the mines in question.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner