

CCASE:

SOL (MSHA) V. RNS SERVICES

SOL (MSHA) V. MASE TRANSPORTATION CO.

DDATE:

19940627

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-343
Petitioner	:	A.C. No. 36-07266-03536
v.	:	
	:	Docket No. PENN 93-431
RNS SERVICES, INCORPORATED,	:	A.C. No. 36-07266-03537
Respondent	:	
	:	Refuse Pile Reprocessing
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-479
Petitioner	:	A.C. No. 36-07266-03501
v.	:	
	:	Docket No. PENN 94-30
MASE TRANSPORTATION CO., INC.,	:	A.C. No. 36-07266-03502
Respondent	:	
	:	Refuse Pile Reprocessing

DECISION

Appearances: Richard Rosenblitt, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondents.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," to challenge citations and orders issued by the Secretary of Labor for the alleged failure of Respondents to have complied with regulations for miner training at the RNS Services, Inc. (RNS) No. 20 refuse reprocessing site. This site has been identified as the "Refuse Pile Reprocessing" mine.

On April 14, 1994, the Secretary filed a motion for partial summary decision on the issue of jurisdiction. However, as noted in Respondent's brief in opposition, a dispute remained regarding certain material facts. See Commission Rule 67(b), 29 C.F.R. 2700.67(b). A hearing was thereafter held limited, upon agreement of the parties, to the jurisdictional issue.

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There is no dispute that the No. 20 refuse disposal site at issue was purchased by RNS in early 1989 from the Barnes and Tucker Company, which had operated the site as part of its Lancashire No. 20 Mine. Until active mining ceased in April 1986, the Lancashire No. 20 Mine included an underground area from which bituminous coal was extracted, a coal cleaning and preparation plant on the surface approximately 100 to 200 feet from the mine's "Slope Portal," and the adjacent refuse site at issue in these cases. (Footnote 1)

At the preparation plant bituminous coal was broken, crushed, sized, cleaned, washed, drying, stored, and loaded. Rejected coal and refuse from the preparation plant, as well as some surplus processed coal, was stored in the adjacent refuse pile. Also on the premises of the mine was at least one storage silo containing coal.

At the time of the inspection giving rise to the citations and orders at issue, and at the time these citations and orders were issued, the underground Lancashire No. 20 Mine had been permanently abandoned and the preparation plant had been dismantled and removed. Apparently only the coal refuse pile containing refuse from the preparation plant and some surplus processed coal and the storage silo containing coal remained.

The evidence shows that RNS provides services for cogeneration power plants by loading and transporting its product to fuel the plants and by removing ash waste. Mase Transportation Company, Inc. (Mase) provides the trucks that transport the material from the No. 20 site to the cogeneration facilities. Approximately 720,000 tons of this material per year is trucked directly from the refuse pile without processing to the Cambria cogeneration facility and approximately 120,000 tons per year of processed material is trucked to the Ebensburg cogeneration facility. The latter material is processed at the No. 20 site.

There appears to be no dispute that the portable processing plant at the No. 20 refuse site is similar to that depicted in Government Exhibit No. 1. Photographs in evidence (Exhibits R-2 through R-5) were taken of the actual processing unit. An end loader loads material from the refuse piles onto

1 The slope portal had an upper deck on which a conveyor belt conveyed the mine product to the preparation plant for processing and a lower deck containing a track for men and supplies. What was known as the "Man Portal," located about 1/4 mile from the preparation plant, also permitted entry for underground miners and smaller size supplies.

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a grizzly on the portable processing unit and into a hopper (Point A on Government Exhibit No. 1). The grizzly consists of horizontal metal bars which break up clumps of material before it enters the hopper bin (Exhibit R-3). The grizzly also screens out large objects such as mine timbers and steel rails that may be in the material. According to Supervisory MSHA Coal Mine Inspector James Biesinger, the bucket on the front-end loader may also be used to smash-up larger pieces of material against the grizzly.

Neil Hedrick, President and shareholder of RNS and a graduate mechanical engineer with extensive experience in the coal mining industry, acknowledged that the crushing of the by the bucket of the front-end loader against the grizzly would constitute "breaking."

The material that enters through the grizzly passes through the hopper to a moving caterpillar tread-like conveyor at the bottom of the hopper (Point B on Government Exhibit No. 1).(Footnote 2) The testimony of Inspector Fetsko is undisputed that the matted and clumped material that was dumped into the hopper exited at the bottom separated and no longer in clumps.

The material then proceeds up an inclined conveyor where it is dumped onto a metal grate and screener (Point D on Government Exhibit No. 1). The material falls through the grate onto vibrating screens. Larger material is separated by the screens and fine material passes through the screens onto another conveyor (Point F on Government Exhibit No. 1). The rock and other reject material is loaded with an end-loader onto trucks operated by Mase employees and is hauled away. The fine material is conveyed to a dump. An end-loader loads this material as needed onto trucks operated by Mase and is transported to the Ebensburg cogeneration plant.

2 While Inspector Fetsko believed, based upon the noise emanating from the hopper area of the portable processing unit and from the fact that material that was matted in clumps entered at Point A and exited at Point B at Exhibit G-1 broken up, that there was a crushing unit between Point A and Point B, the more credible evidence from the photographs, the testimony of MSHA Supervisory Inspector Biesinger and the testimony of Mr. Hedrick leads me to conclude that there was indeed no specific "crusher" between Point A and Point B of Exhibit G-1. The only crushing or breaking resulted from mashing the material against, and passing through, the grizzly bars and from dropping and displacement on the caterpillar-tread conveyor at the bottom of the hopper.

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Section 4 of the Act provides as follows:

Each coal or other mine, the products of which enter commerce, or the operations or products of which enter commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

"Coal or other mine" is defined in Section 3(h)(1) of the Act as follows:

'[C]oal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

The Secretary argues that he has jurisdiction under the Act under two theories. He first maintains that RNS was, in its work performed at the No. 20 refuse disposal site, "engaged in the work of preparing coal" under Section 3(h)(1) of the Act and as defined in Section 3(h)(2)(i) of the Act. Under the latter section "work of preparing the coal" is defined as the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal ... and such other work of preparing such coal as is usually done by the operator of the coal mine."

It is undisputed in these cases that the material being processed at the site at issue included surplus processed coal and coal remaining from the storage silo, as well as refuse material from the Barnes and Tucker coal mine and preparation plant. There is accordingly no need to determine in these cases whether the processing of refuse material alone constitutes

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"work of preparing the coal." Moreover, the credible evidence of record establishes that RNS was engaged in "work of preparing" that coal.

The credible hearing testimony establishes that RNS engages in "breaking" of coal. In A Dictionary of Mining, Mineral and Related Terms,, U.S. Dept. of the Interior, 1968 (Dictionary), "breaking" is defined, in part, as "[s]ize reduction of larger particles [sic]." The breaking in this case occurs at the grizzly bars, at the top of the hopper, and at the screens. MSHA Supervisory Inspector Biesinger testified that breaking occurs when the material passes through the "grizzly" bars and where the bucket of the front-end loader scrapes the deposited material along the bars to break up large chunks. Biesinger further testified that the screening operation causes coal breakage as the material drops off a conveyor and drops through metal screens. The vibration of the screens also causes some breakage.

It is also essentially undisputed that RNS engages in the "sizing" of coal. The Dictionary defines sizing, in part, as the "process of separating mixed particles into groups of particles all of the same size, or into groups in which all particles range between definite maximum and minimum sizes" and the "operation of separating an aggregate of particles into sizes on a series of screens." In order to meet the specifications of Ebensburg Power Company, the material provided by RNS must range in size from 0 to 3/4 of an inch. In order to achieve this, RNS uses a double screening process. This process clearly constitutes "sizing." RNS also mixes coal. RNS President Neil Hedricks testified that RNS mixes material from various parts of the refuse pile to obtain material with a 6,800 BTU rating for the Ebensburg plant.

In addition, RNS engages in the "cleaning" of coal. The Dictionary defines "cleaning, dry," in part, as "[t]he mechanical separation of impurities from coal by methods which avoid the use of liquid." In these cases, RNS uses "grizzly" bars at the top of a hopper to remove large, non-coal objects such as wood or metal and uses double screens to remove objects such as rocks.

The Secretary also argues that the No. 20 refuse site meets the definition of "coal or other mine" under Section 3(h)(1) of the Act in that "the area at issue constitutes lands ... structures, facilities ... or other property ... used in ... or resulting from the work of extracting such minerals from their natural deposits in non-liquid form" In this case it is clear that the "lands," "structures," and "other property" on which the subject refuse pile and coal silo are situated and the structure of the coal silo resulted from the work of the Barnes and Tucker mine extracting coal from its natural deposits in non-liquid form. Accordingly, the land, the coal storage silo and other property constitute a coal or other mine within the meaning of that section of the Act and

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jurisdiction also exists over the RNS operation for this additional reason. While RNS argues that the refuse area (but not the coal storage silo and the coal stored within) resulted from coal preparation, that fact does not preclude a concurrent finding that the area also resulted from the prior extraction of coal from its natural deposits.

It has been stipulated that if jurisdiction exists over RNS it also exists over Mase as a contractor performing services at the RNS No. 20 refuse location. Accordingly, I find jurisdiction under the Act also over Mase. I therefore also reach the Motion for Settlement filed by the parties and conditioned upon the finding of jurisdiction. In this motion, the Secretary proposes to vacate Citation Nos. 3708787 and 3708788 and to reduce the remaining proposed penalties from \$909 to \$636.

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

ORDER

WHEREFORE, the motion for approval of settlement is GRANTED, Citation Nos. 3708787 and 3708788 are hereby vacated and it is ORDERED that Respondent pay a penalty of \$636 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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