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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. LAKE 81-27-M A.C. No. 20-00418-05010F
v.	Empire Mine
CLEVELAND CLIFFS IRON COMPANY, RESPONDENT UNITED STEELWORKERS OF AMERICA, INTERVENOR	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for the Petitioner.
Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill &
Greenlee, P.C., Ishpeming, Michigan, for the Respondent
Ernest Ronn, Marquette, Michigan, for the Intervenor

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." The Secretary proposes a penalty for an alleged violation of the mandatory safety standard at 30 C.F.R. 55.9-54, charging that the Cleveland Cliffs Iron Company (Cleveland Cliffs) failed to provide an adequate berm to prevent the overtravel and overturning of a haulage truck at the Empire Mine's south waste-rock dump. The general issues in this case are, of course, whether Cleveland Cliffs violated the cited standard and, if so, the appropriate civil penalty to be assessed for the violation. Hearings in this case were held in Marquette, Michigan, commencing June 30, 1981.

I. The Alleged Violation

The citation at bar specifically alleges as follows:

> The berm provided at the dumping location (south waste rock dump) site 25.5, was not adequate to prevent overtravel

> of truck No. 3415. Berm heights measured on the day of the accident using a Stanley 6-foot tape measure were 18 to 40 inches. Mid-axel [sic] height of a similar model truck was measured with a 12-foot Lufkin steel tape, 48 inches. The berm shall be improved after removal of the truck at the toe of the dump slope and before resuming dumping operations.

The cited standard, 30 C.F.R. 55.9-54, provides as follows: "Mandatory. Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

The essential facts are not in dispute. On January 22, 1980, the deceased, Michael Bianchi, had been assigned as a temporary driver on an 85-ton WABCO haulage truck at the Empire open pit iron mine. Bianchi was killed when he jumped to escape from his truck as it flipped over and slid to the bottom of a 200-foot slope at the Empire Mine south waste dump. According to the undisputed evidence, the incident occurred at around 10:10 that morning as Bianchi was backing a truckload of waste rock in preparation for dumping at the slope. In spite of efforts by a nearby bulldozer operator to signal Bianchi to stop, the truck rode up onto the berm adjacent to the slope. The berm gave way and the truck flipped over and slid to the bottom of the slope. The berm adjacent to where the truck passed through was variously estimated to have been from about 12 to 30 inches high on the right (facing the slope) and from 34 to 42 inches on the left. It was constructed of boulders up to 2 and 1/2 feet in diameter, sand and crushed stone.

Since Cleveland Cliffs concedes that the berm provided at the south waste-rock dumping location at its Empire Mine was indeed not adequate to have prevented the overtravel and overturning of the subject haulage truck (and since no bumper blocks, safety hooks, or other similar means were here utilized to prevent overtravel and overturning), it is apparent that the violation is proven as charged.

By way of attempted defense, Cleveland Cliffs presents a variety of specious arguments. It first suggests that the standard does not apply to vehicles under power. In other words, the berm need only be sufficient to prevent the overtravel and overturning of parked or coasting vehicles. There is absolutely no basis for reading such an exclusion into the plain language of the standard and it is accordingly rejected. The operator next contends that the phrase "to prevent overtravel and overturning," as used in the cited standard, should be deemed essentially superfluous since the real purpose of berms and other restraining devices is not to prevent overtravel or overturning per se but only to warn drivers of the need to apply their brakes. It is a cardinal rule of construction, however, that a statute or regulation should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous. Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). Within the framework of this rule, I find that I must give

operative effect to the phrase "to prevent overtravel and overturning" as used in the cited standard. Respondent's argument is accordingly rejected.

Cleveland Cliffs next argues that even assuming the cited berm was deficient under the standard, it was nevertheless in "substantial compliance" with MSHA's "guidelines." MSHA's enforcement guidelines for the standard at bar, which were apparently furnished to the operator sometime before the citation herein, read as follows:

> APPLICATION: Use axle height as a guideline if the truck is able to dump. A somewhat lower berm or block will be acceptable if it is needed to clear tail lights, etc.

The operator argues that it was in substantial compliance with these guidelines, and that MSHA should accordingly be estopped from enforcing the more stringent language of the standard itself. However, following Supreme Court precedent, the Commission held in Secretary v. King Knob Coal Company, Inc., 3 FMSHRC (1981), that the doctrine of "equitable estoppel," such as the operator is attempting to invoke herein, cannot be applied against the Federal Government, i.e., MSHA. The Commission further noted in that decision that MSHA's guidelines do not have any binding effect.

In any event, I do not find on the facts of this case that Cleveland Cliffs complied in any way with even MSHA's less stringent "guideline" that the berm need only be axle height. On the same morning as the fatal accident, MSHA supervisory engineer William Carlson measured the height of the berm adjacent to where the subject truck had passed through. He estimated it to be 18 inches high on the right side (facing the slope) at a horizontal distance of 8 inches from the tire tracks and 40 inches high at a corresponding position to the left of the tire tracks. Carlson opined that his measurements could even have been overestimated by as much as 6 inches. I find these conservative measurements to have been the most reliable since they were made in close time proximity to the accident, were made with a tape measure, and were made in the presence of Cleveland Cliffs officials who voiced no objection to the measurement procedures. I observe, moreover, that company safety coordinator, James Tonkin, estimated without taking any measurement that the berm to the right of the tire tracks was only 30 inches high and that mine superintendent Roger Solberg admitted that the berm on the left side was only 42 inches high. Within this framework of evidence, it is clear that, even assuming the axle height of the truck at issue was only 46 inches as represented by the operator, the subject berm was in any case not of sufficient height to meet even MSHA's more liberal "guideline." I note, moreover, that Tonkin testified that larger 120-ton trucks having an even greater axle height were also using the dump at issue, therefore also in clear violation of the "guidelines." The operator's third argument is for these additional reasons clearly unsupportable.

Respondent next argues that the use of a bulldozer operator signalling from inside his closed cab was equivalent to using a "spotter" to direct the trucks backing at the dump site and

constituted a means "similar" to berms, bumper blocks, and safety hooks within the meaning of the cited standard. Under the rule of ejusdem generis, however, general language in a regulation which follows a specific designation of a particular class of items is to be

given a meaning restricted by that specific designation and will include only things of the same kind, class, character, or nature to those specifically enumerated. Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), General Electric Company v. OSHRC, 583 F.2d 66 (2d. Cir. 1978). Applying this rule of construction, it is clear that a person designated as a "spotter" is not of the same nature or character as physical restraints such as berms, bumper blocks, and safety hooks and therefore does not come within the general language "or other similar means" as used in the cited standard. The operator's argument herein is accordingly rejected. Inasmuch as the use of the so-called spotter herein did not prevent the subject truck from overtraveling and overturning, it is clear that a violation of the cited standard would in any event have existed. Indeed, there was obvious confusion over the proper signal to be used to stop a backing truck. One witness thought the bulldozer operator signalled by raising his blade and backing up while another thought it was by shaking the head or waving the hand.

Finally, Cleveland Cliffs appears to argue that the cited standard is so vague that it denies constitutional due process of law. When the contention is analyzed, however, it is apparent that the challenged vagueness is directed not to the regulatory standard itself but only to the MSHA "guidelines" and to MSHA's enforcement practices. Inasmuch as I am not here called upon to determine whether an MSHA guideline or enforcement practice has been violated, the argument is, of course, without any relevance.

II. The Amount of Penalty

In determining the amount of civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) the effect on the operator's ability to continue in business, (4) whether the operator was negligent, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

The operator here is large in size but appears to have had only a moderate history of violations. However, in the year preceding this incident, the Empire Mine had been twice cited for insufficient berms. This factor is particularly significant in finding the operator negligent in this case for in spite of this past history, the bulldozer operator in charge of constructing berms at the south waste-rock dump on the day of this fatal accident had received no management instruction regarding the sufficiency of the berms. Indeed, the undisputed evidence shows that he had been relying on the advice of another employee that berms only 3 feet in height were sufficient--a height which did not even meet the criteria, allegedly relied upon by the operator, under MSHA's more liberal enforcement guidelines. Its negligence is further highlighted by the existence of the obvious hazard presented by the 200-foot drop-off at the south waste-rock

dump. Under the circumstances,

I find that Cleveland Cliffs was indeed negligent in failing to maintain an adequate berm. The high gravity of the violation is obvious in that it resulted in the tragic death of truck driver Michael Bianchi. Abatement was achieved in this case by the construction of an 84-inch berm. There is no dispute that the operator did demonstrate good faith in achieving rapid abatement. There is no evidence that the penalty here imposed would have any effect on the operator's ability to continue in business. Considering these factors, I find that a penalty of $8,000 is appropriate.

ORDER

The Cleveland Cliffs Iron Company is ORDERED to pay a penalty of $8,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge