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SOL (MSHA) V. VALLEY LIMESTONE
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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
v.	Docket No: LAKE 81-87-M A.O. No: 21-00089-05002
VALLEY LIMESTONE COMPANY, RESPONDENT	Hader Quarry and Mill

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Chicago, Illinois 60604, for Petitioner

Lloyd H. Johnson, Sr., Valley Limestone Company, Box 127, Zumbrota, Minnesota 55992, appeared pro se

By: Charles C. Moore, Jr., Administrative Law Judge

The above-captioned civil penalty case was tried before Judge John Cook on August 25, 1981 in Minneapolis, Minnesota. Judge Cook has since transferred from the Federal Mine Safety and Health Review Commission and the case has been assigned to me. The parties were advised of Judge Cook's transfer on January 19, 1982. They have not suggested any rehearing or further evidentiary proceeding. I hold and by their actions, that the parties have waived any right to now object to a decision based on the record made before Judge Cook.

On August 29, 1978 Citation No: 289667 was issued to Valley Limestone Company, a trade name used by Lloyd H. Johnston, alleging a violation of 36 CFR. 56.9-37. See Exhibit M5. The citation charges:

> The Chevrolet 6400 series haul truck was left unattended without setting the brakes at the grizzly dump site and at pit while being loaded.

The standard in question requires that "mobile equipment shall not be left unattended unless the brakes are set . . ." If the statements set forth in the citation are true and if respondent is subject to the coverage of the Federal Mine Safety and Health Act of 1977, then a violation has occurred.

Respondent quarrys limestone crushes some of it into gravel for use as surfacing material and some into powdery limestone for use on farmlands. It sells this limestone powder and gravel within the State of Minnesota and only to customers near its quarry. Some of the limestone is used on

Mr. Johnson's wife's farms. Respondent moved that the case be dismissed for lack of coverage and Judge Cook took the motion under advisement.

I had similar motions before me in Secretary of Labor vs. Capitol Aggregates, Inc., Docket No: DENV 79-163-PM and DENV 79-240-PM. 2 FMSHRC 869, 870 (1980). That case involves a cement plant but insofar as coverage of the Act is concerned it is quite similar to the instant case. As to the motions to dismiss filed because of alleged lack of coverage in Capitol Aggregates, Inc., I stated:

> Both motions were denied pricipally on the rationale of Wickard vs. Filburn, 317 U.S. 111 (1942). The case involved home grown wheat which was used for the grower's own consumption and the court said at page 91 "but if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home grown wheat in this sense competes with wheat in commerce." Subsequent cases have held that Respondent's activities need not be considered alone in order to measure their effect on commerce but may be combined with others engaged in similar activities.
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> > Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. See Heart of Atlanta Motel, Inc. v. U.S. 379 241, 255 (1964); Wickard v. Filburn, 317 U.S.111, 127-128 (1942). [Fry v. U.S., 421 U.S. 542 at 547 (1974).]

For the reasons set forth above, I hold that Respondent's operation is covered by the Mine Safety and Health Act.

When Inspector Tarro came to the quarry on August 29, 1978, he observed two trucks and a front-end loader engaged in transporting the limestone to the crusher. The driver would take a load of limestone to the crusher in one truck, then he would return and leave that empty truck to be loaded while he drove the other truck to the crusher. When the inspector saw the driver leave the truck subject to the citation herein to be loaded, and get in the other truck and drive away, he saw the first truck roll about 50 feet just before the loader dumped any limestone in. When he questioned the front end loader operator and examined the truck he found that there was no handbrake and that the reason the truck had not been left in gear with the motor off, was that it couldn't be started without being pushed. It was constantly left running. While Respondent asserts that the truck did not roll 50 or 60 feet, maybe only a few feet, he does not deny that the truck was left idling with no brakes set. The violation clearly occurred.

When the inspector returned two weeks later and found that the hand-brake had not been repaired (there was not even a handle to set the brakes) he issued a 104(b) order. His reasoning was that the violation had not been abated and there was no reason for an extension of time. While that order is not before me for review, the propriety of its issuance has a bearing on the good faith effort to abate the violation. If the charge had been made that the truck did not have adequate brakes, the order would be clearly justified. Mere failure to use the equipment would not constitute abatement. But the charge here was leaving the truck unattended without setting the brakes and ordinarily when a violation is caused by some affirmative act on the part of a miner, abatement is accomplished by instructing all miners not to do whatever it was that the offending miner did. Such an instruction would have been of no value in the instant case because there were no brakes to be set. Good faith compliance would have been to repair the brakes immediately and instruct the driver never to leave the truck unattended without setting the brakes. Respondent did not do that in this case. While Mr. Johnson testified that he did not use the truck he was vague as to the time after which he did not use it. He did not seem to be able to distinguish between the original citation and the order that was issued two weeks later. After one of those times he did not use the truck, but the truck was in the quarry when the order was issued. Under the circumstances I do not find good faith abatement even though I am not sure the order was technically proper.

The gravity of this violation is very high. Even if there were no mining laws, common sense would dictate that you do not leave a vehicle idling without some means of preventing it from rolling, either blocking it or braking it, or shutting off the engine and putting it in gear. At this very mine, in 1973, a fatality was caused by a truck failing to have an emergency brake, and it may have been this same truck. This prior fatal accident does not go to the Respondent's history of violations because the Act under which this proceeding was brought was not in effect at that time but the evidence does show that Respondent was well aware of the hazards involved in a failure to have emergency brakes.

If the brakes had been working on the truck and the truck driver had failed to set them I would impute the negligence of the driver to the operator in considering the amount of the penalty to be assessed. Here, however, the truck driver did not have a brake to set and because of the condition of the truck he could not stop the engine and leave it parked in gear. I consider it gross negligence for Respondent to allow this piece of equipment in this condition to be used in mine operations.

While Mr. Johnston complains that he was being harrassed by the inspector, I think the inspector was being lenient in giving him two weeks to abate a violation of this type. Another inspector might have issued an imminent danger order and required that the quarry be shut down until the truck was either repaired or taken out of service.

There is no history of prior violations and the operation is not large, but the gross negligence and the gravity involved in this violation justify a substantial penalty. I realize that when a mine operator challenges a citation in an administrative proceeding, and ends up being assessed a penalty higher than that determined by the assessment officer, he feels that he is being punished for having forced the government to go to trial in the matter. That is a false impression, however. The fact is that after examining the evidence in a case, the judge often has much more information concerning the violation than was available to the assessment officer at the assessment stage of the proceedings. The evidence in the instant case and the circumstances surrounding the violation convinces me that a $700 penalty would be appropriate.

Respondent is therefore ordered to pay to MSHA, within 30 days, a civil penalty in the amount of $700.

Charles C. Moore, Jr.,
Administrative Law Judge