CCASE:
SOL (MSHA) V. ELMER NICHOLSON
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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. WEST 94-162-M
Petitioner	:	A. C. No. 02-02108-05517
v.	:	
	:	Docket No. WEST 94-271-M
ELMER JAMES NICHOLSON,	:	A. C. No. 02-02108-05519 A
EMPLOYED BY A-ROCK INC.,	:	
Respondent	:	Gray Mountain Pit

DECISION

Appearances: Susan Gillett, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California for Petitioner;
Gerald W. Nabours, Esq., Flagstaff, Arizona for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, involve a Petition for Assessment of Civil Penalty seeking a civil penalty from Elmer James Nicholson pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), and a Proposal for Assessment of Civil penalty alleging a violation by A-Rock Incorporated ("A-Rock") of 30 C.F.R. 56.14101(a)(3). Also, alleged is a violation of Section 104(b) of the Act. Pursuant to notice, these cases were heard in Flagstaff, Arizona on August 15, 1994. Respondent filed a Post Trial Memorandum on September 16, 1994. On September 20, 1994, Petitioner filed a Post-Trial Brief.

Findings of Fact and Discussion

1. Whether A-Rock Incorporated is subject to the Act.

A-Rock Incorporated, operates the Gray Mountain Pit, a sand and gravel operation, located in Coconino County, Arizona. The material produced at the subject site is sold intrastate, primarily to customers within 100 miles of the site. Daryl Merick, A-Rock's general manager, indicated, in essence, that he is not aware of any out of state suppliers who compete with A-Rock. According to Merick, none of the materials purchased from A-Rock are used outside the state of Arizona.

A-Rock argues, in essence, that it is not involved in interstate

commerce, and that its products and operations do not affect commerce.

Section 4 of the Act provides that each mine ". . . the operations or products of which affect commerce," shall be subject to the Act.

In Jerry Ike Harless Towing, Inc., and Harless, Inc., (16 FMSHRC 683 (April 11, 1994)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. Fry v. United States, 421 U.S. 542, 547 (1975); Wickard v. Filburn, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. Marshall v. Kraynak, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). In Lake, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." Id. Harless, supra at 686.

The front-end loader at issue in these proceedings was built outside the state of Arizona. Also, A-Rock has purchased parts for its caterpillar equipment that have been produced outside the United States. Further, A-Rock's products were used by a customer in the construction of Highway No. 89 in Arizona. I take administrative notice of the fact that Highway No. 89 goes from Arizona to Montana. Based on these factors I find, under the broad principles enunciated by the Commission Harless Towing, supra, and based upon the authority of the Sixth Circuit in Lake, supra, that A-Rock's operations did affect interstate commerce.

2. Violation of 30 C.F.R. 56.14101(a)(3)

On March 23, 1993, Pete Herrera, an MSHA inspector, inspected the subject site. He observed a 950-B front-end loader in the crushing area. Herrera asked the front-end loader operator, Jerry Semallie, whether the brakes were operational, and the latter said that they were not. Herrera asked Semallie

to operate the loader in a forward direction, and gave a sign for him to hit the brakes. According to Herrera, when the service brakes were applied, the loader continued forward and "never slowed down." (Tr. 32). Semallie testified that when the brakes are applied, initially there is some resistance, but the resistance fades away. Herrera issued a citation alleging a violation of 30 C.F.R. 56.14101(a)(3) which provides that "All braking systems installed on the equipment shall be maintained in functional condition." The testimony of Herrera regarding his observation of the functioning of the service brakes on the front-end loader was not impeached or contradicted.(FOOTNOTE 1) Accordingly, based upon his testimony I find that A-Rock did violate Section 56.14101(a)(3), supra.(FOOTNOTE 2)

3. Significant and Substantial

In normal operations the front-end loader is driven to various areas on the site where it must come to a stop, and either load or unload materials. In this aspect of its operations, the loader must stop within dumping and loading distances of stock piles of gravel, a hopper, and haul trucks. Also, in normal operations, the loader travels down an incline to the washer. According to Herrera, in normal operations

FOOTNOTE 1

I also note that the violation was abated after the hydraulic cylinders were rebuilt, and all disc pads and the cylinders for the calipers were replaced.

FOOTNOTE 2

In essence, it appears to be A-Rock's position, inter alia, that it has not been established that a violation of Section 14103(a)(3) supra, occurred because Herrera did not (1) test the brakes pursuant to 30 C.F.R. 56.14101(b)(1) or (2) give A-Rock the option, pursuant to Section 14101(b)(1) supra, of removing the equipment from service.

While it is true that Herrera did not test the brakes in spite of his conclusion that the service brake system did not function as required, A-Rock is not relieved of its responsibilities to comply with Section 56.14101(a) supra. (Conco-Western Stone Co., 13 FMSHRC 1908 (December 1991)) (Judge Maurer)). To hold, as apparently being argued by A-Rock, that Section 56.14101(a) is not violated in absence of proof that the vehicle in question had been tested or removed pursuant to Section 56.14101(b), would render meaningless the plain language of Section 56.14101(a) which provides that the truck in question "shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade of travel."

Ferlin Huskie, the foreman at the site, "walks the area." (Tr. 34). Also, other vehicles are driven in the area.

In Mathies Coal Co., 6 FMSHRC 1 (January, 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (l) 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Considering the above guidelines set forth in U.S. Steel, supra, and the fact that in normal operations the front-end loader in issue operates on an incline, and must be able to stop so as not to collide with other vehicles and equipment, I conclude that the violation was significant and substantial.

4. Unwarrantable Failure

In essence, Semallie indicated that the brakes on the loader at issue had not been working for "probably" (Tr. 73) a few months prior to March 23, when the vehicle was cited. He indicated that he had told Ferlin Huskie, the foreman at the Gray Mountain Pit, that the brakes were not working. Huskie confirmed that Semallie had informed him about the condition of the brakes. He indicated that the brakes had been bad for almost a month prior to the time they were cited on March 23. Huskie indicated that he did not have any authority to get the brakes fixed. He indicated that approximately a month prior to the time the vehicle was cited, he had informed Elmer James Nicholson, the A-Rock superintendent, that the brakes were not in good condition.

In essence, Nicholson indicated that when the loader was cited, in March 1993, he was aware that the brakes were not working properly, and this had been a problem "for quite sometime." (Tr. 108). He indicated that there were problems with the brakes at various times over a period of months. He indicated that he was not sure when he was informed about the problems with the brakes. However, according to Nicholson, when he was informed about the problems with the brakes, he went to Brian Waghorn, the mechanic, "to do something about it." (Tr. 112). Nicholson said that on "numerous occasions", Waghorn worked on the cylinder that was leaking fuel, and the caliper. (Tr. 123). Nicholson indicated that he followed up with Waghorn who indicated that the brakes were working "at that time." (Tr. 113). Nicholson said that he thought the brakes were in good repair. He indicated, in response to questioning by A-Rock's counsel, that after he referred the matter to Waghorn, he did not "hear again that there were any problems with the brakes before March 23, 1993." (Tr. 119).

I find that A-Rock's agents knew, for about a month prior to March 23, 1993, that there were problems with the brakes on the loader. In spite of this knowledge, the loader was continued in operation. Nicholson indicated that he thought that the brakes were in good repair, as he had referred the matter to the mechanic, and followed up with him. However the mechanic, Waghorn, did not testify. Nor were any repair records proffered in evidence. It thus is not possible to make any findings regarding any specific repairs that had been made to the brakes, and when these repairs had been done. I find that the violation herein resulted from A-Rock's aggravated conduct, and thus was the result of its unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)).

5. Violation of Section 110(c) of the Act

In Kenny Richardson, 3 FMSHRC 8 (1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. den., 461 U.S. 928 (1984), the Commission reviewed the legislative history of the term "knowingly" as used in Section 109(c) of the Federal Mine Safety and Health Act of 1969, whose exact language was continued in Section 110(c) of the 1977 Act, and held that the term means "knowing or having reason to know," (Kenny Richardson, supra, at 16). Specifically, the Commission stated as follows: "If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." Kenny Richardson, supra, at 16.

I find that the record establishes that Huskie had informed Nicholson approximately a month prior to the date the loader was cited, regarding the problems with the brakes. I find Nicholson's testimony inadequate to establish that, after he became aware of the problems with the brakes, and prior to the time the brakes were cited, he took action to have the brakes repaired, and ensured that the brakes were repaired. Nor is there any other evidence of record to establish the same. Hence, I find that it has been established that Nicholson violated Section 110(c) of the Act.

6. Violation of Section 104(b) of the Act.

In the initial order issued to A-Rock, Herrera indicated that termination of the cited condition was due March 26, 1993. On August 26, 1993, MSHA inspector David F. Estrada, inspected the front-end loader at issue. He observed that the parking brake was defective, and could not hold the loader when stopped. He issued an order under Section 104(b) of the Act which, as pertinent, provides that if in a follow-up inspection it is found ". . . that a violation described in a citation issued pursuant to Subsection (a) has not been totally abated within the period of time as originally fixed there or subsequently extended, ... ", the inspector shall issue a withdrawal order.

The original order alleges that the "brakes" had not been maintained in functional condition. Specifically, it alleges as follows "the loader would not stop when tested on level ground." The record supports a conclusion that the service brakes are a different system from the parking brakes. The former are used to stop the vehicle, and the latter are used to hold a vehicle stationary once it has come to a stop. According to Nicholson, at some time subsequent to the issuance of the initial citation, the hydraulic cylinders where rebuilt, and the discs, cylinders for the calipers, and pads were all replaced. Estrada indicated that he found the service brakes to be functioning when he inspected the vehicle on August 26, 1993. Thus, I find that it has not been established that, on August 26, 1993, when inspected by Estrada, the violation described in the initial citation had not been totally abated. Thus, I conclude the Section 104(b) shall be dismissed.

7. Penalty

I find that a penalty of $5,000 is appropriate for the violation of 30 C.F.R. 56.14101(a)(3), and that a penalty of $3,000 is appropriate for the violation by Nicholson of Section 110(c) of the Act.

ORDER

It is Ordered as follows:

1. Order No. 4124514 shall be dismissed.

2. A-Rock, Incorporated shall, within thirty (30) days of this decision, pay a civil penalty of $5,000 for the violation of 30 C.F.R. 56.14101(a)(3).

3. Elmer James Nicholson shall pay a civil penalty of $3,000 within thirty (30) days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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