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SOL (MSHA) V. SCOTIA COAL
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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. BARB 78-401-P
A.C. No. 15-03746-02049V

v.

Upper Taggart Mine

SCOTIA COAL COMPANY,
RESPONDENT

DECISION

Appearances: Eddie Jenkins, Esq., Department of Labor, for
Petitioner
Richard C. Ward, Esq., Hazard, Kentucky, for
Respondent

Before: Administrative Law Judge Steffey

Pursuant to written notice dated September 1, 1978, a hearing in the above-entitled proceeding was held on November 15, 1978, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty in Docket No. BARB 78-401-P was filed on May 12, 1978, and seeks assessment of a civil penalty for an alleged violation of 30 CFR 75.1725.

Issues

The issues raised by the Petition for Assessment of Civil Penalty are whether a violation of section 75.1725 occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Findings of Fact

1. Ronald E. Suttles, a Federal coal mine inspector, was in the process of making a complete inspection of respondent's Upper Taggart Mine when he received a complaint regarding a shuttle car in the One Right Section of respondent's mine. Inspector Suttles went to the One

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Right Section on Monday, April 19, 1976, to determine whether there was any validity to the complaint. The inspector asked Joe Pratt, the operator of the B-29 shuttle car, to maneuver the car so that Inspector Suttles could determine whether it was in safe operating condition. Inspector Suttles concluded that the wheels on one side of the shuttle car would not turn properly. He considered that the shuttle car created a hazard to any miners near the car because the shuttle car had to be backed up several times when the operator of the car needed to receive coal from the continuous mining machine, go around corners, or dump coal at the belt feeder (Tr. 6-12).

2. Despite the fact that the B-29 car was not in safe operating condition on April 19, 1976, Inspector Suttles did not write a notice of violation or order of withdrawal with respect to the unsafe car. Inspector Suttles stated that new management had just taken over the operation of the Upper Taggart Mine. The inspector had been getting good cooperation from the new management and accepted management's assurances that the car would be fixed without the necessity of the inspector's writing an order or notice of violation with respect to the car (Tr. 13).

3. Inspector Suttles stated that when he returned to the mine on April 20, 1976, he saw the B-29 shuttle car being operated. Inspector Suttles was "pretty sure" that the same operator, Joe Pratt, was driving the shuttle car. Mr. Pratt told Inspector Suttles that the car had not been repaired (Tr. 15-16). Inspector Suttles then issued at 9:55 a.m. unwarrantable failure Order No. 2 RDS under section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. Order No. 2 RDS cited respondent for a violation of section 75.1725 because the B-29 shuttle car (6SC) being used in the One Right Section was not being maintained in a safe operating condition in that the steering was bad and the operator could not safely steer the car through crosscuts (Exh. M-1). Section 75.1725 requires mobile equipment to be maintained in safe operating condition, or requires, in the alternative, that unsafe equipment be removed from service immediately.

4. James Bentley, respondent's safety inspector, testified that when he and Inspector Suttles came to the face area of the One Right Section on April 20, 1976, the miners were in the process of opening a new section of the mine off of the old section in which they had been working. Mr. Bentley said the B-29 car had been repaired on the 11 p.m.-to-7 a.m. shift on April 20 and that the car had not been moved on the day shift of April 20 because there was not sufficient room between the place where the belt feeder was located and the working face for two shuttle cars to be operated. Mr. Bentley said that new parts had been installed on the B-29 shuttle car and that the old parts were still lying beside the car. The old parts had to be picked up so that the car could be moved. Mr. Bentley said that

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the operator of the B-29 car got up on it and moved it a few feet but that there was not enough room for it to be operated very much (Tr. 32-40; 42).

5. Timothy Maggard, a repairman who normally works on the 3 p.m.-to-11 p.m. shift, testified that the B-29 car broke down on his shift on April 19, 1976, at about 8:30 p.m. Mr. Maggard made a temporary repair of the B-29 car on April 19 so that the car could be used up to the end of the production shift which ended at 11 p.m. Mr. Maggard said that the steering mechanism on the B-29 car was so bad that he decided that it needed to be completely rebuilt. Although Mr. Maggard had already worked his full 8-hour shift by 11 p.m., he continued to work overtime on the next shift (11 p.m.-to-7 a.m.) so that the B-29 car would be in good operating condition for the beginning of the next production shift which was due to start at 7 a.m. Mr. Maggard had completed the repair of the B-29 car by 5 a.m. on April 20. He was due to report back to the mine to work his regular shift which began at 3 p.m. that same day. Therefore, Mr. Maggard obtained the promise of the other repairmen on the 11 p.m.-to-7 a.m. shift that they would take the old parts to the end of the track for him and he went home to get some sleep before reporting back to the mine at 3 p.m. Before Mr. Maggard left for home, however, he drove the B-29 car around the block in each direction to make sure that all wheels were turning properly when the machine was maneuvered around corners (Tr. 46-49; 53-56; 59).

6. When Mr. Maggard returned to the mine to work his regular shift commencing at 3 p.m. on April 20, 1976, he found that a red tag had been placed on the B-29 car indicating that the car was the subject of a withdrawal order. Mr. Maggard first checked the car's steering by jacking it up. He turned the car's steering wheel in one direction and checked the wheels on both sides of the car to make certain that they turned. He then turned the steering wheel in the opposite direction and found that the wheels all turned properly in that direction also. Mr. Maggard thereafter drove the car around the block and could find nothing wrong with it. Therefore, he parked the car where he found it with the red tag still on it. He then reported to the maintenance foreman that he could find nothing wrong with the B-29 car. When Mr. Maggard reported for work on his regular shift on April 21, 1976, he found that the red tag had been removed from the B-29 car and that it was being used (Tr. 49-50; 56-57).

7. Richard Combs, who was general mine foreman at the Upper Taggart Mine on April 19 and 20, 1976, testified that the time sheets in the company's files show that Mr. Maggard worked a regular 8-hour shift on April 19 and worked 8 hours of overtime on the 11 p.m.-to-7 a.m. shift on April 20 (Tr. 62-66; Exhs. A and B).

8. In his rebuttal testimony, Inspector Suttles first stated that there was more room for use of the B-29 car on April 20, 1976,

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than the company's witnesses had described. Inspector Suttles conceded, however, that his memory of the conditions in the One Right Section on April 20 was not distinct and that the continuous-mining machine might have been involved in cleaning up the mine floor for commencement of mining operations in a different direction. If that were true, respondent's claim that there was insufficient room for operation of two shuttle cars was probably correct. Inspector Suttles stated that he was not entirely certain about what the miners were doing on the 20th, but he was certain that there was sufficient space for both shuttle cars to be used on the 21st (Tr. 68-70).

Nonoccurrence of Violation

I find that the preponderance of the evidence supports a conclusion that no violation of section 75.1725 occurred on April 20, 1976. There is no doubt but that the steering on the B-29 shuttle car was defective on April 19, 1976, as both Inspector Suttles and the repairman, Mr. Maggard, agreed that the steering on the B-29 shuttle car was in bad condition on April 19, 1976, when Inspector Suttles asked that it be repaired. If Inspector Suttles had cited the B-29 shuttle car for a violation of section 75.1725 on April 19, 1976, there is no reason to believe that respondent's management would have contested the citation.

If the inspector had been more certain of what he actually saw on April 20 when he came back to check the condition of the B-29 car, it is possible that I could have found in his favor, but his admission that he could not recall for certain what the miners were doing on the 20th, as opposed to the 21st, makes it impossible to find in his favor. Mr. Maggard's demeanor at the hearing was that of a truthful witness and his testimony is consistent throughout. Both his direct testimony and his cross-examination show that he specifically recalled the rebuilding of the steering system on the B-29 shuttle car. The fact that he personally drove the car after it was repaired is a very convincing reason to believe that he had satisfactorily repaired the B-29 shuttle car before Inspector Suttles ever issued Order No. 2 RDS citing the car for a violation of section 75.1725. Additionally, Mr. Maggard jacked up the car to test the steering on the 20th after the order was issued and Mr. Maggard again drove the car after the order was issued without finding anything wrong with it. The fact that nothing was done to the B-29 car between the time the inspector issued his order and the next day when it was found to be in proper operating condition, is strong and convincing evidence that nothing was wrong with the steering on the B-29 car at the time the inspector's order was written.

At transcript page 41 Mr. Bentley referred to the fact that both the inspector and respondent's management were under a lot of pressure at the time the inspector issued his order on April 20, 1976. As I have indicated in Finding No. 1, supra, Inspector Suttles had received

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a complaint to the effect that the B-29 shuttle car was being operated in an unsafe condition. Even though he found that the B-29 shuttle car was unsafe on April 19, the inspector did not write an order or notice citing management for the violation at the time the violation was observed. It appears that the inspector's failure to cite a violation on the 19th may have been the subject of criticism. Therefore, when he returned to the mine on April 20, he was under pressure to cite the company for the violation which did exist the previous day but which did not exist on April 20 when he actually wrote his order of withdrawal.

The inspector's order is dated April 20, 1976, so there is no question before me as to whether the inspector could have backdated his order to cite respondent on the 20th for a violation which he observed on the 19th. The finding of a violation can be sustained only if the testimony shows that the B-29 shuttle car was defective on the 20th. The preponderance of the evidence shows that the car had been repaired between 11 p.m. on the 19th and the time that the inspector saw the car on the 20th. Since the car was not in an unsafe condition on the 20th, no violation of section 75.1725 existed when Order No. 2 RDS was written.

Ultimate Findings and Conclusions

(1) The Petition for Assessment of Civil Penalty filed in Docket No. BARB 78-401-P should be dismissed because of MSHA's failure to prove that a violation of section 75.1725 occurred as alleged in Order No. 2 RDS (6-206) dated April 20, 1976.

(2) Scotia Coal Company was the operator of the Upper Taggart Mine at all pertinent times and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

WHEREFORE, it is ordered:

The Petition for Assessment of Civil Penalty filed May 12, 1978, in Docket No. BARB 78-401-P is dismissed for the reason stated in paragraph (1) above.

Richard C. Steffey
Administrative Law Judge