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SOUTHERN OHIO COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SOUTHERN OHIO COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 88-349-R Order No. 3105926; 8/2/88
	Martinka No. 1 Mine Mine ID 46-03805
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 89-10 A. C. No. 46-03805-03876
v.	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for the Secretary;
Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) seeks a civil penalty for an alleged violation of the Operator (Respondent) of 30 C.F.R. 75.1003-1. Pursuant to notice, these cases were heard in Morgantown, West Virginia, on May 31, 1989. At the hearing, Homer Delovich and Albert Kirtchartz testified for Petitioner, and Fred Rundle, III, and Dewey Ice testified for Respondent. Proposed Findings of Fact and Briefs were filed by Petitioner and Respondent on September 7 and 8, 1989, respectively.

Stipulations

1. The Administrative Law Judge had jurisdiction over this proceeding.

2. The Martinka No. 1 Mine of Southern Ohio Coal Company is affiliated with the American Electric Power Service Corporation.

3. Martinka No. 1 Mine and the Southern Ohio Coal Company are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. Order No. 3105926 was properly served by a duly authorized representative of the Secretary of Labor upon the agent or the respondent on the date, time and at the place stated therein.

5. Copies of the Order No. 3105926 are authentic and may be admitted into evidence for the purpose of establishing the issuance.

6. The Assessment of civil penalty for this proceeding will not affect the Respondent's ability to continue in business.

7. The annual coal production of the Martinka No. 1 Mine was 2,872,018 tons for 1988.

8. There was no intervening inspection prior to the issuance of the August 2, 1988 Order No. 3105926. The printout of the civil penalty complaint reflects the Secretary of Labor's history of violations of the Martinka No. 1 Mine.

9. There were approximately 934 inspection days of the Martinka No. 1 Mine in the 24 month period prior to the issuance of Order No. 3105926.

Findings of Fact and Discussion

I.

During the weekend of July 29 - 30, 1988, two flat cars containing a 1000 foot section of belting were placed in the 13 left track chute, after having been transported two miles from the surface of the mine on July 28, 1988. On August 1, 1988, Homer Delovich, an MSHA Inspector, performed an inspection of Respondent's Martinka No. 1 Mine in response to a request that has been filed for a section 103(g) inspection, alleging that the height of the loaded belting was 57 inches above the track rail. Delovich testified that on August 1, he measured the distance between the track rail and the trolley wire, which was suspended from the roof by hangers. At five locations at the 13 left switch and outby and inby that location, the distance was between 56 1/2 and 54 inches. On August 2, 1988, Delovich continued his inspection in the first shift (12:00 p.m. to 8:00 a.m.), and indicated that, using a tape measure, he measured the distance

from the track rail to the top of the belting at its highest point. This distance was 57 inches. Albert Kirtchartz, a plant mechanic for Respondent, who accompanied Delovich as a member of the Safety Committee of the Local Union, indicated that he agreed with Delovich's measurements of the distance between the track and the trolley wire. Dewey Ice, Respondent's Accident Prevention Officer, essentially agreed that the belting in the flat cars was 57 inches high, and the trolley wire was 56 or 56 1/2 inches. Delovich issued a section 104(d)(2) Order alleging a violation of 30 C.F.R. 75.1003-1 which provides as follows: "Adequate precaution shall be taken to insure that equipment being moved along haulageways will not come in contact with trolley wires or trolley feeder wires."

Respondent, in essence, argues that the belting in question is not "equipment" within the purview of section 75.1003-1, supra. Webster's New Collegiate Dictionary, 1979 edition, defines equipment, as pertinent, as "2a: the set of articles or physical resources serving to equip a person or thing; as (1): the implements used in an operation or activity . . . . " Accordingly, inasmuch as the testimony indicates that the belting is used to transport materials in Respondent's mining operation, it is clear that it comes within the definition of "equipment," and thus is within the purview of section 75.1003-1, supra. According to the uncontradicted testimony of Ice, as depicted in SOCO Exhibit 2, the trolley wire was 5 to 7 inches beyond the track in the direction of the rib; the flat car extended 18 inches beyond the track toward the rib; and the belting was 19 inches "inside the most outside part of the car" (Tr. 106). Thus, the wire was at least 5 to 7 inches removed from the belt in a horizontal direction. Ice further indicated that he had not observed the belting shifting from side to side while it was being transported. However, the evidence unequivocally establishes that the height of the belting exceeded that of the trolley wire, and Ice indicated, in essence, that, due to the shifting of the track, the distance between the flat car and the trolley wire could be further decreased. As testified to by Delovich and Kirtchartz, and not contradicted by Respondent's witnesses, should the belting come in contact with the trolley wire, it could cause a hanger to come loose, thus knocking the trolley wire down, creating a fire hazard. Respondent argues that the fact that the belting was transported over two miles, on July 28, without any problems, establishes that adequate precaution had been taken. Although the two mile trip, on July 28, might have been fortuitous, the record fails to indicate that Respondent took any

precaution prior to the transporting of the belting to insure that it would not come in contact with the wires.(FOOTNOTE 1) Accordingly, I find that Respondent herein did violate section 75.1003-1, supra.

II.

In essence, it was Delovich's testimony that the violation herein should be considered significant and substantial, inasmuch as the height of the belting exceeded that of the trolley wire, and ". . . that it did come in contact and the continuance of this practice with this piece of equipment, eventually lead to an accident" (Tr. 39). (sic). He was asked to indicate the hazards of this condition, and he indicated that damage of the trolley wire ". . . leads to a fire or electrical shock to the persons working" (Tr. 39). In its brief, Petitioner cites the testimony of Kirtchartz who indicated that if material is loaded above the end of the cars it "could" contact the trolley wire (Tr. 74). Petitioner also cites the testimony of Ice and Fred Rundle, III, Respondent's midnight shift supervisor, who indicated that if the belting is high enough to contact the trolley wires, there exists the possibility of a hazard. Although this testimony tends to establish that the hazard of contact with the trolley wire could occur, it does not establish that such a hazard was reasonably likely to occur.(FOOTNOTE 2) As such, I find that the violation herein was not significant and substantial (See, Consolidation Coal Company, 6 FMSHRC 189, at 180, 193 (February 1984)); Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

III.

According to the testimony of Delovich, when he investigated the section 103(g) complaints on August 1, 1988, he interviewed Bill Lucas and Danny Wade, who were the motormen who moved the belting on July 28, 1988, from outside the mine, a distance of 2 miles to the 13 left track chute. In essence, he indicated

that the latter told him that the day shift motormen, Rudy Baker and Larry Stafford, had questioned the height of the belting, and their foremen Steve Shaffer had told them not to move the belting. None of the sources interviewed by Delovich testified. Further, the record is not clear as to the source of Delovich's testimony with regard to conversations Baker and Stafford had with their foreman with regard to the height of the belting. Accordingly, I do not find this testimony sufficiently reliable to support a finding that Respondent's managers, prior to the transporting of the belting, knew that it was too high. Delovich testified that Lucas and Wade had told him that when transporting the belting on July 28, they may have knocked out a trolley wire hanger. However, in a report of his investigation, Government Exhibit 3, he indicated that Lucas and Wade told him that in transporting the belting they ". . . did not observed (sic) or no happenings if the belting touched the trolley wire." (sic). I place more weight on Delovich's version of the conversation with Lucas and Wade as contained in the report of the investigation, rather than on his testimony, as the investigation report was written the same day or a day after his interview of Lucas and Wade. Rundle indicated that the belting was bound down in the flat car to keep it from shifting, and he asked Lucas and Wade if they had any problems transporting the belting, and they indicated that they did not. Also, I note, that the testimony of Ice has not been contradicted which establishes as discussed above, infra, II, that the belting was approximately 5 to 7 inches horizontally removed from the trolley wire. Thus, based on all of the above, I conclude that it has not been established that the violation herein was the result of Respondent's "unwarrantable failure," as it has not been established that it acted with any aggravated conduct of a degree higher than mere negligence. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)).

In assessing a penalty herein, I find the violation herein to be of only a moderate degree of gravity, and find that Respondent herein acted with only a low degree of negligence. I have also taken into account the remaining factors set forth in section 110(i) of the Act as stipulated to by the Parties. Based upon all of the above, I conclude that a penalty herein of $200 is appropriate for the violation of section 75.1003-1, supra.

ORDER

The Respondent shall, within 30 days of this Decision, pay $200 as a civil penalty for the violation found herein.

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It is further ORDERED that Order No. 3105926 be AMENDED to a Section 104(a) citation, and to reflect the fact that the cited violation was not significant and substantial

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. In its brief, Respondent argues that adequate precautions were taken inasmuch as Rundle, the shift supervisor, indicated that when belting is transported the tail motorman's job is to see if the belting shifts. Rundle indicated that in the event the belting would shift, the motorman would stop the cars and lighten the belt. The record does not establish that the miners who actually transported the belting in question were specifically told of their duties to continuously monitor the belting to insure that it would not contact the trolley wire. I find that Rundle's testimony is insufficient to establish that "adequate" precautions were taken.

~FOOTNOTE_TWO

2. In concluding that the hazard of contact of the belting with the trolley wire was not reasonably likely, I accorded considerable weight to the uncontradicted testimony of Ice that the belting was at least 5 to 7 inches removed from the trolley wire in a horizontal plane.