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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 92-334-M A. C. No. 23-01924-05520
v.	:	
FORT SCOTT FERTILIZER-CULLOR INC., Respondent	:	Fort Scott Fertilizer-Cullor, Inc.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 93-117-M A. C. No. 23-01924-05523 A
v.	:	
JAMES CULLOR, Employed by FORT SCOTT FERTILIZER-CULLOR, INC., Respondent	:	Fort Scott Fertilizer-Cullor, Inc.

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gary W. Cullor, President, Fort Scott Fertilizer-Cullor, Inc., and James Cullor, pro se, for Respondents

Before: Judge Feldman

These consolidated cases are before me as a result of petitions for civil penalties filed by the Secretary of Labor pursuant to sections 110(a) and (c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 820(a) and (c). The petitions charge the corporate respondent, Fort Scott Fertilizer-Cullor, Inc. (Fort Scott), with violations of four mandatory safety standards and James Cullor, as an agent of the corporate respondent, with knowingly authorizing, ordering, or carrying out two of these alleged violations.(Footnote 1)

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1 Section 110(c) of the Act provides, in pertinent part, that agents of corporate operators who knowingly authorize, order or carry out violations of mandatory safety standards are subject to the same civil penalties that may be imposed on the corporate operator.

These matters were heard on September 21, 1993, in Fort Scott, Kansas at which time the parties stipulated that the respondents were subject to the provisions of the Mine Act. The Secretary called former Fort Scott employees Raymond Jenkins, a truck mechanic, and truck drivers William Burris and Timothy Ragland. Michael Marler, the issuing inspector, also testified on behalf of the Secretary. Gary Cullor and his uncle, James Cullor, testified for the respondents. The parties filed posthearing briefs.

STATEMENT OF THE CASE

These matters concern the following citation and orders issued to Fort Scott by Inspector Marler as a result of his May 27, 1992, inspection: 104(d)(1) Citation No. 4110164 for inoperable brakes on a 30 ton Euclid truck (big Euclid); 104(d)(1) Order No. 4110166 for a disconnected left front brake on a red Kline haulage truck; 104(d)(1) Order No. 4110167 for inoperable brakes on a 15 ton Euclid truck (small Euclid); and 104(d)(1) Order No. 4110171 for a broken leaf spring on a little Kline haulage truck.

James Cullor was cited for knowingly authorizing or carrying out the violations in Citation No. 4110164 and Order No. 4110167 by purportedly ignoring repeated complaints about malfunctioning brakes on the big and small Euclids by truck drivers Burris and Ragland. Marler determined that brakes on the big Euclid driven by Burris and the small Euclid driven by Ragland could not hold the trucks on level ground.

The respondents have stipulated to the fact of the defective brake conditions on the three trucks in issue and to the fact that there was a reasonable likelihood that the hazards contributed to by these conditions could result in injuries of a reasonably serious nature. (Tr. 12-18, 195, 212). However, the respondents attribute the faulty brake systems to improper slack-adjuster settings on three of the four wheels on each of the three cited trucks. The respondents maintain that these adjustments were tampered with by Burris and Ragland who then reported the defective brake conditions to the Mine Safety and Health Administration (MSHA) on May 22, 1992, shortly before Marler's May 27, 1992, inspection. Burris and Ragland were terminated on June 1, 1992, because they did not have steel-toed boots. (Tr. 164). Both subsequently filed discrimination complaints pursuant to section 105(c) of the Mine Act. On July 14, 1992, MSHA advised Fort Scott that it had determined that Burris and Ragland had not been discriminated against.(Footnote 2)

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2 The record was left open for Gary Cullor to submit copies of MSHA's discrimination determinations. Pursuant to my request, Cullor submitted this information on September 27, 1993. These

As noted herein, the testimony in this proceeding supports the respondents' contention that the brakes were tampered with. Moreover, the Secretary's decision not to pursue related discrimination complaints on behalf of Burris and Ragland further support the respondents' position that the subject brake complaints were lacking in merit. The remaining issue is whether employee misconduct for the sole purpose of imposing withdrawal and civil penalty sanctions on an operator is an affirmative defense given the strict liability nature of the Mine Act.

PRELIMINARY FINDINGS OF FACT

Gary Cullor is President of Fort Scott Fertilizer-Cullor, Inc. (Fort Scott), a close corporation. Cullor's wife, Sally Cullor, is Secretary and Treasurer of the corporation and is a 100 per cent shareholder. The violations are alleged to have occurred on March 27, 1992, at Fort Scott's limestone quarry in El Dorado Springs, Missouri. Fort Scott sold this facility to Ash Grove Cement Company in May 1993.

William Burris and Timothy Ragland were employed by Fort Scott as quarry truck drivers at its El Dorado Springs limestone facility. Burris was hired on September 16, 1991. Ragland was hired on March 26, 1992. Both Burris and Ragland are qualified interstate truck drivers. Each holds a certified commercial driver's license (CDL) in the State of Missouri. As CDL licensees, they are required to be familiar with the operation and maintenance of trucks, including truck braking systems. (Tr. 90-92, 152-153).

Burris and Ragland became upset over the subsequent hiring of Jerry Carpenter who, in addition to other duties, was a welder. Carpenter's salary was higher than the wages of Burris and Ragland. (Tr. 166). Burris "thought it was wrong" and that he "deserved more [money]" (Tr. 118). Ragland also did not "think [Carpenter's higher salary] was right." (Tr. 166). Burris and Ragland knew that Fort Scott had to timely complete its performance on a state job that it had bid for. (Tr. 117, 166). Threats were made concerning some type of action if they did not receive a raise. (Tr. 168). Specifically, Ragland testified:

> Q. You know Jerry Carpenter? Do you remember Jerry Carpenter that was hired at the quarry?
>
> A. I think so.

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fn. 2 (Continued)
documents have been identified and admitted into evidence as Respondents' Ex. 1. (Tr. 129, 141).

Q. Do you remember an incident where he was hired and apparently somebody found out about what the pay rates was (sic) he got and several of you were upset about what he was getting paid?

A. I don't see what that's got to do with this?

Q. Do you remember that?

A. Yes, I do.

Q. Do you remember you and Bill and a couple of others wanting more money because he was getting paid more?

A. Well, we really didn't go to that extreme on it, no, but, yeah, I didn't think it was right, because he came to work there after we did.

Q. But you did ask for more money?

A. Yeah, we did.

Q. Do you remember at the same time referring that things could get awful slow around there as far as getting anything done or on our state project and equipment could break down?

A. I never said nothing like that, no.

Q. You don't remember anybody else saying anything like that?

A. I can't speak for other people.

Q. Do you remember anybody saying that?

A. I can't tell you that. I don't know.

THE COURT: Mr. Ragland, that's not the question he asked you. He asked you did you ever hear anybody say that?

THE WITNESS: Oh, they was always shooting crap about something, you know. It was just kind of like doing carpenter work, you know, it's just one of them deals where everybody goes hem-hawing around, talking about what they'd do, but, no, I can't say that I just heard a bunch of people going on about it, no.

THE COURT: Would you please restate the question? I don't know if I got an answer.

Q. (By Mr. Gary Cullor) Did you hear any comments from anybody, without naming names, referring to the fact that if we didn't receive more wages, there could be a work slowdown or that equipment could break down?

A. Not --

Q. Equipment could break down a lot?

A. Not in them words, no.

Q. But something similar to that?

A. It was more like there just wasn't nobody going to come back out there is what it was more than anything. I don't remember them saying anything about that, no. They were talking more kind of like strike features than they were demolishing anything.

Q. There would be some implications that there would be some type of action taken if they didn't get a raise?

A. I guess you could probably put it that way. (Tr. 166-168).

Burris and Ragland requested a pay raise. (Tr. 118, 166). They received a small pay raise on May 18, 1992.

On Friday, May 22, 1992, Ragland telephoned the MSHA office and spoke to Inspector Marler's supervisor. At that time, Ragland requested an MSHA inspection because the quarry trucks reportedly had no brakes. (Tr. 96, 165, 259, 278-279). Burris knew an inspector would soon inspect the El Dorado Springs facility. (Tr. 96). However, Burris testified that he did not experience brake problems on the days immediately preceeding Marler's May 27, 1992, inspection. (Tr. 106).

Burris and Ragland started hauling mud and water out of the quarry pit at approximately 8:00 a.m. on Wednesday, May 27, 1992. Burris was driving the big Euclid, Ragland was operating the small Euclid and Derek Edmiston was driving the red Kline haulage truck. (Tr. 88). Burris, Ragland and Edmiston made several trips into the pit to haul mud between 8:00 a.m. and 9:00 a.m. During this period, the red Kline and the small Euclid became stuck in the mud. (Tr. 96, 287-288). Normal quarry operations were then suspended at approximately 9:00 a.m. because the high loader was experiencing steering problems. (Tr. 31, 184). Contemporaneous with the high loader breakdown, Burris and Ragland complained to James Cullor that their truck brakes were not working. James Cullor stated that he did not observe any brake problems prior to Marler's inspection. (Tr. 289-290). However, Cullor told Burris and Ragland to park their trucks by

the work shed so that the trucks could be checked out. (Tr. 287).

Marler testified that he arrived at the quarry at approximately 10:00 a.m., shortly after the trucks were taken out of service because of the high loader malfunction (Tr. 184, 258). Marler asked to talk to the drivers of the haulage trucks (Tr. 186). Marler spoke to Burris who told him that the big Euclid's brakes would not hold going down into the quarry. Burris stated that he had told Jim Cullor who reportedly told Burris to keep driving and not to complain so much about the equipment. (Tr.186). Marler tested the big Euclid and determined that the brakes would not hold the truck in gear on level ground. Therefore, Marler issued 104(d)(1) Citation No. 4110164 citing a violation of the mandatory standard in section 56.14101, 30 C.F.R. 56.14101 for defective brakes on the big Euclid.

Marler also spoke to Ragland who complained about the brakes on the small Euclid. (Tr. 215). Consistent with Burris' complaint, Ragland informed Marler that he had reported the brake problems to James Cullor who did nothing about it. (Tr. 216). Marler determined that the brakes would not stop the small Euclid on a 6 per cent grade, even when unloaded. Consequently, Marler issued 104(d)(1) Order No. 4110167 citing a violation of section 56.14101 for ineffective brakes.

Marler also sought to inspect the red Kline haulage truck. Marler asked to speak to Burris about the condition of the truck as he was advised that Burris was the usual operator of this vehicle. Burris advised Marler that he had disconnected the front left brake after he told James Cullor that the brake was locking up and causing the truck to pull. (Tr. 235-236). Based on the information provided by Burris, Marler issued 104(d)(1) Order NO. 4110166 citing the mandatory safety standard in section 56.14101(a)(3) for failing to maintain the left front brake in a functional condition.

Finally, Marler observed a broken left front leaf spring on the little Kline haulage truck. The spring had eight to nine leaves, of which four or five were broken. The broken spring allowed the front to sag to the point where the tire was almost touching the fender on the left side. Consequently, Marler issued 104(d)(1) Order No. 4110171 citing a violation of the mandatory safety standard in section 56.14100(c) for the continued use of defective and hazardous equipment.

FURTHER FINDINGS AND CONCLUSIONS

The Secretary seeks to impose civil penalties on the corporate respondent as well as James Cullor, as an individual, based on the ineffective breaking systems on the big and small

Euclid trucks. Although there were several maintenance problems on these trucks that required attention, items requiring preventative maintenance, eg., brake shoe replacement, must be distinguished from the primary cause of the brake system failure.(Footnote 3)

In the case at bar, Raymond Jenkins testified on behalf of the Secretary that there were loose slack adjusters on three of the four wheels on the big and small Euclid trucks and on the red Kline truck. Slack adjusters are located on the inside of each wheel. They consist of a bolt that can be tightened with an ordinary wrench. In view of the large diameter of the truck tires, slack adjusters can be easily tightened from a squatting position without removing the wheels. (Tr. 50) Properly adjusted, they are fully tightened and then turned back one-half turn. (Tr. 51).

If slack adjusters are not properly tightened, they prevent the brake shoe from contacting the brake drums. (Tr. 206). The slack adjustment procedure was described by Jenkins as being "real easy" (tr. 49); "a minute" to adjust (tr.50-51); and "there ain't nothing to it, really." (Tr. 36). Marler testified that anyone could walk up to [a slack adjuster] with a wrench and change [it] if they want." (Tr. 221). Jenkins found loose slack adjusters on the big and small Euclid trucks (tr. 32-36, 37-38, 48-49). Marler testified that the slack adjusters were loose, but not loose enough to prevent the shoes from contacting the drums (Tr. 206). Marler also stated that it was not determined whether the slack adjusters were out of adjustment. (Tr. 229).

Jenkins, however, opined that the major reason why the brakes could not hold the Euclid trucks on grade was the loosened slack adjusters. (Tr. 38-39, 48). Jenkins' opinion is consistent with Marler's testimony that slack adjusters can be loosened to the point where they would render the brakes ineffective. (Tr. 221-222). Significantly, Jenkins testified that neither Burris nor Ragland ever complained to him about brake problems. (Tr. 70). Therefore, I credit the testimony of truck mechanic Jenkins that the primary brake defects on the Euclid trucks driven by Burris and Ragland were the loosened slack adjusters.

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3 For example, an inspection of the small Euclid with the wheels removed revealed a sticking left s-cam shaft and a broken ear on a right front cam support. Similar inspection of the big Euclid revealed a right rear leaking axle seal and a brake shoe lining pulled from the left rear brake shoe. (P Ex.2; Joint Ex. 2). However, I credit the testimony of Jenkins that these conditions were not the primary cause of the inoperable brakes on the Euclid trucks. (Tr. 38-39, 225-226).

Having concluded that the slack adjusters were the primary cause of the Euclid brake malfunctions, I now address the respondents' allegations of tampering. Although Burris initially denied familiarity with slack adjusters, both Burris and Ragland conceded that they knew how to make such adjustments. (Tr. 87, 92, 152-154, 168, 200). Jenkins and Marler testified that it is not uncommon for truck drivers to adjust slack adjusters. (Tr. 26-27, 36-37, 221). Although Marler did not observe any recent wrench marks on the slack adjuster bolts, he conceded that mud would cover any recent evidence of tampering. (Tr. 262-263). Significantly, Marler stated that slack adjusters are one of the first things checked by qualified, experienced truck drivers in the event of brake problems. (Tr. 199-200, 228-229). Yet, Burris and Ragland continued to operate trucks without brakes without checking these adjusters. Marler testified that a competent driver could conceal an inoperable brake condition by operating a truck with defective brakes in the quarry by downshifting. (Tr. 256, 264).

Thus, the evidence reflects that Burris and Ragland were disgruntled employees; threats had been made about disrupting quarry operations; Ragland complained to MSHA; Burris and Ragland were anticipating Marler's inspection; there was a pattern of loosened slack adjusters on three of four wheels on three quarry trucks that is indicative of tampering; Burris and Ragland had access to these slack adjusters; although slack adjusters loosen over time, there is no evidence of inoperable breaks on the days preceding Marler's May 27, 1992 inspection; and Burris and Ragland operated their trucks without brakes without checking the condition of the slack adjusters. Under these circumstances, I conclude that there is sufficient circumstantial evidence that supports the respondents' contention that brake tampering occurred.

Moreover, the Secretary's decision not to pursue the discrimination complaints of Burris and Ragland because the Secretary's investigation revealed that they "were not discriminated against" further supports the conclusion that the brake complaints in this matter were not legitimate. Under these circumstances, even counsel for the Secretary conceded that the Secretary's case is apparently inconsistent with his own investigation. (Tr. 130-131). The record was left open for submission of the pertinent discrimination investigation findings. (Tr. 129, 141). However, the Secretary has declined to submit this information. Consequently, the refusal of the Secretary to submit this relevant investigatory report creates the inference that this report would be adverse to the

Secretary's case.(Footnote 4) See NLRB v. Dorn's Transportation Co., 405 F.2d 706, 713 (2d Cir. 1969). While the adverse inference to be drawn is not dispositive, it is consistent with other evidence of record and it is of significant evidentiary value.(Footnote 5)

Having concluded that the brakes were tampered with, I turn to the novel question of whether such employee misconduct is an affirmative defense to the pertinent citations in issue. While employee misconduct is relevant as a mitigating factor in reducing a civil penalty, it is ordinarily not a defense to a citation given the strict liability imposed under the Mine Act. Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982). It is fundamental that strict liability is imposed on operators to encourage mine safety even if the hazard contributed to by the violation resulted from the employee's misconduct.

Thus, the Commission has consistently rejected arguments by operators that they are not liable for the unauthorized or careless actions of miners. See A.H. Smith Stone Company, 5 FMSHRC 13 (January 1983); Southern Ohio Coal Company, 4 FMSHRC at 1462-64; Sewell Coal Co. v. FMSHRC, 686 F.2D 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982). These cases recognize and are consistent with the ultimate goal of the Mine Act which is to encourage safety and avoid risk. In this case, however, employees attempted to use the Mine Act to create risk by disabling brakes. Such acts of sabotage can not be equated with the unauthorized or careless acts in the above cited cases. Acts of sabotage subvert the purpose of the Mine Act and must not be given effect.

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4 Obviously, it is not appropriate to draw an adverse inference against a miner prosecuting a dicrimination complaint on his own behalf under section 105(c)(3) of the Mine Act when the Secretary, an entirely different party, elects not to bring a discrimination action under section 105(c)(2) of the Act. In this case, however, the Secretary is the party prosecuting this civil penalty proceeding. The Secretary's failure to bring discrimination actions on behalf of Burris and Ragland after they were terminated only days after filing the pertinent brake complaints with MSHA, in the absence of any explanation by the Secretary, permits the inference that the Secretary's investigation failed to support the validity of these brake complaints.

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5 I am sensitive to the Secretary's desire to protect confidentiality. However, it is no secret in this case that complaints were filed with MSHA. The Secretary has made no effort to explain its investigation results and subsequent decision not to pursue discrimination cases. Such an explanation could be provided without violating confidential sources, if any.

In reaching this conclusion, I am aware that the Secretary argues that, if tampering occurred, a de minimus civil penalty must be imposed for a technical violation of safety standards. I decline to elevate form over substance which, in this case, would contravene legislative intent. Rather, I conclude that tampering has occurred and that such tampering is a defense to Citation No. 4110164 (the big Euclid) and Order No. 4110167 (the small Euclid). Consequently, Citation No. 4110164 and Order No. 4110167, issued to Fort Scott and James Cullor, as agent, shall be vacated. Therefore, Docket No. CENT 93-117-M concerning James Cullor's personal liability under section 110(c) of the Mine Act must be dismissed.

With respect to Order No. 4110166 issued for the disconnected left front brake on the red Kline truck, I note that Burris has admitted disconnecting the brake. James Cullor denies any knowledge of Burris' action. Given my findings in this proceeding, I credit the testimony of James Cullor on this issue. Jenkins testified that a truck with a disconnected brake could not "stop as good." (Tr. 39-40) The evidence reflects that this brake was disconnected for a considerable period of time and that this action was not taken for the sole purpose of reporting it to Marler. Therefore, there is no defense to this citation. Fort Scott has stipulated to the significant and substantial nature of poor brakes on a quarry truck. However, I am unable to find any unwarrantable failure as I have found no knowledge of this condition on the part of the respondent. Therefore, I am modifying Order No. 4110166 to a significant and substantial 104(a) citation and I am removing the unwarrantable failure charge. Given the circumstances of this case and considering the criteria in section 110(i) of the Mine Act, I am assessing a civil penalty of $150.00.

Finally, Order No. 4110171 was issued for a broken left front leaf spring on the little Kline truck. Marler's testimony that the tire was almost touching the left front is consistent with the photograph of the little Kline truck placed in evidence. (P. Ex. 10). I reject Gary Cullor's assertion the spring's primary purpose is for driver comfort. Rather, I accept Marler's analysis that this condition posed a serious risk in that the driver could lose control of the truck and sustain serious injury. Therefore, I conclude that this violation was properly characterized as significant and substantial as there is a reasonable likelihood the hazard contributed to, i.e., loss of control, will result in an injury of a reasonably serious nature given continued use of the truck in frequently muddy conditions. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). With respect to the issue of unwarrantable failure, I note that the photograph illustrates that the defective spring was obvious in that the truck was listing to the left side. Fort Scott's continued use of this vehicle in its readily apparent defective state constitutes an unwarrantable failure. Given the serious gravity

of this violation, I am modifying this Order to a 104(d)(1) citation and assessing a civil penalty of $400.00.

ORDER

1. Accordingly, Citation No. 4110164 and Order No. 4110167 ARE VACATED.

2. Order No. 4110166 is modified to a significant and substantial 104(a) citation thus removing the unwarrantable failure charge and IS AFFIRMED as modified.

3. Order No. 4110171 is modified to a 104(d)(1) citation and IS AFFIRMED as modified.

4. The case against James Cullor, as an agent of Fort Scott Fertilizer-Cullor, Inc., in Docket No. CENT 93-117-M IS DISMISSED.

5. Fort Scott Fertilizer-Cullor, Inc., IS ORDERED to pay a total civil penalty of $550.00 within 30 days of the date of this decision, and, upon receipt of payment, Docket No. CENT 92-334-M IS DISMISSED.

Jerold Feldman
Administrative Law Judge

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