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SOL (MSHA) V. UNITED STATES STEEL
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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. KENT 81-136 A.O. No. 15-02008-03036
v.	
UNITED STATES STEEL CORP., RESPONDENT	No. 32 Mine

SUMMARY DECISION

Appearances: Carole Fernandez, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner Louise Q. Symons, Esquire, Pittsburgh, Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Case

This case concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on July 6, 1981, seeking a civil penalty in the amount of $170 for an alleged violation of mandatory safety standard 30 CFR 77.1605(k), as detailed in a section 104(a) citation, No. 981185, served on the respondent by MSHA inspector Alex R. Sarke, Jr., on January 23, 1981. The condition or practice described by the inspector on the face of the citation is as follows:

> The berms provided along the elevated roadway leading to the mine were not as high as the axle of the largest piece of equipment using the roadway in that 3 locations along the roadway have berms with less than 22 inches which is the height of the axle of the Pettibone tractor used at the mine. Location No. 1 is directly across from the bathhouse and an area of 29 feet at this location has no berm or guardrail. Guardrails were installed at one time, but they have been dislodged. Location No. 2 is three tenths of a mile from the bathhouse and an area of 22 feet

> has a berm of 6 to 8 inches. Location No. 3 is 1.6 miles from the bathhouse and an accident has occurred in this area in that three workmen went over the berm and down under the elevated roadway in a passenger car. The height of the berm provided in this area is 16 inches for a distance of 29 feet. This is where the car went over the berm.

Respondent filed its answer on July 10, 1981, denying the alleged violation, and subsequently, by letter filed August 28, 1981, petitioner's counsel advised that the parties had conferred with each other and believe that the material facts are not in dispute and can be stipulated, and that the case may be decided on motions for summary decision without the necessity for a hearing on the merits. Subsequently, on December 7, 1981, the parties filed a joint stipulation, setting forth the following:

> 1. Number 32 Mine of United States Steel Corporation's (USS) Lynch District is subject to the jurisdiction of the Mine Safety and Health Administration.
>
> 2. The proceedings in Docket No. KENT 81-136 are properly before the administrative law judge.
>
> 3. USS is a large operator and payment of a civil penalty will not affect its ability to stay in business.
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> 4. Citation No. 981185 was issued by a duly authorized representative of the Department of Labor.
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> 5. Citation No. 981185 alleges a violation of 30 CFR 77.1605(k).
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> 6. The standard cited states, "Berms or guards shall be provided on the outer bank of elevated roadways."
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> 7. Citation No. 981185 states that there were berms along the roadway except at Location No. 1 where the guardrail was dislodged.
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> 8. USS claims that it was in the process of replacing the guardrail when the citation was issued; the mine inspector saw no evidence of this activity.
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> 9. The MSHA Surface Manual at page III-338 requires that berms must be as high as the axle of the largest piece of equipment using the roadway.
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> 10. An accident in which a car went over the 16-inch berm occurred on January 22, 1981.
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> 11. It has not been determined that a berm of 22 inches would have had any different effect on the fact situation of January 22, 1981, than a berm of 16

inches.

Motions for Summary Decision

By motion and supporting arguments filed December 21, 1981, petitioner moves for summary decision in its favor. In support of its motion, petitioner asserts that with regard to location No. 1 along the elevated roadway which was cited, the parties have stipulated that no berm was at that location and that the guardrail was dislodged and the inspector saw no evidence of the claim that respondent was in the process of replacing the guardrail at the time the citation issued. Respondent maintains that it has established a violation as to that location since no berm or guardrail was present.

With regard to the remaining two locations cited by the inspector, petitioner argues that the inspector found a violation on the basis of the inadequacy of the existing berms. Petitioner asserts that in its interpretation of section 77.1605(k), MSHA applies the definition of an adequate "berm" found in 30 CFR 77.2(d), which defines "berm" to mean "a pile or mound of material capable of restraining a vehicle". Petitioner asserts further that as a minimum standard, MSHA policy requires berms to be "at least as high as the mid-axle height of the largest vehicle using the roadway". That policy is set forth in MSHA's March 9, 1978, Surface Manual, as well as in a June 30, 1972, publication of the Bureau of Mines, Department of the Interior, which contains an interpretative "application" of identical berm standards found in Parts 55, 56, and 57, Title 30, Code of Federal Regulations. The Surface Manual "policy" dealing with section 77.1605(k), provides as follows at pg. III-338:

> "Berm" as used in this requirement means a pile or mound of material at least axle high to the largest piece of equipment using such roadway, and as wide at the base as the normal angle of repose provides. Where guardrails are used in lieu of berms, they shall be of substantial construction.

The "policy" application set forth in the Bureau of Mines publication at pg. 9-5 is as follows:

> Berms shall be at least as high as the mid-axle height of the largest vehicle using the roadway. They need not be continuous where drainage and snow removal may constitute a problem. Guards of posts and railings shall be substantially equivalent as a restraining medium as berms of earth or waste rock.

Petitioner argues that the respondent has not argued that it was unaware of the aforementioned longstanding MSHA policy. Further, while there were mounds or berms of earth, rock, or other materials along the roadway in question (except for location No. 1), in the judgment of the inspector these berms were inadequate to meet the definition of

"berms" in the "regulations". This is because location No. 2 had a 6-to-8-inch berm, location No. 3 had a 16-inch berm, and the height of the axle of the largest piece of equipment using the roadway was 22 inches. In support of its case, petitioner cites the case of Secretary of Labor v. Heldenfels Brothers Inc., 2 MSHC 1143, Docket Nos. CENT 79-280-M and CENT 79-235-M (1980), where the Judge affirmed a violation of the berm requirements of 30 CFR 55.9-22, based on an inspector's opinion that the berms provided were not sufficient to restrain the vehicles using the elevated roadway. Petitioner points out that in Heldenfels, the Judge rejected the operator's argument that there was no violation since the existing berm was approximately 18 inches high. Looking at the definition of "berm" in the applicable regulations, the Judge found that there could be no berm within the meaning of the regulations if the mound of material along the roadway was incapable of restraining the vehicles using the roadway.

Conceding that the referenced MSHA policy and guidelines are not mandatory requirements imposed on a mine operator, petitioner nonetheless argues that in the case at hand, while it would appear from the wording of the citation that the inspector considered the general MSHA policy in finding that the berms were inadequate to restrain vehicles using the roadway in question, such a reference by the inspector to the inspector's manual and agency guidelines is not an illegal or arbitrary practice as long as the inspector's application of these guidelines and policies to his interpretation of the cited standard is not contradictory to the intent and clear meaning of the standard, Secretary of Labor v. Empire Energy Corporation, 1 MSHC 1751, Docket No. DENV 78-442-P (1979).

Petitioner argues further that the clear intent of the cited standard is to prevent vehicles in use from going over the edges of elevated roadways, and since road conditions and the speed of vehicles may vary, it may be unreasonable to attempt to insure by testing that a berm be sufficient to restrain a vehicle under all circumstances. Assuming normal conditions, petitioner asserts that the height of the axle of the vehicle is a reasonable, workable, and clear guide in estimating whether or not a berm would be an adequate restraint since the wording of the "regulation" indicates that the adequacy of berms is tied to the nature of the vehicles used on the roadway.

In the instant case, petitioner asserts that the inspector was aware that a 16-inch berm had proved inadequate to restrain a passenger vehicle at one roadway location. Petitioner also asserts that whether or not a 22-inch berm would have been effective is not known, because the facts and conditions of the accident are unknown; but the prior accident is a factor to consider in support of the inspector's determination that the existing berms were inadequate. Under the circumstances, petitioner concludes that the respondent cannot show that the inspector was arbitrary and unreasonable in his application of the cited standard in this case, and that petitioner therefore is entitled to summary decision as a matter of law.

In its motion for summary decision, respondent asserts that since it is clear that berms were present along the roadway in question, the alleged violation necessarily turns on the belief by the inspector that the berms provided were not as high as the axle of the largest piece of equipment using the roadway. Since there is no legal requirement that berms be as high as the axle of any particular piece of equipment, respondent maintains that the citation fails to state a violation and must be vacated.

In support of its case, respondent points out that a berm is defined by 30 CFR 77.2(d) as a pile or mound of material capable of restraining a vehicle, and that the cited standard contains no requirements pertaining to dimensions of berms, nor does it specify materials to be used in constructing berms. Since the standard addresses neither the design, construction nor installation of berms, respondent argues that the definition of "berm" does little to clarify the standard by referring generically to a vehicle, and taken together, the regulatory bases for the contested citation do not place the respondent on notice as to what is required in the way of berms on elevated roadways; the regulations are vague and unenforceable. Respondent maintains that such vagueness cannot be cured by publication of an internal MSHA policy manual which sets forth agency guidelines for interpretation and enforcement of standards. Petitioner admits that such policies are not mandatory requirements upon respondent, yet it refers to the disputed policy as a minimum standard and suggests that respondent is obligated to comply because it did not argue that it was unaware of the policy. If the policy cannot be enforced against respondent, whether respondent had knowledge of the policy is clearly irrelevant.

With regard to the petitioner's assertion that the inspector made an independent evaluation as to whether the berms were capable of restraining a vehicle, respondent observes that the inspector just "mechanically applied the internal MSHA policy". Respondent believes that a policy which assumes that a berm the height of an axle of a vehicle is capable of restraining that vehicle no matter what the speed or weight of the vehicle is inherently ridiculous. By mechanically applying such an arbitrary policy, respondent suggests that an operator could construct berms six feet high, but only one inch thick or the operator could construct its berms of feathers. Since petitioner concedes that it may be unreasonable to test the sufficiency of a berm to restrain a vehicle, respondent asserts that is an implied concession that there may be times when no berm is capable of restraining a vehicle since every driver knows that under some circumstances the berms and guardrails along public highways may help keep an automobile on the road, but will not stand up to a direct blow at excessive speed.

Finally, respondent maintains that the present berm standard is so vague and ambiguous that it cannot be enforced, and that MSHA cannot correct this problem by publishing internal guidelines for its inspectors. If MSHA intends to properly put operators on notice as to precisely what is required to comply

with the berm standard, it must engage in rule making to properly promulgate regulations. It cannot, without notice to and opportunity for comment by the operators, enforce an

arbitrary requirement that berms must be as high as the axle of the largest vehicle using the roadway. Respondent argues that the fallacy of such a unilateral action and the reason for the required input from interested parties are abvious when the following questions are considered. Does "largest" vehicle mean the tallest in terms of axle height or heaviest or, perhaps, greatest in overall dimensions? Why should height be the determinative criterion when a relatively low, thick berm might function better than a high, shallow barrier? Should the berm be designed to stop all vehicles, regardless of their speed? MSHA's arbitrary criterion of axle height seemingly fails to take any of these matters into consideration. Since MSHA developed the criterion unilaterally and announced it internally, it cannot be considered a "minimum standard" as petitioner contends. Accordingly, respondent maintains that the citation should be vacated because it fails to allege a violation of a standard, and merely alleges a violation of an internal MSHA policy. The policy is not binding on operators and is so far from the stated requirements of the standard that it does not clarify or interpret the standard. Since the policy imposes arbitrary and capricious new requirements and has not been subject to rule making, it cannot be treated as a standard.

Findings and Conclusions

Fact of Violation

In this case, the respondent is charged with one violation of the provisions of section 77.1605(k). However, the citation details three specific locations where the inspector believed the berms which were present were inadequate. The first location had no berms at all, and since a guardrail which had been installed at that location had been dislodged, the inspector apparently took the position that no berm was present. The height of the existing berms at the other two locations were less than 22 inches. Since the axle height of a tractor used at the mine is 22 inches, the inspector obviously applied this axle height as the standard which he believed the respondent should have used in the construction of the required berms. Although it is not altogether clear from the stipulations entered into by the parties, for the purposes of my decision in this case I will assume that the tractor mentioned in the citation by the inspector is in fact the largest piece of equipment using the roadway in question, and that the inspector relied on this "axle-height" test as detailed in the MSHA policy guidelines referred to by the parties in their respective supporting arguments when he issued the citation.

Although one would think that the intent of section 77.1605(k) is to prevent men and equipment driving along an elevated roadway from going over the elevated and unprotected edge of the roadway, the broad and general language of the standard, as embellished by the regulatory definition of the term "berm", leaves much to the imagination. The language of the standard simply requires that berms or guards "be provided". The term "berm" is defined by section 77.2(d), as "a pile or mound of

material capable of restraining a vehicle", but the term "guard" is not further defined. The standard has been the source of much litigation and interpretation, and a representative sampling follows below.

In MSHA v. W. B. Coal Company, LAKE 79-218, January 14, 1981, the operator was charged with a violation of section 77.1605(k) because an inspector believed that the existing berms which ranged from six inches to 24 inches along a 50-to-60 foot stretch of roadway were inadequate. The operator testified that he was never advised that berms were required to be of any specific height, but that prior to the issuance of the citation he had been advised by an inspector that three feet would be adequate to restrain a vehicle. The inspector who cited the violation applied MSHA's "policy" that berms should be the height of the axle on the largest machine which travels a roadway, which would have been 42 inches. In affirming the citation, the Judge ruled that MSHA's policy of axle height, or 42 inches, was not binding on the operator because the operator had no knowledge of the requirement. However, the Judge ruled that implicit in the standard is a requirement that the berms be of reasonable height to offer protection, and he relied on the definition found in section 77.2(d) for reaching this conclusion.

In MSHA v. Heldenfels Brothers, Inc., DENV 79-575-M, the Judge affirmed a violation of the berm "requirements of section 55.9-22", and while he recognized that the standard does not provide criteria by which the minimum height of berms might be determined, he nonetheless accepted the inspector's "rule of thumb" to the effect that a berm must be as high as the axle of the largest vehicle using the road, and ruled as follows at pg. 855, FMSHRC, Vol. 2, No. 4, April 1980:

> The largest vehicles using this section of roadway were Respondent's scrapers. These scrapers had a wheel height of approximately 6 feet and, therefore, an axle height of approximately 2 feet high--1 foot lower than the height which would be required if the rule of thumb applied.
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> The inspector, in relating experiences with scrapers similar to those used by Respondent and with ridge rows of different heights, stated that the scrapers would go over "a two foot deal all the time." Although the ridge rows were not of exactly the same material, consistency, and size of the berms, the inspector obviously was knowledgeable concerning the type of berm that would contain equipment used at the mine.

In MSHA v. Bishop Coal Company, WEVA 80-41, July 14, 1980, the Judge rejected the notion that small piles of rocks or debris along an elevated roadway constituted a berm. He ruled that the requirement of section 77.1605(k), that berms or guards shall be provided means that they must be adequate to prevent overtravel of the outer bank. The facts of the case as reported by the Judge indicated that a truck had gone over a bank at a dumping location, and he obviously concluded that the piles of rock or debris were inadequate. Interestingly, while the inspector and mine superintendent disagreed as to whether even the bern which was installed for abatement would be sufficient to prevent the occurrence of the accident, both agreed that under certain

circumstances the berm would be sufficient.

In MSHA v. Texas Utilities Generating Company, DENV 78-487-P, April 5, 1979, the Judge affirmed a violation of section 77.1605(k), for failure to provide berms or guards on a portion of a haulroad. The inspector who issued the citation was of the opinion that the berms would not prevent a haulage truck which was out of control from running off the roadway, but he indicated that they might be of assistance in guiding a truck, thereby keeping it on the roadway.

In MSHA v. El Paso Rock Quarries, Inc., DENV 79-139-M, December 17, 1979, the Judge affirmed a violation of section 56.9-22; and while he rejected the inspector's notion that berms would stop a fully loaded truck, he did accept the fact that they would serve as a visual warning as to the location of the edge of the roadway, and could possibly slow a truck down enough to give the driver sufficient time to jump.

As noted in the foregoing summary of prior decision dealing with the berm standard, there is no consistent application of the standard, and this leads me to conclude that there is merit to the arguments advanced by the respondent in this case with regard to its assertion that the language of section 77.1605(k) is so vague and broad that it fails to give an operator adequate notice as to what is required for compliance. One would think that after all of the litigation generated by this standard, that MSHA would initiate appropriate rule-making with a view to amending the present language of the standard, or at least publishing specific criteria as part of the published standards for industry guidance, rather than relying on internal "policy" guidelines which all to often are not communicated to a mine operator who is expected to comply with those guidelines.

On the facts presented in this case, it seems clear to me that the inspector applied the literal requirements of MSHA's internal policy guidelines with regard to the height requirements for berms as if they were part of the published mandatory standard, and petitioner's references in its supporting arguments that he applied the "regulations" leads me to conclude that petitioner also believes that an MSHA inspector has the authority or discretion to expand upon the plain meaning of a standard by incorporating unpublished policies as if they were mandatory requirements. I reject petitioner's semantical assertions that the inspector's application of MSHA's internal policy guidelines were not arbitrary and did not contradict the intent and clear meaning of the standard. To the contrary, I agree with the respondent's arguments that the inspector obviously applied the MSHA "axle-height" guidelines in this case. He obviously determined that the height of the axle on the tractor was 22 inches, and they any berms constructed on an elevated roadway where that tractor or other equipment were likely to be used would also have to be constructed at a minimum height of 22 inches. It seems to me that if an inspector can apply such a simple mechanical formula to a regulation requiring berms, then it should be a simple matter for MSHA to indulge in rule-making adopting such an application in a published regulation that would apply across the board to all mine operators.

The parties are in agreement that MSHA's internal policy guidelines do not have the force and effect of a published regulatory mandatory safety standard, and that a mine operator is not obliged to follow them. Petitioner's arguments that the respondent was aware of these policies is immaterial and irrelevant. The fact that a mine operator is aware of a policy that is not a mandatory standard does not subject that operator to a civil penalty assessment for violation of the policy. In my view, MSHA should concentrate its efforts into promulgating standards which are clear and to the point, rather than indulging in the promulgation of policy memoranda which all to often lead to ambiguous and inconsistent enforcement.

In view of the foregoing, and after careful consideration of the arguments advance by the parties in this case, I conclude and find that the respondent has the better part of the argument. I adopt and accept the respondent's arguments in support of its case, and reject those advance by the petitioner. In short, I conclude and find that the inspector exceeded his authority and acted arbitrarily in adopting MSHA's policy guidelines as if they were part and parcel of section 77.1605(k). I further conclude and find that the present language found in section 77.1605(k), is so vague and ambiguous as to render it unenforceable, particularly when MSHA attempts to embelish it through policy guidelines adopted internally rather than through the rule-making process provided for in the Act. In these circumstances, I further conclude and find that the citation in question should be VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED that Citation No. 981185, issued on January 23, 1981, citing an alleged violation of 30 CFR 77.1605(k) is VACATED, and this proceeding is DISMISSED.

George A. Koutras
Administrative Law Judge