CCASE:
SOL (MSHA) v. T & W SAND
DDATE:
19810326
TTEXT:

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. WEST 80-110-M
v.	MSHA CASE NO. 05-02331-05002
T & W SAND AND GRAVEL COMPANY, RESPONDENT	Mine: Chatfield Pit

DECISION

APPEARANCES:

Robert J. Lesnick Esq.
Office of the Solicitor
United States Department of Labor
911 Walnut Street - Suite 2106
Kansas City, Missouri 64106,
For the Petitioner

Gerald M. Madsen Esq.
5601 South Broadway - Suite 200
Littleton, Colorado 80121,
For the Respondent

Before: Judge John A. Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. [hereinafter the "Act"], arose out of an inspection at respondent's mine near Chatfield, Colorado. After receiving a complaint about a loading machine, two representatives of petitioner inspected the machine on July 17, 1979, pursuant to 103(g) of the Act. Four citations were issued; only three were actually tried. (FN.1)

A hearing on the merits was held on December 9, 1980, in Denver, Colorado. Neither party submitted briefs, electing instead to rest on closing arguments.

1. Jurisdiction:

Before reaching the merits, the jurisdiction of this Commission under the Commerce Clause of the United States Constitution must be addressed. Respondent, by its answer, contends that its "products and operations do not enter and/or affect commerce", and that it is therefore not subject to the Act. At the hearing, respondent adduced testimony that none of its products leave Colorado; that no sales are made outside Colorado; that 99% of respondent's customers are located in South Denver; and that in most cases the products are picked up by customers rather than delivered (Tr. 71). There was testimony, however, that the machinery used at respondent's mine, including the machinery cited, was manufactured in Illinois (Tr. 13).

At the hearing, this Judge, without formally ruling on the question, suggested that, in his view, respondent's operation did affect interstate commerce (Tr. 91). The weight of judicial authority supports the position that virtually any effect on inter-state commerce is sufficient to bring a mining operation within the Commission's jurisdiction. Even where a mine operator sells all of its products intra-state, inter-state commerce is affected by the disruption of mining activities caused by unsafe or unhealthy working conditions. Marshall v. Bosack, 463 F.Supp. 800, 801 (E.D. Pa. 1978); Marshall v. Kilgore, 478 F. Supp. 4 (E. D. Tenn. 1979). Specifically, the purchase of equipment produced out of state provides a sufficient basis for a finding that the mining operation affects inter-state commerce. Secretary of the Interior, United States Department of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976). Respondent's argument contesting jurisdiction is therefore rejected.

2. Citation 566091 -- Fume Leaks

a. Violation

This citation alleges that respondent, by allowing a front end loader (FN.2) to be used while its fumes leaked into the cab, violated 30 C.F.R. 56.9-2. That standard provides:

> Mandatory. Equipment defects affecting safety shall be corrected before the machinery is used.

Respondent admits the existence of both an equipment defect and the hazards it created (FN.3) (Tr. 17, 22). It argues, however, that the machine was not used after the defect was discovered (Tr. 61). (FN.4)

The testimony concerning the issue of use was contradictory. All that is clear is that the loader had been taken out of service prior to the inspection on July 17, 1979 (Tr. 79). No evidence directly shows that the loader was used while in a defective condition; there is substantial evidence, however, which strongly suggests that the Hough loader was used before its defects were corrected. Respondent's foreman, Willie Stoops, testified that the Hough loader had not been used before an employee complained of the fumes; at the same time, however, Stoops stated that the employee refused to use the machine because the fumes gave him headaches (Tr. 83). Obviously, the employee would have had no basis for such a complaint if he had not operated the vehicle on a prior occasion. This inference is supported further by testimony of Inspector Marti that the complainant had been asked by Stoops to use the 90-E loader, and refused, claiming it gave him headaches (Tr. 23).

Further, there is evidence that Mr. Stoops told Inspector Marti during a post-inspection conference that the Hough 90-E loader had been used as a back-up for the Cat 966 loader; that when the Cat machine needed repair, Stoops had asked people (other than the complainant) to use the Hough loader (Tr. 85). This testimony is consistent with Mr. Marti's earlier statements that the Hough loader was easily accessible, could be started with just an ignition key, and had not been tagged out of service (Tr. 25-26).

The preponderance of the evidence does indicate that a defect affecting the safety of the Hough loader remained uncorrected while the loader was in use. Citation 566091 is therefore affirmed.

b. Penalty:

The parties stipulated that respondent is a relatively small operator, has an average prior history of violations, and demonstrated good faith in abating the violations promptly (Tr. 4, 5). (FN.5)

The evidence shows that the fume leads created a moderate hazard. Inspector Marti testified that the fumes could cause the driver to become dizzy and operate the loader unsafely. As a practical matter, however,the operator would probably be able to stop the machine and step down from the cab if he felt dizzy. The fumes did increase the risk of an engine fire. The potential employee exposure to a fire hazard was moderate. The loader operator himself, of course, would be exposed to a risk of fire; possibly a truck driver would also have been exposed (Tr. 17, 18). If a fire were to break out, the probability of injury to the operator would be significant. The evidence also suggests some negligence since respondent's foreman acknowledged that the loader was in need of repair (Tr. 17, 22). Considering all these factors together, I find that the proposed penalty amount of $180.00 is appropriate.

3. Citation 333026 -- Back-up Alarm:

This citation charges that respondent violated 30 C.F.R. 56.9-87 because the Hough loader used at its mine lacked a back-up alarm. (FN.6) That standard provides:

> Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The undisputed evidence indicates that the Hough loader did not have a back-up alarm, that the operator had an obstructed view to the rear, and that observers were not used when the machine was backed up (Tr. 31).

Respondent argues that the loader was not "heavy equipment" and thus was not subject to the standard. Respondent's evidence, however, shows only that the loader was small compared to other machines of its type. In determining the hazard presented by the absence of a back-up alarm on this machine, the relative size of the machine is unimportant. The loader was estimated to weigh between fifteen and twenty tons and thus presented a significant safety hazard when moving in reverse without an alarm (Tr. 32).

Although few employees were potentially exposed to the hazard, the gravity of the hazard was severe (Tr. 33). Accordingly, the proposed penalty of $180.00 should be affirmed.

4. Citation 333027 -- Fire Extinguisher:

This citation charges respondent with a violation of 30 C.F.R. 56.4-23, which provides:

> Firefighting equipment which is provided on the mine property shall be strategically located, readily accessible, plainly marked, properly maintained, and inspected periodically. Records shall be kept of such inspections.

The citation was issued because there was no fire extinguisher on the Hough loader; since an engine fire could have broken out, an extinguisher, to be "strategically located", must have been placed on the vehicle according to the inspector (Tr. 52).

The fact that the Hough loader lacked a fire extinguisher is undisputed. Respondent argues, however, that the standard at 56.4-23 applies to mine premises generally, and does not impose a specific requirement that vehicles be equipped with fire extinguishers.

In view of a recently promulgated mandatory standard, which does specifically require vehicles to be equipped with fire extinguishers, respondent's interpretation of 56.4-23 is, in my opinion, correct. On August 17, 1979, the advisory standard at 30 C.F.R. 56.4-39 was revised, renumbered and made mandatory as follows:

> 56.4-27 Mandatory. Whenever self-propelled mobile equipment is used, such equipment shall be provided with a suitable fire extinguisher readily accessible to the equipment operator.

That the standard specifically addresses mobile equipment and was made mandatory indicates that it was intended to fill a gap left by the standard at 56.4-23. Both the language and history of 56.4-27 support respondent's interpretation of 56. 4-23. The citation is therefore vacated.

CONCLUSIONS OF LAW

The following conclusions of law are based upon findings of fact discussed in the body of the decision.

1. Respondent's mining activities affect commerce and are therefore subject to regulation under the Act.

2. Respondent violated 30 C.F.R. 56.9-2 as alleged in citation 566091, and the proposed penalty of $180.00 is appropriate.

3. Respondent violated 30 C.F.R. 56.9-87 as alleged by petitioner's proposal for penalty, which incorporated citation 333026 by reference and which was amended pursuant to Federal Rule of Civil Procedure 15(b). The penalty proposed by petitioner, $180.00, is appropriate.

4. Respondent did not violate 30 C.F.R. 56.4-23 as charged in citation 333027.

ORDER

Pursuant to the foregoing, it is ORDERED that the penalty proposals made in connection with citations 566091 and 333026 are affirmed, and that the penalty proposals made in connection with citations 333027 and 333028 are vacated. It is further ORDERED that respondent pay the sum of $360.00 within 30 days of this order.

John A. Carlson
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 During the hearing, petitioner moved to withdraw one of the citations, number 333028. The citation alleged that the absence of lights on the loading machine constituted a violation of 30 C.F.R. 56.17-1. That standard requires:

"illumination sufficient to provide safe working conditions ... in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

To support his motion, petitioner indicated that there was no evidence that the vehicle was used under conditions requiring lights. The motion was unopposed by respondent and subsequently granted by this Judge (Tr. 36).

~FOOTNOTE_TWO

2 Respondent maintained two front end loaders on its mine premises: a Hough 90-E loader (manufactured by International Harvester) and a Caterpillar 966 loader. The citations in this case concern the Hough loader.

~FOOTNOTE_THREE

3 The testimony of Mr. Lyle Marti, one of the inspectors, indicates that the "defects" were leakage of diesel fuel (from the left-bank injector cylinder onto the manifold) and exhaust (caused by cracks in the first elbow of the left exhaust manifold).

~FOOTNOTE_FOUR

4 Respondent's argument confuses the issue by implying that the standard requires only that machines, known by the operator to be defective, not be used. Indeed counsel asserted in closing argument that T & W could not have done more than correct the defect once it was brought to its attention. The real issue under 30 C.F.R. 56-9-2 is whether the machine was in fact defective while being used; the evidence has been evaluated with reference to this issue.

~FOOTNOTE_FIVE

5 These factors were taken into account in determining an appropriate penalty in connection with citation 333026, where violation was also established.

~FOOTNOTE_SIX

6 The citation itself actually alleged a violation of 30 C.F.R. 56.9-5, which concerns operator conduct rather than the condition of a vehicle. Petitioner's proposal for penalty, however, incorporates a computerized penalty assessment sheet which indicates an alleged violation of 30 C.F.R. 56.9-87. The pleading does not expressly modify the citation.

The issue raised by respondent's counsel is whether the computerized assessment sheet, incorporated by the proposal for penalty, operates as a proper modification of the original citation. Section 104(h) of the Act implicitly gives the Secretary power to modify a citation. However, neither the Act nor Commission rules set out procedures for modification. The interim procedural rule at 29 C.F.R. 2700.22 (published March 10, 1978) only requires that a modified citation or order be challenged within 15 days of receipt.

The reference to 30 C.F.R. 56.9-87 on the computerized sheet is not accurately described as an amendment to a pleading since it accompanies the initial pleading. Federal Rule of Civil Procedure 15(a) is therefore inapposite; however, 15(b) would allow this Judge, on his own motion, to amend the pleadings to conform to the facts pleaded in petitioner's proposal and proved at the hearing. The facts alleged in the citation in essence charge a violation of 30 C.F.R. 56.9-87; the computerized assessment sheet provided additional notice of that charge; respondent's pleadings and proof at hearing reflect no prejudice resulting from the discrepancy. The proposal for penalty is therefore amended to charge a violation of 30 C.F.R. 56.9-87.