

CCASE:
SOL (MSHA) V. MINERALS EXPLORATION
DDATE:
19830128
TTEXT:

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. WEST 82-136-M
A.C. No. 48-01181-05040

v.

Sweetwater Uranium Project

MINERALS EXPLORATION COMPANY,
RESPONDENT

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
U.S. Anthony D. Weber, Esq., Los Angeles, California,
for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act", in which the Secretary charges the Minerals Exploration Company with one violation of the mandatory standard at 30 C.F.R. | 55.9-3. The cited standard requires that "powered mobile equipment shall be provided with adequate brakes." The general issue before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation.

I have previously determined in connection with violations alleged under the identical standard at 30 C.F.R. | 56.9-3, that the regulatory language does not provide sufficient guidance as to what is to be considered "adequate brakes." (FOOTNOTE 1) In order to pass constitutional muster, a statute or standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. General Construction Co., 269 U.S. 385, 391 (1926). Rather, "laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972). See Secretary v. Alabama By-Products Corporation, 4 FMSHRC 36D (December 9, 1982).

In deciding whether powered mobile equipment is provided with adequate brakes under 30 C.F.R. | 55.9-3, the alleged violative condition may appropriately be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action. Alabama By-Products, supra.

The one citation at issue in this case (No. 578809) charges as follows:

A Michigan 280 rubber tired dozer No. 2506 was being operated in the C-3 Pit with inadequate brakes. It would slowly stop on level ground at less than 5 miles per hour. The parking brake would not hold on level ground with the engine idling and transmission engaged. This created a hazard to the operator and other persons working in the pit.

On the unique facts of this case, I cannot conclude that a reasonably prudent person familiar with the factual circumstances surrounding this allegedly hazardous condition would recognize that there was in fact a hazard warranting corrective action within the purview of the cited regulation. This determination is based in part upon the failure of MSHA to have followed the standardized brake testing procedures approved by industry and accepted by MSHA. According to MSHA inspector Merrill Wolford, brake testing standards established by the Society of Automotive Engineers (SAE) then existed for rubber-tired construction equipment such as the Michigan 280 dozer here cited (See Appendix A attached hereto). Wolford conceded that the SAE tests were the only "recognized" tests, but for reasons not made clear, he devised and followed his own testing procedures in this case which admittedly did not meet the SAE standards. (FOOTNOTE 2) By devising and using his own ad hoc testing procedures, procedures not shown to have had scientific validity or reliability, the inspector was, indeed, exercising completely arbitrary enforcement practices.

The actual tests performed by Wolford, first on the parking brake and then on the service brakes, were described by him in the following colloquy:

A. I asked the operator to set the parking brake, to engage the transmission on the vehicle with the engine in idle speed, and then let off of the service brakes, and the vehicle moved forward with no hesitation %y(3)5C then I asked the operator -- explained to him what I wanted to do: to have him back up a ways. And while he was doing that, I checked the backup alarm

~170

-- the audible warning device, rather -- and asked him to run it forward at slow speed and when I waved to him, to set the service brakes. Q. Did he do that? A. Yes, sir. Q. When you say "slow speed," how fast did he proceed? A. Estimated at 3 to 5 miles an hour. Q. Now, when you signaled him to set the service brake, what then occurred? A. The vehicle slowly came to a halt -- what I estimated to be in excess of what would constitute adequate brakes -- approximately 25, 30 feet. (T. 14-15).

In light of Inspector Wolford's admission that his own ad hoc testing procedures were not the recognized industry and MSHA procedures, that Wolford's testing procedures had no correlation to those recognized SAE procedures and that no evidence has been presented to show that Wolford's testing procedures have any scientific validity or reliability, I cannot conclude that a reasonably prudent person would have recognized that the brakes on the Michigan 280 loader here cited were inadequate in that they presented a hazard warranting corrective action within the purview of 30 CFR 55.9-3.(FOOTNOTE 3) Accordingly, the operator was denied fair notice of any alleged violation and the citation must be vacated.

Even assuming, arguendo, that the apparent partial admission by safety supervisor Casey Conway that the parking brakes were indeed bad (see footnote 3, supra) and that therefore due process problems stemming from the operator's asserted lack of notice may be considered waived, I do not find from the credible evidence of record that MSHA has in any event met its burden of proving that the parking and service brakes on the Michigan 280 loader here cited were indeed "inadequate". For the reasons previously stated, I reject the unproven testing procedures followed by Inspector Wolford. In any event, I give no weight to Conway's apparent admissions that the parking brakes were bad, in light of his testimony that he had no expertise in brake testing procedures and that indeed he was then confused by the procedures followed by Woford.

~171

On the other hand, I accord significant weight to the firsthand testimony of David Martinez, the man who was actually operating the cited dozer both before and after it was cited, that the brakes were working "real good". I also accord significant weight to the firsthand testimony of field mechanic George Baker, who drove the cited dozer to the shop after it was cited. He too found the brakes to be in "very good" condition and upon inspection, found no need for repairs. In addition, inspection documents produced at hearing, buttressed by the testimony of Conway, show that the cited dozer had been subjected to a "150 hour" inspection, including an inspection for brake adjustment, only the day before the citation herein was issued. I find it unlikely that the cited dozer would have been returned to service with defective brakes after such an inspection.

Finally, I accept as credible the testimony of mine operations supervisor Jerome Connor that he did not personally believe that the brakes on the cited dozer were defective and that he agreed to withdraw the dozer to the shop only to avoid an argument with Inspector Wolford. Under these circumstances, I do not consider either Connor's silence in the face of accusations by the inspector or his agreement to withdraw the cited equipment to constitute admissions that either the testing procedures followed by Wolford were proper, or that the brakes on the cited equipment were indeed defective. For these additional reasons, then, I find that the cited standard was not violated in this case and that Citation No. 578809 should be vacated.

ORDER

Citation No. 578809 is hereby vacated and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

1 Secretary v. Concrete Materials, Inc., 2 FMSHRC 3105 (1980); Secretary v. A.H. Smith, 4 FMSHRC 1371 (1982) rev. grntd. September 3, 1982.

2 Wolford testified at one point that it would have been hazardous to have followed the SAE tests on the cited machine, but he also testified that he nevertheless offered to perform those tests for the operator and was prepared to do so. Wolford subsequently recanted and admitted that he did not in fact advise the operator that he would perform the SAE tests. I do not find Wolford's testimony to be credible in light of these inconsistencies.

3 Wolford also claims that Casey Conway, the company safety supervisor, admitted after Wolford's testing that the brakes were bad. Ordinarily, if the operator has actual knowledge that a cited condition is hazardous, the problem of fair notice does not exist. Cape and Vineyard Division of the New Bedford Gas and

Edison Light Company v. OSHRC, 512 F.2d 1148 (1st Cir. 1975). However, Conway testified, and credibly I believe, that although he did initially agree with Wolford, he was inexperienced in brake testing and confused by Wolford's tests and that indeed he subsequently learned in talking with his maintenance "people" that Wolford's tests were indeed improper. Under the circumstances, I do not find Conway's apparent admission to be probative and, because of his inexperience in the testing of brakes, I would not consider him to have been a qualified person sufficiently "familiar with the factual circumstances surrounding the allegedly hazardous condition". Alabama By-Products, supra.

~172

APPENDIX A

SAE

STANDARD

RECOMMENDED PRACTICE

INFORMATION REPORT

J-i 1152

This material appears in the
SAE Handbook

The Engineering Resource For Advance Mobility
SAE, 400 COMMONWEALTH DRIVE, WARRENDALE, PA 15096

Report of the Construction Machinery Technical Committee, approved July 1976, editorial change April 1980. This document incorporates material from SAE J166, J236, J237, J319, and J1080, which have been discontinued. Rationale statement available.

1. Scope-Minimum performance criteria for service braking systems, emergency stopping systems, and parking systems for off-highway, rubber-tired, self-propelled loaders, dumpers, tractor scrapers, graders, cranes, ex-ed. cavators, and tractors with dozer are provided in this SAE Recommended Practice. Refer to SAE J1057 (July, 1973) and J1116 (July, 1975) (Sections 1.1, 1.2, and 2) for machine identification.

2. Purpose

2.1 To define minimum braking system performance for in-service machines.

Note: This is not a design standard.

2.2 To provide test criteria by which machine braking system compliance may be verified.

3. Braking Systems

3.1 Service Braking System-The primary system of any type used for stopping and holding the machine.

3.2 Emergency Stopping System-The system used for stopping in the event of any single failure in the service braking system.

3.3 Parking System-A system to hold stopped machine stationary

Note: Common Components-The above braking systems may use common components. However, a failure of a common component shall reduce the effectiveness of the machines stopping capability below the emergency stopping performance as defined in paragraph 4.2.1.

4. Braking System Performance

4.1 Service Braking System-All tractor scrapers and dumpers have braked wheels on at least one axle of the prime mover and one at each trailing unit. All other machines shall have at least two braked with (one right hand and one left hand).

4.1.1 Stopping Performance-The service braking system, when test in accordance with Section 5, shall stop the machine within the distance satisfied in the appropriate table.

4.1.2 Holding Performance-The service braking system shall have capability equivalent to holding the machine stationary on a dry swept concrete

APPENDIX A p.3

The criteria shall apply to both forward and reverse directions.

4.1.3 System Recovery-With the machine stationary, the service braking systems primary power source shall have capability of delivering at least 70% of maximum brake pressure measured at the brakes when the brakes are fully applied twelve (12) times at the rate of four (4) applications per minute with the engine at maximum governed rpm for dumpers, tractor scrapers, cranes and excavators; and twenty (20) times at the rate of six (6) applications per minute with the engine at maximum governed rpm for loaders, graders, and tied tractors with dozer.

4.1.4 Warning Device-The service braking system using stored energy shall be equipped with a warning device which actuates before system energy drops below 50% of the manufacturers specified maximum operating energy level. The device shall be readily visible and/or audible to the operator, and provide a continuous warning. Gauges indicating pressure or vacuum shall not be acceptable to meet these requirements.

4.2 Emergency Stopping System-All machines shall be equipped with an emergency stopping system.

4.2.1 Stopping Performance-The emergency stopping system, when tested in accordance with Section 5, shall stop the machine within the distances shown in parenthesis in the appropriate table.

4.2.2 Emergency Application-The emergency system shall be capable of being applied by a person seated in the operator's seat. The system shall be arranged so that it cannot be released from the operator's seat after any application unless immediate reapplication can be made from the operator's seat to stop the machine or combination of machines.

4.2.2.1 In addition to the manual control, the emergency stopping system may also be applied automatically. If an automatic emergency stopping system is used, the automatic application shall occur after the warning device is actuated.

4.3 Parking System-All machines shall be equipped with a parking system capable of being applied by a person seated in the operator's seat.

4.3.1 Parking System Performance-The parking system shall have capability equivalent to holding the machine stationary on a 15% dry swept concrete grade under all conditions of loading. This criterion shall apply to both forward and reverse directions.

4.3.2 Remain Applied-The parking system while applied shall maintain the parking performance in compliance with paragraph 4.3.1 despite any contraction of the brake parts, exhaustion of the source of energy or leakage of any kind.

APPENDIX A p.4

5. Brake Criteria

5.1 Facilities and Instrumentation

5.1.1 The test course shall consist of a clean swept, level, dry concrete or other specified surface of adequate length to conduct the test. The approach will be of sufficient length, smoothness, and uniformity of grade to assure stabilized travel speed of the machine. The braking surface shall not have over 1% grade in the direction of travel, or more than 3% grade at right angles to the direction of travel.

5.1.2 An instrument to measure the stopping distance with an accuracy of $\pm 1\%$.

5.1.3 A means to measure the test speed with an accuracy of $\pm 5\%$ of actual speed.

5.1.4 A means for determining the machine mass (weight).

5.1.5 A means for measuring the braking system energy level as required in paragraphs 4.1.3 and 4.1.4.

5.1.6 A means for measuring the force required by the operator to actuate the braking system.

5.2 Test Requirements

5.2.1 All tests to be conducted with the applicable braking system fully charged.

5.2.2 Stopping tests to be conducted under the following conditions:

5.2.3 Stopping distance to be measured in metres (feet) from the point at which the brake control is applied to the point at which the machine is stopped.

5.2.4 Stopping tests to be conducted from at least one speed for each machine as listed:

5.2.5 Stopping test shall be conducted with the transmission in gear commensurate with the speed required in paragraph 5.2.4. The power train may be disengaged prior to completing the stop.

5.2.6 Auxiliary retarders shall not be used in the test unless the retarder is simultaneously actuated by the applicable brake system control.

5.2.7 Maximum allowable operator forces to actuate braking systems as defined in Section 3 are 890 N (200 lb) for a foot operated system, and 535 N (120 lb) for a hand operated system.