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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. DENV 79-389-PM A.C. No. 05-00354-05003
v.	Climax Mine
CLIMAX MOLYBDENUM COMPANY, RESPONDENT	

DECISION

Appearances: James Cato, Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Kansas City, Missouri, for Petitioner
Rosemary Collier and Chalres W. Newcom, Esqs., Climax Molybdenum Company, Golden, Colorado, for Respondent

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on September 9, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered an opinion on the record. (FN.1) My bench decision containing findings, conclusions and rationale appear below as it appears in the record, aside from minor corrections.

> This proceeding arises upon the filing of a petition for an assessment of civil penalty by the Secretary of Labor against the Respondent seeking a civil penalty for the violations alleged in Citation No. 331748 issued July 28, 1978, and alleging a violation of 30 C.F.R. 57.9-3. The authority for this proceeding is vested by section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a).
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> Originally, there were four violations involved in this docket, two of which were amicably settled by the parties

previously, and one of which (No. 331729) was vacated upon motionof counsel for Petitioner and the Secretary of Labor at the commencement of the hearing. One citation remains. The citation in question, No. 331748, was issued by inspector James L. Atwood, a duly authorized representative of Petitioner, who described the allegedly violative condition or practice as follows: "The 28 motor pulling the muck train in 614 X cut did not have an adequate braking system; four of the five braking cars used were inoperative. When the operator set the air brakes, the brakes failed to close."

30 C.F.R. 57.9-3 is a mandatory safety standard set forth under the general "loading, hauling, and dumping" standard relating to surface and underground mines. It provides that "powered mobile equipment should be provided with adequate brakes." The general issue to be decided, and indeed the sole factual issue, is whether or not the braking system on the muck train in question was adequate.

I find initially that the safety standard in question is not so vague or ambiguous as to be unenforceable. In the abstract, it appears that it is possible to clearly establish by probative evidence whether or not a braking system is adequate or not even though the standard does not provide for specific minimum stopping distances for various types of equipment or trains. It would stipulate, however, that the regulation is not a model to be emulated in terms of detail or clarity and that it does invite further elucidation. On the other hand, not all standards are subject to perfect description, and whether or not brakes are sufficient or not is properly one for a subjective evaluation based upon the evidence submitted to the finder of fact.

The citation was issued during the first regular inspection of the Climax Mine of Respondent under the 1977 Act. Inspector Atwood observed at the 614 crosscut a muck train consisting of 21 cars which was being pulled by engine No. 28. The citation was issued at 9:20 a.m. (on July 28, 1978), and set forth a termination date of August 2, 1978, at 1600 hours. Thus, an abatement time in excess of 5 days was established. Inspector Atwood examined the train again on August 3, 1978, at which time he extended the compliance time to 1:45 p.m. on August 3, 1978. On August 4, 1978, the inspector terminated the citation noting that new brake shoes were installed and the brakes were holding on the three braker cars on the No. 28 motor train.

During his inspection on July 28, Inspector Atwood visually observed the brakes on the locomotive (sometimes referred to as the "motor") and the five braker cars. He asked the motorman to set the brakes

while he went under each car and checked

the brakes. He noted that on four of the braker cars, the brakes did not function on some, and that on some of the brakes the linkage had been bent where the shoes had not contacted the wheel. Thus, there was one good braker car, in the sense that it had an operable braking system on all four of its wheels, out of the five total braker cars which were placed immediately behind the motor on the 21-car train. The inspector indicated that, as to the four cars which were inadequate, at least two wheels of the four on each car had brakes which did not function properly. He indicated that one of the braker cars, and possibly two, did not have operable brakes on all four wheels. The inspector took hold of some of the brake shoes and shook them indicating the degree of looseness. He expressed the opinion that the brakes were not capable of stopping the muck train because there was not sufficient tension on the brake band or linkage.

The inspector also testified that routinely during the course of the daily operation of the muck trains the brakes would have been checked. One of those occasions is when the operator picks up the train; another occasion is when the train is reloaded. And other evidence in the record, I note, indicates that the trains are checked frequently--one of the points being at a derailing point near the crusher.

The inspector indicated with respect to the seriousness of the violation that the train would have traveled downgrade to the crusher from the point where he observed it approximately 1 mile from the crusher; that the downgrade ran approximately a quarter of a mile to the crusher; and that the train, had it been unable to properly stop, could have derailed or struck persons walking along the track or maintenance personnel repairing the rails. His opinion was that such an accident could result in a fatality. He also indicated that there are personnel who work in the drifts and that there is traffic on the rails.

There are two production levels in the Climax Mine, the storke and the 600 level. When the alleged violation was observed by the inspector, the train was on the 600 level and, according to the inspector, "appeared to be empty." The inspector indicated that the downgrade which commenced approximately a quarter of a mile before the crusher was a 6-percent downgrade. This was an estimate by the inspector who first testified that he did not know the percent of the downgrade.

The record indicates that the braking system on the train consisted of the following: On the motor were air brakes backed up by a "dead man," which automatically sets the brakes should the locomotive operator faint or otherwise become incapable of operating the air brakes. In addition, on the

motor is a dynamic brake system which operates off the electrical system and which can be used to slow up the train. The use of braker cars had been in effect at the Climax Mine for approximately 15 years. The purpose of braker cars is to assist in the stopping of the trains.

Various interpretations with respect to the purpose of the braker cars was provided by the Government inspector, who testified on behalf of the Petitioner, and by the three witnesses presented by Respondent. Based upon all of their testimony, I find that the braker cars, at least in theory, have the following purposes: (1) to help the actual stopping or slowing down of the trains of which they are a part; (2) to help decrease the wear on the brakes of the motor behind which they are placed in the train; and (3) to provide an additional braking system should the braking system on the motor braker become inoperable. I would footnote that the third of Respondent's witnesses, Mine Master Mechanic Harry Anderson, indicated that the main reason the use of braker cars is being continued is to minimize wear on the locomotive itself. He also indicated that had the Respondent's safety manual been updated the use of braking cars might have been changed or discontinued. This latter testimony, which I find to be gratuitous, is rejected, the hard fact being that for 15 years the use of braker cars has continued. Considering the requirement for them in the Respondent's safety manual, and considering the (obvious) purposes of the braker cars, I conclude that they do constitute a braking contribution on any individual train which must be considered within the totality of the braking power to determine whether or not there is an adequate braking system.

Respondent presented convincing evidence that the greatest grade on the 600 level was one of 0.45 percent. That is less than one-half of 1 percent and to be contrasted with the 6-percent grade estimated by Inspector Atwood. A 1-percent grade would indicate a 1-foot gradient every 100 feet. I infer that that is not a particularly steep grade. The inspector defined what adequate brakes should be as "enough to do the job," which in the context of the facts of this case would be enough to stop a loaded muck train on a downgrade in the 600 level of the mine. I note that it was at this point in his testimony that he indicated that he did not know the percent of the downgrade and that it was later on that he ventured the 6-percent estimate. The inspector indicated, in explanation as to why he gave the Respondent 5 days to abate the alleged violation, that he was aware that the company knew of the bad brakes and was aware that it would have to operate (the train) at a slower speed. The inspector also

said that a motorman would not use the dynamic system of braking in the locomotive alone to stop a train because it would take too long. He also pointed out that if the brake shoes did not work properly on the air brake system the same deficiency would apply to the deadman system. The inspector estimated the maximum speed which a loaded muck train might travel to be 15 miles per hour. Respondent's evidence indicated that the maximum speed would be 4 to 5 miles per hour. Inspector Edward Machesky, a rebuttal witness for the Petitioner, estimated the maximum speed would be 8 to 10 miles per hour. Inspector Atwood, as I previously noted, believed the train to be empty when he observed it and indicated that it would take 2 or 3 times as much distance to stop a loaded train as an empty train. Based upon the evidence submitted by Respondent, which I accept in the following particulars, I find that the inspector's opinion that the brakes were inadequate was based in part upon the following erroneous assumptions:

(1) That the downgrade in proximity to the crusher was 6 percent. The Respondent's evidence in this respect I find to be the more persuasive and I find that the maximum grade in the 600 production area was .45 of 1 percent.

(2) The inspector also mistakenly believed the train was empty at the time he observed it, which I gather the Petitioner has accepted as erroneous. In any event, I find on the evidence of record that the train was fully loaded at the time.

The inspector's opinion can also be subject to a final criticism in the sense that if he considered the alleged violation to be of a high degree of gravity, why would a 5-day abatement have been granted? On the other hand, he did partially explain the granting of such a period based upon his understanding that the Respondent would, presumably, automatically slow down the speed of the trains. However, he also testified that he obtained no promise or commitment from any of Respondent's personnel to take certain remedial action immediately. There was no assurance that the train would not proceed fully loaded down the incline to the crusher. Although it is impossible to be certain from the evidence of record, the probability is that the train, after it was observed by the inspector, would have proceeded to the crusher - which Respondent's witnesses indicated was approximately a mile and a quarter from the place of observation by the inspector.

There is testimony in the record with respect to the effect that fully operational braking systems on the braker cars would have on the distance it would take to stop the

train. One estimate by Respondent's witness was that it would stop the train under certain circumstances in some 30 feet less distance than if the braking system was to be done only by the locomotive itself. One of Respondent's witnesses, its general mine foreman in July 1978 who is now retired, Lee Walker, did indicate what I construe to be an admission that not all the brakes were working at the time the citation was issued. He testified that the brakes in the braker car directly behind the locomotive were working properly but that the brakes in the next car were not working, and that the brakes in the remaining cars (that is the Nos. 3, 4 and 5 cars) were only partially working. He went on to indicate--which I find to be somewhat in contradiction to his earlier testimony--that once the train got underway the brake shoes would fit tight against the wheels. That is, while the train is static or not moving the brake shoes may be loose, but once the train becomes dynamic or moving this would have the effect of causing the brake shoes to set more closely against the wheels. This same explanation was advanced in more technical detail by Mr. Anderson, Respondent's mine master mechanic. However, I felt that Mr. Walker's testimony was revealing in the sense that his testimony changed from the initial statement that the brakes on various of the braker cars were not working to the explanation that the shoes would get tight once the train began moving. I should state that I thought that the latter position was not one of explanation but more one of induced change as he was testifying. This finding and analysis on my part is somewhat critical to my final determination. The reason it is critical is that the hard evidence and the persuasive evidence and the evidence upon which this dispute must be ultimately resolved rests upon the opinions of the various persons who have testified here today. There have been considerable inconsistencies and contradictions in the record as well as lengthy testamentary discourse which in the long run led nowhere. The opinions of various individuals when weighed and analyzed become the determinant of whether or not the powered mobile equipment in question was provided with adequate brakes at the time the inspector issued the citation. I therefore conclude that despite the three errors, which I enumerated, in the inspector's testimony his opinion should be credited. It is somewhat bolstered, and I think actually very significantly bolstered, by the testimony of Mr. Walker when the same is finally analyzed. This acceptance of the inspector's opinion in turn is founded upon a finding that four of the five braker cars had, to some extent, faulty braking systems. I infer from the facts that if such braker cars are on a muck train to begin with and have been used there for many, many years without the Respondent's taking them off, they certainly must have some purpose. The obvious purpose of any braking system

is, in any context, to stop movement of a vehicle. This is the primary safety factor on any moving vehicle. Since I find that one of those cars had an entirely inoperable braking system and that the remaining three were possessed of brakes which on at least two wheels were not operable, I conclude that the train was not provided with adequate brakes. In this context, I note that safety standards are not designed to cover ideal situations. There must be overkill so that when accidents do happen and when other systems do fail there is a backup or an alternative to the occurrence of a hazard which the standard is designed to avoid. I have no doubt that at least on a level run the train in question could be stopped by the locomotive or motor-braking system. On the other hand, the evidence of record clearly establishes that the braking systems of the braker cars would shorten the distance in which that train could be stopped should the need arise. And the braker cars also provide, I find, a possible alternative braking source should the braking system on the motor fail as the result of any cause other than an impairment of its air system which also seats the braking systems on the braker cars.

I thus conclude that a violation of 30 C.F.R. 57.9-3 was committed as described by the inspector in the citation.

The statutory penalty assessment factors which must be considered have to a great extent been resolved by stipulations and agreement of the counsel for the parties. I find that this is a large mine operation on the basis that it has a total of 3,000 employees, some 1,600 to 1,700 of which work underground, and that such was the case in 1978. I also find that the Respondent produces some 48,000 tons of molybdenum ore every day, 30,000 tons of which are produced at the underground mine. The Respondent, at the time of the commission of the violation, had a history of 107 violations, two of which involved the same safety standard as that involved here today. I find that the Respondent proceeded in good faith to achieve rapid compliance with the safety standard after being advised of the violation by the inspector. I find that the Respondent has the economic ability to pay any penalty which I might assess in this case without jeopardizing its ability to continue in business. * * *

There remains to be considered the factors of negligence and gravity. I am unable to find any evidence of gross negligence on the part of Respondent or any specific act of negligence or failure to discharge any specific responsibility that it has under the Act or otherwise which can be attributed to it by any action or nonfeasance of its supervisory personnel. There was no Government rule in effect at the time of the violation, as I understand it, which required certain checks of those practices.

The question arises whether or not ordinary negligence should be inferred from the commission of a safety violation by an employer. There is considerable state law to the effect that ordinary negligence can be and should be inferred from the mere commission of a safety violation. I believe that in this case the finding of ordinary negligence would be academic as I do not believe the penalty should be increased or otherwise changed one way or the other on the basis of negligence. There is just an absence of criteria in the record which would govern or guide any judgment along that line. So I make a finding in this case of no negligence.

With respect to the seriousness of the violation, I previously set forth the inspector's testimony in that respect. There is no question but that a train accident, because of the multi-ton weight and the impetus and movement of the same, is fraught with the possible occurrence of serious bodily injury to anyone involved in a derailment or to anyone being hit by a runaway train. On the other hand, the inspector's view of the seriousness of the violation is dramatically tempered by his failure to issue an imminent danger order. I therefore find that this was only a moderately serious violation under all the circumstances.

Summing up then, the factors of size of the operator would call for an increase in the size of any penalty. On the other hand, the moderate history of violations which the Government concedes is not extraordinary for an operator of this size, is in mitigation of such an increase. Additionally, the good faith abatement of the violation by the operator and the fact that the operator was not negligent in this case militate for a lowering of the penalty. * * * Weighing those factors, a penalty of $100 is assessed. (FN.2) I would note that had I found negligence and had I found a higher degree of seriousness, a penalty in the $3,000 range would have been entertained.

ORDER

The Respondent, for Citation No. 331748, is ORDERED to pay a penalty of $100 to the Secretary of Labor within 30 days from the issuance of this decision.

Citation No. 331729 is VACATED.

Michael A. Lasher, Jr. Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 Tr. 217-231.

~FOOTNOTE_TWO
2 Petitioner's initial proposed assessment was $66.00.