

CCASE:
SOL (MSHA) v. YELLOW SUPPLY
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Federal Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. LAKE 79-284-M A/O No. 47-02550-05003
v. YELLOW RIVER SUPPLY CORPORATION, RESPONDENT	Bohn Pit and Frederic Plant Docket No. LAKE 79-285-M A/O No. 47-00906-05002
OSTERMANN SAND AND GRAVEL, INC RESPONDENT	Wittenbreer Pit Docket No. LAKE 79-301-M A/O No. 47-02537-05002
	Spooner Pit & Plant

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Robert G. Schlegel, for Respondents.

Before: Judge Cook

I. Procedural Background

On October 19 and 25, 1979, the Mine Safety and Health Administration (Petitioner) filed proposals for assessment of civil penalties against Yellow River Supply Corporation (Respondent) in the above-captioned proceedings. The proposals were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (Supp. III 1979) (1977 Mine Act), and allege violations of four provisions of the Code of Federal Regulations. Answers were filed by Respondent. As a result of motions filed by Petitioner the captions of the cases were amended to include Ostermann Sand and Gravel, Inc. as a Respondent. On December 1, 1980, in a prehearing report Yellow River Supply Corporation and Ostermann Sand and Gravel, Inc. appeared by Roger G. Schlegel, Controller.

Notices of hearing were issued on January 8, 1981, and February 25, 1981. The hearing was held on March 12, 1981, in Eau Claire, Wisconsin. Representatives of both parties were present and participated.

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II. Violations Charged

Docket No. LAKE 79-284-M

Citation No.	Date	CFR Standard
291943	06/14/79	56.12-25

Docket No. LAKE 79-295-M

291945	06/15/79	56.12-25
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Docket No. LAKE 79-301-M

291946	07/11/79	56.12/25
291947	07/11/79	56.12-25

III. Proceedings at Hearing

Evidence was presented during the hearing by both parties up to a point where, as a result of a conference off the record, the Petitioner presented a motion to vacate the four citations involved. The following statements appear in the record of proceedings on this point:

THE COURT: All right. Then, we'll proceed back on the record. I might mention that we have had a conference off the record between representatives of both parties to discuss some of the detailed matters in the proof that is required as it relates to the violation we've now been discussing; and as a result of this conference, I believe, Mr. Carmona--and further as a result of his conferring with his own inspector--has reached some conclusion as to what his next step is going to be in this case; so would you like to explain that now, Mr. Carmona?

MR. CARMONA: At this point, we would like to express our position in the case indicating that we are willing to withdraw--vacate the citation, the four citations involved in this case because we feel we don't have sufficient evidence to show that the operator didn't comply with the standard that required grounding. We find that there is no detail with reference to the definition of grounding to determine at what point when the equipment is tested can be determined whether it's grounded, or not. Based upon this fact, we discussed with the operator the problem that we're facing with the possibility if we vacate the four citations, that it is very important that his mine be kept in a safe condition; so that the operator is willing to continue his program making every possible effort to keep electrical equipment and check the equipment tested is adequate to ensure that there is no

danger for the men working in that place. I plan to request from the Mine Safety and Health Administration a revision of this particular standard to provide sufficient information to the operator as to the proper way to enforce this particular standard, providing more details about what type of reading is supposed to be obtained when the equipment is tested, or any other way that they can have some guidelines to follow and determine what they have to do to be in compliance.

THE COURT: Very well. Now, Mr. Schlegel, you've heard the statement of Mr. Carmona. He apparently is making a motion now to vacate the four citations, and he is actually moving to vacate his petition in this case and for the dismissal of the case; but, of course, you've heard his statement as to procedures that should be carried out between MSHA and your companies to try to resolve this question. Now would you like to make some statement about that?

MR. SCHLEGEL: Yes, I would. I would like to make the statement that both Yellow River Supply Corporation and Ostermann Sand and Gravel, Incorporated will fully and completely cooperate with Mine Safety and Health Administration in providing a safe place to work in all of our facilities. This has been our policy in the past, and it will continue to be in the future.

THE COURT: All right. So Mr. Carmona, you will have your Inspector then contact Mr. Schlegel's people to work out what you have described earlier as far as what really has to be shown in order that grounding is proper, is that correct?

MR. CARMONA: That is correct.

THE COURT: And that is agreeable, Mr. Schlegel?

MR. SCHLEGEL: Yes, it is.

THE COURT: All right. Then under those circumstances, I'll grant your motion, Mr. Carmona; and then we'll enter an order after the transcript has been received providing for the vacation of the four citations and for the dismissal of the proceeding under the circumstances as stated here today. * * *

(Tr. 78-80).

ORDER

Accordingly, IT IS ORDERED that Citation Nos. 291943, June 14, 1979, 30 C.F.R. 56.12-25; No. 291945, June 15, 1979, 30 C.F.R. 56.12-25;

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No. 291946, July 11, 1979, 30 C.F.R. 56.12-25; and No. 291947,
July 11, 1979, 30 C.F.R. 56.12-25 be, and hereby are, VACATED
and that the proposals for penalty herein be, and hereby are,
DISMISSED.

John F. Cook
Administrative Law Judge