

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

20 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 80-195-M
Petitioner : A.O. No. 12-00890-05004
v. :
 : Griffin Plant Mine
EVANSVILLE MATERIALS, INC., :
Respondent :

DECISION

Appearances: William C. Posternack, Attorney, U.S. Department of Labor,
Chicago, Illinois, for the Petitioner;
Philip E. Balcomb, Tell City, Indiana, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding **concerns** a proposal for assessment of civil penalties filed by the petitioner against the respondent 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 violation of mandatory safety standard 30 C.F.R. § 56.9-2.

Respondent filed a timely answer contesting the civil penalty proposal and requested a hearing. A hearing was convened on June 25, 1980, in Evansville, Indiana, and the parties appeared and participated fully therein. The parties waived the filing of written proposed findings and conclusions but were afforded an opportunity to present oral arguments in support of their respective positions, and a bench decision was rendered and is herein reduced to writing in accordance with Commission Rule 65, 29 C.F.R. § 2700.65(a).

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 proposal for **assessment of civil** penalties 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 Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

DISCUSSION

Citation No. 367494, October 3, 1979, 30 C.F.R. § 56.9-2 states as follows: "The brake system on the Cat. 966A front-end loader (SN 33A 1719) had an air leak when the brakes were applied. The air gauge showed a 30 P.S.I. drop in less than a minute. The air seemed to be leaking around the foot control valve'."

Stipulations (Exh. P-1; Tr. 10-13):

1. Respondent is subject to the provisions of the Act and is a small mine operator.
2. Respondent's prior history of violations consists of seven citations.
3. The proposed civil penalty assessment will not adversely affect respondent's ability to remain in business.

Testimony and Evidence Adduced by the Petitioner

MSHA Inspector Jerry Spruell confirmed that he conducted an inspection at the mine in question on October 3, 1979, and that he issued Citation No. 367494 (Exh. P-2(a)) after checking the brakes on a 966A Caterpillar loader which was being operated intermittently at the mine. He requested the loader operator to operate the brake pedal, and while he did so he observed the air gauge which indicated a drop in air pressure while the brakes were being applied with the engine in operation. When the engine was shut off, he determined that there was air leakage around the area of the brake foot control valve. The decreased air pressure was a constant decrease and the pressure dropped from 95 pounds per square inch to 55 pounds per square inch after he himself applied the brakes without the engine operating. He determined that the air pressure generated by the machine engine could not keep up with the leak, and the leak was in the braking system because air was escaping only when the brakes were applied. He cited section 56.9-2

because he believed the brakes were defective and the defect affected safety because lack of proper brake air pressure would not permit the operator to have full control of his machine. The loader had been in use at the time it was cited, and when he returned to the mine on November 30, 1979, the loader developed another leak and he extended the abatement time. The conditions were corrected when he again returned to the mine on December 27, 1979 (Tr.13-28).

Inspector Spruell testified that the respondent should have been aware of the defective brakes since visual observation of the air pressure gauge would have alerted mine management of the defect, and he also believed the condition was serious because the operator would have less than full braking capacity. Abatement was timely achieved within the extensions given (Tr. 28-30).

On cross-examination, Inspector Spruell described the mining operation and confirmed that it was a small operation with four men present at the time of his inspection (Tr. 33). The loader was operating at the limestone stockpile loading crushed stone onto a customer's truck. The loader which was cited is a back-up loader and it was being used intermittently, or once every half hour over a relatively flat area of the mine for a distance of some 30 feet (Tr. 30-36). After informing the loader operator about the brake conditions, the operator drove it to the mill area where he said he would leave it for the mechanic. Inspector Spruell could not determine by observation whether the loader operator was experiencing difficulty in stopping the machine and he did not ask the operator to demonstrate the stopping capability of the machine (Tr. 39).

Inspector Spruell stated that he could hear the air leak with the engine running and that it could be heard from the ladder next to the operator's position (Tr. 40-42). However, he did not actually observe the inability of the loader to stop (Tr. 44), and he confirmed that he is not an expert on braking systems (Tr. 52).

In response to bench questions, Inspector Spruell stated that while he did not accompany the loader operator while he operated the machine, he did depress the brake pedal and determined by means of his watch that the air pressure dropped during a few minutes and that there was air leakage in the system (Tr.55-56). He did not observe the loader operating in other mine areas and possibly only one or two persons were exposed to any hazard (Tr. 58). The loader operator advised him that he was unaware of any air leaks and he was not shown any maintenance records (Tr.61).

Paul E. Grubb, Jr., MSHA metal and non-metal mine specialist and inspector, testified that he was previously employed in the mining industry as a maintenance supervisor and that he supervised mechanics in the repair and maintenance of a variety of mobile mining equipment and vehicles. He was also employed for 6 years as a mobile equipment mechanic and has on numerous occasions examined and repaired air-over-hydraulic braking systems on a daily basis (Tr. 65-69).

Inspector Grubb testified that after listening to the testimony of Inspector Spruell, it was his opinion that the conditions described by him constituted a defective braking system affecting safety. He described the operation of the braking system in question and indicated that the effectiveness of the system is proportional to the available air in the system. Safety is diminished if the required air is not present in the system because of the fact that the stopping distance of the vehicle is extended. When he worked as a mechanic, vehicles would be taken out of service if they were found to have defects such as those described for the loader in question (Tr. 70-72).

On cross-examination, Mr. Grubb testified that a diminished air supply or air pressure will directly affect the braking capability of the vehicle and will diminish it to a point where the stopping time and distance of the vehicle will be extended (Tr. 74). The air pressure is directly proportional to the operation of the brake system, and he believed the brake condition described by Mr. Spruell indicated defective brakes affecting safety because the leak was of a magnitude to cause the air pressure gauge to plummet in a downward direction (Tr. 75). Although Mr. Grubb did not observe the loader which was cited, he was aware of the "red-line" on the air pressure gauge which indicates a danger zone for the braking system. He could not, however, state what the minimum safe operating air pressure would be for the loader in question and he has never observed the loader in question in operation (Tr. 83). He confirmed that it was not likely that the loader was operating at a high speed (Tr. 86).

Respondent's Testimony and Evidence

Timothy W. Titzer, loader operator, testified that at the time the citation issued he was not operating the loader but that he intended to operate it and did so after the inspector advised him that he wished to inspect it. He checked the brakes and air-pressure before using the loader and found nothing wrong and he noticed no air leak. He observed the air gauge while operating the loader, observed no unusual loss of air pressure, and the inspector did not ask him to demonstrate whether or not the brakes worked well. He recalled that the machine was not operating and that the engine was shut off while the inspector conducted his inspection. He also recalled that when he depressed the brake pedal he held it for 3 minutes while the inspector crawled under the loader to check it and he then advised him that he had an air leak. During this time, the air pressure dropped from 120 to 90 P.S.I. The "red-line" on the air gauge is fixed at 60 P.S.I. or under and his instructions are that he is safe as long as the gauge needle is above 60 P.S.I. (Tr. 101-110).

ML. Titzer stated that he heard no air leak and he believed that the alleged air leak in no way affected the safe operation of the machine because the brakes were good, and he did not believe that the citation contributed to his safety (Tr. 111).

On cross-examination, Mr. Titzer confirmed that he has operated front-end loaders and a single-axle truck at the Griffin Plant (Tr. 113). He operated the loader on the day the citation issued and did so prior to the inspector's arrival and loaded one or two trucks. He visually inspected the loader before putting it in operation the morning of the inspection and he checked the oil and hydraulic pressure, and the air

pressure gauge indicated 120 P.S.I. He tested the brakes by backing up the loader and they functioned. He had no **difficutly** with stopping the loader the day before while loading trucks. He experienced no unusual loss of air pressure when the brakes were applied with the engine running, and the pressure was maintained at 120 P.S.I. However, the air pressure gauge indicated a drop when the engine was shut off, and it dropped some 30 pounds from 120 P.S.I., but he has never known the air pressure to drop below 60 P.S.I. (**Tr.113-124**). He did not perform the maintenance work on the loader (**Tr.125**).

William L. Goffinet, master mechanic, testified that he is **responsible** for the maintenance of respondent's front-end loaders and that he has personally repaired the brake systems for some 15 years, including the type of loader cited. He is familiar with its braking function and operation and indicated that the normal operating air pressure for the 966 loader is between 110 and 120 P.S.I. The air pressure is measured by a factory installed gauge and the air pressure is generated by an air compressor mounted on the machine engine. Once the engine is started, it takes a couple of minutes to raise the air pressure and to fill the air reservoir which is used to store air for the brakes. He further explained the operation of the brake system, and stated that with the engine compressor running during normal operation, the air pressure would never reach below 110 pounds. When the pressure drops below 110 pounds, a governor built into the system starts the compressor pumping again until 120 pounds is achieved (**Tr.128-133**).

Mr. Goffinet described the brake foot treadle valve from which the alleged air leak was coming and indicated that it is possible for some leakage to occur as the operator depresses and releases the brake pedal. It is also common to have some leakage during operation and this is compensated for by the air compressor. He did not believe that the air leakage described by the inspector would affect the brakes (**Tr. 135**). In his view, the air pressure would have to drop below 60 pounds before the brakes would be rendered ineffective (**Tr. 138**). He did not believe that the air leak described by the inspector constituted a defect affecting the safe operation of the machine (**Tr.140**).

On cross-examination, Mr. Goffinet testified that he did not repair the loader to achieve abatement but that he was advised that the brake air system needed repair (**Tr. 141**). An air leak was repaired but he did not know where the specific leak was coming from, and he indicated that he had experienced no leakage problems with the loader (**Tr. 142**). **Assuming** a steady drop in air pressure below 110 P.S.I. when the brakes were applied and held, he would say that there was an air leak in the system and that repairs would be in order (**Tr.144**). Repairs are made when air leaks are reported (**Tr.145**). Leaks which are ignored could get worse and the amount of pressure lost would increase (**Tr. 147**). He reiterated that a continual drop in air pressure as indicated by the gauge when the brakes are applied and the engine running would indicate a major malfunction in the air system (**Tr. 149**).

Inspector Spruell was recalled as the court's witness and stated that the air leak was evident since the air pressure gauge was constantly dropping. He also indicated that the loader had been in operation prior to his arrival at the mine, and that he inspected the brakes with the engine on and

off (Tr. 151-155). At the time the air pressure dropped 30 pounds, he did not know the operating specifications of the loader. He then stated that the drop of 30 P.S.I. as stated on the face of the citation was detected when the loader was not operating and it dropped from 90 P.S.I. to 55 P.S.I. after the brakes were applied (Tr. 161). He also observed the air pressure drop when the operator applied the brakes with the engine running (Tr. 162). The air pressure would rise and fall as the brake pedal was applied and if the brake pedal was constantly applied as the loader was operated there would be a constant drop in air pressure (Tr. 164). With the engine on and the brake pedal applied, he observed the gauge needle drop below 110 P.S.I., but could not remember how far below 110 P.S.I. it fell (Tr. 165).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of 30 C.F.R. § 56.9-2, which provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used." Petitioner's evidence establishes that the loader which was cited was used to load materials on the morning of October 3, 1979, and on the basis of all of the testimony and evidence adduced in this proceeding, I further find that the petitioner has established a violation by a preponderance of the evidence. The tests and methods utilized by the inspector to document his belief that there was a substantial air leak in the braking system of the loader in question support his findings in this regard and establish to my satisfaction that the brakes were in fact leaking air and that this leakage rendered the brakes defective within the meaning of the cited safety standard. In addition, I conclude and find that the defect caused by the air leak affected safety in that the loss of air would affect the stopping capability of the loader and would extend the time and distance it would take to stop the loader (Tr. 185-186). Respondent's arguments and suggestions that the loader could be stopped by dropping and dragging the bucket or by using the transmission is rejected as a defense to the citation. The principal means of stopping the loader was by activating the brake pedal and since the depression of the brake pedal during the operation of the loader resulted in a constant and steady loss of air pressure, I conclude that such loss of air affected the braking capability of the loader. Although the loader operator testified that he experienced no difficulty in stopping the loader and denied that he observed any drop in air pressure or that he heard a leak, I find the inspector's testimony more credible on these issues and also find that the methods he used for testing and ascertaining the loss of air, while the loader was running and while the engine was off, adequate to support his findings. The citation is AFFIRMED.

Good Faith Compliance

Petitioner concedes, and I find, that abatement was timely achieved in good faith within the time fixed and extended by the inspector. I take note of the fact that as soon as the citation was issued the loader operator took the loader out of service so that a mechanic could look at it. Although the inspector found a second condition which necessitated additional repairs upon his return to the mine after issuing the citation, there is no evidence that the respondent failed to achieve good faith compliance in correcting all of the conditions cited by the inspector.

Gravity

While 1088 of air in a braking system of any vehicle is a **serious** situation and pose8 a potential for serious injuries, on the fact8 of this case I conclude and find that the cited condition **was** nonserious. **The** testimony reflect8 that the loader was a back-up piece of equipent used on an intermittent **basis**, that it **was** operating in a rather limited area loading materials from a stockpile onto a truck, and at most was operating at speed8 not in **excess** of 5 mile8 an hour. Further, there is no evidence that anyone was directly exposed to a **hazard of being struck** or run over by the loader, and the operator was satisfied that he could control the loader with the brakes which he had had even though the inspector detected leakage in the system. Further, the testimony adduced by the respondent **reflects** that the loss of air was corrected by simply tightening all of the brake system hoses and fittings and no one actually determined the actual cause of the leak and there is no evidence that it was caused by any defective mechanical **parts**.

Negligence

Respondent argues that it could not have reasonably known about the air leak in question because the loader operator checked the loader before **using** it on the morning of October 3, 1979, detected no leak8 that day, had no difficulty operating the loader, detected no drop in air pressure through visual observation of the air pressure gauge, and heard no leaking air. Petitioner produced no evidence that the respondent had actual knowledge of the leak and the inspector did not **check** any maintenance **records** to determine whether there were any prior- recorded problems with the loader. On the fact8 here presented, I cannot conclude that the respondent could have done anything more to detect and correct the air leakage problem prior to the inspector's inspection. Under the circumstances, I conclude that there is no evidence to support a finding of any negligence on the respondent'8 part and I find that respondent was not negligent.

History of Prior Violation8

Respondent'8 history of prior violations (**Exh.** Attachment A), consists of seven prior paid citations and I find that this **is** indicative of a good record on respondent' s part.

Size of Business and Effect of Civil Penalty on Respondent'8 Ability to Remain in Business

The parties stipulated that respondent is a small mine operator and that the penalty assessed will not adversely affect it8 ability to remain in business.

Penalty Assessment

On the basis of **the foregoing** finding8 and conclusion8 made in **this** proceeding, a civil penalty of \$25 is assessed for Citation No. 367494, issued on October 3, 1979, for a violation of 30 **C.F.R. §** 56.9-2.

ORDER

Respondent IS ORDERED to pay the civil penalty assessed by me in the amount of \$25 within thirty **(30)** days of the date of this decision.


George A. Koutras
Administrative Law Judge

Distribution:

William C. Posternack, Esq., U.S. Department of Labor, Office of the Solicitor, 230 **S.** Dearborn, 8th **Fl.**, Chicago, IL 60604 (Certified Mail)

Philip E. Balcomb, Manager, Evansville Materials, Inc., P.O. Box 248, Tell City, IN 47586 (Certified Mail)