FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 19, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 78-722-P
ALLIED CHEMICAL CORPORATION	:	

DECISION

This civil penalty proceeding arises under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) ("the Mine Act"). 1/ In his decision, the administrative law judge concluded that Allied Chemical Corporation (Allied) had not violated 30 CFR §75.1404 as alleged by the Secretary of Labor, and dismissed the Secretary's petition for assessment of civil penalty. For the reasons below, we remand to the judge for further proceedings.

Certain facts are undisputed. On September 8, 1977, while hauling loaded mine cars in Allied's Shannon underground mine, the trolley harp assembly supplying electrical power to the locomotive became disengaged. The motorman was unable to control or stop the locomotive, which subsequently derailed. Both the brakeman and the motorman jumped from the moving locomotive before the derailment. The brakeman was killed and the motorman was injured.

A withdrawal order was issued to Allied on September 9, 1977, alleging a violation of the mandatory standard at 30 CFR §75.1404. The order stated:

1/ The inspector issued the withdrawal order at issue on September 9, 1977, pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) ("the Coal Act"). The Secretary filed his petition for assessment of civil penalty on August 29, 1978, after the effective date of the Mine Act. Thus, while the violation occurred under the Coal Act, these proceedings arise under the Mine Act.

The pneumatic braking system on the ... locomotive ... was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks [locomotive wheels] and could not apply uniform frictional pressure on the braking surface....

Allied contested the order and a hearing was held before the administrative law judge. In his decision the judge concluded that the locomotive in question had a dual braking system "installed." 2/ He further concluded that the Secretary had not proven that the locomotive was being operated outside its design capabilities, or had been operated at excessive speed. The Secretary filed a petition for discretionary review, which we granted in part. 3/ The issue before us on review is whether the judge correctly interpreted and applied 30 CFR §75.1404.

The standard at issue provides:

§75.1404 Automatic brakes; speed reduction gear. [Statutory Provisions]

Each locomotive and haulage car used in an underground coal mine shall be equipped with automatic brakes, where space permits. Where space does not permit automatic brakes, locomotives and haulage cars shall be subject to speed reduction gear, or other similar devices approved by the Secretary, which are designed to stop the locomotives and haulage cars with the proper margin of safety.

§75.1404-1 Braking system.

A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of §75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design capabilities and at speeds consistent with the conditions of the haulage road....

2/ The parties agree that a dual braking system consists of a dynamic or electric brake system and a pneumatic or service brake system.

3/ In his petition for discretionary review, the Secretary also assigned as error the judge's conclusion that he had not established by a preponderance of the evidence an adverse effect on the locomotive's braking capacity caused by misaligned brake shoes. However, under the authority of section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. §823 (d)(2)(A)(i), we declined to direct that issue for review.

Allied argued before the judge, and argues before us, that to comply with the cited standard a locomotive merely has to have a dual braking system installed, and that the standard is not directed at the operability of the system. In Allied's words, the standard establishes "design" criteria and does not impose "maintenance" requirements. In our view the judge's resolution of this issue is ambiguous. At the conclusion of his decision, the judge appears to accept Allied's interpretation, but in other portions of his decision he apparently considered the operability of the braking system. To resolve any doubts, we hold that 30 CFR §75.1404-1 requires that a dual braking system be both present and operable. Thus, a violation of the standard can be established by proving that a locomotive is not equipped with an operable dual braking system. The standard can also be violated if the locomotive is operated beyond its design capabilities or at speeds inconsistent with haulage road conditions.

We believe that any other result would be contrary to the remedial intent of the Coal Act, the Mine Act, and this standard, as well as common sense. 30 CFR §75.1404 restates section 314(e) of the Coal Act. 30 CFR §75.1404-1 merely establishes a permissible alternative to the automatic brakes required by the statutory provision. Section 314(e) in turn reiterates section 214(e) of S. 2917, the Senate version of the Coal Act, and is quite similar to the House version. The Senate Report stated: "This provision will reduce, substantially, the number of haulage collisions that are responsible for many accidents." 4/ The House Report stated that section 314(e) "requires automatic brakes, speed reduction devices, or other safeguards ... to be certain that the equipment can be stopped promptly." 5/ Where Congress indicated in such unequivocal terms that its objective was to stop equipment promptly in order to prevent accidents, it could not have intended merely that locomotives be equipped with dual braking systems, and have been indifferent to whether the brakes were operable. If brakes are to stop a locomotive promptly, it is axiomatic that, once installed, they must be operable.

We turn now to the question of whether the judge properly applied the standard in this case. The judge found that "the failure of the locomotive brakes to function was due to the unexpected loss of power caused by the loss of the trolley harp assembly, which in fact resulted in the unanticipated loss of braking air pressure due to the loss of electrical power." The judge found "no indication that the ... operator

4/ S. Rep. 91-411, 91st Cong., 1st Sess. at 82 (1969); reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 208 (1975) ["Legis. Hist."].
5/ H. Rep. 91-563 at 55; Legis. Hist. at 1085.

experienced any difficulties in negotiating the grades traveled on the very day of the accident ... or that he experienced any difficulty in braking and controlling the locomotive...," but that his difficulties began when the loss of power "incapacitat[ed] all of the locomotive brake systems."

The Secretary submits that the judge's finding, that the brakes failed because of a loss of electrical power, is contrary to the evidence. He submits that of the three possible causes of the locomotive's brake failure, the judge considered only two: operator error and loss of power. In attributing the brake failure to the latter, he did not consider the third possible cause, systemic failure. The Secretary bases his assertion on the apparent failure of both portions of the pneumatic brake after the loss of the harp assembly. He contends that notwithstanding the loss of electricity, a single application of the primary pneumatic component should not have exhausted the air supply; the pneumatic brake should have stopped the locomotive. Even if the primary pneumatic component failed, "the loss of electrical power cannot rationally explain the failure of the truck emergency component to stop the locomotive...." He emphasizes that the truck emergency brake does not rely on electricity and is immune to air demands of other equipment. Therefore, the only logical explanation for its failure to stop the locomotive after the primary pneumatic brake failed to do so, is that it was defective. The Secretary contends that "[s]ubsequent testing confirmed that the truck emergency [brake] was defective," because the brakes failed in three surface tests conducted on level ground. Citing the testimony of Allied's expert witness, the Secretary submits further that because the truck emergency brake is an integral part of the pneumatic system, any defect in it meant that the pneumatic system was defective. Therefore, in the Secretary's view, the locomotive was not equipped with an operable dual braking system as 30 CFR §75.1404-1 requires.

In sum, the Secretary contends that the judge's analysis is flawed because the loss of electricity does not adequately explain the failure of the dual braking system. In the Secretary's view the primary pneumatic brake should have had sufficient air, even without electricity, to stop the locomotive on nearly level ground. Once the primary pneumatic brake failed, he believes that an operable truck emergency brake, as part of the dual braking system, with its independent air supply, should have stopped the locomotive.

Allied contends that it was in compliance with 30 CFR §75.1404: "A dual braking system was present and the locomotive was operated within design capabilities and at speeds consistent with the haulage road conditions." Allied rejects the Secretary's argument that the truck emergency brake is a part of the pneumatic system, was inoperative and therefore that the pneumatic braking system was deficient. Allied cites the testimony of its expert witness that the truck emergency brake is independent of the dual braking system. It compares the technical expertise of that expert witness to the "speculative opinion testimony" of the allegedly untrained MSHA inspector, urging the correctness of the judge's reliance on the former.

Allied asserts further that the Secretary introduced no evidence to demonstrate that the truck emergency brake was inoperable. It argues that the surface tests to which the Secretary refers involved bleeding off pressure in the main reservoirs, not in the truck emergency brake. Allied submits that this demonstrated nothing about the truck emergency brake, which would have required 24 hours to replenish its air supply. In conclusion, Allied asserts that the Secretary failed to demonstrate that the truck emergency brake was part of the pneumatic system or that it was inoperable. Allied submits that the judge considered the truck emergency brake and all other possible causes of brake failure, and that the judge properly determined that the loss of electrical power was the sole cause of the failure.

30 CFR §75.1404-1 permits a locomotive to be equipped with a dual braking system as an acceptable alternative to the automatic brakes mandated by 30 CFR §75.1404. Neither the regulation nor the legislative history of section 314(e) of the 1969 Act (which §75.1404 restates) defines a dual braking system. The parties appear to agree that a dual braking system consists of a dynamic braking system and a pneumatic braking system. They also agree generally as to the operation of at least the primary pneumatic brake. They disagree, however, on what constitutes the pneumatic braking system, and whether the truck emergency brake is part of the pneumatic braking system. They disagree further as to whether the truck emergency brake was operable. The ensuing controversy colors the entire case.

Although the judge found that "the locomotive had a dual braking system installed ...," he did not explicitly determine what constituted the pneumatic portion of the dual braking system. We believe that the judge should have made explicit findings as to whether the truck emergency brake and its air supply were part of the pneumatic braking system. The failure to determine whether the truck emergency brake was part of or independent of the pneumatic braking system leaves unanswered the major factual issue in this case, whether the dual braking system was operable. If the truck emergency brake were found to be part of the pneumatic system, questions remain as to whether it was operable in these circumstances and could have supplied air to the brake cylinders after the main air supply was depleted. We also believe that the loss of the harp assembly does not explain the total breakdown of the dual braking system. The loss of the harp assembly should have caused the complete failure of only the electrically-powered dynamic brake. The other component of that dual braking system, the pneumatic braking system, is not fully dependent upon electricity. Electricity powers the compressor to maintain adequate air supply. If operable, it should have continued to function at least until the air supply in its tanks was exhausted; the loss of electricity would merely have prevented the replenishing of that air supply.

Therefore, we remand to the judge for further proceedings. Specifically, we remand for a finding as to whether the dual braking system was operable. In order to make this ultimate finding, findings are also necessary on why the primary pneumatic brake failed to stop the train after the electricity was interrupted; whether the truck emergency brake is part of the pneumatic portion of the dual braking system; and, if so, why it failed to stop the train.

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