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HARMAN MINING v. SOL (MSHA) & (UMWA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HARMAN MINING CORPORATION, CONTESTANT	Contest of Order and Citations
v.	Docket No. VA 80-94-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Order No. 698509 February 9, 1980
	Docket No. VA 80-95-R
UNITED MINE WORKERS OF AMERICA, (UMWA), RESPONDENT	Citation No. 0698510 February 11, 1980
	Docket No. VA 80-96-R
	Citation No. 0698511 February 11, 1980
	Docket No. VA 80-97-R
	Citation No. 0698513 February 14, 1980
	Central Preparation Plant

DECISIONS

Appearances: Robert M. Richardson, Esq., J. Peter Richardson, Esq., Bluefield, West Virginia, for Contestant
John H. O'Donnell, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent MSHA

Before: Judge Koutras

Statement of the Proceedings

These consolidated contests concern a section 103(k) order and three section 104(a) citations issued by MSHA to the contestant in February, 1980. The order was issued by MSHA inspector Roger L. Clevinger on February 9, for the purpose of facilitating an investigation into a fatal railroad haulage accident which occurred at contestant's central preparation plant on the evening of February 8. The accident resulted in the death of an employee (brakeman) of the Norfolk & Western Railroad Company who was struck by a

trip of two runaway loaded railroad cars being dropped by an employee (car dropper) of the contestant. The facts and circumstances surrounding the accident are detailed in the accident investigation report prepared by MSHA inspectors Clevinger and Merian O'Bryan (Exh. R-1). The citations were issued as a result of the information obtained by the inspectors during the course of their investigation, but only two of them were related to the accident.

The section 103(k) Order No. 0698509, February 9, 1980, issued by Inspector Clevinger reads as follows: "A fatal accident has occurred on the railroad side track serving this preparation plant. This order is issued pending an investigation to determine the cause and means of preventing a similar occurrence."

Citation No. 0698510, February 11, 1980, issued by Inspector Clevinger, cites a violation of 30 C.F.R. 77.1607(v), and states as follows: "The railroad car dropper did not have the two loaded railroad cars being dropped on the side track under control in a manner to where the cars could be stopped safely when needed. This was issued during a fatal accident investigation."

Citation No. 0698511 (as amended), February 11, 1980, issued by Inspector Clevinger, cites a violation of 30 C.F.R. 77.1713, and states as follows: "The onshift examination for hazardous conditions at the Central Preparation Plant was not being conducted by a certified person."

Citation No. 0698513, February 14, 1980, issued by Inspector Clevinger, cites a violation of 30 C.F.R. 48.31, and states as follows: "Hazard training was not provided for the Norfolk and Western employees serving this preparation facility."

A hearing was conducted in Pikeville, Kentucky on September 11, 1980, and the parties appeared and participated therein. Post-hearing proposed findings and conclusions were submitted by the parties and the arguments presented have been fully considered by me in the course of these decisions. Although notified of the hearing, respondent UMWA failed to appear and I dismissed them as a party (Tr. 80).

Issues Presented

1. Whether the accident occurred on contestant's coal mine property and whether the asserted mining activities engaged in by the contestant at the time of the accident constituted "mining" within the meaning of the Act.

2. Whether the order and citations were properly and validly issued by the inspector pursuant to the Act, and whether the conditions and practices described in the citations constituted violations of the cited mandatory safety standards.

3. Whether the order and citations should have been served on the Norfolk and Western Railroad Company (N & W) as the "operator" of the "mine," rather than on the contestant.

4. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Findings and Conclusions

The Jurisdictional Question

Resolution of the legal question concerning MSHA's jurisdiction in this case centers on the following questions: (1) Is the tipple and preparation plant part of a coal mine within the meaning of the Act? (2) Is the area of land where the N & W railroad tracks are located and where loaded coal cars are parked awaiting transportation by the railroad part of a coal mine?

The definition of "coal or other mine" found in section 3(h)(1) of the Act is as follows:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

In its post-hearing brief contestant argues that the fatal accident and all car-dropping activities relating to and leading up to the accident happened on the N & W railroad tracks, at a site physically separate from the preparation plant and that any coal preparation had been completed and transportation begun. In these circumstances, contestant advances the argument that since the accident did not occur in "a coal or other mine" as defined by the Act, MSHA has no jurisdiction to issue orders or citations for conditions or practices over which contestant has no control.

Conceding that the definitions of "coal or other mine" follows the mining process from extraction through preparation, contestant nonetheless advances the argument that while specific facilities are referred to by the definitions section found in the Act, transporting prepared coal in railroad cars is not included among the itemized activities listed therein. Further, contestant asserts that it conveyed all of its tangible property

interests in

the railroad tracks, roadbeds, and appurtenances thereto to the railroad. Contestant would draw the line at the production or preparation end of its mining process precisely where the coal has been prepared and completely loaded into the railroad car delivery vehicle while it is on the track, but would not extend MSHA's jurisdiction to loaded railroad cars assertedly off of the coal company's property. In support of this argument, contestant points out that MSHA has not undertaken to regulate the defective railroad car brakes such as the ones which caused the accident in this case, and that the railroad has refused to submit itself to MSHA's jurisdiction because it believes that the accident occurred on a railroad rather in a coal mine, thereby subjecting the railroad to the jurisdiction of the Interstate Commerce Commission rather than MSHA.

Contestant's jurisdictional position was succinctly stated by its counsel during the course of the hearing as follows (Tr. 219):

> When that car is dropped onto tracks belonging to the Norfolk and Western Railroad in a Norfolk and Western railroad car completely loaded and ready for transportation to its destination with nothing more to be done to it in the manner of preparation or extracting, then I say that is the fine line. Because I say under the definition of a coal mine there is nothing, no language that would include the tracks of the Norfolk and Western Railroad as a part of the coal mine. But I think it is definitely a far cry different thing from a preparation facility belonging to Harman and I think when that car's under that preparation plant being loaded that it is subject to inspection. When it is dropped in position, which is the case in this case, below that tipple loaded in a Norfolk Western Car on a Norfolk and Western track with defective brakes on it that it is not on a coal mine.

Respondent MSHA's arguments in support of its jurisdiction in this matter includes a detailed analysis of the deed and agreement between contestant and the railroad concerning the use of the land and railroad equipment in question (Exhs. R-15 and R-16). In summary, MSHA argues that when read together, the agreement and deed do not reflect any intention on the part of contestant to convey the land below the tipple and preparation plant in fee to the railroad. To the contrary, MSHA argues that the effect of the deed and agreement is to grant to the railroad an easement or license across contestant's land for the purpose of providing a mutually beneficial and convenient method of transporting coal off mine property.

The record reflects that the railroad cars are loaded at the tipple preparation plant and trips of three to five loaded cars are then dropped by gravity and placed on certain tracks some four to five hundred feet from the plant until such time as they can be added to other trips and taken away by the railroad. During the dropping process the cars are dropped by gravity, they

are manned by car droppers employed by the contestant, the car droppers control the positioning of the loaded cars on the tracks, and their duties

include operating the track switches to facilitate the placing of the loaded cars at the desired track locations (Tr. 29-31). The tracks consist of three storage tracks and the main railroad track (Tr. 32, Exh. R-2). The car dropper actually stands on a platform at one end of the loaded moving car, and his job is to control the speed of the car by means of a wheel-type mechanical braking device (Tr. 36).

The record also reflects that brakemen employed by the railroad also operate the track switching devices and often instruct the car droppers where to position the loaded coal cars. These railroad brakemen routinely spend time on mine property, and Inspector O'Bryan stated that "That's the only way the cars can get on and off is by N & W people or the railroad people. I know of no other company that has their own railroad" (Tr. 38, 40). Mr. O'Bryan believed that the storage tracks were on mine property but he had no knowledge as to who actually owned the land where the tracks are located, but it was his understanding that the area from the preparation plant to the "D-rail" is on mine property and that the three storage tracks were leased to the contestant mining company (Tr. 43-45).

Contestant's employees do have occasion to drop cars as far as the D-rail, but they are normally pulled to that area by a locomotive for storage purposes (Tr. 49). Contestant's car dropper James Bennett testified that employees of the railroad company are on the property from the tipple to the D-rail on a daily basis and that the tipple operates normally on two shifts, sometimes three, and there are times when the railroad employees extend their work hours (Tr. 146). He also testified that both he and railroad employees operate all of the track switches when required, and that he has dropped cars as far as the D-rail (Tr. 149). He also testified that he has been employed at the tipple for 27 years and that the coal processed at the tipple comes from three or four different mines and that it is transported to the tipple by trucks and railroad cars (Tr. 155-156). Car dropper Bill McCoy testified that railroad brakemen do not drop any of the loaded coal cars because "the union wouldn't let them" (Tr. 184).

Contestant's Vice-President for Operations, Paul Hurley, testified that "we couldn't operate as a coal mining company without the services of N & W" (Tr. 208). With regard to the source of the coal which is processed through the tipple and preparation plant, he testified as follows (Tr. 202):

> It comes from a multiplicity of mines around. Primarily the Harman Preparation Plant is a plant that was built many years ago to service the number one and number three mines which it still does and is still a part of that operation in that the mine cars from number three mine come in and dump right in directly into the back of the plant everyday and every night. In addition to that we have a facility on the hill back of this plant through a system of conveyors where we accept and receive coal from three of our truck mines - three of

our outlying area mines that the coal from them is trucked in. And sixteen or seventeen small contract mines that is brought in by the truck route too.

Mr. Hurley described the operations of the tipple and preparation plant, and stated that the plant was constructed in 1937 to service the number one and number three mine. His office is located some 1,500 feet above the plant location, and he confirmed that the preparation and tipple operations have been regulated and inspected by MSHA for many years (Tr. 213-218). Although he did indicate at one point during his testimony that he did not consider the tipple to be a "mine" because coal was not extracted there, contestant's counsel conceded that it was (Tr. 219).

On July 6, 1978, I rendered a decision in the case of MSHA v. Consolidation Coal Company, Docket No. VINC 77-122-P, and ruled that a certain track area over which the Norfolk and Western Railroad Company had an easement to operate was part and parcel of Consolidation's coal mining operations and that the track area where an MSHA inspector issued a citation for failure by Consolidation to maintain the tracks as required by mandatory safety standard 30 C.F.R. 77.1605(m), was in fact a part of a coal mine within the meaning of the 1969 Act. A copy of my decision, as well as my jurisdictional ruling of January 5, 1978, in response to a motion for summary judgement, is attached to MSHA's post-hearing brief and are matters of record. The facts and circumstances in Consolidation, particularly with respect to the jurisdictional arguments advanced by the parties, are essentially similar, if not identical, to those presented in the instant case.

After careful review and consideration of all of the arguments presented in this case, I conclude and find that MSHA has the better part of the jurisdictional argument and I accept and adopt its contentions in this regard and reject those advanced by the contestant. I believe it is clear that contestant's tipple and preparation plant are in fact subject to MSHA's enforcement jurisdiction and that the activities at those locations are in fact coal mining activities within the meaning of the Act, and I believe that contestant has conceded as much and does not seriously dispute this fact. As pointed out in my prior decision in the Consolidation case, the definition of "coal or other mine" as found in section 3(h) of the Act includes mining activities which take place at a tipple or preparation facility.

The Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, 1968 Ed., pg. 859, defines the term "preparation plant" as including any facility where coal is "separated from its impurities, washed and sized, and loaded for shipment." The term "tipple" is defined at pg. 1145 as:

> Originally the place where the mine cars were tipped and emptied of their coal, and still used in that sense, although now more generally applied to the surface structures of a mine, including the preparation plant and loading tracks * * *. The dump; a cradle dump * * *. The tracks, trestles, screens, etc., at the entrance to a colliery where coal is screened and

loaded. [Emphasis supplied.]

Based on the testimony and evidence presented in this case, I believe there is no question that the tipple preparation plant is in fact a "coal or

other mine" for purposes of the Act. In addition, I also conclude that the track area below the tipple, up to and including the D-rail location, is also part of contestant's "coal or other mine" for purposes of the Act, and its very narrow arguments to the contrary are rejected. I conclude and find that contestant is the legal owner of the land where the track system is located, and the fact that the railroad has been allowed to use the land for its tracks and other equipment, including its locomotives and coal haulage cars, does not detract from this fact. As I construe the deed and agreement referred to by the parties, any conveyance from the contestant to the railroad was in effect a license or easement to use the land, and the fee ownership in the land itself has still be retained by the contestant. Further, as candidly admitted by Vice-president Hurley, for all practical purposes contestant cannot continue to exist and operate as a viable mine operator without the benefit of the railroad to carry away the coal processed and loaded at its central tipple and preparation plant.

Although coal extraction does not take place at the preparation plant, the work of loading the processed coal into railroad cars and dropping them below to the track storage area falls within the broad statutory language found in section 3(h), particularly the language "the work of preparing coal or other minerals, and includes custom preparation facilities." More importantly, the definition of "coal or other mine" is broad enough in my view to include the track area in question. The railroad track is an integral and indispensable part of contestant's mining operations at the tipple and preparation plant and I reject any attempt to divorce them from the normal mining operations obviously being carried out by the contestant on the basis of a somewhat artificial and semantical interpretation of a somewhat antiquated deed and agreement entered into by the contestant and the railroad for their mutual benefit.

This conclusion is in accord with Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980), which dealt with a closely analogous situation. There, the State of Pennsylvania dredged a river and deposited the material into a nearby basin. The operator purchased this material and through the use of a front-end loader and conveyor belts transported the material to its plant where, through a sink-and-float process, a low-grade fuel was separated from the sand and gravel. The court held that the operator was engaged in the preparation of minerals within the jurisdiction of the Mine Act, and that "the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator." 602 F.2d at 592.

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it

> is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602.

Docket No. VA 80-94-R

Order No. 698509

Inspector Clevinger testified that as a result of the fatal accident, he issued the section 103(k) order on February 9, 1980, to facilitate an investigation to determine the cause of the accident. The order was terminated on February 11, 1980, after the investigation was concluded. The investigation team consisted of Federal, Union, and company officials and the cars involved in the accident were not moved by the railroad company until after the investigation was completed (Tr. 80-83).

Section 103(k) states in pertinent part:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

Contestant's defense to the order is based on its jurisdictional argument that the track area where the accident occurred is not part of the mine and that the inspector therefore had no jurisdiction or authority to issue the order. Since I have rejected contestant's jurisdictional argument and have concluded that the accident site was part of the mine, contestant's argument in defense of the order on this ground is likewise rejected.

It seems clear to me that the inspector issued the order so as to maintain the status quo while an investigation was conducted. The order was limited to the railroad cars located in the track storage area and there is no evidence that contestant's coal tipple or preparation activities were in anyway otherwise curtailed or that contestant's production was in anyway affected by the order. The purpose of the order was to prevent the cars involved in the accident from being moved or disturbed until certain tests were conducted as part of the investigation. As a matter of fact, the railroad did not move the cars, the contestant participated in the investigation, and as soon as the investigation was completed the order was terminated. In these circumstances, I conclude and find that the inspector acted within his

authority in issuing the order and that the use of such an order in the circumstances presented in this case was reasonable, proper, and in accord with section 103(k). See: MSHA v. Eastern Associated Coal Company, HOPE 75-699, Commission Decision of September 2, 1980. Further, in view of my findings and conclusions concerning the jurisdictional question, I also conclude and find that the section 103(k) control order was properly served on the contestant as the mine operator. Considering all of these circumstances, the order is AFFIRMED.

Docket No. VA 80-96-R

Citation No. 698511

The citation in this case was issued because the inspector discovered that the person conducting the onshift hazardous conditions examination was not a certified person within the meaning of cited standard 77.1713(a). Inspector Clevinger confirmed that he issued the citation after reviewing the onshift examination books and observing that the signature of the person signing the report as the examiner did not include a certification number confirming the fact that he was in fact a certified examiner. He identified that person as David Ratliff and he confirmed that while Mr. Ratliff may have conducted the examination, he had no state or federal certification as a qualified onshift examiner (Tr. 95-97).

Inspector Clevinger testified further that the citation was terminated the day after it issued after a certified person conducted the required examination, and he confirmed that the citation was unrelated to the fatal railroad accident which occurred on February 8, 1980 (Tr. 96-98). He also testified that the preparation plant had its own MSHA "ID" or mine identification number and he considers it to be a surface mine (Tr. 122).

Mr. Ratliff conceded that when he signed the onshift examination report he was not a certified examiner. He explained that in order to be certified one must have 5 years of mining experience and that he will have 5 years' experience on January 1, 1981. He also indicated that Mr. Clevinger considered him to be a competent person to make the required examination but that the report should have been countersigned by a certified person (Tr. 240-243).

30 C.F.R. 77.1713(a) provides as follows:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examination shall be reported to the operator and shall be corrected by the operator. [Emphasis added.]

The term "certified person" is defined in section 77.2(m) as:

> [A] person certified or registered by the State in which the coal mine is located to perform duties prescribed by this Part 77, except that, in a State where no program of certification or registration is provided or where the program does not meet at least minimum Federal standards established by the Secretary, such certification or registration shall be by the Secretary.

The regulatory details concerning "qualified and certified persons" are set forth in section 77.100 and need not be repeated here. Contestant does not dispute the fact that Mr. Ratliff was not "certified" as required by the regulations. Its defense is based on the assertion that the certification requirements of section 77.1713 apply only to surface coal mines, and that since the term "surface mine" is not defined, and the inspector testified that no coal is produced by the preparation plant, contestant argues that the plant is not a surface mine. In further support of its argument, contestant produced a copy of an MSHA Memorandum of April 10, 1979, from Administrator Joseph O. Cook to MSHA District Managers concerning the application of section 77.1713, and the pertinent portion of that memorandum reads as follows: "Section 77.1713, applies only to surface coal mines and does not apply to surface work areas of underground coal mines. Therefore, examinations as specified in Section 77.1713 are not required at surface work areas of underground coal mines."

MSHA argues that while contestant asserts that the preparation plant is the outside area of an underground mine, contestant does not specify which of its underground mines it wishes to associate with the plant. MSHA goes on to argue that the coal processed at contestant's central preparation plant is mined at different mine locations owned by the contestant as well as several mines operated under contract, and that the plant is the only one used by the contestant to process this coal. Each of contestant's mines, as well as the preparation plant, have separate mine identification numbers, and MSHA argues that the plant is in fact a surface facility independent of any mine.

With regard to the April 10, 1979, memorandum alluded to by the contestant, MSHA asserts that it was intended to apply to a preparation plant operated as part of one underground mine. MSHA attached a copy of a December 13, 1979, memorandum from its Associate Solicitor for Mine Safety and Health (Appendix No. 1, posthearing brief), which concludes in pertinent part as follows:

> Preparation plants not associated with surface or underground mines fall within the definition of "coal or other mine" because they conduct the work of preparing coal. Since all the activity at such preparation plants occurs on the surface, these plants are surface coal mines within the meaning of Part 77 which applies to surface coal mines and surface

> work areas of underground coal mines. For the same reason, they are also active surface installations within the meaning of 77.1713.

The memorandums alluded to by the parties in these proceedings are not binding on me, nor are the interpretations of the application of section 77.1713. Accordingly, my findings and conclusions which follow are made on the basis of my independent consideration of the Act as well as the regulatory language of the pertinent standards found in Part 77.

Part 77, Title 30, Code of Federal Regulations, contains the mandatory safety and health standards applicable to surface coal mines and surface work areas of underground coal mines. While it is true that the term "surface coal mine" is not further defined, section 77.200 dealing with surface installations provides that: "All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees." The purpose of onshift examinations is to detect conditions which may contribute to hazards. The central preparation plant falls within the statutory definition of a "coal or other mine," and the fact that coal is not actually mined at that facility by use of drag lines or other machinery normally associated with the actual extraction of coal is not controlling. The definition of "coal or other mine" found in the Act is broad enough to include the work of processing the coal produced at contestant's mines through the central preparation facility.

I take note of the fact that the regulatory language found in section 77.1713 makes reference to "active surface installation" and it can hardly be argued that the central preparation plant is not an active surface installation. The activities taking place at this plant are as much an integral part of the mining process as is the initial extraction of the coal itself, and since these activities take part on the surface I conclude and find that for purposes of the application of section 77.1713, the central preparation plant may be considered a surface coal mine and contestant's arguments to the contrary are rejected. The citation is AFFIRMED.

Docket No. VA 80-97-R

Citation No. 698513

This citation was issued to the contestant because of its asserted failure to provide hazard training for the employees of the railroad who worked in and around the railroad yard near contestant's preparation plant. Specifically, MSHA asserts that the failure by the contestant to provide such training to the railroad employees who were engaged in duties connected with the transportation of the loaded railroad cars from contestant's property constituted a violation of the training requirements found in section 48.31. That section of the regulations provides as follows:

(a) Operators shall provide to those miners, as defined in 48.22(a)(2) (Definition of miner) of this subpart B, a

training program before such miners commence their work duties. This training program shall include the following instruction which is applicable to the duties of such miners;

(1) Hazard recognition and avoidance;

(2) Emergency and evacuation procedures;

(3) Health and safety standards, safety rules and safe working procedures;

(4) Self-rescue and respiratory devices; and,

(5) Such other instruction as may be required by the Chief of the Training Center based on circumstances and conditions at the mine.

(b) Miners shall receive the instruction required by this section at least once every 12 months.

(c) The training program required by this section shall be submitted with the training plan required by 48.23(a) (Training plans; Submission and approval) of this subpart B and shall include a statement on the methods of instruction to be used.

(d) In accordance with 48.29 (Records of training) of this subpart B, the operator shall maintain and make available for inspection, certificates that miners have received the instruction required by this section.

The regulatory education and training requirements mandated by the Act are found in Part 48, Title 30, Code of Federal Regulations. Subpart B contains the requirements for the training and retraining of miners working at surface mines and surface areas of underground mines. For purposes of the hazard training requirements imposed by section 48.31, the term "miner" is defined in pertinent part by section 48.22(a)(2) as follows:

[A]ny person working in a surface mine or surface areas of an underground mine excluding persons covered under paragraph (a)(1) of this section and subpart C of this part and supervisory personnel subject to MSHA approved state certification requirements. This definition includes any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine.

Inspector Clevinger stated that he issued the citation upon instructions from his supervisor and that he did so after confirming during the course of

his accident investigation that the contestant had not given any hazardous training to any of the railroad employees. An operator is required to maintain records of such training on MSHA Form 5000-23, and when plant supervisor Ronnie Cox could not produce the form attesting to such training, he issued the citation (Tr. 87-88). The abatement was extended several times because of the fact that contestant has sought review of the citation, and the violation has never been abated (Tr. 92).

On cross-examination, Inspector Clevinger identified a copy of a February 21, 1980, letter from the railroad trainmaster to contestant's vice-president for operations refusing to permit railroad employees to be trained by the contestant (Exh. R-8), and he confirmed that contestant would have compliance difficulties without the cooperation of the railroad. Mr. Clevinger suggested that the only alternative available to the contestant would be to exclude railroad employees from its property (Tr. 100-101; 110). Mr. Clevinger also stated that the hazardous training requirements under section 48.31 apply to anyone on contestant's mine property and that the requirements apply to any person whether he is a miner or not (Tr. 111). He confirmed that he has inspected other mine sites but has never previously cited other mine operators for not training railroad employees, nor could he recall that other MSHA inspectors cited operators for such violations (Tr. 113-114).

Contestant's Vice-President Hurley testified that when he initially contacted the railroad trainmaster concerning the training of railroad employees, the trainmaster advised him that the railroad would object and he confirmed this in writing by letter (Exh. R-8, Tr. 204). Mr. Hurley testified further that he did not inquire any further and accepted the trainmaster's refusal to permit railroad employees to be trained as the railroad's policy in this regard, and he made no further inquiries and confirmed the fact that the railroad services provided to the contestant were an essential part of its mining operations (Tr. 205-212).

Contestant's defense to the citation is based on the fact that the railroad has refused to submit its employees to the required training, as well as the argument that as an independent contractor "mine operator," the railroad should be held accountable for its refusal to allow its employees to be trained, and that as an independent contractor, the railroad rather than contestant should be cited for the violation.

In support of the citation, MSHA points to the fact that since the employees of the railroad are routinely assigned to contestant's property to perform duties connected with the loading of the railroad cars at the tipple, it is incumbent on the contestant to insure that they receive the required training. MSHA views the letter from the railroad trainmaster as a half-hearted attempt by the contestant to escape liability in this case and suggests that more effort by the contestant could have achieved compliance. In the final analysis, MSHA would have the contestant refuse entry to all railroad employees who do not

subject themselves to contestant's training efforts.

The citation issued in this case charges the contestant with the failure to provide hazard training for the employees of the Norfolk and Western Railroad. MSHA's evidence and testimony in support of the alleged violation is the testimony of Inspector Clevinger that mine management was unable to produce an MSHA form attesting to the fact that the employee who was killed had received any training. Contestant's defense is that it provided an opportunity for training, but that the railroad refused to allow its employees to be trained. MSHA has not proven that contestant does not have a training program for its own employees, nor has it not rebutted the fact that the contestant was ready, willing, and able to train railroad employees working on its mine property. Since MSHA has the initial burden of making out a prima facie case to support its contention that training was not provided in accordance with the requirements of section 48.31, it is incumbent on MSHA to prove its case by a preponderance of the evidence. Since section 48.31 requires that such training be provided, I cannot conclude that contestant did not in fact provide such training. The railroad simply failed to take advantage of it by refusing to submit its employees to such training. As an analogy, a public school system provides for the education of its citizens, but if the citizens do not accept the opportunity to educate themselves one can hardly hold the school system accountable. Of course, one recourse by the school authorities is to seek enforcement of any compulsory school attendance law if one is in fact in effect. In such a case, the local authorities would undoubtedly hold a parent accountable for failure to insure that his child take advantage of the education which has been provided. By the same token, MSHA should look to the "parent railroad" rather than the "surrogate parent" mine company to insure that its own people take advantage of the training which has been provided.

MSHA does not dispute the fact that the contestant has given the railroad an opportunity to train its employees. MSHA's position seems to be that although training has been provided, the contestant must go one step further and insure that the railroad employees avail themselves of the training, or suffer the consequences of citations and closure orders for failing to insure that railroad employees submit to such training. In the circumstances, I conclude and find that MSHA has not established a violation of the cited standard and the citation is VACATED. Further, on the facts and circumstances presented in this case, I feel compelled to comment further with regard to the training requirements and the theory of MSHA's attempts to enforce those standards, and my remarks follow below.

Since MSHA has the initial enforcement jurisdiction in matters relating to mine safety and health compliance, I suggest that MSHA take the initiative to insure compliance by railroad companies operating on mine property, rather than to shift the burden to mine operators or to the Commission Judges. Failure by MSHA to act directly against a contractor-operator is precisely why I recently dismissed nine civil penalty dockets remanded to me from the Commission, MSHA v. Pittsburgh & Midway Coal Mining Company, Dockets BARB 79-307-P, etc., September 5, 1980. On the

facts presented in this case, MSHA concedes that the independent contractor railroad is in fact subject to

the Act and can be regulated by MSHA, and in support of this conclusion I cite the following colloquy between MSHA counsel and me during the course of the hearing (Tr. 76-79):

> JUDGE KOUTRAS: But, what I'm saying, there's nothing to preclude the Secretary if he wanted to, to subpoena some Norfolk and Western people and during the course throughout the investigation.
>
> MR. O'DONNELL: We could have them there if we wanted them. One thing I've been listening with amusement here. Both Mr. Richardson and to a certain extent our own people seem to indicate that these railroad people are what - Government? they're just - we have the same rights with them that you've got against the driver of a - and an accident on the property we could go in and slap them good. We're not afraid of the railroads. We'll tell the railroad what to do and they'll do it. If they don't do it, they won't haul coal. And if they don't haul coal, they're going to be hurting in this area. That's the major part of their business.
>
> JUDGE KOUTRAS: Are the railroad companies that haul coal regulated at all by any regulations and safety standards by MSHA?
>
> MR. O'DONNELL: Every railroad, every airline, every, everybody that is on mine property is subject to the Federal Mine Safety and Health Act of 1977. And they have to comply. Whether it's anything or whether it's a United States Postal person coming on there. If he comes onto the mine property as part of his duty, he's subject to it. Everybody is. It comes in the jurisdiction of a mine they are responsible. And we can control them. And we will control them.
>
> JUDGE KOUTRAS: In other words, if they were to find defective brakes on these locomotives, the theory against Harman Mining would be what?
>
> MR. O'DONNELL: Independent contractor.
>
> JUDGE KOUTRAS: Who?
>
> MR. O'DONNELL: The railroad is an independent contractor performing services for Harman Mining Company - they are a necessary part of their mining operation.
>
> JUDGE KOUTRAS: That's the way you would proceed now, you would look at the railroad company as an independent contractor?

> MR. O'DONNELL: Exactly. Same way we would a coal haul truck.What is the difference between a coal haul truck and the railraod cars? They both haul coal out of the way and take it to the supplier. If there's any difference at all - you might say, well, the railroad is subject to Interstate Commerce Acts of Congress, but if those Acts don't conflict with the Federal Mine Safety and Health Act of 1977, then this steps into that void and that's it then. This is a later Act for that matter.
>
> JUDGE KOUTRAS: But the theory of the Government's case in this particular proceeding is that the loaded coal trips were being operated by Harman employees and that they were operated at the mine site, which in the Government's eyes is from the tipple down to the D-rail. And it's the responsibility of Harman Mining Company rather than the railroad in this case.
>
> MR. O'DONNELL: That's right.
>
> JUDGE KOUTRAS: Theoretically, if this case were to start today, assuming that you found no defective brakes et cetera, et cetera, that you would proceed in the same manner or in a combination. You could possibly have the railroad in here as co-respondent, couldn't you?
>
> MR. O'DONNELL: I believe we would cite them both. I'm reminded of the Austin Powder Company case where we cited the mine operator for some of the problems and the Austin Powder Company for other violations.

MSHA's suggestion that a mine operator may exclude or evict railroad employees from its mine property is of course one course of action available to an operator who is faced with a recalcitrant railroad company, and although this is precisely what I suggested in my prior decision in the Consolidation Coal case, I do not believe that this is the most effective way of dealing with a training problem that will undoubtedly have a broad and far reaching effect upon the entire railroad and mining industry. Further, it seems to me that after many years of litigation concerning independent contractors, the case-by-case method of adjudicating disputes which have broad application on a day to day basis is not the best way of gaining compliance. The Consolidation Coal Company decision and the instant proceeding are classic examples of MSHA attempting to place the Judge in the position of policing the railroad and coal industry, and MSHA's counsel reminding me that after my decision in the Consolidation Coal case nearly 2 years ago the railroad somehow found time to repair defective tracks for which the mine operator was cited confirms my point. Conversely, I remind counsel of my observations at pg. 20 of that decision where I stated as follows:

> The choice of a proper party-respondent lies within the authority and discretion of the enforcing agency. However,

> aside from the fact that petitioner acted on the basis of the then prevailing policy and controlling decisions when it cited the respondent for the violation in this case, it seems to me that in future cases of this kind, petitioner should seriously consider joining the independent contractor as a party respondent, particularly in a case of a culpable independent contractor, rather than taking the expedient route of simply naming the mine operator.

During the course of the hearing MSHA's counsel alluded to the fact that the manner in which MSHA would proceed to insure that railroad employees are trained by mine operators is to issue withdrawal orders to the mine operators, and he stated that "we can issue one against every single customer that Norfolk and Western has until they comply" (Tr. 104). As a matter of fact in the instant case, assuming my decision is favorable to MSHA, MSHA stands ready to issue a section 104(b) withdrawal order to the contestant, thereby hoping to force submission by employees of the railroad (Tr. 93-94). The fact that the railroad refuses to submit its employees to training is a matter that MSHA leaves to me. In short, MSHA's position seems to be that a decision adverse to the contestant on this question will undoubtedly result in the railroad's immediate submission to MSHA's training requirements. Assuming that this is the case, I am not convinced that in the next identical set of circumstances MSHA will in fact cite the railroad. My guess is that MSHA will await the next contest by another mine operator involving another, or possibly the same railroad company, and will undoubtedly opt to gain compliance in precisely the same manner as this case has unfolded.

As I observed during the course of the hearing in this case, MSHA apparently has made no effort to enforce the training requirements provided for in the Act or in its mandatory regultory training requirements directly against a railroad until the unfortunate accident which occurred in this case. Once the accident occurred, immediate focus was placed on the lack of training and the fact that there was no confirmation of the fact that the railroad employee who met his demise was not trained to stay clear of an oncoming trip of loaded coal cars. Assuming that I were to issue a decision favorable to MSHA in this case, I honestly and candidly believe that it will not trigger further enforcement of the training requirements for railroad employees directly against a railroad. Experience has shown that we will simply await the next contested case in which the issue is again placed in focus the next time there is an accident involving a railroad employee performing work on mine property.

It occurs to me that the time has come for MSHA to meet the problem presented by the facts of this case head-on rather than to attempt to avoid the inevitable. MSHA's proposed remedy is an easy solution to its not to pleasant task of taking on a major railroad. It would be a simple matter to suggest that the contestant in this case notify the railroad that it is no longer welcome on its property until such time as it agrees to submit its employees to MSHA's training requirements. However, I

believe that a more effective sanction would be to cite the railroad as a "mine operator" and

insist that it train its own employees. If the railroad refuses, then MSHA could impose the direct sanction provided for in section 104(g)(1) of the Act, and order the withdrawal of railroad employees which have not been trained according to MSHA's requirements. Section 104(g)(1) provides that:

> If, upon inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

Section 104(g)(1) mandates the immediate removal from mine property of miners who have not received the requisite training mandated by section 115 of the Act and the Secretary's regulations implementing those requirements. Section 115(a) requires each mine operator to establish its own training programs, subject to review and approval by the Secretary. Since an independent contractor is in fact a mine operator under the Act, and since MSHA has indicated it will treat railroads such as the Norfolk & Western on an equal basis with other operators, then it seems to me that MSHA should hold all such railroads accountable on an equal footing with other mine operators and the railroad should be required to train its own employees or suffer the consequences of having its untrained personnel barred from mine property through the sanction of a withdrawal order served directly on the railroad company.

Docket No. VA 80-95-R

Citation No. 698510

In this case the contestant is charged with a violation of section 77.1607(v) for the failure by its car dropper to keep two loaded cars under control in a manner to insure that the cars could be safely stopped "when needed." The cited standard states as follows: "Railroad cars shall be kept under control at all times by the car dropper. Cars shall be dropped at a safe rate and in a manner that will insure that the car dropper maintains a safe position while working and traveling around the cars."

Inspector Clevinger testified that he issued the citation in question after being advised by plant supervisor Ronnie Cox during the course of the accident investigation that car dropper James Bennett could not control the trip of cars which were involved in the accident. Mr. Clevinger confirmed that he was present when certain post-accident car tests were conducted on Monday, February 11, but denied that the tests influenced his decision to issue the citation. He issued the citation because

the cars were not under

control and his conclusion that they were not under control stemmed from the fact that the car dropper could not stop them (Tr. 83-85). Mr. Clevinger further confirmed that he had no way of knowing why the cars in question were not under control, and MSHA's counsel confirmed that the citation was issued because the car dropper couldn't stop the cars and had to jump off to protect himself (Tr. 129-130).

Car dropper James Bennett described the procedure he followed in dropping the cars which were involved in the accident. After cleaning some snow off the tracks, throwing some switches, and consulting with several employees of the railroad as to where he should drop the cars, he was advised by Harman car dropper Bill McCoy that one of the loaded cars had no brakes and that it should be held by another car. Mr. Bennett proceeded to position another car in place to hold back the one with no brakes and his intent was to drop and couple the cars onto the rear of a trip of cars which were ready to be pulled out by the locomotive. However, that trip had been moved out before he could drop and position the cars he was handling, and as he dropped them he picked up speed, attempted to apply pressure to the brakes, and when they would not hold, he jumped off the fast moving trip. He then proceeded to the area where he thought the cars had derailed and found the man who had been struck and killed by the runaway cars (Tr. 137-143).

Mr. Bennett stated that he has 27 years experience as a car dropper, and indicated that during any 8 hour shift "anywhere from one to five cars" with faulty brakes are encountered. He indicated that the contestant is not equipped to make major brake repairs and that efforts at correcting such problems are limited to making brake adjustments (Tr. 144). He also confirmed that when he finds a car with defective brakes, he simply places it behind another one with good brakes and attempts to control both cars with the one with the best brakes (Tr. 151; 157-158). That is what he did in this case, but the front car would not hold the other cars behind it and they ran away and struck the rear of the train of cars which was being pulled away (Tr. 154-155). He is no longer employed with Harman and does not know whether the procedures for dropping cars has changed as a result of the accident (Tr. 158). However, he did allude to the fact that when cars are found with defective brakes they are marked with chalk so as to alert the train crew that they need repair, and the railroad is responsible for repairs. Once they are repaired, the chalk marks are removed by painting over them, but he has observed empty cars returned to the tipple loading point with the chalk marks intact indicating that the brakes are still not repaired. These cars with defective brakes are logged in a record book and the railroad is supposed to take care of them (Tr. 157-162).

Car dropper Bill McCoy, testified that at the time of the accident his duties involved the dropping and positioning of empty railroad cars at the tipple loading point. He confirmed that he often encountered empty cars being returned by the railroad with defective brakes and he indicated that he is not

equipped to do anything but make minor brake adjustments and that the railroad has the responsibility of maintaining the cars which they own. He confirmed that cars with faulty brakes are controlled by positioning them

behind ones with good brakes, and he also confirmed the system of marking the defective cars to alert the railroad to make the necessary brake repairs (Tr. 163-169). He also stated that he has had to jump off a car because he could not stop it and indicated that when cars with defective brakes are found they are loaded anyway (Tr. 171), but he explained that they are usually positioned behind cars with good brakes (Tr. 174), and more than one car dropper is used to control the cars in these cases (Tr. 178). Mr. McCoy also stated that a car with defective brakes which is usually placed behind one with good brakes can usually be controlled by the car dropper, and that is the usual manner to "build trips." However, in this case the train had already pulled out and Mr. Bennett had no choice but to drop the cars down to a location where others could be positioned behind them (Tr. 182).

Contestant's Vice-President Hurley testified as to the procedures followed by the car droppers at the preparation plant, explained the logistical difficulties in removing empty cars which are returned by the railroad with defective brakes, and he believed that the practice of placing cars behind others with good brakes is a safe practice as long as the car dropper does not attempt to drop one loaded car by itself. In short, the current car dropping procedures are essentially the same as those which were in effect at the time of the accident, except that more emphasis is now placed on those procedures, and in particular the fact that single cars should not be dropped and insuring that only a minimum number of cars are placed behind those with good brakes (Tr. 186-195). He also indicated that contestant has limited facilities for making brake repairs, was unsure as to the contestant's right to make such repairs, and his testimony regarding the braking problems is reflected in pertinent part as follows (Tr. 199):

> I don't know of anything that has been done on either side on what you're asking now. We're getting down to do any repairs to their brakes other than the fact that we mark the cars so that they can tell the ones that have the bad brakes or no brakes and we're just not in any position to dictate to them to what they do. We have had bad brakes and no brakes for as long as I can remember and as for as long as I can remember most of all coal mining companies drop their cars through under their loading points and drop them out on the lower end. There are few exceptions. And there's always been a problem with brakes that you've always had to have some kind of system to keep the good brakes and bad brakes together to affect the safe dropping.

Tipple foreman David Ratliff testified that his duties include the supervision of car droppers and he was the shift foreman on the day of the accident in question. He described the general procedures used for the loading and dropping of the railroad cars and confirmed the fact that cars with defective brakes are controlled by placing them behind cars with good brakes (Tr. 228-231). He confirmed that he checked the brakes on the cars involved in the accident and that he knew the brakes on

one of the cars were bad before it was loaded because Mr. McCoy told him so (Tr. 234). When asked

to give his opinion as to what caused the cars to get away from Mr. Bennett, he stated that one car had bad brakes, one car had good brakes, and that "something did go wrong, the brakes failed. The brake would not hold the two cars" (Tr. 238-239).

MSHA's theory in support of the violation is that the car dropper had to jump from the cars because he obviously could not control them, and since he could not control them a violation of section 77.1607(v) occurred; and, the fact that no one knows why the car dropper could not control the cars is immaterial (Tr. 130). Further, during the hearing, MSHA's counsel points to the fact that the contestant knew that one of the cars had faulty brakes, yet still dropped it with another loaded car behind it, and the trip could not be controlled (Tr. 131).

Contestant's defense to the citation rests on its jurisdictional argument that the site of the accident was not on coal mine property and that it occurred at a site physically separate from the preparation plant and from the coal preparation function performed at the plant. This defense is rejected. The evidence establishes that the loaded cars involved in the accident had been dropped into place at the preparation plant where they were loaded with coal processed at that plant and were then being dropped into position by contestant's car droppers. While attempting to drop these cars, the car dropper lost control of the cars and he jumped from the cars to protect himself. The resulting run-away trip of loaded cars continued on their way until they came to rest after colliding with the trip of cars being transported from the coal mine property. In these circumstances, I conclude and find that the alleged violation occurred on coal mine property and that contestant was properly served with the citation. Further, on the basis of the evidence and testimony presented by MSHA in support of the citation, I conclude and find that the failure by the car dropper to maintain control of the trip of loaded coal cars constituted a violation of the cited mandatory safety standard and the citation is AFFIRMED.

While I have affirmed the citation in this case, I take note of the fact that abatement was achieved by mine management giving a safety talk to its employees with regard to the proper procedures to be followed during the car dropping process, and the posting of those procedures on the mine bulletin. However, it would appear from the testimony and evidence adduced in this case that contestant is apparently still permitting railroad cars with defective brakes to be loaded and dropped into place behind cars with good brakes and that MSHA still accepts this procedure and the inspector apparently accepted it when he terminated the citation (Tr. 85-86). Although the official accident report does not specifically conclude that the use of cars with defective brakes contributed to the accident which occurred, it seems to me that the testimony of those persons directly involved in the incident warrants a further examination of the continued use of such cars in the loading and dropping process. Requiring a car dropper to maintain control over loaded coal cars at all times while such cars are dropped down a grade is one thing, but

requiring him to do so with additional loaded cars with defective brakes coupled to the rear of the one on which he is riding defies logic. Again,

it occurs to me that some action should be taken against the railroad to insure that the defective brakes on their cars are repaired, or to insure the removal of such cars from service.

George A. Koutras
Administrative Law Judge