

CCASE:
SOL (MSHA) v. PITTSBURG & MIDWAY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

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

v.

PITTSBURG & MIDWAY COAL
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 90-25
A.C. No. 29-00096-03534

McKinley Mine

DECISION

Appearances: Michael H. Olvera, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Ray D. Gardner, Esq., Pittsburg & Midway Coal Min-
ing Company, Englewood, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging Pittsburg & Midway Coal Mining Company (P&M) with a 104(d)(1) significant and substantial violation of 30 C.F.R. 77.404(a).

P&M filed a timely answer to the Secretary's proposal for penalty, denying the alleged violation. After notice to the parties, an evidentiary hearing on the merits was held before me at Albuquerque, New Mexico. Both parties filed post-hearing briefs, which I considered, along with the entire record in making this decision.

ISSUES

The issues presented in this proceeding include the following:

1. Whether the 170-ton Unit Rig Haul truck powered by a Cummins diesel engine was being maintained in a safe operating condition as required by 30 C.F.R. 717.404(a).

2. If a violation of the cited standard is found, whether it is of a "significant and substantial" nature.

3. If a violation is found, whether the contested 104(d)(1) order resulted from an unwarrantable failure by P&M to comply with the cited standard.

4. If a violation is found, the appropriate civil penalty that should be assessed, taking into consideration the statutory civil penalty criteria found in Section 110(i) of the Act.

Statement of the Case

The McKinley Mine operated by the Respondent P&M is a surface coal mine. The citation in question charges P&M with a violation of 30 C.F.R. 77.404(a), which is a broadly worded safety standard requiring operators of surface coal mines to maintain mobile and stationary machinery and equipment in "safe operating condition". The cited safety standard in its entirety reads as follows:

77.404 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 immediately.

P&M is charged with failure to maintain its Unit Rig 170-ton haul truck in a safe operating condition.

The haul truck weighs 192 fully loaded and travels at an average speed of 22 miles per hour. The haul truck functions as follows: (a) a fuel pump located and fixed on the diesel engine draws fuel from a tank to run the diesel engine (b) the diesel engine turns an alternator to generate electricity, and (c) the electricity generated runs two electric driven motors located near the rear wheels. Although the haul truck was supplied by Unit Rig Inc., the diesel engine, including the electrical fuel shut-off system and the mechanical fuel shut-off system it replaced to successfully abate the alleged violation, were both manufactured by Cummins Engine Company.

After careful review and evaluation of the evidence, the

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arguments of the parties and the record as a whole, I find that the preponderance of the evidence presented fails to establish that P&M did not maintain the truck in a safe operating condition. I therefore find that there was no violation of 30 C.F.R. 77.404.

Even though there was no violation of the cited standard, it is undisputed and clear from the record that Respondent made the modification required to successfully and timely abate the alleged violation.

At the time the citation was issued, the haul truck had a properly designed and functional electric fuel shut-off system that was turned on and off by turning a key on the dashboard in the cab of the truck. The modification made to abate the violation was to replace the electric fuel shut-off system with a mechanical fuel shut-off system. Both options are manufactured by the Cummins Engine Company. After abatement, the truck still had a single fuel shut-off system. There was no meaningful difference in the safe operating condition of the truck before and after abatement of the citation.

II

The finding and conclusion that there was no violation of the cited safety standard is based upon the fact that the preponderance of the evidence presented at the hearing established that none of the optional fuel shut-off systems for the Cummings diesel engine on the Unit Rig haul trucks are related to employee safety. The evidence established that the fuel shut-off systems on these trucks are designed solely to protect the diesel engine from damage and thus mitigate the potential economic loss that would result from destruction of the truck's diesel engine. These findings and conclusions are based on the creditable testimony of Mr. William R. Baltus, regional service manager for the Cummins Engine Company, and Mr. Norvell Moore, mine manager at the McKinley Mine. The only witness called by Petitioner was the MSHA inspector who issued the citation. He testified he had no experience with haul trucks. (Tr. 34). Messrs. Baltus and Moore, on the other hand, have had many years of relevant experience. Mr. Baltus has been the regional service manager for Cummins Engine Company for the past 13 years and has worked for the manufacture of the diesel engine in question for 35 years. This experience included working in the research and engineering labs with production-type and advanced research-type engines. Mr. Baltus was also employed as the supervisor of the company's test mechanics.

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I credit the testimony of Messrs. Baltus and Moore. The evidence presented at the hearing fails to establish that the haul truck in question was not being maintained in a safe operating condition. The citation should therefore be vacated.

III

The cited safety standard, 30 C.F.R. 77.404 is a broadly worded standard. It requires all machinery and equipment to be maintained in safe operating condition. The Commission in *Ideal Cement Company*, 11 FMSHRC 2409 at 2416 (November 1990) stated that in interpreting and applying broadly worded standards, the appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987), *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-1618 (September 1987).

Assuming arguendo that the fuel shut-off system on the truck in question affected safety, I find, on the basis of the evidence presented at the hearing, that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that the haul truck should have been equipped with a mechanical fuel shut-off system rather than the functional electric fuel shut-off system with which it was equipped at the time the citation was issued.

Based on the creditable testimony of Mr. Baltus of the Cummins Engine Company and Mr. Moore, I conclude there were no violations of the cited standard. The citation is VACATED.

ORDER

Citation No. 2840029 is VACATED and its related proposed penalty is set aside.

August F. Cetti
Administrative Law Judge