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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FMC CORPORATION,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Contest of Citation

Docket No. WEST 80-506-RM
Citation No. 576918; 8/27/80

FMC Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

FMC CORPORATION,
RESPONDENT

Civil Penalty Proceeding

Docket No. WEST 81-260-M
A.O. No. 48-00152-05046 I

FMC Mine

DECISION

Appearances: John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy,
P.C., Salt Lake City, Utah, for FMC Corporation
James R. Cato, Esq., Office of the Solicitor, U.S.
Department of Labor, Kansas City, Missouri, for
Secretary of Labor

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above proceedings were consolidated by a bench order of Judge Cook on August 12, 1981. They involve a contest of a citation issued August 27, 1980 and a civil penalty proceeding seeking penalties for the violation charged in the contested citation and two other citations. Pursuant to notice, the case was called for hearing by Judge Cook in Green River, Wyoming on August 12, 1981. The parties submitted a stipulation of fact on the record and agreed to certain exhibits being introduced. The case was submitted for decision on the basis of the stipulation and exhibits. Both parties have filed posthearing briefs. Judge Cook left the Commission before he could issue a decision, and the parties have agreed that I may decide the cases on the basis of the stipulation and exhibits submitted before Judge Cook and the contentions of the parties in their posthearing briefs.

APPLICABLE REGULATIONS

1. 30 C.F.R. 57.9-1 provides: Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator * * *.

2. 30 C.F.R. 57.9-3 provides: Powered mobile equipment shall be provided with adequate brakes.

3. 30 C.F.R. 57.9-37 provides: Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

FINDINGS OF FACT

1. The FMC Corporation (FMC) is the operator of a large underground mine in Sweetwater County, Wyoming, known as the FMC Mine.

2. The subject mine produces trona and its products enter interstate commerce and its operation affects interstate commerce.

3. For all FMC mines, a total of 2,660,064 man hours are worked annually; for the subject mine, a total of 2,624,064 man hours are worked annually.

4. The subject mine had 245 paid violations of mandatory health and safety standards between August 14, 1978 and August 13, 1980. Twenty-nine of these violations involved the standards in 30 C.F.R. 57.9; none involved violations of 57.9-1; two involved violations of 57.9-3; two involved violations of 57.9-37. In addition, I take notice of a violation of 57.9-37 occurring on August 9, 1980 (for which, however, the citation was not issued until August 13, 1980) which is the subject of a separate proceeding, Docket No. WEST 81-259-M. I conclude that this history is moderate in view of the size of the mine and penalties otherwise appropriate should not be increased because of it.

5. The parties have stipulated that penalties assessed in the proceeding will not affect FMC's ability to continue in business.

6. All of the citations involved in this proceeding were abated in good faith.

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7. On August 12, 1980, John Nordgran, an employee of FMC, operated a lube truck in the subject mine.

8. The running brake and the parking brake on the lube truck were not operating properly on August 12, 1980: the parking brake wear surface was worn out on one side and covered with grease and oil on the other. The wheel brakes were substantially worn. The brakes were caked with trona which can cause or contribute to brake failure. Washing stations were available throughout the mine for washing trona accumulations from brakes on vehicles.

9. FMC posted a notice on the lube truck in question which read: ATTENTION OPERATOR WILL MAKE DAILY PRE-SHIFT EXAMINATION OF EQUIPMENT TO BE USED. (Tires, Brakes, Ground Trip, Dust Control System, Cables, Controls, etc.). REPORT ANY EQUIPMENT DEFECTS AFFECTING SAFETY IMMEDIATELY TO YOUR FOREMAN OR SUPERVISOR.

10. FMC enforces the requirement for preshift inspections pursuant to its labor agreement.

11. Lube truck operator Nordgran knew on August 12, 1980 that the brakes on his vehicle were inadequate. He did not report this fact to his supervisor. The condition of the brakes was not known to FMC.

12. On August 12, 1980, Nordgran performed his normal duties of lubricating mine equipment beginning at 4:00 p.m. At about 9:30 p.m. he drove his truck to the Number 11 drill in No. 7 room, No. 3 crosscut intersection in the subject mine to lubricate the drill.

13. Nordgran parked his lube truck on a slight incline sloping down toward the drill. He did not set the parking brake and he did not block the wheels nor was the vehicle turned into a rib.

14. No blocks or chocks were provided on the lube truck in question.

15. FMC has policies and regulations requiring mobile equipment operators to block or turn a vehicle into a rib when parked on a grade and to set the brakes of the vehicle when unattended.

16. The policies above described were enforced through disciplinary actions pursuant to the Labor Relations Agreement between FMC and the union representing the employees.

17. There was no record that Mr. Nordgran required close supervision or that he had previously violated safety regulations of FMC.

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18. While Nordgran was lubricating the drill referred to in Finding of Fact No. 12, the lube truck rolled toward him and he was struck and pinned between the truck and the drill. Nordgran sustained two broken toes and contusions to his right leg.

19. There were no supervisory personnel in the area at the time of the injury and the failure of Nordgran to block the truck or turn it into a rib was not known to FMC.

20. The inadequate brakes contributed to the accident involving Nordgran.

21. On August 14, 1980, Federal Mine Inspector Robert Kinterknecht issued Citation No. 576909 alleging a violation on August 12, 1980 of 30 C.F.R. 57.9-37 because the lube truck in question was parked on a grade of about one percent without being blocked or turned into a rib. The inspector issued Citation No. 576910 on the same day charging a violation of 30 C.F.R. 57.9-3 because adequate brakes were not provided on the lube truck.

22. On August 27, 1980, Inspector Kinterknecht issued Citation No. 576918 charging a violation of 30 C.F.R. 57.9-1 because the employee involved stated he had not reported the inadequate brakes to his supervisor but continued to operate the vehicle.

ISSUES

1. Did FMC violate the mandatory standards charged in the citations?
2. If it did, what is the appropriate penalty for each violation?

CONCLUSIONS OF LAW

1. On August 12, 1980, an FMC employee left the mobile equipment he was operating unattended without setting the brakes. He parked the vehicle on a grade without blocking it or turning it into a bank or rib. This constituted a violation of 30 C.F.R. 57.9-37

2. The violation directly resulted in an injury to a miner. I conclude that the violation was serious even though the injury was to a miner whose misconduct contributed to the violation. I do not believe that fact lessens the seriousness of the violation. This proceeding is not a private action for damages, but the enforcement of a public policy to bring a greater degree of safety to the nation's mines.

3. The parties have stipulated that FMC had and enforced policies requiring the blocking of a truck parked on a grade or turning the vehicle into a rib. However, blocks were not provided for the vehicle in question. The driver stated that he did not block the truck because it was too much bother for him to find blocks. The vehicle was normally used to service equipment in various parts of the mine, and when service was performed, it would be parked. Under the circumstances, a prudent mine operator would provide blocks for such a vehicle. I conclude that FMC was negligent in failing to provide blocks for the vehicle in question.

4. The parties have agreed that on August 12, 1980, the lube truck in question did not have adequate brakes. This constitutes a violation of 30 C.F.R. 57.9-3.

5. The violation (inadequate brakes) contributed to the injury which occurred on August 12, 1980. Inadequate brakes on a vehicle used in an underground mine is self-evidently a serious safety hazard. I conclude that the violation was serious.

6. FMC argues that the inadequate condition of the brakes was solely caused by the failure of the vehicle driver to remove the caked trona dust from them and to report the condition of the brakes to his supervisor. However, the stipulated facts show that the parking brake wear surface was "worn out on one side and covered with grease and oil on the other wear surface. The wheel brakes were substantially worn." The caking of trona dust on the brake surfaces provided an additional inadequacy. However, the brakes were clearly inadequate without reference to the trona caking and had obviously been inadequate for some time. I conclude that FMC should have known of the inadequate brakes and was negligent for failing to have them repaired.

7. The parties have stipulated that the operator of the lube truck did not report the inadequate brakes on his vehicle - an equipment defect affecting safety - to the operator, and that it was not recorded by the operator. This constitutes a violation of 30 C.F.R. 57.9-1.

8. The failure to report a safety defect is a serious matter, but in this case I conclude that the seriousness of the violation is merged in the violation of 30 C.F.R. 57.9-3. That is, the operating of the vehicle without adequate brakes was the serious violation. The failure to report it, I conclude was nonserious.

9. There is no indication in the record that FMC knew or had reason to have known of the violation. I conclude that the violation was not caused by FMC's negligence.

ORDER

IT IS ORDERED that the contest of Citation No. 576918 is DENIED and the citation is AFFIRMED.

IT IS FURTHER ORDERED that the FMC Corporation, Respondent in the civil penalty proceeding, shall, within 30 days of the date of this decision, pay the following civil penalties for the violations found herein to have occurred:

Citation	30 C.F.R. Standard	Penalty
576909	57.9-37	\$ 500
576910	57.9-3	500
576918	57.9-1	40
	Total	\$1,040

James A. Broderick
Administrative Law Judge