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

FMC CORPORATION, CONTESTANT	Application for Review
v.	Docket No. WEST 81-169-RM Citation/Order No. 577094; 1/6/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	FMC Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding
v.	Docket No. WEST 81-278-M A.O. No. 48-00152-05044 H
FMC CORPORATION, RESPONDENT	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 an order of Judge John F. Cook for hearing and for the purpose of this decision. FMC Corporation filed an Application for Review and Notice of Contest of an order/citation issued under section 107(a) and 104(a) of the Federal Mine Safety and Health Act. The order charged that an imminent danger existed and the citation alleged three violations of mandatory safety standards. The Secretary filed a civil penalty proceeding seeking penalties for the alleged violations. Pursuant to notice, the cases were heard before Judge Cook on August 13, 1981 in Green River, Wyoming. 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 transcript of the hearing and the exhibits introduced before Judge Cook, and the contentions of the parties in their posthearing briefs.

Federal Mine Inspector Merrill Wolford testified on behalf of the Secretary; Steven M. Simpson, Darrel R. Nystrom, Ted K. Walker and Karl D. Christensen testified on behalf of FMC. On the basis of the entire record and considering the contentions of the parties, I make the following decision:

STATUTORY PROVISIONS

1. Section 107(a) of the Act provides in part:

If, upon any inspection or investigation of a coal or other mine which is subject to the Act, an authorized representative of the Secretary finds that an imminent danger exists, [he] . . . shall . . . issue an order requiring the operator . . . to cause all persons, except those persons referred to in section 104(c), to be withdrawn from, and to be prohibited from entering [the area of danger]

2. Section 3(j) of the Act provides: "imminent danger' means the existence of any condition or practice in a coal or other mine, which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

REGULATORY PROVISIONS

1. 30 C.F.R. 57.9-3 provides: "Powered mobile equipment shall be provided with adequate brakes."

2. 30 C.F.R. 57.4-24(c) provides: "Fire extinguishers and fire suppression devices shall be: * * * replaced with a fully charged extinguisher or device, or recharged immediately, after any discharge is made from the extinguisher or device."

3. 30 C.F.R. 57.9-2 provides: "Equipment defects affecting safety shall be corrected before the equipment is used."

FINDINGS OF FACT

1. The FMC Corporation (FMC) is the operator of a large mine in Sweetwater County, Wyoming known as the FMC Mine.
2. The operation of FMC's mine 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 a total of 254 paid violations of mandatory standards between January 6, 1979 and January 5, 1981. Thirty-two of these violations involved the standards in 30 C.F.R. 57.9; 12 involved violations of 57.9-2; two involved violations of 57.9-3. Eighteen involved the standards in 30 C.F.R. 57.4, four of which involved violations of 57.4-24. I conclude that the history is moderate in view of the size of the mine, and penalties otherwise appropriate will not be increased because of it.

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

6. The violations alleged in the order/citation involved herein were abated in good faith.

7. On January 6, 1981, at about 10:00 a.m., Darrel Nystrom, a mechanic employed by FMC, drove the No. 7 Size Brute mantrip an unknown distance to the 3 shaft warehouse in the mine to pick up some parts. Earlier that morning, Steven M. Simpson, also a mechanic at FMC, drove the same vehicle a distance of about 1 mile underground to the place where Nystrom obtained it. Both men made a general inspection of the vehicle before driving it including the brake pedal. Simpson noticed that the leaf spring was disconnected from the shackle. Neither found any difficulty with the brakes, either before or during their operation of the vehicle.

8. On January 6, 1981, Federal Mine Inspector Merrill Wolford conducted a regular inspection of the subject mine. He saw the No. 7 Sign Brute Mantrip being driven up to the shop area, so he inspected it.

9. On January 6, 1981, the front brake lining on the subject vehicle was broken off and hanging down underneath the vehicle. The line had been flattened and doubled to seal it off and prevent the fluid from braking. This rendered the front wheel brakes of the vehicle inoperative. The rear-wheel brakes were operative at this time.

10. On January 6, 1981, the battery behind the passenger seat in the subject vehicle had exposed, uncovered connectors and had a hole of undetermined size in the top of it.

11. On January 6, 1981, the fire extinguisher on the vehicle was completely discharged.

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12. On January 6, 1981, the front spring was separated from the shackle because of a missing bolt.

13. On January 6, 1981, Inspector Wolford issued a combined order and citation in which he found that the condition of the vehicle constituted an imminent danger and ordered it removed from service until repaired. He also cited FMC for three alleged violations of mandatory safety standards.

14. The vehicle in question was ordinarily not driven at a speed in excess of 10 miles per hour. The rear wheel brakes are capable of stopping the vehicle under normal circumstances, but the braking capacity of the vehicle was diminished by the absence of the front-wheel brakes.

15. The condition of the brakes was evident and should have been known to FMC.

16. The condition of the spring shackle could affect the driver's ability to steer and stop the vehicle. It was an equipment defect affecting safety.

17. The hole in the battery could have caused an injury by permitting acid to be splashed on a passenger in the mantrip. However, the hole was very small and the battery out of the way of passengers so the likelihood was injury was small. This was an equipment defect affecting safety.

18. The conditions described in Findings 16 and 17 were evident and should have been known to FMC.

19. The discharged fire extinguisher on the vehicle was evident and should have been known to FMC.

ISSUES

1. Did the condition of the No. 7 Sign Brute Mantrip in the subject mine on January 6, 1981, constitute an imminent danger?

2. Did the vehicle in question have adequate brakes on January 6, 1981?

3. If a violation of 30 C.F.R. 57.9-3 is found, what is the appropriate penalty?

4. Did the condition of the battery and the spring shackle on the subject vehicle on January 6, 1981, constitute equipment defects affecting safety?

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5. If a violation of 30 C.F.R. 57.9-2 is found, what is the appropriate penalty?
6. What is the appropriate penalty for the violation of 30 C.F.R. 57.4-24?

CONCLUSIONS OF LAW

1. Imminent Danger

The imminent danger withdrawal order by its terms resulted from all of the cited conditions. However, the inspector testified that neither the condition of the battery nor the condition of the fire extinguisher was by itself an imminent danger, and there is no evidence that either of these conditions was related to or exacerbated the conditions caused by the brakes or spring shackle. Ultimately, I conclude, the existence vel non of an imminent danger depends upon the condition of the brakes, and possibly the extent to which that condition may have been exacerbated by the condition of the spring shackle.

Typically, an imminent danger withdrawal order involves a general condition of the mine: float dust, gas, a roof condition. See *Old Ben Coal Corporation v. Interior Board*, 525 F.2d 25 (7th Cir. 1975); *Freeman Coal Mining Company v. Interior Board*, 504 2d 741 (7th Cir. 1974); *Cyprus Industrial Mineral Corp. v. Secretary of Labor*, 1 FMSHRC 2069 (1978). Of course, an item of equipment can cause an imminent danger where its condition may threaten an explosion or fire. Further, a vehicle without any brakes could be an imminent danger - to its occupants and to others in the mine. The condition found here is a closer question. It seems reasonable to conclude that a vehicle equipped with four wheel brakes has diminished stopping power if its front brakes are inoperative. But the vehicle normally is operated at 10 miles per hour or less. It was driven prior to the order by two operators a total of more than a mile and no difficulty in stopping was encountered. After issuing the order, the inspector permitted FMC to move the vehicle which argues against a finding of imminent danger. I conclude that the condition of the vehicle in question was not such as could reasonably be expected to cause death or serious physical harm before the condition could be abated.

UNWARRANTABLE FAILURE

No order or citation was issued under section 104(d)(1) of the Act for an unwarrantable failure violation. The Secretary argues that if the condition of the vehicle did not constitute an imminent danger, it was an unwarrantable failure violation under section 104(d)(1). Since FMC was not charged with an unwarrantable failure violation, I conclude that this question is not before me in these proceedings, and I do not rule on it.

ADEQUATE BRAKES

I conclude that a vehicle equipped with front and rear wheel brakes does not have "adequate" brakes within the meaning of that term in 30 C.F.R. 57.9-3 when the front brakes are inoperative. Since the front brakes supply more than 50 percent of the stopping power, the violation of the standard was serious. The condition was obvious to visual inspection and therefore the violation was due to the negligence of FMC.

EQUIPMENT DEFECTS

The condition of the spring shackle and the condition of the battery were defects affecting safety. Therefore, a violation of 30 C.F.R. 57.9-2 was shown. Each of the conditions was moderately serious since either could have resulted in injury. Both were due to FMC's negligence.

FIRE EXTINGUISHER

FMC has conceded that the discharged fire extinguisher constituted a violation of 30 C.F.R. 57.4-24(c). The condition was moderately serious even though there is no specific requirement that a fire extinguisher be on the vehicle, since in an emergency, a miner might rely on a functioning extinguisher being on the truck. The condition was long standing and caused by FMC's negligence.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that the application for review of Order No. 577094 IS GRANTED and the ORDER, as an order, IS VACATED.

IT IS FURTHER ORDERED that the Citation 577094 is AFFIRMED.

IT IS FURTHER ORDERED that FMC Corporation shall, within 30 days of the date of this order, pay the following civil penalties for violations found herein to have occurred.

30 C.F.R. Standard	Penalty
57.9-3	\$ 500
57.9-2	250
57.4-24(c)	150
\$ Total	\$ 900

James A. Broderick
Administrative Law Judge