

CCASE:
SOL (MSHA) V. EMPIRE ENERGY
DDATE:
19861212
TTEXT:

~1908

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. WEST 86-76
A.C. No. 05-01370-03553

v.

Eagle No. 5 Mine

EMPIRE ENERGY CORPORATION,
RESPONDENT

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
R. Henry Moore, Esq., Rose, Schmidt, Chapman, Duff
& Hasley, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Lasher

Procedural Background

This proceeding was initiated by the filing of a petition for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) on March 17, 1986, pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820 (1977) (herein the Act). A hearing on the merits was held in Denver, Colorado, on August 6, 1986, at which both parties were ably represented by counsel.

The Secretary charges Respondent with violating 30 C.F.R. 75.1725(a) as described in Citation No. 2207389 issued October 4, 1985, as follows:

"The double head roof bolter #18089 operating at 1st Left of the Set up entry at 14 East was being operated with the ATRS (FOOTNOTE 1) that was bleeding off the pressure (PSI). While 2 driller (sic) were drilling the ATRS dropped very slow 4 to 5 inches. The second time the ATRS dropped 4 to 5 inches all at once. There was an excessive hydraulic old leak on the right side drill pot and one hose was leaking right on the hydraulic pump assembly. This leak were (sic) corrected. The PSI was checked with a gauge and the PSI went up to 1725 PSI, then the motor was turned off and the pressure drope (sic) to 1500 PSI. Then it went down to 1350 PSI in

~1909

2 1/2 minutes. The motor was started and it went up to 1625 PSI and while the motor was operating the PSI drope (sic) 150 PSI in 3 minutes."

30 C.F.R. 75.1725(a) provides:

"Machinery and equipment; operation and maintenance.
(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The alleged violation was characterized in the Section 104(d)(1) Citation as being "significant and substantial".

On October 7, 1985, the Inspector who issued the Citation, Ernesto L. Montoya, took subsequent action and "terminated" the Citation with the following indication for his justification:

"The ATRS jack was replaced on the double head roof bolt machine #18089."

In addition to Inspector Montoya, MSHA Inspector Alexander Kendzerski, a rebuttal witness, testified for Petitioner at the hearing. Three management personnel, James Hake, who was Respondent's Supervisor of Safety and Loss Control, Darrell Sparks, a maintenance foreman, and Randy Bunyon, maintenance superintendent, testified for Respondent.

The primary and dispositive issue in this matter is whether, in fact, the ATRS was not functioning properly, i.e. that it was dropping from its position at the roof because it was not "maintained in safe operating condition."

Preliminary Findings

At the commencement of the hearing the parties reached the following stipulations of facts and conclusions:

1. Respondent is engaged in the mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.
2. Respondent is the owner and operator of Eagle No. 5 Mine, MSHA I.D. No. 05Ä01370.
3. Respondent is subject to the jurisdiction of the Act.
4. The Administrative Law Judge has jurisdiction in this matter.

~1910

5. The subject Citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevance of any statements asserted therein.

6. The exhibits offered by Respondent and the Secretary are authentic (but no stipulation was reached made as to their relevance or the truth of the matters asserted therein).

7. The proposed penalty (\$1,000.00) will not affect Empire's ability to continue in business.

8. The Respondent demonstrated good faith in abating the alleged violation.

9. Respondent is a large mine operator with production of 1.2 million tons in 1985.

10. In the 24-month period preceding the issuance of the Citation there were 247 inspection days at the mine.

11. The computer printout offered into evidence by the Secretary (PÄ1) is only relevant insofar as it reflects the number of violations between October 4, 1983 and October 3, 1985. Any violations on the printout which did not occur within that time period are not relevant.

The preponderant reliable and probative evidence of record established the following factual conformation and sequence of events.

On October 4, 1985, after a union complaint under section 103(g) of the Act was filed with MSHA, Inspector Montoya undertook an inspection of Respondent's Eagle No. 5 mine (T. 27Ä34).

Upon arriving at the mine, Inspector Montoya met with Respondent's Supervisor of Safety and Loss Control, Jim Hake, and while proceeding to the 14 East Section he handed Mr. Hake a copy of the union complaint. The complaint alleged that the ATRS was "bleeding off" (T. 26Ä28); that such had been reported for a week and that Randy Runyan, the maintenance superintendent, and "acting foreman James Pike" had not taken any steps to correct the condition (Ex. PÄ2).(FOOTNOTE 2)

The ATRS, depicted in Exhibit PÄ3, is an attachment to a Fletcher Dual Head Roof Bolter (T. 37Ä39; PÄ3). It is operated

~1911

by means of hydraulic pressure derived from two independent hydraulic pumps on the bolter itself (T. 39Ä40, 152). The ATRS consists of a T shaped beam or bar which is raised against the top and is hinged in the middle (T. 38Ä46; RÄ4, PÄ3). The T-bar is connected to a hydraulic cylinder which in turn is connected to a "shoe" or skid foot assembly which is pressurized against the bottom when the T-bar is pressurized against the top (T. 40Ä41, 70Ä71, 111Ä112; RÄ4; PÄ3). The ATRS has a "tilt" cylinder which facilitates its use on steep slopes such as are present at the mine in question (T. 102, 155Ä158; 192; RÄ4). It is designed to operate at an angle without binding (T. 72, 150Ä151, 192; PÄ3; RÄ4). Two hydraulic hoses run from the hydraulic system of the bolter to the ATRS (T. 96). There is a load check (safety) valve which is part of the ATRS cylinder itself (T. 40Ä41, 97Ä98, 146Ä147). Its function is to prevent hydraulic oil from flowing from the ATRS back to the bolter once the ATRS is pressurized (T. 42, 146Ä147, 181). (FOOTNOTE 3) Once the ATRS is pressurized, the hydraulic hoses to the ATRS can be removed without effect on the pressurization of the ATRS because of the presence of the load check valve (T. 74, 97Ä98, 146Ä147). The depressurization of the ATRS can only be effected by use of the controls on the bolter (Tr. 125).

When the Inspector and Mr. Hake arrived on the section and first viewed the ATRS, Inspector Montoya observed the boom of the ATRS to gradually drop from the roof approximately 4Ä5 inches (T. 41; Citation). The miners operating the bolter indicated to him that the ATRS was not operating properly (T. 47Ä8, 94). They demonstrated that by operating the ATRS and the bolter in a manner to cause the ATRS to come away from the roof suddenly by about 4Ä5 inches (T. 94Ä95, 129Ä132; Citation). At the face area where the bolter was being operated, there was approximately 12Ä14 inches of loose unconsolidated material (loose coal) on the bottom.

At Mr. Hake's direction, the bolter was taken out of service, and moved back away from the face area to an intersection where the roof was supported and where there was no soft material on the bottom; the ATRS was then pressurized against the roof (T. 47, 72Ä73, 82, 95Ä97). It did not come away from the roof, even during drilling operations, and the mechanics who inspected and tested it could find nothing wrong with it (T. 52Ä53, 73Ä74, 97Ä100, 145Ä146). The ATRS remained pressurized against the roof for 35 minutes (T. 97Ä99, 133). The hydraulic cylinder was marked and this indicated that no decompression of the hydraulic cylinder occurred at that time (T. 73Ä74). The

~1912

hoses were disconnected from the ATRS and no hydraulic fluid ran out of the hoses, indicating that the check valve was functioning properly (T. 97-98, 146-147).

The bolter was again taken back into the face area (T. 81-82). Before this was done, it was explained to Inspector Montoya by maintenance foreman Darrell Sparks that the loose unconsolidated material on the bottom of the place might cause the ATRS to come away from the top (T. 81-82, 101, 151). There were gouges in the material, indicating that the ATRS foot had slid down when it was in the place previously (T. 151). The bolter was again pressurized against the roof and the hydraulic cylinder marked to indicate any movement which would indicate a loss of hydraulic pressure (T. 103-104, 137). While the marks on the cylinder did not indicate any decompression of the cylinder which would result from a loss of hydraulic pressure, the T-bar of the ATRS did come away from the roof on one side as the bolter was operated (T. 103-105).

The bolter was again taken out of the face area and back to an intersection (T. 105). In the intersection the ATRS was again pressurized against the roof for approximately 45 minutes and showed no signs of coming away from the roof (T. 107). Two minor oil leaks which had been observed by the Inspector (T. 48) were repaired. These leaks had nothing to do with the operation of the ATRS (T. 105-106). A pressure gauge was used to test the hydraulic pressure in the bolter but could not be used to test the ATRS itself (T. 106-107, 181-182).

The equipment involved (the bolter with ATRS attached) was mobile and was removed from service immediately upon issuance of the citation. (T. 11-13, 18-19).

The alleged violation was abated by replacing the ATRS hydraulic cylinder and was completed before the time set for abatement (T. 192; Citation).

The following week the hydraulic cylinder which was removed from the ATRS was tested by a private firm and found to show no evidence of "bleeding off" of hydraulic pressure or malfunction of the check valve (T. 81, 175-179; R-1).

Discussion and Ultimate Findings and Conclusions

Inspector Montoya, even at the hearing, was unable to say in precisely what respect the ATRS was not being maintained in safe

~1913

operating condition.(FOOTNOTE 4) His belief that it was unsafe or defective appears to be based on several factors. First, he testified that he saw the T-bar lower from the roof (T. 85). This occurred after he observed two roof-bolter operators pouring two 5-gallon cans of oil into the machine. He also observed patches of oil in the vicinity of the bolter, and that two hoses were leaking oil. From these observations and perhaps other factors, the Inspector apparently reached the conclusion that the hydraulic cylinder of the ATRS, which raised the T-bar (boom) of the ATRS upward to support the roof, was losing pressure, because of loss of oil pressure. The Inspector's precise thinking as to the mechanism which caused the purported malfunction was not convincingly articulated in his testimony. His most precise explanation for the T-bar's dropping was that: "It dropped because the - safety valve, the check valve, and the ATRS was not working properly" (Tr. 42) and "The cylinder leaked and the T-bar dropped" (T. 43).(FOOTNOTE 5)

Respondent effectively and credibly rebutted the bases for Inspector Montoya's belief that the ATRS' hydraulic cylinder was losing pressure. For example, Respondent showed that the bolter "on a day to day basis" normally uses 30 gallons of oil and that the 10 gallons seen being put into the machine by the Inspector is a "small amount" (T. 153, 193-194). Respondent also established:

(1) That on October 3, 1985, the day before the Citation was issued, the ATRS and its load check valve was checked and found to be in good working order (T. 185).

(2) That the two oil "leaks" observed by the Inspector were not on the ATRS but on the bolter and that these leaks were not excessive, but a "dripping" (T. 152, 187).

~1914

(3) That the ATRS and roof bolter were thoroughly tested two times on October 4, 1985, and it was not found to be malfunctioning, and more specifically, that there was no sign that oil was leaking from the ATRS cylinder (T. 96-107, 147, 181-182, 187).

(4) That shortly after the Citation was issued, the ATRS was taken to a local hydraulic shop, Craig Electric Motor and Machine, Incorporated, and it was examined, tested, and determined that it was not malfunctioning, and more specifically, that there was nothing wrong with the load check valve, or the cylinder (Ex. R-1; T. 175-183, 196).

(5) That the reason the T-bar dropped from the roof on the two occasions the Inspector saw it do so was due to the facts that:

(a) The roof bolter (to which the ATRS is attached) was sitting on 12-14 inches of loose coal, i.e. a soft bottom (T. 100, 113, 134-135, 151, 220, 222),

(b) Both times the T-bar was seen to drop the equipment was at the face sitting on loose coal (T. 41-42, 81-82, 100, 139-140, 151),

(c) The inherent capacity of the ATRS itself to raise the T-bar back to the roof automatically requires the operator to make certain adjustments when the bottom gives way under the ATRS (T. 215, 218, 222) and that the problem observed on October 4, 1985 was the result of the roof-bolter operator's failures (T. 138, 155-157, 169, 221-222).

(6) The problem of the T-bar's dropping down had been noted and diagnosed some two years earlier (T. 100, 139).

In this connection, Mr. Hake testified:

"When we first started roof-bolting at Empire a couple of years ago, we had had this same thing, same type of situation. People thought the ATRS was not working properly, and that's what we found out then, that if you didn't set - it was very important that when you did put the ATRS down that it was on solid footing, that if there was any loose material underneath it, that it may not stay snug up against the mine roof." (T. 100)

I am unable to conclude on the basis of the evidentiary record developed at the hearing herein that on the occasions observed by Inspector Montoya where the ATRS dropped or lowered from the roof such was a result of the equipment's "not being maintained in safe operating condition". Such a finding is necessary to a determination that the particular regulation cited by MSHA was infringed. Secretary v. Alabama By-Products Corporation, 4 FMSHRC 2128 (1982). In the final analysis, this matter called for resolution of a conflict between Respondent's version of what caused the 4-5 inch T-bar drop and that of Petitioner.

~1915

Both parties presented and relied on the opinions of their witnesses to carry the burdens of proof required by their respective positions. As above noted, the expertise and qualifications of Respondent's witnesses in this particular matter to render opinions as to the mechanical aspects of the ATRS and its behavior overwhelmed that of Petitioner's witnesses. Furthermore, Respondent's experts were generally more familiar with the equipment, the mine conditions and the past operation of the roof bolter than was the issuing inspector. Their testimony, when compared, reflects more detail and superior quality. For example, the Inspector saw significance in the fact that when he arrived on the scene, two 5-gallon cans of hydraulic fluid were being put into the machine. Yet, it appeared that the bolter would require some 30 gallons daily. While the Secretary's second witness, Alexander Kendzerski, had impressive qualifications to render an opinion as to operation and safety of the bolter (the ATRS system), his testimony was not based on direct knowledge, testing, or personal observation (T. 206). More importantly, the tenor of his testimony was speculative, i.e. the cause of the 4.5 inch drop "could" have been the relief valve (T. 201, 206, 208, 209, 214). Again, the issuing inspector reached the conclusion that something was wrong with the ATRS system based on circumstantial evidence, but he was unable to establish what actually was wrong or precisely in what respect the equipment was not "in safe operating condition".

Assuming arguendo that the event viewed by the Inspector, the 4.5 inch drop of the T-bar, posed a hazard to the miners working under it, it does not automatically or necessarily follow that it was caused by unsafe equipment or, more specifically, that the equipment itself was not in "safe operating condition". This is particularly true in view of the relative strength and probative value of Respondent's explanations for the drop, and its supportive explanations for the presence of splotches of oil observed by the Inspector on the floor area, and the necessity for replenishing hydraulic fluid in considerable quantity. Assuming that use of the ATRS in the circumstances extant at the time and place involved here was unsafe, the enforcement choice, issuance of a 104(d)(1) citation citing an infraction of 30 C.F.R. 75.1725(a) either will not, or cannot, achieve the remedial result sought by the Secretary. As previously indicated, various testing procedures performed both in the Inspector's presence and subsequently after the cylinder had been replaced for abatement purposes, disclosed no defects or malfunctioning.

On the basis of this evidentiary record, it has not been proved, nor can it be inferred, that the subject equipment was not in some respect being maintained properly, was otherwise defective, or, in the language of the regulation, not in "safe operating condition." It is concluded that the Secretary has failed to establish the violation charged by a preponderance of the reliable evidence.

ORDER

Citation No. 2207389 is VACATED.

Michael A. Lasher, Jr.
Administrative Law Judge

1 "ATRS" stands for Automatic Temporary Roof Support (T. 12, 38).

2 The miner who filed the section 103(g) complaint did not testify.

3 The load check valve is a safety feature designed so that if a hose should burst or "something extraneous to the operation should happen", no oil would escape the cylinder. If oil should escape, this would allow the TRS beam against the roof to come down (T. 181).

4 The Secretary failed to establish what, if anything, was wrong with the ATRS, or the hydraulic system generally. Various tests performed all showed there was nothing wrong with the safety (load check) valve or the cylinder. The Secretary's rebuttal witness, Inspector Kendzerski, after learning of the negative testing, could only point to the primary possibility of a defective valve as being the cause for the T-bar's dropping down.

5 While the behavior of the ATRS provided a clear and legitimate basis for the Inspector's concern, and his sincerity is beyond question, comparison of the Inspector's qualifications and training with respect to the operation of hydraulic systems to those of Respondent's witnesses in such field indicates a higher degree of expertise on the part of Respondent's witnesses. Further, Respondent's three witnesses were clearly much the more knowledgeable in the subject matters involved and such is reflected in even the most casual comparison of their testimony with that of the Inspector.