

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 24, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 96-77
Petitioner : A. C. No. 46-02249-03602
v. :
: No. 7 Surface Mine
HOBET MINING, INC., :
Respondent :

DECISION

Appearances: James F. Bowman, Conference and Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, Mount Hope, West Virginia, for the Secretary;
David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

In this case, the Secretary of Labor seeks the assessment of a civil penalty against the respondent for an alleged violation of 30 C.F.R. ' 77.404(a).¹ Pursuant to notice, the case was heard in Beckley, West Virginia, and the parties have filed post hearing briefs which I have considered in the course of my adjudication of this matter.

The issues presented in this case are:

1. Whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard,

¹/ The standard cited, 30 C.F.R. ' 77.404(a), provides as follows: A(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.@

2. whether the alleged violation was A significant and substantial@ (AS&S@) and

3. in the case a violation is found, what is the appropriate civil penalty to be assessed.

STIPULATIONS

The parties stipulated to the following (Joint Exhibit No. 1):

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.

2. Hobet Mining Incorporated is the owner and operator of the No. 07 Surface Mine.

3. Operations of the No. 07 Surface Mine are subject to the jurisdiction of the Act.

4. Hobet Mining Incorporated may be considered a large mine operator for purposes of 30 U.S.C. ' 820(i).

5. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. ' 820(a) will not affect the ability of Hobet Mining Incorporated to remain in business.

6. The inspector was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 4640244.

7. A true copy of the citation listed in paragraph 6 was served on Hobet Mining Incorporated or its agent as required by the Act.

8. The citation listed in paragraph 6 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

9. MSHA's Proposed Assessment Data Sheet accurately sets forth (a) the number of assessed penalty violations charged to the Hobet Mining Incorporated 07 Surface Mine for the period from January 1993 through July 1996 and (b) the number of inspection days per month for the period from January 1993 through January 1996.

10. MSHA's Assessed Violations History Report, R-17 report, may be used in determining appropriate civil penalty assessments for the alleged violation.

11. The platform and handrail described in the citation were not mounted on the Caterpillar D-10 equipment.

FINDINGS, CONCLUSIONS, AND DISCUSSION

On November 28, 1995, MSHA Inspector Tyrone L. Stepp issued section 104(a) Citation No. 4640244 to Hobet Mining, Inc. (Hobet) alleging that:

The Caterpillar D 10 N (Co. No. 115959) existed with the platform & handrail missing from the left side - (mounted near the radiator).

Hobet acknowledges that the platform and handrail described in the citation were not, in fact, mounted on the subject Caterpillar D-10 equipment at the time the inspector saw it. (Joint Stipulation No. 11). They had apparently been knocked off the bulldozer at some undetermined time during the course of mining close to the highwall. There is also no dispute that the platform and handrail needed to be replaced and would have been replaced at some point, with or without the citation.

The real question in this case is what effect that has on safely operating the bulldozer in the meantime. The company's position is that the missing parts did not present a hazard per se, but rather only to those maintenance personnel who needed to stand on the platform to service the radiator. Therefore, unless and until radiator maintenance was required, the bulldozer could remain in service. At the point in time that such access to the radiator was needed, the bulldozer would then have to be taken out of service until the platform was replaced and the radiator service completed.

I do not believe there is any question that there were several safe means of getting on and off the bulldozer without the missing platform and handrails described in the subject citation. Most obviously, operating personnel could simply get on or off the equipment from the other side, the right side, for instance. Once safely aboard the bulldozer, the operator, of course, would have no use for the missing pieces and could continue to safely run the equipment. Whenever he wanted to shut down operation and get down from the bulldozer, he could depart the same way he got aboard, e.g., down the right side.

The platform and associated handrail are only required when it becomes necessary to check the radiator coolant level or otherwise examine and service the radiator. There is some dispute in the record as to when and how often this need arises.

It is variously described as being as long as every 10 to 11 days or as short a time period as every other day. Whichever time period is in fact closer to the truth is not important to the primary issue in this case as I view it.

I find as a fact that the missing platform and handrail assembly from the left side of the D-10 bulldozer is primarily utilized to provide maintenance personnel with a secure place to stand while servicing the radiator. Other provisions have been made on the left and right sides of the equipment to assist in safely mounting and dismounting the dozer.

Therefore, I conclude that so long as no radiator maintenance is being attempted on the bulldozer without the required secure platform and handrail, the bulldozer is not necessarily in an unsafe operating condition simply because these parts have been knocked off the dozer and not yet replaced. For its normal intended use, i.e., **Abulldozing@**, its **Aoperating condition@** is unaffected by their absence. Mere proof of an equipment defect does not establish a violation of 30 C.F.R. ' 77.404(a).

Hobet acknowledges that these parts must be replaced before a maintenance worker attempts to access the radiator since no safe alterative means exists to work on the radiator. At that point in time, the bulldozer must be taken out of service so that the missing or damaged assembly can be replaced before the maintainer attempts to access the radiator.

There is no evidence in this record that any such attempt to service the radiator on the affected bulldozer was made with the platform and handrail missing. Conversely, there is evidence in the record that Hobet would discipline any maintainer caught utilizing such an alternative, i.e., attempting to access the radiator without first replacing the platform and associated handrail.

Accordingly, the Secretary has failed to sustain his burden of proof that any unsafe condition actually existed at the time the citation was issued and therefore, he has failed to prove a violation of 30 C.F.R. ' 77.404(a).

ORDER

Citation No. 4640244 **IS VACATED**, and the Petition for Civil Penalty **IS DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

James F. Bowman, Conference and Litigation Representative,
U. S. Department of Labor, Mine Safety and Health Administration,
100 Bluestone Road, Mt. Hope, WV 25880-1000 (Certified Mail)

David J. Hardy, Esq., Jackson & Kelly, P. O. Box 553, Charleston,
WV 25322 (Certified Mail)

dcp