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FMC CORPORATION v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FMC CORPORATION, CONTESTANT	CONTEST PROCEEDING
	Docket No. WEST 82-30-RM
v.	Citation No. 578746; 9/10/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	FMC Mine

DECISION

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant;
Margaret Miller, Esq., and James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding arose upon the filing of a Notice of Contest by Contestant on October 14, 1981, seeking, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), to challenge Citation No. 578746 dated September 10, 1981, which was issued pursuant to Section 104(a) of the Act and which alleges a violation of 30 C.F.R. 48.27(a) in August, 1981 (Tr. 57-63) at Contestant's mine in Sweetwater County, Wyoming, to wit:

> "A miner was assigned to operate a Case front-end loader to clean up a spill at the Mono plant. The employee had not received new task training in the operation of the Case front-end loader. The employee had been trained to operate a dozer at the stockpile. Part of his job required that he operate the loader on the off shift. This citation was written and delivered after investigation was finalized on the date September 14, 1981. This citation is not S & S."

The standard allegedly violated, 30 C.F.R. 48.27(a), provides as follows:

> "Training of miners assigned to a task in which they have had no previous experience; minimum courses of instruction.

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(a) Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, ground control machine and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

(1) Health and safety aspects and safe operating procedures for work tasks, equipment, or machinery. The training shall include instruction in the health and safety aspects and safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment; and,

(2)(i) Supervised practice during nonproduction. The training shall include supervised practice in the assigned tasks, and the performance of work duties at time or places where production is not the primary objective; or,

(ii) Supervised operation during production. The training shall include, while under direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

(3) New or modified machines and equipment. Equipment and machine operators shall be instructed in safe operating procedures applicable to new or modified machines or equipment to be installed or put into operation in the mine, which require new or different operating procedures.

(4) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

(c) Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety

> and health aspects and safe work procedures of the task, prior to performing such task.
> (d) All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced."
>
> (emphasis added)

The matter came on for hearing on March 6, 1985, in Salt Lake City, Utah. Both parties were represented by counsel.

The miner described in the Citation, Billy J. Young, was employed during the month of August, 1981, and at all times pertinent to this proceeding at the FMC (FOOTNOTE.1) mine as a "Stockpile A" operator at the so-called "Baby Sesqui" area of the mine (Tr. 62, 89 91, 107, 109, 130). His regular and customary duties included the operation of a D-7 Caterpillar bulldozer (herein "dozer") upon which he had been trained (Tr. 32, 92, 115, 116, 131). Other than on the indeterminate day in August, 1981, referred to in the Citation (FOOTNOTE.2) he had not been required to operate a Case front-end loader ("loader") and he had not been trained to operate-or certified as qualified to operate-the same (Tr. 20, 21, 23, 24, 27, 28, 48, 89, 116, Ct.Ex. 1, 121, 122, 172). It also appears that it was not normal procedure for Contestant to ask its dozer operators to operate loaders (Tr. 100, 102, 109, 110).

One of Contestant's several contentions in this matter is that 30 C.F.R. 48.27(a) fails to give fair notice of what is required and is constitutionally invalid. This is found to lack merit.

The regulation consists of three sentences. The general rule, a training requirement, appears in the first sentence and two exceptions thereto are then set forth--one each in the two remaining sentences. Stripped of superfluities and insofar as

pertinent here the regulation provides that mobile equipment operators shall not perform new work tasks in the "mobile equipment operator" category until (prescribed) training has been completed. I find no ambiguity in it insofar as its applicability here is concerned. As the Commission has previously noted, many safety and health hazards standards must be simple and brief in order to be "broadly adaptable" to myriad circumstances. Alabama By-Products Corporation, 4 FMSHRC 2128 (1982). In that case, the standard involved, 30 C.F.R. 75.1725(a) required that equipment be maintained in "safe operating condition." The Commission rejected the mine operator's contentions of unconstitutional vagueness and that it had not been given fair notice of the nature of the violation and applied the following test in doing so:

> ". . . in deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately 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 within the purview of the applicable regulation."

In comparing 1725(a) with the standard involved here, 48.27(a), I find little to choose between in the amount and degree of judgmental exercise and difficulty to which a reasonably prudent person would be put in deciding (1) whether a piece of equipment is in "safe" operating condition and (2) whether a particular assignment is a "new" work task.

Under section 48.27(a), "mobile equipment operator" patently is one of the categories within which a new work task, in the abstract, can be performed, and operating a new (different) piece of mobile equipment is reasonably and logically one of the ways in which one would perform a "new" work task within the "mobile equipment operator" category. Indeed, it is the first situation which comes to mind. Nevertheless, determining whether a change in a mobile equipment operator's work assignment does indeed constitute a "new work task" as contemplated by this regulation requires a case-by-case approach. Secretary v. U.S. Steel Corporation, 5 FMSHRC 3 (1983). It should not be overlooked that the miner here was not only given a different machine to operate but he also was sent to an entirely different work area.

Where there is an assignment to use new equipment, it would seem that if the new piece of equipment is essentially the same as that regularly operated by the miner in the past, or the same as a piece of equipment upon which the miner has been previously

trained and certified, then the work task involved in the new assignment should not be deemed a "new" work task and additional training should not be required. If the new equipment is significantly different, than a contrary result must obtain.(FOOTNOTE.3)

The issue posed here is thus primarily factual in nature and is fairly stated in Contestant's post-hearing brief: ". . . whether or not the operation of the Case front-end loader by said miner constituted a task separate from the operation of the D-7 bulldozer and was therefore required to have new task training under 30 C.F.R. 48.27(a)." We turn now to the facts bearing on this issue.

Substantial and reliable evidence in the record indicates that Contestant's training procedure was to place a miner-trainee "with an experienced operator on different pieces of equipment." Such miner, upon being trained, would then be certified to operate the particular piece of equipment by Jack Freeze, Contestant's "task trainer" and certifier (Tr. 20, 22, 27-29, 35, 116, 134, 135).

Contestant's normal training procedure was to give separate task training for the loader and for the dozer (Tr. 27, 35-37, 51, 52, 101, 102, 132, 136, 137). For one to learn the basic operation of a Case front-end loader takes approximately 4-hours after which a period ranging from 8-hours to 4 or 5 days is required with the trainer sitting with the miner/trainee for the miner to learn the loader's operation (Tr. 166).

The loader is substantially different from the dozer because of significant differences in weight, size, function, controls, brakes, speed, moving mechanism (wheels v. track) and steering mechanism (Tr. 32, 43-47, 54, 94, 162-164).

On the day in question, Ralph Pedem, the lead foreman at the Baby Sesqui plant, advised Mr. Young of the spill at the Mono plant and instructed him to get the loader from the yard crew who normally operated it and take it to the Mono plant and clean up the spill in a confined and small area about the size of a two-stall garage) (Tr. 22, 24, 93, 125, 176). The distance traveled by Mr. Young from the Sesqui plant to the Mono plant was approximately 1,000 yards (Tr. 92). Mr. Young was alone when he first got on the loader and he experienced trouble in starting it (Tr. 24).

It was Mr. Pedem's responsibility to decide whether or not Young was sufficiently trained to operate the loader (Tr. 138). Mr. Pedem had not trained Mr. Young on the loader, had not seen him operate a loader (Tr. 23, 24) and did not believe Young had been trained on the loader (Tr. 24).

After experiencing difficulty starting the loader. Mr. Young drove it from the Baby Sesqui area to the Mono plant (Tr. 174) where he operated it in a slow (FOOTNOTE 4) but safe manner for approximately 30 minutes (Tr. 159). His performance in operating the loader displeased the foreman, Carl Pearson (Tr. 160, 179, 181). Mr. Pearson, did not remove him from this duty, however (Tr. 159-161, 168-171, 180), and Mr. Young himself ultimately requested that Mario Shassetz, a helper at the Mono plant, replace him on the loader (Tr. 26, 99, 160-161, 180). Mr. Young told Mr. Shassetz that he was "uncomfortable" operating the loader (Tr. 161, 168, 176). After the clean-up of the spill had been accomplished, taking a period of approximately 3 1/2 hours, Mr. Young drove the loader back to the Baby Sesqui area (Tr. 26, 175, 176).

The purpose of Mr. Young's assignment when he was called from his regular duties at the Baby Sesqui stockpile (Tr. 125) to operate the loader to clean up the spill at the Mono plant was production-related and not for training purposes (Tr. 24, 26, 93, 125, 158, 161, 174, 180).

Because of lack of training, the numerous fundamental differences between the loader and the dozer he usually operated, and the differences in the new area he was assigned to work in,

Mr. Young was not able to operate the loader competently on the day in question (Tr. 67, 94, 169, 179, 193). Mr. Young was not familiar with the entirely different, small and enclosed area (Mono plant) in which he was directed to operate the loader (Tr. 169, 175, 176, 179).

In the context of the circumstances present on the day in question the hazards posed by an untrained miner, such as Mr. Young, operating a loader were (1) pinning bystanders against a wall, beam or other object, (2) running over a bystander, (3) catching them with the bucket or (4) turning the machine over on them. Two persons were in the area where Mr. Young was operating the loader. Serious injuries requiring hospitalization could have resulted from the occurrence of the enumerated hazards (Tr. 98-100, 163).

While one must agree with Contestant's position that a change of a miner's assignment to a different piece of mobile equipment does not necessarily--or automatically--require new task training, that result is dictated by the numerous fundamental differences between the two pieces of equipment involved here.

Mr. Young's demonstrated sub-par ability to operate the loader, the foreman's dissatisfaction with his performance, and Mr. Young's self-removal from the equipment give strong circumstantial credence to this conclusion. The record supports the Secretary's summary of the matter:

> "In August 1981 Young was required to undertake a new task in a separate part of the mine on a piece of equipment vastly different from the one he had been trained to operate. Requiring Mr. Young to undertake this new task on unfamiliar equipment was clearly a violation of 30 C.F.R. 48.27."
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> (Respondent's Brief, page 5).

The factual determinations articulated above make it amply clear that the infraction was of a moderately serious nature and that it resulted from the negligence of Contestant's supervisory personnel who both made the assignment of a new work task to Mr. Young and, after observation of his inept performance, permitted his continuation of the task, with the actual and constructive knowledge that he was neither sufficiently trained or certified to perform it. These and other findings with respect to the mandatory penalty assessment criteria (See Fn. 1) have been made even though this is a contest proceeding (FOOTNOTE.5) in view of the fact

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that Contestant apparently paid MSHA's administratively-assessed $78 penalty (Tr. 12) in full prior to the hearing (FOOTNOTE.6). Subsequent to hearing the Secretary, in writing has (1) declined to raise any contention that Contestant has waived its contest rights by prior payment of the penalty, and (2) stipulated to the Commission's jurisdiction to adjudicate this matter.(FOOTNOTE.7) On the basis of this record (FOOTNOTE.8) MSHA's proposed penalty is found to be within a reasonable and proper range.

ORDER

Citation No. 578746 is AFFIRMED.

All proposed findings of fact and conclusions of law not expressly incorporated in this decision are REJECTED.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 The parties have stipulated that Contestant is a large mine operator engaged in the production of trona, a sodium carbonate product; that it has an average number of previous violations; that it acted in good faith to promptly achieve abate of the allegedly violative condition involved; and that payment of a penalty at the level administratively assessed would not jeopardize its ability to continue in business (Tr. 9-11).

~Footnote_two

2 Investigation on the record (Tr. 58, 62, 93) failed to pin-point the exact day.

~Footnote_three

3 Contestant's additional contention that one of the two exceptions to the regulation's general training requirement is applicable is also found to lack merit. Contestant relies on this provision:

"This training shall also not be required for miners who have performed new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 month preceding assignment."

The record is clear that Mr. Young had neither (1) performed nor (2) demonstrated safe operating procedures for the new work task within 12 months preceding the assignment in question. Contestant introduced no evidence to this effect. The record is also clear that Mr. Young's assignment on the day in

question was for production purposes--to clean up the spill at the Mono plant--and not for training purposes. There is no support in the record for the application of either exception to the general training requirement.

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4 Skilled loader operators would have been able to operate the loader "quite a bit faster" (Tr. 67, 169).

~Footnote_five

5 Since this is a contest proceeding no penalty is actually being assessed.

~Footnote_six

6 See the Secretary's brief. Counsel for Contestant didn't know his client had paid the penalty at the administrative level. Indeed, neither party was aware of such payment at the hearing (Tr. 6-8) and the matter was fully litigated. It is unknown whether the payment at the administrative level was intentional or inadvertent. See Secretary v. Old Ben Coal Company, 7 FMSHRC 205 (1985). Inadvertence is inferred, however, from the fact this matter went to litigation.

~Footnote_seven

7 Fairness to the parties and counsel requires mention that this proceeding was one of a large group of cases heard over a 10-day period in Salt Lake City on relatively short notice. The cooperation of Contestant's counsel and counsel in the Labor Department's Office of the Solicitor made it possible for these matters to come to resolution. It is recognized that the unusual happenstance described undoubtedly occurred because of the extraordinary efforts of counsel to accommodate the Commission's schedule.

~Footnote_eight

8 Which covers the penalty assessment aspects as well as the substantive issues of the content.