FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE. SUITE 400
DENVER. COLORADO 80204

AUG 4 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 80-348-M A/O No. 04-04191-05003 H DOCKET NO. WEST 80-349-M A/O No. 04-04191-05004 W
TEHAMA COUNTY EXCAVATING, Respondent.	MINE: Lattin Pit 6 Mill

DECISION

Appearances:

Marshall P. Salzman, Esq., Office of the Solicitor, United States Department of Labor, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102 ,
For the Petitioner,

Fred Lindauer, Pro Se
P.O. Box 615, Red Bluff, California 96080
For the Respondent

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceedings were brought pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) [hereinafter referred to as "the Act"].

Pursuant to notice, a hearing on the merits was held in Redding, California on November 25, 1980. Willie Davis, federal mine inspector, testified on behalf of the petitioner. Fred Lindauer, President of the respondent company, represented the company and appeared as a witness. Roy Cone also testified on behalf of the respondent.

II. FINDINGS OF FACT

I find that the evidence establishes the following facts:

1. Respondent's operation involves removal of aggregate from stream beds. The aggregate is then transported to a screening plant. At the screening plant the aggregate is separated according to size. (Tr. 9).

2. The Caterpillar 966 front end loader, which is the subject of both the withdrawal order and the citation involved herein, is approximately 22 feet long, 10 feet high, 8 feet wide and weighs 20 tons. (Tr.10).

3. On August 28, 1979, Willie Davis, federal mine inspector, asked the operator of the 966 Caterpillar to test the brakes. The brakes would not stop the machine. In order to stop the heavy piece of equipment, the operator had to use the gear lever. For example, if the equipment was moving forward he would shift into reverse and vice versa. (Tr.11).

4. Davis informed the operator that he was going to issue a 107(a) withdrawal order and the operator would have to cease working. At that time the operator got in a car and left the area. (Tr. 12).

5. Approximately ten minutes later Mr. Lindauer appeared. Although he had been notified that the screening plant had been shut down, he proceeded to load two trucks using the 966 Caterpillar. (Tr. 13 and 25).

6. Not until after he had finished loading the trucks did he inquire of Mr. Davis as to why a withdrawal order had been issued. (Tr.13). Mr. Lindauer then stated that he had no intention of shutting down his operation. (Tr.15).

7. Lindauer did tell the operator to check the fluid levels on the brakes and radioed for Roy Cone, a heavy equipment mechanic, to work on the brakes. (Tr. 16 and 30).

8. When Cone arrived at the screening plant, the brakes on the loader were inoperable. (Tr . 33). He repaired an oil leak and also a cracked line or cylinder in the brakes. (Tr.30).

9. On August 30, 1980, Davis returned to the site and again asked the operator to test the brakes. The brakes were still inadequate and would not stop the equipment. (Tr.18). The operator told Davis that mechanics had been out twice to work on the brakes, but had not been able to fix them. (Tr.18).

10. When Davis returned on September 11, 1980, and the brakes were still not fixed he issued a citation for violating the withdrawal order. (Tr. 19). A week later he returned to inform Mr. Lindauer that they were in the process of seeking a temporary injunction, in the United States District Court, to enjoin him from operating the 966 Caterpillar. (Tr. 20).

III. DISCUSSION

Respondent contends that Tehama's operation is not within the coverage of the Act. (Tr.7). Neither side offered any evidence on this point. However, the Act defines its coverage as being,

> Each coal or other mine, the products of which enter Commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act. Sec. 4.

It has long been established that sand and gravel operations are covered by the Act. In the case of Marshall v. Wallach Concrete Products, Inc., et al., the U.S. District Court held that sand and gravel operations are "mines" within the meaning of Section 3(h)(1) of the Act, and accordingly are within the coverage of the Act. 1 BNA MSHC 2337 (1980).

It has also been established that even though the products of a mining operation are not sold outside of the state where they are mined they are competing with interstate products. Therefore, there is what has been termed a "ripple effect" and it has been established that the products do affect commerce. Marshall v. Bosack 1 BNA MSHC 1671 (1978) See Also Wickard v. Filburn, 317 U.S. 111 *(1942)*.

Also, Respondent had been issued citations prior to the ones involved in these cases and there is no evidence that jurisdiction was ever challenged.

In light of the above, I conclude that respondent is covered by the Act and that I have jurisdiction over these proceedings.

The 107(a) imminent danger order was issued on August 28, 1979.[1/] There is no evidence in the record to the effect that the brakes were working. Mr. Lindauer testified that as soon as he was notified of the problem he called for a mechanic. (Tr.25). Roy Cone, the mechanic, testified that the brakes were inoperable when he arrived. (Tr. 33).

1/ 381640 was modified on the same day, August 28, 1979, because the inspector had incorrectly designated the type of action as being taken under section 104(a) and the standard being violated as 56.9-2. The type of action was modified to read; 107(a)-104(a) and the part and section was changed to 56.9-3.

The loader was being operated on a public road. There were low banks approximately three feet high and there were trucks and people walking in the same area. (Tr. 11 and 12). Since the operator did not have complete control of the loader, I conclude that the operation of the loader presented an imminent danger not only to the operator, but to others in the vicinity. Therefore, the withdrawal order is affirmed.-

Citation no. 381641 was issued on September 11, 1979 after Davis requested that the operator test the brakes, and again found that they were inadequate to stop the loader. The citation alleges that the respondent was operating the loader in violation of the withdrawal order.

Respondent failed to offer any testimony that would point to the brakes being in good condition on the day the citation was issued. Mr. Lindauer testified that he just assumed the brakes had been repaired after the withdrawal order had been issued. (Tr.26). Roy Cone stated that he worked on the brakes subsequent to August 28, 1979, but could not remember the exact date or what work had been performed. (Tr.33).

Based on the uncontradicted testimony of the inspector, I find that the citation should be affirmed.

Penalty Assessment

I find that the respondent is a small operator within the meaning of the Act. The company operates six months of the year and has only three employees. (Tr.7). Prior to the violations involved herein, respondent had been issued only four citations. (Tr.20). Based on this fact, I conclude that respondent had a small history of violations. There being nothing contrary in the record, it is assumed that the penalties imposed will not affect respondent's ability to continue in business. The negligence of the respondent in both instances was great. There was no explanation offered; nor is there one that I can think of that would justify the operation of a heavy piece of equipment without adequate brakes. This is especially so considering that it was being operated on a public road.

Based on the foregoing, I hereby impose a penalty of $500.00 for withdrawal order no. 381640. In considering an appropriate fine for Citation no. 381641, I would point out that the respondent failed to act in good faith. Not only did the company not abate the condition upon which the withdrawal order was based, but it continued to operate the machine. It was not until action was initiated in the United States District Court that respondent corrected the defective brakes. Based on respondent's continued neglect of the matter, I find that $1,000.00 is an appropriate penalty.

ORDER

Respondent is Ordered to pay the assessed penalties of $1,500.00 within forty-days of this decision.

Virgil E. Vail
Administrative Law Judge

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