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SOL (MSHA) V. JOHN MIDDLETON
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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. CENT 80-356-M

v.

JOHN H. MIDDLETON, RESPONDENT

Apperances:
J. Phillip Smith, Esq., Office of the Solicitor, United States Department of Labor Arlington, Virginia 22203,
for the Petitioner

John H. Middleton, appearing pro se,
Lyons, Kansas,
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor of the United States, the individual responsible with enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act) charges John Middleton with violating Section 110(c) of the Act.

Section 110(c), now codified at 30 U.S.C. 820(c), provides:

> (c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any other incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Secretary specifically charges John Middleton with knowingly authorizing, ordering, or carrying out a corporate operator's violation of 30 C.F.R. Section 56.9-3,(FOOTNOTE 1) a mandatory safety standard adopted under the Act.

After notice to the parties a hearing on the merits was held in Wichita, Kansas.

The parties filed post trial briefs.

Issues

The issues are whether a violation of the Act occurred, and, if so, what penalty is appropriate.

Applicable Case Law

In Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8 (1981), the Commission held section 110(c) of the Act to be constitutional and enunciated the critical elements which constitute a violation of this section. The corporate operator must first be found to have violated the Act. In addition, a violation occurs if a person in authority knows or has reason to know of the violative condition and fails to act on the basis of that information.

The Commission adopted the rule that "knowingly" as used in the Act does not necessarily have any connotation indicating bad faith, evil purpose, or criminal intent. Rather, its meaning is the same as in contract law: knowing means having actual knowledge or having acquired sufficient facts that the person should have known of the condition. 3 FMSHRC at 16.

Petitioner's Evidence

Petitioner's witnesses included MSHA inspectors Elmer D. King and David P. Lilly. In addition, Richard Jones and Richard Brayton, employees of Tobias and Birchenough, Inc., (Tobias), at the time of the inspection testified in the case.

On November 16, 1979 MSHA inspector Elmer King, a person experienced in mining, inspected an Allis Chalmers front end loader on the worksite of Tobias (King 7-9, 12, 19, 20; C2).

The inspection was made after Dick Jones, Tobias' superintendent, called the MSHA Topeka office and complained the loader had no brakes (King 9, 10, 17; Jones 44, 45).

King went to the site, checked the loader and found it had no brakes. king tested the loader. The brakes would not hold on an incline or on an elevated roadway. He ran three tests in various operating modes. There were absolutely "no brakes" (king 10, 12, 23). The loader operator could not stop the vehicle other than by using forward and reverse gears. In this hazardous situation a loader could overturn and cause a severe injury or a fatality (King 21, 22, 26; Lilly 67, 68).

King then issued an imminent danger withdrawal order. He served it on John Middleton, Tobias' president (King 11, 12, 14, 20; C1).

Brayton, the loader operator, stated this was the only loader at the plant. Brayton was operating the loader on orders from John Middleton (King 17, 24). The brakes had been inadequate for five or six weeks (Brayton 55).

At the time of the November 16 inspection this loader, a powered mobile piece of equipment, was hauling sand and gravel to a stockpile (King, 14, 16).

Jones and Brayton had complained to John Middleton that the loader needed brakes. The brakes were adjusted October 29, 1979 but the adjustment didn't take care of the problem and they were in worse condition on November 16th (King 24, 25, 32; Jones 42, 43, 47; Brayton 52, 54, 57; Lilly 61, 62).

The brakes were adjusted on both occasions by Sellers Tractor Company of Salina. The initial Sellers service report, dated October 29, states in part: "Also rebuilt master brake cylinder, and adjusted brakes best as possible. They are all fourn worn out" (Lilly 62-63; Exhibit C4).

After the November 16 withdrawal order Sellers performed the following work on the loader; "Removed all four wheels and wheel cylinder. Cleaned up and had drum turned. Had to replace one new wheel cylinder. Rest were rust spotted and rough. Turned drums and new 5/16 lining with 1/8 shim lining. Put kit in one wheel cylinder. Checked planetaries and found one set of rear planetary shafts bad and one rear ring gear. Rest OK. New bearing and seals and assembled, adjusted and bled brakes. They worked OK. Had given through (sic) master cylinder before. Got good brakes" (Exhibit C5).

Before the November 11 inspection, and specifically on November 1st, the MSHA representative inspected this same loader. At that time he felt the brakes were getting bad and should be repaired (King 27, 36, 37). At that time Jones said he'd bring it to Middleton's attention (King 37). On November 1st, the brakes held in the tests conducted by the inspector. But they did not hold to the point where they were adequate (King 37). King, at the hearing, opted that he should have withdrawn the equipment at that time (King 37).

At the conclusion of the November 1st inspection King told

loader operator Brayton that he would stop in Lyons and advise Middleton of his findings. But the inspector later changed his mind about contacting Middleton because Jones was identified as being in charge of safety and

health on Tobias' legal identity form (King 37-40). As a result the inspector didn't go to Lyons (at the home office, nine miles away) to discuss the situation with Middleton (King 39, 40, 49).

The loader was never taken out of service after Jones complained to Middleton. While Jones wanted it withdrawn he didn't have the authority to go over John Middleton (Jones 44, 45). Middleton never told anyone the machine had to be operated but he knew it was in daily use (Jones 45).

Tobias, a sand and gravel operation, sells its products to various places. Its products are used in the construction of public roads (King 13, 14).

The vehicle cited here, a 1971 model Allis Chalmers weighing 10 1/4 tons, was manufactured in La Porte, Indiana (King 12, 13).

Tobias, the corporate operator, paid a civil penalty for this violation. Payment was made at the assessment office level (King 25, 26).

Respondent's Evidence

John Middleton testified on his own behalf.

The first information coming to John Middleton's attention about the brakes was when Richard Brayton told him he was having brake problems. The same day Middleton had superintendent Schwerdtfeger check the brakes. The superintendent reported there was a "brake problem" as well as a problem with the master cylinder (Middleton 72-74).

Middleton called Sellers to do the repair work. After the service Middleton contacted Sellers foreman. The foreman confirmed the fact that the brakes needed repair. Middleton felt that the brakes were sufficient because Sellers has never been hesistant about advising Tobias if there were no brakes (Middleton 75-76). No further statements were made about the brakes to John Middleton until the imminent danger order was received on November 16 (Middleton 76-77).

John Middleton takes exception to the claim that he was grossly negligent and that he endangered the life and limb of his workers (Middleton 80). Middleton agrees there was a brake problem but he did not know the loader was without brakes (Middleton 80).

Tobias is a medium sized sand and gravel operation producing annually 20,000 yards of concrete. The company employs nine to thirteen workers (Middleton 78, 79, 81).

Discussion

The evidence in this case establishes a violation. Tobias and Birchenough, Inc., and its president, John Middleton knew or should have known the brakes were inadequate on or immediately

after October 29. On that date Sellers, the brake repair service, adjusted the brakes. They said they couldn't be adjusted further and had to be repaired (King 49). In fact

the Sellers service report, dated October 29, states in part as follows: "Also rebuilt master brake cylinder and adjusted brakes best as possible. They are all four worn out" (Exhibit C-4). If all four brakes are "worn out" the braking system can hardly be said to be adequate. Middleton also knew on October 29th that there was such a problem. He was also advised of that fact by Brayton the loader operator and Jones, his foreman (Middleton 73, 74, 75). But nothing was done until the imminent danger order was issued.

John Middleton, both at the hearing and in his post trial brief, asserts he knew there was a brake problem but he didn't consider it imminently dangerous. Further, he did not knowingly ask anyone to risk life and limb (Middleton 85, 86, Brief).

The test imposed by the regulation is whether the brakes were adequate. Since they were not and since John Middleton should have known of such inadequacy the citation should be affirmed.

CIVIL PENALTY

Section 110(i) of the Act, [30 U.S.C. 820(i)], provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The Secretary proposes a civil penalty of $500 for this violation. The statute authorizes a civil penalty not to exceed $10,000, 30 U.S.C. 820(a).

In considering the statutory criteria I note that John Middleton does not have an adverse prior history. But John Middleton should have known of this condition and the gravity of the violation was severe. Concerning good faith it does appear that John Middleton abated in a rapid fashion after the events of November 16th.

On balance I deem that the proposed civil penalty of $500 is appropriate.

The Solicitor and John Middleton has filed post trial briefs which have been most helpful in analyzing the record and in defining the issues. However, to the extent they are inconsistent with this decision, they are rejected.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 541426 and the proposed civil penalty of $500 are affirmed.

2. Respondent is ordered to pay said penalty to the Secretary of Labor within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

FOOTNOTE START HERE-

1 The cited standard provides as follows:

56.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.