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

CENTRAL OHIO COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. LAKE 89-53-R Citation No. 2950074;1/20/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Muskingum Mine Mine ID 33-00989 CIVIL PENALTY PROCEEDING
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Docket No. LAKE 89-91 A.C. No. 33-00989-03571 Muskingum Mine
v.	
CENTRAL OHIO COAL COMPANY, RESPONDENT	

DECISION

Appearances: Patrick M. Zohn, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, OH, for the Secretary of Labor;
David A. Laing, Esq., Porter, Wright, Morris and Arthur, Columbus, OH, for Central Ohio Coal Company.

Before: Judge Fauver

The Company seeks to vacate a citation and the Secretary seeks its affirmance, with a civil penalty, under the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq.

The pivotal issue is whether the Company's 16-mile railroad track at its surface coal mine is an "active working area" within the meaning of 30 C.F.R. 77.1713(a).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Central Ohio Coal Company owns and operates a surface coal mine, known as the Muskingum Mine, which encompasses 135,000 to 140,000 acres.

2. At all relevant times, the mining process commenced with the uncovering and extraction of coal from five pit areas, from which the coal was transported by truck to the north end tipple. From the tipple, the coal was conveyed by rail to the south end preparation plant, where the coal was washed and conveyed off the mine premises.

3. The railroad connecting the north end tipple and the south end preparation plant has been in existence for about 20 years. The railroad is 16 miles long and generally runs through remote areas of the mine. It does not pass through or near any pit area.

4. The train can be operated manually or by automatic control but is manned by a train operator, called a "trip rider."1 He or she usually operates the locomotive for half the trip and frequently more than half the trip. When the train is on "automatic," the operator stays near the controls. At the time of the citation, the duties of the train operator included operating the train, observing the railroad track (from the locomotive) and recording hazards or track conditions warranting attention. The day shift foreman had the duty of reviewing the inspection logs prepared by the train operators.

5. On January 20, 1989, MSHA Inspector Robert Grissett issued Citation No. 2950074, alleging a violation of 30 C.F.R. 77.1713(a), as follows:

> Records indicated that this railroad system was being examined each shift, however the examinations were not being conducted by a certified person.

6. Inspector Grissett issued the citation because the individuals examining the railroad -- the train operators -- were not certified examiners.

7. In Ohio, "certification" requires that an individual obtain a surface foreman's license by passing an examination given by the Ohio Mine Examining Board. There is no certification for the position of train operator or "train rider."

8. Inspector Grissett had been inspecting this mine for 11 years. Prior to the citation, MSHA had not required that a certified person inspect the railroad, or asked for any records pertaining to the inspection of the railroad. For at least five years preceding the citation, Inspector Grissett had not inspected the 16 miles of railroad.

9. Around January 19, 1989, MSHA offered to permit the train operators to inspect the railroad if they maintained an inspection log and if the supervisor of the railroad reviewed the log daily and rode the train once every two weeks. If the Company had agreed to this, the citation apparently would not have been issued. However, when a mutual agreement did not materialize, Inspector Grissett requested an interpretation from MSHA and subsequently concluded that the railroad was an "active working area" within 77.1713(a) because of the presence of individuals -- such as the train operators and track crew -- working on the train or in the vicinity of the track. He equated "active working area" as used in 77.1713(a) with "active workings" as defined in 30 C.F.R. 77.2(a).

10. For about a month before the citation, the Company had been maintaining an inspection log filled in by the train operators. This practice was commenced at the recommendation of the Ohio Division of Mines. It was not based on any violation of Ohio mining law.

11. A track crew worked on the railroad each day. The train passed the crew twice on each roundtrip.

12. A number of derailments had occurred in recent times. These dangers gave rise to a complaint to MSHA which resulted in the subject investigation and citation.

DISCUSSION WITH FURTHER FINDINGS

The key issue is whether the 16-mile railroad is an "active working area" within the meaning of 30 C.F.R. 77.1713(a), which provides in part:

> (a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such inspection shall be reported to the operator and shall be corrected by the operator.

The term "active working area" is not defined in the Act or in the regulations, but the Secretary contends it is synonymous with the definition of "active workings" in 77.2(a), which states:

> (a) "Active workings" means any place in a coal mine where miners are normally required to work or travel; ***.

The Secretary contends that, because the railroad is an area "where miners are normally required to work or travel," and the railroad is an integral part of the mine, it is necessarily an "active working area" within the meaning of 77.1713(a). The Company submits that "active working area" is not synonymous with "active workings," that its railroad is not an active working area as that term is used in 77.1713(a), and that safety standards with respect to the railroad are governed by Subpart Q of 30 C.F.R. Part 77, not 77.1713(a).

Section 77.1713(a) requires that, at least once during each working shift, "each active working area and each active surface installation shall be examined by a certified person . . . " (emphasis added). Although not defined in 77.2, "surface installations" are the subject of considerable regulation in Subpart C of Part 77. Section 77.200, entitled "Surface Installations: General," provides that:

> All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

If "active working area" in 77.1713(a) were synonymous with "active workings" in 77.2(a), the reference in 77.1713(a) to "active surface installation" would be superfluous. A statute or regulation should be construed so as to avoid making any word superfluous. United States v. Handy, 761 F.2d 1279, 1280 (9th Cir. 1985); King v. Internal Revenue Service, 688 F.2d 488, 491 (7th Cir. 1982); Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976). As stated in

Suwannee River Finance, Inc. v. United States, 7 U.S. Cl. Ct. 556, 560 (1985):

> It is axiomatic that regulations must be interpreted to give meaning to every word, particularly where doing so leads to an entirely sensible interpretation of the provision in question.

The language of 77.1713(a), similar language contained elsewhere in Part 77, and MSHA's own Policy Manual interpretation of 77.1713(a) support the conclusion that "active working area" in 77.1713(a) refers to the pit areas of surface coal mines -- in other words, the working areas where coal is mined and extracted.

Section 77.1004(a) uses the term "working areas" as follows:

> Highwalls, banks, benches, and terrain sloping into the working areas shall be examined after every rain, freeze, or thaw before men work in such areas, and such examination shall be made and recorded in accordance with 77.1713. [Emphasis added.]

Terms such as "highwall," "bank," and "bench" are clearly associated with the "pit" areas of a surface coal mine where coal is uncovered and extracted.2 In 77.1004, "working area" thus refers to the pit or mining areas of a surface coal mine. In addition, 77.1004 provides that examinations conducted pursuant to 77.1004 "shall be made and recorded in accordance with 77.1713," indicating that "working areas" as used in both sections has the same meaning. Statutory or regulatory phrases are not construed in isolation. They must be construed in the context of the statute or regulation as a whole. Barnson v. United States, 816 F.2d 549, 554 (10th Cir. 1987), cert. denied, 484 U.S. 896 (1987) (citing United States v. Morton, 467 U.S. 822, 828 (1984). As stated in Barnson:

> Generally, when the same words are used in different sections of the law, they will be given the same meaning. [Citation omitted.]

See also Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 904 (4th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) ("the canon of construction is well established that words repeated within the same statutory section have an identical meaning in the several places employed"); Tre-State Terminals, Inc., v. Jesse, 596 F.2d 752, 757 (7th Cir. 1979) (the connotation of a term in one portion of an act may often be clarified by reference to its use in others).

In its Program Policy Manual, MSHA states with respect to 77.1713:

> MSHA will continue to require that daily on-shift examinations be made in accordance with this Section at active working areas of surface mines, active surface installations at these mines, and preparation plants not associated with underground coal mines. MSHA will not require daily on-shift examinations of the surface work areas of underground coal mines. [Emphasis added.]

MSHA's Policy Manual is consistent with the interpretation that "active working area" in 77.1713(a) means the "pit" or "mining area" of a surface coal mine and not simply any location where miners are normally required to work or travel. This seems to be a reasonable regulatory distinction, since non-mining areas of surface mines, like the surface areas of underground mines, are generally not subject to the shift-by-shift changes that may characterize the working sections underground (e.g. methane accumulation, roof falls, inadequate ventilation) or the pit or mining areas of surface coal mines (as the result of drilling, blasting and mining operations and the presence of highwalls, benches, etc.).

This interpretation of 77.1713(a) is consistent with the fact that MSHA did not require the Company to conduct on-shift inspections of haulage roads not located in the pit areas or on-shift inspections of the service road that runs parallel to the railroad track, even though miners work on or travel these roads. It is also consistent with the fact that for 20 years, before this citation, MSHA did not require that a certified person inspect the railroad.

Section 77.1713 is included in "Subpart R -- Miscellaneous," which does not refer to railroads or track haulage. However, Subpart Q, entitled "Loading and Haulage," sets forth numerous mandatory safety standards with respect to loading, haulage equipment, trains and railroad tracks. See, e.q., 77.1603, 77.1605(m), (n), (p), 77.1606 and 77.1607(v), (w), (y), and (z). Section 77.1606 is entitled "Loading and haulage equipment; inspection and maintenance." Section 77.1606(a) requires an inspection of mobile loading and haulage equipment by a "competent" person and 77.1606(b) requires inspections of carriers on aerial tramways, as well as the brakes, ropes, and supports thereof.

Thus, in Subpart Q the Secretary has set forth explicit safety standards as to haulage equipment, including trains and railroads. Where she found it appropriate, the standards include the inspection of loading and haulage equipment. If the Secretary had intended that a certified person inspect a railroad track each shift, she would clearly have stated such requirement in Subpart Q and not relied upon unclear language under the "miscellaneous" subpart. For example, a logical place for such a requirement would be 77.1606.3

Finally, it may be noted, 77.1713(a) is the surface coal mine counterpart to 75.304, which requires on-shift examinations of each "working section" of an underground coal mine. Like 77.1713(a), 75.304 requires that at least once during each working shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions "by certified persons designated by the operator to do so." As defined in 75.2, "working section" has a much narrower definition than "active working."4

For all of the foregoing reasons, the Secretary's attempt to equate "active working area" as used in 77.1713(a) with "active workings" in 77.2(a) is rejected. I conclude that 77.1713(a) does not apply to the railroad at the subject mine. Citation No. 2959974 is therefore invalid.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. The Secretary failed to prove a violation of 77.1713(a) as alleged in Citation No. 2959974.

ORDER

1. The Secretary's motion to correct the transcript is GRANTED.

2. Citation No. 2959974 is VACATED.

3. The civil penalty proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

1. The company designates the train operator position as "trip rider." This seems to be a misnomer, since the employee operates the train at least half the trip, and when the train is on automatic he or she remains available to operate the controls when needed. This seems analogous to calling an airline pilot a "plane rider" because part of the time the plane is on automatic pilot or instrument control. Except for a confusing title, the train employee's job and duties are understood and not in dispute on this record. In this decision, the job is called "train operator," rather than "train rider," in the interest of closer accuracy.

2. A "highwall" is "the unexcavated face of exposed overburden and coal or ore in an opencast mine or the face or bank on the uphill side of a contour strip mine excavation." Bureau of Mines, A Dictionary of Mining, Minerals, and Related Terms, 543 (1968). A "bench" for purposes of a surface mine is "a ledge, which, in open-pit mines and quarries, forms a single level of operation above which mineral or waste materials are excavated from a continguous bank or bench face." Id. at 96. See also 30 C.F.R. 77.1000 et seq. as evidencing that "highwalls," "banks," and "benches" are part and parcel of the "pit" or mining areas of a surface coal mine.

3. Section 77.1606 states in part:

"(a) Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation.***"

"(b) Carriers on aerial tramways . . . shall be inspected each shift; brakes shall be inspected daily; ropes and supports shall be inspected as recommended by the manufacturer or as physical conditions warrant. ***."

4. Section 75.2(g)(3) defines "working section" as "all areas of the coal mine from the loading point of the section to and including the working faces."