FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2001

KINDER MORGAN OPERATING LTD "C",	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. KENT 2000-128-R
v.	:	Citation No. 7641076; 2/2/2000
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2000-129-R
MINE SAFETY AND HEALTH	:	Citation No. 7641077; 2/2/2000
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT 2000-130-R
	:	Citation No. 7641078; 2/2/2000
	:	
	:	Grant Rivers Terminal Mine
	:	Mine ID 15-18234
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH		:
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-168
Petitioner	:	A. C. No. 15-18234-03501
v.	:	
	:	
KINDER MORGAN OPERATING LTD "C",	:	Grand Rivers Terminal Mine
Respondent	:	

DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty brought by Kinder Morgan Operating L.P. "C" against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Kinder Morgan, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815.[1] The company contests the issuance to it of Citation Nos. 7641076, 7641077 and 7641078, which allege violations of the Secretary's mandatory health and safety standards. The petition seeks a penalty of $187.00 for the three contested citations. For the reasons set forth below, I affirm the citations and assess a penalty of $187.00.

[1]The cases are **CONSOLIDATED** for this proceeding.

The parties have stipulated to the facts in these cases and submitted their positions in briefs. They agree that the sole issue in the cases is whether the Grand Rivers Terminal is subject to the Mine Act. They further agree that if jurisdiction is found, the citations may be affirmed and penalties assessed.

Stipulated Facts

Kinder Morgan operates the Grand Rivers Terminal, a marine terminal located adjacent to Kentucky Lake, near Grand Rivers, Kentucky. The Terminal consists of three separate areas: (1) a rail-to-ground coal unloading and storage facility (GRT-1); (2) a rail-to-barge coal loading facility (GRT-2); and (3) a barge-to-ground coal unloading and ground-to-barge loading facility (GRT-4). The Terminal employs approximately 40 workers on a permanent basis and has 12 temporaries. With the exception of eight administrative employees, the employees, while primarily employed at one facility, work on an as-needed basis at all three facilities.

Kinder Morgan receives approximately 10 million tons of processed coal per year at the Terminal, either by rail or by barge. Ninety-five percent of the coal arrives by rail. Most of the coal arrives by rail from mines in Colorado, Utah and Wyoming. Some comes from the Illinois basin of Kentucky and Illinois, transported by rail or barge. Occasional shipments also come from West Virginia and Virginia.

None of the coal received at the Terminal is owned by Kinder Morgan. Kinder Morgan is a bailee of the coal while it is on the ground at the Terminal. It has no responsibility for the coal until it is unloaded at the Terminal, nor does it have any responsibility for the coal after it has been loaded into barges for shipment to the ultimate user. Coal shipments are processed through the facility in three ways: (1) rail-to-stockpile-to-barge; (2) barge-to-stockpile-to-barge; and (3) rail-to-barge.

More than 95% of the coal received by Kinder Morgan is owned by the Tennessee Valley Authority (TVA), which purchases it for use in its 11 coal-fired plants. The price paid by TVA for the coal is F.O.B. railcar or barge at the producer's or supplier's shipping facility. By the time the coal arrives at the Terminal, it has already been processed by the coal producers to meet TVA's contract specifications, which may differ depending on the particular plant for which the coal is intended. In its contracts with the various coal producers, TVA requires the coal to meet certain specifications such as moisture content, ash content, percentage of volatile matter, heating value (BTU), SO_2 content, grindability and chlorine content. Kinder Morgan is not a party to the contracts and has no responsibility to deliver coal to TVA that meets the contract specifications. No washing, screening, crushing or sizing of coal occurs at the Terminal.

Rail-to-Stockpile-to-Barge

When arriving TVA coal is processed in this manner, it is unloaded from bottom-dump rail cars into a 100 ton hopper at GRT-1. The coal is then fed onto two inclined belts which carry the

coal either to: (a) surface stockpiles (approximately 60% of the coal), or (b) a conveyor belt system that connects GRT-1 and GRT-4. The coal in the surface stockpiles is later moved by dozers and trucks into hoppers which deposit it onto the conveyor belt system to be conveyed to GRT-4. There are up to 18 working stockpiles of TVA coal. Approximately 95% of the coal received by rail is unloaded by Kinder Morgan at GRT-1, the rest being directly loaded into barges at GRT-2.

TVA designates which coal from which supplier will be placed into which working stockpile. While Kinder Morgan personnel work with TVA to monitor the quantity of coal moving into and out of each working stockpile, they may not know the specific qualities of the coal, identifying the source of each stockpile only by supplier and railcar.

When the coal arrives at GRT-4 on the conveyor belt system, it is dumped by chute to a 150 foot inclined belt on a radial stacker. The stacker segregates the coal into separate stockpiles. Since the stacker cannot create all of the required number of stockpiles, some coal is pushed into stockpiles by dozers and some coal is loaded into haulage trucks and dumped into stockpiles.

When the coal is to be loaded into a barge, it is pushed into one of four feeders for the 605 foot draw-off tunnel in the underground coal "layer loading" facility. The feeders are computer controlled to facilitate precise "layer loading" from different surface stockpiles. Each feeder transfers coal at a predetermined rate onto the main tunnel belt. For example, the first feeder may put four inches of coal on the belt, the second six, the third none and the fourth eight, resulting in three layers 18 inches thick. TVA tells Kinder Morgan the individual working stockpiles from which coal is to be removed, and the amount that is to be removed, for the purposes of "layer loading" in the draw-off tunnel and ultimate loading into barges.

After leaving the draw-off tunnel, the coal is transferred onto a portable, rail-mounted belt conveyor. Samples of each coal load are taken at this point by TVA's independent laboratory, which collects, bags and removes the samples on a daily basis and sends them by courier to TVA facilities in Chattanooga for analysis. The conveyor then loads the layered coal into barges for final shipment as fuel to TVA.

Barge-to-Stockpile-to-Barge

Approximately five percent of the coal processed at the Terminal arrives by barge at GRT-4. The coal is unloaded by a crane, which places it in a feeder for a 735-foot inclined belt on a stacker. The coal is then stockpiled, as directed by TVA, until it is "layer loaded" in an identical manner to the coal arriving at GRT-4 from GRT-1 on the conveyor belt system.

Rail-to-Barge

About 20% of the coal arriving at the Terminal by rail is unloaded from bottom-dump rail cars at GRT-2 into a surge bin and then directly loaded onto TVA barges. There is no on-the-ground storage or "layer loading" of coal at GRT-2. Coal is sometimes temporarily stored on the rail cars until time to load the barges.

Non-TVA Coal

Non-TVA coal accounts for less than five percent of the coal received at the Terminal. A portion of the five percent is petroleum coke (petcoke). The non-TVA coal and petcoke is unloaded, stored and loaded at the Terminal by Kinder Morgan in the same manner as is the TVA coal. Alabama Power and West Kentucky Energy have historically delivered and received the non-TVA coal unloaded, stored and loaded at the Terminal by Kinder Morgan.

Conclusions of Law

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), defines "coal or other mine" as:

> (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. . . .

Finally, Section 3(i), 30 U.S.C. § 802(i) defines the "work of preparing coal" as: "[T]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine."

The Secretary contends that Kinder Morgan's Grand Rivers Terminal *mixes, stores* and *loads* coal, which are all included in the Act's definition of the "work of preparing coal" and, therefore, the terminal is a mine subject to the Mine Act. On the other hand, Kinder Morgan maintains that it does not prepare coal *as is usually done by the operator of a coal mine* and,

consequently, it is not a mine operator within the meaning of the Act. A review of the case law indicates that the Secretary is correct.

In one of the earliest cases determining jurisdiction under the Mine Act, the Third Circuit Court of Appeals pointed out that Congress intended that "'what is considered to be a mine and to be regulated under this Act' was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act. *See* S.Rep. No.181, 95th Cong., 1st Sess. 1, 14, *reprinted in* [1977] U.S. Code Cong. & Admin. News, pp. 3401, 3414." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979). The court went on to say that "the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator." *Id.*

With this in mind, the Commission, in a case with facts very similar to the ones here, subsequently determined that not all facilities dealing with coal are "mines" subject to the Act. *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (January 1982). Elam owned and operated a commercial dock on the Ohio river which loaded, among other things, coal onto barges. Coal brokers, who were not mine operators, arranged for coal to be delivered by truck to the dock and then to be loaded onto barges for delivery to their customers. Elam was paid to load the coal onto the barges. The coal was delivered to and stockpiled on the property. It was then weighed by the brokers' employees and loaded into a hopper. If a piece of coal was too big for the hopper, Elam's employees would break it so that it could pass through. From the hopper the coal was carried on a conveyor to a crusher where it was broken into one size to increase the ease of loading and to allow more coal to be placed on the barges. From the crusher, another conveyor carried the coal to the barge.

Based on these facts, the Commission held that:

> [A]s used in section 3(h) and as defined in section 3(i), "work of preparing coal" connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom coal preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications. In the present case, although Elam performs several of the functions included in the 1977 Act's definition of coal preparation (*i.e.*, storing, breaking, crushing, and loading), it does so solely to facilitate its loading business and not to meet customers' specifications nor to render the coal fit for any particular use. We therefore conclude that Elam's facility is not a "mine" subject to the coverage of the 1977 Mine Act.

Id. at 8 (footnote omitted).

While there are not any other cases with facts as close to the ones in this case as *Elam*, the interpretation of the meaning of "the work of preparing coal" continued to evolve. Most of the cases concern coal burning utility plants. In *Pennsylvania Electric Co. v. FMSHRC*, 969 F.2d 1501, 1503 (3rd Cir. 1992) (*Penelec*), the court held, after setting out the language in sections 3(h)(1) and 3(i), that: "Under the functional analysis we are to employ when giving the 'broadest possible' scope to mine Act coverage . . . the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation 'usually done by the operator of a coal mine.'" Later, in a concurring opinion, Commissioner Doyle stated that in referring to a "functional analysis," the *Penelec* court had "concluded that each of the activities listed in section 3(i) . . . as part of the 'work of preparing the coal,' wherever and by whomever performed and irrespective of the nature of the operation, subjects anyone performing that activity to the jurisdiction of the Mine Act." *Air Products & Chemicals, Inc.*, 15 FMSHRC 2428, 2435 (December 1993).

Although not specifically saying so, this seemed to be the same reasoning of the Fourth Circuit Court of Appeals when it stated:

> We think it irrelevant that United Energy is transporting and delivering the coal to the power plant it operates, rather than to another consumer of coal. The statute sets forth a functional analysis, not one turning on the identity of the consumer, and United Energy's activities meet the functional test. Although delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act, United Energy's activities occur a step earlier in the overall process. They involve the transportation of coal to the preparation facility and thus are part of the "work of preparing coal."

United Energy Services v. MSHA, 35 F.3d 971, 975 (4th Cir. 1994).

Whether or not the court's interpretation of the Act was as sweeping as Commissioner Doyle's, by 1997 the Commission had unhesitatingly adopted her conclusion that *each* activity listed in section 3(i) subjects the performer of that activity to the jurisdiction of the Act. *RNS Services, Inc.*, 18 FMSHRC 523, 529 (April 1996), *aff'd*, 115 F.3d 182 (3rd Cir. 1997).

If this were the state of the law, the case would be fairly easy to resolve. Whether one concluded that the Commission had effectively overruled *Elam* by the adoption of the functional analysis set forth in *RNS*, or whether *Elam* is still good law, the results would be the same in this case. The Grand Rivers Terminal is a "mine" within the meaning of the Act.

Since the terminal performs three of the functions set out in section 3(i), *storing*, *mixing* and *loading*, it is doubtlessly subject to the Act under the functional analysis. As in *United Energy*, the delivery of the coal in this case is a step earlier than delivery to the consumer after it is processed. And regardless of whether the coal is "layered" to be loaded onto barges at TVA's

directions or at the Terminal's directions, it is clearly the Terminal employees who are doing the "layering." Consequently, this facility is performing the work of preparing coal within the meaning of the Act.

In addition, the facts in this case are distinguishable from those in *Elam*. In *Elam*, the Commission found that the section 3(i) activities performed by the company were done solely to make easier the loading of the coal. Here there is no such claim. Indeed, it would appear that the "layer loading" would make the loading process more difficult. Furthermore, the Commission held that Elam's activities were not performed to meet customer's specifications or to render the coal fit for any particular use. Here, the "layer loading" is obviously being undertaken to meet TVA's specifications and to render the coal fit for TVA's particular use. Thus, unlike Elam, Kinder Morgan is preparing coal as usually performed by a mine operator or custom preparation facility.

What seemed clear, however, has been confused by a recent decision of the Eighth Circuit Court of Appeals. In that case, relied upon by the Contestant, the court held that an electric utility plant that purchased crushed coal from two mines, then removed debris from, and further crushed, it at its facility, so that it could be burned in its generator units, was not a mine under the Act. *Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078 (8th Cir. 1999). While the court covered most of the Commission and court decisions discussed above, it did not mention "functional analysis." Instead, it concluded that the Act "was designed primarily to protect miners, not employees of coal purchasers such as electric utilities and steel mills." *Id.* at 1082. It apparently based this conclusion on the dissenting judge's opinion in *Penelec*. *Id.* Finally, it held that "after a mine delivers processed, marketable coal to a utility any further operations to prepare the coal for combustion are not subject to MSHA jurisdiction." *Id.* at 1083.

It is possible that this decision is the law only in the Eighth Circuit as there do not appear to be any subsequent decisions following it. In fact, the Fifth Circuit has already stated that: "We do not entirely agree with the majority opinion of the Eighth Circuit in *Herman . . . .*" *In re: Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000). Nevertheless, even if the holding is applicable in this matter, the facts in this case are distinguishable. No matter how the facts are arranged, it remains indisputable that the coal in this case is delivered to Kinder Morgan, not to TVA, the utility, and that the further operations, "layer loading," to prepare the coal for combustion are performed by the Kinder Morgan, not TVA.

Accordingly, I conclude that Kinder Morgan does perform the "work of preparing coal" as is "usually done by the operator" of a coal mine. As such it is a "mine" within the meaning of the Act and subject to the Act's jurisdiction.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of $187.00 for the three violations in this case. However, it is the judge's independent responsibility to determine the appropriate amount of

penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the criteria, the parties have stipulated that Kinder Morgan demonstrated good faith in attempting to achieve rapid compliance after notification of the violations, that the penalty will not affect Kinder Morgan's ability to continue in business and that Kinder Morgan is a large-size operator. As might be expected, the Assessed Violation History Report indicates that these are the first violations charged to the company. I find that the company's negligence in all three instances was "moderate." Finally, I find in connection with Citation No. 7641076 that the gravity of the violation was not serious, but that with respect to Citation Nos. 7641077 and 7641078 the violations were fairly serious.

Taking all of this into consideration, I conclude that the proposed penalties of $55.00 for Citation No. 7641076 and $66.00, each, for Citation Nos. 7641077 and 7641078 are appropriate.

Order

Citation Nos. 7641076, 7641077 and 7641078 are **AFFIRMED** and Kinder Morgan Operating L.P. "C" is **ORDERED TO PAY** a civil penalty of **$187.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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