FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 23, 1997

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, 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 ON REMAND

Before: Judge Feldman

On September 15, 1997, the Commission remanded this case for an analysis of the six penalty criteria in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820(i), with respect to the appropriate civil penalty to be imposed in this matter.[1] A nominal $10.00 civil penalty had been assessed for each of two citations issued for violations of 30 C.F.R. ' 56.14101 for defective brakes on two of Fort Scott Fertilizer=s haulage trucks. Although Fort Scott stipulated to the defective brake conditions on the trucks in issue, and to the significant and substantial nature (S&S) of these violations, Fort Scott maintained the defective brakes resulted from brake tampering by truck drivers William Burris and Timothy Ragland. Specifically, Fort Scott alleged Burris and Ragland loosened slack adjuster settings on three of the four wheels on

[1] This decision only concerns the appropriate civil penalty to be assessed. The Commission has affirmed the initial findings that the subject violations were not attributable to Fort Scott=s unwarrantable failure, and that James Cullor is not liable under section 110(c), 30 U.S.C. ' 820(c).

each of the cited haulage trucks shortly before MSHA=s May 27, 1997, inspection, which occurred at the request of Burris and Ragland.[2]

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[2] Burris and Ragland reported the defective brake conditions to the Mine Safety and Health Administration (MSHA) on May 22, 1992, and these complaints were the impetus for Inspector Marler=s May 27, 1992, inspection that resulted in the subject citations. Burris and Ragland were terminated by Fort Scott on June 1, 1992, four days after Marler=s inspection. Burris and Ragland filed discrimination complaints pursuant to section 105(c) of the Act, 30 U.S.C. ' 815(c). MSHA investigated these complaints. In separate letters mailed to Fort Scott on July 14, 1992, concerning Burris= and Ragland=s complaints, James E. Belcher, MSHA=s Chief, Division of Technical Compliance and Investigation, stated AMSHA has determined, in its opinion, the complainant was not discriminated against in violation of section 105(c) (emphasis added).@ (Resp. Ex. 1.). The Secretary has mischaracterized MSHA=s July 14, 1992, determinations as Aprosecutorial discretion.@ On the contrary, these determinations are admissions that either Burris= and Ragland=s complaints were not protected activity under section 105(c), or, that their terminations four days later were, in no part, motivated by their complaints. See *Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). However, consistent with the Commission directive that considering these facts is impermissible, it is the circumstantial evidence alone, regardless of these admissions, that serves as the basis for the conclusion that Burris= and Ragland=s complaints were

Slack adjusters control the contact of the brake shoe with the brake drum. They are located on the inside of each haulage truck wheel. In view of the large diameter of a haulage truck=s tires, slack adjusters are easily accessible from a squatting position. Slack adjusters are adjusted by turning a bolt with an ordinary wrench. The proper setting is tightening the bolt completely and then turning the bolt back half a turn. Truck mechanic Raymond Jenkins testified tightening or loosening slack adjusters is Areal easy@ and takes Aonly a minute.@ (Tr. 36, 49, 50-51). Slack adjusters can be loosened to the point where they would render the brakes ineffective. (Tr. 38-39, 48, 221-22).

In the initial decision, I concluded there was sufficient circumstantial evidence to support the respondents' contention that brake tampering had occurred. 15 FMSHRC 2354, 2361 (November 1993). I concluded that such sabotage is anathema to the Mine Act's goal of preventing unsafe conditions and should not be given recognition. 30 U.S.C. ' 801(e). Thus, I vacated the defective brake citations holding that intentional disabling of equipment, as distinguished from other employee misconduct *(e.g.*, a violation of a mandatory safety standard caused by an employee's failure to follow company safety procedures) was an exception to the strict liability application of the Mine Act. 15 FMSHRC at 2362-63. Consequently, I vacated the citations in issue.

In its first remand, the Commission, citing, *inter alia*, its decision in *Ideal Cement Co.*,

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not made in good faith. *19 FMSHRC __ , slip op.* at 3.

13 FMSHRC 1346, 1351 (September 1991), concluded the Mine Act imposes strict liability on operators for the violative acts of its employees, even when such acts involve "significant employee misconduct." 17 FMSHRC 1112, 1115 (July 1995). Thus, the Commission determined I erred in treating Adeliberate employee misconduct@ as a defense to liability and reinstated the citations.[3] *Id.*; 19 FMSHRC __, *slip op.* at 2. The Commission also vacated my findings that tampering had occurred and remanded for further evaluation on that issue. However, the Commission noted that miner misconduct would not be imputable to the operator in determining the degree of negligence for penalty purposes. *Id.* at 1116.

In my remand decision I once again determined there was adequate circumstantial evidence to support the conclusion that tampering had occurred. 17 FMSHRC 1330 (remand decision, August 1995). Since employee misconduct constituting the intentional disabling of brakes is central to resolution of the issue of the appropriate penalty to be assessed, I repeat the circumstantial case that was summarized in the remand decision:

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[3] As noted by the Commission, as well as the initial decision in this matter, it is well settled that deliberate employee misconduct is ordinarily not a defense to liability under the Mine Act. *17 FMSHRC at 1115; See also* 15 FMSHRC at 2362 (citations omitted). Deliberate employee misconduct is most commonly manifest by a conscious failure to follow company policy or safety rules. Under such circumstances the operator is subject to strict liability, and may be liable for significant civil penalties. However, as discussed *infra*, enforcement of statutory provisions must be viewed in the context of the Adesign of the statute as a whole.@ *K Mart Corp. V. Cartier, Inc.*, 486 US 281, 291 (1988). The conduct alleged in this case **C** using the Mine Act to create a serious hazard so as to subject an operator to Mine Act sanctions under section 110(i) **C** is distinguishable from the term Adeliberate employee misconduct@ as it relates to Mine Act liability. Recognizing such an act by imposing a significant civil penalty would undermine the statute=s fundamental intent of encouraging safety.

> My initial decision noted strong circumstantial evidence of this simple act of tampering. The complaining truck drivers had the motive and opportunity to loosen the slack adjusters. Their own testimony reflects they were disgruntled employees and threats had been made about disrupting quarry operations. Moreover, the complainants were responsible for routine truck maintenance. (Tr. 87). [MSHA Inspector] Marler testified one of the first things a truck driver experiencing brake problems should check are the slack adjusters. (Tr. 29). Yet Burris and Ragland, licensed by the State of Missouri to drive eighteen-wheeler trucks, continued to use their trucks without brakes without this rudimentary check. (Tr. 91). In addition, the pattern of loosened slack adjusters on three out of four wheels on both trucks driven by Burris and Ragland is further evidence of tampering.
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> Furthermore, Ragland's May 22, 1992, complaint to MSHA that the quarry trucks' brakes were ineffective is also suspect for several reasons. Significantly, despite complaining to MSHA that Fort Scott ignored their brake complaints, Fort Scott truck mechanic Jenkins testified Burris and Ragland never complained to him about brake problems. (Tr. 70). Of greater significance is Burris' testimony that the cited 30 ton Euclid's brakes "held" when he last operated the truck on May 25, 1992, during the interim period between Ragland's May 22 MSHA complaint and Marler's May 27 inspection. (Tr. 106). I can find no reasonable explanation short of tampering to account for this spontaneous remission in the big Euclid's brake system.
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> Moreover, Burris' testimony lacked credibility. Although Jenkins and Marler testified it is not uncommon for truck drivers to adjust slack adjusters, Burris was reluctant to admit he knew how to make such adjustments. (Tr. 26-27, 36-37, 92, 221). However, both Burris and Ragland ultimately conceded they were familiar with the maintenance and function of slack adjusters. In fact, Ragland told Marler "he knew a little bit about repairing trucks." (Tr. 200). (17 FMSHRC at 1337).

In my remand decision, consistent with the Commission=s discussion of strict liability and the fact that employee misconduct is not imputable to the operator, I imposed a nominal penalty of $10.00 for each of the two citations. This *de minimus* civil penalty was based on the extraordinary circumstances in this case.

In its current remand decision, in considering the issue of unwarrantable failure, the Commission concluded, based on credibility findings, Athat [Fort Scott] did not know about the brake problems,@ and, that upon becoming aware of the brake problems, A[it] responded by directing [Burris and Ragland] to park the trucks so the brakes could be examined.@

19 FMSHRC __, *slip op.* at 6. Thus, the Commission concluded it was not necessary to address whether employee misconduct had occurred. Consequently, the Commission=s remand, in effect, left the employee misconduct determination undisturbed.

The Commission=s remand directs me to reconsider the appropriate civil penalty in light of the six civil penalty criteria in section 110(i) of the Act. A discussion follows.

1. History of Violations

Fort Scott had a history of 24 violations during the two year period preceding the issuance of the citations in issue. (Gov. Ex 1). With the exception of two violations for which $400.00 civil penalties were assessed, most, if not all, of the remaining violations appear to be non S&S based on numerous assessments ranging from $20.00 to $50.00. *Id*. Thus, the history of violations is not a significant consideration in imposing the appropriate penalty in this case.

2. Size of Business

Fort Scott is a small operator.

3. Negligence

Although an operator=s fault, or lack thereof, is relevant in assessing a civil penalty, employee misconduct is not imputable to Fort Scott. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1992); *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (November 1986), *aff=d*, 868 F.2d 1195 (10th Cir. 1989) . The Commission has concluded, based on credibility findings, that the Secretary has not shown, by a preponderance of the evidence, that Fort Scott knew or should have known about the brake problems prior to Burris= and Ragland=s complaints, or, that Fort Scott ignored their complaints. *19 FMSHRC __ , slip op.* at 6, 7. Thus, there is no negligence attributable to Fort Scott in this matter. There are no allegations that Burris and Ragland were lacking in supervision, training or discipline. 4 FMSHRC at 1464; *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988), *aff=d* 870 F.2d 711 (D.C. Cir. 1989). Therefore, the lack of negligence attributable to Fort Scott is a significant mitigating factor.

4. Effect on Operator=s Ability to Continue in Business

The $20.00 civil penalty will not interfere with Fort Scott=s continued business operations.

5. Gravity of Violation

Defective brakes on multi-ton haulage trucks pose significant hazards to their occupants and anyone in the vicinity of the defective vehicles. Thus, the gravity of the violations is extremely serious.

Ordinarily, serious gravity, under the doctrine of strict liability, may warrant a significant civil penalty. For example, in *Birmingham Coal & Coke Company*, Docket No. SE 96-99, I denied the Secretary=s settlement motion wherein the parties agreed to a reduction in proposed penalties from $16,000.00 to $100.00 for two citations issued to an absentee operator for training violations committed by an independent contractor. *Birmingham Coal & Coke Company*, Docket No. SE 96-99 (order denying joint motion to approve settlement, May 28, 1996). The Secretary=s

reduction in proposed penalties was based on the concept of strict liability and the operator=s lack of knowledge of the violations. In denying the settlement motion, I noted the public interest in ensuring that operators contract with reputable independent contractors, and, to this end, that strict liability without meaningful liability is no liability at all. *Birmingham Coal & Coke Company*, Docket No. SE 96-99, *slip op.* at 3 (decision approving settlement, August 15, 1996).

In determining the meaning and applicability of a statutory provision, the Commission looks to Atraditional tools of . . . construction,@ including an examination of the intent of the drafters. *Amax Coal Company*, 19 FMSHRC 470, 474 (March 1997) *citing Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990) (interpretation of Mine Act provision). In this regard, the imposition of a significant strict liability civil penalty in *Birmingham Coal* is consistent with the Supreme Court=s analysis of the penalty provisions in the predecessor Federal Coal Mine Health and Safety Act of 1969, that a Amajor objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.@ *National Indep. Coal Operators= Ass=n v. Kleppe*, 423 U.S. 388, 401 (1976). Here, however, giving recognition to equipment sabotage that was motivated by a desire to subject an operator to Mine Act liability, turns the Mine Act on its head. The imposition of a significant penalty in this case will neither minimize future accidents nor serve as a deterrence. On the contrary, significant penalties in this case may only encourage future sabotage and result in serious injury.

6. Good Faith Abatement

The evidence reflects the trucks were parked so their brakes could be examined when Burris and Ragland informed Fort Scott of the brake problems. Thus, this penalty criterion is not a basis for imposing a higher penalty.

ORDER

In the final analysis, a nominal penalty in this case is not imposed because there Ais only@ strict liability. Strict liability may justify significant penalties. A nominal penalty is imposed in this instance because it is consistent with the penalty criteria in section 110(i) of the Act, and, more importantly, it is consistent with Congressional intent as well as the public interest. Accordingly, the $10.00 civil penalty for each of the two citations in issue is reinstated. The record reflects Fort Scott has paid the total $20.00 civil penalty for these citations. Consequently, these proceedings **ARE DISMISSED.**

Jerold Feldman
Administrative Law Judge

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