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SOL (MSHA) V. PHELPS DODGE & MALONE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceedings Docket No. DENV 79-561-PM A/O No. 29-00159-05002-I
v.		Docket No. DENV 79-562-PM A/O No. 29-00159-05003-A
PHELPS DODGE CORPORATION,	RESPONDENT	Tyrone Mine & Mill
REX MALONE,	RESPONDENT	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner Stephen W. Pogson, Esq., Phoenix, Arizona, for Respondent

Before: Judge Stewart

The above-captioned civil penalty proceedings were brought pursuant to sections 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. || 820(a) and 820(c), and a hearing was held in El Paso, Texas. Posthearing briefs were submitted by the parties. Proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

Order of Withdrawal No. 150034 was issued on July 20, 1978, by inspector Omer Sauvageau pursuant to section 107(a) of the Act. The inspector described the pertinent conditions and practices as follows:

> On May 12, 1978, the Pettibone 25 Multicrane was in the shop for B.O. brakes. It could not be shifted into low gear (55.9-2). It was not tagged as defective equipment unsafe to operate (55.9-73). It was removed from the shop prior to repairs being made. As it traveled Niagra Gulch Road which was not bermed or guarded (55.9-22), the engine failed, the operator could not stop and the Pettibone rolled on its side.

> The operator was seriously injured. The operator must initiate a maintenance program which will insure that all equipment is not used until it is repaired and safe to operate.

On the basis of Order No. 150034, MSHA petitioned that Respondent Phelps Dodge Corporation be assessed four civil penalties, one each for alleged violations of 30 C.F.R. || 55.9-3, 55.9-2, 55.9-73, and 55.9-22, pursuant to section 110(a) of the Act. MSHA petitioned that Respondent, Rex Malone, be assessed penalties pursuant to section 110(c) of the Act for his knowing authorization, ordering or carrying out of the violations of sections 55.9-3 and 55.9-2, as an agent of Phelps Dodge Corporation.

The Tyrone Mine and Mill is an open pit copper mine located in Tyrone, Grant County, New Mexico, and, at all material times involved herein, was operated by Respondent, Phelps Dodge Corporation, a corporate entity. Phelps Dodge Corporation is a large mine operator, owning and operating several other mines throughout the country. A total of 723 miners are employed at the Tyrone Mine and Mill on three shifts per day, 7 days per week. These miners are represented by the United Steelworkers of America. Of the 723 miners employed, 140 work at the mill.

At all material times herein, Respondent Rex Malone was employed by the corporate operator as subforeman. He supervised approximately 30 miners in the mill area of the mine. Mr. Malone had been a subforeman at the mine for 9 years.

On May 12, 1978, Respondent's Pettibone 25 Multicrane (hereinafter, the Pettibone) was involved in an accident, resulting in serious injuries to its operator, Benjamin Ybarra. The Pettibone is a gasoline-powered, mobile-type crane weighing approximately 46,000 pounds, wheel-mounted on 1400/26 rubber tires, and equipped with hydraulically controlled power steering and hydraulic brakes. Its transmission is a spur-gear type with three forward speeds and one reverse in two ranges, high and low. The machine is equipped with a torque converter drive with no clutch. It was generally used for lifting and transporting heavy objects around the mine. The Pettibone was ordinarily assigned for use in the mill department of the mine, but anyone at the mine who needed it could use it.

On May 5, 1978, Santiago (Jimmy) Lopez, a mill repair helper first class, was operating the Pettibone while working on the No. 7 conveyor. At one point, Mr. Lopez applied the brakes with both feet but the brakes would not hold the vehicle. Mr. Lopez thereafter filled out a truck and equipment report(FOOTNOTE 1) on which he checked and listed the vehicle's defects. In the space provided, he checked as b.o., or bad order, the seat belt, brake, lights and horn, and noted that the fire extinguisher was missing. Under the heading "Other defects--Report in Detail," he wrote "No low gear-will not engage. No wipers." He conveyed this report to Homer Young, assistant mill repair foreman. Mr. Lopez testified that he felt the Pettibone to be unsafe because

of these defects.

Homer Young told Ernest Spezia, mill repair foreman, that the Pettibone could not be put into first gear. This conversation was overheard by Malone. Rex Malone was directed to take the vehicle to the shop by Ernest Spezia and Ed Reynolds, assistant mill repair foreman. At Rex Malone's direction, Norman Schwab, a mill repairman, drove the Pettibone to the truck repair shop about a week before the accident. Mr. Schwab was one of the most experienced operators of the Pettibone at the mill. The vehicle had been parked at the west end of the crusher. Mr. Schwab drove between the secondary crusher and mill building, past the mill building, across the railroad tracks, past the power house, across another set of railroad tracks and along the north side of the truck shop. Mr. Schwab used the Pettibone's brakes at the two stop signs along this route. He was traveling slowly on both occasions. The first stop sign was located at the end of the section of the road between the secondary crusher and the mill. The road was level at this location, but Mr. Schwab was traveling "real slow" because of the road's narrowness. The second stop sign was located before the railroad crossing. The road was on a very slight decline leading up to the second stop sign. Mr. Schwab testified that the brakes did not operate at 100 percent efficiency but they were sufficient to stop the machine.

Approximately 2 days after the Pettibone had been driven to the truck shop, Ernest Spezia directed Rex Malone to take the report submitted by Jimmy Lopez on the Pettibone to the truck shop. Mr. Malone testified that he picked up the report from Mr. Spezia's desk and delivered it to the office of Leonard Duncan, truck shop foreman. He also testified that he read only the bottom of the report and only enough of the report to make certain that it dealt with the Pettibone. More specifically, he stated: "I looked and I seen here something about it would not engage. So, I knew I had the right one." The report was thereafter posted on the bulletin board in the truck shop office.

Leonard Duncan testified that repair of the Pettibone was not undertaken prior to the accident because of a heavy work load at the shop. Before the accident, on May 12, Mr. Duncan instructed Rafael Rueda, Jr., and Donald Gojkavick, two mechanic's apprentices, to use the Pettibone to assist them in the repair of a truck. Mr. Duncan told them first of the low gear problem, and, then after checking the malfunction report, of the bad order brakes. Mr. Duncan testified that he was not aware of the bad order brakes until this point in time. Prior to reading the report, he knew only about the low gear problem of which he had been apprised in a telephone conversation with Ernest Spezia.

Both Rueda and Gojkavick used the Pettibone on the morning of May 12th. Mr. Rueda drove the vehicle from the north side to the east side of the truck stop and parked it there, next to the truck. The area was flat. Mr. Rueda did not recall whether he used the brakes. He testified that he traveled very slowly and had no trouble stopping the machine.

On that same morning, Ed Reynolds, the assistant repair

foreman, told Mr. Malone that a pump had to be replaced in the No. 2 tailing's thickener.

Mr. Malone testified that Reynolds directed him specifically to use the Pettibone. He denied that he had been told to use it "if available." Reynolds testified that he had told Mr. Malone generally that a piece of equipment was needed to work on the pump and that he might have instructed him to use the Pettibone, if available, but to use something else if it was not available. He did not recall telling Mr. Malone that the Pettibone, in particular, was needed. Rex Malone testified that the Pettibone was the only usable, available piece of equipment.

At the instruction of Mr. Reynolds, Mr. Malone went to Norman Schwab, mill repairman, and requested the assistance of one of his men. Of the two men available, Mr. Schwab chose Benjamin Ybarra. Malone and Ybarra proceeded to the truck shop in Malone's pickup.

Malone and Ybarra located the Pettibone on the east side of the truck shop. Rafael Rueda was in the immediate area. Malone told Mr. Rueda that he needed to use the Pettibone. Rueda, in turn, told Malone that the Pettibone had not yet been worked on. Both Ybarra and Rueda testified that Malone replied that he would "take it anyway." Malone asserted that he replied with words to the effect that he needed the Pettibone but that he would bring it right back to the shop. Mr. Malone then ordered Mr. Ybarra to proceed with the vehicle to his assigned task. He did not instruct Ybarra as to which route to take to the thickener. Mr. Malone did not attempt to check the defective equipment report or to obtain a release from a truck shop foreman prior to taking the Pettibone.

Under the procedures in effect at the time of the accident, the need for equipment repair might be reported to the truck shop in any of a number of ways. It might be communicated orally or in writing. A check list of problems was frequently included. Sometimes, a work order of the sort submitted by Jimmy Lopez was included. It was contingent upon the operator of the equipment to report a condition which was unsafe or which jeopardized the equipment. The equipment was brought to the shop and parked on the north side of the building. All such equipment was considered "dead-lined" and was not to be used. John Strahan, supervisor of the truck shop, testified that a tag-out procedure was in effect during, and prior to, May of 1978. When equipment was reported as unsafe, or not to be operated, and the shop foreman thought that this was the case, he would tag-out the machine. In this instance, the Pettibone was not tagged-out by a foreman. Jimmy Lopez, however, asserted that he had placed a tag on the Pettibone on May 5, 1978, when he completed the truck and equipment report. None of the other witnesses, including Mr. Schwab who drove the vehicle to the shop, observed a tag on the Pettibone thereafter. No explanation was offered as to its absence.

Mr. Ybarra drove the Pettibone to the No. 2 thickener. He took the most direct route, a distance of approximately one-half mile. This road had a 1- to 2-percent grade. He parked the machine at the thickener and began to work on the pump. After 45

minutes of work, Schwab asked Ybarra to drive the Pettibone to a storage area to help load metal steps needed for the work on the thickener.

The storage facility was located a distance of one-fourth mile from the thickeners on the far side of the Niagra Gulch Road. To get to the storage area, Ybarra had to drive to and along the Niagra Gulch Road. At its upper end, this road was elevated 6 to 8 feet above a gulch. A 3- to 4-foot drop existed from the road at the site of the accident. The grade on the Niagra Gulch Road was approximately 5 to 7 percent. Mr. Reynolds testified that the Niagra Gulch Road was used only to provide access to the storage area located at the end of the road. Trips were made to this area once or twice a year when work was performed on the thickener pumps. The distance from the point where the road crossed over the gulch to the storage area was approximately 50 yards. The section of the road at which the accident occurred was 20 yards long and 10 yards wide.

There was no continuous berm on the area of the Niagra Gulch Road where the accident occurred. Nicholas Armyo and Norman Schwab testified that a "slight berm" existed on the right side of the road. This berm was 14 inches at its highest. It tapered off to nothing at the center of the gulch. Mr. Schwab stated that this berm was not "sufficient to resist the crane." At the recommendation of a state mine inspector, berms were subsequently built along the portion of the Niagra Gulch Road where the accident occurred. In addition, the road was "bladed," slightly changing its grade.

Norman Schwab and two other workmen followed Mr. Ybarra to the storage area. As Ybarra made the final turn onto the section of the Niagra Gulch Road where the accident occurred, the engine stalled--he did not have his foot on the accelerator because the felt that he was traveling fast enough already. Mr. Schwab testified that Mr. Ybarra was traveling at a slow rate of speed, less than 5 miles per hour. Mr. Ybarra was unable to steer the vehicle. He applied the brakes a first time, but they did not function. He tried to brake a second time, but was again unsuccessful. Mr. Ybarra testified that he felt no pressure on the pedal and he thought that it went to the floorboard, although it may not actually have hit the floorboard. The Pettibone rolled off the road and turned over. In the process, Ybarra was thrown from the vehicle and seriously injured.

Mr. Ybarra testified that he would have used the low gear and had it been functioning. In his opinion, negotiation of the Niagra Gulch Road would have been safer in low gear. Norman Schwab, one of the most experienced operators of the Pettibone, testified that he would have used second gear, high range, or third gear, low range to travel from the thickener to the storage area.

Both Respondent, Phelps Dodge, and union safety representatives commenced an immediate investigation of the accident. Respondent, Phelps Dodge, did not report the occurrence of the accident in a timely fashion to MSHA or to state officials. As a consequence, MSHA did not carry out an immediate, firsthand investigation.

On July 14, 1978, Thomas Castor, supervisor of the Albuquerque Field Office of MSHA, received a report concerning the accident which had been

prepared by Local 890 of the United Steelworkers of America on June 8, 1978. The report was accompanied by a letter from the union, dated July 11, 1978, requesting investigation of the accident. The report had been sent earlier, but had not been received by MSHA. In response to this request, Mr. Castor, Inspector Sauvageau, and Harold Robertson, an MSHA special investigator, conducted an investigation of the accident on July 20, 1978.

By July 20, 1978, repairs had been completed on the Pettibone. Company records revealed only that the repairs had been made. The date and details of the repairs were not revealed. Leonard Duncan testified that the problem with low gear--a loose pin in the linkage--had been repaired. He stated that replacement of a vacuum line was the only repair done to the braking system. Checks were made for leakage, but no cylinders, shoes or the like were replaced or adjusted. The clogging of the line was caused by the separation of the lining within the vacuum line and the formation of a tumorlike bubble. Leonard Duncan testified that it was possible that the degree to which the bubble blocked the line and the effectiveness of the power braking might change during operation of the vehicle. He stated that the power brakes might work on first application, but be slow to recover. Mr. Duncan also testified that he tested the brakes as soon as the Pettibone had been righted. He found that they were operable, but had less than full power. Leonard Duncan conducted a number of tests on the Pettibone after the vehicle had been repaired. He discovered that the steering of the vehicle was more affected by the stalling of its engine than was its braking power. A slight amount of steering remained as long as the machine was in motion. When the engine died, appreciably more pedal force had to be applied to the brake and the pedal had to be pushed farther down to begin braking. Mr. Duncan was of the opinion that a small man could exert enough pedal force to stop the Pettibone on a 6- to 8-percent grade with the engine dead. Mr. Duncan's tests also revealed that when the vacuum line was disconnected, the vehicle actually braked more effectively with the engine dead than with it running.

Respondent Phelps Dodge did not have a tag-out procedure established in writing at the material times herein. On September 19, 1978, a memorandum concerning the tag-out and newly effected lock-out procedures was distributed to its employees. Respondent asserted that, notwithstanding the fact that the tag-out procedure had not been reduced to writing, a procedure had been in effect during these times and that the procedure was common knowledge throughout the operation, spread by word of mouth. Respondent asserted that the tag-out procedure was not reduced to writing and distributed prior to September 19, 1978, because of difficulties experienced in implementing the lock-out procedure.

Issues Under Section 110(a) ÕPhelps DodgeÊ

Section 110(a) of the Act reads as follows:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed

> a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

At issue, therefore, is whether Respondent was in violation of the four mandatory standards alleged in Order No. 150034. If Respondent is found to have violated a mandatory standard as alleged, an appropriate civil penalty must then be assessed in keeping with the criteria enumerated in section 110(i) of the Act. That is, it is necessary to consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. As noted above violations of four mandatory standards--one each of sections 55.9-3, 55.9-2, 55.9-73 and 55.9-22 were alleged herein by Petitioner.

(a) 30 C.F.R. | 55.9-3

Section 55.9-3 requires that powered mobile equipment shall be provided with adequate brakes. Clearly, the Pettibone 25 Multicrane was powered mobile equipment and subject, therefore, to the requirement of the mandatory standard.

Jimmy Lopez and Benjamin Ybarra testified that they experienced total braking failure. A written failure report was prepared and submitted after the first total failure. The second total failure occurred when the Pettibone was taken from the repair shop and used before repairs were made. Notwithstanding the absence of a simple mechanical explanation for this total failure, the testimony of these two individuals is uncontradicted and, therefore, accepted. The uncertainty as to the exact cause of the total braking failure should not obscure the fact that such failure occurred on at least two occasions even though at other times the brakes did function to some degree. This is particularly true, here, where the uncertainty may be due in part to the failure of Respondent Phelps Dodge to provide prompt notification of the accident to MSHA. In addition, the written records show only that the vehicle was released as repaired. Details of the repair efforts were not included in the repair records.

Witnesses for Respondent admitted that the brakes were not at 100 percent full power, but asserted that they were sufficiently operative to stop the vehicle. Leonard Duncan testified that a partial blockage which was found in the vacuum line might have caused the vacuum booster to operate sporadically. He felt that the capacity of the system to recover after each use may have been compromised. A second possibility was that the position of the partial blockage within the vacuum line might change with use of the brakes, thereby changing the effectiveness of the power braking system. The Pettibone is a

large vehicle of substantial weight and, on occasion, it is driven on roads with grades steep enough that full braking power had to

be maintained in order to operate the vehicle safely. This was particularly true given the absence of low gear at the times material herein. Variability in effectiveness of the power braking system posed additional safety problems in that it would be difficult to judge the vehicle's stopping distance.

The loss of power-assisted braking, whether sporadic or complete, made operation of the Pettibone unsafe. An even more serious safety problem was presented by the sporadic full loss of braking power. The braking system of the Pettibone was, therefore, inadequate and in violation of the mandatory standard as alleged.

Respondent Phelps Dodge was negligent in its failure to maintain adequate brakes on the Pettibone. The condition of the vehicle was known or should have been known to a number of the members of mine management and the defective brakes, which had been previously reported, should have been repaired prior to its use by Benjamin Ybarra on May 12, 1978.

Jimmy Lopez wrote his faulty equipment report on May 5, 1978, noting that the vehicle's brakes were in "bad order." Rex Malone carried this report to the truck shop. He testified that he had seen such reports on prior occasions and that they are very simple. Mr. Malone testified, however, that he read only the bottom of the report and knew, therefore, only of the problem with low gear. An examination of the report reveals that seat belts, brakes, lights and horn were very conspicuously marked as "b.o." That each of these items had been checked as bad order was unmistakable and evident at a glance.

The term "bad order" as used at the mill may apply to defects on a piece of equipment other than those affecting safety. While the use of the term in that sense at the mill does not always mean that a safety-related defect exists, it does mean that a safety defect may exist. Caution is mandated under these circumstances. It should have been established with certainty that the defect was not safety-related before the unrepaired vehicle was taken from the repair shop and used.

Rex Malone knew that a defective equipment report had been issued on the Pettibone and he knew that no work had been done on it. He had seen this report and had it in his hands. It is evident from even a hasty look at this report that the brakes of the Pettibone were defective. Even so, he ordered Ybarra to take the vehicle without consulting or seeking permission from a truck shop foreman. Rex Malone knowingly ordered Ybarra to use the vehicle with defective brakes. Given Mr. Malone's status as a subforeman and representative of Respondent Phelps Dodge, his negligence is imputed to Phelps Dodge.

The use of the Pettibone despite the inadequacy of its brakes was a direct, proximate cause of an accident in which the operator of the vehicle suffered serious injury. As with any such defect on a vehicle, it was probable that an accident would occur. It was also probable that serious injury or fatality would

be suffered.

(b) 30 C.F.R. | 55.9-2

30 C.F.R. | 55.9-2 requires that equipment defects affecting safety shall be corrected before the equipment is used. The record clearly establishes that the Pettibone was operated even though low gear could not be engaged in either range. The primary dispute between the parties concerning this issue was whether this defect was one affecting safety within the meaning of the mandatory standard.

Rex Malone testified that the machine had been used several times with the defect and because of this he did not feel that the defect presented a safety hazard. Norman Schwab also felt that the machinery was safe because he believed that low gear would not be needed in the area in which they were working at the time. On the other hand, Inspector Sauvageau, MSHA, supervisor Henry Narramore, and Mr. Ybarra testified that the absence of low gear did present a safety hazard.

The defect was clearly one which affected safety. The use of the vehicle on relatively steep inclines without low gear would have been hazardous. There was nothing to prevent the use of the vehicle on such inclines.

Rex Malone knew of the low gear problem yet he ordered Ybarra to operate the vehicle. Malone was negligent in so doing. Malone was a representative of management and, as such, his negligence is imputed to Respondent Phelps Dodge.

Norman Schwab testified that he would have used second gear, high range, or possibly third gear, low range, on the Niagra Gulch Road. Ybarra indicated that he would have used low gear on the Niagra Gulch Road, had he been able to do so. He also testified that he would have used low gear traveling "to the thickener and back," but he did not indicate which of the two ranges he would have used.

It was probable that an accident would occur. Inclines existed at the mine which were of sufficiently steep grade to require the use of low gear. The vehicle was not assigned to any one department and it was driven on occasion by operators of varying experience. Nothing prevented use of the vehicle on a relatively steep incline by an inexperienced operator. The likelihood of accident was substantially increased by the concurrent brake problem. If an accident were to occur, such accident would be likely to result in serious injury or fatality.

(c) 30 C.F.R. | 55.9-73

Section 55.9-73 requires that defective equipment, removed from service as unsafe to operate, shall be tagged to prohibit further use until repairs are completed. Jimmy Lopez testified that he had placed a tag on the Pettibone on May 5, 1978, when he completed the truck and equipment report. This tag was not attached when Norman Schwab transported the vehicle to the shop or at any material time thereafter. No explanation for the

absence of the tag exists on the record.

The Pettibone was removed from service for defects which made it unsafe to operate. Jimmy Lopez had acted because he felt that the vehicle was unsafe. John Strahan, Respondent's master mechanic and supervisor of the truck shop, testified that the truck shop foreman had the responsibility of tagging-out unsafe equipment. Once the vehicle was in the shop, however, the Pettibone was not tagged and no effort was made to determine the exact nature of the defects to vital components until the morning of the accident, May 12, 1978. This appears to have been in contravention of the tag-out procedure purported by Respondent to have been in effect at the time.

Respondent's assertion that a tag-out procedure was in effect on and before May 12, 1978, is undermined by the facts of this case. Even if such a procedure had been orally promulgated, it was not effective since the Pettibone was not tagged-out at the material times herein. At the time that Rex Malone ordered the vehicle taken, it was untagged and unsafe to operate. The failure to tag the Pettibone to prohibit its further use was in violation of the mandatory standard as alleged.

Respondent was negligent in its failure to tag the Pettibone to prohibit its further use. A defective equipment report indicating that defects existed in vital components had been submitted because the vehicle was felt to be unsafe to operate. Even so, no effort was made by Respondent for a number of days to check whether it would have been appropriate to tag-out the vehicle.

The failure to tag-out the Pettibone and effectively remove it from service was one of the causes of the Ybarra's accident. Certainly, it was probable that an accident and serious injury or fatality would occur because of the failure to tag-out.

Respondent was careful to point out that a piece of equipment which was in "bad order" need not pose a safety hazard as well. Leonard Duncan testified that no more than 20 percent of the bad order equipment in the shop presented safety hazards. In this instance however, the equipment was clearly unsafe with defects in the brakes, transmission, lights, seat belt and horn. The equipment had no windshield wipers or fire extinguisher.

(d) 30 C.F.R. | 55.9-22

Section 55.9-22 requires that berms or guards shall be provided on the outer bank of elevated roadways. The record indicates that adequate berms or guards were not present along the Niagra Gulch Road as required by the mandatory standard.

The Niagra Gulch Road was elevated and, therefore, the standard applied to it. The term "berm" is defined in section 55.2 to mean a pile or mound of material capable of restraining a vehicle. As noted above, a "slight berm" existed on one side of the Niagra Gulch Road in the vicinity of the culvert. This mound of material was of insufficient height and material to restrain

the Pettibone. It did not, therefore, meet the definition contained in section 55.2 or the requirements contained in section 55.9-22. The Respondent's assertion that berms had not been placed continuously along the Niagra Gulch Road because drainage and snow removal problems existed was not substantiated.

The Respondent was negligent in that the need for berms was readily evident yet insufficient effort was made to install them prior to the accident. Respondent's negligence was mitigated in part by the infrequent use to which the road was put.

It was improbable that this condition would lead to accident and injury. The road was used but once or twice per year. However, the absence of berms directly contributed to Ybarra's accident. George Lopez, Inspector Sauvageau and Henry Narramore each testified that the accident would not have occurred had berms been present as required.

History of Previous Violations

At the hearing, Petitioner introduced a computer printout containing a history of the prior paid violations of Respondent Phelps Dodge Corporation. This printout listed prior paid violations which occurred at each of Respondent's subsidiaries, including the Tyrone Mine and Mill, between the effective date of the Act and July 20, 1978. During this time, there were a total of 16 prior paid violations at the seven mine sites which had Phelps Dodge Corporation listed as operator. There were no prior paid violations at Tyrone Mine and Mill before July 20, 1978.

Respondent Phelps Dodge objected to consideration of the history of Western Nuclear Corporation, its subsidiary, in the assessment of civil penalties herein. Note is taken of the fact that, matters of ownership aside, no showing was made that the Tyrone Mine and Mill and Western Nuclear have any relationship except "a common corporate officer at their New York Offices." However, the history of violations introduced in evidence by Petitioner does reflect on the posture of Phelps Dodge Corporation as a whole to safety matters and may, therefore, properly be considered in assessing civil penalties. There were 33 prior paid violations at the three mines of which Western Nuclear Corporation was operator from the effective date of the Act through July 20, 1978. Twenty-seven of these occurred at a single mine--the Sheep Mountain Operations.

On the whole, since the Tyrone Mine and Mill had no prior paid violations and the prior history at its other operations was not substantial, Respondent's history of violations was good.

Abatement Efforts

Three of the four violations at issue herein were abated prior to the issuance of the subject order. The braking and low gear problems had been repaired and berms had been placed alongside the Niagra Gulch Road. There is no indication that these abatement efforts were other than promptly carried out.

Inspector Sauvageau asserted that Respondent's effort with regard to the tag-out violation was very poor. Although the order was terminated with respect to the Pettibone and Niagra Gulch Road on July 20, 1979, he did not terminate the order with respect to the failure to tag-out until September 19, 1978. At that time, the inspector was given a copy of a document entitled "Mobile Equipment and Tag Out Procedure". On the other hand, John Strahan testified that a tag-out procedure was in effect at all times material herein. This procedure was not in writing but it was generally understood by the employees at the Tyrone Mine and Mill. Testimony to this effect was also given by Leonard Duncan.

There is nothing in section 55.9-73 or in the record which suggests that a tag-out procedure must be in writing to meet requirements of the mandatory standard, although the promulgation of a written document would have surely better informed the miners of the details of the procedure. It might have also provided a better basis for an argument that the procedure was in effect, even though it was ineffective in this instance to prevent the accident caused by the defective Pettibone. The delay in placing the procedure in writing was in part due to the time required in developing a comprehensive lock out procedure of even greater scope than that required by the inspector.

In pertinent part, section 110(i) of the Act requires consideration of the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Although there was no effective tag-out procedure prior to the date of the accident, there is nothing in the record to support a finding that the orally promulgated procedure was not effective after the accident when the order had undoubtedly increased the operator's awareness of the necessity of such procedures. In view of the operator's efforts after the accident, it is found that Respondent demonstrated good faith.

Issues Under Section 110(c) ÕRex MaloneÊ

Section 110(c) of the Act reads as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

It has been established that the corporate operator, Respondent Phelps Dodge, was in violation of sections 55.9-3 and 55.9-2, the two violations which Respondent, Rex Malone, was alleged to have knowingly authorized, ordered or carried out.

The remaining issues, therefore, are (a) whether Rex

Malone was an agent of Phelps Dodge, (b) whether Rex Malone knowingly authorized, ordered or carried out these violations, and (c) if a violation of section 110(c) is found, the appropriate civil penalty that must then be assessed.

Respondent, Rex Malone, was an agent within the meaning of section 110(c). Section 3(e) of the Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine." At all times material herein, Rex Malone supervised approximately 30 employees of the corporate operator Phelps Dodge.

As agent of the corporate operator, Rex Malone is subject to civil penalties pursuant to section 110(c) if the knowingly authorized, ordered or carried out the violations of sections 55.9-2 and 55.9-3. Rex Malone clearly knew that the Pettibone was defective. A week before the accident, he had directed Norman Schwab to drive the Pettibone to the truck shop for repairs. Moreover, Rex Malone hand-delivered the defective equipment report concerning the Pettibone to the truck shop. The report was simple and very clearly marked, and he had seen others on earlier occasions. It has been described above and is reproduced in Appendix I. It is evident that the truck and equipment report could be read and understood at a glance.

Rex Malone admitted that he looked at the defective equipment report and knew of the defective low gear. His statement, that he read only the handwritten portion of the report and did not see the clearly marked notation that the brakes were defective, is unbelievable. The record clearly establishes that Respondent Malone had personal knowledge of the Pettibone's defects, including the brakes.

At the time that he ordered Ybarra to use the Pettibone, Malone knew that it was defective, that it was in the shop for repairs, and that no work had been done on it. He knew that a certain procedure was in effect with respect to dead-lined or defective equipment, yet he deliberately chose to ignore such procedure. While defects in some components of mining equipment might not necessarily cause the operations of the equipment to be unsafe, the record in this case establishes that defective brakes on the Pettibone were defects in a vital component and clearly a safety hazard. Mr. Malone acted with knowledge that the vehicle was defective and in conscious disregard of established procedure.

It is found, therefore, that Rex Malone knowingly authorized and ordered the use of the Pettibone in violation of sections 55.9-2 and 55.9-3 and that he is subject to the assessment of a civil penalty for each violation pursuant to section 110(c) of the Act.

The criteria set forth in section 110(1) of the Act are considered in the assessment of penalties against Mr. Malone as well as against the operator insofar as they are applicable.

In addition, the financial ability of Malone to pay a civil penalty is relevant and should be considered. It was established that Mr. Malone's yearly salary, excluding overtime pay, was $18,000.

The parties stipulated at the hearing that Rex Malone has no history of previous violations. With respect to both the defective brakes and the low gear problem, it was probable that an accident would occur. In both instances, a fatality or serious injury would be the anticipated result of such an accident. Moreover, a direct causal relationship was established between the use of the Pettibone despite its defective brakes and Ybarra's accident.

Constitutionality of Section 110(c) of the Act

In its amended answer and again in its posthearing brief, Respondent, Rex Malone, asserted that section 110(c) was unconstitutional because it violates the right of Respondent to equal protection of the laws accorded by the Fifth Amendment of the United States Constitution. Section 110(c) of the Act provides for the imposition of civil penalties for knowing violations committed by agents of corporations. The Act does not provide for the imposition of civil penalties against agents of other entities such as partnerships and sole proprietors. Respondent contends that this classification bears no rational relationship to a legitimate governmental purpose.

There is a question as to whether an administrative law judge of the Federal Mine Safety and Health Review Commission has the authority to declare section 110(c) of the Act unconstitutional. This issue need not be decided in this case. Even if we assume, arguendo, that the Commission has such authority, Respondent has not demonstrated in any meaningful way that the classification is without reasonable basis. In essence, Respondent's position is as follows:

> The varied treatment of corporate employees and partnership employees under the Mine Safety Act is not only imprecise but wholly arbitrary and without rationale. There is no rational way that such a distinction might aid in the protection of the safety and health of the nation's miners. Surely, one could not reasonably maintain that a corporate employee is more likely to violate a safety or health standard than an employee of a partnership.

Respondent asserts that the classification is imprecise but offers no rational argument in support of this assertion. Respondent likewise states that the classification is arbitrary and without rationale, but offers nothing to support its position. Respondent recognized that it bore the burden of showing the lack of rational relationship of the classification at issue herein to a legitimate Government purpose, but it did not meet this burden.

The Act's stated purpose of insuring the safety and health of miners is unquestionably a legitimate governmental purpose. One of the means of achieving this end is provided for in section 110(a) of the Act. Every operator,

whether corporate or otherwise, is subject to the assessment of a civil penalty for a violation of a mandatory standard occurring within its mine. The deterrent effect of such a penalty varies with the type of organization against which the penalty was assessed. The individuals who comprise mine management are those most likely to be responsible for a particular violation and to be in the best position to prevent its recurrence. Congress was aware that non-corporate management, as compared to corporate management, was likely to be in a close relationship with the operator of the mine. As cousel for Petitioner notes, "where a mine is run by a sole proprietorship or partnership, generally the individual owner or partner is involved in the day-to-day operations of the mine and thus is chargeable as a mine operator himself under the Act." Thus, whether a violation was caused knowingly or not, the corresponding civil penalty assessed pursuant to section 110(a) would usually be expected to have a more immediate deterrent effect on non-corporate management. On the other hand, the organization of the larger mines is typically corporate. Those members of management responsible for a violation would be less likely to feel the impact of an assessment of a civil penalty under section 110(a). The corporation, rather than management, absorbs the penalty. As a consequence, the deterrent effect of the civil penalty would be greatly reduced. Section 110(c) provides the means of penetrating the shield of corporate organization to insure that a civil penalty would have as great a deterrent effect in a corporate setting as it would in a non-corporate one.

In pertinent part, section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. | 801 et seq. (1970). parallels section 110(c) of the 1977 Act. The following reference was made in the legislative history of section 109(c) to the classification at issue herein:

> The committee expended considerable time and energy in discussing the role of an agent of a corporate operator and the extent to which he should be penalized and punished for his violations of the act. At one point, it was agreed to hold the corporate operator responsible for any fines levied against an agent. It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him.
>
> The committee recognizes, however, the awkward situation of the agent with respect to the act and his supervisor, the corporate operator, and his position somewhere between the two. The committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield. The committee does not, however, intend that the agent should bear the brunt of corporate violations. It is presumed that the agent is often acting with some higher authority when he chooses to violate a mandatory health or safety

standard or any other provision of the act, or worse when he knowingly

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violates or fails or refuses to comply with an imminent danger withdrawal order or any final decision on any other order. ÕEmphasis added.Ê

House Committee on Education and Labor, 91st Cong., 1st. Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Committee Print, 1975) at 1041, 1042.

This passage makes it clear that Congress was concerned about the reduced deterrent effect of penalties assessed under section 110(a) at all levels of corporate management. Therefore, it extended application of section 110(c) to the agents of corporations as well as to the officers and directors thereof. Respondent has offered nothing upon which to predicate a finding that this classification is without rational basis.

ASSESSMENTS

In consideration of the findings of fact and conclusions of law contained in this decision, the following assessments are appropriate under the criteria of section 110 of the Act:

(a) Respondent Phelps Dodge, Inc.:

Standard Violated 30 C.F.R.	Penalty
55.9-3	$1,000
55.9-2	500
55.9-73	500
55.9-22	100

(b) Respondent Rex Malone:

Standard Violated 30 C.F.R.	Penalty
55.9-3	$ 500
55.9-2	400

ORDER

It is hereby ORDERED that Respondent Phelps Dodge, Inc., pay the sum of $2,100 within 30 days of the date of this decision.

It is further ORDERED that Respondent, Rex Malone, pay the sum of $900 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE_ONE
1 This truck and equipment report is reproduced in Appendix I.

APPENDIX 1

THE PHELPS DODGE CORPORATION
ORE DRESSING DIVISION
TYRONE BRANCH

TRUCK AND EQUIPMENT REPORT

Equipment PETTIBONE 25 Shift "A"
Operator J. LOPEZ Date May 5, 78

EQUIPMENT ()	O.K. ( )	B.O. ()
Seat Belt	( )	()
Brake	( )	( )
Lights	( )	()
Horn	( )	()

Fire Extinguisher if required
O.K. ( ) B.O. ( ) Missing ()

OTHER DEFECTS - REPORT IN DETAIL
No low gear-will not engage. No wipers.

Defects to be turned in at end of "A"-Shift for "B"-Shift repair.

Mechanic Making Repairs
Date Complete