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SOL (MSHA) V. HOMESTAKE MINING
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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 85-20-M
A.C. No. 39-00055-05537

v.

Homestake Mine

HOMESTAKE MINING COMPANY,
RESPONDENT

DECISION

Appearances: Margaret Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Robert A. Amundson, Esq., Amundson, Fuller &
Delaney, Lead, South Dakota,
for Respondent.

Before: Judge Lasher

This matter arose upon the filing of a Petition for Assessment of Civil Penalty by Petitioner on February 13, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner seeks assessment of a penalty against Respondent for violation of 30 C.F.R. 57.9Ä16 1 which was described in Citation No. 2097700 issued August 29, 1984, as follows:

"On the 2150 level the main haulage line was not being maintained in a safe condition the rail was loose with the track spikes being pulled loose, fish plates loose at the joints and track ties rotted creating a safety hazard to persons who must use the main line to haul the man trip, hauling personal (sic) to and from work places. Heavy equipment travels the line hauling ore and materials to and from work areas a person could be seriously injured should the haulage motor derail."

On August 31, 1984, the Citation was modified to read:

"On the 2150 level main haulage line a section of railroad from the stairway entrance (sic) to the Green light at the curve and another area from H2 fan to the 34a Sill x-cut was not being properly maintained in a safe condition. The rail and rail spikes was pulled loose from the track ties Fish plate Bolts loose, track ties rotted to a point that spikes would not hold and in some areas the rail was starting to lean to one side. This condition creates a safety hazard for the motor person who must travel this haulage line to haul personal (sic) to and from work places on the mantrip. Deliver materials and supplies to and from work places. The motorperson must also haul with a 6 ton motor 6"10 ore cars with a capacity of 3 tons each. A train derailment could cause serious injury to persons who must travel this rail line many times during a shift."

The Citation, issued under Section 104(a) of the Act, also charged that the violation was "significant and substantial" (herein "S & S").

In *Secretary v. Consolidation Coal Company*, 6 FMSHRC 189 (1984), the Commission held that S & S findings may be made in connection with a citation issued under Section 104(a) of the Act. Considering this ruling in conjunction with *U.S. Steel Mining Company*, 6 FMSHRC 1834 (1984), where the mine operator was allowed to contest S & S findings entered on Section 104(d)(1) citations in a penalty case, it is concluded that S & S findings contained in a Section 104(a) Citation similarly are properly reviewable in this penalty proceeding.

The matter came on for hearing in Lead, South Dakota on November 13, 1985. Both parties were ably represented.

The Secretary contends that Respondent did not maintain the track in question in a safe manner, that the track in question was deteriorating and in need of repair, that Respondent should have known that the track was not being properly maintained and was unsafe, that such violation was S & S, and that the penalty assessment of \$276.00 originally proposed administratively by the Secretary should be assessed.

Respondent contends that the safety standard cited, 30 C.F.R. 15.9"16 is unconstitutionally vague, i.e., that it does not give a mine operator fair notice of what is required to maintain track in a safe manner consistent with speed and type of haulage. Respondent also maintains that the Secretary failed to prove a violation, and in the alternative if a violation is established that Respondent was not negligent in its commission, that the violation was not S & S, and that the gravity thereof was slight.

The pertinent factual events commenced on August 29, 1984, when MSHA Inspector Jeran C. Sprague issued Citation No. 2097700 on a regular inspection of the Homestake Mine, during which he was accompanied by Fred Bichler, shift foreman. (Tr. 14, 209).

The track on the 2150 level of this underground mine-where the violation was observed by the Inspector-runs from one end of the level to the other for approximately one mile and is used for the transportation of men as well as materials (Tr. 15, 16, 60, 150). The Inspector felt that approximately 3000 feet of track was not being properly maintained and that 800 feet was in "bad repair". (Tr. 61, 170). There is approximately 400 miles of track in the entire mine (Tr. 91). However, only three levels were inspected on the day the Citation was issued.

On the inspection day the Inspector observed Granby ore-haulage cars on the track: these cars are approximately 7' long, 5' wide and 5' high, carry 3½ tons of ore, and are pulled by 6½ ton motors (locomotives) (Tr. 13, 16, 160, 174). In addition, the motors also pull man cars which are used to transport 4 to 8 miners to and from their workplace at the beginning and end of the shift (Tr. 18-21, 65, 150, 198, 204, 210, 327). Both ore-haulage cars and man cars move on iron wheels and both are braked by the motor (Tr. 19, 79). The length of track described in the Citation was "zero-grade", that is, level (Tr. 175-176).

Reliable and probative evidence of record established that the following defects in the track existed at the time of Inspector Sprague's inspection:

1. Loose rail (Tr. 24, 162-164, 188, Ex. PÄ1). At one area (near the HÄ2 fan) the track was spread more than 19 inches which could cause derailment (Tr. 187, 188, 337).

2. An area along a wood track tie where the tie had been moving back and forth (Tr. 26; Ex. PÄ2).

3. An area of track where a track spike was "pulled out" and was not holding the rail in place on one side and where a track spike on the opposite side of the rail was missing (Tr. 27, 28; Ex. PÄ3).

4. Areas of track where the wood track ties were rotted and where track spikes were entirely missing on one track tie (Tr. 28, 29, 84, 85, 187, 188; Ex. PÄ4). In abating the violative condition of the track, Respondent's track repairman, Dennis Willuweit, replaced 25 to 35 ties out of a possible 480 present in the 1000 foot section he worked on (Tr. 154, 172, 173, 201).

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5. An area of track where the rail was misaligned because the fishplates 2 intended to hold two joint sections together were loose (Tr. 29, 81, 133, 134; Ex. PÄ5).

6. A fishplate - broken in the middle - at an area of track where two sections of rail were joined together with a deteriorated flange used to spike the rail (Tr. 30, 184, 185, 231; Ex. PÄ6). As to this condition, Respondent's witness, track repairman Dennis Willuweit, conceded that the "worst place" a fishplate could break was in the middle and that "with a fishplate broken right in the middle, the joint could move enough to let a car derail" (Tr. 184Ä186).

7. An area of track where the top flange of a piece of rail was completely worn away and could break any time (Tr. 31, 278Ä283; Ex. PÄ7).

8. An area of track where the bolts holding a fishplate were loose and also deteriorated to a point that the threads were "gone" so that the bolts could not be tightened (Tr. 31; Ex. PÄ8).

9. Rust, rotted ties, loose spikes and deterioration were prevalent in various of the track areas mentioned above (Tr. 32, 73, 91, 94, 95, 185, 198Ä200, 215, 226, 233, 234). Inspector Sprague summed up the general condition of the track in question as follows:

"For the most part, there was either a loose section; spikes missing; ties rotted out. There had been some areas on the far end that had been repaired, some new installation" (Tr. 32, 33).

It is concluded from considerable probative evidence of record showing the general condition of the track that it was not being properly maintained and that work was not being done to keep the track in a safe, manner (Tr. 33, 35, 51, 66, 67, 96, 97, 212, 213, 226, 236). This situation had been allowed to continue "for quite some time" (Tr. 35). Mine management knew or should have known of the defective conditions since they travelled the area daily and the condition had been reported to them (Tr. 47Ä49, 213, 220, 274). Also, as part of his inspection, Inspector Sprague talked to a motorman and other miners who indicated that the track had been in such condition "for quite some time". The motorman reported to Inspector Sprague that he

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was being derailed on a daily basis, "sometimes 3 and 4 times a shift" and that he had not seen a trackman (track repairman) on the 2150 level in months (Tr. 35-38).

Normally derailments result because of the condition of the track (Tr. 82, 83, 206, 292). Inspector Sprague gave this explanation of the cause of derailments:

"Just the normal condition of the track, with the fishplates being broken, not holding the joints together; no track spikes in the ties; the rotted condition of ties, which would, in no way, hold the rail in position, and it could very easily cause misalignment of the joints which could cause derailment." (Tr. 41).

Derailments are a relatively common occurrence at this mine (Tr. 38, 82, 205, 261, 291). Usually, when a derailment occurs, the equipment simply drops off the track (Tr. 83, 188, 283). According to the Inspector, if the motor were to derail it would probably stop instantly. On the other hand, if an ore car were to derail, the motorman might travel half a mile before becoming aware of it (Tr. 84). In this connection it should also be noted that there were 3 curves in the track on the 2150 level which the motorman could not see around (Tr. 191, 205).

The track in question is 18-gauge, that is, the distance between the rails is 18 inches (Tr. 22, 79, 155). The rails themselves are 20 to 25 feet in length and are attached by spikes to wood ties placed at 2-foot intervals along the track (Tr. 30, 41, 61, 62, 88, 285). Track gauge must spread to 19-20 inches before derailment occurs, i.e., the equipment drops between the rails (Tr. 155-158, 282); derailment can also occur if the rails move inward to a gauge of 17 inches. Should this happen, the equipment would drop off to the outside of the rail (Tr. 158, 197).

As indicated heretofore the hazard posed by the track defects described by the Inspector - the existence of which were for the most part admitted by Respondent - was derailment of (1) the motor (locomotive), (2) the trailing haulage cars, and/or (3) the trailing man cars (Tr. 38, 39, 41, 42, 86, 292). Derailments usually occur because of such track conditions (Tr. 82, 83, 206, 292, 294, 295), and it was very likely that such derailments (accidents) would occur (Tr. 38, 41, 52, 106, 179, 187-188, 203, 205-206, 325, 334).

Track conditions and defects which cause derailments are unsafe (Tr. 69, 114, 204-205, 236, 337-339, 343). Thus, should a derailment occur when miners were being hauled on a man car (mantrip) the miners could have been injured from being thrown around in the man car, from being thrown out of the man car, from

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being pinched between the man car and the rib, and/or being run over (Tr. 41-43, 110-112, 236, 316-317). In addition, similar injuries could occur to a motorman while engaged in rerailling derailed equipment (Tr. 43-46, 87, 109, 110) and to persons standing or walking along the track at the time of a derailment (Tr. 45, 113, 132, 195, 204). Such injuries could be serious or even fatal (Tr. 46, 111-113, 314-317) and were reasonably likely to occur as a result of a derailment (Ct.Exs. 1 and 2; Tr. 46, 132, 161-162, 198-200, 204-206, 240-244, 333-334, 347-348).

30 C.F.R. 57.9-16 mandates that the track be maintained in a safe manner consistent with speed of haulage. The estimates of various witnesses and sources had considerable range. Although at the hearing Respondent's witnesses testified that Respondent's "policy" was that the motormen would not travel faster than-or should slow down to (a) 2 mph (Tr. 151) or (b) 2 to 3 mph (Tr. 178), or (c) 4 mph (Tr. 179, 325), in correspondence to the Secretary's counsel and to the undersigned prior to the hearing (Ct.Exs. 1 and 2), Respondent's Director of Safety and Health indicated that the following was one of the issues upon which it built its case:

"... Speed of travel of the locomotive and cars would never exceed 10 miles per hour with normal speed being 5-7 miles per hour."

Even accepting Respondent's evidence at the hearing that the speed was 2, 3, or 4 mph, and I do not so find, the record establishes that the speed actually was left to the judgment or discretion of the motorman who was supposed to slow down when men were seen walking along the track or where track defects were noted (Tr. 179, 203). It is clear that there were curves in the 2150 level track where the motorman could not see what was ahead (Tr. 191, 204-205). In its post-hearing brief (p. 3) Respondent characterizes the speed at from 2-10 mph, and concedes that the speed could be up to 10 mph. (Ct.Exs. 1 and 2; Tr. 116, 242). Finally, Inspector Sprague guessed the speed at 6-7 mph (Tr. 22, 71), and the Secretary's expert witness, Michael Sheridan, based his opinion on a speed of 5-7 mph (Tr. 117). This latter speed is well-supported in the evidence and provides a reasonable foundation for the opinions and findings based thereon, particularly those of the Secretary's witnesses relating to the question of the safety of the 2150 level track. Further, in the background of the entire record, the opinion of Inspector Sprague as to the bearing of the speed factor on the question of track safety is persuasive:

"It doesn't really matter what speed you're going. If the rail is in a deteriorating condition, it could fall off at any time. I don't think speed really has a bearing on it, as far as whether you go off the track or how many could go off the track." (Tr. 97).

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The speed factor is found less decisive than the regulation's second requirement that the track be maintained in a safe manner consistent with "type of haulage". In this connection, evaluation of the testimony of Respondent's witnesses reflects that the quality of track maintenance varied throughout the mine and that the track in areas of the mine where there was greater production were better maintained (Tr. 179, 198-200, 203, 273-274, 292, 319-320) than the track on the 2150 level and areas where there was less production. The testimony of Mr. Willuweit in this connection is significant:

"JUDGE LASHER: Do you have an opinion of whether or not the 2150 section - area of track that you performed these repairs on after the citation was issued - whether that at that time, was any different from most of the other track areas of the mine?

THE WITNESS: It was was - it was a lot different than areas that are used for mass haulage, where they have to move a lot of rock, but it was similar to a lot of other areas of the mine, where your use is minimal.

JUDGE LASHER: Okay. You're saying that, at this time, this area of this track was used for what?

THE WITNESS: Basically, it was used to haul four to eight men into their work area and out, and haul a few supplies to them and haul a little bit of rock occasionally, and that was it.

* * * * *

JUDGE LASHER: So are you saying it was in a state of higher repair than the areas that haul the ore? - or less repair?

THE WITNESS: Less repair.

JUDGE LASHER: And why would that be?

* * * * *

THE WITNESS: It's not carrying the traffic. And if you have a timber track off, and you're going at a reasonable speed, basically it is - it is an inconvenience. Now, in an area where you are trying to get some work done and you're trying to move rock and you have wrecked cars, or derailments, then they start costing you money because then they are affecting production; they're not affecting just one man. Instead of moving 300 to 400 ton of rock

that day, if they have derailments they may only move half the rock, and that affects the output of the rock at the mine, so the levels where they have - where they move a lot of rock, or where they move a lot of men, they move a lot of supplies, they have to keep that in a lot better condition than you have to keep the levels where they just don't use the track much." (Tr. 198Ä200).

The 1977 Mine Act is remedial legislation intended to promote the safety of miners. It would seem that the regulation's provision that track be maintained in a safe manner consistent with "type of haulage" if anything contemplates a higher standard of maintenance on track where miners primarily are being transported - such as the 2150 level - rather than the lesser standard evidenced in this record. It is concluded on the basis of the various findings above that the rails and track elements on the 2150 level were not maintained in a safe manner consistent with the speed and type of haulage and that the violation described in the Citation did occur.

We next take up Respondent's contention that the cited regulation is unconstitutionally vague and fails to give the mine operator "fair notice" of what is required to maintain track "in a safe manner consistent with the speed and type of haulage". Such is found to lack merit and is rejected. Safety standards such as 30 C.F.R. 57.9Ä16 cannot be considered in a vacuum. Generally when a safety regulation is examined for meeting due process certainty requirements, it must be looked at "in light of the conduct to which it is applied." *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 732 (6th Cir.1980). General terms such as "unsafe" or "dangerous" appear frequently in federal safety and health standards. This approach has been recognized as necessary where narrower terms would be too restrictive. Standards, that is to say, must often be made "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr McGee Corporation*, 3 FMSHRC 2496 (1981). In *Alabama ByÄProducts Corporation*, 4 FMSHRC 2128 (1982) the issue was whether the Secretary could enforce a similarly worded standard requiring machinery to be kept in "safe operating condition." The Commission established the following test:

[I]n 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.

Applying this test to the situation here, it is clear that a reasonably prudent person familiar with the circumstances extant on the 2150 level, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action. The track defects were numerous. At least two of the defects documented by the Inspector were admitted by Respondent's witnesses to have been susceptible of causing a derailment in and of themselves (Tr. 184-186, 187, 188, 231). The evidence of general deterioration of the area of track involved and lack of maintenance thereon was substantial. A considerable body of reliable evidence in this record demonstrates the potential of such track conditions, singly or in combination, to cause derailments, and of derailments to cause significant injuries or even fatalities. The Secretary met its burden of establishing a nexus between the widespread track problems and the effect such would have on the safe operation of equipment on the track. As the Commission has noted in other contexts, and contrary to the general thrust of Respondent's argument, the cited regulation, requiring maintenance of a mine part in a safe manner, is aimed at the elimination of potential dangers before they actually become present dangers. Here, some of the track conditions were shown to have already become present dangers. See *Secretary v. Pittsburg & Midway Coal Mining Company*, 8 FMSHRC 4, 6 (1986). Respondent's vagueness challenge is rejected.

The final question raised by Respondent is whether the subject Citation cited a violation which was "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard" as that phrase is used in the Act.

The Commission has held that a violation is properly designated S & S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3A4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a

reasonable likelihood that the hazard contributed to will result in an event in which there is an injury," U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984), and also emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S & S. See 6 FMSHRC at 1836.

It has previously been determined that a violation occurred, that the failure to maintain the track in a safe manner contributed to the cause and effect of a safety hazard, i.e., a derailment accident, that it was likely that such derailments would result in injuries, and that there was at least a reasonable likelihood that such injuries would be of a reasonably serious nature or fatal. The record indicates several injuries, including a severed finger, which resulted, directly or indirectly, from derailments in the past. The fact that more serious injuries - or fatalities - have so far been avoided is fortunate, but not determinative. Secretary v. Ozark Mahoning Company, 8 FMSHRC 4444, Docket No. LAKE 84-96AM, (decided February 28, 1986). See also Secretary v. U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 329 (1985). It is concluded that the violation was properly designated S & S.

There remains the determination of an appropriate penalty. Based on stipulations of record, it is found that the Respondent is a large gold mine operator (Tr. 221) with a payroll of approximately 1,350 employees at its mine near Lead, South Dakota; that a reasonable penalty assessment will not jeopardize its ability to continue in business; and that upon notification of the violation it proceeded in good faith to promptly abate the violative conditions cited (Tr. 8, 9, 93). The Secretary's evidence with respect to Respondent's history of violations reflects 253 violations during the 2-year period prior to the issuance of the subject citation. Absent further explication or characterization thereof in the record, and in view of the mine's size it is concluded that such is a moderate history of prior violations and that such mandatory penalty assessment criterion should provide no basis for increasing the penalty amount otherwise warranted. Based on the findings specified above it is further found that (1) this was a relatively serious violation and (2) that Respondent's management was aware of the defective condition of the track at the 2150 level and failed to exercise reasonable care in not recognizing the hazards posed thereby and in not maintaining the track in a safe manner. This constitutes ordinary negligence.

After weighing these various assessment considerations and it appearing that Respondent's belief that the various defective track conditions did not amount to unsafe track was sincerely advanced, a penalty of \$300.00 is found to be appropriate.

ORDER

Citation No. 2097700 is affirmed in all respects. Respondent shall pay the Secretary of Labor within 30 days from the date hereof the sum of \$300.00 as and for a civil penalty.

Michael A. Lasher, Jr.
Administrative Law Judge

1 This regulation provides:

"Roadbeds, rails, joints, switches, frogs, and other trackage elements on railroads subject to the control of the operator shall be designed, installed and maintained in a safe manner consistent with the speed and type of haulage."

2 A fishplate is a piece of angle iron approximately 3/4" thick, 18" long and 1 1/2" wide which has four bolt holes. Fishplates, whose purpose is to keep rail in alignment so that the joints don't separate or move from side to side, are bolted to each side of a rail (Tr. 30, 63, 270).