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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. PENN 81-111  
A.O. No. 36-03425-03069

v.

Maple Creek No. 2

UNITED STATES STEEL CORPORATION,  
RESPONDENT

DECISION

Appearances: David T. Bush, Attorney, Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Pennsylvania,  
for the petitioner;  
Louise Q. Symons, Esquire, Pittsburgh, Pennsylvania,  
for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceeding and a hearing was held on September 24, 1981, in Pittsburgh, Pennsylvania, and the parties appeared and participated therein. The parties waived the filing of posthearing proposed findings and conclusions, but were afforded the opportunity to make arguments on the record and those have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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In determining the amount of a 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) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (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.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

4. 30 C.F.R. 75.1403 provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1 provides:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

#### Stipulations

The parties stipulated to the following:

1. The respondent owns and operates the subject coal mine.

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2. The inspector who issued the citations in this case was acting in his official capacity as a designated authorized representative of the Secretary of Labor.

3. Respondent is subject to the Act, and I have jurisdiction to hear and decide the case.

4. The citations which were issued in this case were properly served on an agent of the respondent, and copies of the citations issued may be admitted in evidence.

5. The penalty assessments in this case will not adversely affect the respondent's ability to remain in business.

6. Annual mine production at the subject mine for the year in question was 965,508 tons, and respondent's overall mine production for the same period of time was 15,849,000 tons.

7. The conditions cited in the citations were timely abated by the respondent in good faith.

8. A computer printout showing the previous history of violations for the subject mine was admitted without objection (Exh. G-3).

#### DISCUSSION

In this case, Safeguard Notice No. 1 CBC was issued on July 26, 1973, pursuant to section 75.1403, and it provides in pertinent part as follows (Exh. G-2):

The No. 18 haulage locomotive was being operated in the 5 Flat haulage track in 5 Flat 50 room section and was not equipped with a lifting jack and bar. All track locomotives operated in this mine shall be equipped with a suitable lifting jack and bar.

Section 104(a) Citation No. 845403, December 9, 1980, cites a violation of 30 C.F.R. 75.1403, and the condition or practice cited is described as follows:

The No. 8 locomotive being operated by Tim Jansante in the 8 flat room section I-D 011 was not provided with a suitable lifting jack. The No. 8, 13-ton locomotive is used to pull coal from this section. Foreman in charge Ron Franczky. Notice to provide safeguard 1 CBC 7/26/73.

Safeguard Notice No. 1 RCM was issued on April 26, 1974, pursuant to section 75.1403, and it provides in pertinent part as follows (Exh. G-5):

The sanding devices installed on no. 7 self-propelled mantrip car were in-operative and three (3) sanding devices

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were (empty) not provided with sand. All haulage equipment equipped with sanding devices shall be maintained operative, and provided with sand.

Section 104(a) Citation No. 845404, December 9, 1980, cites a violation of of 30 C.F.R. 75.1403, and the condition or practice cited is described as follows:

Two of the four sanding devices provided on the No. 8 18 ton locomotive being operated in the 8 Flat 5 rm. 011 were inoperative. This locomotive was being operated by Tim Jansante and is used to pull coal from this section. Foreman in charge Ron Franczky. Notice to provide safeguard 1 R.C.M. 4/26/74.

#### Petitioner's Testimony and Evidence

MSHA inspector Francis E. Wehr testified as to his background and experience and he confirmed that he inspected the mine in question on December 9, 1980. He also confirmed the fact that he issued a citation pursuant to section 75.1403, after finding that the No. 8 locomotive was not equipped with a suitable lifting jack, and that it was required to have such a jack in light of a previous safeguard notice issued at the mine. The previous safeguard was issued on July 23, 1973, and it required that all mine locomotives be provided with such jacks. The locomotive which he cited did not have such a jack when he observed it (Tr. 10-16).

Mr. Wehr testified that the purpose of the safety jack was to assist in placing a locomotive back on the track in the event of a derailment. When he inquired of the locomotive operator as to why the jack was missing, the operator replied that he did not know and he commenced looking for one. The operator eventually found a jack lying against the coal rib some 50 feet from where the locomotive was parked (Tr. 16-19).

Mr. Wehr confirmed that he also issued a second citation after finding that two of the four locomotive sanding devices were inoperative, and that this condition also constituted a violation of section 75.1403 because a previous safeguard notice had been issued requiring such devices to be maintained in proper working order. He determined that the sanding devices in question were inoperative by asking the locomotive operator to activate them, and when he did, two of the four would not disperse sand on the track. Mr. Wehr also indicated that he also activated the sanding device levers, but that no sand would disperse on the tracks. Abatement was achieved by making an adjustment to the levers, and upon testing the levers after the adjustment was made, sand was dispersed on the tracks and he terminated the citation (Tr. 19-26).

Mr. Wehr testified that when he spoke with Locomotive Operator Jansante and asked him whether he had a jack, Mr. Jansante indicated that he had no knowledge as to whether he did or not. Since Mr. Jansante had no knowledge

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as to whether he had a jack on the locomotive, Mr. Wehr believed it was reasonable to infer that he probably would have operated the locomotive without the jack (Tr. 48-49). A jack was subsequently found within 5 minutes or so, and it was located some 50 feet from the locomotive (Tr. 49). As for the sanding citation, he conceded that the sanders in question were filled with sand, and that he issued the citation because no sand was dispersed when the levers were initially activated (Tr. 50).

On cross-examination, Inspector Wehr testified that he first came upon the locomotive underground at approximately 10 a.m., and that he had first proceeded to the face area before returning to the area where the locomotive was parked. He could not recall passing the locomotive on his initial way to the face. The locomotive operator was in the area, but he could not recall going to the dinner hole to summon him, and he could not recall whether road work was going on or whether the track rails in front of the locomotive were jacked up. He also stated that he made no particular effort to determine whether the locomotive had been used the day of the inspection, but believed that it had been moved to facilitate coal loading. He did not ask the operator whether it had been moved, and he could recall no road work going on between the location of the locomotive and the coal-loading point. Although Mr. Wehr stated that he was aware that company policy required a locomotive operator to check the sanders and the presence of a jack before moving a locomotive, he did not ask the operator whether this had been done. He conceded that company policy dictated that this be done before a locomotive is moved (Tr. 26-29).

Mr. Wehr stated that at the time he viewed the locomotive, coal production had started at the face area, and he did not believe it unusual to find one or two people still in the dinner hole. In his view, if a jack is taken off a locomotive for the purpose of lifting track directly in front of the locomotive, or in close proximity thereto, then a violation would not occur. However, he indicated that he would have to investigate all of the circumstances to ascertain whether the jack was in fact removed from the locomotive for that purpose, or whether the locomotive had no jack in the first instance (Tr. 29-31). He confirmed that he made no investigation to determine whether the locomotive had been moved without a jack being on it, nor could he determine whether the locomotive would have been moved without a jack being placed on it. The jack which was ultimately placed on the locomotive to abate the citation was located in the area where the locomotive was parked and he did not believe that the person who found it knew precisely where to look for it (Tr. 30-33).

With regard to the inoperative sanders, Mr. Wehr stated that he initially activated the sanding levers in question, and while the levers traveled to their full position, no sand was deposited on the tracks below. He left the area after informing the locomotive operator that he was under a citation, and he was later called back and informed that an adjustment had been made to the levers and they were in fact operable (Tr.36-39).

Mr. Wehr stated that normal coal production begins at approximately 8 a.m. when the shift begins, but he made no notes as to when coal was actually loaded.

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He observed the locomotive at 10 a.m., and if in fact production and loading began at 8 a.m., that would have been sufficient time for the locomotive operator to have made his preshift locomotive inspection (Tr. 51). Mr. Wehr also indicated that there was nothing to indicate that Mr. Jansante was aware that the sanders in question were inoperative and he said nothing to indicate that this was the case (Tr. 51-52). Mr. Wehr stated that once the operator was told that a citation was being issued, no one knew where to look for the jack, and he had to point out the location where he observed the jack against the rib (Tr. 64).

Inspector Wehr referred to notes which he had made at the time the citations were issued, and he stated that his notes reflect that at 9:10 a.m., he was at the face area where he issued another citation for a roof-bolting violation. That citation was abated at 9:40 a.m., and at 10:20 a.m., he observed the locomotive and detected the defective sanders (Tr. 105-106). He stated that he issued the citations because coal production had started, people were on the section, cars were being loaded, and he assumed that the pre-operational equipment checks had been made. He believed that there were three or four mine cars present for loading coal, and that possibly two or three were loaded, but he was not sure (Tr. 110).

Although Mr. Wehr indicated that he made no notes as to whether coal production had started and that he personally observed no coal being loaded, he did recall one mine car being loaded (Tr. 53). He conceded that the locomotive which he cited was located outby the loading point, and that he saw no locomotive being moved (Tr. 53-54).

In response to bench questions, Mr. Wehr indicated that the locomotive in question did have a jack bar, and that the jack which was missing was retrieved within 5 minutes and placed back on the locomotive (Tr. 55). He also confirmed that each mine section has two lifting jacks present for use in jacking up shuttle cars, changing flat tires, etc. (Tr. 56). He believed that the jack which was found was not the same one which may have been on the locomotive because the one which was eventually placed on the locomotive was first observed by him lying against the rib. Since it had rock dust on it, he believed that it had been there for a while. He also indicated that he had seen the jack propped against the coal rib before he issued the citation and that is why he stopped to check the locomotive in the first place (Tr. 57-58).

#### Respondent's Testimony and Evidence

Timothy G. Jansante, currently employed by the Post Office Department, testified that he previously worked for the respondent as a locomotive motorman. He testified that on December 9, 1980, he was in the "dinner hole" having a snack before the start of his work shift when the inspector appeared at approximately 9 a.m., and inquired as to who would be operating the No. 8 locomotive. He acknowledged to the inspector that he was the operator and when the inspector asked whether he had a



jack, he replied that he did not know and he did so because he had not started his shift, nor had he hauled

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any coal with the locomotive. Mr. Jansante indicated that as far as he knew, the shift immediately prior to his was a down shift, and that the locomotive was used prior to the down shift to haul coal. He also indicated that prior to operating the locomotive his normal routine is to check for the jack, and inspect the sanders, brakes, and lights. If any defects are detected, he would take care of minor problems, and major problems are reported to the dispatcher (Tr. 77-81).

Mr. Jansante stated that since he had not checked the locomotive, he had no idea where the jack was located. As for the sanders, he indicated that although the lever worked most of the time, "once in a while" it would stick. On the day in question, after the inspector observed that it would not work, he (Jansante) climbed up into the locomotive and started kicking the lever, and he indicated that "that's how I got it free and the sanders started to work" (Tr. 81). He obtained a jack about a block or so from where the locomotive was parked and he did so after the section foreman advised him where it was located. The foreman also advised him that road work was going on during the previous shift and he (Jansante) believed the jack was used to facilitate the blocking of track. When asked whether any road work was going on during the shift, he replied "there was no road work going on," and that "they don't do any road work when they are loading coal" (Tr. 82-83).

Mr. Jansante stated that from his experience with previous locomotive derails, placing it back on the track with a jack was difficult, and he denied that he would have moved the locomotive had he discovered that the jack was missing or that the sanders were inoperative. He did not believe that the inspector was present when he finally got the sanders to operate, and he did not discuss the inoperative sanders with the inspector and "just did what he asked me to do" (Tr. 84). He also testified that coal was being loaded at the time, but that he had not hauled any with the locomotive (Tr. 85).

On cross-examination, Mr. Jansante confirmed that until the inspector pointed out to him that the jack was missing from its usual place on the locomotive, he was unaware that it was missing. He also confirmed that the locomotive could have been operated along the track from where it was parked, but that he was the only authorized operator assigned to operate it on the shift in question. He believed that the inspector advised the section foreman as to where the jack which was retrieved was located and that the section foreman in turn advised him where it could be found. As for the defective sander lever, he acknowledged that the same condition may have existed "a couple of times" during the previous 2 years. He also confirmed that once the lever was "forced" by kicking it, it operated properly. He stated that given the opportunity, he would have checked his locomotive before operating it, but that he had no opportunity to check it before the inspector got to it and issued the citations (Tr. 83-88). He also indicated that if the locomotive had been inspected on the prior shift and found to be defective, the condition would have been noted, but that was not the case as far

as he knew since no one informed him that the sanders were inoperative or that the jack was missing. He acknowledged that someone had to drive the

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locomotive to the ramp where it was parked when the inspector observed it (Tr. 89).

## Findings and Conclusions

### Fact of Violations

The citations issued in this case concern alleged violations of the safety standards dealing with transportation of men and materials promulgated pursuant to sections 101 and 314(b) of the Act. Section 314(b), which is codified at 30 C.F.R. 75.1403, authorizes an inspector to issue safeguard notices, which in his judgment will adequately minimize hazards connected with the transportation of men and materials in a particular mine. The regulatory criteria under which a mine inspector is required to be guided in issuing safeguard notices for a particular mine are those set forth at sections 75.1403-2 through 75.1403-11.

It seems clear that the purpose of issuing safeguard notices is to initially bring to the attention of a mine operator conditions or practices in the mine which require attention in order to minimize or eliminate hazards with respect to the transportation of men and materials in the mine. Safeguards are issued on a mine-by-mine basis, and once issued, they become mandatory for the particular mine in which they are issued. Pursuant to section 75.1403-1(b), once a safeguard notice is issued, the mine operator is required to provide the safeguard within the time fixed by the inspector. The operator is also required to thereafter maintain the safeguard, and if he does not, a citation may issue pursuant to section 104 of the Act.

In my view, the use of safeguard notices is a rather unusual practice. Absent any specific mandatory safety standard to guide a mine operator, the inspector has discretion under section 75.1403 to require a mine operator to comply with a safeguard which the inspector believes will minimize a perceived hazard connected with transportation of men and materials. In short, the inspector is authorized to issue safeguards which in effect become mandatory standards for the particular mine, and the operator has no opportunity to challenge the inspector's initial judgment or to provide any comments or suggestions regarding a particular safeguard. The only opportunity for an operator to challenge the inspector's judgment is during a hearing after a noncompliance citation is issued. In these circumstances, I believe that safeguard notices should be strictly construed, and the inspector must follow the criteria stated in section 75.1403-1. In this regard, I take note of prior decisions by Judge Michels in *MSHA v. Jim Walter Resources, Inc.*, BARB 78-652-P, 1 FMSHRC 1317 (September 4, 1979), vacating a citation after finding that an operator was not in violation of the specific terms of a previously issued safeguard notice, and Judge Broderick in *MESA v. Jones & Laughlin Steel Corporation*, PITT 77-31-P (March 24, 1979), where he vacated a citation issued for a violation of section 75.1403, after finding that the operator had not failed to comply with a previously issued safeguard notice requiring the operator to provide safe riding facilities

for persons riding on a locomotive. Additional reported cases  
dealing with

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violations of the safeguard notice provisions of section 75.1403 are as follows:

In MSHA v. Sewell Coal Company, WEVA 79-293, 1 FMSHRC 96 (January 24, 1980), Judge Bernstein affirmed a citation for a violation of section 75.1403-6(b)(3), after finding that a track-mounted, self-propelled personnel carrier had only two of its four sanding devices in operational working order. The facts reflected that at the time of the citation, the vehicle was about to carry seven men into the mine over some narrow and steep terrain.

In MSHA v. Clinchfield Coal Company, NORT 78-325-P, 1 FMSHRC 25 (January 14, 1980), Judge Steffey affirmed a citation for a violation of section 75.1403-10, after finding that the last mine car out of a trip of 17 cars being pulled out of the mine by a locomotive failed to have a light or reflector installed on it as required by section 75.1403-10(a).

In MSHA v. Eastern Associated Coal Corporation, MORG 75-393, IBMA 76-55, 1 FMSHRC 1473 (October 23, 1979), the Commission affirmed a violation of section 75.1403, concerning an inoperable parking brake on a track-mounted, self-propelled personnel carrier (a jitney).

In Consolidation Coal Company v. MSHA, WEVA 79-171-R, 1 FMSHRC 1638 (October 19, 1979), Judge Broderick vacated a withdrawal order after finding that the period of time fixed for abatement of a violation of section 75.1403 was unreasonable. However, he found that a safeguard notice issued pursuant to section 75.1403, requiring the operator to maintain haulage tracks in a safe workmanlike manner, taken in conjunction with the citation which was issued by the inspector, constituted a violation of the cited standard.

#### Petitioner's Arguments

MSHA's arguments in support of the citations issued in this case include an admission by counsel that the safety standard is ambiguous. Even so, counsel argues that it is deliberately ambiguous so as to enable an inspector to exercise some discretion requiring safeguards on a mine-by-mine basis. Further, counsel argues that the mine in question has a history of haulage accidents and haulage violations and that is the reason why the safeguards for the mine were issued in 1973 and 1974 (Tr. 114).

Turning to the facts of the case, MSHA argues that the safeguard notices require the respondent to at all times maintain a jack on the locomotive and to insure that the sanding devices are operational. Since the inspector noted the violations approximately 2-1/2 hours into the shift, counsel asserts that it is not unreasonable to require the locomotive operator to make his preoperational check prior to the beginning of production, particularly where it is possible for anyone to climb aboard and drive the locomotive away. Failure to conduct a preshift

inspection of the locomotive would expose that person and possibly others in the event sand was needed for traction, or the locomotive derailed and the operator attempted to right it by lifting it manually (Tr. 115-118). Since the locomotive was not provided with a jack, and two of its

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sanders were inoperative at the time the inspector observed the locomotive, MSHA maintains that it has established the violations in question. And, since the respondent was on previous notice as to the requirements provided by the safeguards, MSHA believes that the respondent was negligent.

#### Respondent's Arguments

Respondent's defense is based on an assertion that at the time the inspector examined the locomotive it was not in operation but simply parked on the track. In these circumstances, respondent asserts that the locomotive operator had not had an opportunity to examine his locomotive prior to putting it in operation and that had he been given that opportunity, he would have discovered that the jack was missing and provided one. Respondent maintains further that company policy requires the locomotive operator to inspect it before placing it in operation and that by issuing the citation before giving the operator an opportunity to complete his inspection, the inspector acted arbitrarily (Tr. 122-125).

In the instant case, it is clear from the evidence presented that the parked locomotive in question was provided with a jack-lifting bar, but that the jack was missing at the time the inspector observed it. As for the cited sanding devices, it is also clear that the sanders were filled with sand, but that the lever stuck at the precise moment the inspector asked the operator to activate it and found that no sand was dispersed. A jack which the inspector had observed against the rib while on his way to the locomotive was retrieved within minutes and placed on the locomotive to abate the citation, and after giving the sanding lever a kick with his foot, sand was dispersed and the inspector abated the second citation.

As I observed during the course of the hearing in this case, counsel for both sides indulged in a great deal of speculation in presenting their respective cases. Respondent argued that the missing jack probably was taken off the locomotive to perform some maintenance work on the roadway during the prior shift. However, no credible testimony was forthcoming to support this conclusion. As a matter of fact, respondent's sole witness testified that he saw no road work being performed while he was present. The inspector did not believe that the jack which was provided to abate the citation was the same one taken from the locomotive because it had rock dust on it. I simply do not believe he knew whether it was the same one or not.

MSHA's conclusions that the safeguards were initially issued in 1973 and 1974 because of mine-haulage accidents and noncompliance with other haulage safety standards is unsupported by any credible evidence. While there are a number of citations for section 75.1403 listed in the computer printout detailing the prior history for the mine in question (Exh. G-3), absent any details as to the specific circumstances connected with those citations, I simply cannot accept an unsupported argument that they all involve haulage locomotives.



Since no one bothered to look at the preshift books for December 9, 1980, the parties conceded that there is no information available as to whether any

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entries may have been made for the locomotive in question (Tr. 119). Although the inspector made notes of the times when he made his observations concerning the missing jack and inoperative sander, he did not check the preshift records, nor did he make any notes as to whether coal was actually being loaded, whether the locomotive was energized, whether cars were coupled to it, etc. It seems to me that these factors are critical to any determination as to whether there is a reasonable inference that the locomotive operator was about to move the locomotive without conducting his usual operational inspection at the time the inspector appeared on the scene. Since the citation issued nearly a year ago, the inspector could not specifically recall any of the critical details connected with the issuance of the citations.

According to the inspector's interpretation of section 75.1725, all of the required equipment checks should be made during the normal work shift, but he conceded that the locomotive operator could wait until coal loading was completed before checking and moving the locomotive (Tr. 111). In addition, he agreed that the safeguard notices speak in terms of operating equipment, and that his citations also use the word "operating." He further explained the rationale for issuing the citations as follows (Tr. 111-113):

JUDGE KOUTRAS: \* \* \* Let me ask you this. Assuming that the locomotive operator told you, look, I don't have a jack and the sander levers aren't working but, let me see what the problem is and if I can get the jack on there and get the sanding levers operating before they finish loading those mine cars, what would be your reaction to that?

THE WITNESS: I'd have a good reaction. Because to me, the individual is aware that there is said violations of law, and he's trying to take the corrective measures to fix them before he even makes an attempt to move it. And, he's notified me through communication that that's what he's going to do.

JUDGE KOUTRAS: But, the story I'm getting now, from the operator in this case, is that you didn't give the locomotive operator an opportunity to pre-check his thing, before you dropped the citations on him?

THE WITNESS: The man ought to--like you said to ask exactly--but, the--if the individual, at that time, had said, hey, look, I haven't even made my pre-op check yet and I don't know what's there or what's not there--it would have made a difference, yes.

JUDGE KOUTRAS: But, that wasn't communicated?

THE WITNESS: It wasn't communicated, no sir.

After careful consideration of all of the testimony and

evidence adduced in this case, including the arguments advanced by the parties in support of

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their respective positions, I conclude that the respondent has the better part of the argument. While it is true that the petitioner has established that the jack was missing from the locomotive and that the sanding lever was inoperative when the inspector first viewed the parked locomotive, I cannot conclude from the facts presented in this case that the petitioner has established that the locomotive in question was being operated or was about to be operated before the inspector arrived on the scene. As a matter of fact, the inspector himself conceded that the locomotive operator could wait until the mine cars were loaded before conducting his inspection and moving the locomotive. In this case, I simply cannot conclude that petitioner has established through any credible testimony or evidence that the mine cars were loaded and waiting to be pulled away by the locomotive at the time the inspector walked past the parked locomotive.

I believe that the locomotive operator in this case should have been given a reasonable opportunity to inspect his locomotive, and absent any evidence that he is required to conduct such an inspection at the start of the shift, the fact that the inspector observed the conditions 2 hours into a production shift is not critical in my view. I reject the notion that a locomotive operator has to inspect a parked locomotive as soon as he arrives on the shift to insure that some unauthorized person driving it away has access to a jack and a workable sanding device. If MSHA believes that this is a problem, then I suggest it consider amending the safeguard notices issued at this mine to make it absolutely clear that locomotive operators are required to inspect their equipment at the start of any shift, rather than waiting until such time as all of the mine cars are loaded and ready for haulage out of the mine.

I note that the criteria for self-propelled personnel carriers found in section 75.1403-6(b)(1) and (3), specifically require a suitable lifting jack and bar as well as well-maintained sanding devices. Although the April 26, 1974, safeguard notice was specifically directed to self-propelled mantrip cars, it also included all haulage equipment equipped with sanding devices, and I assume that this also covers locomotives, but the record is not clear on this point. It would seem to me that MSHA should promulgate similar criteria for locomotives used underground. Since operational sanding devices and lifting jacks appear to be desirable items common to all locomotives, it seems more logical to me to promulgate specific criteria covering this situation rather than to rely on safeguard notices which quite frankly leave much to the imagination and intermingle mantrip vehicles with locomotives used to pull loaded mine cars.

#### ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED that the two citations issued in this case be VACATED.

George A. Koutras  
Administrative Law Judge