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SOL (MSHA) V. AMHERST COAL
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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 83-127
A/O No: 46-01369-03509

v.

MacGregor Cleaning Plant

AMHERST COAL COMPANY,
RESPONDENT

AMHERST COAL COMPANY,
CONTESTANT

CONTEST PROCEEDINGS

Docket No. WEVA 82-329-R
Citation No: 908667; 6/16/82

v.

SECRETARY OF LABOR, ET AL
RESPONDENT

MacGregor Cleaning Plant

DECISION

Appearances: James B. Crawford, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner,
Robert G. McLusky, Esq., Jackson, Kelly, Holt
and O'Farrell, Charleston, West Virginia, for
the Respondent

Before: Judge Moore

On June 9, 1982, at approximately 9.30 P.M. one coal miner died and another was seriously injured as the result of a collision between the six railroad cars the victims were riding on and nine runaway railroad cars that were traveling about 60 miles per hour at the time of impact. The six cars that the victims were dropping were traveling at a walking speed.

While the only issue directly involved in the case before me concerns the derail switch located between the preparation plant where the cars are loaded and the storage area some 3,000 feet downhill where the fatal collision occurred, in order to describe what happened it is necessary to discuss events and alleged violations which have already been settled in other proceedings. In this mine, it is downhill from the east end of the preparation plant to the west end and at a somewhat steeper grade (2-1/2%) from the west

end of the preparation plant to the storage area. Car dropping is therefore done by gravity. The car dropper gets on the platform of the railroad car, releases the brakes and controls the speed of the car until it gets to the track and area of that track where it is needed. In this case car dropper Tom Gilco got on three coupled railroad cars at the east end of the preparation plant and loosened the brake. After rolling a short way, and in accordance with standard procedure, he tightened the brake to see if it would stop the three cars--it would not. He then got off of the first car and ran back to the second car and boarded it. The brake on that car was also ineffective.

Mr. Gilco, realizing that a runaway was beginning, jumped from the cars and yelled a warning. The warning was heard and broadcast over a loud speaker so that everyone in the preparation plant knew that a collision was imminent. The three runaway cars crashed into six cars in the loading area and the collision broke the restraining cable and started another six cars rolling toward the storage area. There were now nine runaway cars and they all ran through the derail switch without being derailed. The derail switch is alleged to have been in the open position, a position that should have derailed the runaway cars. Instead, they proceeded on towards the storage area and as stated before attained a speed of approximately 60 miles per hour before crashing into the cars that the victims were dropping. The estimated speed is derived from the fact that a Mr. Goodman looked at the derail switch position indicator and saw that it was in the open position which should have derailed the cars. He then observed the runaway cars going through the derail switch and he and a Mr. Waugh jumped in a pickup truck to try to beat the cars to the storage area. The pickup truck caught up with the runaways but could not pass them. The pickup truck's lights were flashing and its horn was blowing in an attempted warning to the two victims, Mr. Butcher and Shawver, but the warning was not heard. The surviving victim, Mr. Butcher, testified at the hearing and said that he had heard no warning whatsoever.

As stated earlier the only part of this sequence that is involved in the instant case concerns the alleged violation of 30 CFR 77.1605(p) as far as the derail device is concerned. The section in question provides:

"positive-acting stop-locks, derail devices track skates or other adequate means shall be installed wherever necessary to protect persons from runaway or moving railroad equipment."

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According to A DICTIONARY OF MINING, MINERAL AND RELATED TERMS published by the Bureau of Mines, a derail or derailer is "[a] safety device for derailling mine cars...". The definition says nothing about a device that will derail or not derail depending on the way it is set. I interpret this to mean that the device for derailling must not only be present "wherever necessary" but must be maintained in a derail position. By all accounts the device involved here was in the derail position when the runaway cars passed through.

On June 4, a group of cars had passed through this same derail switch and the workers that observed it stated that the switch was in the derail position. There was considerable evidence that the derail switch was inadequate and there was considerable evidence that it was adequate and effective. Inspector Davis' theory was that since the track curves to the left when going in a downhill direction right at the spot where the derail switch opens at the left rail, that the centrifugal force would be rocking the cars toward the right rail and the flange of the left wheel might miss the moveable section of the derailer and thus not derail the car. He said the cars would be swaying and presented evidence that the right rail was thinner than the left rail. For this to happen however, 36 wheels would have to be in exactly the right place in order that each one of them escape the derailer. I do not see how that could happen. The rails were tested with a jack and it was found that the right rail would not move. There was also testimony that the moveable part of the derailer was actuated by an arm which was somewhat flexible or was loose. Mr. Butcher said that the piece was loose and Mr. Davis speculated that because of the flexibility of the arm that actuated the switch the moving part could be deflected inward either two and one half inches or six inches depending on the flexibility of the actuating arm.

A Department of Transportation team inspected the switch after the accident (applicant's exhibit No. 1). In its report it is stated on page 9 "notwithstanding sworn statements to the contrary, it is 99% improbable that nine coal hoppers passed safely through this derail while it was in the open or derail position ... Results of post-accident inspection of the derail indicate no probable cause to suspect that the derail malfunctioned".(Footnote 1). On June 8, the day before the accident, the foreman noted in the on-shift report "derailer needs slack took out". (Gov.Exh. 6). The next day, at 1.15 A.M. another foreman, in his pre-shift examiner's report (Gov.Exh. 7) stated "derail switch below plant was approved by C & O on 6/4/82, & condition of switch has not changed." There was other confirming testimony about the examination by C & O personnel. After the accident a Federal inspector inspected the switch and said there was nothing wrong with it.

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I have no crystal ball nor the type of training that would allow me to study the photographs and measurements between the rails and determine what the experts failed to determine i.e. whether the nine cars actually escaped the derailing device or whether someone inadvertently closed the switch. All I know is that the cars were not derailed and as a result one man was killed and another seriously injured. Certainly a derail device was "necessary" between the preparation plant and the storage area and inasmuch as the runaway cars were not derailed there did not exist a type of derail device required by the standard. If the switch was closed it was not a derail device and if it was open it was not effective. I therefore find a violation and affirm the citation.

C & O Railroad Company was responsible for the maintenance of the track itself and this included the track parts of the derail switch. Respondent was responsible for the switch motor but there had been no indication of any trouble with the switch motor. If the switch was actually set in the correct position and failed to derail the cars, C & O Railroad would share in the responsibility for this accident. Respondent would share because it was on notice that other cars had gone through the derail. The fact that Amherst knew about the previous failure of the derail, the fact that Amherst employees operated the derail together with the fact that Amherst employees were the victims of the accident are sufficient to establish respondent's partial liability.

The Secretary can cite the "independent contractor, the owner or both." *Cyprus Industrial Minerals v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir.1981). Also *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794 (4th Cir.1981). While the Secretary's choice is not without limit, the facts of this case are not similar to those in *Secretary of Labor v. Phillips Uranium Corporation*, 4 FMSHRC 549 (April 1982). (Footnote 2) If the switch was

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inadvertently closed, however, by respondents, C & O would bear no responsibility. The railroad has paid a penalty of \$2,000. I do not know its history of violations, but the other criteria would be the same for the railroad and the company if they were equally negligent.

I find that while the Secretary has established a violation he has failed to carry the burden of proving that Amherst was more negligent and thus should be penalized more than the railroad. I find equal negligence. I will assess the same penalty as that assessed against the railroad.

Amherst Coal Company is consequently ORDERED to pay to MSHA, within 30 days, a civil penalty in the amount of \$2,000.

Charles C. Moore, Jr.
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 Government Exhibit 5 is the same report but for some reason it does not contain the quoted language.

~Footnote_two

2 At page 553

The shortcomings of the Secretary's decision to proceed against Phillips here are made all the more evident by viewing the facts in light of the basic statutory scheme. Large, skilled contractors were retained for their expertise in an important and familiar facet of mine construction, i.e., the sinking of shafts and related underground construction activities. The hiring of contractors to perform the specialized task of shaft construction is common in the mining industry. The contractors, conceded to be "operators" subject to the Act, failed to comply with various safety standards. Yet Phillips, rather than the contractors, was cited; penalties were sought against Phillips, rather than the contractors; the violations would be entered into Phillips' history of violations, rather than the contractors' histories, resulting in increased penalties for Phillips rather than the contractors in later cases; Phillips, rather than the contractors could be subjected to the stringent section 104(d) sequence of citations and orders; and Phillips rather than the contractors could be subjected to the stringent section 104(e) pattern of violation provisions. Compared to Phillips' burden in bearing the full brunt of the effects of the violations committed by the contractors, the contractors would proceed to the next jobsite with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions should the contractors again proceed to engage in unsafe practices.