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SOL (MSHA) V. LONE STAR INDUSTRIES  
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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

v.

LONE STAR INDUSTRIES, INC.,

RESPONDENT

Civil Penalty Proceeding

Docket No. VA 80-67-M  
Assessment Control No.  
44-00109-05003F

Jack Plant

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner William I. Althen, Esq., and Barry M. Hartman, Esq., Smith, Heenan, Althen & Zanolli, Washington, D.C., for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued July 11, 1980, a hearing in the above-entitled proceeding was held on August 12, 1980, in Falls Church, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

At the conclusion of the hearing, counsel for the parties indicated that they would like to file simultaneous posthearing briefs before a decision was rendered. Counsel for petitioner filed a Post Trial Brief on October 14, 1980, and counsel for respondent submitted on October 16, 1980, a document which consists of a preliminary statement, findings of fact, and conclusions of law. I shall hereinafter refer to the filings by both parties as "briefs." Since I shall provide page numbers for any references I make to each party's "brief," neither party will have any difficulty in finding a portion of his or her brief which is being cited.

Issues

The parties' briefs raise the normal issues which are generally involved in civil penalty cases, that is, whether a violation of a mandatory health or safety standard occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Before considering the parties' arguments, I shall make some findings of fact on which my decision will be based.

#### Findings of Fact

1. Lone Star Industries, Inc., operates the Jack Plant which is located near Petersburg, Virginia. The plant prepares stone products for sale. The stone is hauled away from the plant in trucks or in railway cars, depending upon the mode of transportation desired by Lone Star's customers (Tr. 146). Operation of the Jack Plant involves about 152,196 man hours per year and operation of the company as a whole involves approximately 6,124,273 man hours per year (Tr. 5). Lone Star's counsel stipulated at the hearing that it is a large company, that it operates a mine within the meaning of the Federal Mine Safety and Health Act of 1977, and that it is subject to the jurisdiction of the Commission (Tr. 4; 6).

2. Exhibit No. 6 shows that Lone Star has paid penalties for 347 alleged violations during the 24 months preceding August 13, 1979, the date on which the violation of 30 C.F.R. 56.9-41 alleged in this proceeding, was cited. Lone Star has not been cited for a previous violation of section 56.9-41 (Tr. 7).

3. Inspector Ronald J. Baril, Sr., was a duly authorized representative of the Secretary of Labor and the Mine Safety and Health Administration on August 11, 1979. On that day, he was asked by his supervisor to go to Lone Star's Jack Plant for the purpose of investigating an accident which had occurred at the plant about 3:45 p.m. on August 10, 1979 (Tr. 9; Exh. 5, p. 1). Other MSHA inspectors, a State inspector, and several company officials participated in the investigation (Tr. 10-11; Exh. 5).

4. The Jack Plant has two locations where railroad cars may be loaded. The normal loading site is at a place which is referred to as the crusher and rewash bins which are located about the middle of the plant near the main railroad tracks of the Norfolk & Western Railway Company. An alternate loading site is at a loading ramp situated near some stockpiles which are about 1,000 feet east of the normal loading bins (Tr. 14; 158; Exhs. 5 and C).

5. On August 10, 1979, the day the accident occurred, a water pump had broken which had the result of preventing the loading of railroad cars at the bin area (Tr. 152). Four 70-ton hopper-type railway cars were situated in the bin area when the pump ceased to work (Tr. 14). Two of the cars had already been loaded from the bins and two of them were empty (Tr. 153). All four of the cars had been coupled together for purposes of loading and all four were pushed eastward to the stockpile loading ramp, or alternate loading area. The operator of the pushing vehicle, whose name is Mr. James A. Mays, stated that the drawhead on the front car was open when he pushed it to the loading ramp (Tr. 160). The loaded weight of hopper cars is approximately 84-1/2 tons (Tr. 14; 77).

6. Loaded railroad cars are kept at a site located at the extreme western part of the Jack Plant (Tr. 13; 114; Exhs. 5, p. 3, and C). The cars are given a push with an end loader or a dump truck to get them started

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and then they are allowed to drift down a .6 of 1 percent grade to the storage area for loaded cars (Tr. 15; 119; 150-151; Exhs. K and L). Each railroad car has a manually operated brake at one end of the car (Tr. 115). The manual brake is tightened or loosened by means of a wheel which is located on the end of the car (Exhs. 5, p. 2, and G). The person who operates the brake must stand on a small platform just below the braking wheel (Tr. 40; 70-74; 192-193; Exhs. E, G and H). The person who operates the manual brake is called a brakeman or "car dropper" because he controls the brake while the cars are being "dropped" from the loading area to the place where the loaded cars are stored until such time as the loaded cars are pulled away by a locomotive owned by the railway company (Tr. 16; 68; 126; 128; 140; 180).

7. On August 10, 1979, after the four railway cars mentioned in Finding No. 5 above had been loaded, Mr. Mays pushed the cars in a westerly direction for coupling with the 13 other loaded cars which had already been "dropped" to the storage area for loaded cars. Mr. Mays could not push the cars farther than 400 feet because some switches were located 400 feet west of the loading ramp and Mr. Mays did not want to drive his pushing vehicle over the switches. It was Mr. Mays' duty, however, to be present at the loaded-car area when the cars being dropped arrived at that area. Therefore, Mr. Mays drove his pushing vehicle along a road parallel to the railroad track to the loaded-car area. Since Mr. Mays could drive faster than the loaded cars could be dropped, he was able to arrive at the loaded-car area and be in a position to watch the coupling of the four cars with the 13 which were already present in the loaded-car storage area (Tr. 117; 154; 157; 158-160; 165; 183).

8. A person was assigned the responsibility of being the "car dropper" in each instance (Tr. 174). On August 10, 1979, Mr. James M. Brown, who was the operator of the rewash plant, assigned himself the job of being the car dropper for the four cars which had just been loaded (Tr. 154). Mr. Brown gave Mr. Mays the signal to start pushing the cars and Mr. Mays pushed them in a normal fashion. Mr. Mays, as indicated above, then drove his pushing vehicle to the loaded-car storage area. Mr. Mays was watching Mr. Brown as he approached the coupling point. Since Mr. Brown was standing on the front of the four cars being dropped to the loaded-car storage area, Mr. Mays could observe Mr. Brown just before the front car made impact with the rear of the 13th car located in the storage area. Mr. Mays looked down at the drawhead just prior to the time when the front car was ready to hit the 13th car and noted that the drawhead was closed on the car being ridden by Mr. Brown (Tr. 160-165).

9. Mr. Mays was only 15 or 20 feet from Mr. Brown at the time of the impact and Mr. Mays stated that the closed drawhead on the front car bypassed the drawhead on the 13th car so as to allow the front car to come into contact with the rear of the 13th car (Tr. 160; 163). The front car and the 13th car came together with so much force that the brake wheel on the car ridden by Mr. Brown made an imprint on the rear of the 13th car (Tr. 94). The force of the impact is further illustrated by the

fact

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that the 13 loaded cars were moved for a distance of from 12 to 14 feet and the cars being ridden by Mr. Brown rebounded after the impact for a distance of 8 feet (Tr. 23; 88; 93). Additionally, the force of the impact was so great that the wheels on the front car on which Mr. Brown was riding were derailed (Tr. 91). The wheels on the remaining three cars being dropped remained on the tracks (Tr. 19; 95; Exh. 5, p. 4).

10. Since Mr. Brown was on the front of the front car when it ran against the rear of the 13th car, Mr. Brown's body was crushed between the two cars as they came together (Tr. 166). Although Mr. Brown was alive immediately after the accident occurred, he died that same day at about 5:30 p.m. in the Petersburg General Hospital (Exh. 5, p. 4).

11. Mr. Mays, who observed the accident, is also an experienced car dropper. He stated that it is the duty of the car dropper to examine the drawhead on the front car and make sure that it is open so that it will couple with the drawhead on the rear car in the loaded-car storage area (Tr. 180). Although Mr. Brown stood just above the closed drawhead throughout the trip from the loading ramp to the point of impact with the 13th car, he failed to note that the drawhead was in a closed position (Tr. 99). Mr. Mays says he has also, on a few occasions, failed to make sure that the drawhead was open before the cars he was dropping came into contact with the cars in the storage area (Tr. 173). At such times, nothing happened other than that the cars failed to couple (Tr. 171). Mr. Mays stated that the rate of speed the "dropped" cars are traveling affects the amount of bounce which occurs if coupling fails to take place (Tr. 177). On the occasions when Mr. Mays' cars did not couple because of his failure to open the drawhead, the rebound of the cars he was riding was only 2 feet (Tr. 177).

12. After Inspector Baril had obtained all or most of the facts described above, he wrote on August 13, 1979, Citation No. 305912 alleging that Lone Star had violated 30 C.F.R. 56.9-41 which provides "[o]nly authorized persons shall be permitted to ride on trains or locomotives and they shall ride in a safe position" (Tr. 11; Exh. 1).

13. Citation No. 305912 gives the following description of the conditions which caused the inspector to believe that respondent had violated section 56.9-41: "[A] brakeman was fatally injured while he was dropping 4 loaded railroad cars. The victim was operating the brakes which [were] forward of the front car. The 4 cars he was dropping collided with the first of the 13 parked railroad cars in the plant storage area. The victim was standing on the brake platform in front of the lead car, when the two drawbars failed to couple, the car the victim was riding derailed and then collided with the first parked railroad car crushing the victim. The victim was not working in a safe position" (Exh. 1).

14. Mr. George Bishop, another car dropper, testified that if he were to read a regulation which stated that a car dropper

should ride in a safe position, he would consider that he could comply with such a regulation and still ride on the front of a car which is being dropped to the storage



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area (Tr. 192). Some reasons advanced by Lone Star's witnesses in support of their belief that riding the front car is safe are (1) that riding on the front enables the car dropper to observe the track in front of him at all times so as to be on the alert for people who may be working on switches or crossing the tracks (Tr. 168), (2) that riding on the front enables the car dropper to be on the lookout for any of the 1,200 trucks which cross the tracks each day (Tr. 118), (3) that riding on the front enables the car dropper to be aware of materials which may build up at the truck crossing so as to cause derailment (Tr. 144-145), and (4) that riding on the front permits the car dropper to have the best possible vision of the coupling area at times when the weather is inclement so as to impair or obscure visibility (Tr. 35; 53; 62-64; 142).

15. Lone Star's South Atlantic Division (which does not include the Jack Plant here involved) had a written safety regulation in effect on August 10, 1979, the date of the accident, which provides "7. Unless absolutely necessary, never ride leading car down grade end. Ride in between the cars or the trailing end" (Exh. 4). Lone Star's Regional Safety Director, Mr. Roger Vaughan, testified that the reason the South Atlantic Division had the above safety regulation was that the employees in the South Atlantic Division do not wear safety belts and they recognized that if they are riding on the front car without safety belts and should happen to fall, they would be more likely to be run over by the car's wheels than if they ride between cars or on the rear car (Tr. 130-131).

16. Lone Star's Chesapeake Division (which does include the Jack Plant here involved) has 42 basic safety rules which all employees are required to follow. No. 12 of those rules provides that "[a]ny person required to ride moving railroad cars will wear safety belt hooked to car at all times when cars are in motion" (Exh. D). Mr. Vaughan stated that since the employees at the Jack Plant are required to wear safety belts, they do not need to follow the South Atlantic Division's Rule No. 7 prohibiting riding of the front car because the wearing of safety belts at the Jack Plant prevents car droppers from falling under the wheels of the front car in case they should slip (Tr. 131).

17. Mr. Mays, one of Lone Star's witnesses, noted that a car dropper who is riding on the rear of the last car being dropped could fall and be run over by the pushing vehicle (Tr. 171). In view of the foregoing possibility, the employees in Lone Star's South Atlantic Division, where the wearing of safety belts is apparently not required, are riding in an unsafe position when they ride on the rear of one or more cars. Employees in the Jack Plant would not be exposed to the hazard of falling under the wheels of the pushing vehicle because of their practice of wearing safety belts (Tr. 195).

18. South Atlantic Division's Rule No. 5 provides that "[a]ny time three or more cars are dropped down the track there should be two people braking the cars" (Exh. 4). Only Mr. Brown was braking the four cars being dropped at the Jack Plant on

August 10, 1979, but Mr. Vaughan did

not explain why it would not have been good policy for the employees at the Jack Plant to have followed the South Atlantic Division's Rule No. 5. The safety rules adopted for the Jack Plant after Mr. Brown was killed prohibit riding on the front of any car being dropped and also prohibit the dropping of more than three loaded cars at one time (Exh. I).

19. It was the inspector's opinion that a car dropper is not complying with the provisions of section 56.9-41 if he is riding on the front of a car being dropped (Tr. 20; 84). He said that the car dropper should ride on the rear of one car being dropped, or between cars or on the rear of the last car, if more than one is being dropped (Tr. 21; 40; 76; 80; 97). Lone Star's safety manager agreed that Mr. Brown would have been likely to escape serious injury on the day of the accident if he had been riding between cars (Tr. 143).

20. Although Lone Star's witnesses discussed the possibility that a car dropper might be pinched when he is riding between cars, no one was able to cite an occasion on which such an injury has ever occurred (Tr. 133; 169). One of Lone Star's witnesses, Mr. Mays, referred to a time when a malfunctioning switch caused the wheels on one car to go in one direction while the wheels on another car went in a different direction (Tr. 169). Mr. Mays said that he was glad no one was riding between cars when that event occurred, but he could not say for certain that anyone would have been killed on that occasion if he had been riding between the effected cars (Tr. 170).

21. Exhibit A in this proceeding consists of a two-page memorandum written by the Secretary of Labor's Office of the Solicitor. The writer of that memorandum discusses 30 C.F.R. 77.1607(v) which contains language similar to that set forth in section 56.9-41 which is quoted in Finding No. 12 above. The writer of Exhibit A expresses the opinion that there might be circumstances in which an operator could be cited for a violation of section 77.1607(v) if a car dropper were observed to be riding on the front of cars which are about to be coupled. Exhibit A also expresses the opinion that if MSHA is going to adopt a general policy under which operators will be cited for violations of section 77.1607(v) any time a car dropper is observed riding on the front of a car, advance warning of that policy should be given before such an enforcement policy is instituted (Tr. 45-46; Exh. A). Inspector Baril had never seen or heard of the above-described memorandum prior to the hearing held on August 12, 1980 (Tr. 46).

22. Empty railroad cars are delivered to Lone Star's Jack Plant by the railway company. The location of the manually operated brake wheels varies from car to car, so that when the cars are dropped after being loaded, the brake wheel may be on the front of one car and on the rear of the adjacent car. Lone Star has no facilities for turning the cars so as to cause the brake wheels to be uniformly located on the rear of all cars (Tr. 89-90). For that reason, if a single car needs to be dropped to the storage area, and the brake-control wheel is on the front of

that single car, Lone Star would find it impossible to comply with section 56.9-41 if

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that section is interpreted to prohibit the car droppers from riding on the front of the car (Tr. 58). After Citation No. 305912 was written, Lone Star prepared some new safety rules pertaining to the loading and dropping of railroad cars. Rule No. 5 of those regulations provides "[n]ever ride one loaded or empty car. Brake will be set and car will be pushed all way from loading to parking area". [Emphasis is part of Rule No. 5.] (Exh. I; Tr. 127; 139).

23. Cars being dropped from the loading area to the storage area have the right-of-way over vehicular traffic. The car droppers rarely see any persons walking in the vicinity of the track (Tr. 197). Since the accident on August 10, 1980, the car droppers have been riding on the rear car or between cars and they have had no difficulties in dropping cars from those positions (Tr. 128; 196). The employee who is pushing the cars can see down the track on one side of the cars being dropped, while the car dropper looks down the track on the other side of the cars. If either employee sees any hazard in front of the cars being dropped, he can notify the other person of the fact so that the car dropper can decrease the rate of speed or stop the cars being dropped (Tr. 196-197).

#### Consideration of Parties' Arguments

##### The Parties' Proposed Findings

Respondent's brief (pp. 5-13) contains 50 proposed findings of fact. While the subjects discussed in respondent's 50 findings of fact may be found in the record on the pages and in the exhibits to which the findings of fact refer, I believe that the 23 findings of fact set forth above in this decision are preferable to those proposed by respondent because I have organized my findings of fact so as to make them a composite of the credible testimony of all witnesses on a given subject. As such, I believe they faithfully reflect all the facts on which my decision should be based.

Petitioner's brief (pp. 3-8) contains a statement of facts. Here again, I prefer to rely upon the 23 findings of fact set forth above. I have provided more transcript and exhibit references in support of my findings than have been given in petitioner's brief. Some of the statements on pages three to eight of petitioner's brief contain ambiguities which could be misleading to the Commission if my decision should become the subject of the Commission's granting of a petition for discretionary review. For example, petitioner's counsel seems to be saying in the upper part of page six of her brief that the Jack Plant involved in this proceeding is located in Lone Star's South Atlantic Division. If that is what is being stated on page six, it would be contrary to the evidence which shows that the Jack Plant here involved is located in the Chesapeake Division (Finding No. 15 and 16, supra). Also on the lower part of page six of petitioner's brief, a statement appears to the effect that when cars fail to couple, the knuckles "always" override. Mr. Mays testified that he had had the cars being dropped fail to

couple on about a dozen occasions, but he said that the cars bounced back 2 feet and that nothing unusual occurred at the speed the cars were being dropped on those occasions. The testimony cited in petitioner's brief on pages six and seven fails to support a finding that the knuckles "always" override when cars fail to couple.

Occurrence of Violation

The primary issue raised in this proceeding is whether a violation of 30 C.F.R. 56.9-41 occurred. Respondent's brief (p. 4) states that it has contested this case because it does not believe that a violation occurred. If a violation, in respondent's opinion, had occurred, respondent would not have made an issue about payment of the civil penalty of \$1,500 proposed by the Assessment Office.

Respondent's brief (p. 2) quotes the language of section 56.9-41 which provides that "[o]nly authorized persons shall be permitted to ride on trains or locomotives and they shall ride in a safe position". Respondent states that no question exists as to whether the person who was riding on the railway cars involved in this case was authorized to ride on the cars. Therefore, respondent concludes that the only question at issue in this case is whether the person who was fatally injured while riding on the front of the four railway cars being dropped to the loaded-car storage area was riding "in a safe position" within the meaning of section 56.9-41.

Respondent's brief (p. 2) explores the areas which might be considered safe for riding on railway cars. Respondent states that many riding places would obviously be unsafe, such as riding on couplings or clinging to ladders while the cars are in motion. Respondent points out that transporting men between cars is not only unsafe, but is specifically prohibited by section 56.9-40(d) of the mandatory safety standards (Tr. 96). Respondent also argues that riding on the rear of a single car or group of cars would significantly obscure the forward vision of a car dropper riding in that position (Finding Nos. 6 and 14, supra).

On the basis of the foregoing discussion, respondent's brief (p. 2) concludes that on any given railway car, only one place appears to be safe for riding and that is the brake platform specifically provided by the car manufacturer for that purpose (Finding No. 6, supra). Respondent observes that the brake platform provides the car dropper with a definite place to stand where he has good footing and direct control over the braking mechanism.

Respondent's brief (p. 3) continues its argument by observing that while the brake platform provides the car dropper with a safe place to ride, that safe location is subject to certain disadvantages over which the car dropper has no control. Among those disadvantages, respondent notes, is the fact that the railway cars are constructed so that the brake platform and manual wheel for controlling the brakes are located on only one end of a given car. The railway company delivers the cars without giving any consideration to the direction of travel on respondent's premises and respondent has no facilities for turning the cars around or otherwise arranging them so that all of the brake platforms will be uniformly located on the opposite end from the direction of travel. The result is that the car dropper may find that the brake platform and braking wheel are on

the front of a single car, or on the front of the first of a group of cars, at the time the loaded cars need to be dropped to the loaded-car storage area (Finding No. 22, supra).



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Respondent's brief (p. 3) concludes from the above discussion that dangers are inherent in the dropping of railway cars and that the car dropper can never find an absolutely safe place to ride. Respondent argues that the inspector in this instance was under pressure because of the death of the car dropper to cite a violation of some mandatory health or safety standard. Respondent says that if the car dropper had been riding between cars and he or some person had been injured or killed in an accident, that the inspector investigating that accident would either have cited a violation of section 56.9-40(d), which prohibits the transportation of persons between cars, or of some other section of the regulations.

Respondent's brief (p. 4) states that it has been given no guidance from the Secretary of Labor or the Mine Safety and Health Administration as to how car dropping can best be accomplished. Respondent's brief claims that it has not ignored the problems involved in dropping cars and that it has variations in its instructions as between operating divisions within respondent's total organization (Finding Nos. 15 and 16, supra). Respondent's brief states that since the occurrence of the accident involved in this case car droppers at the Jack Plant have been riding between cars or on the rear of cars and will continue to do so, but respondent argues that the fact that the car droppers will ride between cars or on the rear of cars means only that they will be riding in a different, but not necessarily safer, position than the position on the front of the car where the car dropper was riding when the accident here involved occurred.

At first impression, the arguments in respondent's brief appear to have a great deal of merit. The question which has troubled me from the beginning of this case is whether an operator should be expected to know from reading the provisions of section 56.9-41 that his employees are prohibited by the language in that section from riding on the front of railway cars being dropped to the loaded-car storage area of his plant. For all practical purposes, section 56.9-41 boils down to six words, namely, car droppers "shall ride in a safe position".

When I read section 56.9-41 prior to the hearing, I was certain that I would not have known that the six words quoted above prohibited a car dropper from riding on the front of the car or cars being dropped. After I had heard the testimony of the inspector and respondent's three witnesses, however, I had an entirely different perspective upon which to base my response to the exhortation that car droppers "shall ride in a safe position." Therefore, section 56.9-41 must be interpreted on the basis of the 23 findings of fact set forth above in my decision.

One should begin his initiation into the business of car dropping by examining Exhibit E which shows a car dropper standing on the brake platform on the front of a loaded car which is about to be dropped to the loaded-car storage area. The car dropper appears to be "in a safe position" because he has his left hand free to grasp a handhold on the front of the car and he

is wearing a safety belt which will prevent him from falling to the ground if he should slip. If one then looks at Exhibit F he will see the expanse

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of track which separates the car dropper from the other loaded cars and which the car dropper expects to couple the car or group of cars on the front of which he is riding. The above-described pictures show the car dropper on a clear day and show an unobstructed track area in front of him. There is nothing about those two pictures which should cause anyone to conclude that the car dropper is riding in other than "a safe position".

When one begins to add the facts revealed by the record in this case to the serenity reflected by Exhibits E and F, however, he begins to understand why the car dropper is not riding "in a safe position". First of all, in this case, the car dropper was riding on the front of four loaded cars. The empty weight of each car is 70 tons and its loaded weight is about 84-1/2 tons. The car dropper, therefore, began his trip to the loaded-car storage area with 338 tons of weight riding behind him (Finding No. 5, supra). The car dropper's momentum is supplied initially by the pushing force of a truck or rubber-tired dozer. After the 338 tons of cars and materials start their journey, they can be stopped or slowed down only by application of a single manual brake on one of the four cars. No one knows the exact speed which the four cars were traveling on the day of the accident involved in this case, but the force of the impact of the cars being dropped against the 13 loaded cars in the storage area was so great that the 13 cars were pushed a distance of from 12 to 14 feet and the four cars being dropped rebounded a distance of 8 feet even though the front car was derailed by the collision. Moreover, the front car hit the rear of the 13th car with such force that the brake wheel on the front car being dropped left an imprint in the rear of the 13th car (Finding Nos. 9 and 10, supra). The operator of the Jack Plant has been dropping cars for 20 years and knows how much they weigh and how hard they are to slow down or stop even when they are moving at a low rate of speed.

The evidence in this case also reveals that the car dropper has the obligation of making sure that the drawhead on the front of the car being dropped is open so that it will couple with the loaded cars in the storage area. The success of the coupling operation depends upon the drawheads being in an open position. The only eyewitness to the accident stated unequivocally that the car dropper who was fatally injured on the date of the accident involved in this proceeding failed to check the drawhead of the front car before he got on it for the dropping operation. The eyewitness who was situated within 15 feet of the point of impact, stated that he looked down at the drawhead a few seconds prior to the impact and observed that the drawhead was closed. The fact that the drawhead was closed prevented the cars from coupling. If the drawheads had properly meshed, the action of coupling would have kept the front car separated from the rear of the 13th car by about 3 feet, or the length of the two drawheads. The fact that the drawhead on the front car being dropped was closed caused the two drawheads to bypass each other and permitted the cars to come together so as to crush the body of the car dropper (Finding Nos. 9-10 and 13, supra).

The eyewitness to the fatal accident testified that he had on about a dozen occasions failed to open the drawheads before dropping cars and that the cars had failed to couple on those occasions. No damage to the cars or injuries to the car dropper occurred on those occasions because the cars

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being dropped were traveling slowly and the cars rebounded only 2 feet, as compared with the rebound of 8 feet in the case of the accident involved in this proceeding (Finding Nos. 10 and 11, supra). The operator of the Jack Plant must be held to have knowledge of the fact that the cars don't always couple and that the car droppers had been careless about making certain that the drawheads were open at the time the cars were started on their journey to the loaded-car storage area.

The operator's witnesses in this proceeding gave several reasons for preferring that the car dropper ride on the front of the car or cars being dropped (Finding No. 14, supra). Those reasons primarily stressed the fact that when the car dropper rides on the front car, he has an unobstructed view of the track area which separates him from the loaded cars to which he intends to couple. The operator's safety manager emphasized the fact that trucks make 1,200 trips per day across the railroad tracks used for dropping cars. The presumption to be drawn from the operator's arguments about the need for the car dropper to have an unobstructed view of the railroad tracks is that the car dropper would have an opportunity to stop the cars being dropped if a vehicle or person should stop on the tracks while the loaded cars are being dropped. The difficulty with that argument is that the cars are difficult to stop after the pushing vehicle has started them to rolling. If an object does get on the tracks and the car dropper should be unsuccessful in stopping the cars being dropped at a time when the car dropper is riding on the front car, the car dropper runs the risk of being crushed against any vehicle which may stop on the tracks. Moreover, as one of the operator's witnesses pointed out, persons seldom, if ever, walk in the vicinity of the tracks so as to be hit by moving cars. Additionally, the car dropper's view of the tracks in front of the car or cars being dropped is not greatly impaired in any event if he rides on the rear of the last car being dropped because the operator of the pushing vehicle can see the track area from one side of the cars being pushed while the car dropper is able to observe the track area from the other side of the cars being pushed (Finding No. 23, supra).

Respondent's brief (p. 4) correctly notes that the car-dropping rules adopted by its various divisions are inconsistent. For example, the rules respondent's South Atlantic Division, of which the Jack Plant is not a part, specifically state that "[u]nless absolutely necessary, never ride leading car down grade end. Ride in between the cars or the trailing end" (Finding No. 15, supra). Respondent's safety manager explained that the reason the South Atlantic Division had a rule prohibiting the car droppers from riding on the front of a car is that the employees in the South Atlantic division do not wear safety belts and they felt that they should stay off the front of the cars lest they slip and fall under the wheels of the front car. The safety manager stated that since the car droppers at the Jack Plant wear safety belts, there was no reason for the Jack Plant to adopt a rule prohibiting the riding of the front car because the car droppers at the Jack Plant are protected by their safety belts from falling under the wheels of the front

car.

The safety manager's justification for not having a rule prohibiting the riding of the front car at the Jack Plant was neutralized by the testimony of one of respondent's other witnesses who stated that riding on the rear car is dangerous because the car dropper may slip and fall under the wheels of the vehicle used to push the cars (Finding No. 17, supra). While the safety belts worn by the car droppers at the Jack Plant would protect them from falling under the wheels of the pushing vehicle, the employees in respondent's South Atlantic Division would not be protected from falling in front of the pushing vehicle because of their practice of failing to wear safety belts. The fact that the employees in any of respondent's various divisions have recognized the hazards inherent in riding on the front car or group of cars being dropped shows that respondent's management is aware of the hazards involved in riding on the front car.

Although some of respondent's witnesses referred to the fact that it might be possible for a car dropper to be injured while he is riding between cars, the testimony of those witnesses stops short of being able to state that anyone riding between cars has been so injured and respondent's safety manager conceded that if Mr. Brown had been riding between cars on the day of the accident, he would, at most, have been exposed to a bruise or some other minor injury if he had been riding between cars when they failed to couple (Finding Nos. 19 and 20, supra).

A legal memorandum (Exhibit A) written by a person in the Secretary of Labor's Office of the Solicitor discussed section 77.1607(v), which contains language similar to that in section 56.9-41 here at issue, and concluded that the language in that section, depending on the circumstances involved in a given situation, would support the writing of a citation for a violation of that section if a car dropper were to be observed riding on the front of a car or group of cars being dropped. I believe that the facts which I have discussed above would warrant the writing of the inspector's citation in this proceeding. Therefore, I do not believe that my finding of a violation of section 56.9-41 in this case is inconsistent with the legal opinion expressed by the Solicitor's Office in Exhibit A.

I agree with the arguments advanced by the Secretary's counsel in her brief (pp. 8-13). On those pages, the Secretary's counsel notes that the definition of "safe", among other things, means to be free from damage, danger, or injury. The Secretary's counsel agrees with respondent that car dropping is a hazardous enterprise at best, but she points out that the hazardous nature of the work makes it essential that respondent require the car droppers to ride in the safest place available. She correctly contends that riding on the front of a car or the front car in a group of cars being dropped is the most dangerous place of all, that is, riding the front is more dangerous than riding between cars or on the rear of a group of cars (Finding No. 19, supra). Therefore, she concludes that respondent cannot permit the car droppers, as it was doing prior to the accident here involved, to ride wherever they determine is the most convenient position.

I believe that the inspector satisfactorily explained why it is not inconsistent for section 56.6-40(d) to prohibit the transportation of persons between railway cars while section 56.9-41 is interpreted as requiring that



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persons working with moving cars be prohibited from riding on the front of moving cars in order for them to be considered as riding "in a safe position". The inspector, when asked about that apparent inconsistency, stated that his recommendation that a car dropper ride between cars or on the rear of cars being dropped refers to a person who is performing a function related to production. The car dropper's job requires him to move railroad cars from one point to another. In doing that job, the car dropper's safest position must be found and that is between cars or on the rear of cars, but if people are going to be transported from one place to another as passengers on trains, the safe position for them to ride, or be transported, is inside railroad cars rather than between the cars (Tr. 95-96).

I adopt the inspector's interpretation of section 56.9-40(d) and find that respondent improperly refers to section 56.9-40(d) in its brief (p. 3) as if that section prohibits a car dropper from riding between cars which are being dropped to the loaded-car storage area.

For the reasons given above, I find that respondent on August 10, 1979, the day of the accident, was in possession of knowledge pertaining to the hazards of allowing car droppers to ride on the front of a car or group of cars being dropped. An operator, having such a background of knowledge and experience as has been discussed above, should have known that allowing its car droppers to ride on the front car or group of cars was not in compliance with section 56.9-41 because a car dropper riding the front car is not "in a safe position".

#### Assessment of Penalty

Having found above that a violation of section 56.9-41 occurred, I shall now consider the six criteria set forth in section 110(i) of the Act for the purpose of assessing a penalty.

It was stipulated by the parties that respondent is a large operator. Therefore, any penalty assessed should be in an upper range of magnitude insofar as it is determined on the basis of the criterion of the size of respondent's business (Finding No. 1, supra).

Respondent presented no evidence pertaining to its financial condition. Therefore, in the absence of any facts to the contrary, I find as to a second criterion that payment of penalties will not cause respondent to discontinue in business (Buffalo Mining Co., 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 614 (1974)).

Although respondent has a history of previous violations showing that respondent has paid penalties for 347 prior violations during the 24-month period preceding the issuance of Citation No. 305912, it has been my practice to increase a penalty under the criterion of history of previous violations only when the violation before me has been violated on one or more prior occasions. Inasmuch as respondent has not previously

been cited for a violation of section 56.9-41, the criterion of history of previous violations will not be used either to increase or decrease the penalty assessable under the other five criteria (Finding No. 2, supra).

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Respondent demonstrated a very good faith effort to achieve rapid compliance after Citation No. 305912 was written because the citation was terminated within the time originally provided for in the inspector's citation. The evidence shows that the new rules adopted by respondent, among other things, prohibit riding on the front of cars being dropped, prohibit the dropping of more than three loaded cars at one time, require the checking of the drawhead to make sure the coupling is open before cars are dropped, and caution that pushing be done at a slow speed at all times (Finding No. 18, supra; Exh. I). The inspector's subsequent action sheet states that the company's new rules would probably have been enforced even sooner than they were had not all production been stopped on August 14, 1979, so that respondent's employees could attend funeral services for the person who was killed in the accident on August 10 (Exh. 2). Therefore, respondent will be given full credit for having shown very good faith in achieving rapid compliance.

As to the criterion of negligence, counsel for the Secretary argues in her brief (pp. 13-14) that respondent was "excessively negligent" for several reasons. She claims that respondent had a regional policy prohibiting the riding of the front car, but that respondent failed to invoke that rule at the Jack Plant. She also notes that respondent had no formal training program for car droppers and allowed them to learn how to drop cars by watching "experienced" car droppers who habitually rode on the front of cars being dropped. She argues that respondent's failure to publish any guidelines for the dropping of cars at the Jack Plant left the car droppers free to follow procedures which were unsafe, such as allowing cars to be dropped at excessive speeds and without properly checking to see that the drawheads were open prior to dropping.

There is some merit to the claims in the Secretary's brief to the effect that respondent was "excessively negligent", but the record does show that respondent is a safety-minded company in many respects. For example, each employee in respondent's Chesapeake Division, which includes the Jack Plant, was required to read and sign a list of 42 safety rules and certify that he or she had read the rules and had agreed to follow them so as "%y(3)5C to perform my job in the manner that is the safest for me, my fellow employees, and my equipment" (Exh. I; Finding No. 16, supra). Among the rules which the employees at the Jack Plant are required to follow is a requirement that employees wear safety belts at all times if they ride on moving railroad cars. Employees are also prohibited from getting on and off of moving equipment at any time. Employees are advised in Rule No. 42 of the list of safety rules that violation of any of the safety rules will be cause for disciplinary action.

Consequently, while respondent did not at the Jack Plant enforce a rule prohibiting the riding on the front of cars being dropped while such a rule was in force in its South Atlantic Division (Finding No. 15, supra), it cannot be said that respondent was completely indifferent about operating its plant in a safe manner. The most negligent aspect of respondent's

actions was its failure to publish any specific written rules with respect to the dropping of cars (Tr. 142). Also respondent's management did not pay enough attention to the careless manner in which the cars were being dropped by

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Mr. Brown who was fatally injured on August 10. That employee not only failed to make sure the drawhead was open before the cars were started on their trip to the loaded-car storage area, but also dropped the cars at an excessive speed. The foregoing conclusion is supported by the fact that the front car derailed and all of the cars rebounded a distance of 8 feet, whereas when cars are traveling at a slow speed and fail to couple, they rebound for a distance of only 2 feet (Finding Nos. 9 and 11, supra). Therefore, I find that the violation was accompanied by a relatively high degree of negligence.

As to the criterion of gravity, the Secretary's brief (pp. 15-16) contends that the violation was very serious. In support of that contention, the Secretary's counsel argues that the probability of occurrence of a serious accident was very high because it repeatedly happens at the Jack Plant that the front car fails to couple with the loaded cars in the storage area because of the car dropper's oversight in opening the drawhead before the cars are dropped. She argues that the great weight of the cars being dropped, the fact that the cars on August 10 were being dropped at an excessive speed, the lack of a training program, and the riding of car droppers on the front car, all contributed to the likelihood of occurrence of a serious accident and made the riding of the front car a very serious act. On the basis of the reasoning set forth above, the Secretary's counsel recommends assessment of a maximum penalty of \$10,000.

There is merit to the arguments advanced by the Secretary's counsel in support of her claim that the violation was very serious. The fact that Mr. Brown was riding in an unsafe position when he was fatally injured demonstrates beyond any doubt that the violation was serious. As has been mentioned above, all the witnesses agreed that dropping cars is a hazardous type of work. The evidence supports a finding that riding on the front car is the most unsafe position that a car dropper can assume. Yet all of the car droppers were habitually riding on the front of the first car where they were more likely to be crushed if the cars failed to couple than if they had been riding between cars or on the back of the last car, and the cars had failed to couple. Therefore, I find that the violation was very serious.

Considering that a large operator is involved, that there was a very good faith effort to achieve rapid compliance, that respondent has no history of a previous violation of section 56.9-41, that payment of penalties will not cause respondent to discontinue in business, that the violation was accompanied by a relatively high degree of negligence, and that the violation was very serious, I find that a penalty of \$6,000 should be assessed.

WHEREFORE, it is ordered:

Lone Star Industries, Inc., within 30 days from the date of this decision, shall pay a civil penalty of \$6,000.00 for the violation of 30 C.F.R. 56.9-41 charged in Citation No. 305912 dated August 13, 1979.

Richard C. Steffey  
Administrative Law Judge  
(Phone: 703-756-6225)