PLAINTIFF'S EXHIBIT
DUP-1282

Asbestos

INDUSTRIAL UNION DEPARTMENT
AFL-CIO

I. W. ABEL, PRESIDENT

THE IUD POSITION ON ECONOMIC FEASIBILITY

(abstracted from the Reply Brief For Petitioners for review of the Secretary of Labor's standard for exposure to asbestos dust: (IUD, AFL-CIO et al vs. Hodgson)

Section 6(b)(5) of The Occupational Safety and Health Act of 1970 on its face contains no express reference to the relevance of economic considerations in the Secretary's standard setting function. There have been statutes where Congress provided in express terms that economic costs should be taken into account in promulgating standards (National Emission Standard Act of 1955, 46 U.S.C. s 1857 f-1(a) -- the Secretary must promulgate standards concerning motor vehicle emissions "giving appropriate consideration to technological feasibility and economic costs;" Water Pollution Control Act, 33 U.S.C. ss1160(c)(5) and 1163(b)(1) -- due consideration must be given to the "economic feasibility" and "economic costs.")

OSHA, however, provides only that the Secretary shall set the standard "which most adequately assures, <u>to the extent feasible</u>, on the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." From this reference to "feasibility,"

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the argument is made that Congress necessarily intended that, in addition to technological capabilities, economic costs were also relevant in setting standards.

In support of this position, reliance is placed on the dictionary definition of "feasible" and the legislative history of OSHA. With respect to the former, the dictionary provides little comfort to the proponents of this interpretation. For the redesign of a plant (e.g.) is plainly something which is feasible -- "capable of being done or carried out" -- if adequate technology is available, even though it may involve a major financial expenditure for the company or industry concerned.

The legislative history -- far from supporting the argument -- strongly militates against the relevance of economic considerations. The legislative history, and most particularly the concerns voiced by Senator Dominick (Colo.) and others whose efforts led Senator Javits (N.Y.) to insert the "to the extent feasible" language in the bill, ineluctably shows that Congress intended only to avoid statutory language "which might be interpreted to require absolute health and safety in all cases, regardless of feasibility. . . ." (Sen. Javits' explanation of his amendment, Leg. Hist. 196) (emphasis added). In turn, it is significant that the legislative concern centered about the fact that "absolute" language in the statute could be taken to mean that the Secretary had to promulgate a standard which guaranteed or warranted that no injuries would occur. Of course, this would ignore the practical realities that notwithstanding the most comprehensive and rigorous standards some injuries would occur incident to the inherent hazards of certain jobs. Precisely because of this, Congress inserted the "to the extent feasible" provision. But there is nothing in the legislative history even to suggest that in doing so Congress desired or intended to accommodate employer economic problems -- real or imagined.

We thus have a situation where the legislative history which gave rise to the "feasibility" limitation did not relate to economic or cost considerations. Insofar as the legislative history contains any direct references to economic costs, it supports the conclusion that it is not an applicable consideration. Thus, Senator Eagleton (D.-Mo.), in endorsing OSHA, commented (Leg. Hist. 1150-1151):

> "The costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business. Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite."

Likewise, Senator Yarborough (D. - Tex.) stated (Leg. Hist. 444):

> "This is legislation that has been needed in this country for many years. We have no national comprehensive occupational health and safety bill. If a man in a manufacturing plant in one State were to put into effect safety measures to protect his workers and across the State line that practice was not followed, theoretically there would be a cheaper operational base. . . .

> We need a Federal statute, not to try to federalize things, but to equalize the cost in one industry vis-a-vis another. We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America."

To accept the "economics" position also would be inconsistent with the overall structure of the Act.

Section 6(c)(1), OSHA, empowers the Secretary to promulgate emergency temporary standards which take effect immediately upon publication in the Federal Register; the only preconditions for exercising this power is a determination by the Secretary "(A) that employees are exposed to grave danger from exposure to substances or agents. . . toxic or physically harmful. . . and (B) that such emergency standard is necessary to protect employees from such danger." Consideration of economic costs play no role in the Secretary's determination concerning the precise emergency temporary standard to be promulgated. In this connection, it should be emphasized that the Secretary did promulgate such an emergency standard on December 27, 1971 covering exposure to asbestos dust; further, in lowering the acceptable level of exposure from 12 to 5 fibers, the Secretary relied exclusively on his determination that the two above-quoted statutory prerequisites had been satisfied. Significantly, while the impact of immediate compliance with this new more stringent standard undoubtedly meant increased costs to many employers in the asbestos industry, the Secretary's statement of reasons contained no reference to such economic considerations.

Section 28, OSHA, amends the Small Business Act to authorize loans:

> "to assist any small business concern in effecting additions to or alterations in the equipment, facilities or methods of operations of such business in order to comply with the applicable standards promulgated pursuant to Section 6 (OSHA). . ., if the Administrator (under SBA) determines that such concern is likely to suffer substantial economic injury without assistance under this paragraph."

The logical conclusion to be drawn from this provision is that Congress did not consider the costs which would be borne by small businesses a valid basis for imposing a less stringent standard but, instead, offered the alternative of the above-quoted loan provision as a method for offsetting the economic impact of such stringent standards.

Further, Section 6(b)(6)(a), sets forth a procedure whereby an individual employer or employers may obtain a temporary order granting a variance from a standard under certain limited circumstances. The legislative history makes clear that "economic hardship is not to be a consideration for the qualification for a temporary extension order" (H. Rept. No. 91-1765, p. 35; Leg. Hist. 1188, 1201). The Government has acknowledged in its Brief on the asbestos case, p. 40) that "it is doubtful that the Secretary may even consider economic factors in granting any variance under Section 6(b)(6)A." An intolerable anomaly would result if the Secretary could take into consideration economic cost factors in promulgating a standard, but he could not do so when an employer thereafter seeks a temporary order granting a variance from that standard.

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Finally, we note the position of the Secretary of Labor in proceedings to enforce safety and health standards before the Occupational Safety and Health Review Commission. Thus, in Hodgson v. American Smelting & Refining Co., OSHRC Docket No. 10, the Secretary cited the employer for a serious violation in allowing airborne inorganic lead concentrations to exist at its Omaha, Nebr. smelter which constituted a recognized hazard likely to cause death or serious physical harm to affected employees. The employer, as an interim measure, provided respirators to the affected employees. It contended that the installation of engineering controls could only be achieved at an estimated cost of 20 million dollars and, accordingly, urged that it should not be compelled to take such drastic affirmative action.

The Secretary's brief to the OSHRC hearing examiner (dated January 3, 1972) is of particular relevance here. The Secretary responded (Brief, pp.26-28) to the employer's above-stated argument as follows:

> "Even if the 20 million dollar figure were correct and economics were a factor in the consideration of feasibility, the cost of any potential modifications means nothing by itself. Respondent(t) submitted no evidence whatever as to the financial impact on its operations of the cost of necessary engineering modifications on or prior to June 30, 1971. If economics is an issue, cost by itself is only half the question. The other half of the question would be the financial impact of a cost of 20 million dollars on the employer, as to which there was no evidence whatever. . . We submit that whatever respondent's attitude might have been previous to the passage of the Act, the necessary provisions for the safety and health of employees is now, under that Act, as necessary a cost of doing business as expenditures which may result in increased production or profits, and it should be considered as such. . . .

"We submit that engineering controls afford the best protection to employees, and abatement by engineering controls should be required in all instances to the extent that such engineering controls are feasible. It is our further position that where there is sufficient engineering ability to accomplish the control the question of economics of implementation of the controls will not be a factor unless it involves major reconstruction of a plant which would seriously jeopardize the financial condition of the company and then only if there were feasible alternative administrative controls or protection devices available."

It is thus self-evident that in assessing "feasibility" the Secretary's express reluctance in ASARCO, for example, to attach any significance to economic considerations -- except in the most extreme circumstances -- stands in marked contrast to the position that as a general principle economic considerations are relevant to standard setting.

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June 27, 1973