

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

27 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 80-42-M
Petitioner : A/O No. 01-00040-05011
v. :
ALLIED PRODUCTS COMPANY, : Moatevallo Quarry and Mill
Respondent :

DECISION

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S.
Department of Labor, Birmingham, Alabama, for Petitioner;
Robert D. Rae, Allied Products Company, Alabaster, Alabama,
for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section **110(a) 1/** of the Federal Mine Safety and Health Act (hereinafter, the Act), 30 **U.S.C. § 820(a)**. At the hearing in this matter held in Birmingham, Alabama, the parties stipulated the facts of the case and some of the statutory criteria to be used in assessing civil monetary penalties. A decision was entered on the record.

1/ Section **110(a)** reads as follows:

"SEC. 110. (a) The operator of 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."

Section **110(i)** reads as follows:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall 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

Stipulations

At the hearing, the parties entered into the following stipulations:

Respondent was served with citation No. 082553, which stated "warning signs or signals were not provided at in-plant railroad crossing." 30 C.F.R. § 56.9-59 reads: "Public and permanent railroad crossings shall be posted with warning signs or signals or shall be guarded when trains are passing and shall be planked or otherwise filled between the rails."

Respondent does not contest the service of Citation No. 082553 or any modification or termination thereof or the subsequent amendment of that citation.

The total manhours worked for the company are 355,251. At the Montevallo Quarry and Mill, the manhours are 211,939. This is a medium size facility.

The penalty would not impair Applied Products' ability to remain in business.

The violation history of the company is average.

Respondent's operation is a lime plant operation. The subject crossing is in the production plant area.

The railroad comes in once daily, generally at night, and places cars **according** to the direction for loading. When it is necessary for Respondent to move a car from a storage track under the loading tanks, that car is moved by Respondent's own employees. Loading is done Monday through Saturday and 50 percent of the time there are no cars moved across that crossing.

When it is necessary to move a car into the loading area of the plant, Mr. J. C. Smith, the loading foreman, makes that decision and he calls his bulk loader and his front-end loader operator. They go over and get the car. The bulk loader gets on the brake platform of the car; the bulk loader gets to the rear of the car and is offset from the car so that he has a good, clear view of the track in front of him. Better than 90 percent of the time, J. C. Smith, the foreman, has gone with them and is standing over in the roadway for protection. The two men that move these cars, the bulk loader and the front-end loader operator, have stated that if Mr. Smith is not there, they generally will pick up another man who will guard the rail crossing for him.

fn. 1 (continued)

after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

These **cars are** pushed with the brake on. They travel at a very low speed. The only traffic crossing this crossing, generally, are people working in the plant -- plant employees. Occasionally, a supplier will come in. They normally will stop by the office in the building on the north side of the railroad for directions. If they are to go into the plant area, they proceed across this crossing.

It is not a blind crossing. There is good visibility for a man to see a slow moving rail car.

At this plant Respondent has shoved cars across this crossing when necessary for many years -- since back **in** 1955 or '56, and to Respondent's knowledge, there has never been an accident or an injury because of cars being shoved by Allied employees.

The parties stipulated that on August 11, 1979, Citation No. 082553 arose out of an inspection of Allied Products' premises by Mr. Billy Alverson. During part of his inspection, he observed the front-end **loader** pushing the boxcar or a dump car across the intersection. At the time the front-end loader was pushing the hopper car across the intersection, there were no warning signs at the intersection; nor was there any other person guarding, or on top of, the hopper **car** or any person other than the person driving the front-end loader that preceded it across the intersection. Mr. Alverson issued a citation charging a violation of 56.9-59, which states that "public and permanent railroad crossings shall be posted with warning signs or signals or shall be guarded when trains are passing and shall be planked or otherwise filled between the rails."

Mr. Alverson, who at that particular time, was in the company of Mr. J. C. Smith, and of Mr. **Dunlap**, who was an official of the company, observed that the car crossed the intersection

Bench Decision

After the entry of the above stipulations into the record and oral argument by Respondent, a decision was rendered from the bench.

The stipulations proposed by the parties are accepted. I adopt these stipulations as the findings of fact in this case.

Citation No. 082553, issued on September 11, 1979, cites a violation of 30 C.F.R. § 56.9-59 and states: "Warning signs **or** signals were not provided at in-plant railroad crossing. Bath **house was approximately 40 feet from crossing on north side and maintenance shop about 40 feet from crossing on south side. The termination due date was September 24, 1979, at 1300.**

Another citation form, checked as a subsequent action, was issued on September 28, 1979, stating: "This citation is extended to the date shown to allow time to obtain the signs required. Copy of order form was produced to warrant the extension." The date shown was in a notation below which stated: "Extended to date October 28, 1979, at 1500."

The citation was terminated by subsequent action on the citation form issued on October 31, 1979, which states: "Railroad signs were provided for the railroad crossing in the plant."

In a subsequent action on March 3, 1980, the inspector's citation states:

The above citation is modified to read as follows: "Warning signs or signals were not posted at the railroad crossing at the plant, and the crossing was not guarded. The employees' bath house was located approximately 40 feet from the railroad crossing on the north side, and the maintenance shop was located about 40 feet from the crossing on the south side."

30 C.F.R. § 56.9-59, mandatory standard, reads: "Public and permanent railroad crossings shall be posted with warning signs or signals or shall be guarded when trains are passing and should be planked or otherwise filled between the rails."

In oral argument, Respondent contended that it was not subject to this regulation because of the word "public."

It is held that the Respondent and Respondent's operation on the date of the citation was within the purview of this regulation.

30 C.F.R. § 56.1 states the purpose and scope of these regulations to be as follows:

The regulations in this part are promulgated pursuant to Section 6 of the Federal Metal and Non-Metallic Safety Act (30 USC-725) and prescribed Health and Safety Standards for the purpose of the protection of life, the, promotion of health and safety, and the prevention of accidents in sand (including industrial sand, gravel and crushed stone) operations subject to that Act.

Each standard preceded by the word "mandatory" is a mandatory standard. A violation of a mandatory standard will subject an operator to an order or notice under Section 8 of the Act, 30 USC 727.

It is clear that the regulations do pertain to operations within the plant of Respondent.

The only other contested issue between the parties is whether there was a guard at the crossing.

As required in section **56.9-59**, which I have previously read, public and permanent railroad crossings shall be posted with warning signs or signals or shall be guarded when trains are passing. It is undisputed that there were no warning signs or signals and the parties have so stipulated.

It has also been stipulated, that on the particular occasion when the pertinent citation was issued, there was no guard on the ground in the area of the car that was being moved.

The stipulation also provided that there was, however, a guard on most occasions. On most of these occasions, the guard was J. C. Smith, who was employed by Respondent in a supervisory capacity in the area. When he was not available, generally another person would be provided as a guard,

While providing the railroad crossing with a guard most of the time or almost all of the time is not a defense to the citation, it does bear on the gravity of the violation and on the operator's negligence.

Under the facts of the case, it is clear that it is improbable that a person would be injured since a guard was stationed at the crossing most of the time; and, under the facts of this case, including the slow moving car that was actually moved, there is little likelihood that a person would be injured.

The facts of this case also indicate that the negligence on the part of Respondent is slight.

The parties have stipulated as to the other statutory criteria which are adopted as my conclusions of law in this case.

In consideration of the foregoing findings of fact and conclusions of law, a civil penalty in the sum of **\$75** is assessed. It is ordered that the Respondent pay to Petitioner the sum of \$75 within 30 days of the date of this **Order**.

The bench decision is hereby **AFFIRMED**.

ORDER

It is ORDERED that Respondent pay the ~~sum~~ of \$75 within 30 days of the date of this order if it has not already done so.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of
Labor, 1929 Ninth Avenue South, Birmingham, AL 35205 (Certified Mail)

Robert D. Rae, Director, Industrial Relations, Allied Products Company,
P.O. Box 628, Alabaster, AL 35007 (Certified Mail)