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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. WEVA 82-106
A. C. No. 46-03839-03013V

v.

FORD COAL COMPANY,
RESPONDENT

No. 2 Surface Mine

DECISION

Appearances: Matthew Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Susan Cannon-Ryan, Denny & Caldwell, Charleston, West Virginia, for Respondent

Before: Judge Lasher

A hearing on the merits was held in Charleston, West Virginia, on December 15-16, 1982, at which both parties were represented by counsel. After consideration of the evidence submitted by both parties and proposed findings and conclusions proffered by counsel during closing argument, a decision was entered on the record. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This proceeding was initiated by the filing of a petition for assessment of civil penalty by the Secretary of Labor on December 28, 1981, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a), (1977).

This proceeding involves three alleged violations which were initiated by the issuance of a citation and two withdrawal orders alleging violations of 30 CFR 77.1605(b). The Secretary initially sought a penalty of \$400 each for the three violations.

Citation No. 886455

This part of my decision is confined to Citation No. 886455 which was issued on August 24, 1981.

Citation No. 886455 describes the violative condition as follows: "The 769 Caterpillar haulage truck (CO No. 2217) was not equipped with adequate brakes in that the diaphragm was

ruptured in the air brake chamber which provided air pressure for the left and right front brakes, this truck was being operated on a steep elevated roadway of about 19 per cent grade, going down to a valley fill at the mine worksite."

The citation was issued at 0900 hours and was terminated at 1300 hours on the same day. The regulation allegedly violated, 30 CFR 77.1605(b), is part of a series of regulations pertaining to "Loading and haulage equipment; installation" and it provides: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

The Respondent contends that the key word in the regulation is "adequate" and that even though the front brakes were shown to be defective to an unspecified degree, the primary braking system on the 769(b) Caterpillar truck in question were the rear brakes and the rear brakes constituted an adequate braking system for the truck within the meaning of the regulation. The Secretary on the other hand contends that the brakes were inadequate.

Inspector James E. Haynes, a surface mining inspector for the Mine Safety and Health Administration (MSHA) issued Citation No. 886455 during an inspection of the Respondent's No. 2 mine.

The Respondent, Ford Coal Company, a West Virginia enterprise, has two surface mines and at the No. 2 mine involved here the annual tonnage is 108,747 tons and the payroll consists of 24 employees. The "controlling entity" of Respondent is an individual, L. W. Hamilton, and his annual production as an operator is 681,719 tons from the two mines of Ford Coal Company and other entities which he controls.

In proximity to the time the citation was issued there was one working shift at the Respondent's No. 2 mine and the Respondent had in use four trucks similar in type to the one involved in this proceeding (769 Caterpillar) and two Euclid trucks and employed six drivers to operate the same. One of the functions of the truck in question-and presumably the other four Caterpillar trucks-was to carry overburden which had been removed from an area called the upper Kittaning coal seam, to a place called the lower Kittaning coal pit where a fill was under construction. In the process of doing so, the trucks would negotiate an elevated haulage roadway constructed of compacted rock approximately 1,250 feet in length and 50 feet wide except for a 200-foot stretch toward the bottom of the haulageway where its width was approximately 30 feet wide. (See testimony of Respondent's dozer operator, Gerald Spencer).

The percent of grade along the haulageway, which runs along the side of a hill for most of its distance, is approximately 19 percent near the top and at the bottom and ranges from 12 percent to 19 percent in the middle. The distance in vertical drop from the top of the Kittaning coal seam to the bottom is 160 feet which as previously noted is negotiated by the haulageway's distance of 1,250 feet. Along the left side of the haulageway are berms which range from three to five feet in height and are approximately ten to twelve feet in width at the base. About halfway down the haulageway is a dropoff which actually runs to the left of the haulageway approximately 800 feet and which at its maximum height is 55 feet.

The front brakes of the 769(b) truck in question are "air-over-oil" actuated expander tube type and they have a brake lining surface of 496 square inches. The rear brakes are Caterpillar oil-cooled, air-over-oil actuated disc brakes which provide both surface and retarder braking and which have a braking surface of 7,869 square inches. In addition the truck has a parking brake and an emergency brake which is air-over-oil actuated, and which has independent air reservoirs for both the front and rear brakes which, if air pressure drops below 80 pounds per square inch, sounds a horn to warn the operator. If air pressure drops to 45 pounds per square inch, the emergency brakes automatically apply to stop the truck. (Exhibit R-1, Page 2).

The truck's surface brakes include all four wheels. The rear brakes which are disc brakes, according to the Caterpillar Company's specification guide (Exhibit R-1), resist fading even with repeated braking. If pressure drops below 60 PSI in the surface retarder system, a buzzer and red light warn the operator of the truck. The rear disc brakes are designed to absorb high torque loads at the wheels, reducing stress on the power train. The adjustment free discs and each rear brake are fade resistant because the oil which surrounds them is continuously cooled by a water-to-oil heat exchanger. The rear brakes have two master cylinders, one for each wheel, while the front brakes have one master cylinder (Exhibit R-1, Page 3; testimony of Linwood Young). The front brakes can be deactivated by a "front wheel brake control lever" on the righthand side of the dashboard of the truck (shown in Exhibit R-2 at Page 7), the purpose of which will be shown more clearly subsequently herein.

The truck which weighs 60,760 pounds has a capacity of 35 tons (Exhibit R-1, Pages 1 and 5) and is designed to go down grades steeper than 20 percent. (Testimony of Linwood Young; See also brake performance chart, Exhibit R-1, Page 6). Thus, although the grade of the haulageway in question is steep, the truck is designed

to handle steeper grades.

Because of its width, there is room on the haulageway for trucks going in different directions to pass each other.

On August 24, 1981, and at the time observed by Inspector Haynes, the diaphragm was ruptured in the air brake chamber which provided air pressure for the left and right front brakes. The degree to which this condition reduced braking power of the front brakes is conjectural.(FOOTNOTE 1)

The surface of the haulageway is wet approximately 50 percent of the time (testimony of Frederick Miller), and when the surface is wet a majority of the truck drivers transporting overburden over the haulageway would drive the Caterpillar trucks with the front brakes switched off, the reason being that when the road is slippery applying the front brakes could create the situation where the front wheels would lock up and cause the rear axle to swing around (testimony of Frederick Miller).(FOOTNOTE 2)

The dispositive question involved in this proceeding is whether the brakes on the truck were "inadequate," or as stated in the precise language of the regulation itself, whether this piece of mobile equipment(FOOTNOTE 3) was "equipped with adequate brakes."

Various subissues not having direct relevance to this issue were litigated at some length during this proceeding presumably for purposes of lessening the credibility of witnesses and the weight to be attached to various aspects of their testimony, and also for the purpose of creating a factual background from which inferences could be drawn. However, in the final analysis, the critical question in this case comes down to a determination of what facts are to govern the "adequacy" issue. One of the difficulties is that the regulation itself provides no clear guidance as to what is to be considered "adequate brakes." Such a regulation necessarily must be articulated in somewhat general terms in order to cover the myriad of equipment used in the mining industry. In considering what constitutes adequate brakes at least some of the factors which must be considered are the overall braking system of a given vehicle, the uses to which it is to be put, and the conditions under

which it is to be used--all of which should be considered in the background of the experiences and common understanding of the particular facet of the industry in question. No specific factual standard for determination of what "adequate brakes" would mean insofar as the truck in question is concerned was delineated by the Secretary, nor has such standard been delineated to my knowledge by the Secretary either through administrative action, promulgation of other regulations, or in other ways. Thus, the standard by which "inadequacy" is to be measured is absent from the Secretary's proof, if indeed there is such an ascertainable standard.
(FOOTNOTE 4)

The clear language of the regulation establishes a requirement only that mobile equipment shall be equipped with adequate brakes. Such a regulation as this without specific standards does not provide constitutionally sufficient warning to a mine operator unless interpreted to penalize only conduct or conditions unacceptable in light of the common understanding and experience of those working in the industry. See *United States v. Petrillo*, 332 U.S. 1, 91 L.Ed. 1877 (1947). Unless the mine operator has actual knowledge that a condition or practice is hazardous, the test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against some hazard. *Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSHA*, 512 F.2d 1148 (1st Cir., 1975).

In the instant proceeding there was evidence with respect to the common understanding and experience of those working in the industry from Respondent's witness Linwood Young, an employee of Walker Machinery (an equipment supplier of Respondent

and a representative of Caterpillar), to the effect that field tests had been performed on the Caterpillar truck in the early 1970's with the 769 truck carrying a gross test weight of approximately 131,000 pounds (similar to a truck carrying a 70,000 pound load) travelling at a speed of 20 miles per hour and rated in terms of stopping ability with both the rear and front brakes on and with only the rear brakes on. Tested with the front brakes deactivated the stopping distance was 74 feet, whereas with the front and rear brakes both operating the stopping distance was 54 feet. According to Mr. Young, whose testimony I credit and which was not rebutted by the Secretary, OSHA guidelines mandate a performance acceptability of 143 feet stopping distance. Thus, even with the front brakes off such tests indicate that the 769(b) truck has approximately a 100 percent margin of safety. In addition, other clear un rebutted testimony in this case indicates that the primary, if not overall, braking payload on the 769(b) truck is carried in the rear braking system. This is also reflected in the truck's specifications by the disparity between the braking surfaces of the rear brake (7,869 square inches) and the front brake (496 square inches), the fact that there is actually a cut-off switch on the dashboard to deactivate the front braking system, and the very credible evidence in the record that approximately 50 percent of the time it might be preferable practice to drive the truck--when the surface of the haulage way is wet--with the front braking system deactivated.

Can it be said that the defect in the front braking system caused this truck to be without "adequate" brakes? I find that on the basis of the evidence of record that the answer to this question is no, particularly when it appears that for a significant percentage of the time it is the preferable practice to operate without the front brakes and that a majority of the drivers do so.(FOOTNOTE 5)

Accordingly, I find that the condition of the truck in question at the time it was cited by Inspector Haynes on August 24, 1981, was such that it was provided with adequate brakes within the meaning of the pertinent regulation. Since I find no merit in the Secretary's petition with regard to this citation, Citation No. 886455 is vacated.

Withdrawal Order No. 886456

The proposed settlement involving Withdrawal Order No. 886456 dated August 24, 1981, was approved at the hearing. The Petitioner's motion at the hearing to modify this Section 104(d)(1) Withdrawal Order to a simple Section 104(a) citation with the "significant and substantial" allegation contained on the face of the order deleted was granted. See Secretary v. Consolidation Coal Company, 4 FMSHRC 1791 (October 29, 1982). The parties agreed that an appropriate penalty for the citation is \$50 since it appeared that the hazard contemplated was less than originally believed, thus diminishing the penalty assessment factor of seriousness.

In view of the modification and resultant reduction in the gravity of the violation, the settlement is approved.

Withdrawal Order No. 886459

The Secretary's motion to withdraw the penalty assessment petition insofar as it related to Withdrawal Order No. 886459 was granted at the hearing and the Order was vacated.

ORDER

(1) Citation No. 886455 is VACATED.

(2) With respect to Order of Withdrawal No. 886456, Respondent, within 30 days from the date hereof, shall pay the Secretary of Labor a penalty in the sum of \$50.00.

(3) Withdrawal Order No. 886459 is VACATED.

(4) All proposed findings of fact and conclusions of law not expressly incorporated in this decision are rejected.

Michael A. Lasher, Jr.
Judge

FOOTNOTES START HERE-

1 Inspector Haynes in his testimony indicated that because the front brake chamber was ruptured there were no foot brakes. There is, however, no evidence that the front brakes were inoperable and the testimony of Frederick Miller, the mine superintendent at the No. 2 mine, to the effect that while there was an air leak in the front brakes "they were not inoperable" is credited.

2 I infer from Miller's testimony that loss of control of the truck could occur on the haulageway's grade by applying the brakes to the front wheels.

3 The parties stipulated that the 769(b) truck in question was "mobile equipment" within the meaning of the regulation.

4 The Secretary did introduce evidence in the form of an opinion expressed by Inspector Haynes which was apparently based completely on the hearsay opinion of a mechanic with whom he discussed the matter the day before the hearing commenced. This opinion stated by the Inspector was that the truck, because of the defect in the front brakes, "would lose 30 to 35 percent of its stopping ability." One is left to speculate, however, whether the mechanic's opinion of this loss was based on an assumption that all of the front braking power was lost--which I, again, note was apparently the Inspector's belief--or based on the assumption that there was some degree of loss which was unspecified resulting from the ruptured diaphragm.

I am unable to accept this opinion of the Inspector which was nothing more than his expression of the opinion of another who was not present for cross-examination, whose qualifications to render such an opinion were not delineated, and the bases for whose opinion on this critical question are unknown since they were not expressed.

Likewise, the opinion of Robert Dearfield, the second witness who testified for the Secretary in this proceeding, that after the truck was "fixed" subsequent to issuance of the citation he "could stop it in almost half the distance" was overwhelmed by the evidence presented by Respondent, the acceptance of which is reflected in my general fact findings here and above.

5 As Respondent points out (1) it was charged, (2) this proceeding was processed, and (3) this matter was litigated on the basis of an allegation of violation of 30 CFR 77.1605(b). While it is possible that a violation of 30 CFR 77.1606(c) occurred, that was not litigated or established by evidence which I can accept in this proceeding. This latter regulation (77.1606(c)) provides "equipment defects affecting safety shall be corrected before the equipment is used."