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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 81-146 A/O No. 36-00970-03094
v.	Maple Creek No. 1 Mine
UNITED STATES STEEL CORPORATION, RESPONDENT	

DECISION

Appearances:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner
Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Stewart

I. Procedural Background

On June 8, 1981, the Secretary of Labor (Petitioner) filed a petition for assessment of civil penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (Act), charging United States Steel Corporation (Respondent) with five violations of law as set forth in various citations issued pursuant to section 104(a) of the Act. The violations charged are identified as follows:

Citation No.	Date	30 C.F.R. Standard
1046741	2/11/81	75.1403
1046742	2/11/81	75.1403
1046753	2/17/81	75.1403
1046754	2/17/81	75.1403
1046755	2/17/81	75.1403

Each citation contained the additional allegation that the violation charged was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

On June 26, 1981, the Respondent filed an answer: (1) denying the existence of each condition alleged in the 5 citations; (2) denying that any violations of 30 C.F.R. 75.1403 occurred; (3) denying the allegation set forth in each of the 5 citations that the alleged violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and (4) admitting that it is engaged in interstate commerce.

The hearing was held on August 11, 1981, in Pittsburgh, Pennsylvania with representatives of both parties present and participating. The Petitioner called Federal mine inspector Okey H. Wolfe as a witness. The Respondent called assistant mine foreman Joseph G. Ritz as a witness.

The parties waived the right to file posthearing briefs and proposed findings of fact and conclusions of law. However, the parties did present closing arguments. Such closing arguments, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

II. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of 30 C.F.R. 75.1403 occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

The following additional issue is presented in this proceeding: If the cited violations of 30 C.F.R. 75.1403 occurred, then whether such violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. See Energy Fuels Corporation, 1 FMSHRC 299, 1979 CCH OSHD par, 23,503 (1979).

II. Opinion and Findings of Fact

A. Stipulations

1. The Maple Creek No. 1 Mine is owned and operated by the Respondent, United States Steel Corporation (Tr. 3-4, 6).

2. The Maple Creek No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977

(Tr. 4, 6).

3. The Administrative Law Judge has jurisdiction over these proceedings (Tr. 4, 6).

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein (Tr. 4, 6).

5. The assessment of the civil penalty in this proceeding will not affect the Respondent's ability to continue in business (Tr. 4, 6).

6. The appropriateness of the penalty, if any, to the size of the operator's business should be based on the fact that the Respondent's annual production tonnage is 14,585,534 tons; and the Maple Creek No. 1 Mine's annual production tonnage is 740,382 tons (Tr. 4, 6).

7. The Respondent demonstrated ordinary good faith and attained compliance after the issuance of each citation (Tr. 5-6).

8. The Maple Creek No. 1 Mine was assessed a total of 699 violations over 759 inspection days during the 24 months immediately preceding the issuance of the instant citations. Of these violations, 100 were cited pursuant to 30 C.F.R. 75.1403 (Tr. 5-6).

9. The parties stipulate to the authenticity of their exhibits, but not to their relevance nor to the truth of the matters asserted therein (Tr. 5-6).

B. Occurrence of Violations

Federal mine inspector Okey H. Wolfe issued Citation Nos. 1046741 and 1046742 during the course of his February 11, 1981, regular inspection of the Respondent's Maple Creek No. 1 Mine. Citation No. 1046741 was issued at approximately 8:05 a.m., and charges the Respondent with a violation of 30 C.F.R. 75.1403 in that "[t]he sanding devices provided for the number 12 personnel carrier (portal bus) located on Spinner Bottom were not provided with sand." (Exh. G-1, Tr. 9). Citation No. 1046742 was issued at approximately 8:06 a.m., and charges a violation of 30 C.F.R.

75.1403 in that "[t]he sanding devices provided for the number 13 personnel carrier (portal bus) located on Spinner Bottom were not provided with sand." (Exh. G-2, Tr. 9).

Inspector Wolfe issued Citation Nos. 1046753, 1046754 and 1046755 at the Maple Creek No. 1 Mine at approximately 8 a.m. on February 17, 1981. Citation No. 1046753 charges the Respondent with a violation of 30 C.F.R. 75.1403 in that "[t]he sanding devices provided for the number 10 personnel carrier (portal bus) located on Spinner Bottom were not being well maintained due to a lack of sand being provided for the two outby sanding devices."

(Exh. G-3, Tr. 11). Citation No. 1046754 charges the Respondent with a

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violation of 30 C.F.R. 75.1403 in that "[t]he sanding devices provided for the number 12 personnel carrier (portal bus) located on Spinner Bottom were not being well maintained due to a lack of sand being provided for the inby and outby sanding devices on the wide side" (Exh. G-4, Tr. 11-12). Citation No. 1046755 charges the Respondent with a violation of 30 C.F.R. 75.1403 in that "[t]he sanding devices provided for the number 13 personnel carrier (portal bus) located on Spinner Bottom were not being well maintained due to a lack of sand being provided for the inby and outby sanding devices on the wide side" (Exh. G-5, Tr. 12).

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."

The five citations charge the Respondent with violations of 30 C.F.R. 75.1403 based upon the Respondent's alleged failure to comply with the requirements of Safeguard Notice 1 HB, which was issued at the Respondent's Maple Creek No. 1 Mine on June 10, 1976. (Exh. G-6).(FOOTNOTE 1) The Safeguard Notice imposes a requirement on the mine operator whereby "[a]ll personnel carriers which transport more than 5 persons shall be equipped with a properly installed and well maintained sanding device in the mine."

The portal buses in question are electrically powered, track-mounted personnel carriers used to transport the miners to the section (Tr. 58). Each has the capacity to carry more than 5 people (Tr. 15, 42), and each is equipped with four sanding devices with reservoirs capable of holding approximately 20 to 25 pounds of sand (Tr. 37-38, 59). There are two sanding devices for the inby direction and two for the outby direction (Tr. 37-38), meaning that there is one sanding device for each of the four wheels (Tr. 58-59).

The Maple Creek No. 1 Mine has approximately 20 to 25 miles of haulage which is set up as a dual haulage system with one track reserved for inbound traffic and one reserved for outbound traffic (Tr. 60). Sand stations are located at the portal bus station, along the haulage and in the sections along the flats (Tr. 59).

The Respondent's program for replenishing the sand in the sanding devices requires the portal bus operator to check the sanders when he arrives at the portal bus station at the beginning of the shift. Normally, this occurs before the personnel carriers are energized with electrical power (Tr. 61, 63). The buses are then used to transport the miners to their work place, and the personnel carriers remain parked underground until the end of the shift. At the end of the shift, but prior to restoring electrical power to the personnel carriers, the portal bus operator is again supposed to check the sanding devices for sand (Tr. 63-64). If he runs out of sand during a run, he is required to replenish his sand supply at the next sanding station which he encounters (Tr. 65).

Additionally, mechanics check the sanding devices between shifts to assure that they remain mechanically operational (Tr. 61-62).

All of the citations were issued in the portal bus boarding area at the beginning of a shift at a point in time when the miners on the on-coming shift were preparing for transport to their work places. Although the citations were issued prior to the buses being put in motion (Tr. 27), all of the portal buses were ready and available for use (Tr. 15). There were no indications that the personnel carriers had been taken out of service for any reason (Tr. 15). Normally, the first 2 to 4 buses in line are used to transport the crews onto the section (Tr. 31). Additionally, the inspector testified that he did not give the portal bus operator or the on-coming shift an opportunity to determine whether there was sand in the sanders (Tr. 32-33).

With respect to the two citations issued on February 11, 1981, the evidence shows that approximately 7 or 8 men were sitting in the portal bus encompassed by Citation No. 1046741 (Tr. 10). The portal bus encompassed by Citation No. 1046742 was next in line, but there was no one aboard it.

There was no one aboard the three portal buses encompassed

by Citation Nos. 1046753, 1046754 and 1046755 at the precise point in time when the citations were issued on February 17, 1981 (Tr. 13).

There was no sand in the two outby sanders on the portal bus encompassed by Citation No. 1046753. With respect to the remaining four citations, there was no sand in the inby and outby sanders on the wide side (Tr. 9-10, 13, 17-18, 41-42). However, it appears that all of the sanding devices were mechanically operational (Tr. 27).

The Petitioner argues, in substance, that a violation of the Safeguard Notice exists whenever a personnel carrier which transports more than five persons is in the mine, out of sand, and not tagged out of service because, while in such condition, the sanding devices are not being "well maintained." According to the Petitioner, the personnel carriers are available for use, even though not in motion, and are not being properly maintained (Tr. 79).

The Respondent concedes that a violation would have existed if the cited personnel carriers had departed the station with empty sanding devices. However, the Respondent maintains that there will be occasions in the normal course of operation when the sanders will be empty, and argues that so long as it has and enforces a program to fill the sanders, and so long as sand is available for the sanders, no violation exists. The Respondent also argues that the Safeguard Notice requires only the presence of sanding devices capable of being used (Tr. 81-82).

The subject Safeguard Notice requires all personnel carriers which transport more than five persons to be equipped with a properly installed and well maintained sanding device. A sanding device which does not contain sand at a time when such personnel carrier is in use cannot be considered "well maintained" within the meaning of the Safeguard Notice. Whenever a personnel carrier is available for use, as these were, it must be considered to be in use. See Eastern Associated Coal Corporation, 1 FMSHRC 1473, 1979 CCH OSHD par. 23,980 (1979). Additionally, the fact that the sanding devices must be well maintained at all times while in use indicates that the reservoirs should have been checked and refilled promptly when the personnel carriers returned to the station after the prior run.

Furthermore, the requirements imposed on the Respondent by the Safeguard Notice are clearly applicable to all personnel carriers with the capacity to transport more than 5 persons. The fact that it may have been holding five, or fewer, persons when a given citation was issued is not a defense if it is capable of holding more than five persons.

It should also be noted that the Respondent never proved that the sanding devices would, in fact, have been checked and refilled before the personnel carriers departed the station. The portal bus operators, the individuals assigned by the Respondent to perform this task, were never called by the Respondent to testify on this point. It is significant to note that 7 or 8 men were aboard the portal bus cited in Citation No. 1046741 when such citation was issued. This indicates that it was at least

possible that portal buses would have been operated with empty sanding devices.

The Respondent also sought to prove, through the testimony of assistant mine foreman Joseph G. Ritz, that the use of sand with respect to haulage equipment presents certain hazards. He gave testimony indicating that excessive sand deposited on the rails can adversely affect proper grounding, presenting an electrocution hazard (Tr. 65-66, 75-77).

The use of sand to provide added traction for track-mounted haulage vehicles is a long standing practice in the mining industry. It is considered singularly inappropriate to entertain the Respondent's challenge to this long standing practice on the basis of the testimony of one witness who appears to have no specialized expertise in electrical matters. This issue was not raised by the Respondent in its answer, and there is no indication that the Petitioner was given any other form of notice that the Respondent wished to raise it in this proceeding. Considering the significance of the challenge to the safety of miners, the issue should have been specifically raised prior to the hearing so as to give the Petitioner adequate opportunity to prepare and present expert testimony in rebuttal.

In view of the foregoing, I conclude that Citation Nos. 1046741, 1046742, 1046753, 1046754 and 1046755 properly charge the Respondent with violations of Safeguard Notice 1 HB, June 10, 1976, and, hence, of 30 C.F.R. 75.1403. I find that the violations charged have been established by a preponderance of the evidence.

C. Negligence of the Operator

The record contains no probative evidence to establish either that the Respondent's supervisory personnel or that those persons designated by the Respondent to perform inspections or examinations required by law had actual or constructive knowledge of the violative conditions. Accordingly, I conclude that the Petitioner has failed to prove the mine operator's negligence by a preponderance of the evidence.

D. Gravity of the Violation

Properly installed and well maintained sanding devices provide additional traction for track-mounted personnel carriers when the need arises. They deposit sand on the rails, as the need arises, to provide additional friction between the wheels and the rails, providing traction when slick conditions are encountered and for sudden stops and starts (Tr. 18-19, 22-23, 37-39). Mr. Ritz testified that there are areas along the haulage which are "reasonably level" and areas that have "some degree" of slope (Tr. 60).

The inspector testified that a haulage accident could result from a lack of sand, and that an occurrence of the event against which the cited standard is directed would be expected to result in broken bones, cuts, bruises, abrasions and/or concussions. Up to 10 people would have been affected by an occurrence (Tr. 44-45).

There was no hazard present so long as the portal buses remained stationary (Tr. 44, 53-54). However, there is no probative evidence in the record to establish the probability of occurrence had the portal buses been placed in motion with empty sanders. In this regard, the record contains only the inspector's speculation that "[i]t could well happen" (Tr. 44). To hold otherwise on the facts of this case would, in effect, require that official notice be taken that all violations of the type charged present a probability of occurrence classified as "probable," without regard to the particular conditions existing along the haulage.

In view of the foregoing, it is found that the violations were of moderate gravity.

E. Remaining Penalty Assessment Criteria

Based upon the stipulations entered into by the parties, I find: (1) that the Respondent demonstrated ordinary good faith and attained compliance after the issuance of each citation; (2) that the Respondent is a large operator; (3) that the Respondent's history of previous violations is moderate; and (4) that the assessment of the civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

F. Significant and Substantial Criterion

The inspector included findings on the face of each citation that the violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. His testimony indicates that the determination was based upon an application of the test set forth by the Interior Board of Mine Operations Appeals in *Alabama By-Products Corporation*, 7 IBMA 85, 94, 83 I.D. 574, 1 BNA MSHC 1484, 1976-1977 CCH OSHD par. 21,298 (1976) (Tr. 50-51). This test was overruled by the Commission in *National Gypsum Company*, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par. 25,294 (1981), wherein it was held:

[T]hat a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. Additionally, the Commission stated that:

Although the [Federal Mine Safety and Health Act of 1977] does not define the key terms "hazard" or "significantly and substantially," in this context we understand the word "hazard" to denote a measure of danger to safety or health, and that a violation "significantly

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 0 precludes the issuance of a withdrawal order because of imminent danger."

Safeguard Notice No. 1 HB, June 10, 1976, was issued pursuant to the safeguard notice issuance guideline set forth at 30 C.F.R. 75.1403-6(b)(3), (Exh. G-6, Tr. 15), which provides as follows:

"(b) In addition, each track-mounted self-propelled personnel carrier should:

* * * * *

(3) Be equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys), which transport not more than 5 men, need not be equipped with such sanding device;"