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PEABODY COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

PEABODY COAL COMPANY, CONTESTANT	Contest of Order of Withdrawal Docket No. CENT 79-335-R
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 793364 July 23, 1979 Tebo Surface Mine
UNITED MINE WORKERS OF AMERICA (UMWA), RESPONDENT	

DECISION

Appearances: Thomas R. Gallagher, Esq., St. Louis, Missouri, for Contestant; Inga Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent MSHA Mary Lu Jordan, Esq., Washington, D.C., for Respondent UMWA

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 801 et seq., upon the application of Peabody Coal Company (Peabody) to contest an order of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(1) of the Act.(FOOTNOTE 1) A hearing was held on November 7 and 8, 1979, in Kansas City, Missouri.

The substantive issue is whether there is sufficient evidence to support the validity of Order of Withdrawal No. 793364 issued to Peabody on August 2, 1979. Peabody alleges that the order was invalid because there was insufficient evidence of the violation charged in the order (mandatory standard 30 C.F.R. 77.404(a)) and that in any event there was insufficient evidence of unwarrantable failure on the part of Peabody to comply with that standard. The parties stipulated in this case as to the existence of a valid underlying section 104(d)(1) citation; a condition precedent to the issuance of a withdrawal order under section 104(d)(1).

The order in this case was triggered by an alleged violation of mandatory standard 30 C.F.R. 77.404(a) in that "the transmission [in the No. 10 D-9 bulldozer] would not go into gear at times and when it would it would lurch forward or backward, particularly when pushing down an incline at the reclamation site." The cited standard requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

MSHA's case is based primarily on the testimony of its inspector, James Jury. I find his testimony to be completely credible and the significant portions of his testimony to be uncontradicted. Jury arrived at Peabody's Tebo Surface Mine for a routine inspection on the morning of August 2, 1979. He was approached by bulldozer operator Eldon Prettyman who reported that the No. 10 D-9 bulldozer had transmission problems. It would not shift properly, would take a long time to go into gear, and when it went into gear, would lurch. Jury then received what is commonly known as a "103(g)(2)" complaint(FOOTNOTE 2) regarding alleged safety defects in the No. 10 bulldozer including, inter alia, a complaint that the transmission was not working properly. Inspecting the subject bulldozer in the presence of Peabody representatives Mike Cain, Owen Suhr, and Darrel Montgomery, and union representatives Jack Sheppard and Elmer Robertson, Jury found no safety violations. Norman

Engelhart, the No. 10 bulldozer operator at that time, then complained to Jury that "it would not go into gear and it would lurch; and when you are on an incline changing from one gear to another, it would take a long time for it to go into gear [and] in the meantime, the machine would keep moving." Suhr then operated the machine in a brief demonstration on level ground but no problems were evident. Jury observed, however, that the complaints had been primarily directed to operations on steep inclines.

There is some disagreement over the exact sequence of events that followed, however, I do not consider them to be material. Jury recalled that he next went to the maintenance shop to check the log books and maintenance records for the suspect bulldozer. Jury found log entries indicating that the bulldozer had been in the shop on at least two different occasions for transmission work and that it had been returned to service. Maintenance logs for the subject bulldozer were introduced in evidence and show that complaints had in fact been made during the months of May, June, and July 1979, about transmission shifting difficulties. These entries were not crossed out or stricken in accordance with company procedure for completion of work, thus indicating that the repairs had not been performed. Suhr, being in charge of the shop and these shop procedures, should therefore have known of the complaints and that the repairs had not been performed. I therefore give no credence to his testimony that he thought the problems had been corrected. After examining the maintenance records, Jury consulted briefly with his supervisor by telephone and thereupon issued the order at bar.

Jury explained at the hearing some of the safety hazards involved in operating a bulldozer in the condition in which the No. 10 was reported to him:

> When you are pushing down an incline, pushing dirt into a pit or anywhere where you are on an incline, pushing into a hole, when you get a blade full of dirt, you have a matter of seconds to change directions or go into the pit. If your transmission is faulty, the bulldozer is still moving while you are trying to change gears.
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> Also, when a bulldozer is being used to push a scraper or whatever you have, to one approaching the equipment you are going to push, you have to go up to this slowly rather than hitting them hard; and if the transmission is lurching you go off slowly and it won't go into gear and it lurches forward, you are going to be hitting the scraper or truck harder than you should. Plus, if there is anyone in front of you, there's a possibility of running into someone or damaging other equipment or machines.

Six bulldozer operators from the Tebo Surface Mine also testified at the hearing about their experience in operating the No. 10 bulldozer with its defective transmission. They all

described various problems generally described as difficulty changing gears, hesitation after the gears had

become engaged, and unexpected movement. Their testimony, in significant respects, is uncontradicted and is fully corroborative of the inspector's testimony.

Norman Engelhart, who was operating the suspect bulldozer when Jury made his inspection, testified that it was unpredictable--"[o]ne time it might go into gear and the next time possibly not, and if it did go into gear, there was a chance it would lunge foward." The problem was described as hesitation after shifting gears and not knowing when the gears would engage. He recalled that on August 1st or 2nd he was pulling a pump with the bulldozer and was afraid that the cable might snap because of the unexpected movement. Engelhart reported these problems to company foreman Darrel Montgomery in May and again when he was pulling the pump. He explained that the transmission defects affected the ability to rapidly engage reverse gear so that it was also likely that you would go over the highwall with the dirt. He explained that the brakes alone would not pull the machine to safety in such a situation.

Joseph Marme was pushing scrapers and loading dirt with the suspect bulldozer on July 31, 1979. He too had difficulties because of the hesitation. The bulldozer would not properly disengage from the scraper it was pushing. It could have broken the "gooseneck" of the scraper and pushed the load on top of the scraper operator.

Danny Haggart had operated the suspect bulldozer for 4 or 5 days before the order was issued in this case (Tr. 113). He explained that "[w]henever you go to change gears, there would be a hesitation in it and I would have to work it back and forth, from forward to reverse sometimes to get it into gear" (Tr. 113). Haggart recalled a situation in which he was pushing dirt into water and could not shift into reverse. The mud was beginning to give away when finally the gears engaged and he was able to pull out. The brakes did not prevent him from sinking since the dirt beneath the tracks was also sliding into the water (Tr. 117). He reported the defective operation to his immediate supervisor, Raymond Roks, "quite a few times," but the problem had never been corrected.

J. C. Young operated the suspect bulldozer for 4 hours on July 12, 1979, moving topsoil into a pond. He had difficulty engaging reverse gear and when it did engage, it jumped or hesitated. He told company official Terry Rassler of the problem. Eldon Prettyman also had shifting problems with the suspect bulldozer 2 or 3 weeks before the order was issued while pushing off a highwall down into a pit of water. He reported this to company official Hoppy Gibson and the reclamation foreman.

The uncontested testimony of John Ferguson, a shop mechanic, is also significant in that it suggests that in spite of the known transmission problems, management returned the bulldozer to service without appropriate repairs. He was working on another problem with the No. 10 bulldozer in the latter part of July and

was unable to shift it into gear. He was told to put the bulldozer back "on the line" after getting the track buckled up. It went out the next morning.

The cause of the transmission problems became evident after it was withdrawn from service. Robert Tallenger, senior mechanic at the mine, examined the suspect bulldozer on August 3 and could not get it into gear. He found that the gears in the hydraulic pump were gaulded and prevented the pump from producing any pressure. After the pump was changed the transmission worked properly. Donald C. Potts, an experienced mechanic and service manager for the Fabick Tractor Company, conceded that inadequate oil pressure in the transmission could cause a delay or hesitation in the movement of the bulldozer until sufficient pressure was built up. This certainly could account for the difficulties encountered.

In light of the foregoing evidence, I can give but little weight to the testimony of Michael Cain, Peabody's health and safety supervisor, denying that he had received any complaints about the transmission prior to August 2nd. I also accord little weight to the testimony of truck and tractor manager Gail Gustafson who reportedly checked out the withdrawn bulldozer on the morning of August 3rd. The fact that the bulldozer may have operated without difficulty during this 45-minute demonstration does not detract from the described hazards. The hazards were in fact, in my opinion, even greater because of the unpredictability of the problem.

Within this framework of evidence, I have no difficulty in finding that Peabody was operating its No. 10 bulldozer in violation of mandatory standard 30 C.F.R. 77.404(a). Moreover, in light of the overwhelming evidence that various bulldozer operators had reported the faulty transmission problems to management, that the maintenance logs on the No. 10 bulldozer reflected that similar complaints had been made to the maintenance shop under the direct supervision of management and had been returned to service without repair, and the admissions of foremen Montgomery and Suhr that they had known of the transmission difficulties before the order was issued; I find that the violation was caused by an unwarrantable failure of the operator to comply with the standard. The order of withdrawal at bar therefore was, and is, valid.

Peabody has during the course of this case also raised several procedural questions which I shall now dispose of. I held in this case that MSHA had the burden of going forward to establish a prima facie case and that Peabody bore the ultimate burden of proof. Peabody disagreed and contended that the burden of proof should lie with MSHA. The Commission's Rules of Procedure (29 C.F.R. 2700.1 et seq.) do not directly address this issue. My determination in this regard is, however, consistent with my authority to regulate the course of the hearing under Commission Rule 29 C.F.R. 2700.54(a)(5),(FOOTNOTE 3) and is in accord with Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(d).4 Cf. Zeigler Coal Company, (FOOTNOTE 4) IBMA 88

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(1975), interpreting the former burden of proof rule of the Interior Board of Mine Operations Appeals in light of Section 7(d) of the Administrative Procedure Act. Moreover, in light of the overwhelming evidence supporting MSHA's case, the assignment of the burden of proof herein becomes immaterial. It is only when the evidence is in a state of equipoise that the burden becomes significant.

Peabody has also suggested that in determining the validity of a withdrawal order issued pursuant to section 104(d)(1) of the Act, such as the one at bar, I may consider at the hearing only that evidence within the knowledge of the MSHA inspector at the time the order was issued and not evidence subsequently discovered or obtained. There is no authority for this proposition and I reject it. The issues before me are whether the violation charged in the order occurred and whether a special "unwarrantable failure" finding can be made. In order to make a full and fair determination of these issues, I must consider all admissible evidence produced at hearing. I observe, however, that the inspector in this case had ample credible information at the time he issued the withdrawal order on which to base that order.

Peabody further argues that an MSHA inspector should not rely solely on "hearsay and third party statements" in issuing a 104(d)(1) order and cites the dictum of Judge Koutras in Secretary of Labor (MSHA) v. Pennsylvania Glass & Sand Corporation, BARB 79-108-PM (presumably at pages 19-30) as authority. That dictum is, in any event, inapposite to this case. Among other things, it dealt with a section 104(a) citation and not a section 104(d)(1) order. Moreover, Judge Koutras found an exception to his evidentiary requirements where the MSHA investigation follows a section 103(g) complaint, as occurred herein. Inspector Jury based his decision to issue the order in this case on unquestionably reliable evidence, including the company maintenance logs, admissions by company officials and statements by bulldozer operators, one of which was made in the presence of, and not denied by, company officials. Moreover, at hearing in this case, in contrast to Pennsylvania Glass & Sand, MSHA produced substantial admissible evidence of the violation and of "unwarrantable failure."

Gary Melick
Administrative Law Judge

~FOOTNOTE 1
Section 104(d)(1) of the 1977 Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard,

and if he finds such violation to be caused by an unwarrantable failure of the such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

~FOOTNOTE
Section 103(g)(2) of the 1977 Act provides in relevant part as follows:

"Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine * * *."

~FOOTNOTE 3
29 C.F.R. 2700.54(a) provides that:

"Subject to these rules, a Judge is empowered to * * * (5) Regulate the course of the hearing; * * *."

~FOOTNOTE 4
Section 7(d) of the Administrative Procedure Act states, in pertinent part, as follows:

"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."