

CCASE:
U.S. STEEL V. SOL (MSHA)
DDATE:
19930616
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

U.S. STEEL GROUP, MINNESOTA	:	CONTEST PROCEEDINGS
ORE OPERATIONS,	:	
Contestant	:	Docket No. LAKE 92-247-RM
	:	Order No. 4097164; 2/25/92
v.	:	
	:	Docket No. LAKE 92-248-RM
SECRETARY OF LABOR,	:	Citation No. 4097166; 2/25/92
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 92-249-RM
Respondent	:	Citation No. 4097167; 2/25/92
and	:	
	:	
UNITED STEEL WORKERS OF	:	
AMERICA, LOCAL 1938,	:	
Miners	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois,
for Respondent;
William M. Tennant, General Attorney, U.S.,
Pittsburgh, Pennsylvania, for Contestant;
James Ranta, Representative, United Steel Workers
of America, Local 1938, for Miners.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 801 et seq., U.S. Steel Group, Minnesota Ore Operations ("U.S. Steel") contests the validity of an imminent danger order of withdrawal issued pursuant to section 107(a) of the Act, 30 U.S.C. 817(a), and the citation for a violation of a mandatory safety standard issued in association with the order pursuant to section 104(a) of the Act, 30 U.S.C. 814(a). In addition, U.S. Steel contests the validity of two other section 104(a) citations. The order and the citations were issued at U.S. Steel's Minntac Plant, a taconite processing plant located in St. Louis County, Minnesota, and they involve work done in the vicinity of the plant's primary crusher on the morning of February 25, 1992.

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Pursuant to notice the proceeding was heard in Duluth, Minnesota. (Footnote 1) William M. Tennant represented U.S. Steel and Miguel J. Carmona, represented the Secretary of Labor, Mining Enforcement and Safety Administration ("MESA"). In addition, the United Steelworkers of America, Local 1938 ("Steelworkers"), sought and was granted party status. James Ranta represented the Steelworkers.

With regard to the section 107(a) order/section 104(a) citation, U.S. Steel contests the inspector's allegation that the cited conditions constituted an imminent danger, the inspector's finding that the same conditions constituted a violation of a mandatory safety standard and the inspector's finding that the violation was a significant and substantial contribution to a mine safety hazard ("S&S" violation). With respect to one of the two other section 104(a) citations, U.S. Steel challenges the inspector's finding of a violation and his S&S finding and with respect to the other, U.S. Steel challenges his finding of a violation.

Following the receipt of the transcript, counsels submitted helpful briefs.

DOCKET NO. LAKE 92-247-RM

ORDER/CITATION NO. 4097164, 2/25/92

Order/Citation No. 4097164 charges as follows:

Coarse Crusher - Step 2

The power was "on", and the step 2 primary crusher hatches were not blocked against inadvertent motions. One employee had been working below the unsecured hatches, suspended in a work basket (with two anchor points), and hoisted through the hatches utilizing a 15-ton capacity P&H bridge type crane. All work at the No. 2 Course Crusher shall be halted until persons are protected from hazardous motion.

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Due to an industrial accident in the area, the hearing had to be suddenly and unexpectedly adjourned and reconvened at a location outside the city. Had it not been for the diligence and cooperation of all involved -- counsels, the representative of miners, the witnesses, and the reporter -- this would not have been possible and the hearing would not have been completed within the time originally allotted.

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Resp.'s Exh. 1. The order/citation further alleges that the condition constituted an S&S violation on 30 C.F.R. 56.14105.(Footnote 2)

THE SECRETARY'S WITNESSES

Arthur Toscano

Arthur J. Toscano, a metal and nonmetal Mine Safety and Health ("MSHA") inspector since 1975, stated that on February 25, 1992, he went to the Minntac Plant to conduct an inspection as part of an ongoing inspection by MSHA of the entire facility. The inspection was in the morning, and during the inspection Toscano was accompanied by miners' representative Tim Kangas and by U.S. Steel safety engineer Robert Tomassoni. Tr. 15-16.

Toscano arrived at the mine at approximately 8:00 a.m. Following an opening conference with Kangas and Tomassoni, during which the group discussed what they would do during the course of the day, the inspection party drove to the crusher building. While on their way to the crusher site, Toscano testified that he advised Tomassoni that he, Toscano, had received an MSHA policy memorandum dealing with the hoisting of men in work baskets and that "if [he] saw a man in a basket that didn't meet MSHA's requirements, that [he] would issue a citation." Tr. 18.

The inspection party arrived at the crusher building at approximately 9:40 a.m. As they entered the building Toscano observed David Tacchio, a certified electrician, suspended in a work basket. Tr. 19, 72-73. The basket was hanging from an overhead traveling bridge-type crane. According to Toscano, Tomassoni asked if Toscano wanted to inspect the basket and Toscano said that he did. Tr. 19. Tomassoni shouting instructions to the crane operator who brought the work basket to the plant floor. Id. Toscano testified that at this time his sole concern was with the nature of the basket's cable connections. Tr. 42.

Toscano testified that Tocchio unhooked his safety line and left the basket. Tr. 44. Toscano was sure that while Tocchio was in the basket he had on all of his personal safety equipment, including a safety belt and line. Tr. 44. However, because the basket had two cable connections rather than four, Toscano told Tomassoni that he would issue a citation for a violation. He

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Section 56.14105 requires in pertinent part that:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off and the machinery or equipment has been blocked against hazardous motion.

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stated that he understood the MSHA policy memorandum and an applicable mandatory safety standard (he did not specify which) to require four connections. Tr. 20.(Footnote 3)

Toscano then spoke with Tocchio and the crane operator about their training and the job they were about to do. They explained to Toscano that they were in the process of preparing the crusher for some electrical repair work. Tocchio also stated that prior to Toscano arriving that morning, he already had done some preliminary work inside the crusher. Tr. 23, see also Tr. 26.

Toscano testified that as he looked over the railing into the crusher he noticed that two doors covering the crusher (the "hatch doors") were open. (They were in a verticle position rather than lying in a horizontal position across the crusher opening. Tr. 21.) The hatch doors were constructed of steel plate, were approximately 12 feet by 15 feet in size and weighed several tons each. Tr. 27, 29. Toscano stated that when closed, the doors fitted together tightly.

Toscano also stated that the doors were opened and closed by an electric winch that let out and retrieved wire ropes attached to the doors by eyelets. Tr.28. The purpose of the doors was to keep dust and noise from reaching the upper floors of the crusher building. Tr. 55.

Upon further investigation Toscano discovered that the doors were not de-energized or physically blocked against unintentional motion.(Footnote 4) Tr. 25-26. Toscano stated, "the electrical control circuit was in the on or energized position and there was no physical means of blocking those vertical hatch doors from unintentionally being lowered in the work area." Id. To physically block the hatch doors, U.S. Steel personnel usually pinned each door with a steel bar. The bar kept the doors in an upright position if the cables were activated for some reason or if they failed.

Toscano did not know why the bars were missing. Tr. 26-27. He feared that if someone were purposefully or accidentally to activate the winch's start/stop buttons (and Toscano stated that he noticed miners work gloves, a broom and other materials used by miners within inches of the start/stop

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The following day Toscano spoke with his supervisor and was advised that two connections were acceptable to MSHA. Toscano told Tomassoni about the error and did not issue a citation for two cable connections. Tr. 20-21.

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However, Toscano determined that the crusher was locked out and that everything else that should have been blocked against motion was blocked. Tr. 42.

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buttons) nothing would have prevented the hatch doors from moving down into a closed position. Tr. 29. Toscano agreed, however, that the start/stop buttons were probably spring loaded and that if they were working properly they would only have activated the winch so long as whatever contacted them remained in touch to keep them engaged. Toscano was asked whether the buttons could have stuck and he stated that if they were just touched they probably would not have stuck. They would have had to be "smashed." Tr. 50. He also stated that he had not inspected the buttons. Id., 67.

Toscano believed that he advised Tomassoni that he was issuing a imminent danger order of withdrawal and that there would be no work done in the area until the doors were de-energized and until they were physically blocked. (Toscano did not recall exactly what he told Tomassoni and the others who were with Tomassoni when he issued the order, but whatever he said, he did not actually write the order of withdrawal until later in the afternoon. Id.) Tr. 46.

Toscano testified that when he first observed Tocchio, Tocchio was suspended about four or five feet above the floor and was being moved toward the crusher cavity. Tr. 40-41. To reach the work area Tocchio would have had to be lowered through the upraised, unblocked, energized hatch doors. Tr. 30, 57.

After the order was issued, Tomassoni promptly ordered that corrective measures be taken and the order was terminated when U.S. Steel personnel placed steel bars through the eyelets blocking all unintentional motion on the hatch doors and when they also de-energized and electrically locked out the doors. Tr. 38.

Toscano stated that after the order was issued he determined that when preliminary work had been done on the crusher earlier in the shift, the crew doing the work, including Tocchio had gained access to the crusher by using man-doors at and below the floor level of the work station from which he had observed Tocchio being lowered. Tr. 45. They had not, as first he had supposed, gone down in the basket. To reflect the fact that the order/citation was issued prior to Tocchio actually having been lowered past the doors, Toscano modified the order in part as follows:

One employee had been assigned repair work below the unsecured hatches and was observed suspended in a work basket (with two anchor points.) He was in the process of being hoisted through the opening created by the vertical hatches, which were not de-energized and were not blocked against

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hazardous motion, utilizing a P&H-type over-head crane.

Resp. Exh. 1 at 2 (emphasis in original).

Toscano described the imminent danger that he believed existed:

[T]here was a very . . . likely occurrence of an energized motor being started up, sometimes accidentally, and beginning a downward motion of these doors . . . the cables [of the basket] could get tangled in the closing action of the doors, you could bounce the man around . . . If [the doors] made it all the way down to the closed position, [the doors] could . . . crimp . . . kink . . . or . . . cut . . . [the] wire rope[s] to drop the basket with the man in it.

Tr. 29-30. Later Toscano expanded upon what he believed the imminent danger to be:

[T]he worst scenario in my mind would be if an eyelet or a connection anywhere around the support cables failed, it would cause a gravity dropping or slamming motion . . . [I]f someone just touched the button . . . [i]t would just be enough to cause high stress points on the support cables in an eyelet on the door and if the eyelets failed or the rope broke or a coupling . . . it would be a slam.

Tr. 59.(Footnote 5) He also stated that even though Tocchio wore a safety line, he could have been jostled and thrown from the basket and if he did not have the right length of line Tocchio could have fallen head first into the crusher. Tr. 34, 59.(Footnote 6) Moreover, if either of the doors had hit the basket, they could have crushed portions of the basket and caused a fatal injury. Tr. 33.

Toscano stated his understanding of the concept of imminent danger:

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Toscano testified that he had inspected the hoisting ropes and found nothing wrong with them. He did not inspect the electrical system that powered the opening and closing of the hatch doors. Tr. 67.

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Toscano stated that Tocchio's safety line was approximately three feet long. Tr. 43. He did not recall how Tocchio had secured the line. Tr. 44.

[S]ection 107(a) provides for . . . [an inspector] to withdraw people from an area [in] which he feels a person could be hurt . . . if nothing is done and everything remains the same and a job is allowed to continue, [and] an inspector feels that there's a good likelihood that somebody is going to get seriously hurt and that's when I exercise . . . authority under section 107(a).

Tr. 32-33.

Toscano was shown a company document entitled Safe Job Procedure. Resp. Exh. 4.(Footnote 7) Toscano was of the opinion that it stated safety procedures required when repair work, such as that done on February 25, was performed on the crusher. Toscano interpreted safety procedure 7.b., which states "[l]ock out overhead doors over crusher cavity," to mandate that the hatch doors be de-energized. Tr. 37.

According to Toscano, U.S. Steel's failure to de-energize the doors and to pin them so they could not move prior to miners working on, around and under them, in addition to creating an imminent danger, also constituted a violation of section 56.14105. Tr. 33. With regard to the "hazardous motion" against which the standard is to guard, Toscano stated that he had seen the doors close and he estimated they took approximately 20 seconds for them to do so. Tr. 47. If they struck the basket or its supporting wires they could cause serious or even fatal injuries. Id., 38.

He also believed it highly likely that such an accident would occur. Because the doors were not de-energized they could start closing if the stop/start buttons were pushed accidentally or on purpose. Tr. 29, 38. Or, they could start down if an electric short ran through their control circuit. Id.

DAVID TOCCHIO

Tocchio testified under subpoena. He stated that on February 25, he had been assigned to change a broken conduit underneath the crusher. Tr. 73. When Tocchio first saw Toscano and the inspection party he was suspended in the basket about four feet off of the floor. Tocchio explained that the basket had to be lifted from the floor of the work station, over a

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The document sets forth safety procedures to be followed by the electronic repair department at the Minntac Plant. It states that it is for the following job: "052 Crusher Mantal Position Trouble Shoot and Calibrate -- Step I & II." Resp. Exh. 4.

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railing, swung out over the crusher and lowered through the hatch doors into the crusher and that when Tomassoni stopped the procedure the basket had just started to move toward the hatch doors. Tr. 75. Had it not been stopped, it would have taken approximately 20 to 30 seconds for him to be lowered through the hatch doors. Tr. 75-76.

Once inside the crusher Tocchio would not have left the basket, but rather would have worked from it. Tr. 77. Before Tocchio could change the conduit he had to clean rock from the crusher. Normally, such work was done by maintenance personnel and that was why he never had any training in safe job procedures for being lowered into the crusher through the hatch doors. Tr. 77.

However, he was aware that pins were used to block the hatch doors because he had done a job one other time requiring him to be lowered through the doors and he had been told about the pins and had put them in place. Tr. 82. In addition, the doors had been de-energized and locked out. Tr. 79. He did not know why the pins had not been installed this time, except that "[m]aintenance just normally did it." Tr. 82, see also Tr. 78. He did not check to see if the pins were in place before he got into the basket. He observed, "It's not a very good excuse I guess." Tr. 83.

U.S. STEEL'S WITNESS

ROBERT TOMASSONI

Robert Tomassoni, safety engineer for U.S. Steel, was the company's sole witness. (Tomassoni testified that he has been the company's safety engineer for approximately one year.

Tr. 144.) Tomassoni stated that upon entering the crusher building he saw Tocchio who was in the process of getting into the basket and was putting on his safety belt. Tr. 87. Tomassoni saw also that the basket only had two cable connections and he asked if Toscano would cite that as a violation? According to Tomassoni, Toscano said he would and Tomassoni immediately signaled for Tocchio and the basket to be returned to the work station. As Tomassoni remembered it, Tocchio had gotten only three or four feet above the floor. The basket had been ascending vertically and Tomassoni did not believe that it had yet moved laterally toward the crusher. Tr. 88.

Tomassoni called his supervisor to report what had happened and when the call was concluded Toscano asked to see the pin locations and the electrical disconnect for the hoist mechanism for the doors. Tr. 90.

After Toscano found out that the pins were not in place and the hoist mechanism was not de-energized or locked out, Tomassoni

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was made aware that U.S. Steel would receive a citation for a violation of a mandatory standard. He stated that he was not made aware that an imminent danger order of withdrawal would be issued and, as best he could recall, he did not know that an order had been issued until an hour or two after the inspection party had observed the conditions. Tr. 93-94. In addition, even though the order/citation on its face stated that it was terminated at 10:40 a.m., 45 minutes after it was issued, Tomassoni did not recall Toscano telling him about the termination. Tr. 94.

In any event, Tomassoni did not believe that the cited conditions constituted an imminent danger. In his opinion, it was highly improbable that "someone would . . . push the buttons or the cables would break." Tr. 95.

Tomassoni testified that there are two spring-activated buttons for the doors -- one to raise them and one to lower them. After the order/citation had been issued the buttons were tested and found in good working condition. As described by Tomassoni, the buttons have a chrome safety guard over their tops so that they can not be activated by being leaned on or by being struck from above. Tr. 95-96.

Tomassoni stated that it takes thirty-one seconds to lower the doors to a horizontal position. Tr. 96. One door lowers approximately two to three seconds ahead of the other. If the cables attached to the doors were to break, the doors would come down much quicker, but Tomassoni was not unaware of any cable failures at the plant. Tr. 102-103. If Tocchio had been lowered into the crusher, Tocchio would have been approximately fifteen feet from the control panel for the doors. Tr. 98. Had he wanted to get the attention of someone near the control panel he probably would have had to yell because of the noise in the plant. Tr. 98. (Tomassoni agreed, however, if the doors had fallen, yelling would have done no good. Tr. 103.)

Tomassoni indicated the reason the doors were not pinned, de-energized and locked out was because Tocchio had not made sure it was done.

IMMINENT DANGER

Section 3(j) of the Act, 30 U.S.C. 802(j), defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Commission has noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989) (citations omitted). The Commission

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also has noted that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Id.*, quoting *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. Appl.*, 491 F.2d 277, 278 (4th Cir. 1974). Finally, the Commission has adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164, quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.* 523 F.2d 25,31 (7th Cir. 1975), see also *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1291 (August 1992).

While the inspector has considerable discretion in determining whether an imminent danger exists, there must be some degree of imminence to support an imminent danger finding, and the Commission also has observed that use of the word imminent means the danger must be "ready to take place[;] near at hand[;] impending . . . [;] hanging threateningly over one's head[;] menacingly near." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (October 1991).

In challenging the validity of the order, U.S. Steel in essence argues the evidence does not establish that if normal mining operations had continued it was reasonably likely that the feared accident would have occurred. U.S. Steel catalogues the reasons why:

The hoist and ropes had no safety-related problems and the control buttons operated the doors properly. The buttons were spring-loaded and guarded against accidental contact. Tocchio was tied off . . . and could communicate with the other employees if a descending door presented a hazard. Barring a total failure of a cable (which had no observable defect), someone would have had to stand at the control panel in view of Tocchio and depress the button . . . to get the doors to a position where they could create a hazard. Under such circumstances it is inconceivable that Tocchio could have been killed or seriously injured by the conditions cited on February 25, 1992.

U.S. Steel Br. 9.

The Secretary counters that he need not prove that a reasonable likelihood of an accident existed, that the test to be applied is what a reasonable person with the experience and education of a qualified MSHA inspector would consider an imminent danger. Sec. Br. 9. Here, according to the Secretary, he has proven that the cited doors were energized and not blocked against motion at the time Tocchio was going to be lowered through the doors with the resulting danger of him being crushed or thrown from the basket. Id.

I believe U.S. Steel has the better part of the argument and that the Secretary has not established the existence of an imminent danger. It is undisputed that the doors were not pinned and that they were not de-energized and locked out. Under U.S. Steel's own safe job procedures these steps should have been taken.(Footnote 8) Tocchio testified without contradiction that when he had done a similar job in the past, the procedures had been implemented. Tr. 79, 82, see also Tr. 105-106. I conclude from this that without implementation of these safety precautions, a hazard existed to miners working in the vicinity of the doors. Indeed, common sense compels such a conclusion. The descent of a 12 feet by 15 feet steel door or doors onto a work basket or onto hoisting cables attached to the basket clearly would subject any person in the basket to the danger of being jostled and thrown from the basket if not of being crushed outright.

Still, the existence of a hazard alone does not warrant imposition of a withdrawal order pursuant to section 107(a). As noted above the hazard must be imminent, that is there must be a reasonable potential to cause death or serious harm within a short period of time, and I conclude that it is here the Secretary's case fails.

Toscano viewed the start up of the motor controlling the doors as "very likely". Tr. 29. Yet, the circumstances which would have caused this to happen were anything but. Someone would have had to purposefully activate the button controlling the winch, a circumstance that was extremely remote since, as U.S. Steel points out, any person standing at the button would also have a view of a person suspended in the work basket. Or, the button would have had to be activated accidentally by being "smashed", simply touching the button would not have kept the doors in motion. Tr. 50. Toscano offered no convincing

Tomassoni believed that pinning of the doors was all that was required under U.S. Steel's safety procedures at the time the order was issued. He stated "pinning the doors was satisfactory because the doors are not powered in the down position, it's gravity controlled, gravity descent." Tr. 106. However, Resp. Exh. R-4 indicates the power also should have been turned off and Tocchio's testimony of his past work practice strongly suggests this was in fact the rule.

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explanation of how the button could reasonably have been expected to be struck hard, let alone have been "smashed."

Toscano did offer a "worse case" scenario for how the doors could have fallen. In this version of the hazard the cables or the eyelets would have failed. Tr. 59. Yet, once Toscano inspected the cables he found that they were not defective and there is simply no evidence indicating that cable failure was reasonable to anticipate. Further, Tomassoni's testimony that he was unaware of any previous cable failures at the Minntac Plant, was not refuted and suggests that such failures were unheard of since U.S. Steel's safety engineer would certainly have known about them had they occurred. Tr. 103. In addition, no testimony or documentary evidence was offered concerning the eyelets.

Finally, Toscano made a passing reference to the doors starting to close if activated by an electric short in their control circuit. Tr. 38. However, no credible evidence was offered to prove that there was any reasonable likelihood that such a thing could occur and without the doors closing there could have been no reasonable expectation of serious injury or death.

Obviously, almost anything can happen. But the fact that conditions create circumstances in which hazards can occur does not make them imminently dangerous. The Secretary must establish more than the speculative possibility that a miner or miners may be endangered. Because he has not done so, the inspector's finding of an imminent danger must be vacated.

VIOLATION OF SECTION 56.14105

As previously noted, section 56.14105 requires that when repairs or maintenance are performed on machinery or equipment the machinery or equipment shall be blocked against hazardous motion. The doors were not pinned and, as Toscano testified, the motion against which pinning would have guarded was their downward descent. Tr. 47. The motion was hazardous because it could have subjected Tocchio to serious injury or even death. Tr. 33-34.

U.S. Steel argues that this is not a violation of the cited standard because the crusher was the machinery being repaired, not the doors. U.S. Steel Br. 13-14. U.S. Steel observes that the crusher was locked out and de-energized. I reject this argument and find that the violation existed as charged. The doors, while not part of the mechanism that did the actual crushing of the ore at the plant, were an integral part of the crusher unit. They covered the crusher mechanism and, as Toscano

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explained, were designed to keep the dust and noise produced by the crushing of ore from the upper levels of the plant. Tr. 55. As part of the crusher unit which could cause injury to mine personnel if they descended, the doors should have been blocked against motion.

S&S

The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the 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, 3-4 (January 1984), the Commission further explained:

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.

Here I have concluded that a violation of mandatory safety standard section 56.14105 existed as charged. Moreover, the evidence establishes there was a discrete safety hazard contributed to by the violation in that there was a possibility, however remote, the cables or eyelets holding the doors in place could have failed or that the buttons controlling the descent of the doors could have been "smashed" and that the doors could have fallen endangering anyone passing in the work basket. Moreover, any injuries a person in the basket would have suffered from having been struck by the doors or jostled in the basket or thrown from it reasonably could have been expected to be of a serious nature.

As is frequently the case when the Secretary alleges that a violation is S&S, the question is whether the Secretary has established a reasonable likelihood that the hazard would have resulted in an injury? In other words, had normal mining operations continued would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). I conclude the answer is "no."

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As I have stated in discussing the nature of the Secretary's imminent danger allegation, in my view the Secretary has established only an extremely remote possibility of an injury causing event. To prove S&S he must do more. There is no evidence regarding the likelihood of cable or eyelet failure or the likelihood of objects smashing the start/stop buttons. (Indeed, the testimony of Tomassoni suggests that such occurrences would be highly unusual. Tr. 103.) Therefore, I conclude that the violation of section 56.14105 was not S&S. Section 107(a) Order/Citation No. 4097164 must be modified to a section 104(a) citation. The inspector's finding of an imminent danger must be vacated and his S&S finding must be deleted.

DOCKET NO. LAKE 92-428-RM

CITATION NO. 4097166, 2/25/92

Citation No. 4097166 charges as follows:

Step 2 - Coarse Crusher

An employee was observed working below the primary crusher dumping station. A readily visible warning sign or signs were not posted at all approaches, notifying persons above that work was being done below the open, unbarricaded dump station. The hazard to the employee of dumping, dropping or throwing material into the opening, would not be readily obvious to persons working, traveling, or cleaning-up at track level.

Resp. Exh. 2. The citation alleges that the conditions constituted a violation of 30 C.F.R. 56.20011 and that the alleged violation was S&S. (Footnote 9)

SECRETARY'S WITNESS

Toscano testified that after the inspection party had completed its observation of the area of the hatch doors, the party entered the area of the primary dump site (also known as the lower crusher area) where the ore cars dump into the crusher. Tr. 108. Toscano stated that from his discussion with Tocchio, he knew that earlier in the shift Tocchio had been working in this area. In addition, Toscano said that Tocchio told him that

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Section 56.20011 requires in pertinent part that "[A]reas where . . . safety hazards exist that are not immediately obvious to employees shall be barricaded or warning signs shall be posted at all approaches."

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millwrights also had worked there earlier in the shift. Tr. 110, 130, 135. Toscano feared that given the area where Tocchio and others had been working and where Tocchio would have been required to work had the job gone ahead as planned, train loads of ore could have been dumped on the men or material could have been thrown down upon them because they could not have been seen from the dumping area above.

Toscano observed that there were no signs posted to warn anyone on the upper level that persons were working below. Tr. 109. Nor were there any barricades. Tr. 113. When asked what constituted the violation Toscano replied:

The violation would be . . . the failure to post at all approaches an appropriate sign describing what protective action would be needed. [T]he person who would be protected would be for instance . . . Tocchio or any other persons working below . . . the main dumping station. The person who would not know . . . Tocchio [was] there is the person who would have to be able to see the sign if he was traveling or working or walking through the area.

Tr. 110. Although Toscano did not see anyone working in the area that he believed should have been posted, he thought that he recalled having seen miners walking through it. Tr. 110-111.

The standard requires where there is not an immediately obvious health or safety hazard existing, the area should be posted or barricaded. Toscano explained that under normal operating procedures, a locomotive would pull ore cars into the dumping station. The cars would be grabbed by a rock dumping mechanism, be rotated and they would each in sequence dump up to 100 tons of ore into the hopper feeding the crusher. The ore would fall 20 to 25 feet to the lower level where Tocchio had been. Tr. 111-112.

Not only would the dumping of the cars endanger anyone working below, but, in Toscano's opinion, it would not be unusual for a miner walking the track to pick up spillage from the cars and "throw it where it [was] going to go anyhow." Tr. 113.

Toscano admitted however that should material fall from above, anyone in the basket would have been provided some protection in that the basket was enclosed on three sides to waist height. Also, the person would have been afforded protection by the basket's overhead canopy. Tr. 123. In addition, a "safety tub" could be lowered around the basket and the tub would have provided additional protection. Tr. 125-127.

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Toscano recognized that there were safety lights outside the crusher building that were used to signal the train operator not to enter and dump. Tr. 129-130. There was also a warning light inside that Toscano believed a train operator could probably see. Tr. 136. All rail traffic was controlled by computer from a building separate from the crusher building. Tr. 137.

Toscano stated that he believed it was reasonably likely for someone who was not aware of miners working below to throw something down to the lower level. Tr. 114. He also stated that he knew of an incident in 1977 in which a miner was fatally injured by having rock dumped on him while working in the hopper unbeknownst to the person who dumped the rock. Tr. 114-115. Nonetheless, he agreed that when he observed the pertinent area on February 25, it was clean and there were no ore cars present nor other equipment present (such as a backhoe) capable of dumping material into the crusher. Tr. 118. Moreover, the doors to the crusher building were closed and Toscano stated that ordinarily he would not expect a locomotive to pull loaded cars into the building under those circumstances. Tr. 118-119.

Finally, Toscano stated that the violation was timely abated when the company provided readily visible signs reading "danger, men working below." Tr. 118, 147.

U.S. STEEL'S WITNESS

Tomassoni described the system of rail traffic control at the crusher building. He stated that inside the building there were warning lights at the crusher dump station and also at the site where the train dumped its load. When the lights were "on", they indicate that there is to be "no dumping." Tr. 139. However, he agreed that the placement of the inside lights was such that anyone using an end-loader or moving materials by hand would have had his back to the lights. Tr. 144.

With regard to the outside lights Tomassoni's testimony was conflicting -- although he stated he believed a red light outside on the building indicated "no dumping," he also testified, "We do not look at the outside lights on the building." Id. However, he added that he was unaware of any instances in which loads had been dumped even though the red lights were on. Tr. 144. He also acknowledged that lights burn out and that burned out lights were a problem at the plant. Tr. 145.

Tomassoni did not consider the lack of signs a violation of the cited standard, because the people working in the crusher building were a small, closely knit group and their jobs were coordinated. Further, the area had been cleaned and Tocchio was "well protected" while in the basket. Tr. 141. Moreover, in his opinion, the basket could have been observed from the track level. Tr. 142.

STEELWORKERS' WITNESS

Timothy Kangas testified on behalf of the Steelworkers. Kangas, a millwright at Minntac, is also the acting co-chairman of the union safety committee. He testified that in 1989, he monitored an investigation of an incident when a train pulled into the dump area against a red light and directly over an electrician working from a work basket. Tr. 148-149.

VIOLATION OF SECTION 56.20011

U.S. Steel observes that the standard does not require warning signs in all areas where work is being performed, but only in areas where safety hazards exist that are not immediately obvious to employees and it argues, in effect, that at the time the citation was issued, its employees were aware of the potential hazard to Tocchio. "The employees in the area, i.e., the crane operator, electrician, and attendant, were there to assist Tocchio; it is unreasonable to believe that they would drop material on him." U.S. Steel Br. 15.

I conclude otherwise. While I accept the testimony of Tomassoni that those working in the crusher building were a closely-knit group who knew one another's job assignments, it seems to me that the purpose of the standard is to remind such personnel that one or more of their number who is not always readily observable is in a potentially hazardous area -- people do after all forget -- as well as to advise other miners coming into the area of the situation existing therein.

Here the presence of miners working below was not immediately obvious. The basket may well have been observable from the track area if one looked, but it would have been suspended below the track level and one would have had to look. Also, any miners working below and not in the basket would have been even less obvious.

Further, there was a potential for injury. Trains could have entered the building and dumped while Tocchio was suspended or others were working below. Even though the doors to the buildings were closed, even though there were warning lights in existence, even though, as discussed infra, Toscano later accepted U.S. Steel's explanation that when he cited the violation the switching system for the rail line to the crusher was in such a position that trains were shunted away from the building, all such added protective features could have failed. Thus, Tocchio and any other of his colleagues working on the crusher were in a hazardous position and warning signs should have been posted. I conclude, therefore, that in failing to post

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the warning signs or to barricade the area U.S. Steel violated section 56.20001.(Footnote 10)

S&S

The violation existed as charged. As I have stated in finding that the violation existed, the warning signs would have served as an ever-present reminder to others that a miner or miners, who were not immediately obvious, were at work in a potentially hazardous area. They would have jogged the memory of not only those on the section who were aware of the presence of such miners but also they would have advised newcomers of the miners' situation. Thus, they would have protected miners from what was in fact a discrete safety hazard, the potential of having material dumped or thrown down upon them. Obviously, if such had happened, any miner struck would have been lucky to have escaped with only serious injuries.

As with consideration of the S&S nature of the previous violation, the critical question is whether the Secretary has established a reasonable likelihood of an event in which there would have been an injury had normal mining operations continued? Again I conclude that the answer is "no."

Continued normal mining operations did not mean the usual movement of trains to the crusher but rather the repair of the crusher. That was the work being undertaken in the crusher building on February 25. When the work was completed, trains would again purposefully enter the building to discharge their loads. However, by that time, the crusher would have been repaired and Tocchio and any others working on it would have left.

Thus, under normal mining operations Tocchio or others repairing the crusher would have been subjected to the likelihood of injury from the dumping of ore only if trains entered the crusher building in spite of the protection afforded by the building's closed doors, warning light system and, most important, by the switches thrown to shunt trains away from the building. See discussion, infra. The chance that these precautions would have been ignored or would have failed is, in

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The essence of U.S. Steel's arguments that it did not violate the standard really go to the question of how likely an accident would be under the circumstances, a question whose answer is essential in resolving the issue of S&S.

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my opinion, remote at best.(Footnote 11) Therefore, I cannot find that on February 25, had normal mining operations continued there would have been a reasonable likelihood of "an event in which there [would have been] an injury." U.S. Steel, 6 FMSHRC at 1836.(Footnote 12)

For the foregoing reasons I conclude that the violation of section 56.20011 was not S&S. The citation must be modified to delete the inspector's S&S finding.

DOCKET NO. LAKE 92-249-RM

CITATION NO. 4097167, 2/25/92

Citation No. 4097167 charges as follows:

Step 2 - Course Crusher

An employee was observed performing work on the primary crusher. He was situated below the railroad track level and adjacent to the dump station and feeder. Although a red light was "on" to "block" trains approaching, the employee was not protected from moving or runaway rail equipment with a stop block, detailer or other stopping device.

Resp. Exh. 3. The citation alleges that the conditions constituted a violation of 30 C.F.R. 56.9302.(Footnote 13) Although Toscano originally found that the alleged violation was S&S, subsequently he modified the citation to indicate injury was

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The danger of a rail car discharging onto Tocchio and any others working to repair the crusher is the "event in which there [would have been] an injury." U.S. Steel, 6 FMSHRC at 1836. Toscano agreed that the area along the track had been cleaned and there being nothing for backhoes to pick up, nor any backhoes present, it seems unlikely that any danger would have come from that source or from any miner picking up spillage and throwing it into the crusher.

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While I was impressed with the testimony of Kangas involving a previous incident at the plant where a train had moved into the dumping area and was preparing to dump not only against the lights but over an electrician in a work basket -- the very thing Toscano feared -- there was no testimony indicating the train also had entered in spite of the crusher building's closed doors and because of a failed railroad switch or switches.

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Section 56.9302 states:

Stopblocks, derail devices, or other devices that protect against moving or runaway rail equipment shall be installed whenever necessary to protect persons.

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unlikely and to delete the S&S designation. He based the modification upon the fact that:

Additional information indicated that at the time of this citation, [a] track switch was thrown to direct tract movements away from the Step 2 Crusher. The switch and . . . track were in view of the mine traffic controller, who had 2-way radio communication with mine trains.

Id. at 2.

SECRETARY'S WITNESS

Toscano testified that continuing the inspection of the same general area that Tocchio had been assigned to work, he walked up the track, in the direction from which loaded trains would have come, and he asked if any derailer or other device to prevent unauthorized entry of trains into the area was present? When none was found, Toscano told Tomassoni that the company was in violation of section 56.9302. Tr. 152-153.

Toscano stated that Tocchio would have been exposed to any runaway train or rail car entering the area. Toscano believed a stopblock or derailer should have been placed far enough from the dumping area so that any runaway would derail before it entered the area. Tr. 153. No trains were traveling the track at the time Toscano issued the citation. Id.

Later in the day Kangas told Toscano that he thought the company had a safe job procedure requiring the installation of a derailer. Tr. 156.

Approximately three or four days later Toscano stated he conferred with Tomassoni and Kangas about the citation. Tomassoni emphasized the existence of the warning light system used to prevent trains from entering the building and from dumping. Also, Tomassoni showed Toscano the computerized control center that directed rail traffic and switches at the plant. It was then brought to Toscano's attention that on the morning of February 25, 1992, the switching system had been activated to prevent trail traffic from entering the building. Toscano therefore changed his assessment of the likelihood of injury due to the violation from reasonably likely to unlikely and he deleted the S&S finding. Tr. 156-157.

However, Toscano did not agree with Tomassoni that the lights and the computerized control system were the equivalent of a stopblock or a derailer and he refused to vacate the citation. Toscano rejected Tomassoni's connection because in his experience and for various reasons (ice, rain, moisture), switches have been

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known to fail so that the person operating the control system will think they have been thrown when, in fact, they have not. Tr. 158. On the other hand a stopblock or derailler "is a physical means when other systems fail to make sure that approaching equipment does not get into a danger zone." Id.

Toscano stated that the violation was abated when a derailler was installed. Tr. 159-160.

U.S. STEEL'S WITNESS

Tomassoni described rail traffic control at the Minntac Plant as being under the direction of a clerk and a control supervisor. It is the control supervisor's job to direct all rail traffic hauling ore to the crushers for processing. Tr. 166. This is done in part through computers logging the direction of locomotives and switches. Because information regarding all switches that are thrown is stored in the computer's memory, Tomassoni was able to determine that on the day the subject citation was issued switches had been in such a position that all rail traffic would have been turned away from the crusher building. Tr. 168. Thus, he was sure that no rail traffic had been routed to the crusher building on February 25. Moreover, Tomassoni stated that the control supervisor had been advised early on February 25 that the No. 2 Crusher was "down" that day. For these reasons, Tomassoni did not believe that U.S. Steel had violated section 56.9302. Tomassoni admitted however that a company safe job procedure in effect when the citation was issued required a derail device. Tr. 170, 173, see also Resp. Exh. 4 at 2.

VIOLATION OF SECTION 56.9302

There is no dispute a device that could stop or derail a moving or runaway train or rail car was not in place on the track leading to the No. 2 Crusher dump area. The question is whether, given the circumstances at issue, such a device was, in the words of the regulation, "necessary to protect persons?" I conclude that it was.

As Toscano noted, Tocchio was working that day in the area of the primary crusher. The testimony also makes clear that other miners occasionally worked and traveled the area. These people needed protection from moving or runaway trains or rail cars, and I agree with Toscano that the computerized traffic control system and switch monitoring system at the plant, while lessening the chances of miners being injured by such vehicles, did not obviate the need to comply with the standard. Toscano put it well, the required devices are "a . . . means when other systems fail to make sure that approaching equipment does not get into a danger zone." Tr. 157.

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Toscano's testimony that the switches could malfunction due to ice, rain or humidity was not refuted. Further, the warning light system, while it hopefully would have alerted a locomotive operator not to enter the crusher building, obviously would have had no effect on a runaway train or rail-car. In addition, the control supervisor could have forgotten the crusher was "down" or could have been unaware that a failed switch had not responded as the system indicated. All of which may be why the need for such a device was not recognized by government regulation alone but was also required by U.S. Steel's own safety procedures, as Tomassoni candidly admitted.

Therefore, I find that in failing to have installed a stopblock, derail device or other device on the track leading to the No. 2 Crusher dump area, U.S. Steel violated section 56.9302.

FINDINGS AND CONCLUSIONS

Based on the forgoing it is concluded that Order/Citation No. 4097164, 2/25/92, properly sets forth a violation of section 56.14105 but fails to validly state a condition or practice constituting an imminent danger and fails validly to state that the violation was S&S. It also is concluded that Citation

No. 4097166, 2/25/92, properly sets forth a violation of section 56.20011 but fails validly to state that the violation was S&S. Finally, it is concluded that Citation No. 4097167, 2/25/92, properly sets forth a violation of section 56.9302.

ORDER

The findings of imminent danger and S&S made in connection with Order/Citation No. 4097164 are VACATED. The Secretary is ordered to MODIFY the Order/Citation to a citation issued pursuant to section 104(a) of the Act.

Citation No. 4097166 is AFFIRMED. The S&S finding made in connection with the citation is vacated. The Secretary is ORDERED to modify the citation accordingly.

Citation No. 4097167 is AFFIRMED.

David F. Barbour
Administrative Law Judge

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