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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
v.	Docket No. CENT 79-403-M A/O No. 41-01643-50005
LONE STAR STEEL COMPANY, RESPONDENT	Beneficiation Mine

DECISION

Appearances: Richard Collier, Esq., U.S. Department of Labor, Dallas, Texas, for Petitioner;
Donald W. Dowd, Esq., Lone Star Steel Company, Lone Star, Texas, for Respondent

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, the Act). The hearing in this matter was held on May 7, 1980, in Dallas, Texas. A posthearing brief was filed by Respondent on June 30, 1980. Proposed finding of facts and conclusions of law inconsistent with this decision are rejected.

Inspector Michael Sanders issued Citation No. 153483 on June 7, 1979, pursuant to section 104(a) of the Act. He cited a violation of 30 C.F.R. 55.9-2 and described the pertinent condition or practice as follows: "The hoist brake on the Marian 183 dragline would not "hold" the bucket suspended in the air with a normal load of material while loading trucks. The operator had to make a complete cycle of drag, hoist and dump without stopping."

Section 55.9-2 reads as follows: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

This citation was issued in the course of an inspection conducted by Inspector Sanders at Respondent's Lone Star Pits and Plant on June 6 and 7, 1979. This mine is an open-pit, surface strip operation.

The specific piece of equipment involved was a Marian 183 dragline. This dragline was used primarily to excavate ore and load it into haulage

trucks. The dragline boom was estimated by the inspector to be 65 feet in length. Its bucket had a capacity of 10 yards. Estimates of the weight of a fully loaded bucket ranged from 15 to 25 tons.

In June of 1979, Respondent hauled ore both with its own trucks and with those of contractors. When empty, each of Respondent's trucks weighed 70 tons. The cab on each of Respondent's trucks was protected from above by a canopy. This canopy was designed to withstand heavy impact and was constructed of the same material as the truck bed - that is, "M-1 steel" with a tensile strength of 100,000 pounds per square inch. The canopies also provided roll-over protection up to two times the weight of the truck. Elliot Dressner, Respondent's assistant superintendent in charge of mining, and John Irwin, Respondent's manager of safety at the times pertinent herein, testified that they believed these canopies could withstand the impact of a falling, fully loaded bucket. Operators of Respondent's trucks were permitted to remain in their cabs while ore was being loaded into their trucks. Because the trucks owned by contractors were not equipped with canopies or other such overhead protection, operators of those trucks were required to stand away from their vehicles during loading.

The dragline was in operation loading ore into a haulage truck when observed by the inspector. He estimated that the dragline mined and loaded 25 to 30 truckloads of ore per day.

The loading sequence was as follows: The bucket was lowered to the ground, dragged along the ground to collect material, hoisted, swung over the bed of the haulage truck and released. The truck was positioned so that the bucket swung over the back corner of the bed. Normally, the bucket was released over the center of the truck bed. The operators of the dragline were instructed not to allow the bucket to be suspended over a haulage truck's cab.

During his examination of the dragline, the inspector asked the dragline operator to hoist the bucket and hold it in midair. The operator responded that the hoist brake would not hold the bucket. The inspector then had the operator of the dragline test the hoist brake four times - once with a fully loaded bucket, once with a bucket halfway loaded, once with a small amount and, finally, once with an empty bucket. On each occasion, the hoist brake failed to hold and the bucket fell to the ground.

The hoist brake was a manually activated external or check brake. When such a brake is applied, it contacts and "squeezes" the hoist drum. The diameter of the drum was 70 inches. Its width was approximately 11-3/4 inches. At the time the citation was issued, the brake lining was approximately 2 inches off center of the drum. The inspector believed that the brake failure might have been due to this slight misalignment. The testimony of Respondent's witnesses established that the misalignment was not the cause of the brake failure, but rather that it had been caused by a faulty brake adjustment. The brake had been adjusted

too tightly, resulting initially in constant drag and
overheating. Operation of the brake in this condition

caused the formation of a glaze. Even if the hoist brake is properly adjusted, the presence of such glaze will cause the brake to slip. To abate the condition, vinegar was applied to cut the glaze and the brake was readjusted.

A foreman was assigned to supervise the operation of the dragline. Although his main job was to stay with the dragline and he was on the machine several times a day, he was not constantly at the dragline or at the dragline site. His duties entailed "trips back to the shop" and "other chores involving a water truck on the haul road and things like that." He remained in radio communication at all times.

Roland Adams, Respondent's relief foreman during the pertinent times, had operated the dragline on occasion during the two days immediately prior to June 7, 1979. The brake was functioning properly at these times.

Safety procedures in effect at the time required that the operator of the dragline "check brake adjustment before attempting to load", recognizing that improperly adjusted brakes presented a "potential" accident or hazard. John Irwin testified that the operator's running of the dragline without the brake was in contravention of a job safety rule. Elliot Dressner testified that the improper adjustment had not been reported to mine management and that the failure to do so was contrary to the training and instruction given a dragline operator.

The inspector testified that he observed two conditions during this inspection which could have contributed to the hazard presented by the inoperative hoist brake. A drag bucket has a series of chains of large size hooked up in harness fashion. These chains are secured to the bucket with pins of approximately 1-1/2 to 2 inches in diameter. One of these pins was worn three-fourths of the way through; the second was worn halfway through. He also testified that he observed a separation of 1 inch in one of the links of these chains.

Violation of 30 C.F.R. 55.9-2

The record clearly establishes that the violation of 30 C.F.R. 55.9-2 occurred as alleged. The hoist brake on the Marian 183 dragline was defective on June 7, 1979, when observed by Inspector Sanders. A glaze had formed on the brake lining, and, as a result, the brake could not hold the bucket suspended in midair or halt the bucket's downward descent. This brake failure constituted an equipment defect within the meaning of the mandatory standard.

Respondent's argument that the equipment was not defective but only improperly adjusted is rejected. The record establishes that the brake had been adjusted too tightly. As a consequence, the brake overheated and caused a glaze to form on the lining. The glaze was the immediate cause of the failure of the brake to hold and constitutes a defect within the meaning of the standard. Respondent's identification of the cause of the defect in no way

changes the fact that such defect existed.

Respondent also argued that the failure of the inspector, and hence of the Petitioner, to correctly identify the cause of the brake defect amounted to a failure to prove that an equipment defect affecting safety existed. This argument is also rejected. Again, it was conclusively established on the record that the hoist brake would not function properly and, thus, that it was defective. The inspector's erroneous conclusion as to the cause of the defect does not undermine the correctness of his conclusion that the brake was defective. The absence of an operative hoist brake affected safety. Respondent recognized that "improperly adjusted brakes" presented a hazard. Certainly, a completely inoperative brake would present an even greater hazard.

The procedures in effect and equipment used minimized the risk of injury if an accident were to occur in the course of normal operations. Typically, the bucket was swung over the rear corners of the truck bed, not the cab. Drivers of contractors' trucks were required to step away from the vehicle during loading. Drivers of Respondent's trucks were permitted to remain in the cab of their vehicles because of the protection afforded by a canopy which extended over the cab. While these procedures and protective canopies lessened the probability that the defective hoist brake would lead to injury in the course of normal operations, they did not eliminate the hazard. Although it may not have been absolutely necessary to use the brake during the normal loading sequence, there was still the possibility of situations in which the use of the brake would become necessary. For instance, employee or contractor inadvertence or the existence of a related mechanical defect might make necessary an immediate interruption of normal loading operations, including suspension of the bucket. The mitigating factors reflect on the gravity of the equipment defect. The gravity of the violation, the degree to which safety was actually affected, is specifically at issue in the determination of the appropriate civil penalty.

Respondent advanced two additional invalid arguments in support of its contention that the citation should be vacated. In the first of these arguments, Respondent contended that Petitioner must prove a compliance with 30 C.F.R. 55.9-1 before it could prove the occurrence of a violation of 30 C.F.R. 55.9-2. Section 55.9-1 reads as follows:

> Mandatory. Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed in operation. Equipment defects affecting safety shall be reported to and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

Respondent submitted "that management is under no duty to correct an equipment defect under 55.9-2 unless it has been made known to

management under 55.9-1." Respondent also asserted that the
citation should be dismissed because it was

the result of isolated misconduct on the part of an employee. This argument, which Respondent styled the "isolated employee misconduct defense," was comprised of three elements:

(1) An isolated, brief violation of a standard by an employee;

(2) Misconduct was unknown to the employer;

(3) Misconduct was contrary to both employer instructions and to a company work rule that had been uniformly enforced.

The gist of Respondent's assertions is that it should not be held liable for the violation of 55.9-2 because it was without fault.

Section 110(a) of the Act reads, in pertinent part, that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of the Act, shall be assessed a civil penalty * * *." The language of section 110(a) is clear. The imposition of liability upon Respondent for a violation need not be premised on the fault of Respondent or its knowledge, constructive or actual, of the condition or practice constituting such violation.

Respondent asserted that 30 C.F.R. 55.9-2 failed to pass constitutional muster on two closely related grounds. First, the standard was "violative of the Fifth Amendment of the United States Constitution because it is so facially vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." Secondly, it was asserted that the regulation suffered from "vagueness as applied." That is, the standard "in its application to Respondent under the circumstances of this case was violative of the Fifth Amendment to the United States Constitution because a reasonably prudent man familiar with the circumstances of the industry would not know that the cited standard was designed to guard against the condition cited." These arguments are without merit.

Section 55.9-2 was intended to eliminate a wide range of hazards and was drafted with as much exactitude as possible. Though general in its wording and scope, it prohibits only conditions or practices which are unacceptable in light of common understanding and experience of those working in the industry. It is set out in terms with which the ordinary person in the industry exercising common sense was able to understand and comply.

Respondent's argument that the mandatory standard suffered from "vagueness as applied" is also without merit. An inoperative hoist brake is defective equipment within the meaning of the regulation. Certainly, a reasonable man in the mining industry would have corrected the hoist brake before using the dragline. Moreover, Respondent recognized the necessity of

maintaining the brake in working order. Under company work rules, it was the dragline operator's responsibility to inspect the brake prior to use. As Respondent noted in its posthearing brief, "specific safety rules of the company promulgated under the overall safety program of the company" required that the

dragline operator report the condition to management and discontinue use of the hoist. Respondent specifically listed improperly adjusted brakes as a potential hazard in its job safety procedure. Respondent clearly recognized that the condition was an equipment defect affecting safety.

Statutory Criteria

Section 110(i) of the Act requires that the following criteria be considered in the assessment of a civil penalty:

> [t]he 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.

The parties offered stipulations regarding each of these criteria except for Respondent's negligence and the gravity of the violation.

Negligence

It was not established that Respondent knew or should have known of the condition. Roland Adams, Respondent's relief foreman, had operated the dragline on the 2 days prior to the issuance of the citation and found that the brakes were in good working order. It is probable that Adams was on the dragline at the beginning of the shift during which the citation was issued. However, the point in time at which the brake became inoperative was not established. Moreover, it was not established that the lack of an operative hoist brake would have been observable by management during a normal loading sequence. The inference cannot be drawn that Adams, or any other member of mine management, knew or should have known of the condition. The operator of the dragline had actual knowledge that the brake was defective. However, it was not established that he was a member of mine management. His knowledge cannot be imputed to Respondent.

The record also showed that Respondent had a safety program, a part of which required that the dragline operator inspect the hoist brake and adjust it if necessary.

In view of the above, it is found that Respondent was not negligent in its failure to comply with the requirements of the standard.

Gravity

The absence of an operative hoist brake presented a serious safety hazard. It was probable that the need for use of the hoist brake would arise and that, because of the inability of the

brake to hold the bucket suspended, that an accident would occur.
It is evident that normal operations could continue

without the need to resort to use of the brake. Nevertheless, the possibility existed that the inadvertence of an employee or contractor or the existence of a related mechanical defect might make necessary the immediate interruption of normal operations, including suspension of the bucket. The possibility of human inadvertence cannot be considered to have been remote. Inspector Sanders estimated that the loading of haulage trucks took place from 25 to 30 times per day. Moreover, dragline operations were not supervised constantly. The foreman who supervised the dragline made several trips a day "back into the shop" and was responsible for "other chores involving a water truck on the haul road and things like that," remaining only in radio contact. An employee or contractor might easily contravene company safety rules, just as the operator of the dragline did in this instance, and place himself in jeopardy.

With regard to the possibility that a mechanical defect might give rise to a situation in which the use of the hoist brake would be necessary, the inspector actually observed defects in the chain which secured the bucket to the dragline. The inspector believed that it could reasonably be expected that the chain or pin would break completely because of these defects and, if such a break occurred, use of the hoist brake would very likely be necessary.

Respondent's evidence, at best, would support a finding that the risk of serious injury was low if an accident were to occur in the course of normal operations as long as established procedures were being followed. Individuals would either be within a cab protected by a canopy or standing outside the immediate area. John Irwin and Elliot Dressner thought that the protective canopies could withstand the impact of a fully loaded bucket. Although this testimony was unrebutted, it does not rule out the possibility of a serious accident. Nevertheless, in view of the high tensile strength of the steel from which they were constructed, it is accepted for the purposes of this decision that the canopies could withstand the impact of a fully loaded bucket. The canopies would, therefore, provide the operators of Respondent's vehicles with a measure of protection in the course of normal operations.

A further measure of protection was provided by the standard operating procedure. The bucket was hoisted over the backend of the haulage vehicles. If proper procedure were followed, the bucket would at no time be suspended over the cab of a vehicle.

However, just as an instance of employee or contractor inadvertence or mechanical defect might cause an accident, these occurrences could give rise to a situation in which an individual subjected himself to the risk of serious injury or fatality. As noted above, the possibility of human inadvertence was not remote and mechanical defects were observed in the bucket and chains by the inspector. It is found, therefore, that it was probable that an accident and injury would occur.

If injury were to occur, in view of the weight of the

bucket, such injury would be expected to be serious or fatal.

STIPULATIONS

At the hearing, the parties stipulated the following:

> Jurisdiction exists and Respondent is engaged in business affecting interstate commerce. Respondent has no history of violations under the particular standard cited. The size of Respondent for the year 1978 for the entire company was 284,804 man-hours. For the mine involved, the size was 141,104 man-hours. This makes Respondent a medium-size employer. The assessment of a penalty herein will not affect Respondent's ability to continue in business.

These stipulations were accepted at the hearing by the Administrative Law Judge and are incorporated as part of the Findings of Fact herein.

ASSESSMENT

In consideration of the findings of fact and conclusions of law rendered above, it is found that an assessment of $100 is appropriate for the violation of section 55.9-2 under the criteria contained within section 110 of the Act.

ORDER

It is ORDERED that Respondent pay the sum of $100 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge