

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 8, 2003

RS&W COAL CO.	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2003-171-R
	:	Citation No. 3561084; 8/18/03
v.	:	
	:	Docket No. PENN 2003-172-R
SECRETARY OF LABOR	:	Citation No. 3561085; 8/18/03
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	R S & W Drift
Respondent	:	Mine ID 36-01818

DECISION

Appearances: Randy Rothermel, President, R S & W Coal Company, Klingerstown, Pennsylvania, for the Contestant.
John Strawn, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

At issue in the above captioned Notices of Contest, consolidated for hearing on an expedited basis, are: 1) the validity of two citations issued to R S & W Coal Company alleging failure to abate two previously issued safeguards, and 2) the validity of the two underlying safeguards. A hearing was held in Harrisburg, Pennsylvania. Subsequent to the hearing the parties each filed a brief.

Findings of Fact

R S & W has been operating an anthracite coal mine at the subject site since 1984. In connection with its operation, men and coal, respectively, are transported from the surface into the underground mine by five cars, hooked up in tandem to a battery powered locomotive,¹ which in turn pushes the cars into the mine. The coal and miners are transported out of the mine in these cars which are pulled out of the mine by the locomotive. Subsequent to the commencement of operations through the date of the hearing, August 27, 2003, this method of transportation has not resulted in any accidents or injuries.

The locomotive which travels at a speed of four miles an hour when pushing or pulling a

¹The transport of the cars in tandem along with the locomotive, is called a trip.

trip, is operated by a miner who is positioned about ten feet from the leading edge of the locomotive, and approximately 60 feet from the leading edge of the first car of the trip. The top of the locomotive is approximately 48 inches above the track, and the top of the cars are about 54 inches above the track. The travelway from the surface into the mine does not have any illumination; the sole source of illumination are the cap-lights in the miner's helmets. The locomotive weights approximately 6 tons, and each car weights three to four tons.

In traveling inby, the trip travels up a six tenths of a percent grade, and must negotiate two turns including one of approximately 90 degrees. Due to the length of the trip, the operator of the trip can not see the first car after it enters the 90 degree turn. When traveling inby, the locomotive operator watches the roof and the miners' heads to alert them to low roof², and other hazardous conditions in the roof. In traveling inby, a miner is stationed in the lead car to watch for debris and other hazardous conditions on the track, and to warn the locomotive of the same. Should this miner observe a hazardous condition, the practice is for him to turn his head backward in the direction of the locomotive operator, and to issue a verbal warning.

On July 16, 2003, MSHA Inspector Michael J. Dudash, while inspecting the subject site, issued a Notice to Provide a Safeguard (No. 7005339) which refers to 30 C.F.R. § 1403-7(c)³, and which contains the following language:

THE MINE'S GREENBERG SCOUT LOCOMOTIVE (SER. NO. S433) WAS PUSHING 5 MINE CARS TRANSPORTING 7 MINERS FROM THE SURFACE TO THE ACTIVE WORKING SECTION OF THE HOLMES VEIN EAST SIDE (MMU- OO10). THE CARS WERE PUSHED A DISTANCE OF ABOUT 6000 FEET FROM THE SURFACE PORTAL TO THE SECTION'S WORKING PLACE. THE MINERS WERE RIDING IN VARIOUS CARS. EACH CAR HAS A 3 TON CAPACITY AND EACH IS 10 FEET LONG BY 3.5 FEET HIGH BY 4 FEET IN HEIGHT. THIS IS A NOTICE TO PROVIDE A SAFEGUARD FOR ALL OF THIS MINE'S MAN TRIPS TO BE PROVIDED WITH LOCOMOTIVES PULLING THE MAN CARS INTO AND OUT OF THE MINE.

On the same date, Dudash issued another Notice to Provide a Safeguard containing the same language as No. 7005339, supra, except that it refers to "all of the mine's trips" and cites 30 C.F.R. Section 75.03-10(b)⁴.

²In places, the roof is two to three inches above the locomotive operator, who is six feet, two inches tall.

³30 C.F.R. § 1403 authorizes the Secretary to provide "other safeguards" to minimize hazards relating to the transportation of men and materials. Section 1403-7, supra, provides the following criteria for mantrips" ...(c) [m]antrips should not be pushed."

⁴Section 75.1403-10 sets forth criteria for "haulage", and in subsection b provides that "[c]ars on main haulage roads should not be pushed,"

On August 18, 2003, Dudash returned to the subject site, and noted that RS&W had failed to abate the two safeguards at issue . Dudash issued, respectively, two citations for failure to abate the safeguards, citing, respectively, Section 75.1403-7(c) supra, and Section 75.1403-10(b), supra. According to Dudash, after he observed the company's manner of transporting men and materials into the mine, he concluded that pushing a trip into the mine presented a derailment hazard, and that pushing, according to the criteria set forth in Section 1403, supra, is a hazard due to the lack of control. He indicated that on July 16 a hazard existed in the company's mine since pushing "is inherently less controlled as to visibility than pulling" (sic) (Tr. 57). On cross-examination he indicated that the safeguard was issued "based on the pushing of the locomotives - of the mine cars and mantrip "(sic) (Tr. 85). He also opined, based on the criteria in Section 1403, supra, that just pushing the cars was a hazard because of less control. Dudash indicated that because of less control by the operator, and less visibility in pushing the cars, there was a high potential for derailment. Dudash explained that when the locomotive pushes the trip, the operator would have less visibility than when pulling the trip because of the distance from the operator to the end of the trip. Dudash noted that when the locomotive pushes the trip, the operator is located 60 feet from the leading edge of the first car of the trip, whereas, in pulling the trip, the operator is located only approximately 10 feet from the leading edge of the locomotive. Dudash pointed out that the two sharp turns of the track limit the ability of the operator to see past the lead car of the trip until the trip straightens out. Thus, when traveling inby the operator's ability to see debris on the track would be limited, contributing to the possibility of derailment. Further, contributing to this possibility is the presence of water on the track, which would diminish the stopping ability of the locomotive. In addition, although dispersal of sand increases braking power, it is not done efficiently as the method of dispersal is not automatic. Lastly, Dudash opined that when the trip is being pushed if the lead car of the trip derails, the rest of the cars might jack-knife into the rib.

Dudash indicated that the miners being transported in the cars could be thrown out of the open cars in a derailment, and possibly suffer a fracture or a head injury. Also, should a derailment occur, due to the weight and size of the cars, it is possible that timber supporting the roof could be dislodged thus causing a roof fall which could cause a fatality.

Dudash indicated that the best way for RS&W to comply with the safeguards is to use a second locomotive which would be attached to pull the trip out of the mine. He opined that, as an alternative, RS&W could install another set of tracks and two switches which would allow the locomotive to be uncoupled after it pulls the trip into the face area, and be re-routed to the other track. It then could travel outby, then return inby to the trip to pull it out of the mine. However, he indicated that the only area of the mine that would allow sufficient room for the placement of these switches was located about 1000 feet outby the face.

Ronald Medina, a professional engineer, indicated that, generally, the following factors, which are involved in pushing a trip, contribute to the likelihood of derailment: 1) since the first car is empty when the trip is pushed into the mine, it is thus lighter than the locomotive and therefore is more likely to be derailed due to rocks on the track, 2)that when a trip is being pushed, a sideways force is exerted that could cause a car to derail, 3) that because the visibility

of the operator of the locomotive is more limited when pushing rather than pulling, a derailment is more likely to occur when the cars are being pushed rather than pulled, and 4) that when the locomotive pulls the cars its headlight illuminates the tracks, whereas, when the trip is being pushed the only illumination is from the caplight of the miners positioned in the lead car. Also, he opined that when the trip is pushed, its forward momentum would tend to push the cars against the ribs, thus causing a greater likelihood of injury as opposed to the likelihood of injury should the cars be pushed and then derail. Further, according to Medina, when cars are pushed they tend to jack-knife in a derailment, increasing the likelihood of a serious injury.

DISCUSSION

Validity of the underlying safeguards

Section 314(b) of the Federal Mine Safety and Health Act of 1977 (the Act), authorizes the Secretary of labor to issue safeguards "... to minimize hazards with respect to transportation of men and materials"

In general, the Commission has concluded that, regarding safeguards, "... it is within the Secretary's sound exercise of discretion to issue mandatory standards or to issue safeguards for commonly encountered transportation hazards." Southern Ohio Coal Co., 14 FMSHRC, 1, 9 (Jan 1992). The Secretary bears the burden of establishing the validity of the underlying safeguard (Southern Ohio at 13). The Commission in Southern Ohio at 14, elaborated as follows: "The Secretary is required to demonstrate only that the inspector evaluated specific conditions at the particular mine and determined that a safeguard was warranted in order to address a transportation hazard. In rebuttal, the operator would be free to offer evidence that the safeguard was not based on conditions present at its mine, or that the safeguard was routinely applied without consideration of conditions at its mine."

Applying the principles set forth above, the issue presented herein is whether the issuance of the safeguards in question, regarding the pushing of a trip, was a sound exercise of discretion. In other words, considering the evidence adduced by the Secretary regarding the inspector's evaluation of the conditions at the mine as well as evidence adduced by RS&W regarding conditions at its mine, the issue is whether considering the Secretary has met its burden in establishing that the specific conditions at the mine warranted the issuance of the safeguards. I conclude, for the reasons forth below, that considering all the conditions at the mine, the issuance of the safeguards was not warranted, and was not an exercise of sound discretion by the Secretary.

The inspector noted the specific conditions at the mine which he found to be hazardous when a locomotive pushes a trip of five cars⁵, either loaded with men, or coal and other materials. In his opinion, when the locomotive pushes a trip the following conditions limit the ability of the

⁵The inspector indicated, in essence, that these conditions are existent even when the locomotive pushes only one car.

operator to see hazardous track conditions, and contribute to the hazard of a derailment which could cause serious injuries: the fact that the operator has to see over the tops of the cars which are higher than the top of the locomotive; the distance between the position of the locomotive operator and the leading edge of the lead car; and the fact that track is not straight and has two sharp curves, including one at a 90 degree angle, which deprives the operator of the locomotive from seeing the lead car and the tracks beyond the car in such bends.

However, I note the uncontradicted evidence proffered by RS&W that the locomotive, and hence the trip, travel at only four miles an hour; that in normal operations, a miner is positioned at the front of the lead car in a trip to watch out for hazards on the track and to alert the operator of such hazards by turning his head and shouting back to the operator; that the operator would immediately be alerted to such hazards due to the extremely low speed of the trip, and because in the dark conditions of the underground mine the operator would immediately notice movement in the miner's caplight when the latter would turn to alert him of a hazardous condition; that when the locomotive pushes the cars, in contrast to pulling them, the locomotive operator observes the miners' heads and the roof to warn miners of hazardous conditions in the extremely low roof, which the operator can not do when the trip is being pulled; and, most significantly, that trips have been pushed into the subject mine on a daily basis since 1984, and there have not been any accidents or injuries caused by or related to this manner of operation.

Thus, taking into account all the conditions at the subject mine, I find that the issuance of the two safeguards herein was not a sound exercise of the Secretary's discretion. The Secretary has failed to establish that the safeguards were warranted based on a proper evaluation of all conditions at the mine. Hence, the safeguards herein were not validly issued. Thus, the citations at issue citing, in essence, failure to abate these safeguards, were not validly issued and therefore shall be dismissed.

ORDER

It is **ORDERED** that the Notices of Contest herein are sustained, and that Citation Nos. 3561083 and 3561084 be **vacated**.

Avram Weisberger
Administrative Law Judge

Distribution:

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