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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 31, 1982

SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. PITT 77-15 PITT 77-16 PITT 77-17
v.	PITT 77-18 PITT 77-19
FLORENCE MINING COMPANY HELEN MINING COMPANY ONEIDA MINING COMPANY NORTH AMERICAN COAL CORPORATION	PITT 77-23 IBMA 77-32

DECISION

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976)(amended 1977) ("the Coal Act"). 1/ The issue is whether the administrative law judge erred in concluding that 30 C.F.R. $ 75.1405 does not apply to certain mine haulage equipment that travels both on and off tracks. For the reasons that follow, we reverse the judge's decision.

The standard at issue essentially reiterates section 314(f) of the Coal Act and provides:

All haulage equipment acquired by an operator of a coal mine on or after March 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on March 30, 1970, shall also be so equipped within 4 years after March 30, 1970.

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1/ On March 8, 1978, this case was pending on appeal before the Department of Interior's Board of Mine Operations Appeals ("the Board"). Accordingly, it is before the Commission for disposition. 30 U.S.C. $ 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted in the caption for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

In this case review was sought of an unabated notice of violation. For the reasons stated in our decision in Eastern

Associated Coal Corp., 4 FMSHRC 835 (May 1982), we will review the merits of the notice at this time.

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30 C.F.R. $ 75.1405-1, which delineates the scope of the above standard, provides:

The requirement of $ 75. 1405 with respect to automatic couplers applies only to track haulage cars which are regularly coupled and uncoupled (emphasis added).

The six notices of violation at issue allege that the operators (all subsidiaries of the North American Coal Company at the time the notices were issued) failed to equip "rubber-rail" mine cars with automatic couplers. 2/ The issue is whether the standard applies to "rubber-rail" equipment.

This case has an involved procedural history. Litigation of the issue began on April 3, 1974, when the companies filed separate petitions for modification of $ 75.1405 under section 301(c) of the Coal Act. The petitions alleged that the standard was inapplicable to rubber-rail equipment or, in the alternative, that application of the standard would diminish safety. The petitions for modification were consolidated. On March 26, 1976, the administrative law judge ruled that the rubber-rail vehicles were not "track haulage cars" within the meaning of $ 75.1401-1. He made no findings with respect to the diminution of safety argument. The Secretary appealed this decision to the Board of Mine Operations Appeals.

Thereafter, the Board ruled in a different case that a petition for modification alleging that a mandatory safety standard was inapplicable did not state a claim upon which relief could be granted under section 301(c) of the Coal Act. Itmann Coal Co., 6 IBMA 121, 128 (1976). Subsequently, the Board reviewed the judge's modification decision in light of its holding in Itmann and concluded: (1) the applicability of $ 75.1405 to rubber-rail equipment was not a proper issue under section 301(c) of the Coal Act, but (2) the issue could be litigated if the companies were issued notices of violation of $ 75.1405 and applied for review of the notices under section 105 of the Coal Act. Oneida Mining Co., 6 IBMA 343, 349-350 (1976).

The Secretary then issued the presently contested notices of violation. The companies filed for review and the case was assigned to the same judge who had heard the modification case. The parties stipulated that the issue before the judge was whether $ 75.1405 was applicable to rubber-rail vehicles and that this issue should be decided on the basis of certain specified exhibits and specified portions of the testimony from the previous modification proceeding.

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2/ Rubber-rail equipment can be used both on and off track. When operating on track, a rubber-rail car is pulled by a small

locomotive and moves along the track on steel wheels similar to traditional railroad equipment (Tr. 149). When the car reaches the end of the track, the rubber tires, which are suspended along the side of the car, are dropped and they "literally lift the vehicle up off the rail" (Tr. 149). The car is then pulled by a battery powered vehicle and can move along the mine floor or in the supply yard where there are no tracks.

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On April 20, 1977, the administrative law judge rendered a decision, the substance of which was virtually identical to his decision in the modification case, finding that the regulation was not applicable to the company's rubber-rail cars. Prior to his discussion and resolution of the issue, the judge set forth those findings of fact he believed to be essential. The findings which are relevant for purposes of our decision are those pertaining to the equipment, the method of coupling and uncoupling the equipment, and MESA's history of enforcement of the automatic coupler standard.

The judge found that approximately 600 rubber-rail cars were operating at the six mines. The cars are coupled and uncoupled manually by the draw bar and pin method (Dec. at 3). The draw bar is a steel bar 1-1/2 inches thick, 4 inches wide and 30 to 36 inches long (Tr. 179-180). It serves as the horizontal link between two cars and is secured by steel pins which are inserted vertically through holes in "pockets" at the end of each car. Coupling takes place when the pocket holes are aligned with holes at each end of the draw bar and the pins are dropped through the holes in the pockets. The process is reversed for uncoupling (Tr. 168). Alignment of the draw bar holes with the pocket holes and insertion of the pins are done manually.

The judge found that the rubber-rail cars are used solely to transport men, equipment and supplies. 3/ He also found that the cars are used intermittently and that 2 to 3 times as many couplings and uncouplings are performed off track as are performed on track (Dec. at 3-4).

The judge found that the rubber-rail cars are loaded on the surface (in the supply yard) and moved on track into the mine in trips of 5 to 15 cars (Dec. at 4 and Tr. 151-155). The trips are pulled by locomotives (Tr. 150). He found that once in the mine the trips are broken down into small groups of 1 to 5 cars, the wheels are lowered and the small trips are pulled by tractors to the section where the supplies are needed (Dec. at 4). The process is reversed after the supplies are unloaded. 4/

At the time the evidence was taken below, MESA was divided into 9 administrative districts. Each district was headed by a district manager responsible for enforcement of the Act in his district. The mine in this case were located in District 2, with headquarters in

Pittsburgh. The judge found that from the passage of the Coal Act until
3/ Coal is moved out of the mines on conveyor belts.
4/ After the cars are uncoupled, a tractor picks up the empty cars, one by one, and takes them back to the track. The locomotive goes from section to section picking up cars which have been put on the track. Once the locomotive has about 15 cars it pulls the trip back to the supply yard. After a complete return trip is assembled underground, no further coupling or uncoupling occurs until the trip reaches the supply yard (Tr. 154-155).
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February 1974, $ 75.1405 was not enforced with respect to rubber-rail cars in District 2 (Dec. at 4). He also found that, in a memorandum dated November 21, 1973, the district manager indicated that when the regulation was written, $ 75.1405 was not intended to apply to rubber-tired haulage cars and was intended to apply only to track haulage cars (Dec. at 5). The judge also found that during this period of non-enforcement the companies, relying on this policy of non-enforcement, purchased 230 rubber-rail cars not equipped with automatic couplers (Dec. at 4). The judge further found that the Secretary at one time proposed to amend $ 75.1405 to specifically include rubber-rail cars (Dec. at 6). 5/ Finally, he found that MESA's enforcement policy changed on February 7, 1974, and the Secretary began applying the automatic coupler requirement to rubber-rail vehicles in District 2.
The judge's ultimate conclusion was that rubber-rail cars are not "track haulage cars" within the meaning of $ 75.1405-1. He noted that $ 75.1405 applies to "all haulage equipment." He found that the phrase "all haulage equipment" is not ambiguous, that the word "haulage" as used in mining parlance refers to the hauling of men and supplies as well as ore, and that the word "equipment" is very broad. Thus, he found that if the statutory language had been literally applied, there would be little doubt that rubber-rail haulage equipment would be required to have automatic couplers (Dec. at 5-6). However, in implementing $ 75.1405, the Secretary promulgated $ 75.1405-1 which states that $ 75.1405 applies "only to track haulage cars." (Emphasis added.) The judge attempted to determine whether Congress had intended that section 75.1405 apply "only to track haulage cars." He first examined the legislative history. The sole reference in the legislative history to section 314(f) is contained in a letter from the Director of the Bureau of Mines to Congressman John Dent. Congressman Dent had asked the Director to conduct a technological review of safety standards which had been proposed as amendments to the House bill. The automatic coupler provision was one of those amendments. The Director stated

"[t]he provisions relative to coupling mine cars ... will make a positive contribution to safety." The judge found this reference to be uninstructive (Dec. at 6).

Next, the judge examined the structure of section 314 itself and found this to be persuasive:

Perhaps the best indication of what Congress intended can be obtained from viewing section 314 of the Act in its entirety. It consists of six subsections, "a" through "f" and is headed "Hoisting and Mantrips." Subsections "a," "b," "c," and "d"

5/ The proposed amendment stated:

$ 75.1405-1 automatic couplers, haulage equipment. The requirement of $ 75.1405 with respect to automatic couplers applies only to track haulage cars, including rubber-rail cars, which are regularly coupled and uncoupled.

The proposal was one of many contained in a February 10, 1975, MESA memorandum which was addressed to all underground coal mine operators (Exhibit 12). The memorandum stated that hearings would be conducted on the proposed changes and requested the operators to submit comments. The change with respect to rubber-rail cars was never adopted nor was the change ever formally proposed in the Federal Register.

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deal specifically with hoists and generally with the transportation of men and material. However, in "e" locomotives and haulage cars are mentioned for the first time in connection with the requirement that they have automatic brakes. Next follows 314(f) and its reference to "all haulage equipment." I believe subsections "e" and "f" are generally different than the preceding four subsections and should be read together. Following this approach, the phrase "haulage equipment" would relate back to subsection "e" and its mention of locomotives and haulage cars. Since in customary coal mining jargon, the word "car" and the term "haulage car" has reference to vehicles used on railroad track, I would conclude that this is what Congress had in mind, even though the phrase "all haulage equipment" when taken out of context is not patently ambiguous outside the mining industry (Dec. at 7, fn. 12).

The judge stated that the Secretary in promulgating $ 75.1405-1 had done what Congress intended--that is, had made the automatic coupler provision applicable to equipment which solely traveled on track (Dec. at 6-7). He also concluded that because the record showed rubber-rail cars at the 6 mines were used only intermittently, were

primarily operated off track and represented a technological variant not contemplated by Congress, they were not "track haulage cars" within the meaning of $ 75.1405-1 (Dec. at 6-7).

Finally, the judge found that MESA's enforcement practice for the first four years of the Coal Act limited the coverage of $ 75.1405 to locomotives and haulage cars which traveled on track, and concluded that this constituted a "binding construction of the statute" (Dec. at 7).

The Secretary asserts that the rubber-rail vehicles are "track haulage cars" which are "regularly coupled and uncoupled" and therefore come within the purview of $ 75.1405. He first argues that the judge's decision effectively modifies $ 75.1405-1 to apply to haulage cars that operate exclusively on track. He asserts such an interpretation is erroneous because the Coal Act was remedial and regulations adopted thereunder should be given a liberal construction. He states that the purpose of section 314(f) of the Coal Act and $ 75.1405 is to prevent accidents while track haulage equipment is coupled and uncoupled. In his view, it makes no difference if the cars are coupled and uncoupled on the track only some of the time. In short, the Secretary argues that interpreting the standard so as to include rubber-rail equipment best effectuates its purpose.

The Secretary next argues that the rubber-rail vehicles are "regularly coupled and uncoupled." According to the Secretary the proper test for regularity should be whether the equipment is coupled or uncoupled in the normal course of routine operation or on a cyclic basis. The Secretary

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argues that in testifying about rubber-rail procedures the companies' safety manager described routine on track couplings and uncouplings both in the supply yard and the point of track nearest the working sections (citing to Tr. 150-155).

The Secretary also argues that the agency cannot be estopped from enforcing $ 75.1405-1 if it applies to rubber-rail equipment. An agency, the Secretary states, can change its interpretation of a regulation if that change is within the scope of the regulation. 6/

The operators maintain that, although the language of section 314(f) requires automatic couplers on "all haulage equipment," the judge and the parties agree that Congress never intended the standard to be applied literally. They also assert that the parties agree that $ 75.1405-1 attempts to make explicit the limitation intended, but not stated by

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6/ The Secretary makes two other arguments which do not warrant extended discussion. First, he argues that the judge erred in admitting the testimony of the then district manager of District 2,

Robert Barrett, concerning his understanding of the proper interpretation of $ 75.1405. Barrett had a dual role with regard to the regulation. He was assigned by the director of the Bureau of Mines to coordinate the efforts of those writing the Coal Act's implementing regulations--including $ 75.1405-1 (Tr. 40, 46). Moreover, as district manager for District 2 he was responsible for enforcing all standards in the district. Barrett testified as to his opinion concerning the type of equipment the drafters of section 75.1405-1 intended to cover. He also testified concerning the enforcement policy he pursued while district manager (Tr. 49-56, 59-63, 81-88, 91). The Secretary asserts the testimony of a participant in the drafting of a regulation cannot be admitted to prove regulatory intent. He asks that any findings or conclusions based upon Barrett's testimony be rejected. A review of the judge's decision, however, fails to indicate any findings of fact or conclusions of law based upon Mr. Barrett's testimony concerning his view of the drafters' intent or his understanding of Congressional intent in enacting section 314(f). (Finding of fact No. 12 relates to a memorandum issued by Barrett). Thus, even if we were to assume that admission of Barrett's testimony regarding intent was erroneous, it was harmless error.

Second, the Secretary asserts that the Board of Mine Operations Appeals in Canterbury Coal Co., 6 IBMA 276 (1976), affirmed a judge's decision disallowing a modification of $ 75.1405 for several types of track equipment, including rubber-rail equipment, and refused to stay its decision with respect to rubber-rail equipment until the instant case was decided. The Secretary views this as de facto recognition by the Board that the standard applies to rubber-rail equipment. However, the Board's refusal to stay the part of the proceeding relating to rubber-rail equipment was based on factual differences it perceived between the Canterbury case and this case. 6 IBMA at 286. Moreover, the validity of the application of the standard to rubber-rail equipment could not have been at issue in the modification case, the Board having ruled that such an issue could only be raised in an enforcement proceeding.

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Congress. They assert the original intent of section 75.1405 was to apply the automatic coupler requirement only to coal haulage equipment that operates solely on track and that this original intent must control. They argue this intent may be derived from the legislative history, i.e,, the letter to Congressman Dent, and from the structure of section 314. Moreover, they assert that the Secretary's consistent policy from 1971 to 1974 of excluding rubber-rail equipment from coverage under $ 75.1405 is the type of contemporaneous construction of the regulation by those charged with its enforcement to which

deference should be accorded. They view this consistent administrative interpretation over a period of four years as compelling evidence of the original intent underlying the statutory and regulatory provisions. They also view the Secretary's proposal to amend $ 75.1405-1 so as to include rubber-rail vehicles as evidence that such equipment was not originally covered.

In short, the operators argue that because of the legislative history, the Secretary's contemporaneous construction of the standard, the four year enforcement policy of not requiring automatic couplers on rubber-rail equipment and the proposal to amend $ 75.1405-1, the judge correctly concluded that the Act and regulations do not require automatic couplers on rubber-rail equipment. The companies state that if the Secretary wishes to change a regulation he should follow the promulgation procedures set forth in the Act, rather than legislate through interpretation. 7/

Our resolution of this case begins with an examination of the words of the statute and standard. The judge and parties agree that section 314(f) and $ 75.1405 on their face apply to "all haulage equipment." They also agree that Congress could not have intended literal application of the standard to all haulage equipment because there are many types of equipment used to transport coal, men and supplies (e.g., shuttle cars, battery powered tractors, and battery powered personnel carrier) which travel alone and upon which automatic couplers would serve no purpose. The judge and the parties also agree that in order to clarify Congressional intent and to narrow the overly inclusive language of the statutory standard the Secretary promulgated $ 75.1405-1 limiting the automatic coupler requirement to "track haulage cars which are regularly coupled and uncoupled."

The word "track" indicates that the regulated cars travel on rails as opposed to free moving vehicles. All parties agree the rubber-rail cars travel on rail from the supply yard into the mine to the point on the track nearest the section where the supplies are to be used (Tr. 150-152, Dec. 4). Thus, the rubber-rail vehicles qualify, at least in this facet of their operation, as "track" equipment. The term "haulage

7/ The operators insist that they are not raising an estoppel argument. Rather, they are arguing that the original interpretation of the standard is the correct interpretation and must be followed. They state that the agency "is free to change the regulation despite reliance on the old regulation so long as [the agency] pursues the proper procedures." (Brief at 17.)

cars" in mining parlance indicates cars which carry either ore, equipment, supplies or personnel. 8/ The rubber-rail vehicles are used for the transport of men, equipment and supplies. Thus, we

conclude that, based on a plain reading of the standard and the nature of the use of the equipment at issue, the rubber-rail vehicles involved are a type of "track-haulage cars." 9/

The Secretary's inconsistent enforcement of the standard against the operators involved is troubling, but it does not lead us to a different result. The prior practice in District 2 of not enforcing section 75.1405-1 against rubber-rail equipment was contrary to the plain language of the standard. Further, although an agency's contemporaneous interpretation of a regulation can be given weight, the interpretation must be a consistent practice implemented by the agency as a whole. See 2 Davis, Administrative Law Treatise, $ 7.14 at 66-69 (2d ed. 1979). The record indicates confusion among agency personnel regarding enforcement of the standard and it cannot be determined what interpretation, if any, had been adopted as the official agency position on the standard.

This leaves the question of whether the cited rubber-rail vehicles are "regularly coupled and uncoupled" within the meaning of the standard. The adverb "regularly" suggests a practice or implies uniformity or a method of proceeding. It excludes isolated or unusual occurrences. We believe that the record reflects a uniform method and practice of on-track coupling and uncoupling. The judge's finding that the rubber-rail cars are used only intermittently and are not regularly coupled and uncoupled is difficult to explain. None of the sources cited by the judge states or infers that the use of the equipment was only intermittent or that on-track coupling and uncoupling are not routine practices.

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8/ Haulage cars. Rail haulage cars for surface or mine shaft operations are used to carry ore and equipment to and from the digging site. They may be of the trailer type or self-propelled, and include dump cars, flat cars, personnel cars, etc. Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior at 530.

9/ There is a great deal of discussion by the parties as to whether Congress intended section 314(f) to apply to rubber-rail vehicles. The judge concluded that the Secretary "correctly divined Congressional intent" when he promulgated $ 75.1405-1 (Dec. 6). Our attempt to determine Congressional intent is inconclusive. We have found no indication that Congress in drafting section 314(f), or the Secretary in promulgating $ 75.1405-1, considered rubber-rail equipment. See 35 Fed. Reg. 17890 (Nov. 20, 1970). At most section 314(f) and the legislative history indicate that automatic couplers are required on mine cars which run on track and which carry loads. Thus, we perceive no definitive indication from the legislative history, or the context of section 314, as to whether automatic couplers are to be installed on such cars that run only part of the

time on track.
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We therefore find that the rubber-rail cars are track haulage equipment that are regularly coupled and uncoupled on track and, therefore, that the standard applies.
Finally, we note that the operators initially raised two separate challenges to the enforcement of 30 C.F.R. $ 75.1405 against their rubber-rail equipment: (1) that the standard did not apply, and (2) that such enforcement would result in a diminution of safety. In our decision we have addressed only the first argument concerning the applicability of the standard. From our review of the previous decisions of the administrative law judge and the Board in this matter, it appears that the question of diminution of safety has never been finally resolved. We are not unaware of the operators' expressed concerns about the safe use of automatic couplers when rubber-rail equipment is operated off track. But as we have previously held, it is "important that questions of diminution of safety first be pursued and resolved in the context of the special procedure provided for in the Act, i.e , a modification proceeding." Penn Allegh Coal Co., 3 FMSHRC 1392, 1398 June 1981)(emphasis added). This Commission was established as fully independent of the Secretary by the 1977 Mine Act. As a result we do not have jurisdiction, as did the Board, to rule on petitions for modification based on diminution of safety. 30 U.S.C. $ 811(c)(Supp. IV 1980).
The present status of the previously instituted modification proceeding is unclear. Whether the previous petition for modification is still pending or filing of a new petition would be required, the operators should at this time, if they so choose, pursue their diminution of safety claims before the Secretary of Labor. 30 C.F.R. Part 44. 10/
Conclusion
Accordingly, we reverse the judge's conclusion that 30 C.F.R. $ 75.1405 does not apply to the track haulage cars at issue and reinstate the notices of violation.
A. E. Lawson,
Commissioner
10/ The present case arose from an application for review filed by the operators, rather than a petition for assessment of penalties filed by the Secretary, and only the question of the applicability of the standard is being resolved herein. Therefore, we need not explore in this case the effect that a previously instituted modification proceeding should have on a subsequently filed action seeking civil penalties for noncompliance with the standard sought to be modified. See Sewell Coal Co., 3 FMSHRC 1402, 1414-15 (June 1981).

Jestrab, Commissioner dissenting:

I most respectfully dissent.

Regulations 30 C.F.R. 75.1405 and 1405-1 are ambiguous insofar as they purport to cover the on-track/off-track rubber tired vehicles at issue here. It appears from the record that on or about February 10, 1975 the Secretary proposed an amendment to this regulation so as to deal with on-track/off-track rubber tired vehicles. (Exhibit P-12) The final disposition of this proceeding is not disclosed in the record. Further, statutory modification proceedings to cover the on-track/off-track rubber tired vehicles of these applicants were commenced, but here again these proceedings apparently have not reached final disposition. (JD-2, footnote 2) Reference is made in the record to the practice of the Secretary in other districts, but there is no evidence in the record as to whether the vehicles are operated under individual modifications of the regulation or if, in fact, the regulation is enforced as it is presently written. It thus appears that the interpretation and enforcement policy of the Secretary may be inconsistent. (e.g. T-51-57)

It is of parenthetical interest to note that there is testimony in the record that any attempt to adapt automatic couplers to rubber tired vehicles operating off-track could be dangerous to the safety of miners. (T-67-68, 202) Vertical movement of the automatic coupling on the uneven mine floor, together with the difficulty of lateral alignment in off-track operation, lends considerable force to this testimony. Here it is well to have in mind that this regulation is being applied to rubber tired vehicles which in fact operate off-track. To say that the question raised by the operator in this case should have been the subject of a modification proceeding is to beg the question presented to us.

In my opinion, if the Secretary wishes a regulation that requires automatic coupling devices for on-track/off-track rubber tired vehicles, he should amend the regulation 75.1405 to expressly so provide. See Diamond Roofing v. Occupational Safety and Health Review Commission, 528 F.2d 645 (5th Cir. 1976) In the course of the rulemaking process set forth in $ 101 of the Mine Act (30 U.S.C. 811), 11/ the technology, feasibility and safety considerations so important to miners and the industry could be developed and a rational result reached. See King Knob.Coal Co., 3 FMSHRC at 1420, 1421 (1981); B&B Insulation v. Occupational Safety and Health Review Commission, 583 F.2d at 1371, 1372 (5th Cir. 1978).

I would affirm the order of the Administrative Law Judge for these reasons and for the reasons set forth in his opinion.

Frank F. Jestrab,

Commissioner

11/ Similar provisions existed in section 101 of the Coal Act.
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