

CCASE:
MINERALS EXPLORATION V. SOL (MSHA)
DDATE:
19840214
TTEXT:

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

MINERALS EXPLORATION COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

DOCKET No. WEST 80-339-RM
Citation/Order No. 576877;
dated, 4/29/80
Docket No. WEST 80-340-RM
Citation/Order No. 576878;
dated, 4/29/80

Sweetwater Uranium Project

DECISION

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

Before: Judge Morris

Contestant, Minerals Exploration Company, contests two
citations issued by the Secretary of Labor on behalf of the Mine
Safety and Health Administration, (MSHA), under the authority of
the Federal Mine Safety and Health Act, 30 U.S.C. | 801 et seq.

After notice to the parties a hearing on the merits began on
October 5, 1982 in Laramie, Wyoming.

Contestant filed a post trial brief.

Jurisdiction

The parties admit jurisdiction (Tr. 3-4).

Issue

The issue is whether contestant violated the regulation.

Summary of the Cases

MSHA Inspector Merrill Wolford issued citations 576877 and 576878. These citations are now respectively docketed in WEST 80-339-RM and WEST 80-340-RM.

The condition or practice referred to in Citation 576877 reads as follows:

Terex Scraper #2401 was being operated with the brake retarder disconnected. The control line was plugged off. The right rear service brake was worn out rubbing metal to metal. Statements by operators and checking safety records indicates these defects had been turned into the operator and had not been repaired. This vehicle is ordered withdrawn from service until repaired.

The same portion of Citation 576878 reads as follows:

Terex Scraper #2406 was being operated with the brake retarder disconnected. The control line was plugged off. The front service brakes were way out of adjustment and the rear brake quick air release did not operate properly. Statements by operators and checking safety records indicates these defects had been turned into the operator and had not been repaired. This vehicle is ordered withdrawn from service until repaired.

Each of the citations alleges that contestant violated Title 30, Code of Federal Regulations, Section 55.9-3. (FOOTNOTE 1)

MSHA's EVIDENCE

The inspector issued these citations on the same day. In addition to various unrelated safety problems the scrapers share identical conditions: The retarder connector to the transmission of each was disconnected (Tr. 47-50, Exhibits D1, D2).

The retarders are part of a system to help control and brake the scrapers. They reverse the pressure in the transmission; this in turn slows down the input shaft in the engine. This then slows the revolutions per minute of the engine. By reducing output shaft the speed of the Terex is retarded (Tr. 50).

In addition to the disconnected retarder, the right rear service brake of Terex scraper No. 2401 was worn out. It was rubbing metal to metal (Tr. 51, 61). The inspector conducted a moving as well as static test of the brakes (Tr. 61). He crawled under the vehicle to check the worn out lining.

~318

In addition, the brake drum was badly grooved (Tr. 51). There were insufficient pads to contact the brake drums. This resulted in a lack of brakes on that wheel (Tr. 51).

The vehicle operator stated that he had reported safety defects to the company but nothing had been done (Tr. 51-52). After the inspection contestant's maintenance people said they had a hairline fracture in the brake drum. (Tr. 51-52).

The hazard presented here centers on the stopping ability of this vehicle (Tr. 52).

Terex No. 2406 (Citation 576878) had other problems. The front service brakes were out of adjustment. The inspector inserted paper under the brake drum with the brake depressed. Since he was able to remove the paper the inspector considered the brakes were not working (Tr. 53, 54). In addition, the quick air release did not operate properly (Tr. 53). The hazards in each situation were similar (Tr. 55).

Inspector Wolford didn't recall if he issued verbal orders that the vehicles be removed from service. He wrote the citation sometime later (Tr. 57, 58).

The inspector didn't know if the retarders were part of the braking system referred to in any of the SAE standards (Tr. 59). Retarders work most effectively when the revolutions per minute (RPMs) are at their highest level. Conversely, they are least effective at the lowest RPMs (Tr. 60).

Inspector Wolford, on occasion, will conduct more extensive moving braking tests than he did here. But, in view of the condition of the brakes, he thought any additional testing would be a hazard (Tr. 67).

Bobby Jacobsen, Edward Johnson, Rocky Anaya, Jerome Connor, George Kelly and Kenneth Evans, testified for contestant.

Bobby Jacobsen, the general maintenance foreman, a person with considerable experience, indicated a retarder on a Terex scraper bears no relationship to its braking system (Tr. 68-73). A retarder on such equipment slows down the revolutions per minute. It thereby slows the speed of the engine as well as the transmission (Tr. 72).

Prior to April 29, 1980 the engines of the company's scrapers were overheating. Three of the company officials decided to disconnect the retarders. As a result there was less of a heating problem. Jacobsen has disconnected retarders under the same circumstances (Tr. 74, 76).

~319

On the day of the inspection two Terex operators came into the yard. The inspectors said the brakes were out of adjustment. Wolford further stated that it constituted a willful violation to disconnect the retarders (Tr. 77-78).

At Wolford's request Jacobsen told him how the retarders worked (Tr. 78, 79).

Jacobsen didn't test the brakes on the scrapers because it was close to a shift change; however, Lonnie Johnson tested them. Johnson saw no problem. (Tr. 80-82, 96). Jacobsen, who got under the vehicle, saw no evidence of metal to metal rubbing on No. 2401. They'd be looking for lining touching bolts and screws (Tr. 95). You should not be able to get a piece of paper between a brake drum and a shoe (Tr. 97). In Jacobsen's opinion a vehicle is capable of having adequate brakes even though one brake does not touch its drum (Tr. 97-98).

The next day Terex representatives, assisted by contestant's mechanic, adjusted the brakes. Further, the retarders were reconnected (Tr. 80). Jacobsen didn't consider that a brake was inadequate even though the brake shoe was worn down to the metal (Tr. 89).

The first 5A 18 scrapers and the first Terex scrapers were not fitted with retarders; neither were a lot of CATERPILLARS (Tr. 75, 90).

If a scraper is moving at a high RPMs rate a proper retarder would reduce such RPMs. This, in turn, would slow the vehicle (Tr. 91). A retarder cannot totally stop a vehicle, as an adequate braking system will do (Tr. 83, 91-92).

Edward Johnson, operator of scraper No. 2406, was present during the 30 to 45 minute inspection. He participated in the brake test and answered the inspector's questions (Tr. 140-144). Johnson didn't see the inspector measure any distances and he was not advised of the results (Tr. 144). Johnson had never operated his scraper with the retarder connected but had he known it was disconnected he would have reported it as an equipment defect (Tr. 146). He thought the retarders were part of the brake system (Tr. 148).

The brakes on the scraper, confirmed by the operator's checklist, were "adequate" (Tr. 148, 154, Exhibit D3). When he marked the checklist showing the brakes not in proper condition he was referring to the retarder system (Tr. 149, Exhibit D3).

~320

As the inspectors left, the scraper operators were told to resume work (Tr. 152).

Anaya described his scraper's brakes as "good" on flat ground (Tr. 131).

Jerome Connor, contestant's shift supervisor, indicated the inspection of the scrapers took 30 minutes (Tr. 121). The vehicles were stopped where they were inspected. The retarders were inoperative and there was some problem with the quick release air valve on the brakes (Tr. 122, 126). No citations or orders were issued when they concluded the inspection of the scrapers. Connor first heard about the citations about 4 p.m. This was after the scrapers had been returned to work (Tr. 123, 124).

Connor had tested the brakes several times. Prior to Wolford's inspection Connor had received no complaints concerning inadequate brakes (Tr. 125).

Connor told Wolford that the retarders were not the main braking system (Tr. 127).

George Kelly, an employee of Southwest Kenworth, is familiar with retarders. Except for some warranty work in 1976, he has had no relationship with contestant. Engine and transmission overheating are fairly common equipment problems. Retarders are disconnected to alleviate the overheating (Tr. 107-111, 113). Kelly recommends retarders be disconnected if the scrapers are on level ground (Tr. 111).

Retarders will not stop a Terex scraper. The retarders, useful at higher RPMs, are almost useless at lower RPMs (Tr. 112). It retards the engine and the speed of a scraper on steep grades (Tr. 114).

The Terex brake system consists of an air compressor, four air chambers, a foot pedal which operates an air valve and two brake shoes on each wheel (Tr. 116).

If a Terex was moving at 15 miles per hour a retarder could reduce its speed ten per cent (Tr. 116).

Kenneth Evans, contestant's mine superintendent, was familiar with heavy equipment as well as retarders (Tr. 100-103). The retarder's function is to help the engine slow down so it will not overspeed (Tr. 104).

Retarders have always overheated the 35E units. If used correctly the retarders reduce the RPMs (Tr. 106-107).

Discussion

The credibility determinations on these citations are mixed.

Each citation contains a common allegation that the brake retarders were disconnected. Therefore, the Secretary asserts the Terex equipment lacked adequate brakes.

On the credibility issues raised concerning the retarders I credit contestant's evidence. Its witnesses are Jacobsen, Johnson, Connor, Kelly and Evans. With a certain cohesiveness, they all confirm the view that the retarders bear no relationship to the braking system. George Kelly's testimony was particularly persuasive on these issues. He was a disinterested witness with considerable experience involving Terex scrapers.

On the other hand, it is apparent that Inspector Wolford was unsure of the function of the retarders. This is confirmed by his testimony to that effect. Further, the inspector was unsure whether the SAE standards include retarders as part of a braking system (Tr. 59).

In short, I conclude that retarders under certain conditions will reduce an engines' RPMs and, consequently, they will reduce the speed of a vehicle. However, down shifting the transmission on an automobile also will reduce its speed but no one considers that a transmission is part of a braking system.

For these reasons the allegations in each citation concerning the retarders should be stricken.

Notwithstanding the foregoing ruling on the retarders, I find a violation of the regulation in that the brakes were otherwise inadequate. On this issue I credit Inspector Wolford's testimony.

Concerning the 2401 scraper: the right rear service brake was rubbing metal to metal and worn out (Tr. 51, 61). The drum was badly grooved. Insufficient pads resulted in a lack of brakes (Tr. 51). Contestant's maintenance people discovered that a brake drum had a hairline fracture (Tr. 52).

Concerning the 2406 scraper: the front service brakes were out of adjustment, the quick air release was not operating properly; the drums, with the brake depressed, would not grab paper inserted next to the pads (Tr. 53, 55).

Jacobsen's testimony to the contrary is not persuasive. He admits he didn't test the brakes. Lonnie Johnson's evidence that he saw no problem with the brakes is, at best, hearsay (Tr. 80-82).

Jacobsen's testimony is somewhat conflicting when he states you should not be able to get a piece of paper between a brake

~322

drum and a shoe (Tr. 97). But then he contradicts himself when he states that a vehicle has adequate brakes even though one brake does not touch its drum (Tr. 97-98). On this point I reject Jacobsen's testimony. If one of four shoes on a vehicle's brake drum do not contact the drum then such brakes are inadequate as a matter of law.

Contestant's witnesses Johnson, Connor and Anaya all confirm that Inspector Wolford inspected the scrapers (Tr. 120, 136, 137, 140-144).

In its post trial brief (pages 5-8) contestant asserts that MSHA is estopped to maintain that the brakes were inadequate because of Inspector's Wolford delay in withdrawing the vehicles.

I disagree. Estoppel does not generally lie against the federal government. King Knob Coal Company, 3 FMSHRC 1417 (1981); Burgess Mining and Construction Corporation, 3 FMSHRC 296 (1981). MSHA's case does not fail merely because the inspection occurred at 11 a.m. and the withdrawal order was not issued until 4 p.m. Contestant cited no authority for this position and I find none.

Contrary to contestant's arguments the weight of the evidence supports MSHA. Particularly destructive of contestant's case, as to scraper 2406, is the testimony of witness Johnson, the scraper operator. On the day before the inspection he had marked the operator's daily checklist (Exhibit D3) to indicate that the brakes were not in proper operation. His explanation was that he was referring to the retarder system (Tr. 149). The witness established no foundation to reach such a conclusion. He had never operated any equipment with retarders on it; he didn't know they were disconnected on the date of the inspection; further, he hadn't been instructed on the retarder's use. (Tr. 145, 146). For these reasons I am inclined to believe the brakes were not in proper condition.

For the foregoing reasons the notices of contest filed in each case should be dismissed.

CONCLUSIONS OF LAW

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are made:

1. The Commission has jurisdiction to decide these cases.
2. The allegations in each citation relating to the retarders on the Terex equipment are stricken.

