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U.S. STEEL GROUP V. SOL (MSHA)  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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U.S. STEEL GROUP, MINNESOTA	:	CONTEST PROCEEDING
ORE OPERATIONS,	:	
Contestant	:	Docket No. LAKE 92-265-RM
	:	Order No. 4097118; 3/23/92
v.	:	
	:	Maintenance Dept. 21-00819
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
and	:	
	:	
UNITED STEELWORKERS 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, Esq., General Attorney,  
U.S. Steel, Pittsburgh, Pennsylvania,  
for Contestant;  
James Ranta, Staff Representative, United  
Steelworkers of America, Virginia, Minnesota,  
for Miners.

Before: Judge Barbour

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, is contesting 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 an associated citation issued pursuant to section 104(a) of the Act, 30 U.S.C. 814(a), for violation of a mandatory safety standard, 30 C.F.R. 56.14211(b), and designated as a significant and substantial contribution to a mine safety hazard (an "S&S" violation). A hearing was held and the parties submitted posthearing briefs.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 1992, Federal Mine Inspector Arthur J. Toscano and Ronald E. Brendle, a supervisory mine inspector accompanying

Toscano, conducted an inspection at U.S. Steel Group, Minnesota

Ore Operations' ("U.S. Steel") Minntac Plant, a surface taconite operation, located in St. Louis County, Minnesota. Toscano and Brendle were driving in an automobile leaving the mine for lunch, when Brendle observed Michael J. Brohman, a railroad ore car repairman at the plant, bending under a railroad ore car. The car was in a half-raised position. Brohman was bent at the waist near a wheel with his upper torso under the ore car. Brohman remained in this position for about 10 seconds and then moved to another wheel where he did the same thing.

Brendle stated to Toscano that Brohman's position looked "extremely dangerous," so Brendle and Toscano stopped and got out of the automobile to further observe Brohman. They saw Brohman lower the ore car, and raise another ore car and start to bend under the other car. At that point, a train stopped in the inspectors' line of vision (the inspectors were about 100 feet from Brohman), and the inspectors walked around the train to the work site and asked Brohman what job assignment he was doing.

Brohman stated that he was inspecting the ore cars -- a job that mostly required the inspection of brakes, wheels, air cylinders, and rocker pivot areas. The inspectors asked Brohman if he had to lift up the ore cars to do the job, and Brohman stated that he did. They asked Brohman to show them how he did it, and Brohman pulled an air control valve handle on a third ore car. The handle activated a compressed air system that raised the ore car 5 to 6 feet (in a half-up, pivoted position with all wheels on the track). Brohman explained he inspected the brakes and wheels while the ore car was in this position.

Toscano noticed that the ore car's compressed air system had leaked and that the car was slowly creeping downward. Toscano asked Brohman if he had the ore car blocked or mechanically secured to keep it from falling on him. When Brohman answered he did not, Toscano told Brohman that it was a very unsafe practice and Toscano issued an imminent danger withdrawal order, pursuant to section 107(a) of the Mine Act, to prevent him from doing the job without first blocking the ore car from unintended motion.

Minutes later, the inspectors spoke with Bill Holmes, a U.S. Steel supervisor, and Randy Pond, a U.S. Steel safety engineer for the maintenance and mining departments. Both knew of "a light-weight aluminum prop which was supposed to have been used to block these cars when they're out in the field to be inspected the way that [Brohman] . . . was inspecting them." Tr. 16. After the order of withdrawal was issued, Holmes instructed the employees to use aluminum props when inspecting railroad ore cars.

In conjunction with the order of withdrawal, Toscano also issued a citation, because the ore car was not blocked or mechanically secured in accordance with 30 C.F.R. 56.14211, a

mandatory safety standard for surface metal and nonmetal mines. Section 14211(b) provides, in part: "Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering." Under 30 C.F.R.

56.14211(d), "a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent." In addition, Toscano found that the violation was S&S.

#### IMMINENT DANGER

Section 107(a) of the Mine Act, 30 U.S.C. 817(a), provides that if, upon inspection or investigation of a mine, an imminent danger exists, an order shall be issued requiring the operator of the mine to withdraw persons from the area until the imminent danger no longer exists. Section 3(j), 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 & Pittsburg Coal Co., 11 FMSHRC 2159, 2163 (November 1989) (citation omitted). The Commission 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) (citation omitted). The Commission 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." 11 FMSHRC at 2163 (emphasis omitted), quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 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." Id. at 2164 (emphasis omitted), 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) (quoting same).

I conclude Toscano properly found an imminent danger and properly issued the order of withdrawal pursuant to section 107(a). The testimony establishes that each ore car is equipped with two air cylinders and one air control valve on each side of the car, which operate the dumping mechanism. The air is supplied by an air compressor on the locomotive and transferred

to the ore cars through metal pipe with rubber hose connections. Each air control valve has three positions -- charge, lap (which doesn't allow air in or out), and exhaust. The air cylinders are activated to the lifting position by pulling a handle attached to the air control valve. Pushing the handle releases the air and allows the cylinders to "float" back to the down position. One valve controls both cylinders. There is no solid, air-tight car because air always escapes between the seals of the pressurized piston.

The evidence establishes, and I find, that it takes about 7 to 10 seconds to lower an ore car by pushing the valve handle, and that without pushing the handle and if an airline ruptures, it takes approximately 30 seconds for the car to drift down. See Tr. 57-59. The evidence further establishes, and I find, that without pushing the handle and without a defective airline, it takes over one minute for an ore car to gradually lower, leaking air, from the fully raised position. Finally, I find that the clearance between the box chassis and the pillow assemblies on the wheel trucks is 20 inches, with 6 inches of clearance at the pivot arm assembly. There is no clearance at the perch between the wheels. I also find that an empty ore car weighs 40 tons.

Toscano testified that the air control valve handle is positioned near a set of wheels where someone with a tool or part of his clothing could bump the handle and release the car onto himself. Toscano noted that Brohman was wearing a long jacket (below his waist) that could possibly snag on equipment if he leaned over. In addition, Toscano testified that the ground conditions surrounding the ore car, i.e., tracks and spillages of ore, constitute tripping hazards that might cause someone to fall towards the ore car. Toscano also stated that blown components in the air system, e.g., a blown valve, a blown air line, or a bad leak in an air receiver tank, could cause the air system to fail and the car to rapidly descend. Toscano knew of hydraulic cylinder failures where there had been serious injuries. Toscano also knew of an accident involving an air cylinder used to control a chute with ore in it -- a hose, the fittings, and the connections blew and the cylinder failed.

Toscano, however, had no experience working with the rocker cars and was not familiar with the design of the ore car and its air system. Toscano did not inspect the ore car for problems with air lines or the air system -- he only heard air leaking and observed the car drifting down.

Brohman, on the other hand, has been a car repairman for twenty years. He testified that he could hear air leaks when the ore car was raised and could judge whether or not it was safe to go underneath the car. He stated that if the ore car had an air problem, it would not go to the raised position.

Brohman also stated that once the car had been raised, it was not likely to experience an air problem and drop because the mechanics of the compressed air system restricted air from escaping at one time. Brohman testified that no one could inadvertently activate the valve handle to cause the car to lower because the handle is located out of the way (one would have to lean into the car) and he had never known an air line to break, or a cylinder to fail when it was unloaded. Brohman was aware of a dump cylinder exploding during repair. However, the cylinder was under extreme pressure and, in any event, a miner would not be under an ore car when it was being dumped with a load.

When Brohman made his inspections, the ore cars were empty. Brohman and another car repairman each inspected about ninety cars per day. In an inspection, Brohman looked at the wheels, brakes and the undercarriage, as well as the floor beams, and air cylinders. Everything could be inspected without raising the car, but Brohman raised it to look at the undercarriage. Brohman stated that there was ample time to make minor adjustments when an ore car was in the raised position. It took Brohman about ten seconds to change a set of brake shoes -- positioning himself over the side frame. Brohman had done it this way (without blocking or securing) for twenty years -- it was a common, standard procedure at the plant.

Edward A. Muha, area manager of maintenance at the Minntac Plant for eleven years, testified regarding the compressed air system that raises the ore cars. Each car has four dump cylinders and two dump valves. The valves control the entry and release of air in the cylinders. The pipes supplying air to the cylinders are 1-1/4 inch in diameter and the exhaust dump valves are 1-1/2 inch in diameter. He testified that air would exhaust faster through the dump valve than through a broken line because the line is narrower than the valve. Thus, if air lines were disconnected or otherwise broken, it would be impossible to get a free and uncontrolled descent of the ore car. Further, if one dump cylinder failed, the other would still work, and if both cylinders fail at once a car still would not fall free and uncontrolled because the volume of air charging the bottom sides of the dump cylinder would cushion the drop. Regarding maintenance performed on ore cars at Minntac, Muha testified that he was aware of only one dump valve that had been replaced. He acknowledged that the valve seats had been replaced, but stated that this was as part of regular maintenance.

The Senate Report for the Mine Act states: "The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time." S. Rep. No. 181, 95th Cong., 1st Sess. at 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human

Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

In challenging the validity of the withdrawal order, U.S. Steel argues that the air system used to raise and lower the ore car is not subject to such failure or accidental activation that is likely to cause "free and uncontrolled" descent of the car. I agree, but I do not conclude this means the order was invalidly issued.

Based on Brohman's testimony that the valve handle was located out of the way, I find that it was unlikely that the valve handle would have been inadvertently activated. Unlike Toscano, Brohman was totally familiar with the mechanics and configuration of the ore car, and his testimony in this regard is credible. Further, I conclude that the failure of a cylinder, a cylinder valve, or an air line was unlikely given Muha's and Brohman's testimony and the lack of any evidence offered by the Secretary of such failings on empty ore cars while they were being inspected. I also conclude that the evidence fully supports finding that given the mechanics of the compressed air system, free fall of the car was unlikely. Muha's testimony regarding the effect of the restricted air lines on the descent of a car if the lines ruptured and the cushioning effect of air in the cylinders if the cylinders failed was persuasive.

Nevertheless, even assuming everything about the system was functioning normally, it is clear to me that Brohman had placed himself in an imminently dangerous position. It is undisputed that the 40 ton, raised ore car was not blocked before Brohman went under it to perform the inspection and any quickly accomplished and necessary repairs. The "safety devices" preventing the raised ore car from an uncontrolled descent were (1) the width of the air pipe and the exhaust dump valve, which were too narrow to allow all the air to escape at once, (2) the second cylinder which would still be working if the other cylinder failed, and (3) the volume of air charging the bottom sides of the pistons which would cushion the drop if both cylinders failed. However, none of these devices prevented the ore car from descending due to normal leaks in the air system, a descent that took approximately one minute from the fully raised position and when Brohman was first observed under the car, the car was but half raised; and none of these devices prevented the ore car from a complete descent onto Brohman if for some reason he had been unable to get out from under the car, e.g., loss of consciousness, injury restricting movement, snagged clothing, etc. (I do not accept that there is adequate clearance under the car to assure safety. As I have found, clearance varied from 20 inches to none.)

When Brohman worked under the unblocked ore car, danger was quite literally "hanging threateningly over [Brohman's] head,"

creeping nearer with each passing second. No intervening malfunction of the equipment or outside activation of the equipment was necessary to initiate the hazard. Compare U.S. Steel Group, Minnesota Ore Operations, Docket No. LAKE 92-247-RM (6/16/93) (ALJ Barbour) 11-12. Had Brohman been caught under the car, he would have been lucky to escape with only serious injuries, and it bears emphasis that an accident was not just a speculative possibility, for without any malfunction whatsoever, the ore car was in the process of lowering toward Brohman. Under these circumstances, I conclude that Brohman's failure to block the ore car against motion reasonably could have been expected to cause him serious physical harm or death.

VIOLATION OF 30 C.F.R. 56.14211(b)

To prevent a raised component of mobile equipment from accidentally lowering, section 14211(b) requires that the component be blocked or mechanically secured before persons perform work "on top of," "under," or "from" it. The mandatory safety standard considers a component blocked or mechanically secured if a functional load-locking device or a device which prevents "free and uncontrolled descent" is used. 30 C.F.R. 56.14211(d)

Brohman testified that it is standard policy to use a stand (prop) as a means of blocking the ore car when making a repair, but the stand is not required when making an inspection. Brohman stated that the purpose of the stand is "to do . . . major repairs." Tr. 77. When making inspections, Brohman stated he went under the car "[j]ust a little bit, just for a few seconds." Id. Sometimes Brohman made running repairs on the ore cars, e.g., changing the brake shoes. Muha testified that "car repairmen are . . . sent out to inspect the cars and make minor repairs, change brake shoes, et cetera." Tr. 91. Muha testified that the prop is used only for repair and not for inspection because the man doesn't put himself in a precarious position and it is not a free and uncontrolled descent. "[B]ut when the man is putting himself in a position where he needs to be under there and do some minor repairs, [the prop] is used." Tr. 96. (Brohman and Muha appear to be at odds over whether the stand was used for "major" repairs only or was also required for "minor" repairs. In any event, both agreed it was not required for inspections -- a position I reject when, like Brohman, a miner puts all or part of his body under a car during the inspection.) Muha further stated that the inspector is not supposed to go under the car when he's inspecting. He's supposed to make the inspection from the outside (Tr. 96-97) because "if there are leaks, . . . [the cars] come down and that's the only reason." Tr. 101.

I conclude that Brohman violated section 14211(b) by not blocking the ore car before he leaned under it to perform his

inspection. The regulation requires the component to be blocked or mechanically secured before persons perform work. It is true that Brohman was not conducting the inspection in an area where repair work was usually performed and that Brohman did not anticipate he would be required to perform major repairs to the car while in the field. However, the regulation does not distinguish between work performed during a field inspection and work performed in a maintenance shop, nor does it distinguish between minor and major repairs. Brohman positioned himself under the raised and unblocked car to inspect it. Brohman's testimony makes clear that inspection of the undercarriage was a preliminary step to any repair work that had to be done and, I therefore conclude, inspection was a part of the work cycle. Because section 14211(b) applies to all work performed under a raised component of mobile equipment, it applies both to inspection and any subsequent repair that Brohman would have had to make, and the ore car should have been blocked or secured against motion.

SIGNIFICANT AND SUBSTANTIAL

Under section 104(d)(1) of the Mine Act, 30 U.S.C.

814(d)(1), a "significant and substantial" violation exists if the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." The Commission has held that a violation is significant and substantial within the meaning of section 104(d)(1) 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). The Commission has stated:

Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation need not be so grave as to constitute an imminent danger . . . . At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes--mere existence of a violation, and existence of an

imminent danger, the latter of which contains elements of both likelihood and gravity.

Id. at 828 (emphasis omitted). 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.

The Commission also has held that the significant and substantial nature of a violation must be determined in the context of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). The Commission has emphasized that "the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis omitted).

Because I have concluded that Brohman's conduct constituted an imminent danger and a violation of a mandatory safety standard, I conclude that it also constituted a significant and substantial violation. The evidence establishes that there was a safety hazard contributed to by the violation in that there was a possibility of the ore car lowering onto Brohman. Moreover, any injuries Brohman would have suffered reasonably could have been expected to be at least of a serious nature. Had normal mining operations continued there would have been a reasonable likelihood of an event in which there would have been an injury.

#### FINDINGS AND CONCLUSIONS

Based on the foregoing, I hold that Order/Citation No. 4097118 issued on March 25, 1992, validly states a condition or practice constituting an imminent danger, and properly sets forth a violation of section 56.14211, and validly states that the violation was of a significant and substantial nature.

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ORDER

Accordingly, Order/Citation No. 4097118 is AFFIRMED.

David F. Barbour  
Administrative Law Judge  
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