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SOL (MSHA) v. BELTON SAND
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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	Civil Penalty Proceeding Docket No. CENT 80-324-M A/O No. 41-02534-05003
v.	Mound Plant
BELTON SAND & GRAVEL COMPANY, INC., RESPONDENT	

DECISION

Appearances: Max A. Wernick, Esq., Millie Brooks, Legal Assistant, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner
Mr. Richard Prater, President, Belton Sand & Gravel Company, Inc., Temple, Texas, for Respondent

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act), (FN.1) to assess civil penalties against Belton Sand & Gravel Company, Inc. (hereinafter, Belton).

A hearing was held on November 26, 1980, in Dallas, Texas. Each of the parties called one witness and entered into the following stipulations on the record:

> We have reached an agreement as to the company's history of previous violations and we would indicate at this time that it is good. They have been inspected on an average of three times per year and they received one citation in 1978 and one citation in 1979, both of which were uncontested and immediately abated.
>
> We would also indicate that this is a small operator in that their total tonnage at the Mound Plant is between 10,000 and 12,000 tons per month and that their monthly man-hours average around 2,000 per month.
>
> With regard to the effect of these citations on the operator's ability to continue in business we would indicate, and it is stipulated, that Belton Sand & Gravel Company, Inc., do an annual dollar volume of business in the area of $800,000 and a million dollars a year. The effect of the proposed penalty would have no appreciable effect on the operator's ability to continue in business.

The decision rendered orally from the bench at the hearing is reduced to writing below as required by the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 30 C.F.R. 2700.65:

> Pursuant to stipulation by the parties, I find that the operator's history of previous violation is good. He has been inspected approximately three times per year and has had only one citation in 1978 and one citation in 1979. Both of these citations were immediately abated.
>
> As to the appropriateness of the penalty to the size of the operator I find that Belton Sand & Gravel Company, Inc., the Respondent, is a small operator, producing between 10,000 and 12,000 tons per month with an average of 2,000 man-hours per month.
>
> I also find, pursuant to the stipulation by the parties, that the penalty will not affect the operator's ability to continue in business.
>
> Order of Withdrawal No. 154781 was issued by MSHA inspector Stephen R. Kirk on March 19, 1980. The condition or practice noted on the order of withdrawal was: "The Euclid haul unit No. 1 did not have adequate brakes. At a slow speed on a flat, level surface, the unit made no attempt to stop when the brakes were applied." This order of withdrawal cited a violation of 30 C.F.R. 56.9-3.
>
> Order of Withdrawal No. 154782 was also issued by MSHA inspector Stephen R. Kirk on March 19, 1980. The condition

or practice noted on this order was: "The Euclid Haul unit No. 2 did not have adequate brakes. At a slow speed on a flat, level surface, the haul unit made no attempt to stop when the brakes were applied. This order also cited a violation of 30 C.F.R. 56.9-3.

30 C.F.R. 56.9-3 reads as follows: "Mandatory. Powered mobile equipment shall be provided with adequate brakes."

When Inspector Kirk arrived at the Mound Plant of the Belton Sand & Gravel Company, Inc., on March 3, 1980, he tested the brakes of the two Euclid haul units in service at the pit and found that they were inadequate and did not stop the units at a slow speed when the brakes were applied. The No. 1 haul unit has been identified as the bright green Euclid haul unit in service, and the No. 2 haul unit has been identified as the pale green or yellow-green Euclid haul unit in service. Since the brakes of the two units were inoperative, it is clear that a violation did occur on each unit, and Respondent has acknowledged that there was a violation.

As to the gravity of the violations in each instance, the testimony indicates that the only method of stopping the units would be to gear the engine down and slow it through the low gearing to a very slow speed, or to possibly stall the unit by dumping the load. While operating in the sand near the pit, the units operate at a very slow speed of approximately 1 or 1-1/2 miles per hour. When the units are operating out on the hard surface, they may operate at speeds from 10 to 15 miles per hour. Although there are means of slowing these vehicles other than by the use of brakes, I find that the stopping ability was critically impaired by the lack of adequate brakes on the two units.

The record establishes that it was possible that there would be pedestrians and other traffic in the area of the operation of the Euclid unit, as well as the operation of other units in the area. I find it is probable that a serious injury could result as a result of the inadequacy of brakes of these two Euclid haul units.

The record establishes that the operator's foreman had knowledge for some time prior to issuance of the orders of withdrawal on March 19, 1980, that the brakes of the two Euclid haul units were inadequate. The exact period of time that these brakes had been inadequate has not been definitely established, however, it is clear that the time was sufficiently long that something should have been done to correct the situation.

The brakes had been adjusted on occasion, as it was normal to do in the regular course of business at the pit. Nevertheless, when there came a time when the brakes would not stop the vehicles and adjustment would not remedy the situation, that was a time at which other attempts should have been made to undertake further repair work and remedy the inadequacies in the braking ability.

The company, after finding that the brakes were inadequate, did stop using the vehicles to go up the ramp and, instead, dumped the materials at the stockpile which was on level area. Nevertheless, the vehicles were allowed to continue to operate with inadequate brakes, which created a hazard. The fact that it was a costly and time-consuming operation to pull the wheels and overhaul the brakes is no excuse for failure to operate the vehicles with adequate brakes. I therefore find the operator negligent in operating the Euclid haul unit No. 1 and the Euclid haul unit No. 2 with inadequate brakes.

As to the good faith of the operator, the order of withdrawal was issued on March 19, 1980, by inspector Stephen R. Kirk and was abated on March 26, 1980, by inspector Stephen R. Kirk. In terminating the order, Inspector Kirk noted that: "The brakes on the No. 1 Euclid haul unit were rebuilt and working." Mr. Kirk has testified that the operator exhibited good faith in accomplishing these repairs in this time.

Order of Withdrawal No. 154782, which was also issued on March 19, 1980, was terminated by inspector Harold R. Yount on March 31, 1980. In terminating the order, Inspector Yount noted: "New brakes and cylinders were installed on the No. 2 Euclid haul unit."

Mr. Prater has testified that these repairs were accomplished as expeditiously as possible and that the operator was fortunate in being able to obtain these parts in time to accomplish the repairs as soon as he did.

I find that as to both citations, Citation No. 154781 and No. 154782, the operator demonstrated good faith in achieving rapid compliance after notification of the violations.

In consideration of the statutory criteria and the findings already made, I find that the appropriate penalty for each of these citations is $200. The sum of $200 is assessed for the violation noted in Order of Withdrawal No. 154781, and a penalty of $200 is assessed for Order of Withdrawal No. 154782.

Respondent is ordered to pay Petitioner the sum of $400 within 30 days of the date of this decision.

ORDER

The decision and order announced orally from the bench at the hearing on November 26, 1980, is AFFIRMED. It is ORDERED that Respondent pay Petitioner the sum of $400 within 30 days of this decision if it has not already done so. (FN.2)

Forrest E. Stewart
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Sections 110(i) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

~FOOTNOTE_TWO

2 Section 110(j) of the Act provides:

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order."