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CLEVELAND CLIFFS IRON V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judge

CLEVELAND CLIFFS IRON COMPANY,
APPLICANT

Contest of Order

Docket No. VINC 79-68-M

v.

Order No. 286223

October 30, 1978

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

UNITED STEELWORKERS OF AMERICA,
REPRESENTATIVE OF THE MINERS

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

Civil Penalty Proceeding

Docket No. VINC 79-240-PM

Humboldt Mill

v.

CLEVELAND CLIFFS IRON COMPANY,
RESPONDENT

DECISION

Appearances: Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman,
Graybill & Greenlee, Ishpeming, Michigan, for Appli-
cant in Docket No. VINC 79-68-M and Respondent in
Docket No. VINC 79-240-PM;
William B. Moran, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Respondent in Docket No. VINC 79-68-M and Petitioner
in Docket No. VINC 79-240-PM;
Mr. Bruce Chapman, Safety Committee Chairman, and
Mr. Ernest Ronn, Subdistrict Director, United Steel-
workers of America, for the Representative of the
Miners.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Applicant (CCI) seeks review of an order of withdrawal
issued on October 30, 1978, under section 104(b) of the Federal
Mine Safety and

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Health Act of 1977, 30 U.S.C. 814(b). The order was issued because of the failure of Applicant to abate the violation alleged in a citation issued August 23, 1978, and modified October 5, 1978, charging a violation of the mandatory safety standard contained in 30 CFR 55.9-22, which requires berms or guards to be installed on the outer bank of elevated roadways. Petitioner (MSHA) filed a civil penalty proceeding seeking a penalty for the violation alleged in the citation. The two proceedings were consolidated for the purposes of hearing and decision since they involved the same facts. Pursuant to notice, a hearing was held on the merits in Marquette, Michigan, on August 7 and 8, 1979. Frank Gerovac and William Carlson testified on behalf of MSHA. Max Woelffer, Joseph Crites, Gordon Miner, and Robert Neil testified on behalf of CCI. No witnesses were called by the Representative of the Miners (USWA). At the request of the parties, I viewed the cited areas on August 8, 1979, accompanied by representatives of the three parties. Following this, I stated on the record what I had observed. Posthearing briefs were filed by CCI and MSHA. To the extent that the proposed findings and conclusions are not incorporated in this decision, they are rejected.

REGULATION

30 CFR 55.9-22 provides as follows: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

ISSUES

1. Whether the roads covered by the citation and order involved in this case were subject to the mandatory standard in 30 CFR 55.9-22?
 - (a) Whether the roadways in question were elevated?
 - (b) Whether the portions of the roadway involved herein are covered by the phrase "the outer bank?"
 - (c) Whether the standard applies only to roadways used for loading, hauling and dumping?
 - (d) If the previous question is answered affirmatively, whether the roadways in question here were used for loading, hauling or dumping?
2. If a violation of the standard has been established, what is the appropriate penalty?

FINDINGS OF FACT

1. CCI, in October 1978, and prior thereto, was the operator of the Humboldt Mill, a mill and iron ore pelletizing plant in Marquette County, Michigan.

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2. CCI is a large operator. In October 1978, the Humboldt Mill employed approximately 111 people and operated three shifts daily, 7 days a week.

3. From the effective date of the 1977 Act until August 23, 1978, three violations of the mandatory standard contained in 30 CFR 55.9-22 were assessed and paid. Mr. Carlson, the supervisor of MSHA's Marquette Field Office, testified that approximately 26 "berm citations" were issued to CCI between 1974 and 1979. Since there was no evidence as to the number of such citations that were paid, this does not establish a history of prior violations. I conclude that the history is not such that penalties should be increased because of it.

4. On August 23, 1978, Federal mine inspector Frank Gerovac, during a regular inspection of CCI's Humboldt Mill, issued Citation No. 286849 charging a violation of 30 CFR 55.9-22 for a failure to provide berms on a 1,500-foot stretch of land on the western side of the road to the M-95 lift station and on a 35-foot stretch of land on the road leading to the pit pump station.

5. On October 5, 1978, William Carlson, supervisory mining engineer for MSHA's Marquette Field Office, modified the citation based upon a reinspection of the area. The modified citation included an additional area: a 200-foot section on the eastern side of the M-95 lift station road. The abatement time was extended to October 12, 1978.

6. On October 30, 1978, Federal mine inspector Richard Breazeal issued a 104(b) closure order because of the failure to abate the condition cited.

The M-95 Lift Station Roadway

7. The M-95 lift station roadway, also called the tailings dike road, is a rough gravel road along the crest of an impoundment dike, which is itself constructed of gravel and rock. The road is wide enough for two-way travel, although it is normally used by only one vehicle at a time.

8. The distance between the edge of the road and outer edge of the dike varies from 6 to 10 feet.

9. The roadway itself slants slightly to the inner side of the dike (away from highway M-95). The slant varies from 6 inches to a foot in some places.

10. The side of the dike road toward M-95 has a drop-off increasing in steepness as the road approaches the pumps. The road also narrows as it approaches the pumps. The angle of the slope is

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up to 45 degrees. The slope from the roadway to the bottom measured up to approximately 75 feet. The vertical differential in height from top to bottom was approximately 35 feet.

11. There are many large rocks and boulders on the slope down to the bottom. At the bottom of the slope, there are many large trees and a large area covered by water or swamp.

12. The other side of the dike road toward the tailings basin is less steep--the drop-off is from 5 to 8 feet or less. There are some boulders along the side forming a natural barrier on this bank. The tailings basin is presently grown over with vegetation.

13. The road is used as an access to the M-95 lift pump station. The purpose of the pump station is to raise the water in a stream, which was blocked by the dike, up over the dike to its original course further downstream. Two operating pumps are in the pumphouse, and a third is there for use when needed.

14. At least once a day on the day shift, a supervisory employee drives a pickup truck on the road to check the pumps and the water level. On many days, the afternoon and night shift supervisors also drive down to check the pumps and the water level.

15. In the winter the pumps do not run continuously. Therefore, trips are made to the lift pump station to turn the pumps off and to restart them. When the pumps are turned off, the pipeline must be drained and two or more men are taken to the pumps for this task.

16. If mechanical problems develop with a pump, a 1-ton flat-bed truck brings a replacement pump, and the faulty one is taken back to the shop for repairs.

17. In the spring of the year, it is ordinarily necessary to bring in and install a fourth pump because of the large amount of water. After the water has subsided, it is necessary to drive a truck down to the station and remove the fourth pump.

18. In the winter time, it is necessary to plow the road of snow to maintain access to the pumps. I can safely take official notice that a considerable amount of snow normally falls in the winter months in Marquette County, Michigan.

19. The road has minimal maintenance, but occasionally it is necessary to use a front-end loader to fill chuckholes and patch rough areas.

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20. The pit pump station has a submerged pump in the pit water and draws cold water from 60 feet down for use in the concentrating process in the mill. The water is pumped out to the mill.

21. The road to the pit pump station is narrow--only wide enough for single-lane traffic for most of its course, but widening out in the area closer to the station. As the road approaches the station, there is a wider turn around area, or parking area, below which is an overflow pipe which crosses the road and prevents vehicles from going further.

22. The composition of the road to the pit pump station is similar to that of the lift station road.

23. There are boulders forming a berm along the edge of the roadway northeast of the area covered by the citation. This apparently is a remnant of a bermed roadway used when the pit was being mined.

24. There is a drop-off of about 12 feet to a flat area 20 or 30 feet wide. Beyond that, there is a further drop-off to an area covered by water.

25. The pump is checked each shift by a supervisor who ordinarily drives to the station in a pickup truck. Periodic maintenance is required as was the case for the pumps in the lift station.

DISCUSSION AND CONCLUSIONS OF LAW

Elevated Roadway

There is little dispute that the roadways in question are elevated. The roadway to the M-95 lift station is 35 to 40 feet above the adjacent terrain and the slope toward M-95 is at a 45-degree angle. The other edge of the road in the cited area is 5 to 8 feet above the adjacent terrain. The cited area on the pit pump station road has a 10- to 12-foot drop-off to a ledge and a further drop-off of 12 feet to a water-filled area. Both areas are of sufficient height above the adjacent terrain to create a hazard in the event a vehicle ran off the roadway. Therefore, they are elevated.

Outer Bank

The standard applies to "the outer bank" (singular) of an elevated roadway. CCI argues that it is intended to cover roadways having a single bank as is typically the case on a haulage road from a pit or on the side of a mountain. No compelling reason having to do with safety was advanced for so limiting the standard. Two Administrative Law Judge decisions are in point. In *MESA v. Peabody Coal Company*, Docket No. VINC 77-102-P, issued December 13, 1977, Judge

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Koutras considered the berm standard for coal mines contained in 30 CFR 77.1605(k). The standards are in identical language. Judge Koutras held that the regulation applies only to a single outside bank of the road and vacated the citation because it was directed to the inner bank of the roadway in question over which an employee drove in a fatal accident. In *Cleveland Cliffs Iron Company v. MSHA*, Docket No. VINC 78-300-M, issued September 8, 1978, Judge Moore interpreted the language in 30 CFR 55.9-22 as follows:

Inasmuch as it is the elevation which creates the hazard that berms are designed to alleviate, the intent of the regulation must be to require those berms wherever there is a hazard created by the elevation. Therefore, the term "outer bank" means whichever bank is hazardous because of the elevation, and if both sides of a road present a hazard of rolling down a steep embankment, then both sides of the road are required to have berms.

The safety standard is meant to protect drivers of vehicles from injuries caused by going over embankments. It would be anomalous if the standard were limited to one side of the road when the hazard is on the other side or on both sides. With no reason other than the use of the singular term "the outer bank," I would find it impossible to accept such a construction. The use of the singular may be explained by reference to the direction of travel: the outer bank may be interpreted as the bank on the right of the driver. Therefore, on roads carrying traffic both ways, both banks are "the outer bank." I conclude that the standard requires berms for both banks of elevated roadways.

Loading, Hauling and Dumping

30 CFR 55.9 (of which 30 CFR 55.9-22 is a part) is a heading or title for the entire section. It reads: "Loading, hauling, dumping." It explains or defines the purpose and scope of the section, and therefore, in my opinion, limits the applicability of the safety standards set out in the subsections. See *Cleveland Cliffs Iron Company v. MSHA*, supra. I conclude that the berm standard applies only to roadways involved in loading, hauling and dumping. It remains to consider whether the activities on the road in question come within those terms.

CCI contends that the berm standard applies only "to typical load haul and dump movements associated with open pit activities, the most obvious of which is the loading, hauling and dumping of overburden and ore." This restricted interpretation was rejected in the case of *Cleveland Cliffs Iron Company v. MSHA*, supra, which held that trucks building a pipeline road were involved in hauling. Under the coal mine standard, Judge Michels held that the berm standard was applicable on roads used for the transportation of personnel. *MESA v.*

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Consolidation Coal Company, Docket No. VINC 77-87, issued July 13, 1977. In the case of MESA v. Peabody, supra, Judge Koutras held that the standard applied to all roads on mine property used to transport coal, equipment or men.

As is shown in findings of fact numbers 13 through 19 and finding of fact 25, the roads in question here are used regularly, ordinarily three times a day and on some days more often. Their primary use is as access roads to the pump stations. They are not used for hauling ore or any mine product. The vehicles using the road are normally pickup trucks and 1-ton flatbed trucks. Ordinarily, the driver is alone, but occasionally men are transported. A number of times each year, the roads are used to haul pumps to and from the stations. Thus, men, equipment and tools are transported along these roads on a regular though limited basis. Is this hauling? A technical dictionary (FOOTNOTE 1) defines "hauling" as "the drawing or conveying of the product of the mine from the working places to the bottom of the hoisting shaft or slope." This definition seems to limit the term to underground mining and is therefore not helpful. The same dictionary defines "haulage" as "the drawing or conveying, in cars or otherwise, or movement of men, supplies, ore and waste both underground and on the surface." This definition would seem to include the activities on the roads in question. MSHA and its predecessor agency have in a more or less formal way interpreted the standard as applicable to all active roadways. The interpretation by the agency responsible for the regulation is of course entitled to great weight. However, it is not clear whether this interpretation is based upon the conclusion (which I reject) that the terms "loading, hauling and dumping" do not limit the applicability of the standard or upon the position that hauling occurs on all active roadways.

Having in mind the purpose of the regulation, which is to guard the safety of miners who travel on elevated roadways, I conclude that the routine, systematic usage of the roadways shown by this record constitutes hauling. Therefore, I conclude that berms are required on the areas of the roadways covered by the citations and order involved herein.

Penalty

I conclude that the citation as modified properly charged a violation of 30 CFR 55.9-22 and that a violation has been established by the evidence. CCI does not dispute that berms were not provided in the areas covered by the citation.

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I have previously found that CCI is a large operator, and that its history of prior violations is not significant. There is no evidence that a penalty imposed herein will have any effect on CCI's ability to continue in business, and therefore, I find that it will not.

The gravity of a safety violation must be measured by (1) the likelihood that it will result in injuries, (2) the number of workers potentially exposed to such injuries, and (3) the severity of potential injuries. The evidence establishes in this case that injuries are not likely. The roadways are wide and the chances of going over the bank are not great. However, the hazard may be increased by weather conditions, such as fog or rain or snow. The number of workers exposed is not great, since the roadways are used relatively infrequently. However, should a vehicle go over the bank, the likelihood of severe injuries is very high because of the steep, rocky terrain. I conclude the violation was moderately severe.

CCI's failure to provide berms was intentional, in keeping with its (good faith) position that the standard did not apply to the roadways in question. For the purpose of the assessment of a civil penalty, I treat this as the equivalent of ordinary negligence.

CCI did not demonstrate good faith in attempting to achieve rapid compliance, since it did not make any attempt to comply, and a closure order was issued. Although CCI was in good faith relying on its interpretation of the standard, I cannot credit it in the penalty proceeding with attempting to achieve rapid compliance.

Based on the testimony and other evidence introduced at the hearing and my viewing the site, and considering the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$880 should be imposed for the violation found to have occurred.

ORDER

Therefore, IT IS ORDERED that in Docket No. VINC 79-68-M, Order of Withdrawal No. 286223 issued October 30, 1978, is AFFIRMED and the contest of the order is DENIED.

IT IS FURTHER ORDERED that in Docket No. VINC 79-240-PM, Respondent CCI is ordered to pay the sum of \$880 within 30 days of the date of this decision as a civil penalty for the violation of 30 CFR 55.9-22.

James A. Broderick
Chief Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1 A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968), pp. 530-531.

