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MSHA V. EASTERN ASSOC. COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
October 23, 1979

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

v. Docket No. MORG 75-393

EASTERN ASSOCIATED COAL CORPORATION IBMA No. 76-55

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. 30 U.S.C.A. §961 (1978).

On May 15, 1975, a Mine Enforcement and Safety Administration inspector observed a track-mounted, self-propelled personnel carrier (a jitney) with an inoperable parking brake. The condition violated 30 CFR 75.1403. The inspector issued a notice of violation and gave the company until the following morning to abate. The abatement period was then extended to May 20, 1975, based upon the fact that the company had expressed a need for more time to repair the brake and had placed a danger sign on the jitney. On May 20 the danger sign was still on the machine, but nothing had been done to repair the jitney or to otherwise eliminate the danger posed by the inoperative brake. The inspector determined that the time for abatement should not be further extended and thereupon issued a withdrawal order under section 104(b) of the Federal Coal Mine Health And Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). 1/

1/ Section 104(b) of the 1969 Act provided, in pertinent part:

... if, upon an inspection of a coal mine, an authorized

representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall ... promptly issue an order requiring the operator of such mine to cause immediately all persons, ... to be withdrawn from, such area....

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The company sought review of the order. In his decision, the administrative law judge vacated the order. He found that a roof fall on the track haulage made it impossible to remove the jitney to the maintenance shop for repair and that the risks of attempting to repair the jitney in any place other than the shop outweighed the danger of postponing the repair because the machine had been tagged out of service. He therefore held that placing the danger tag on the equipment constituted abatement of the violation prior to the issuance of the order. We do not agree.

It is undisputed that the inoperable parking brake was a violation. For a violation such as this, there are two basic ways to abate - repair or withdrawal from service. Assuming that the jitney could not have been repaired safely in the time set for abatement, the question in this case is whether a danger tag alone constitutes withdrawal from service. We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored. 2/ To abate under these circumstances, the jitney should have been made inoperable. There is no suggestion in the record that the jitney could not have been rendered inoperable safely, thus eliminating the danger posed within the abatement period.

The company also argued, and the judge held, that the time set for abatement was unreasonable in view of the difficulties involved in repairing it. However, as noted above, there is no evidence that the jitney could not have been made inoperable within the abatement period. We therefore find that the time set for abatement was reasonable.

2/ The judge cited Plateau Mining Company, 2 IBMA 303 (1973), in support of his finding that the company had abated the violation prior to the issuance of the order of withdrawal. There the Board of Mine Operation Appeals held that if an operator establishes that the equipment in question is under repair, has not been used, and will not be used until repaired, no violation exists. Without passing judgement on the merits of that decision, we note that unlike the jitney in this case, the equipment in Plateau (pneumatic drill) had been rendered inoperable through removal of the plug on the cable that connected it to its power source.

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The decision of the judge is reversed, and the withdrawal order is reinstated.

Jerome R. Waldie, Chairman

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner