No. 15-2640

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NORTHERN ILLINOIS SERVICE COMPANY,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

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

Respondents.

ON PETITION FOR REVIEW OF A FINAL DECISION OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR, MSHA

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Northern Illinois	Northern Illinois Service Company
Commission	Federal Mine Safety and Health Review Commission
Judge	Administrative Law Judge
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Pet. Br.	Brief for Northern Illinois
Secretary	Secretary of Labor
G. Ex.	Secretary's Exhibit
Tr.	Hearing Transcript
ALJD	Administrative Law Judge's Decision

STATEMENT REGARDING JURISDICTION

The Secretary of Labor ("the Secretary") is satisfied that the jurisdictional and standing statements set forth in Northern Illinois Service's ("Northern Illinois") opening brief are complete and accurate.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Secretary permissibly interprets Section 3(h)(1)(C) of the Mine Act, 30 U.S.C. § 802(h)(C), which covers not only "structures" used in mining but also "facilities" used in mining, as covering not only the shop structure itself but also all of the things in the shop.

2. Whether the operator had fair notice that 30 C.F.R. § 56.12018, which states that "[p]rincipal power switches shall be labeled to show which units they control . . . ," applies to a principal power switch that controls a single unit.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act") was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines . . . in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act

authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and the prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Section 4 of the Mine Act, 30 U.S.C. § 803, states that "each coal or other mine" the products of which enter commerce, or the operations or products of which affect commerce, shall be subject to the provisions of the Act. Section 3(h)(1)(C) of the Act defines a "coal or other mine" as "(A) an area of land from which minerals are extracted . . . , (B) private ways and roads appurtenant to such areas, and (C) . . . structures, facilities, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals . . . ."

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to ensure compliance with the Act and with standards. 30 U.S.C. § 813(a). If an MSHA inspector discovers a violation of the Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or Section 104(b) of the Act to the operator of the mine. 30 U.S.C. §§ 814(a) and 814(b).

Section 110(a) of the Mine Act provides for the assessment of a civil penalty against the operator of a mine in which a violation of a standard occurs. 30 U.S.C. § 820(a). Section 110(i) of the Act requires that, in determining what penalty is to be assessed under Section 110(a), consideration be given to six factors. 30 U.S.C. § 820(i).

An operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. § 815 and 30 U.S.C. § 823. The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings before an administrative law judge and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. *See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113-14 (4th Cir. 1996). If the Commission declines to review an administrative law judge's decision, the judge's decision becomes a final and appealable Commission decision. *Id.*

The present case involves two MSHA safety standards: 30 C.F.R. § 56.16005 and 30 C.F.R. § 56.12018. Section 56.16005 states that "[c]ompressed and liquid gas cylinders shall be secured in a safe manner." Section 56.12018 states that "[p]rincipal power switches shall be labeled to show which units they control unless identification can be made readily by location."

B. Factual and Procedural History

During an inspection at Northern Illinois Service Company's ("Northern Illinois"') Portable No. 1 and Portable No. 2 quarries in Rockford, Illinois, MSHA Inspectors Eric Crum and Robert Bauman issued Citations No. 8747007 and 8741715 on July 30, 2013, and November 13, 2013, respectively. Tr. 25, 235.[1]

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[1] Northern Illinois is a small rock operation operating two adjoining quarries that utilize crushers to produce limestone and other products for sale. The quarries, consisting of the plant area, the shop, and the scale house trailer, operate seasonally and operate based on the crushed rock orders they receive. Tr. 41, 52-53. At the sites, the stones are crushed, screened, and sized before being transported by

While inspecting Northern Illinois' MCC/generator trailer, Inspector Crum, accompanied by loader operator Tim Thistle, observed that a principal power switch was not labeled to reflect the equipment the switch controlled. Tr. 235. Each of the eight power switches housed on the outside of a silver electrical box located along the wall of the trailer had a green "start" button and a red "stop" button, but only seven of the eight were labeled to indicate the equipment each controlled. Tr. 236. Employees needed to push all eight buttons to start all of the plant's equipment after the generator was energized. Tr. 236. The inspector subsequently learned that the unmarked power switch energized the Deister underscreen conveyor, but during his inspection, Crum could not determine where the cable from the cited box led, even after he and Thistle unsuccessfully searched for the missing label. Tr. 240-41; G. Ex. 16.[2]

Inspector Crum believed that the unlabeled power switch he observed was a principal power switch because the only way to control power to the Deister conveyor was to press the start button on the unlabeled switch. Tr. 259. The unlabeled power switch was the only switch that could energize the Deister conveyor. Tr. 258-59. The inspector observed that although mine management and

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conveyor to a stockpile area, where they are loaded into customers' trucks. The trucks are then weighed at the scale house before being driven off the premises. Tr. 44-45.

[2] At trial, Inspector Crum testified that each of the principal power switches had a number and that, if the number on the unlabeled switch had corresponded to a number on the equipment it controlled, he would not have issued a citation. The numbers did not correspond in that manner. Tr. 241-42.

perhaps miners had the ability through experience at the mine to readily identify the switch that corresponded to its matching equipment, in the event of an emergency, an independent contractor performing work on the electrical boxes, being unfamiliar with the mine, could identify only the labeled power switches. Tr. 263. Recognizing that labels on principal power switches facilitate prompt recognition and prevent exposure to electrical hazards from working on energized circuits, the inspector issued Citation No. 8741715 alleging a violation of Section 56.12018.

On November 13, 2013, while concluding the inspection begun at the mine in June 2013, Inspector Bauman observed two unsecured compressed gas cylinders being stored in an unsafe manner. Tr. 25-26. The inspector believed that the manner of storage constituted a hazard because the cylinders, approximately four feet in height, were neither tied up nor chained to the wall to prevent them from tipping over. Tr. 26. Instead, they were stored upright between two parked front-end loaders. Tr. 30-31, 42.[3] Inspector Bauman believed that the unsecured pressurized cylinders posed a hazard and, as a result, issued Citation No. 8747007 alleging a violation of Section 56.16005.

C. The Decision of the Administrative Law Judge

On June 5, 2015, the administrative law judge issued a decision in which he affirmed the alleged violation of Section 56.16005 consisting of two unsecured

[3] Inspector Bauman observed a bungee cord on the floor in the vicinity of the cylinders and presumed that, sometime in the past, the cylinders had been secured with the cord. Tr. 27.

pressurized gas cylinders in the shop at one of the operator's quarries. ALJD 2-4. The judge found that "one or both of the cylinders could tip over, . . . a cap over the top of the gas valve could come off, . . . a gas valve could be damaged and . . . a cylinder or cylinders could be propelled missile-like around the shop causing severe damage to anything and anyone it struck"; the judge concluded, however, that such an occurrence was "not likely," and the violation was "not serious," because miners did not visit the shop "on a regular basis." ALJD 4; Tr. 28. The judge agreed with the Secretary that the operator's negligence was "low" because it was reasonable to infer that the bungee cord on the floor in the vicinity of the cylinders had been utilized earlier to secure them, even though at some point prior to the inspection, the cylinders had become unsecured. Finally, the judge concluded that the violation was "inadvertent" rather than "purposeful." ALJD 4. The judge rejected the operator's contention that the Secretary failed to establish that the cylinders were covered by the Mine Act, reasoning that the cylinders were located in the shop and the shop was part of the mine. ALJD 4 n.8.

The judge also affirmed the alleged violation of Section 56.12018 consisting of the operator's failure to label the principal power switch in the electrical box in the generator trailer at one of its quarries. ALJD 15-18. Although the judge found that the location of the power switch failed to identify the unit that received its power, he agreed with the Secretary that the violation was "not serious" because the conveyor belt the switch controlled had not been in operation for approximately four years. Furthermore, the judge found that the chance of the power switch being used

was "negligible" because the operator no longer produced the product the conveyor belt transported. ALJD 18; Tr. 262. Finally, the judge found the operator's negligence to be "low" rather than "moderate" as alleged by the Secretary. ALJD 18. In so finding, the judge determined that the operator's negligence was "significantly mitigated" because it was common knowledge that the power switch was not being utilized and had not been utilized for approximately four years. ALJD 18. The judge rejected the operator's contention that the standard does not apply to a principal power switch that controls a single unit, reasoning that the fact that the standard states the term "units" in the plural is merely a "grammatical result" of the fact that it states the term "principal power switches" in the plural. ALJD 17 n.21.

Regarding each violation, the judge assessed the $ 100 penalty proposed by the Secretary. ALJD 22-24.

On July 8, 2015, the Commission declined to review the judge's decision, making the judge's decision a final Commission decision.

SUMMARY OF THE ARGUMENT

The Secretary's interpretation of Section 3(h)(1)(C) of the Mine Act as covering not only the shop structure itself but also all of the things in the shop is entitled to deference and should be accepted because it recognizes that Section 3(h)(1)(C) covers not only "structures" used in mining but also "facilities" used in mining; is consistent with the dictionary definition of "facility"; advances the purpose of the Act by protecting miners; and promotes effective enforcement of and

compliance with the Act by avoiding a patchwork quilt of statutory coverage. The operator had fair notice that Section 56.12018 applies to a principal power switch that controls a single unit because such a reading is supported by the Dictionary Act, common usage, common sense, and the enforcement and adjudication history of the standard.

ARGUMENT

I

The Secretary Permissibly Interprets Section 3(h)(1)(C) Of The Mine Act, Which Covers Not Only "Structures" Used In Mining But Also "Facilities" Used In Mining, As Covering Not Only The Shop Structure Itself But Also All Of The Things In The Shop

A. Standard of Review and Applicable Principles

The factual findings of the Commission – which in this case are the findings of the administrative law judge – are reviewed under the substantial evidence standard of review. *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 614 (7th Cir. 2014); Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1). The Secretary's interpretation of an ambiguous statutory provision is reviewed de novo; in such review, however, the Secretary's interpretation is owed an appropriate degree of deference. *Mach Mining, LLC v. Secretary of Labor*, 728 F.3d 643, 649-50 (7th Cir. 2013); *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 640-41 (7th Cir. 2013).

The operator, citing this Court's decision in *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002), asserts that the Secretary's interpretation of a statutory provision pertaining to his own authority is not owed deference. Pet. Br. at 7. In *City of Arlington, Texas v. FCC*, U.S. ,

133 S.Ct. 1863, 1868-73, L.Ed.2d (2013), however, the Supreme Court held that an agency's interpretation of an ambiguous statutory provision pertaining to its own authority is owed the same degree of deference as its interpretations of other statutory provisions. *City of Arlington*, not *Northern Illinois Steel*, controls.

This Circuit has stated, in dictum, that the Secretary's interpretation of an ambiguous statutory provision in litigation is owed the degree of deference owed under *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), only if the Secretary's interpretation is embodied in the issuance of a citation. *Vulcan Construction Materials, LP v. FMSHRC*, 700 F.3d 297, 312-16 (7th Cir. 2012). Other Circuits have adopted the approach that the Secretary's interpretation of an ambiguous statutory provision in litigation is owed *Chevron* deference without reference to whether it is embodied in the issuance of a citation. *American Coal Co. v. FMSHRC*, 796 F.3d 18, 24 (D.C. Cir. 2015) (citing *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003)); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012); *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113-14 (4th Cir. 1996). *But see North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 742 (6th Cir. 2012) (according the Secretary's interpretation in litigation *Skidmore* deference). The Secretary's interpretation in this litigation is owed deference under either approach because it is embodied in the issuance of a citation.

Under *Chevron*, an agency's interpretation of an ambiguous statutory provision is entitled to acceptance as long as it is not "'arbitrary, capricious, or

manifestly contrary to the statute.'" *Big Ridge*, 715 F.3d at 641 (quoting *Chevron,* 467 U.S. at 844). In determining whether the agency's interpretation is contrary to the statute, a reviewing court examines the statutory language, the legislative history, and the statutory structure and purpose as a whole. *Velasquez-Garcia v. Holder*, 760 F.3d 571, 577-78 (7th Cir. 2014); *Central States Southeast and Southwest Pension Fund v. O'Neill Bros. Transfer & Storage Co.,* 620 F.3d 766, 774 (7th Cir. 2010). To be accepted, the agency's interpretation need not be the only reasonable interpretation or even the most reasonable interpretation; it need only be *a* reasonable interpretation, i.e., it need only be *permissible*. *Chevron,* 467 U.S. at 843; *Velasquez-Garcia*, 760 F.3d at 578; *Castro v. Chicago Housing Auth'y*, 360 F.3d 721, 729 (7th Cir. 2004).

B. The Mine Act's Definition of a "Mine"

Section 4 of the Mine Act, 30 U.S.C. § 803, states that each "coal or other mine" the products of which enter commerce, or the operations or products of which affect commerce, shall be subject to the provisions of the Act. Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), defines a "coal or other mine" in pertinent part as:

> (A) an area of land from which minerals are extracted . . . , (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals . . . .

The courts have recognized that Section 3(h)(1) sets forth a "sweeping definition" of the term "mine" and that Congress intended that "'what is to be considered a mine and to be regulated under [the] Act be given the *broadest*

*possibl[e]*interpretation.'" *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554-55 (D.C. Cir. 1984) (quoting S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977), U.S. Code Cong. & Admin. News 1977, 3401, 3414) (emphasis added by Court); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 796-97 (4th Cir. 1981); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (2d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). *See also Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981) (recognizing that Section 3(h)(1) should be interpreted "very broadly").

C. The Present Case

In the present case, there is no dispute that Section 3(h)(1)(C) covers the shop structure itself; the only dispute is whether Section 3(h)(1)(C) covers the compressed gas cylinders in the shop. Pet. Br. at 7-8. The operator, ignoring Section 3(h)(1)(C)'s inclusion of the term "facilities," interprets Section 3(h)(1)(C) as covering only the shop structure itself and the things in the shop that are specifically shown to be used in mining; the Secretary, focusing on Section 3(h)(1)(C)'s inclusion of the term "facilities," interprets Section 3(h)(1)(C) as covering not only the shop structure itself but also all of the things in the shop, regardless of whether they are specifically shown to be used in mining.[4] The operator's interpretation is not compelled by the statute; the

[4] The Commission's decision in *W.J. Bokus Industries, Inc.,* 16 FMSHRC 704, 708 (1994), cited by the operator (Pet. Br. at 8), has no bearing on this case. In *Bokus*, the Commission held that various things in a garage, including compressed gas cylinders, were covered by Section 3(h)(1)(C) because they were used in mining. The Commission therefore found it unnecessary to decide whether the garage was

Secretary's interpretation is permitted by the statute. It would make little sense for Congress to give MSHA only the authority to regulate the things comprising the shop structure itself – in essence, the floor, the walls, and the ceiling – things that are few in number and are relatively unlikely to pose a hazard to miners, and not the authority to regulate all of the things in the shop – for example, the compressed gas cylinders – things that are more in number and are more likely to pose a hazard to miners;[5] it would make a great deal of sense for Congress to give MSHA not only the authority to regulate the shop structure itself, but also the authority to regulate all of the things in the shop.

The Secretary's interpretation is supported by the ordinary dictionary definition of the word "facility." Webster's Third New International Dictionary defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve some particular end." Webster's Third New International Dictionary 812-13 (2002). The fact that the dictionary characterizes a structure as a "facility" by referring to the function the structure performs or the end the structure serves indicates that the word "facility" encompasses not only the

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covered by Section 3(h)(1)(C). The issue in this case is different: the shop is undisputedly covered by Section 3(h)(1)(C), and the issue is whether the compressed gas cylinders are therefore covered by Section 3(h)(1)(C) even though they were not specifically shown to be used in mining.

[5] MSHA Inspector Bauman testified without contradiction that the following things were in the shop when he inspected it: the two compressed gas cylinders in question; a workbench; a fuel tank; some sizing screens; an angle iron; battery chargers; a band saw; nuts and bolts; a drill press; a Miller welder; a waste oil tank; lube tanks; an air compressor; filters; and two CAT loaders. Tr. 43-44.

structure itself but also all of the things in the structure that enable it to perform its function or to serve its end.

The Secretary's interpretation is also supported by the fact that Section 3(h)(1)(C) uses both the term "structures" and the term "facilities." Because it treats the term "facilities" as covering something more than the term "structures" – that is, as covering all of the things in a structure – the Secretary's interpretation complies with the principle that the words in a statute are to be interpreted in a way that avoids making them "meaningless" or "redundant." *Commodity Futures Trading Comm'n v. Worth Bullion Group, Inc.*, 717 F.3d 545, 550 (7th Cir. 2013); *Scherr v. Marriott International, Inc.,* 703 F.3d 1069, 1077 (7th Cir. 2013). Because it gives the term "facilities" no meaning, the operator's interpretation violates that principle.

The Secretary recognizes that in addition to using the term "facilities," Section 3(h)(1)(C) uses the term "equipment." The term "equipment," however, can be and has been applied to things that are not in a "facility." *See State of Alaska, Department of Transportation*, 36 FMSHRC 2642, 2647-48 (2014) (applying the term to freestanding screens, trucks, and conveyors); *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (2000) (applying the term to a freestanding dragline). Because the term "equipment" covers more than the term "facilities," the Secretary's interpretation does not treat the two terms as "redundant"; it treats them as "complementary." *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980).

In addition, the Secretary's interpretation is supported by the structure and purpose of the Mine Act as a whole. Section 3(g) of the Mine Act, 30 U.S.C. § 802(g), defines the term "miner" as "any individual working in a coal or other mine." Because the shop structure itself is undisputedly a "mine," all of the individuals working in the shop are undisputedly "miners." Accordingly, interpreting Section 3(h)(1)(C) as covering all of the things in the shop promotes the paramount purpose of the Mine Act – protecting miners. See Section 2 of the Act, 30 U.S.C. § 801.

The foregoing point is perfectly illustrated by the facts of this case. MSHA Inspector Bauman testified without contradiction that the compressed gas cylinders, which were located between two loaders, were unsecured and could have tipped over. Bauman testified that if the cylinders were tipped over, and if the caps on the cylinders were knocked off, each of the cylinders, which were four feet tall and were filled with highly pressurized gas, could "turn into a missile." Tr. 25-31, 43-44. The fact that the cylinders were not specifically shown to be used in mining does not detract from the reality that the cylinders posed a hazard to all of the miners in the shop.

Finally, the Secretary's interpretation promotes effective enforcement of and compliance with the Mine Act. As already explained, the compressed gas cylinders were located in a shop that contained numerous things that were used in mining; indeed, they were located between two loaders. Tr. 43-44. If the determination whether each of the things in the shop is covered by the Mine Act

and MSHA standards depended on an item-specific analysis of whether that thing is used in mining, the result would be a patchwork enforcement and compliance system in which MSHA inspectors, miners, and the mine operator itself could not efficiently and definitively determine whether any particular thing is covered by the Mine Act or by some other scheme. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 328 (1943) (rejecting an interpretation that would result in a confusing "double system" of state and federal review); *Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin.*, 603 F.3d 365, 382 (7th Cir. 2010) (rejecting an interpretation that would produce the "odd result" of a "strange" and "inconsistent" "remedial patchwork" consisting of two different remedial schemes), *cert. denied*, 563 U.S. 969 (2011); *Johnson v. Collins Entertainment Co.,* 199 F.3d 710, 723 (4th Cir. 1999) (rejecting an interpretation that would threaten the creation of a "patchwork of inconsistent enforcement efforts" by state and federal authorities). Because the Secretary's interpretation avoids such a confusing patchwork system, it promotes the effectuation of the Mine Act and the protection of miners.[6]

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[6] Section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1), provides that if no federal agency other than OSHA exercises statutory authority to regulate the working conditions of employees performing employment in a workplace, OSHA shall exercise such authority. In this case, the operator's interpretation of Section 3(h)(1)(C) of the Mine Act would result in a scenario in which, for example, MSHA inspectors would inspect and regulate the loaders in the shop and OSHA inspectors would inspect and regulate the compressed air cylinders between the loaders. Such a scenario would not only be inconsistent with effective enforcement and compliance; it would also be inconsistent with case law interpreting Section 4(b)(1) of the OSH Act. *See Reich v. Muth*, 34 F.3d 240, 244 (4th Cir. 1994) (although both OSHA and another agency may exercise authority in

II

The Operator Had Fair Notice That 30 C.F.R. § 56.12018, Which States That "[P]rincipal Power Switches Shall Be Labeled To Show Which Units They Control . . . ," Applies To A Principal Power Switch That Controls A Single Unit.

A. Standard of Review and Applicable Principles

The factual findings of the Commission – which in this case are the findings of the administrative law judge – are reviewed under the substantial evidence standard of review. *Peabody Midwest Mining*, 762 F.3d at 614. This Court reviews a party's claim that it was denied fair notice of what conduct a statutory or regulatory provision proscribes de novo. *United States v. Kahn*, 771 F.3d 367, 375 (7th Cir. 2014).

The District of Columbia Circuit has summarized the principles pertaining to fair notice as follows:

> In order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The courts have recognized, however, that "specific regulations cannot begin to cover all of the infinite variety of ... conditions which employees must face," and that "[b]y requiring regulations to be too specific [courts] would be opening up large loopholes allowing conduct which should be regulated to escape regulation." *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 730 (6th Cir. 1980); accord Grayned, 408 U.S. at 110 (indicating that regulations need not achieve "mathematical certainty" or "meticulous specificity," and may instead embody "flexibility and reasonable breadth" (internal quotations

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a situation involving multiple workforces, OSHA's authority is displaced "where the factual situation involves otherwise overlapping regulation of a single workplace and a single workforce"; in the case of a single workforce, "multiple points of regulatory authority can only confuse employers attempting faithfully to comply with their requirements").

> omitted)). Accordingly, regulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.

Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (selected citations omitted). *Accord Mainline Rock & Ballast, Inc. v. Secretary of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999); *Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1083-84 (10th Cir. 1998); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1182-83 (9th Cir. 1998). "Courts evaluate vagueness challenges in view of the facts of a particular case." *Kahn*, 771 F.3d at 375. Due process "does not demand 'perfect clarity and precise guidance,'" and the Constitution tolerates a greater degree of vagueness in enactments that impose civil penalties rather than criminal penalties. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 519-20 (7th Cir. 2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).[7]

B. The Present Case

The provision at issue in the present case, 30 C.F.R. § 56.12018, states in pertinent part that "[p]rincipal power switches shall be labeled to show which units they control . . . ." The operator claims that it did not have fair notice that Section

[7] The Commission also applies the fair notice requirement to the Secretary's interpretations of MSHA standards. *See BHP Minerals Int'l, Inc.,* 18 FMSHRC 1342, 1344-46 (1996), relied on by the operator, Pet. Br. at 9-10.

56.12018 applies to a principal power switch that controls a single unit. Pet. Br. at 8-12. The operator's claim should be rejected for three reasons.[8]

First, the operator's claim should be rejected because it is inconsistent both with a fundamental rule of federal statutory interpretation and with common usage. The Dictionary Act states that, unless the context indicates otherwise, "words importing the singular include and apply to several . . . things" and "words importing the plural include the singular," 1 U.S.C. § 1 – and that rule "'is simply a matter of common sense and everyday linguistic experience[.]'" *Federal Deposit Insurance Corp. v. RBS Securities Inc.,* 798 F.3d 244, 258 (5th Cir. 2015) (quoting

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[8] Some statements in the operator's brief could be construed as suggesting an argument that the Secretary's interpretation of Section 56.12018 should be rejected on the merits. Pet. Br. at 8-12. The operator states, however, that the judge's interpretation (that is, the Secretary's interpretation) "'may' be reasonable" and could be adopted by a "person[] of common intelligence" (*id.* at 10-11) (quotation marks in original) – a statement that, under applicable case law, amounts to a concession that the Secretary's interpretation is entitled to acceptance on the merits. *See Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2010) (an agency's interpretation of a regulation is entitled to acceptance as long as it is "a reasonable interpretation" and is not "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Accordingly, the Secretary construes the operator's brief as arguing that the operator did not have fair notice of the Secretary's interpretation.

If the Court construes the operator's brief as arguing that the Secretary's interpretation should be rejected on the merits, the Court should reject such an argument because, as just observed, the operator concedes that the Secretary's interpretation is reasonable and because, if the Secretary's interpretation satisfies the stricter requirements for fair notice, and it does, it a fortiori satisfies the less strict requirements for deference. *See Suburban Air Freight, Inc. v. TSA*, 716 F.3d 679, 683-84 (D.C. Cir. 2013) (recognizing that an agency's interpretation may satisfy the requirements for deference but fail to satisfy the requirements for fair notice); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 221-27 (4th Cir. 1997) (same), *cert. denied*, 524 U.S. 952 (1998); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156-57 (D.C. Cir. 1986) (same); *Island Creek Coal Co.,* 20 FMSHRC 14, 24 (1998) (same).

Antonin Scalia & Robert A. Garner, *Reading Law: The Interpretation of Legal Texts* 129-30 (2012)), *pet. for cert. pending* (No. 15-783). Any reasonably prudent person applying the foregoing rule – and, even more important, applying common usage – would understand that Section 56.12018 applies both to a principle power switch that controls multiple units and to a principal power switch that controls a single unit. *See St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 520 (8th Cir. 1999) (the fair notice requirement "'does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding'") (quoting *Sproles v. Binford*, 286 U.S. 374, 393 (1932)). This is especially so because, as the judge recognized (ALJD at 17 n.21), the fact that the standard states the term "units" in the plural is merely a "grammatical result" of the fact that the standard states the term "principal power switches" in the plural.

Second, the operator's claim should be rejected because it is inconsistent with common sense. The self-evident purpose of Section 56.12018 is to protect miners by ensuring that everyone can tell whether a particular unit is energized or deenergized and can deenergize the unit when safety requires it. *See* Tr. 243, 259 (Inspector Crum's testimony). No reasonably prudent person would think that the standard is intended to protect miners when a principal power switch controls the energy to multiple units but not to protect miners when a principal power switch controls the energy to a single unit. *See Thomas v. Davis*, 192 F.3d 445, 456 (4th Cir. 1999) (the fair notice requirement "'is not an inexorable command to override common sense and evident statutory purpose,'" and fair notice is provided if the

words of the provision "'are given their fair meaning in accord with the manifest intent of the lawmakers'") (quoting *United States v. Brown*, 333 U.S. 18, 26 (1948)).

Third, the operator's claim should be rejected because it is inconsistent with the enforcement and adjudication history of Section 56.12018. In reported cases over the years, both the Secretary and Commission judges have applied the standard to principal power switches that controlled a single unit. *See Cobblestone, Ltd.*, 11 FMSHRC 997, 1005 (1989) (ALJ); *Walsenburg Sand & Gravel Co.*, 12 FMSHRC 1093, 1102 (1990) (ALJ); *Omya Arizona, a div. of Omya Inc.*, 33 FMSHRC 2738, 2739-40 (2011) (ALJ). Counsel for the Secretary has found no case in which the Secretary or a Commission judge departed from that approach; indeed, counsel has found no case in which an operator even disputed that approach. Such an enforcement and adjudication history supports a finding of fair notice. *See Walker Stone*, 156 F.3d at 1084 (fair notice was provided where, inter alia, the interpretation in question had been espoused by the Secretary and adopted by a FMSHRC judge in a previous case); *Texas Eastern Products Pipeline Co. v. OSHRC,* 827 F.2d 46, 50 (7th Cir. 1987) (fair notice was provided where, inter alia, the interpretation in question had been expressed by both the Secretary and an OSHRC judge in a previous case).

In support of its fair notice claim, the operator cites testimony by Inspector Crum and a decision by a Commission judge that assertedly show "indefiniteness" and "uncertainty" on the Secretary's part. Pet. Br. at 11-12. The cited testimony and decision, however, do not pertain to the operator's claim that it did not have fair

notice that Section 56.12018 applies to a principal power switch that controls a single unit. Rather, they pertain to the fundamentally different question of what constitutes a "principal power switch." Tr. 251-54; *Beverly Materials, LLC*, 35 FMSHRC 88, 95-97 (2013). As to that question, there can be no fair notice claim in this case: the power switch at issue was a "principle power switch" because it undisputedly was the *only* power switch that controlled the unit at issue. ALJD at 17; Tr. 258-59 (Crum's testimony). *See United States v. Idowu*, 520 F.3d 790, 795 (7th Cir. 2008) (a party making a fair notice claim must show that the provision is vague "'as applied to the facts of the case at hand'") (quoting *United States v. Brierton*, 165 F.3d 1133, 1138-39 (7th Cir. 1999)).

CONCLUSION

For the foregoing reasons, the Court should deny Northern Illinois' petition for review and affirm the administrative law judge's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2016, I, Cheryl C. Blair-Kijewski, electronically filed the foregoing response brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the Court's CM/ECF Electronic Filing System.

I certify that all participants in this case are represented by attorneys who are registered CM/ECF users with this Court and that service on such participants will be accomplished by CM/ECF system service on the following:

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