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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. CENT 89-37-M
A. C. No. 14-00164-05506

v.

Kansas Falls Quarry and Mill

WALKER STONE COMPANY, INC.,
RESPONDENT

DECISION

Appearances: C. William Mangum, Esq., Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri,
for the Petitioner;
Keith R. Henry, Esq., Weary, Davis, Henry,
Struebing and Troup, Junction City, Kansas,
for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for 11 alleged violations of safety standards under 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings of fact in the Discussion below:

FINDINGS OF FACT

1. Respondent owns and operates the Kansas Quarry and Mill, which is a surface limestone mine engaged in mining and selling limestone with a regular and substantial effect on interstate commerce.

2. Respondent is a medium size mine operator.

3. After receiving each citation involved in this case, Respondent made a good faith effort to abate the cited condition promptly either by correcting the condition or by removing the cited equipment from service.

Citation 2651713

4. On October 13, 1988, a guard was not in place over the four V-belt drive pulleys of the 353 natural-gas drive engine for the first set of rolls. The pulleys project from the sides of the motor. The moving parts may be contacted by persons using the elevated walkway around the engine. The pulleys are located about two feet from the floor. If an individual contacted the unguarded moving parts, the accident could result in a fatal or permanently disabling injury.

Citation 2651714

5. On October 13, 1988, a 110 volt metal fan serviced by a #14 AWG conductor cable and located in the #1 crusher control room was not grounded. Grounding provides fault protection. Serious injuries could result from shock or fire.

Citation 2651715

6. On October 13, 1988, a 110 volt electrical metal heater with a fan motor mounted on metal was not grounded. The heater was located in the #1 crusher control room. Grounding provides fault protection. Serious injuries could result from shock or fire.

Citation 2651716

7. On October 13, 1988, part of a conveyor belt was not visible from the #1 crusher control room, where the belt controls were, and there was no warning system to warn people when the belt would start. If a person became entangled in the conveyor, the accident could result in a fatal or permanently disabling injury.

Citation 2651717

8. On October 13, 1988, exposed moving parts on the tunnel conveyor tail pulley adjacent to a walkway were not guarded. The tail pulley was in a poorly lighted area about 2 1/2 feet from the floor. If a person became entangled in the unguarded pulley, the accident could result in a fatal or permanently disabling injury.

Citation 2651718

9. On October 14, 1988, signs prohibiting smoking and open flames were not posted on two diesel fuel tanks near the shop

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and on a diesel fuel tank near the electrical control building. There was some dry vegetation and diesel fuel spillage around the tanks which created a fire or explosion hazard. In the event of fire or explosion, serious injuries could occur.

Citation 2651719

10. On October 14, 1988, a 440 volt square D fuse switch and a starter switch which controlled the #1 crusher conveyor belt were not grounded. There was a grounding conductor leaving the starter switch to the motor, but it was not connected at the switch. If a wire connection, fuse clip, or other switch gear part faulted, the incident could result in a fatal shock or serious injuries.

Citation 2651720

11. On October 18, 1988, a principal 110 volt switch mounted on the outside of the electrical building was not labeled to show that it controlled the 110 volt starter switch for the #1 crusher motors. The unit controlled by the switch could not be readily identified by its location. In an emergency, delay caused by confusion in trying to locate the right switch to de-energize the #1 crusher motors could contribute to serious injuries.

Citation 2652721

12. On October 18, 1988, the 440 volt 3 phase, 10 H.P. conveyor drive motor was not grounded. The flex metal conduit, which had been used as a grounding conductor, was pulled off the motor junction box. Injury from shock could be fatal.

Citation 2651722

13. On October 19, 1988, 440 volt insulated cable wires entering a metal motor junction box were not bushed. The outer jacket on the cable was pushed back. The motor had been in this condition for at least several months. Injury from shock could be fatal.

Citation 2651724

14. On October 19, 1988, the diesel fuel delivery truck used to haul fuel to equipment in the four quarries did not have a door on the driver's side and had no seat belts. The truck travels about 10 to 12 miles per shift from the shop to the four quarries. Injury from falling out the door could be fatal.

DISCUSSION WITH FURTHER FINDINGS

Citation 2651713

On October 13, 1988, Inspector Larry J. Day observed that there was no guard over the V-belt drive pulleys of the alternator part of the 353 natural gas engine for a set of rolls. The engine was operating at the time and the pulleys were moving "at a very rapid pace." Tr. 43. Inspector Day also observed that the unguarded V-belt pulleys were within arm's reach of a walkway next to the engine and the fast-moving machine parts were exposed and would be accessible to persons on the walkway. Although Inspector Day originally checked the "Gravity" section of the citation as non-S & S, he testified that it should have been classified as an S & S violation. He explained that Respondent's plant foreman, Clifford Manning, pressured him not to issue any citations, and because he did not want to increase the foreman's anger, he marked a number of the citations non-S & S instead of S & S. Tr. 227-228. His testimony on this point includes the following:

THE WITNESS: I would like to make a statement as to the inspection was quite intense, I did have a lot of pressure on me.

It was very difficult to issue citations to the operator, and I went lenient on the S and S part because of the difficulty that I had of issuing any citations to the operator.

I was trying not to be ambitious or aggravate the operator any further than what he was, and still try to do my job.

* * *

The difficulty was every time* I wrote a citation, the operator would say, well you can't cite me for that because I'll have it fixed before you leave today.

For some reason, he had the interpretation that if he could fix this violation, that I shouldn't cite him for it.

So this made it difficult to give him -- to issue citations. [Tr. 227-228]

After reviewing each of his 11 citations at the hearing, the inspector testified that he would have changed four of them to allege gravity as S & S instead of non-S & S2.

In her brief, the Secretary requests that these four citations be affirmed as alleging S & S violations. However, inasmuch as the Secretary did not move to amend the citations at the hearing, her request is denied as being untimely.

Accordingly, the above four citations will be considered under "gravity" as used in 110(i) of the Act, but not on the question whether they are S & S violations within the meaning of 104(d)(1) of the Act. The citations that allege S & S violations will be considered under both "gravity" in 110(i) and the question whether the violations were "significant and substantial" within the meaning of Section 104(d)(1) of the Act.

The Commission's test for finding an S & S violation is discussed in connection with other citations, below.

Civil penalty proceedings before the Commission and its judges are de novo, and the penalties assessed in such proceedings are to be based upon the six statutory criteria in 110(i) of the Act rather than MSHA's classification/points system. Sellersburg, 5 FMSHRC 287 (1983), aff'd, 736 F2d 1147 (7th Cir. 1984); Black Diamond Coal Co., 7 FMSHRC 1117 (1985).

The reliable evidence shows that Inspector Day observed a serious violation. He testified that the unguarded V-belt pulleys were accessible from the nearby walkway and that accidental contact with them could cause serious injuries. The violation is serious within the meaning of "gravity" in 110(i) of the Act, even though it is not alleged to be a "significant and substantial" violation within the meaning of 104(d)(1) of the Act. It is a serious violation because the safety standard is an important protection for the miners, and because Respondent's conduct created a substantial possibility of serious injury. It is also serious because Respondent's conduct should be deterred.

Citation 2651714

On October 13, 1988, Inspector Day observed an ungrounded 110 volt metal fan serviced by a conductor cable in the number 1 crusher control room. The parties have stipulated that the fan

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was not grounded and Inspector Day stated that there was no equivalent protection provided. The control room is small, about 8 x 10 feet, and the fan would be close to an operator inside the room. Inspector Day ran a continuity test on the fan from the motor to the frame and found no resistance. He explained that if the fan motor faulted, the frame of the fan would become energized.

In defense of this citation, Respondent states that the fan was approved for use by Underwriter's Laboratory, that it was not in use at the time of inspection, and that it was private property owned by the crusher operator and was used without knowledge or permission of the company.

Inspector Day, a certified electrician, testified that the Underwriter's Laboratory approval had no bearing upon whether the fan was properly grounded (Tr. 50) and the fan was not grounded. The fact that the fan was not in use at the time of inspection does not rebut the proof of a violation, so long as the fan was available for use. Citation 2651714 is one of the four citations discussed above which the inspector stated should have been classified as S & S instead of non S & S. The same ruling applies, denying the Secretary's request to amend the citation.

The fact that the fan was owned by an employee of Respondent and that Respondent did not expressly approve of its use does not rebut the proof of a violation. Respondent has not shown that it prohibited the use of the fan in its control room or that it instructed employees against the use of personal equipment. The fan was present at Respondent's mine site, its presence created a hazard, and until a citation was issued Respondent permitted at least one employee to have access to the fan while working.

I find that this is a serious violation within the meaning of the "gravity" factor in 110(i) of the Act. It is serious because the safety standard (30 C.F.R. 56.12025) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651715

On October 13, 1988, Inspector Day observed an ungrounded 110 volt metal heater located in the number 1 crusher control room. The parties have stipulated that the heater was not grounded. Inspector Day ran a continuity test on the heater and found that it was a good electrical conductor. The metal heater was the property of Respondent. The heater was on the floor of the crusher control room within arm's reach of any operator who would be in the room.

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This citation is one of the four citations discussed above, which the inspector stated should have been classified as S & S instead of non-S & S. The same ruling applies denying the Secretary's request to amend the citation.

I find that this is a serious violation within the meaning of the "gravity" factor in 110(i) of the Act. It is serious because the safety standard (30 C.F.R. 56.12025) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651716

On October 13, 1988, Inspector Day issued Citation 2651716, alleging a violation of 30 C.F.R. 56.9006, which provides:

When the entire length of a conveyor is visible from the the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visual warning system shall be installed and operated to warn persons that the conveyor will be started.

Inspector Day testified that ten to twelve feet of a conveyor belt which was started from crusher control room number 1 was not visible from the crusher control room. Tr. 64, 403. Cliff Manning, the plant foreman, stated that approximately ten to fifteen feet of the conveyor was not visible from the control room. There was no audible or visual warning system to warn persons when the conveyor would be started. Employees performed greasing around the portion of the conveyor that was invisible from the control room. The conveyor was started once or twice a day.

The inspector marked this violation non-S & S on the citation. The Secretary's post-hearing request to amend the citation to allege an S & S violation is denied as being untimely.

I find that this is a serious violation within the meaning of "gravity" in 110(i) of the Act. It is serious because the safety standard (30 C.F.R. 56.9006) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651717

On October 13, 1988, Inspector Day issued Citation 2651717, alleging a violation of 30 C.F.R. 56.14001, which provides:

Gears; sprockets; chains, drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Inspector Day testified that the tail pulley for a conveyor belt located in a tunnel did not have a guard in place. Although a stop cord was located over the unguarded portion of the tail pulley, the presence of a stop cord does not replace the need for a guard. The safety standard makes no provision for the use of a stop cord in lieu of guarding.

The inspector marked this violation as non-S & S on the citation, because of infrequent exposure of personnel to the cited condition.

I find this violation to have a low degree of gravity.

Citation 2651718

On October 14, 1988, Inspector Day issued Citation 2651718, alleging a violation of 30 C.F.R. 56.4101, which provides:

Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.

Inspector Day observed two large diesel fuel tanks side by side that did not have signs prohibiting smoking posted on them or near them. A gasoline tank was located about 45 feet away from the diesel tanks. The gasoline tank did have a single "no smoking" sign posted on it, however the sign was not readily visible from all areas around the diesel tanks. Respondent's president, David Walker, stated that the diesel tanks were accessible from all directions to the plant and that the "no smoking" sign on the gasoline tank could not be seen from all approaches to the diesel tanks. Mr. Walker confirmed that readily visible "no smoking" signs were posted only after the citation had been issued and new signs were painted on the diesel tanks.

Inspector Day testified that a third diesel tank was located near an electrical control building. Tr. 82. The third diesel tank did not have any signs prohibiting smoking posted on it and although there was an old wooden building with a "no smoking" sign located near the third diesel tank, the sign could not be seen from the tank.

The evidence establishes that readily visible signs prohibiting smoking and open flames were not posted on or around three of Respondent's diesel fuel storage tanks. Inspector Day marked this violation non-S & S on the citation.

I find that this violation presented a low level of gravity.

Citation 2651719

On October 14, 1988, Inspector Day observed a 440 volt fuse disconnect switch in an electrical control building about four or five feet above a dirt floor. The switch was not properly grounded and no equivalent protection was provided. Respondent's plant foreman, Cliff Manning, confirmed that there was no grounding between the fuse box and starter switch. This condition was a violation of 30 C.F.R. 56.12025 and presented a risk of electric shock.

The inspector marked this violation non-S & S on the citation. The Secretary's post-hearing request to amend the citation to allege an S & S violation is denied as being untimely.

I find that this is a serious violation within the meaning of "gravity" in 110(i) of the Act. It is serious because the safety standard (30 C.F.R. 56.12025) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651720

On October 18, 1988, Inspector Day issued Citation 2651720, alleging a violation of 30 C.F.R. 56.12018, which provides:

Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

Inspector Day observed a large principal power switch mounted on the outside of an electrical control building. He saw three conductors running into the switch and a conduit running out of the switch into the earth. He could not readily identify which unit or units were controlled by the switch and there was no label on the switch to identify the unit it controlled. Plant foreman Clifford Manning confirmed that the unlabeled power switch might be confusing to some employees. Inspector Day eventually determined that the unlabeled power switch controlled the conveyor motors for the crusher.

The evidence establishes that a principal power switch was not labeled to show which units it controlled and that identification could not be made readily by its location.

Inspector Day marked this violation non S & S on the citation. I find that it presented a low level of gravity.

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"Gravity" of a violation under 110(i) and a "Significant and Substantial" violation under 104(d)(1) of the Act

The term a "significant and substantial violation" derives from 104(d)(1) and (2) of the Act,³ and not its civil penalty provision (110(i)). The civil penalty provision simply uses the term "gravity of the violation," as one of six statutory criteria to consider in assessing a penalty.

Sections 104(d)(1) and (2) grant an administrative injunctive power to the Secretary of Labor quite different from the civil penalty authority in 110(i). Sections 104(d)(1) and (2) authorize the Secretary to withdraw miners from a mine if a certain chain of violations occurs. The chain must begin with a

finding of a violation which, though not an imminent danger,⁴ is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" and is also "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards" If a mine inspector finds such a violation, 104(d)(1) requires that the inspector "include such finding in any citation given to the operator" It is this finding that begins a 104(d)(1) chain that may lead to a 104(d)(2) order withdrawing miners from the mine or a part of it.

This administrative injunctive power is strictly construed by the Commission, which has ruled that, to prove a "significant and substantial" violation, the Secretary must prove "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 (1981)).

The Commission has not stated how its definition of a "significant and substantial" violation differs from the Act's definition of an "imminent danger" (see n. 4, *infra*). However, inasmuch as 104(d)(1) does not apply to an "imminent danger," the Commission's definition of an S & S violation must mean a level of gravity below an imminent danger.

"Gravity of the violation," as used in 110(i), i.e. for civil penalty purposes, is not tied to the question whether a violation is or is not "significant and substantial" within the meaning of 110(d)(1). "Gravity," for civil penalty purposes, is the seriousness of a violation. This includes the importance of the safety or health standard, and the seriousness of the operator's conduct, in relation to the Act's purpose of deterring violations and encouraging compliance with safety and health standards. Many types of safety or health violations are serious even though a single violation might not show a "reasonable likelihood" of causing injury or illness, or even fit into a probability-of-injury-or-illness mold. For example, some violations are serious because they demonstrate recidivism or an attitude of defiance by the operator. Others are serious because the safety and health standard involved is an important protection for the miners. Important safety or health standards are such that, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote

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or even slight.⁵ Other mine safety and health violations are serious because they may combine with other violations or conditions to set the stage for a mine accident or disaster, even though individually, or in isolation, they do not appear to forecast injury or illness. Still others are serious because they involve a substantial possibility of causing injury or illness, if not a probability.

The term a "significant and substantial" violation within the meaning of 104(d)(1) of the Act has been interpreted by the Commission in a number of cases.

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary . . . 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 has explained further that the third element of the Mathies formulation "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, 1986 (1984) (emphasis deleted). It has also stated that, in accordance with 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984).

The Commission's definition of an S & S violation will be applied in considering the following three citations:

Citation 2651721

On October 18, 1988, Inspector Day observed a conveyor and conveyor motor mounted on a river bridge. He saw three conductors running into the motor and a broken conduit next to the junction box on the motor. The unit was not properly grounded. A metal framed walkway ran parallel to the conveyor. Inspector Day explained that two types of faults would probably result in the motor shutting off. Tr. 110. However, in the event of a "ground-to-face" fault the entire steel conveyor could become energized creating a hazard of electrocution. Tr. 110-113. Inspector Day further observed that the walkway adjacent to the conveyor was used regularly and he observed people on it often during the week he was there.

Failure to ground the metal framed motor constituted a violation of 30 C.F.R. 56.12025. A discrete safety hazard of electrocution was contributed to by the violation. The location of the improperly grounded motor and the frequent use of the adjacent metal walkway by employees resulted in a reasonable likelihood that the violation would cause a serious injury. Inspector Day classified this violation as "significant and substantial." The violation meets the criteria set forth in Mathies Coal Co., supra.

Citation 2651722

On October 19, 1988, Inspector Day issued Citation 2651722, alleging a violation of 30 C.F.R. 56.12008, which provides:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Day observed that the wires from a 440 volt cable entered a metal motor junction box. The cable itself did not enter the box, but the cable jacket had been torn back so that only the wires entered the junction box. Inspector Day observed that there was no bushing inside the junction box or anywhere on the cable wires. Lack of adequate bushings could result in electric shock or fire with serious injuries.

Inspector Day's testimony regarding the condition of the wires is not contradicted. He classified this violation as significant and substantial. The violation meets the criteria set forth in Mathies Coal Co., supra. A violation of 30 C.F.R.

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56.12008 is established by the fact that insulated wire passing through the metal frame of junction box were not bushed. The violation contributed to a discrete safety hazard of electrocution, and created a reasonable likelihood of serious injuries.

Citation 2651724

On October 19, 1988, Inspector Day issued Citation 2651724, alleging a violation of 30 C.F.R. 56.9002, which provides:

Equipment defects affecting safety shall be corrected before the equipment is used.

The inspector observed an old dump truck that had been converted into a fuel delivery truck by mounting a large fuel tank on it. The door on the driver's side of the truck had been removed and no seat belt had been installed in the cab. The truck operated on rough gravel roads. The combined equipment defects of no door and no seat belt created a reasonable likelihood of a driver falling out of the truck and being run over by the truck or receiving other serious injuries from the fall.

Inspector Day classified this violation as significant and substantial. This violation meets the criteria set forth in Mathies Coal Co., supra. The lack of a seat belt and a missing door on the fuel delivery truck are equipment defects affecting safety in violation of 30 C.F.R. 56.9002. The violation created a discrete safety hazard which was reasonably likely to cause a serious injury.

The Effect of Prior Inspections

With respect to five of the eleven the citations, Respondent contends that Inspector Day should not have issued a citation because earlier inspections by other MSHA inspectors (of the same conditions at this mine) did not result in citations. Specifically, in its post-hearing brief Respondent contends that Citations 2651716, 2651717, 2651720, 2651721, and 2651724 were for conditions that had previously been observed by other inspectors without issuing a citation.

The doctrine of collateral estoppel may not be invoked to prevent a mine inspector from issuing a citation for a condition he or she believes to be a violation of a safety or health standard. The fact that other MSHA inspectors may not have cited Respondent for the same conditions later cited by Inspector Day does not affect the validity of his citations. However,

Respondent's reliance on prior inspectors' lack of citations may have a bearing upon the question whether Respondent was negligent and, if so, to what degree. After careful consideration of the evidence concerning each violation found herein, I find that the degree of negligence should be changed from "moderate" to "low" for the following citations: Nos. 2651717, 2651720, 2651721, and 2651724. The inspector's finding of low negligence in Citation 2651716 is sustained by the reliable evidence. As to each of the remaining violations (Citations 2651713, 2651714, 2651715, 2651718, 2651719 and 2651722), I find that the violation could have been prevented by the exercise of reasonable care and was due to moderate negligence.

Considering all of the criteria for a civil penalty in 110(i), I find that the following penalties are appropriate for the violations found herein:

Citation	Civil Penalty
2651713	\$ 50.00
2651714	\$ 50.00
2651715	\$ 50.00
2651716	\$ 20.00
2651717	\$ 20.00
2651718	\$ 20.00
2651719	\$ 50.00
2651720	\$ 20.00
2651721	\$ 75.00
2651722	\$100.00
2651724	\$ 75.00

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated the cited safety standard alleged in each of the above citations.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citations 2651717, 2651720, 2651721, and 2651724 are modified to change the degree of negligence from "moderate" to "low." The above modified citations and the other citations herein are AFFIRMED.

5. For example, a stop-look-and-listen safety law for public service vehicles at railroad crossings may be considered an important safety standard even though a particular instance of violation may not show a "reasonable likelihood" of collision with a train.