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SOL (MSHA) V. PHELPS DODGE
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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. WEST 79-67-M A/O No. 02-00156-05004
v.	New Cornelia Branch
PHELPS DODGE CORPORATION, RESPONDENT	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, Department of Labor, San Francisco, California, for Petitioner MSHA
Stephen W. Pogson, Esq., Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, for Respondent

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed under section 110 of the Act by the Secretary of Labor, Petitioner, against the Phelps Dodge Corporation, Respondent.

This case was duly noticed for hearing and heard as scheduled on October 22, 1979.

At the hearing, the parties agreed to the following stipulations:

> One, the operator is the owner and operator of the subject mine; two, the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; three, I have jurisdiction of this case; four, the inspector who issued the subject citation was a duly authorized representative of the Secretary; five, a true and correct copy of the subject citation was properly served upon the operator; six, copies of the subject citation may be admitted into evidence for purposes of establishing issuance, but not for the purpose of establishing truthfulness or relevancy; seven, the operator has a small history of violations and there were only six paid violations in 1978; eight, the operator is large in size; nine, imposition of a penalty in these proceedings will not affect the operator's ability to continue in business; ten, assuming the violation existed, said violation was abated in good faith.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-62). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 61-62). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 66-70).

Bench Decision

The bench decision is as follows:

> This case is a petition for the assessment of a civil penalty under section 110 of the Act. The alleged violation is of 30 CFR 55.9-2. This section provides that equipment defects affecting safety shall be corrected before the equipment is used.
>
> The MSHA inspector who issued the subject citation testified that all the lug nuts on the No. 149 truck were loose. Another inspector who accompanied the issuing inspector testified to the same effect. The inspectors testified that they touched and felt all the lug nuts and that all were loose. Both inspectors further testified that the truck was in the service area where it was being refueled. According to the inspectors, the serviceman fired the truck up so that the truck would have gone back into service after being refueled with the loose lug nuts present and uncorrected, had a citation not been issued. I find the testimony of the inspectors especially detailed, clear and consistent on all the circumstances surrounding the subject condition.
>
> The operator's witnesses testified that less than all of the lug nuts were loose, although it is not exactly clear from their testimony just how many they believed were loose. I recognize the testimony of the operator's mechanical foreman, that if all the lug nuts were loose the tire would be flat or partially flat, but the record has no showing how soon this would occur. Moreover, I accept the testimony of the issuing inspector that when the truck drove into the subject area, the inspector himself was on the opposite side from the affected wheel and that therefore he would not have seen the wheel and the tire at that time.
>
> In any event, I find more persuasive and accept as completely credible the testimony of the inspectors that all the lug nuts were loose. I also accept the testimony of the inspectors that because the lug nuts were loose, the wheel could come off and proper braking might not occur. This, obviously, was not safe. This condition, together with the

fact that after refueling the truck the serviceman fired it up so that it would have gone back into service, constitutes a violation of 30 CFR 55.9-2.

I further conclude that the No. 149 vehicle was not out of service. Even the operator's witnesses testified that it was being refueled in the event that it should be used again. The former Board of Mine Operations Appeals of the Department of Interior held that where equipment was under repair and had not been used and was not going to be used until it met and satisfied all the mandatory standards, no violation occurred. Plateau Mining Company, 2 IBMA 303 (1973) and Zeigler Coal Company, 3 IBMA 366 (1974). Under the provisions of the 1977 Act, the decisions of the former Board remain binding upon the judges until specifically overruled by the Commission. However, it is my opinion that the Board's prior rulings have no applicability here. I have not overlooked the argument of operator's counsel that there were plenty of trucks so that the No. 149 would not have to be used. The difficulty I have with this argument is that the evidence does not show it. If the truck did not have to be used and if in fact it had been completely removed from service, there really was no reason to refuel it.

The testimony regarding the hazards already set forth also show that this was a serious violation. Even the operator's pit mechanical foreman, who himself found two loose lug nuts, found them together which he said was more serious than if they had been spaced apart. In any event, as I have found, all loose lug nuts existed which presented a very serious violation.

I further determine that the operator was negligent in allowing this condition to occur. The operator is responsible for the actions of its serviceman in refueling the truck and in preparing to allow it to return to service. Even more importantly, the maintenance procedures followed at the time were deficient. The fact that after this citation was issued the serviceman in this area was given a wrench to tighten loose lug nuts instead of merely reporting them and waiting for repair equipment to arrive from elsewhere shows that the procedure operative when this citation was issued was defective and dangerous. The operator was negligent.

As set forth in my opening statement, I accept the stipulations of the parties to the effect that the operator is large in size, that the imposition of a penalty here will not affect the operator's ability to continue in business, that the violation was abated in good faith, and that the operator has a small history of prior violations.

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In determining the amount of penalty to assess, I am especially mindful of the operator's small history of prior violations to date, because this is, in my opinion, a serious violation.

Accordingly, a penalty of $125.00 is assessed.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $125 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge