

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 19, 2001

TXI OPERATIONS, LP, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. CENT 2000-419-RM
: Citation/Order No. 7887789; 7/8/2000
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. CENT 2001-24-RM
ADMINISTRATION (MSHA), : Citation No. 7897041; 6/20/2000
Respondent :
: Paradise Plant
: Mine ID 41-03253

CONSOLIDATION ORDER
AND
DECISION

Appearances: Michael T. Heenan, Esq., Heenan, Althen & Roles, Washington, D.C.,
for the Contestant;
Stephen E. Irving, Esq., Susan Meyercord, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for the Respondent.

Before: Judge Feldman

These contest matters concern Notices of Contest filed by TXI Operations, LP (TXI), challenging two citations and an imminent danger order issued as a result of a June 19, 2000, fatal railroad crossing accident that occurred at the entrance of TXI's Paradise Plant. The accident site is on property owned by the Union Pacific Railroad (Union Pacific). The accident occurred when the driver of a haulage tractor-trailer who was entering the Paradise Plant attempted to beat a freight train across the railroad crossing. The operator's cab of the tractor was struck by the train killing the truck driver. TXI notified the Mine Safety and Health Administration (MSHA) of the accident the next morning on June 20, 2000, at approximately 9:00 a.m.

As a result of MSHA's accident investigation, 104(a) Citation No. 7887789 was issued citing TXI for violating the mandatory safety standard in 30 C.F.R. § 56.9100(a) that requires, in pertinent part, that rules governing right-of-way shall be established and followed at each mine. TXI was cited for violating this mandatory standard because, upon entering and exiting the Paradise Mine, TXI personnel and its customers routinely failed to stop completely at the stop signs posted on both sides of the railroad crossing. Citation No. 7887789 was also issued as an imminent danger order pursuant to section 107(a) of the Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 817(a), as a result of TXI's practice of not ensuring that vehicles entering

and exiting its mine stopped completely before traversing the railroad crossing.

A contest hearing concerning 104(a)/107(a) Citation and Imminent Danger Order No. 7887789 was conducted on October 11, 2000, in Decatur, Texas. Subsequent to the hearing, on December 20, 2000, the contest proceeding in Docket No. CENT 2001-24-RM was assigned to me for disposition. CENT 2001-24-RM concerns TXI's contest of 104(a) Citation No. 7897041 for an alleged violation of the accident notification provisions of 30 C.F.R. § 50.10 that require mine operators to notify the local MSHA District or Subdistrict Office immediately after an accident occurs.

During a post-hearing telephone conference, the parties agreed to consolidate the contest in CENT 2001-24-RM with the 104(a)/107(a) contest in CENT 2000-419-RM. To facilitate disposition of the issue in CENT 2001-24-RM concerning TXI's alleged failure to timely notify MSHA of the fatality, on December 28, 2000, the parties filed joint stipulations related to the facts surrounding TXI's notification of the accident. Accordingly, Docket Nos. CENT 2000-419-RM and CENT 2001-24-RM **ARE HEREBY CONSOLIDATED.**

I. Findings of Fact

TXI's Paradise Plant, a medium size sand and gravel mine with approximately 22 employees, is located in a remote area in the vicinity of Chico, in Wise County, Texas. The Paradise Plant is situated on the north side of Union Pacific's mainline railroad tracks that run in an east-west direction. State Highway 114, the exclusive route used for traveling to and from the Paradise facility, also running in an east-west direction, is adjacent and parallel to the Union Pacific right-of-way, on the south side of the railroad tracks. Thus, Union Pacific's tracks are located between State Highway 114 and the entrance to the Paradise facility. To enter the Paradise Plant requires a ninety degree turn from Highway 114 to traverse the railroad tracks that are situated directly in front of the Paradise Mine entrance.

Two to four freight trains pass along the Union Pacific tracks adjacent to the Paradise Plant entrance each day. The track bed in front of, and in the general vicinity of, the Paradise Mine is straight and level. The visibility down the tracks in both the east and west direction is unlimited. Union Pacific freight trains can consist of one hundred or more cars. The freight trains travel at approximately 40 miles per hour. The speed limit on State Highway 114 is 65 miles per hour.

Because TXI has no control over Union Pacific's mainline tracks, it had to negotiate a license agreement with the railroad whereby Union Pacific granted permission for TXI's personnel and customers to cross from Highway 114 over Union Pacific's tracks to the Paradise Plant. Thus, in accordance with the terms of a 1983 license agreement, Union Pacific, pursuant to TXI's request, constructed a crossing from Highway 114 to TXI's mine property. (TXI Ex. 4). The terms of the license agreement provided, with specified exceptions not relevant here, that TXI would indemnify Union Pacific for any liability incurred as a result of injuries or death to persons

occurring at the railroad crossing. (*Id.*). Construction of the crossing was performed by Union Pacific in accordance with its own specifications.

Union Pacific established rules for its track crossing by means of posted signs. Specifically, a white railroad crossing sign, a yellow railroad crossing sign, and a stop sign, were posted on both the highway and mine entrance sides of the track. Section 56.9104, 30 C.F.R. § 56.9104, governs the traffic controls that are required at designated railroad crossings. The Secretary does not contend that the stop signs and railroad crossing signs posted at the railroad crossing are inadequate. In fact, the Secretary characterized the railroad crossing and stop signs as “conspicuous” in 104(a)/107(a) Citation/Order No. 7887789. (Gov. Ex. 9).

In 1987, independent of its license agreement granting the right to cross the Union Pacific tracks, TXI entered into a lease agreement for a relatively small portion of Union Pacific land across from the Paradise Plant entrance on the Highway 114 side (south side) of the tracks.¹ (TXI Ex. 5). TXI used this property to install a flower box and signs that were visible from Highway 114 to identify the location and entrance of the Paradise Plant. TXI also constructed a foundation area used for a rolling fence that could be extended parallel to, and in front of, the highway side of the tracks to prevent vehicles from crossing the track when the Paradise facility was closed.

To access the Paradise Plant, the Union Pacific tracks are crossed approximately 500 times each day by company, vendor, contractor and visitor traffic. Photographs admitted in evidence reflect virtually unlimited visibility down the track with regard to trains approaching from the east or west. (TXI Exs. 2,3). When a train approaches the crossing, the train engineer blows the train whistle loudly and continuously. In fact, the train can be heard long before it can be seen. Vehicles traveling east or west on Highway 114 that turn into the railroad crossing would pass trains traveling in the same direction on the parallel track, or, face trains that were approaching the railroad crossing from the opposite direction. (TXI Ex. 1).

On June 19, 2000, a multi-ton truck pulling double haulage trailers operated by Farris Concrete Company (Farris) , a TXI customer purchasing sand, was traveling west on State Highway 114. The truck driver had been employed by Farris for approximately six months, and he had averaged four trips per day to and from the Paradise Plant, passing through the Union Pacific railroad crossing.

As noted, the speed limit on Highway 114 is 65 miles per hour. Based on the observations of Texas State Trooper Mike Wiley who witnessed the accident, it is apparent that the driver of

¹ TXI’s 1983 license agreement, and its 1987 lease agreement concerning the railroad crossing were with the Oklahoma-Kansas-Texas Railroad Company, and the Missouri-Kansas-Texas Railroad Company, respectively. While the relationships between Union Pacific and these railroad companies are unclear, apparently Union Pacific Railroad is bound by the terms of these agreements.

the Farris truck traveling in a westerly direction on Highway 114 passed a freight train that was also traveling west at approximately 40 miles per hour on the tracks parallel to the highway. State Trooper Wiley, who was traveling east on Highway 114 observed the Farris truck driver turn right off Highway 114 as the truck approached the railroad crossing to enter the Paradise Plant. Wiley concluded the truck driver was intent on driving through the stop sign in an attempt to beat the approaching train across the railroad crossing. Tragically, as a consequence of down-shifting and slowing to negotiate the right turn off Highway 114, the truck driver miscalculated the speed of the approaching train and the time required to clear the train crossing. The freight train struck the cab of the tractor-trailer killing the driver.

TXI's Safety Manager Dana Glover-Smith, who was not at the Paradise mine site on the day of the accident, was notified of the accident on the following day on June 20, 2000. The Safety Manager was not aware that the accident had occurred on Union Pacific rather than TXI property. Therefore, upon learning of the accident, she reported the incident to MSHA on June 20, 2000. TXI asserts it was not required to notify MSHA of the accident because the accident site was not on mine property. Consequently, TXI argues the railroad crossing is not subject to Mine Act jurisdiction.

Upon being notified of the accident, MSHA Supervisory Inspector Charles Sisk and MSHA Inspector Wyatt Andrews were sent to the Paradise Plant on June 20, 2000, to perform an accident investigation. Shortly after arriving at the mine on June 20, 2000, Andrews issued 104(a) Citation No. 7897041 citing a violation of the provisions of 30 C.F.R. § 50.10 that require a mine operator to immediately notify MSHA of an accident. The citation noted that although a fatal accident occurred on June 19, 2000, MSHA was not notified until 9:05 a.m. of the following morning.

During their accident investigation on June 20, 2000, Sisk and Andrews observed at least 20 vehicles crossing the Union Pacific tracks to enter and leave the mine site. The inspectors did not observe any of the vehicles come to a complete stop at the stop signs. At the time these vehicles were observed, there were no freight trains in the vicinity of the railroad crossing.

On June 27, 2000, from approximately 9:30 to 10:30 a.m., Sisk sat in his vehicle outside the mine site and once again observed that vehicles entering and exiting the mine site were not coming to a complete stop at the railroad crossing at times when there were no trains in sight. From approximately 10:00 to 10:30 a.m., Sisk observed approximately 36 vehicles and he recorded notes for every vehicle he observed. (Gov. Ex. 7). Although most vehicles slowed at the stop sign, Sisk observed only two to four of the 36 vehicles come to a complete stop at the stop signs. At no time during Sisk's surveillance did he see a train approaching the railroad crossing.

On July 6, 2000, Andrews observed and recorded vehicles entering and exiting the mine. (Gov. Ex. 8). Andrews observed approximately twelve vehicles during a 25 minute period. Only one vehicle came to a full stop at the railroad crossing stop sign. Once again, there were no

trains crossing the railroad crossing during the period of Andrews' observations. Thus, during the course of the MSHA inspectors' observations of vehicles crossing the train tracks on June 20, June 27, and July 6, 2000, the inspectors did not observe any motorist fail to yield right-of-way to a train approaching the crossing.

David Nelson, TXI's Paradise Plant Manager, testified TXI has established and it enforces rules governing speed, right-of-way and direction of movement on mine property. In this regard, there is a 20 mile per hour speed limit sign posted on mine property. (Gov. Ex. 5(a)).

Nelson readily admitted he was aware that drivers frequently did not come to a complete stop when crossing the tracks when no trains were in sight. (Tr. 205). Nelson explained that a driver of a haulage truck weighing over 30,000 pounds can more quickly clear the tracks when no trains are coming by slowing down rather than completely stopping at the stop sign and shifting to start movement again. (Tr. 193-94). Although Nelson knew drivers frequently did not fully stop when no trains were seen, Nelson testified that TXI had no reason to believe that drivers were traveling over the railroad crossing at excessive speeds, or that they were otherwise failing to yield the right-of-way to approaching trains. (Tr. 204-05).

At the hearing MSHA Supervisory Inspector Sisk was requested to consider the significance of drivers coming to a rolling stop, rather than a complete stop, in instances when there was no train in sight of the railroad crossing. Sisk was asked:

Court: . . . Well, as a matter of fact, if we assume for the sake of arguing in this hypothetical that it's clear that there's no train on the tracks in the vicinity of the mine entrance in any direction, either east or west, can you testify with reasonable certainty that all MSHA inspectors came to a complete stop before entering and exiting the mine under those circumstances?

Sisk: Well, I wish I could, but not being with them, I would hope that they did. The inspectors that I've been with did.

Court: All right. But would you agree with me that it's human nature if the visibility is unobstructed and you're crossing a railroad track, that people frequently won't come to a complete stop?

Sisk: Yes.

(Tr. 87-88).

Based on MSHA's observations of the traffic entering and exiting the mine,

on July 6, 2000, more than two weeks after the accident, Andrews issued 104(a)/107(a) Citation and Imminent Danger Order No. 7887789 citing a violation of 30 C.F.R. § 56.9100(a). This mandatory safety standard provides, in pertinent part, that “rules governing . . . right-of-way . . . shall be established and followed at each mine.” Specifically, Citation/Order No. 7887789 stated:

Traffic “right-of-way” rules are not being enforced by management at the railroad crossing near the mine entrance. Numerous over-the-road haul trucks and passenger vehicles have failed to come to a complete stop before proceeding through the railroad crossing. Conspicuous stop signs and two sets of railroad crossing signs are present at the site. Five previous instances have been reported where trains have struck haul trucks or trailers at the crossing because the vehicles failed to stop. On June 19, 2000, one instance caused fatal injury to a truck driver. *Failing to stop completely at the crossing is a past and current practice at the mine and constitutes an imminent danger.*

(Emphasis added). (Gov. Ex. 9).

Although the Citation/Order No. 7887789 made reference to five previous instances of “trains [striking] . . . haul trucks or trailers at the crossing because the vehicles failed to stop,” the Secretary has failed to present any evidence of previous accidents, or the cause of such accidents, with the exception of testimony that the prior incidents occurred in 1987, 1988, 1997 and 1998. (Tr. 37-38). Nor are there any allegations of injuries or deaths occurring as a result of any previous incidents.

To abate the imminent danger order, TXI was required to provide a flagman “at the crossing to insure that vehicles are aware when a train is approaching the crossing from either direction.” (Gov. Ex. 9).

II. Further Findings and Conclusions

A. Jurisdiction

As a threshold matter, TXI challenges MSHA’s jurisdiction because the fatal accident occurred outside the entrance to the Paradise mine on Union Pacific property. In this regard, TXI argues that a finding of MSHA jurisdiction in this case would be “tantamount to an award of MSHA jurisdiction over an offsite mainline railroad — a step not contemplated by the Mine Act” (TXI Proposed Findings, p.16). However, here MSHA is not seeking jurisdiction over an offsite railroad line. Rather, MSHA seeks enforcement authority over a railroad crossing that provides TXI’s customers with the exclusive access to TXI’s Paradise Mine. Moreover, TXI is a licensee and lessee of this area; TXI has fenced in this area to prevent

mine access when its mine is closed for business; and TXI has assumed, with specified exceptions not relevant here, to indemnify Union Pacific for any liability for any injury or death arising out of any incident at the railroad crossing.

Although the above circumstances are indicia of the requisite mine operator responsibility and control warranting a finding of Mine Act jurisdiction, ultimate resolution of the jurisdictional question requires application of traditional rules of statutory construction that start with a reading of the language of the statute. If a statute is clear and unambiguous, effect must be given to its language. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 842-43 (1984); *Energy West Mining Co. v. FMSHRC*, 40 F. 3d 457, 460 (D.C. Cir. 1994).

As a predicate for Mine Act jurisdiction, the statutory definition of “a mine” in section 3(h)(1), 30 U.S.C. § 802(h)(1), is “broad,” “sweeping” and “expansive.” *Marshall v. Stoudt’s Ferry Preparation Plant Co.*, 602 F.2d 589, 591-92 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). In this regard, the legislative history of the Mine Act clearly states “what is considered to be a mine and to be regulated under this Act [shall be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act.” S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted* in Senate Subcomm. On Labor, Comm. On Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

Turning to the statutory language, Section 3(h)(1)(A) provides that “a mine” is, “an area of land from which minerals are extracted” Clearly, the Paradise Plant is a mine because it is an area of land from which sand and gravel is extracted. Section 3(h)(1)(B) provides that “a mine” includes, “private ways and roads appurtenant to such area[s][from which minerals are extracted].” Without question, the Union Pacific railroad crossing is a “private way or road” that is “appurtenant,” if not an integral part, of the Paradise Mine. But for TXI’s Paradise Plant, no motorists would be exposed to the subject Union Pacific railroad crossing. Surely, given the express legislative intent to broadly construe the meaning of a mine, Congress intended the Mine Act to protect individuals from potential hazards that are incidental to entry into a mine, even if the potential hazards are not located on land owned by the mine operator.

In fact, the Commission has recently recognized that, in appropriate circumstances, a finding of Mine Act jurisdiction in cases where there is a lack of mine operator ownership is consistent with established precedent. *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1297 (November 2000), *citing* *W. J. Bokus Industries, Inc.*, 16 FMSHRC 704, 707-08 (April 1994). In *Justis Supply*, the Commission noted, there is a jurisdictional basis, irrespective of ownership, when the cited conditions would affect miners. *Id.* Here, the conditions at the railroad crossing affect virtually everyone entering the mine. Accordingly, the Union Pacific railroad crossing, located at the mine entrance, is a “a mine” as contemplated by section 3(h)(1)(B) of the statute, and, as such, the railroad crossing is subject to Mine Act jurisdiction.

B. Imminent Danger

Imminent Danger Order No. 7887789 was issued pursuant to section 107(a) of the Mine Act. The condition cited in Order No. 7887789 as constituting an imminent danger was TXI's "past and current practice" of not ensuring that vehicles entering the mine "stop completely at the crossing." Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area *until* an authorized representative of the Secretary determines that *such an imminent danger and the conditions or practices which caused such imminent danger no longer exist*. The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under section 110. (Emphasis added).

In *Wyoming Fuel Company*, 14 FMSHRC 1282 (August 1992), the Commission stated the appropriate analysis for determining the validity of an imminent danger order is whether the preponderance of the evidence shows ". . . that the condition or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated." 14 FMSHRC at 1291. In *Wyoming Fuel*, the Commission noted that there must be a degree of imminence to support a 107(a) order noting that the word "imminent" is defined as "ready to take place: near at hand: impending . . . : hanging threateningly over one's head: menacingly near." *Id.* at 1290 *citing Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (October 1991).

In view of the potential imminence of danger, the Commission has repeatedly recognized that an inspector must be accorded considerable discretion in determining whether to issue a 107(a) withdrawal order because "an inspector must act with dispatch to eliminate conditions that create an imminent danger." 14 FMSHRC at 1291 (citations omitted). However, although far reaching, an inspector's discretion to issue 107(a) orders is not unfettered. Rather, the apparent imminence of danger is a prerequisite to empowering the inspector with the broad discretion to issue 107(a) withdrawal orders.

Analyzing whether the requisite condition or practice that poses an imminent danger is present requires identification of the purported extremely hazardous condition or practice. Here, the Secretary relies on both the purported practice of failing to yield right-of-way at the railroad crossing, as well as the admitted practice of failing to stop completely when no trains are in sight.

A motorist's obligation to come to a complete stop at a stop sign is independent of a motorist's obligation to yield right-of-way to traffic approaching an intersection. The flaw in the

Secretary's case is that she fails to distinguish the practice of failing to yield the right-of-way to an approaching freight train, from the practice of treating a stop sign as a yield sign by coming to a rolling stop when the railroad track is deserted. In relying on the lack of strict stop sign compliance to support the imminent danger, the Secretary equates a motorist's failure to completely stop at a deserted railroad track as an act exposing the motorist to the possibility imminent death or serious injury. Obviously, there is an essential element missing from the Secretary's doomsday scenario - - an approaching train.

The fact that MSHA inspectors Sisk and Andrews observed only six to eight vehicles out of approximately 68 vehicles come to a complete stop illustrates that these were not reckless drivers engaging in self-destructive behavior. On the contrary, they were doing what people normally do at a deserted intersection - - ensuring that nothing was approaching from either direction and then proceeding with caution. In reaching this conclusion I am not trivializing the importance of full stops at stop signs under normal circumstances. However, the circumstances in this case are not normal. The subject Union Pacific railroad crossing is in a remote area of Texas located in an area with unlimited visibility.

As noted above, to support an imminent danger order, the imminence of danger must be "menacingly near." In this regard, section 3(j) of the Mine Act 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 . . .*" 30 U.S.C. § 802(j) (emphasis added). The fact that Sisk and Andrews observed the purported imminent danger for 16 days from June 20 until July 6, 2000, before Andrews issued Imminent Danger Order No. 7887789 demonstrates the lack of any impending threat to safety.

Finally, the fatal accident had nothing to do with the "past and current practice" cited in Imminent Danger Order No. 7887789 of "failing to stop completely at the crossing." According to the eyewitness account, the victim tried to beat the train across the train crossing. Such isolated conduct is not evidence of "a practice" of failing to yield right-of-way to trains approaching the railroad crossing. Moreover, such conduct is unrelated to the common practice of coming to a rolling stop, rather than a complete stop, when visibility is unlimited and the railroad crossing unquestionably is deserted. Accordingly, Imminent Danger Order No. 7887789 shall be vacated.

C. Enforcement of Right-Of-Way Rules

104(a) Citation No. 7887789 cites a violation of section 56.9100(a) that requires that rules governing right-of-way shall be established and followed. In addressing the merits of 104(a) Citation No. 7887789, it is important to note that a fatal accident at mine site is not always attributable to a mine operator's violation of a mandatory safety standard. *ASARCO, Inc.*, 14 FMSHRC 941, 951 (June 1992); *Dynatec Mining Corporation*, 20 FMSHRC 1058, 1065 (September 1998) (ALJ Manning).

Here, the linchpin of the Secretary's case is the fatal accident. In this regard, Citation No. 7887789 alleges: "Traffic 'right-of-way' rules are not being enforced by management at the railroad crossing near the mine entrance. . . . On June 19, 2000, one instance caused a fatal injury to a truck driver." Thus, the Secretary contends that TXI's admitted failure to take actions to ensure strict compliance with the railroad crossing stop signs evidences a failure to enforce "right-of-way rules." Not so fast. As previously discussed, stopping completely at a stop sign, and yielding to traffic in an intersection, are separate responsibilities. After stopping at a stop sign, a motorist can still fail to yield the right-of-way by proceeding into an intersection into the path of approaching vehicles. Conversely, a motorist cannot fail to yield to traffic if, as in the present case, there is no traffic in sight.

Thus, to prevail, the Secretary must show by a preponderance of the evidence that TXI failed to enforce right-of-way rules. The Secretary cannot satisfy her burden of proof by simply bootstrapping an alleged practice of failing to enforce right-of-way rules based on an isolated accident onto TXI's admitted failure to ensure that individuals visiting the mine strictly complied with stop signs at a deserted railroad intersection. Significantly, the Secretary concedes that fully stopping under such circumstances is contrary to human behavior. (Tr. 87-88).

Although TXI's lack of effort to ensure strict adherence to the stop signs may evidence a technical violation of section 56.9100(a) that would be unlikely to result in serious injury, to support the cited significant and substantial (S&S) violation of section 56.9100(a) in Citation No. 7887789, the Secretary has elected to prove that TXI failed to enforce right-of-way rules, and, that such failure somehow contributed to this tragic accident.² The Secretary has failed on both fronts. There is no evidence that TXI had any knowledge that its employees, patrons or contractors were failing to yield to oncoming trains. In fact, with the exception of this accident, there is no specific evidence of any motorist failing to yield right-of-way. Nor is there any evidence that TXI's failure to ensure strict compliance with the railroad crossing stop signs encouraged individuals to race oncoming freight trains across the crossing. Accordingly, Citation No. 7887789 shall be vacated.

Although Citation No. 7887789 has been vacated, I am concerned about the previous incidents that occurred at this railroad crossing. However, in the absence of specific evidence concerning the nature of those incidents, there is an inadequate basis for concluding that TXI should have been on a heightened state of awareness, or that it should otherwise have anticipated the reckless behavior that contributed to this accident.

² A violation of a mandatory safety standard is properly characterized as S&S if it is likely that the hazard contributed to by the violation will result in an event, *i.e.*, an accident, resulting in death or serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

D. Accident Notification

Citation No. 7897041 cites a non-S&S violation of the mandatory standard in section 50.10. It is undisputed that TXI did not notify MSHA of the fatality until June 20, 2000, the day after the accident. Such a delay violates the requirements of section 50.10 that requires notifying MSHA immediately after an accident. While TXI's delay may have been attributable to confusion concerning whether the accident was reportable given the fact that it occurred outside mine property, the Mine Act is a strict liability statute. *Wyoming Fuel Company*, 19 FMSHRC 19, 21 (January 1994). Although TXI could be held liable even in the absence of negligence, the circumstances of this case reflect, as alleged in Citation No. 7897041, that, as a licensee and lessee of the accident site, TXI's failure to immediately notify MSHA is indicative of moderate negligence. While the violation appears to be serious in gravity because the purpose of immediate notification is to enable MSHA to determine that the hazards that contributed to an accident no longer pose risks to mine personnel, the Secretary has designated the cited section 50.10 violation as non-significant and substantial. Accordingly, Citation No. 7897041 citing a non-S&S violation of section 50.10 shall be affirmed.

ORDER

Accordingly, **IT IS ORDERED** that TXI's contest in Docket No. CENT 2000-419-RM **IS GRANTED**, and 104(a)Citation/107(a) Order No. 7887789 **IS VACATED**.

IT IS FURTHER ORDERED that TXI's contest in Docket No. CENT 2001-24-RM **IS DENIED**, and 104(a) Citation No.7897041 **IS AFFIRMED**.

Jerold Feldman
Administrative Law Judge

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/hs