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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. KENT 80-166 Assessment Control No. 15-11787-03003 H
v.	
KENTUCKY MAY COAL COMPANY, RESPONDENT	Kentucky May Preparation Plant

DECISION

Appearances: George Drumming, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Michael Buchart, Coeburn, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued September 26, 1980, a hearing in the above-entitled proceeding was held on December 10, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 88-99):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-166 on March 24, 1980, by the Secretary of Labor, seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. 77.1605(b) by Kentucky May Coal Company. The issues in a civil penalty proceeding are whether a violation occurred and, if so, what penalty should be assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
>
> I shall make some findings of fact on which my decision will be based, and these facts will be set forth in enumerated paragraphs.

1. The parties entered into some stipulations under which it was agreed that Kentucky May Coal Company is subject to the provisions of the 1977 Act and that the judge has jurisdiction to hear and decide this proceeding.

2. It was also stipulated that Kentucky May Coal Company is a small operator which processes approximately 200,000 tons of coal annually at its preparation plant, and which employs six persons besides the president of the company who testified in this proceeding.

3. There was no stipulation made with respect to the criterion of whether payment of penalties would cause Kentucky May to discontinue in business. In the absence of any testimony or evidence to the contrary, I find that the payment of penalties would not cause respondent to discontinue in business (Buffalo Coal Company, 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 164 (1974)).

4. As to the criterion of history of previous violations, it was stipulated that Kentucky May Coal Company had only two previous violations in the 24-month period preceding the writing of the order involved in this proceeding. Neither of those violations was of the section which is alleged to have been violated here today, namely, section 77.1605(b).

5. Inspector John W. Dishner went to the Kentucky May Preparation Plant on August 30, 1979, for the purpose of providing some materials for the operator's information because the preparation plant had only been operating a short time and certain materials were required.

While the inspector was on the premises, he observed a driver standing by a coal truck which was being loaded by a 275-B Michigan end loader. The inspector noticed that the operator of the coal truck was not wearing a hardhat and he issued a citation with respect to that. The truck driver was not an employee of Kentucky May Coal Company, nor did the truck belong to Kentucky May Coal Company, nor was the truck driver or the company for which he worked under contract to haul coal for Kentucky May Coal Company.

6. The inspector also noticed that the end loader had a noise coming from it which he believed was associated with the end loader's braking system. He therefore decided to issue a citation with respect to the brakes on the end loader, and went into the office of Kentucky May Coal Company where he talked to a person named Donna Blanton who was the safety director at that time. She indicated to the inspector

that she could not stop the end loader from operating until the brakes were repaired. The inspector believed that the end loader should not continue to be operated. Therefore, he went back to the area where the end loader was operating and had the truck removed from the area and made a test of the end loader's brakes.

According to the inspector's testimony in this proceeding, he found that the brakes were defective because, under his measurement, the end loader traveled 10 feet after the brakes were applied and it was his judgment that the end loader should have stopped within a distance of about 6 feet, and therefore, he felt that an imminent danger existed and he issued Order No. 746773 under section 107(a) of the 1977 Act.

7. The inspector served the withdrawal order on Donna Blanton and she in turn notified the company that the end loader could not be operated. Thereafter, a company by the name of Rudd was asked to repair the equipment. To the best of the recollection of the president of the company, who testified in this proceeding, the Rudd Company was unable to send a repairman until the following Monday, which would have been September 3.

When the repairs were made, it is the president's recollection that only the compressor on the end loader had to be repaired in order to make the brakes operable. The inspector thinks that the brake linings also were replaced. Regardless of whether the inspector's recollection is correct or whether the president's recollection is correct, the end loader was in a safe and operable condition when the inspector checked it on September 4, at which time he terminated the order of withdrawal.

8. After the repairs had been completed, the inspector had a test made of the brakes similar to the test which had been made before the withdrawal order was issued. At that time, the inspector found that the end loader would stop within a distance of approximately 6 feet, as compared with the 10 feet which he found prior to the repairs.

While the inspector believed that the screeching noise, heard before the repairs were made, was associated with the brake itself, the president of the company said that it might have been associated with the compressor, which did need to be repaired or replaced. Regardless of where the noise may have come from in the first instance, it did not exist after the repairs were made. Therefore, it may be concluded that the noise was associated with the failure of

the brakes to work on August 30, 1979, when the order was issued.

The president of the company testified that approximately 12 to 15 trucks were loaded at the preparation plant on a daily basis back in August of 1979. He said that some of the truck drivers did get out of their trucks to supervise the placement of the bucket loads of coal in their trucks. But he said that there was no reason for the two employees in the tipple, or preparation plant itself, to be on the ground in the vicinity of the operation of the end loader. Therefore, the primary persons who were exposed to any hazards as a result of the brakes not working properly on the end loader would be the truck drivers who got out of their trucks to supervise the loading of their trucks.

10. The president of the company indicated that the Michigan 275-B loader cited in the inspector's order as having defective brakes was an end loader that had been obtained from another company or leasing agency, and was not owned by Kentucky May Coal Company. The end loader, the 275-B Michigan end loader, was replaced shortly after it was restored to proper operating condition with another end loader which the president of the company thought was more appropriate for the type of operation that was conducted at the preparation plant.

11. Section 77.1605(b) provides that mobile equipment shall be equipped with adequate brakes and all trucks and front-end loaders shall also be equipped with parking brakes.

I think that those findings are sufficient for stating the primary facts that have to be considered in this proceeding.

The first matter that has to be considered is whether a violation occurred. The testimony of the company's president primarily opposes the issuance of the order in this instance on the basis that the inspector's test was not made under proper scientific controlled conditions that should be required when determining whether brakes are free from defects. I recognize that the inspector did not have the facilities or the laboratory conditions required to make a precise determination as to what percentage of deficiency the brakes may have had on the Michigan 275-B loader on August 30, 1979.

Despite the lack of the inspector's ability to make a perfect scientific determination as to the brakes' ability to

stop the machine on August 30, I find that there was sufficient reason for him to doubt the brakes' efficiency on that day to warrant the citing of section 77.1605(b), because I do not think that the facts support a finding that the brakes were entirely free of problems. The fact that the compressor was not working and that some repairs were required to get the brakes in good condition indicates that the inspector was within a reasonable conclusion, based on the facts that he had, to warrant his citing the piece of equipment for a violation for having inadequate brakes on that day.

Another reason for my believing that the brakes were defective is the lack of controverting evidence by any eyewitness. The president of the company was not at the site at the time the brakes were considered defective. Additionally, the operator of the Michigan end loader was a man named Arthur Back and he did not appear here today to testify that the brakes were free of all defects. The president does not recall any specific dissent by Mr. Back concerning the alleged defectiveness of the brakes on August 30. So the inspector's testimony is the only eyewitness testimony in this case that can be relied upon as to the exact condition of the brakes on August 30 when the order was written.

Having found that a violation occurred, it is now necessary to consider the remaining criteria which must be considered in assessing a penalty. My findings have already dealt with the fact that we have a small operator, that there is no history of a previous violation of section 77.1605(b), and that the assessment of a penalty will not cause the operator to discontinue in business.

The fourth criterion, which I have not considered, is whether the operator demonstrated a good faith effort to achieve compliance after the violation was cited. The company called a repair organization as soon as the Michigan end loader was cited for a violation in the inspector's order, and the brakes were repaired as soon as that company could provide a serviceman for the purpose. Therefore, I find that the company demonstrated a good faith effort to achieve compliance.

The remaining two criteria to be considered are negligence and gravity. With respect to negligence, it is difficult to find negligence more than ordinary in nature because we do not have any testimony as to how long the brakes had been defective and we do not know what period of time may have elapsed after the brakes became less than adequate before the inspector cited them. Consequently, the evidence will support a finding of only ordinary negligence.

As to the gravity of the violation, there was, in the vicinity of the loading machine, only those people who were associated with the direct loading of the coal. In other words, the end loader operator himself would not have been endangered much by the failure of the brakes to work perfectly because he was inside the machine and it was on a relatively level area, unless the operator deliberately allowed the machine to coast up on an incline near the loading area, and that would not have caused the machine to travel any great distance before it would have rolled back down on a relatively level area. So the primary people who would have been exposed to danger would have been the truck drivers. Since they got out of their trucks primarily for the purpose of directing the operation of the end loader in the placement of coal, it is unlikely that they would have been hit by the end loader since they would probably have been looking at it at such times as they were standing on the ground.

Nevertheless, the fact remains that they could have been hit by the end loader and they might not have been aware that the brakes were defective because the drivers varied from truck to truck. That is, the president of the company indicated that from 12 to 15 trucks were loaded on a daily basis and there is no indication that the same 12 or 15 trucks with the same drivers were involved all of the time. So it would have been possible for someone to have been hit by an end loader and injured or even killed because he might have been assuming that the end loader could stop quickly, when in fact it could not. Consequently, I find that the violation was serious in nature.

When penalties are assessed with respect to small companies, a small penalty has a greater deterring effect for a small company than a large penalty might have for a large company. Based on the evidence that I have already discussed, showing that there is no history of a previous violation, that there was ordinary negligence, that payment of penalties would not cause the operator to discontinue in business, that the operator demonstated a good faith effort to achieve compliance, and that there was a serious violation, I shall assess a penalty of $200.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Kentucky May Coal Company shall pay a penalty of $200 for the viola

tion of section 77.1605(b) cited in Order No. 746773 dated August 30, 1979.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)