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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. HOPE 78-722-P A.O. No. 46-01398-02020F
v.	Shannon Branch UG Mine
ALLIED CHEMICAL CORP., RESPONDENT	

DECISION

Appearances: William Moran, Trial Attorney, U.S. Department of Labor, Ailington, Virginia, for the petitioner; Lee F. Feinberg and William T. Brotherton III, Charleston, West Virginia, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent on August 28, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged mine safety violation issued pursuant to the 1969 Federal Coal Mine Health and Safety Act. Respondent filed a timely answer in the proceeding, asserted several factual and legal defenses, and a hearing was held in Charleston, West Virginia, on January 17, 1979. The parties filed proposed findings and conclusions, and the arguments contained therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation, based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Sections 109(a)(1) and (a)(3) of the 1969 Act, 30 U.S.C. 819(a)(1) and (a)(3), now section 110(i) of the 1977 Ac

Discussion

During the evening shift of September 8, 1977, Thomas M. Williams, motorman on the No. 20 locomotive, and Larry Gibson, the brakeman, were operating the locomotive while hauling 28 trips of loaded mine cars underground in the mine in question. During the course of their travel, the locomotive trolley harp assembly which supplies power to the locomotive became disengaged and as a result of that loss of power, Mr. Williams was unable to stop or otherwise control the locomotive and it subsequently derailed. Mr. Gibson jumped from the moving locomotive before it was derailed and was killed when he apparently struck one of the ribs at the point where he jumped. Mr. Williams stayed with the locomotive for approximately 1,000 feet further from the point where Mr. Gibson had jumped, and after being unable to stop the locomotive, he too jumped into a wide entry prior to the derailment and sustained injuries.

The alleged violation and applicable mandatory safety standard in issue in this proceeding are as follows:

Section 104(a) Order Nos. 1 HS and 1 GLS, dated September 9, 1977, cites a violation of 30 CFR 75.1404, and states as follows:

> The pneumatic braking system on the No. 20 locomotive being used for coal haulage purposes was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks and could not apply uniform frictional pressure on the braking surface. The linkage for the manual brake was disconnected completely. 75.1404.

The orders were terminated on September 16, 1977, after abatement of the conditions cited, and the notice of termination states: "The required conditions to be corrected on No. 20 locomotive were corrected."

Testimony and Evidence Adduced by Petitioner

MSHA inspector James E. Kaylor testified that he has had experience in visually inspecting track haulage equipment, including locomotives, as part of his duties, and that he has an understanding as to how the locomotive braking systems operate. He can tell when a braking system is functioning properly and when it is not, can identify the parts of a braking system, and can determine whether a braking system is properly aligned and adjusted. He went to the mine on September 8, 1977, upon instructions from his supervisor to conduct a fatal accident investigation. He described what took place during the course of his investigation, including what he found at the scene of the locomotive derailment and the point where the accident victim, Brakeman Gibson, jumped from the locomotive and was killed (Tr. 4-16).

Mr. Kaylor testified that at the time of the accident, the locomotive was pulling 27 mine cars, each of which weighs 4 tons, with a load having a capacity of 15 tons each. Company policy at the time limited the trips to 25 mine cars. The locomotive derailed onto a derail track, but did not overturn. It simply left the rails and slid on the rails and sustained no visible damage. The day after the accident, the respondent was allowed to remove the locomotive and cars from the mine, but while it was still underground, he had an opportunity to visually examine the locomotive braking system and his visual examination revealed that the brake shoes were out of line with the wheel trucks and the flange on the brake shoe was wearing on the wheel flange. MSHA inspectors Gerald Smith and Junior Sizemore also observed the locomotive, conducted a more extensive examination, and they concurred in his evaluation that the brake shoes were not properly aligned. In his opinion, the derailment of the locomotive did not cause the braking system to become misaligned and unadjusted. The flange was worn practically off one end of some of the brake shoes. He saw no visual evidence of any brake skidding at the scene of the accident, and this indicated that the brakes or wheels were not frozen or applied. Three wheel skids used as an additional braking device to slow the locomotive down were found at the scene and they were apparently dislodged from their normal position under the wheels in the process of derailment (Tr. 16-25).

Mr. Kaylor identified Exhibit P-10 as a locomotive inspection report dated June 18, 1977, concerning the No. 20 locomotive, and he indicated that it was obtained by MSHA Electrical Inspector Sizemore during his review of company records which are required to be maintained, and that Mr. Sizemore advised him that he could find no other reports or files covering the period June 18, 1977, to the date of

the accident. Mr. Kaylor did not know whether the No. 20 locomotive was inspected during this period of time. Section 75.512 of the mandatory safety standards requires that reports be maintained of weekly inspections of electrical equipment (Tr. 25-37, 44).

Mr. Kaylor testified that during his investigation, he examined the trolley wire, could see no lubrication applied, and he also discovered the trolley pole harp assembly near the top of 18 Hill going down the hill at the 2 Right parallel where the track enters a side track. The trolley harp connects with the trolley wire and serves as a means of supplying power to the locomotive. The dislocation of the harp assembly from the trolley pole results in a loss of power, and this in turn results in a loss of the braking systems because the air compressor shuts off and the only air remaining is that left in the air tanks (Tr. 12-13, 38-39).

Upon observation of the locomotive controls at the scene of the accident, Inspector Kaylor observed the power tram controller in the wide-open position, the sand lever open, and the pneumatic brake lever open, and with these controls open, air pressure will be lost, but the sander would provide additional traction and increased braking ability. In addition, the brake lever was engaged (Tr. 39-43).

On cross-examination, Mr. Kaylor testified as to his training and experience in conducting mine inspections and accident investigations, and while he has had no formal training regarding the actual working of brake shoes, he has observed numerous brake shoes on locomotives and has gained his knowledge through experience. He explained and detailed his understanding of how a locomotive brake operates. He also described a brake shoe flauge, and indicated that the flange on the brake shoe in question was practically completely worn off the shoes which he observed. He observed all eight brake shoes on the locomotive underground and six of them had worn flanges and two appeared to be in good shape. The worn flanges resulted in the braking surface of the shoe not being applied to the full surface of the wheel. When he looked down inside the locomotive, the brake shoes were backed off the wheel due to the loss of air pressure and he could observe where the flanges were worn, but he could not tell how much of the brake shoe surface was on the wheels when the brakes were applied. Some part of the flanges on each of the six shoes was worn away, but he conducted no tests to determine how much of these brake shoe surfaces would touch the wheel and his examination was visual. However, he believed that if only part of the brake shoe is touching the wheel, then that brake shoe, which was designed for the locomotive, would not be doing the job that it was designed to do (Tr. 45-59).

Mr. Kaylor stated that the distances and grades described in his accident report were obtained by scaling from a mine map, but he could not recall whether he did the scaling. The locomotive was still upright after it derailed, had no external damage, and he concluded

that Mr. Gibson possibly could have suffered a bruise or two had he ridden the locomotive and not jumped. He also indicated that as a general rule, it is far safer to ride the motor rather than to jump. His investigation revealed that the trolley pole harp probably caught in a junction point where two wires came together. The harp was in good condition, and he did not issue a violation for it not being lubricated. He was not sure whether any other inspector did, and indicated that if it is not in his report, then no violation was issued. The 4,000-foot distance mentioned in the report was derived from the mine map and the overall 5-percent grade for that distance was supplied by the respondent. He also testified as to the position of the controls as he found them, and described the dynamic and pneumatic braking systems in terms of efficiency and how they are applied and used. He agreed that section 75.512 does not require that a locomotive be inspected during a vacation period or a strike and it is not a violation to leave it uninspected during that time (Tr. 60-78).

On redirect, Mr. Kaylor testified that a misaligned brake shoe is not as efficient as an aligned one, that the manufacturer has certain requirements as to how to install brake shoes, and that alignment is important to braking efficiency. Based on his experience, he believed that with the brake shoes misaligned as they were, the braking effect is not what it would be if they were properly aligned. The brake shoe flange is designed to hold the wheel or shoe in line and is not designed for braking or stopping the locomotive. The size of any trip is not governed by any regulation, but is fixed by company policy with safety in mind and after considering the size of the trams, motors, and the graders involved. Although only three skids were found, it is just as likely that four were used. He was not sure whether trolley wire lubrication is required by regulation and believed that such lubrication with a graphite base tends to keep the trolley harp in contact with the trolley wire (Tr. 80-a - 80-e).

In response to bench questions, Mr. Kaylor stated that being out of line, the brake shoes were not wearing the way they were designed to wear. Normally, the flange of the shoe is supposed to ride over the wheel flange, but in this case, it was riding on top of it. The condition was not a normal wear and tear situation (Tr. 80-85). He did not know how much surface of the worn brake shoes touched the wheels, and the flanges were worn in parts and the entire flanges were not worn (Tr. 80-84).

MSHA electrical inspector Gerald F. Smith testified as to his mining experience and training, and he assisted in the accident investigation conducted at the mine on September 9, 1977. He is familiar with braking systems and how they operate, he can identify a properly working system from one which is not properly working, and he knows how to test such systems to determine whether they are properly working. Upon visual observation of the locomotive at the scene of the accident underground, with the guards removed, he determined that the

brake shoes were not aligned with the trucks of the locomotive. He is familiar with the No. 20 locomotive braking system and indicated that it has a dynamic or electric brake which acts as a speed reducer similar to down-shifting an automobile. The locomotive had a dual braking system, namely, the dynamic brake and the pneumatic, or air brakes. He described the pneumatic braking operation, and also indicated that the locomotive also had a manual or mechanical brake, but it was disconnected and it is used as a parking brake (Tr. 84-89).

Mr. Smith identified Exhibit P-11 as a sketch representing a properly and improperly aligned brake shoe, but the sketch is not intended to depict what the actual brake shoes which he observed looked like. From his observations concerning the wear on the flange, he assumed that it was making contact with the wheel surface, but no pictures or actual sketches were made and the wheels were not dismantled. The basis for his determination that the brakes were improperly aligned was the fact that there was excessive wear on the flange and this led him to conclude that the brakes were misaligned (Tr. 90-95).

Mr. Smith stated that the manual brake installed on the locomotive was required to be maintained as a matter of MSHA policy and guidelines, and once installed, it had to be maintained operative. The locomotive had a dual braking system which complied with section 75.1404 (Tr. 98-99). After the locomotive was removed to the surface and brought to the main shop, it was tested again. He observed the locomotive again from a pit which allowed him to view it from the bottom. He observed that two straps which serve to tie or hold the brake ring in position, were broken, two were bent, and two were missing. Power was put on the locomotive and the pneumatic braking system was inoperative in that the brake shoes did not set. When this occurred, company officials immediately began to find out why the system was not working (Tr. 103-105).

Mr. Smith stated that in issuing the section 104(a) order, he did not consider the number of car trips involved, or the grade of travel when he made the judgment that the brakes were inadequate or that the faulty brake system would not stop the locomotives. He simply considered the condition of the equipment and assuming he walked into a mine and found the same locomotive with the same brake condition, he would again conclude that they would not stop the locomotive. If the brake shoes did not apply uniformly to the locomotive wheels when pressure was applied, then he would conclude that it did not have adequate brakes. He assumed the flanges of the brake shoes were coming in contact with the wheels due to the wearing of the flanges and the flanges are not designed to be used as braking surfaces (Tr. 109-113).

Mr. Smith stated that no tests were conducted on any of the locomotive wheels to determine how much of the braking surface was present or whether the flange presented a problem (Tr. 114). He

issued the 104(a) order because he believed the locomotive braking system was inadequate to control the locomotive. It is adequate only if properly maintained as designed (Tr. 118). Mr. Smith stated that when the locomotive was tested outside the mine, the pneumatic brakes were set, power was put on the locomotive, the locomotive was put in forward motion, but when the brakes were applied, they did not stop the locomotive (Tr. 119-121).

On cross-examination, Mr. Smith stated that mine management made no response when the brakes failed to hold during the test and he could not recall Mr. Halsey telling him that the brake shoes would not touch the wheels because the locomotive had been dragged through mud, and he knew nothing about how it was brought to the surface. Mr. Halsey asked to put the power on so that he could show that the brakes would hold. Mr. Halsey also set the brake and then put the locomotive in motion again and the brakes failed to hold again. The tests were conducted on a Saturday, September 10, and when he returned on Monday, the brake shoes were taken off the locomotive (Tr. 121-125).

Mr. Smith testified that he did not physically attempt to determine whether the misaligned brake shoes were touching on the locomotive wheels and he made his determination by visual observation. No one ever engaged the brakes in order to observe whether the shoes were contacting the wheels. On two of the six brake shoes, the flanges were severely worn, and the remaining four were out of adjustment to the point where the flanges were making contact instead of the surface of the shoe. The mechanical parking brake has nothing to do with the dual braking system, and he had no quarrel with the dynamic brakes. The violation centers on the fact that the pneumatic brake shoes at some times apparently would not have contacted the wheels. He did not know whether the bent and missing straps came off in the wreck. Based on the flange conditions, he believed that the brake shoes did not touch the wheels on six of the eight wheels (Tr. 129-140).

On redirect, Mr. Smith reiterated that there were eight locomotive wheels, and eight brake shoes, six of which were not properly aligned and showed wear. Two of the eight shoes appeared to have been properly aligned. He did not watch the shoes actually being applied to the wheels and he confirmed his opinion that the shoes were not capable of stopping the locomotive and were not properly aligned by the two tests conducted on the surface by Mr. Halsey (Tr. 142-144).

Inspector Kaylor was recalled by MSHA and testified as to the orders he issued in this case, and he identified the report of investigation he compiled. He believed the violation was serious, and that the respondent should have been aware of the brake conditions through the weekly examinations and reports. The brakes can be readily inspected visually to determine whether they are misaligned. The condition cited was abated in good faith (Tr. 154-162).

Mr. Smith stated that the fact that no additional inspection reports were found does not indicate that the brakes were not inspected for alignment (Tr. 166).

Testimony and Evidence Adduced by Respondent

Buddy E. Raines, general superintendent of the Shannon Branch Mine, testified that he was aware of the accident in question and he described the route taken by the locomotive in question on the day of the accident, the loads of coal it was pulling, and Locomotive Operator Williams' activities that day based on the accident investigation report. He also described the general terrain and the track grades over the area traveled by the locomotive, and described the area from a mine map (Exh. R-1). He testified that from the 2 North parallel area, where the locomotive harp was lost, to the point of the derailment, the average travel grade is 1 percent descending downhill, but the area also has uphill grades and steeper grades (Tr. 203-216).

Mr. Raines testified that mine policy, established in 1972, fixed the limit that a locomotive could transport to 25 mine cars of coal. Prior to that time, there was competition among the motormen who often pulled more than 25, and as many as 30, and 25 was fixed as the limit after consultation with the union committeemen and motormen who decided that 25 was a "comfortable limit," and the rotary dump track can only handle 19 cars, with room enough to store the remaining six cars on a side track entry. He has observed locomotives traveling underground and normal speed traveling downhill would be about 10 miles per hour and any speed over 10 would be fast. The speed in the 21 left area would average 5 to 7 miles per hour (Tr. 216-220).

Mr. Raines testified that the company was concerned about whether the 25-car load limit had been exceeded on the day in question. He participated in the company accident investigation and did not know what happened to the brake shoes in question. The map previously referred to, was prepared for the purpose of conducting some tests related to the accident. According to his calculations, the distance from where the harp came off to the point of the derailment where the locomotive came to a stop, is 4,230 feet, and the distance from the top of 18 left hill to where the locomotive stopped, is 7,030 feet (Tr. 220-228).

Safety was one of the factors considered in limiting the loads to 25 mine cars. There is no company policy concerning proper locomotive speed, speed limits are not posted in the mine, and a locomotive does not have a speedometer. Locomotive destinations and movements are controlled by the dispatcher, and he does not control speed, but does control various locomotive checkpoints (Tr. 228-230).

On cross-examination, Mr. Raines testified that state law requires that a locomotive travel no faster than track conditions permit and actual speed is left to the judgment and experience of the motormen. The locomotive was pulling 27 mine cars at the time of the accident (Tr. 232).

On redirect, Mr. Raines stated that the statement attributed to Mr. Waters to the effect that Locomotive Operator Williams could handle 27 trips is found in MSHA's accident report, but did not mention that Mr. Waters told everyone that he believed that his order to limit it to 25 trips was obeyed. The speed of a locomotive depends on a number of factors, including the number of trips, sand, brakes, slope, skids, and the weight of the motor, and the number of cars pulled is not the sole factor in determining stopping distance or speed. Locomotive speed limits are not regulated by statute or safety regulations and he knows of no mines which post such speed limits (Tr. 234-235).

In response to bench questions, Mr. Raines stated that no one calculated the speed of the locomotive at the time of the accident (Tr. 236).

William E. Funsch is employed by the General Electric Company, the manufacturer of Locomotive No. 20, the locomotive involved in the accident. He is a graduate of the University of Oklahoma, has 28 years' experience in pneumatics, and has designed and tested industrial and mining locomotive braking systems. He is familiar with the No. 20 locomotive braking system and it has four independent braking systems, namely, a dynamic brake, a straight service air brake, a truck (wheel) emergency brake, and a parking brake. The parking brake is also referred to as a mechanical brake. The auxiliary braking system is a completely independent system installed as an additional feature to cover a weak link in the system, namely, an air hose that goes between the main locomotive frame and the trucks which swivel. The hose is subject to abrasions, and should it break or become severed, the emergency system is designed to automatically supply air to the four brake cylinders (Tr. 240-242).

Mr. Funsch testified that the No. 20 locomotive has eight wheels, each with a brake shoe, and four braking systems. He calculated the stopping distance of the locomotive, and based on (1) a 1-degree slope, (2) speed of 15 miles per hour, which he considers excessively fast, (3) the weight of the locomotive, (4) the weight of 27 loaded mine cars, and (5) a factor of sliding friction caused by the use of wheel skids, he calculated that it would take 57.7 seconds, or roughly 1 minute, for the train to stop over a distance of 589.3 feet. Assuming sufficient air pressure is in the braking systems, Mr. Funsch testified that the No. 20 locomotive, with 27 loaded cars, could have stopped within the 4,230 feet, which is the distance from where the harp came off to the point of derailment, without any difficulty, and that distance was seven or eight times the distance required to bring the train to a stop (Tr. 244-246).

Mr. Funsch stated that the pneumatic brake system operates by supplying air from two main reservoirs, through a brake valve, to four brake cylinders which exert force on the brake shoe, pushing it against the wheel, thereby generating friction, which retards the rotation of the wheel, thus slowing the train down (Tr. 247).

On cross-examination, Mr. Funsch testified that he sells locomotives to various coal mine operators, including the respondent. He has never seen the No. 20 locomotive, did not examine it after the accident, and has not seen the brake shoes or examined the braking system in question. His testimony is based on the plans and construction of the locomotive, including his underground mine experience, but he did not know whether the brake shoes in question were misaligned. The auxililary truck emergency braking system was designed as an integral part of the locomotive as a standard feature (Tr. 248-250).

Mr. Funsch stated that operating instructions come with the sale of a locomotive, including the operation of the braking system, and he explained the use of the emergency system. Assuming the brake shoes were improperly aligned or adjusted, this would affect the motion. However, a loose brake shoe hanger will wobble, but will seek the flange on the wheel and will center on the wheel and gross misalignment does not occur. The purpose of the wheel flange is to keep the shoe in line and to create more brake shoe area on the wheel. Using only the flange for the braking of the wheel creates a dangerous situation (Tr. 250-256).

Mr. Funsch stated that wetness, mud, or oil would have a great effect on the friction factor as applied to the brake surfaces and that an increase in the grade of travel would increase the distance required to stop the train. This stopping distance calculation did not take into account human error or panic in the operation of the locomotive. He was not paid to appear as a witness and his testimony is voluntary. However, he testified that his company has not sold a locomotive to the respondent since 1957, and he is not in the marketing of his company's business (Tr. 258-262).

On redirect, Mr. Funsch stated that the emergency truck brake is not used in the normal stopping of the pneumatic air brake system. The locomotive in question has a dual braking system within the meaning of section 75.1404, namely, the dynamic brake and the pneumatic brake. Referring to Exhibit P-11, Mr. Funsch stated that the small line on the diagram in the center of the wheel indicates that the brake shoe flange is riding on the wheel flange and is an unstable condition and will eventually wear down the brake shoe flange (Tr. 263-268).

Thomas M. Williams has been employed by respondent for 13 years and has 37 years' underground experience in the mining industry. He

was employed as a motorman on September 8, 1977, and had been employed in that capacity for 20 years. He was the operator of the No. 20 locomotive on the day of the accident, and Mr. Larry Gibson was assigned as the brakeman. Mr. Williams described his movements during the shift when the accident occurred. He performed a routine inspection of the locomotive, including checking the skids, trip light, fire extinguishers, and all the safety devices. After speaking with the dispatcher, he moved the locomotive and checked his sand supply and the brakes and they were in satisfactory condition (Tr. 272-277).

Mr. Williams testified that his job entails pulling loaded mine cars and picking up empties and he goes where the dispatcher tells him to. He described his route of travel on the day of the accident, and indicated that earlier in the shift, he had traveled to the area below 2 North parallel with 22 empty mine cars and had no difficulty stopping on Hill 18 and his electric brake and air brake were working satisfactorily. He picked up 11 loaded mine cars at 6 North and proceeded to 27 where he picked up 16 loads after dropping off the 11 car loads and his brakes were operating. He stopped the cars by means of sand and his air brake. He then recoupled the 11 car loads to the 16 which he had picked up and then proceeded to the 21 left junction where he stopped his load by means of sand or air brakes with no difficulty. While awaiting further instructions from the dispatcher, Mr. Gibson was setting four skids. Mr. Williams saw him set two next to the motor car and left with the other two. He assumed he set the other two, but could not see him due to the length of the cars. Upon receiving clearance from the dispatcher, he moved from the 21 left junction and proceeded on his trip. He passed the 18 Hill with no difficulty, using both electric and air brakes. As he started over the 18 Hill, he lost his trolley pole but put it back on the trolley wire and the trip was under control, and he used electric and air brakes and sand to control the trip down the 11-percent 100-foot grade past the 18 Hill (Tr. 277-288).

Mr. Williams lost his trolley pole again in the 2 North parallel section. The pole knocked his mine cap off his head. He then discovered that the pole harp was missing and he began using every available device to keep the motor under control, including sand and the dynamic and air brake, but could not control the trip. Due to the loss of the harp, he lost his air pressure and no additional pressure was building up. The only available air pressure was that which remained when the harp was lost and his pressure gauge indicated zero. Mr. Gibson jumped from the locomotive and he (Williams) jumped after locating a wide area in an entry (Tr. 288-293).

Mr. Williams testified that he had on previous occasions transported 27 or more car loads down the No. 18 Hill, and has hauled as many as 29 or 30 car loads with engines smaller than the No. 20 locomotive, and he had no trouble controlling those trips, and the accident in question is the first one he has experienced in his 37 years

of mining. The No. 20 locomotive is inspected every Thursday on the third shift, and he had authority to take it to the motor barn if he detected anything wrong while operating it (Tr. 293-295).

Mr. Williams testified that he took 27 trips on the day in question because he felt he could handle that many car loads. When he discovered the loss of air pressure, he did everything possible to slow down, but prior to the loss of air pressure, he was controlling the trip satisfactorily by using sand, and his electric and air brakes, and his trip was under control at all times prior to the losing of his harp and air pressure (Tr. 295-298).

On cross-examination, Mr. Williams testified that he considered himself to be a well-experienced motorman. He checked the brakes of the No. 20 locomotive and visually observed that the brakes were touching the wheels. He could not check the flanges because that requires the locomotive to be parked over a pit. It is possible for the brakes to malfunction sometime during a shift, even though a visual inspection indicates they are in working order. He has had no previous accidents involving the operation of locomotives prior to the accident in question. He had traveled to the motor barn in a westerly direction earlier in the evening, but could not recall whether he had any mine cars. He went to the barn to obtain a slide and normally would not take along a loaded trip of cars. He could not recall his speed at that time, but had the trip under control by using his air brakes (Tr. 299-307).

Mr. Williams believed that some 7 minutes transpired from the time he left 21 Left to the point where he jumped from the locomotive, and at least 5 minutes transpired from the point where he lost his trolley harp to the point where he jumped. Prior to his losing the harp, there was adequate air pressure when the trolley wire was in contact with the overhead wire (Tr. 308-311). He had 60 pounds of air pressure when he lost the harp (Tr. 313).

In response to questions from the bench, Mr. Williams testified that most of the grade starting at 2 North is downhill with some rise and fall. If a car were dropped at one end of the horizontal travelway from 4 South in a westerly direction toward 2 North, it would travel the entire distance to the other end by force of gravity. When his trip derailed, he was told 18 mine cars left the tracks. He never went back to view the scene and has not operated a locomotive since the accident. While he was not disciplined by the respondent, he was taken off the job as a motorman, but is still employed in another capacity (Tr. 313-318).

On redirect, Mr. Williams indicated that 50 pounds of air pressure is required to operate the locomotive. The motorman who operated the No. 20 locomotive prior to his shift did not indicate that he was experiencing any difficulties or that he was having trouble with the brake shoes (Tr. 318-320).

Steve Halsey, employed as an underground maintenance supervisor, was employed in that capacity at the time of the accident, and his job entailed servicing and inspecting locomotives, including work on locomotive brake systems. He knows how brake systems work and has worked on the No. 20 locomotive (Tr. 332-333). He stated that the emergency or auxiliary brake is a different braking system from the air brake system, and the parking or mechanical brake is the fourth. The dual braking system is the pneumatic and dynamic brakes which are designed to stop the locomotive under normal conditions. He has ridden the locomotive underground and the normal speed is 8 to 10 miles per hour while carrying loads. The load limit is presently 15 cars, but at the time of the accident, it was 25. He has ridden the No. 20 locomotive when it pulled as many as 33 car loads and he experienced no trouble in controlling it. He identified the locomotive inspection report (Exh. P-10) and indicated there were additional "time sheets," but he could find no other reports covering the period June 18 to the day of the accident. He stated that during this period, the mine worked approximately 15 days due to a strike and vacation period. During this time, the No. 20 locomotive was in the motor barn for maintenance on several occasions. A new harp was put on 2 days prior to the accident (Tr. 333-343).

Mr. Halsey described the procedure used to remove the locomotive for testing from the mine to the shop area after the accident. No power was put on the locomotive and it was either pushed, pulled, or dragged to the shop. The locomotive was inspected by several people, including MSHA inspectors, and upon instructions, he took the brake shoes off and laid them beside each wheel truck. He looked at the brake shoes and did not believe they were "that far out of adjustment," and he was convinced they would work. After applying the power to the locomotive, the brakes did not hold. A second test was made and the brakes still would not hold. After Inspectors Smith and Sizemore left the shop, he went to the pit to check the wheels and brake shoes again. After power was applied, he noticed a gap caused by compressed mud between the wheels and brake shoes on all eight wheels. The shoes would have contacted the wheels, had it not been for the mud. The mud evidently came from the shop area while the locomotive was being transported. The normal gap between shoe and and wheel is one-half to five-eighths of an inch and the shoe will move an inch or an inch and a half. Two of the brake shoes in question were in perfect condition, two had problems with the flanges, one had a portion of the flange broken off and it was decided that this was an old break which did not result from the accident. The other shoes had no problems with the flanges and exhibited only normal wear. One of the two shoes which concerned MSHA had a groove cut into the tread area causing it to rock on the wheel and ride out of alignment, and the other one had a portion of the flange missing. Mr. Halsey conceded that these two brake shoes were misaligned (Tr. 343-359).

Mr. Halsey testified he inspected all of the brake shoes in question, and in his opinion, the two misaligned shoes were making contact with the wheels, as were the other four (Tr. 359-362).

On cross-examination, Mr. Halsey testified as to his education and training courses concerning braking systems. He has mine foreman's papers and believed he is well-qualified to speak on locomotives and locomotive braking systems. The auxiliary braking system will activate if there is a break in the main line or hose, if the system bleeds off over a period of time, or if the brake lever is pushed all the way over. The locomotive would adequately stop a trip of 25 or 30 and he remembered this from riding it 3 or 4 years ago. At that time, however, he did not check the brakes and could not say whether that braking system was the same as the one involved in the accident. The locomotive was taken out of the mine on the tracks and he was not present when it was taken out and did not know what the conditions were. He initiated the two tests in the shop because he was confident the brakes would work, but was surprised when they did not. He did not protest to the MSHA inspectors after the tests failed because they were leaving the shop and did not do so later, although he did tell them that "something was wrong." He estimated the 1-1/2-inch shoe distance from the wheel through visual observations. In his view, the brake shoes and flanges were not excessively worn. He replaced all of the brake shoes (Tr. 365-376).

On redirect, Mr. Halsey testified the brakes were working on the night of the accident. After the locomotive was brought out of the mine, it was pushed and dragged over the timber yard area which was muddy (Tr. 382).

In response to bench questions, Mr. Halsey stated that when he discovered the mud on the wheels, he did not inform the inspectors of that fact, and after cleaning out the mud, he made no attempt to test the locomotive again (Tr. 383).

Tom Akers, employed as an electrical engineer by the respondent, testified that after the accident, he was assigned the task of attempting to determine the speeds at which locomotives travel in the mine under particular conditions and that MSHA recommended that this be done. A 15-load limit was decided on as a temporary limit until his study could be made. His study determined that a speed of 8 to 9 miles an hour down the No. 18 Hill was considered by the locomotive operators to be a normal rate, and 15 miles per hour was considered excessive. Mr. Akers described the procedures used to conduct his tests, and they included tests to determine stopping and braking distances, and loaded mine cars were used after weighing them on scales. His tests were conducted before Mr. Funsch made his calculations, but the results of both were close.

On cross-examination, Mr. Akers testified that he was not sure whether the No. 20 locomotive was used in the tests and that the braking systems were working adequately (Tr. 387-394).

Mr. Kaylor was recalled by the court and testified that the conclusion reached in his report of investigation that the locomotive in question was traveling at an excessive speed was based on interviews and statements made by several motormen listed in the report who indicated that normally, a locomotive, with four skids and a comparable number of loaded cars, would level off at stop if it were cut loose with the power off after it reached Hill 18 at the point where the grade levels off and dips. The persons giving the statements assumed that the locomotive was traveling at an excessive speed in order for the motor to travel by itself after it lost its air brakes. During his investigation at the accident scene, three skids were found, but the other one could have been inside the rail under the wrecked cars where it could not be seen. He also indicated that Mr. Williams could have left the throttle in the wide-open position, while moving it back and forth in his attempts to bring the locomotive under control, and that Mr. Williams' explanations as to the positions of the controls possibly explain why they were found in those positions as explained in his report (Tr. 394-400).

Findings and Conclusions

Respondent is charged with a violation of 30 CFR 75.1404, a statutory standard found in section 314(e) of the Act, and which reads as follows:

> Each locomotive and haulage car used in an underground coal mine shall be equipped with automatic brakes, where space permits. Where space does not permit automatic brakes, locomotives and haulage cars shall be subject to speed reduction gear, or other similar devices approved by the Secretary, which are designed to stop the locomotives and haulage cars with the proper margin of safety.

30 CFR 75.1404-1 braking system, provides:

> A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of 75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design capabilities and at speeds consistent with the condition of the haulage road. A trailing locomotive or equivalent devices should be used on trains that are operated on ascending grades.

The condition cited as a violation by the inspector, and which he believed constituted a violation of section 75.1404, reads as follows:

> The pneumatic braking system on the No. 20 locomotive being used for coal haulage purpose was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks and could not apply uniform frictional pressure on the braking surface. The linkage for the manual brake was disconnected completed 75.1404.

Petitioner's Arguments

Petitioner takes the position that the provisions of 75.1404-1 pertaining to "design capabilities and speeds consistent with the condition of the haulage road" are not at issue here, and that the key issue in this case, in terms of construction of the standard, is the meaning of the phrase which appears in the first part of 75.1404-1. In support of this proposition, petitioner asserts that the requirement that "a locomotive equipped with a dual braking system will be deemed to satisfy the requirements of section 75.1404," necessarily requires that the dual braking system be working, operative, and in good order and repair, and suggests that respondent's position that the dual braking system need only be in existence on the locomotive and that its ability to function as a braking system is irrelevant and should be rejected. Citing what it believes to be the applicable case law in support of the proposition that remedial legislation such as the Act in question here should be construed liberally, petitioner argues that a construction of section 75.1404 to the effect that a locomotive equipped with a dual braking system need not work, operate, or be capable of stopping the locomotive, runs contrary to the remedial nature of the statute and the general rules of statutory and regulatory construction.

Petitioner cites the case of Sewell Coal Company, HOPE 78-529-P, decided by Judge Merlin on November 15, 1978, and states that Judge Merlin found a violation of section 75.1404 based upon that portion of the standard relating to design capabilities and haulage road conditions, and that the braking system, per se, was not the focus of his decision. However, petitioner maintains that one can infer that an operative, working brake system was considered by Judge Merlin to be a necessary requirement since he found "that the air brake system did work." Further, since Judge Merlin found that the language of section 75.1404-1, dealing with design capabilities and haulage road is a separate requirement of the regulation, petitioner maintains that it need not show that a locomotive's operation was outside of its design capabilities or that the condition of the haulage road was inconsistent with speeds of the locomotive because those are not the only grounds for demonstrating a violation of section 75.1404.

Petitioner maintains that the lack of a dual braking system as well as the lack of a braking system which is working, operative, and in good repair constitute other grounds for a violation of this regulation. With respect to the use of the term "equipped," petitioner asserts that the term should be construed to mean not only outfitted, but also maintained in a working, effective and operative condition, and cited a decision by Judge Michels in Pittsburgh Coal Company, PITT 76-123-P, decided October 7, 1976, concerning the standard for automatic couplers.

Turning to the facts and evidence adduced in this proceeding, petitioner argues that visual examination of the locomotive brake shoes underground at the point of the derailment indicated that the brake shoes were out of alignment with the wheels (or trucks) of the locomotive and that the flanges were worn. In the opinion of Inspector Kaylor, the derailment did not cause the misalignment of the brake shoes, and out of the eight shoes, six were not in good shape and had worn flanges. No evidence of brake skidding was found at the scene of the accident, and when the locomotive was removed to the surface and tested on two separate occasions, the locomotive brakes failed to work when the motor was put in motion. Conceding that the loss of electricity upon which the dual braking system depends, was a factor in the accident, petitioner nonetheless maintains that this fact does not support an inference that the pneumatic braking system would not have failed at some point in time, irrespective of electrical power, and that at some point in time the extent of wear or misalignment will result in brake system failure. This problem has been recognized by section 75.512 requiring a weekly recorded examination of electrical equipment, including a locomotive, and petitioner asserts that no evidence was offered to dispute the fact that no examination report was made between June 18, 1977, and the fatality date of September 8, 1977. In summary, petitioner takes the position that the locomotive did not have a braking system that would do the job at the time the fatality occurred.

Respondent's Arguments

Respondent contends that the condition cited in the order, namely misaligned brakes shoes, is not a violation of section 75.1404, since that section is confined to violations relating to a failure to equip a locomotive with a dual braking system. Respondent maintains that section 75.1404, and its subpart, 75.1404-1, is a design-oriented safety standard rather than a maintenance requirement standard. Citing the plain meaning of the statutory language and the legislative history of the standard in question, respondent argues that they require that the locomotive must have automatic brakes or, alternatively, must have a dual braking system designed to stop the locomotive with the proper margin of safety; they do not mandate maintenance thereof.

In support of its arguments, respondent points to the fact that petitioner's own witnesses admitted that the locomotive had a dual braking system and that respondent's expert witness Funsch testified that such dual braking system was more than sufficient to stop the locomotive, with 27 loads being pulled, on 18 Left Hill under the conditions existing on September 8, 1977, and at a speed far in excess of that which Motorman Williams testified was his speed prior to losing the harp assembly. Witness Funsch testified that the locomotive and its braking system were so capably designed and operated that, had the pneumatic braking system not accidentally been depleted of all of its air supply, the locomotive could have been stopped in approximately one-eighth of the distance between the site where the harp assembly was lost and the derail location at 2 South.

With regard to the Sewell Coal decision, respondent asserts that its position is consistent with Judge Merlin's holding in that case even if it requires that a locomotive must be operated within the limits of its design capabilities and operated at speeds consistent with the condition of the haulage road. In Sewell, respondent points out that the undisputed facts revealed that a decedent/motorman was operating a tandem locomotive pushing a loaded rock duster weighing 5 tons up a steep grade, and when the locomotive failed to make the grade, it slid back down the hill at which time the decedent was thrown out of the locomotive and killed. It was admitted that automatic brakes were not present, so Judge Merlin turned to the alternative section, 75.1404-1, requiring that the locomotive have a dual braking system and he interpreted such alternative to also require that the locomotive be operated within the limits of its design capabilities and at speeds consistent with the condition of the haulage road. Judge Merlin ruled that the locomotive did not have a dual braking system, that the locomotive could not handle the 5-ton load placed upon it (the locomotive was not being operated within the limits of its design capabilities) and that the locomotive did not have enough power to achieve sufficient speed to travel along the grades it was sent on (the locomotive was not operated at speeds consistent with the condition of the haulage road).

Turning to the facts presented in the instant case, respondent argues that as in Sewell, automatic brakes were not present on the No. 20 locomotive, and one must look to section 75.1404-1 to determine whether the locomotive satisfied the alternative of a dual braking system. As pointed out earlier, respondent maintains that the locomotive did, in fact, have a dual braking system, that its expert witness unequivocally testified that the locomotive was being operated within the limits of its design capabilities on the day in question, and that the only person with knowledge of the speed being traveled down 18 Hill, motorman Tom Williams, testified that his trip was "under control," traveling down 18 Hill, by utilizing sand, dynamic and pneumatic braking, until such time as the trolley pole bounced along the roof, accidentally losing the harp assembly and, simultaneously, electric power which would have activated the compressor

which supplied air to the pneumatic and dynamic braking system. Although Mr. Williams continued to use air to pneumatically and dynamically brake and to release sand onto the tracks, when the air cylinders were completely depleted all "control" was lost and the derail became inevitable. Therefore, according to the only witness who knows, speed was not a factor in the accident. In addition, Inspector Kaylor testified that his investigation revealed that the trip was under control until the harp assembly was pulled off the trolley pole.

Respondent submits that it has satisfactorily rebutted petitioner's assertion that the dual braking systems were not maintained operable, and that petitioner presented no evidence as to whether the locomotive in question was operated within the limits of its design capabilities. Regarding the disconnection of the linkage for the manual brake as a condition supporting the alleged violation of 75.1404, respondent asserts that this fact has no relevance to the alleged violation since it is established that a dual braking system existed on the locomotive and the manual brake is not part of that system. Respondent views the inspectors' testimony regarding their inspection of the misaligned shoes as suspect because the inspection was a visual inspection by inspectors who were not trained in the operation of braking systems and who themselves conceded that the visual examination was not conducted with the brake shoes applied to the wheel surface to determine if the brake shoes were indeed failing to make contact.

Regarding the surface tests relied on by the petitioner in support of its argument that the pneumatic brakes were incapable of performing adequately, respondent argues that this resulted from the fact that compressed mud had accumulated on the brake shoe surfaces as a result of the locomotive being dragged to the surface, and the mud prevented the shoes from making contact with the wheels. Further, aside from the surface tests, respondent cites the testimony of the locomotive operator that on the day of the accident he stopped the locomotive with the same 27 loads using only sand and the pneumatic brake, and that he experienced no difficulties during his shift in braking the locomotive or controlling the trip until after he lost power and his air pressure was depleted. Respondent also cites the testimony of its expert that were it not for the loss of power the locomotive would have been stopped, and that the locomotive and its braking system were cabably designed and operated within their design limits.

In summary, petitioner's position is that the respondent failed to properly maintain the pneumatic braking system of the No. 20 locomotive because it allowed certain brake shoes to become misaligned with the locomotive wheels (trucks), thereby rendering the dual braking system inoperative. Respondent's position is that petitioner failed to establish by a preponderance of the evidence that the

misaligned brake shoes had an effect on the braking capacity of the locomotive in question, and assuming that it did, no violation on section 75.1404 ensued because that standard is not directed to the maintenance of a braking system but only to its proper design. With respect to petitioner's further argument that the pneumatic braking system was inoperative because the emergency truck brake was deficient, respondent asserts that such argument is irrelevant because the emergency truck brake is not part of the dual braking system required by section 75.1404.

Petitioner seems to take the position that even if the locomotive had not lost its power, the brakes would not have worked anyway since they were misaligned and had worn flanges. However, based on the testimony and evidence produced by the petitioner, I cannot make that conclusion. I believe it is clear from the weight of the evidence adduced in this proceeding that the failure of the locomotive brakes to function was due to the unexpected loss of power caused by the loss of the trolley harp assembly, which in fact resulted in the unanticipated loss of braking air pressure due to the loss of electrical power. I am also impressed with the fact that the locomotive operator did all that was humanly possibly to bring the locomotive under control, that he stayed with the locomotive for a distance of some 1,000 feet after the brakeman jumped and was killed in his futile attempts to slow it down, and that he finally jumped from the locomotive after failing to stop or slow it down and after finding a safe place in a wide entry in which to jump.

Although the investigative report prepared by Inspector Kaylor mentions the fact that the trip limit policy was disregarded, the report makes no reference as to whether the locomotive in question was being operated within the limits of its design capabilities. As a matter of fact, MSHA produced absolutely no evidence concerning the design or specifications for the braking systems on the locomotive in question, and the inspectors conducted no tests to determine whether the worn brake shoes in question were making contact with the wheel surfaces, or whether the worn brake shoe flanges were, in fact, being used to brake the wheels. Although the brake shoes were removed from the locomotive wheels after it was removed from the mine, the shoes were not further tested and were apparently discarded. Further, once the locomotive was placed back on the tracks underground to facilitate its removal from the mine, no physical tests were conducted at the scene to determine whether the braking systems were operative. The inspectors simply visually observed the brake shoes, noted that six out of the eight were worn and appeared to be misaligned, and came to the conclusion that the brakes were inadequate. As a matter of fact, Inspector Smith stated that at the time he issued his section 104(a) order, he did not consider the number of trips being pulled or the grade of travel, and he simply considered the condition of the brakes as he observed them in coming to the conclusion that they would not

stop the locomotive. However, in support of this conclusion, he relied on the fact that brake shoes which are not applied uniformly to a locomotive wheel surface are inadequate. Yet, no one bothered to test the brake shoes to determine how much braking surface was present and no one visually observed the shoes coming in contact with the wheels during any of the surface tests. Although Inspector Smith asserted that he relied on the two tests suggested by the respondent in the surface shop to support his conclusion that the brakes were inadequate, those tests are somewhat suspect since they were conducted after the locomotive had been removed from the mine and subjected to possible dragging through mud, thereby subjecting the locomotive wheels and brake shoes to conditions which were not present at the time of the accident. Significantly, those surface after-the-fact tests are not even mentioned in the accident investigation report compiled by Mr. Kaylor.

It is clear from the evidence presented that once the harp assembly was disconnected from the trolley wire, the brake systems would not function because of the loss of air pressure and electric power. MSHA's accident report concluded that the primary factor causing the accident was the disengagement of the locomotive trolley pole from the trolley wire and the subsequent loss of the trolley harp assembly which led to the premature loss of the pneumatic and dynamic braking systems. Further, MSHA inspector Kaylor conceded that if the locomotive harp assembly had not been lost, it is very possible that the accident would not have occurred. As for the other factors "possibly contributing to the accident" as stated in Mr. Kaylor's accident report, I believe it is clear they are not so critical. The lack of an operative mechanical brake is irrelevant since it has been established that the locomotive had a dual braking system installed and the mechanical brake is simply an emergency parking brake that is not normally used to stop the locomotive under operating conditions. Mr. Kaylor's assertion of excessive speed is totally unsupported by any credible evidence, and the fact that the 25-car limit was exceeded is irrelevant since respondent's evidence supports a finding that the locomotive was capable of handling loads in excess of that limit and petitioner has not proved otherwise.

In the final analysis of the evidence presented by the petitioner in support of the alleged violation, it seems clear that the thrust of its case is bottomed on the surface "tests" conducted in the shop once the locomotive was removed from the mine several days after the accident. In my opinion, those so-called tests are far from conclusive. In the first place, it is clear to me that the locomotive was not in the same condition that it was underground at the time of the accident. It had been placed back on the tracks underground, pulled from the mine, and then pushed or dragged for some distance over the surface and into the mine shop. Thus, it had been subjected to some abuse, and from the evidence presented by the respondent, it had been dragged through mud and the brake shoe surfaces had been covered with

mud at the time the locomotive had been tested. Respondent's expert testified that such mud and foreign matter on the shoes would cause the brakes not to hold when power was applied and petitioner has not rebutted this fact. Further, the locomotive operator testified that when he tested the brakes underground while the locomotive was in motion, he experienced no difficulties in stopping the locomotive, and, as a matter of fact, his unrebuted testimony is that he experienced no difficulties in stopping the locomotive with the trips he was hauling during the shift in which the accident occurred. His difficulties began when he lost his power, thereby incapacitating all of the locomotive brake systems.

The condition cited by the inspector on the face of the citation alleges that due to the misalignment, the brake shoes were unable to apply uniform frictional pressure on the braking surfaces. In my view, the inspector simply cannot support that statement. He indicated he had no formal training in the operation of brake shoes, and testified that when he visually examined the locomotive underground, he could not tell how much of the brake shoe surfaces were in contact with the wheels when the brakes were applied, and no tests were ever made to determine whether or not the brake shoe surfaces could, in fact, contact the wheel surfaces when the brakes were applied. It would seem to me that since two of the six brake shoes were in good condition, and the flanges were only partly worn, the question of braking efficiency of the brake shoes would necessarily depend on actual physical testing rather than speculation based on visual observations.

It seems to me that in a case of this kind, MSHA should have taken the initiative at the outset and subjected the locomotive to underground testing while it was on the tracks, at a time and place closer to the event, and under actual working conditions. Here, the inspectors merely made a visual observation of the brake shoes, which did not include any observations as to whether the shoes were, in fact, contacting the braking surface of the wheels, and from those cursory observations they speculated that the brakes would not hold. Neither MSHA nor the respondent retained custody of the brake shoes, no photographs were made, and even though the brake shoes were at one time apparently removed from the locomotive once it was taken to the surface shop, no one subjected the six shoes to further testing to determine the effect of the misalignment or worn flanges on the actual braking capabilities of those shoes. In view of the fact that two of the shoes were found to be in good condition, and in light of the testimony presented by both parties concerning the physical and mechanical interrelationships between the braking shoes, braking surfaces, and the wheel surfaces with respect to braking capacities and effectiveness, it would seem that such further tests are critical.

With regard to Judge Merlin's decision in the Sewell case, it seems clear to me that the factual setting which prevailed in that

case can be distinguished from the facts presented in the instant proceeding. Judge Merlin's finding of a violation in the Sewell case turned on the manner in which the tandem locomotives were operated at the time of the fatality. It is clear from his bench decision that he was impressed with the fact that the tracks were in terrible condition, the sanders were inoperative, the grades were too steep for the locomotive, the adverse experiences with motormen on prior occasions indicating that the tandem locomotive in question could not handle the loads placed on it, and the fact that the mine operator was aware of these prior difficulties. Here, there is no evidence that the track conditions were other than in good condition, the grades over which the locomotive traveled were not shown to be such as which prevented the locomotive and trips from operating in other than normal condition, the sanders were operating, the normal procedures for the use of additional braking "skids" were followed, and there is no indication that the locomotive operator experienced any difficulties in negotiating the grades traveled on the very day of the accident with the trips in question or that he experienced any difficulty in braking and controlling the locomotive with the trips which it was hauling.

After full and careful review of the able arguments presented by both parties in support of their respective positions in this matter, and on the basis of the preponderance of the credible evidence adduced, I conclude and find that the respondent has the better part of the argument and its proposed findings and conclusions both as to the interpretation and application of the cited safety standard in issue, including the alleged violation, are accepted by me as correct and petitioner's proposed findings and conclusions to the contrary are rejected. Accordingly, I conclude and find that petitioner has not established by a preponderance of the evidence that the six brake shoes which were misaligned in fact adversely affected the braking capacity of the No. 2 locomotive in question on the day of the accident. I further find and conclude that petitioner has failed to establish by any credible evidence that the locomotive in question was not being operated within the limits of its design capabilities.

ORDER

In view of my findings and conclusions made with respect to Citation No. 7-0102, September 9, 1977, citing a violation of 30 CFR 75.1404, the petition for assessment of civil penalty, insofar as it

seeks a civil penalty assessment for that alleged violation is DISMISSED.

George A. Koutras
Administrative Law Judge