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

BURGESS MINING AND CONSTRUCTION CORPORATION,
APPLICANT

Contest of Citation
Docket No. SE 79-42
Boothton Pit

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

DECISION

Appearances: Frank M. Bainbridge, Esq., Birmingham, Alabama,
for Applicant; Murray A. Battles, Esq., Office
of the Solicitor, U.S. Department of Labor,
Birmingham, Alabama, for Respondent

Before: Judge Fauver

This proceeding was brought by Burgess Mining and Construction Corporation under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., to review the validity of a citation issued by a federal mine inspector pursuant to section 104(a) of the Act.

The parties submitted prehearing statements pursuant to a notice of hearing, and a hearing was held on July 10, 1979, in Birmingham, Alabama. Both sides were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the evidence and the contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Applicant, Burgess Mining and Construction Corporation, operated a coal pit known as the Boothton Pit, in Shelby County, Alabama, which produced coal for sales in or affecting interstate commerce.

2. A navigable stream, the Cahaba River, cuts through Applicant's operations and interrupts its 9-mile haulage road used in connection with mining operations at its Boothton Pit.

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3. In 1969, Applicant obtained the necessary federal and state authorizations to construct a bridge across the river so Applicant could travel back and forth from its mines to the preparation plant, which are on opposite sides of the river. To ensure that the bridge would not impede the river's flow, the approved design (for a flat-top concrete bridge resting on the riverbed) included a number of 36-inch pipes parallel to the course of the river's flow and through which it could pass.

4. Since its construction, the bridge has remained structurally unchanged, without rails or berms on either edge. The driving surface was measured to be about 6 feet above the riverbed and, with the exception of heavy rains, the river was about 3 feet deep on the upstream side and about 1 foot deep on the downstream side of the bridge. The bridge is about 26 feet wide and about 210 feet long.

5. On May 9, 1979, MSHA inspector Greg McDade, accompanied by his supervisor, James Sanders, issued a citation charging Applicant with a violation of 30 CFR 77.1605(k), as follows:

Guards were not provided on either side of the concrete bridge across the Cahaba River which had been constructed by this mining company as a part of the haulage road system from the mine site to the preparation plant. The bridge is 24-1/2 feet wide, 410 feet long with a 5-foot drop from the top of the bridge to the water level on the lower water side of the bridge and a 2-foot drop to the water level on the high water side of the bridge.

6. Section 77.1605(k) provides that "Berms or guardrails shall be provided on the outer bank of elevated roadways." Both inspectors considered the bridge part of Applicant's haulage road system for transporting coal from the pits on one side of the river to the preparation plant on the other side.

7. Inspector McDade determined that guardrails should have been installed to prevent coal trucks and other vehicles from going over the edge of the bridge. He considered as adequate anything that would keep a large vehicle on the bridge by deflecting its tires inward in case it lost control, such as 12 x 12 ties stacked 24 inches high and anchored to the bridge.

8. Before the inspection on May 9, 1979, the subject mining operations had been inspected by MSHA on a regular basis, at least 30 to 50 times, from 1970 to 1979. During this period, MSHA never cited Applicant for failing to install guardrails or berms on the bridge, although the lack of guardrails or berms on the haulage road was the subject of a notice of violation issued to Applicant on May 1, 1972, by MSHA's predecessor¹ which stated: "Elevated

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roadways along the haul road between the mine and the preparation plant needed berms or guards provided on the outer banks." At that time, the predecessor agency (the Interior Department) furnished Applicant with a study indicating specific locations along the 9-mile road where it had determined guardrails or berms should be installed. The bridge, which is part of the haul road, was not included as an area in need of guardrails or berms. As part of a settlement of the 1972 notice, the parties agreed that Applicant would withdraw its application for review of the notice and would install rails or berms at the places specified by the Interior Department.

9. The bridge has been used regularly without guardrails or markers for about 10 years with only one recorded mishap, in 1971 or 1972, when defective brakes forced the front wheel of a coal truck to slide over the retaining wall at one end of the bridge. The truck was traveling slowly enough to prevent its falling off the wall. A coal truck traveling at normal speed would probably fall on its side into the river if one of its wheels ran off the edge of the bridge, especially if it were loaded.

10. Applicant normally has five to seven coal trucks operating between the pit and preparation plant. A driver usually makes six or seven trips across the bridge each day. Coming from the preparation plant on the east side of the river, an unloaded truck would approach the bridge downhill, make a 90-degree turn onto the bridge, at about 5 to 10 miles per hour, and come to an almost complete stop before straightening up and crossing the bridge. The driver would shift into fourth gear and attain a speed of 25 to 35 miles per hour before reaching the west side of the bridge.

11. Returning from the mine to the preparation plant, the truck might cross the bridge at about 20 to 30 miles per hour before downshifting into third gear as it entered the 90-degree turn on the east side of the bridge. Entering the turn, the truck would be traveling about 10 to 15 miles per hour. The speeds in Fdgs. 10 and 11 assume normal driving behavior.

12. Drivers treat the bridge as a one-way road, though the road on land is two-way.

13. Applicant's coal trucks have air brakes with master cylinders on each wheel. The steering is power-assisted and is operated by hydraulic system. In the event of a motor failure, the power steering and hydraulic system would probably fail, but the brakes would continue to operate as long as there was still air pressure. The overall effectiveness of the brakes would be reduced when wet.

14. The water level of the Cahaba River varies depending upon the amount of rainfall, with the river overflowing the structure's surface several times each year, usually in the late winter and early spring.

15. At various times, Applicant's trucks have crossed the

bridge, in daylight, when the water was above the driving surface. The bridge would

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no longer be visible when the water was 6 inches to 1 foot above its surface and would be impassable when the water was deeper than 2-1/2 to 3 feet. When the bridge is under water, the only way to determine its location is a ripple effect caused by the water moving against the bridge on the upstream side and dropping off on the downstream side. The upsurge would be fairly constant across the bridge's surface until the run-off on the downstream side. The lines of demarcation would be reasonably clear to a driver.

16. When the overflow on the bridge is too deep, drivers may refuse to cross the bridge without objection from Applicant. Applicant itself has refused to permit use of the bridge when it determined the water to be too high. The standard used by Applicant for determining when the bridge is unsafe is the axle height of the smallest vehicle, a pick-up truck, which is about 14 inches. The axle on Applicant's coal haulage trucks is 27 inches above the ground and the frame is over 38 inches above the surface. In rainy seasons, a supervisor generally would watch the river on an hourly basis.

17. During the winter, drivers have often crossed the bridge in the dark when working a late shift, but not with the water above the road surface. There are no floodlights on the bridge and the headlights on the trucks are not considered adequate for driving at night if the bridge is under water.

18. Applicant introduced in evidence an undated memorandum circulated by MESA's assistant director respecting the application of section 77.1605(k) (Exh. B-8, p. 2). This memorandum states in part:

This standard only applies to roads cut along the side of a mountain, hill, pit wall, or earth bank where one side of the road is protected by natural barrier (inner bank) but where vehicles or equipment may run off and roll down the unprotected outer bank.

This standard does not apply to roads "elevated" above the terrain to provide drainage, or because the road is "elevated" by reason of drainage ditches * * * to facilitate drainage or snow removal. [Diagrams excluded.]

In 1972, Applicant received the above memorandum as an attachment to a memorandum dated October 19, 1972, addressing the same issue, which states that the "memorandum dated June 28, 1972, * * * is hereby revoked and superseded by this memorandum." The October 19 memorandum, which appears to supersede the undated one, reads in part:

Section 77.1605(k) provides: "Berms or guard rails shall be provided on the outer bank of elevated roadways." This

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standard applies to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks.

Berms or guard rails shall be provided on the unprotected bank, or banks, where the embankment slope and embankment height equal or exceed those slopes and heights shown in the following figure:

TABLE

DISCUSSION

This case concerns the validity of a citation issued under section 104(a) of the Act. The inspector's citation alleges that Applicant violated 30 CFR 77.1605(k) and that the violation could significantly and substantially contribute to the cause and effect of a mine safety hazard. The threshold issue is whether the bridge is covered by 30 CFR 77.1605(k), which requires that "Berms or guardrails shall be provided on the outer bank of elevated roadways."

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Applicant contends that the bridge is not covered by the standard. It contends that the plain meaning of the standard shows that it is intended to apply only to roads cut along the sides of a mountain, hill, pit wall, or earth bank where one side of the road is protected by a natural barrier, the inner bank, but where vehicles or equipment may run off the other side, the outer bank. It points out that the Secretary has promulgated no regulation specifically applicable to bridges or fords. (Applicant relies on the testimony of Inspectors McDade and Sanders who stated that no such regulation existed.)

Applicant also contends that the prior undated memorandum, the 10 years without serious mishap, the 1972 settlement concerning the lack of guardrails along the haulage road, and the 30 to 50 safety inspections without a charge of violation concerning the bridge, all shed "probative value as to the correct "construction'to be given to the regulation."

The Secretary contends that Applicant's bridge across the Cahaba River is an "elevated roadway" within the meaning of section 77.1605(k) and must, therefore, have berms or guardrails. The Secretary argues that section 77.1605(k) "applies to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks."

In applying 30 CFR 55.9-22, which is identical to 30 CFR 77.1605(k), to an elevated pipeline roadway with banks on both sides, Judge Moore concluded that the standard applied to all elevated haulage roadways whether curved or straight. Cleveland Cliffs Iron Company, VINC 78-300 (September 8, 1978). He interpreted "outer bank" to mean whichever bank is hazardous "and if both sides of the road present a hazard of rolling down a steep embankment, then both sides of the roads are required to have berms."

In contrast, Judge Koutras in Peabody Coal Company, VINC 77-102-P (December 13, 1977), held that the elevated side of an inner bank, even though dangerous, was not subject to the guardrail standard:

I conclude that Respondent's position with respect to the application of the regulation on the facts presented in this case is correct. The term "outer bank" is not further defined by the regulations.

However, the term "outer" has been construed to mean "of or pertaining to the outside; that is without or on the outside; exterman; opposed to inner," 67 C.J.S. 538; Brislin v. Carnegie Steel Co., 118 F. 579 (WD Pa. 1902). On the facts presented, the parties are in agreement that the deceased ran off the road at the inside turn of the road while traveling around a curve in the road. In my view, this point was the inner bank of the roadway which I have found was elevated.

However, the regulatory language specifically and

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clearly on its face requires a berm or guardrail on the outer bank, which in this case would be the opposite side of the roadway adjacent to and paralleling the drainage ditch and county road. [Emphasis in original.]

In the instant case, some light is shed on the issue by a question and answer in the parties' briefs. The Secretary asked: "Would Burgess contend that a bridge on a haulage road 50 feet high would not be required to have guardrails in that it is not an elevated roadway and does not have an outer bank?" In the Secretary's view, section 77.1605(k) would require the bridge to have guardrails, but in the view of Applicant:

While all would agree that any bridge 50 feet high should have rails, Burgess does not agree that MSHA under existing "standards" has the right to require rails and to impose fines and penalties for the absence of rails on bridges whether the bridge be 50 feet high or, as in this case, five feet high.

The Secretary's question overlooks the possibility of an imminent danger withdrawal order. Section 107(a) of the Act authorizes such orders wherever miners are subject to an "imminent danger." This authority applies without regard to the question of compliance with a safety standard or regulation. It is directed at dangerous conditions, regardless of the question whether a safety violation has been committed.

The existence of this authority moots the Secretary's question whether a 50-foot high bridge could go unguarded. Closer examination might indicate that bridges of much lower heights, including the height of Applicant's bridge, may pose a question of imminent danger. This question is not involved here, since the inspector issued a citation, not a withdrawal order, and since his citation found that: "the violation has not created an imminent danger" (Exh. B-11). However, the authority granted by section 107(a) makes clear that the issue of the application of the guardrail regulation is not an all-or-nothing question of protection or no protection concerning bridges. Rather, the issue is whether Applicant's bridge is covered by a regulation that says "berms or guardrails shall be provided on the outer bank of elevated roadways." I hold that it is not.

Two of the operative terms of the regulation--"elevated" and "roadway"--could apply to the bridge. The bridge is an integral part of the haulage road and could reasonably be held to be a "roadway." Also, it is necessarily elevated to cross the river, and could reasonably be held to be an "elevated roadway." However, the use of the term "the outer bank" indicates that the regulation was intended to apply to roads cut along the side of a mountain, hill, pit wall, or earth bank, and not to apply to a bridge crossing a river.

This plain meaning is confirmed by the Government's longstanding administrative enforcement position that interpreted the regulation to apply to such roads and not to bridges crossing

rivers. Its many years of

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investigation of Applicant's site without asserting a different interpretation, its settlement of an administrative litigation with Applicant premised on this very interpretation, and its issuance of an early memorandum showing this interpretation all show that the original intent of the drafters of the regulation was not to require guardrails or berms on bridges crossing rivers. These are significant support for the view that such was, and has always been, the plain meaning of the words of the regulation. When the Government changed its position on enforcement, the change reflected a change in policy, not a later discovery that the words "the outer bank" really mean "one * * * or both" banks of a road.

The Government is bound by the plain meaning of the words used in its regulations. It also has the duty to make its regulations as simply and clear as the subject matter will permit. An operator is entitled to rely upon the plain meaning of words and should not be held liable (which may mean substantial civil or criminal penalties and a mine shutdown) for failing to anticipate that the Government will rely upon a hidden or obscure meaning.

If the Government decides to change enforcement policy, it must not do so by an interpretation that stretches a regulation beyond its plain meaning. Fairness requires that rulemaking procedures to revise the regulation be employed.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and the subject matter of the above proceeding.

2. Applicant's bridge across the Cahaba River is not subject to the safety standard provided in 30 CFR 77.1605(k).

ORDER

WHEREFORE IT IS ORDERED that the application for review is GRANTED and the subject citation is VACATED.

WILLIAM FAUVER
JUDGE

~FOOTNOTE_ONE

1 MSHA was created March 9, 1978, when federal mine safety and health enforcement was transferred from the Interior Department to the Department of Labor.