

CCASE:

MSHA V. LONE STAR

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

November 24, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. VA 80-67-M

v.

LONE STAR INDUSTRIES, INC.

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The administrative law judge concluded that Lone Star Industries, Inc., violated 30 CFR §56.9 41, a mandatory safety standard, and assessed a \$6,000 penalty. 1/ The major issue before us is whether the judge erred in his interpretation and application of section 56.9-41, which provides:

Only authorized persons shall be permitted to ride on trains or locomotives and they shall ride in a safe position.

On the narrow grounds indicated below, we affirm the judge's decision. 2/

I.

The essential facts are undisputed. The citation was issued following the investigation of a fatal train accident on August 10, 1979, at Lone Star's Jack Plant, a stone milling facility located near Petersburg, Virginia. The injury was suffered by a brakeman engaged in "dropping" railroad cars.

1/ The judge's decision is reported at 2 FMSHRC 3440 (1980).

2/ Chairman Collyer assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision of the case. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Chairman Collyer's assumption of office, and participation by Chairman Collyer would therefore not affect the outcome and would delay issuance of the decision. Accordingly, in the interest of efficient decision making, Chairman Collyer elects not to participate

in this case.

Former Commissioner Nease participated in considering this case and voted to affirm the judge's decision, but resigned from the Commission before the decision was ready for signature.

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"Car dropping" is the movement of railroad cars down grades for various loading and haulage tasks. At the Jack Plant, railroad hopper cars are loaded by Lone Star employees from bins and then moved down a .6% railroad grade to a storage yard. At the yard, the loaded cars are either parked or coupled with other parked cars prior to being pulled away by a locomotive. To start the cars down the grade, a dump truck or a bulldozer with rubber tires gives the cars a push. A brakeman, or "car dropper," rides on the cars and, by operating a manual brake, is responsible for controlling car speed, stopping the cars, and coupling safely.

The brake and brake platform are located on one end of a car.

The brakeman applies or releases the brake by turning a wheel while standing on the brake platform. No facility exists at the Jack Plant to position the cars so that the brake platform end of each car uniformly faces in one direction. As a result, the brake platform may be on the front of one car and on the rear of the adjacent car. Prior to the accident, Jack Plant brakemen frequently rode in the front of the lead car. Before the cars to be dropped are pushed, the brakeman is supposed to make sure that the coupling device (called the "drawhead") on the lead car is open so that the dropped cars can couple properly with parked cars in the storage yard.

Once the pushing vehicle starts the cars moving, the driver of that vehicle drives along a road that parallels the track and affords an unobstructed view of one side of the tracks. The brakeman observes the tracks in order to adjust the speed of the cars if he notices an obstruction or is notified of one by the driver of the pushing vehicle. When the moving cars reach the storage area, the lead car couples with any parked cars.

On the day of the accident, a broken water pump prevented the loading of cars at the normal bin loading area. Four coupled hopper cars, only two of which had been loaded, were parked in the bin area when the pump broke. All four were pushed back up the track by a bulldozer to a stockpile loading ramp, an alternate loading site. The car against which the bulldozer was pushing was the one that would be the lead car when the cars were dropped to the storage yard. James Mays, the bulldozer operator, testified that the lead car's drawhead was in the open position when he began pushing the four cars to the alternate loading site. 2 FMSHRC at 3441; Tr. 160. Mays also testified that the bulldozer's blade was pushing directly against this drawhead, and his testimony reflects that the initial impact of that

operation may well have closed the drawhead, an occurrence that had happened before "over the years of pushing rail cars." Tr. 161-163. Once the two empty cars in the group of four had been loaded, brakeman James Brown stationed himself on the front brake platform of the lead car in the group to begin the drop. Brown signaled Mays to start pushing the four cars back down the grade. Apparently, neither Brown nor Mays checked to determine whether the front drawhead was open. The four loaded cars weighed about 338 tons. After the initial push, Mays drove the bulldozer alongside and past the four dropping cars to the site where the cars were to be coupled with thirteen parked cars. He observed the fatal accident that followed.

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Just prior to coupling between the dropped and parked cars, Mays noticed that the drawhead on Brown's car, which was to couple with the open drawhead on the rear of the thirteenth parked car, was closed. The closed drawhead bypassed the open drawhead, causing the front car of the moving four cars to collide with the rear of the parked car. The force of the impact was of such magnitude that the thirteen parked cars were driven forward some 13 feet, the four dropped cars rebounded approximately eight feet, the wheels of the lead dropped car derailed, and the brake wheel on the lead car made an imprint on the rear of the parked car. When the front of the lead car hit the parked car, Brown was crushed between the two cars.

Prior to the accident, the Jack Plant had a policy requiring car droppers to wear safety belts while riding cars, but did not have any other written safety rules pertaining to car dropping. The record does not show that the plant had ever established a policy regarding a safe speed for car dropping. 3/ After Brown's death and the resultant citation, the Jack Plant adopted written car dropping safety rules prohibiting front end riding, riding while only one car is being dropped, and the dropping of more than three loaded cars at any time. 2 FMSHRC at 3445, 3446; Res. Exh. 1.

The judge concluded that the front brake platform of the lead dropped car was an unsafe position for the brakeman to have occupied under the circumstances and, therefore, his riding in that position violated section 36.9-41. 2 FMSHRC at 3447-52. The judge found that if a possibility of front end collision exists during car dropping, riding the front brake platform may present the potentially fatal hazard of being crushed between the colliding cars. *Id.* at 3445, 3450. In determining that Brown rode in an unsafe position while car dropping, the judge focused on three factors.

First, the judge found that there was a history at the Jack Plant of miscoupling collisions caused by closed drawheads. 2 FMSHRC at 3443, 3449-50. He observed that cars being dropped at the plant "don't always couple" with parked cars and "car droppers had been

careless about making certain that the drawheads were open at the time the cars were started on their journey to the loaded car storage area." Id. at 3450. Second, the judge noted that, although dropping cars had the right of way, Lone Star itself "emphasized the fact that trucks make 1,200 trips per day across the railroad tracks used for dropping cars. Id. The judge reasoned:

3/ The Jack Plant's sole rule regarding ar dropping--requiring the wearing of safety belts--was one of 42 basic safety rules in effect in Lone Star's Chesapeake Division. In contrast, at the time of Brown's death, Lone Star's separate South Atlantic Division, which did not include the Jack Plant, had several written rules addressing safe position and manner of operation during car dropping. One such rule provided, "[u]nless absolutely necessary, never ride leading car down grade end[;] [r]ide between the cars or the trailing end." Another provided that "[a]ny time three or more cars are dropped down the track there should be two people braking the cars." 2 FMSHRC at 3444; Sec'y Exh. 4.

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If [a vehicle] does get on the tracks and the car dropper should be unsuccessful in stopping the cars being dropped at a time when [he] is riding on the front car, [he] runs the risk of being crushed against [the] vehicle which may stop on the tracks.

Id. Third, the judge found that groups of loaded cars being dropped are extremely heavy and difficult to stop, thus increasing the risk of collision:

The empty weight of each [hopper] car is 70 tons and its loaded weight is about 84-1/2 tons. ... After [groups of loaded] cars ... start their journey, they can be stopped or slowed down only by application of a single manual brake on one of the ... cars. ... The operator of the Jack Plant has been dropping cars for 20 years and knows how much they weigh and how hard they are to slow down or stop even when they are moving at a low rate of speed.

Id. at 3449.

The judge concluded that the uncontroverted facts of the accident illustrated the dangerous interplay of these risks. He found that because Brown was dropping four loaded cars "with 338 tons of weight riding behind him," he would clearly find it difficult to stop or slow down the cars and risked a heavy impact crash if a collision danger arose from any source. 2 FMSHRC at 3449. In the judge's view, a foreseeable collision risk was present: not untypically, the lead drawhead was closed; the dropped cars attained significant momentum; upon contact with the parked cars, the closed drawhead caused

miscoupling; and the combined weights of the thirteen parked cars and 4 moving cars generated a huge force of impact which exposed the front-riding Brown to the hazard of crushing. Id. at 3441-43, 3449-50.

II.

This case presents two major liability issues: first, what is the proper interpretation of section 56.9-41, and second, applying this construction to the facts, did a violation occur? At the outset, we emphasize the following bounds to our decision.

We reject the broad language--essentially in the form of dicta--in the judge's decision suggesting that front end riding while car dropping is per se unsafe. Such a sweeping proscription is not supported by the limited record in this case and necessarily involves safety and industrial ramifications best addressed in the formal rulemaking context.

Further, we agree with Lone Star that the test of whether this standard was violated cannot be made to turn on whether a fatal car dropping accident occurred. While an accident may sometimes shed light on an unsafe practice, it does not, by its mere occurrence alone, prove a violation of any given standard. Plainly, the reasons for an accident may have nothing to do with the substance of the standard allegedly violated. Therefore, our analysis largely ignores Brown's death; our

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inquiry is only whether he was riding in an unsafe position when he started his August 10 car dropping journey. We turn to the meaning of section 56.9-41.

The cited standard, section 56.9-41--like the identical regulations applicable to metal and non-metallic mines, 30 CFR §§55.9-41 and 57.9-41--applies to train riding in general, a subject which includes car dropping in particular. Unlike the surface coal regulation that addresses car dropping specifically, 4/ section 56.9-41 focuses on only one aspect of safe train riding: safe position. Section 56.9-41 is the kind of standard made simple and brief in order to be broadly adaptable to myriad circumstances. The relevant variables affecting safe position are numerous, may differ from plant to plant, and may change from day to day in any particular operation. Accordingly, a broad and flexible standard is not misplaced in theory.

We therefore agree with the Secretary and Lone Star that section 56.9-41, as written, requires a "situational" approach to determining safe position. To quote Lone Star:

The mandatory standard, 30 CFR 56.9 41, does not, by its terms, prohibit or mandate riding a given rail car in a particular position, or on any particular rail car of a group of rail cars. Rather, in order to comply with the standard,

an operator must determine what position is "safe". We submit, therefore, that the standard contemplates that what may be a safe position will vary depending on the context in which it is applied.

Br. 6. See also Secretary's Br. at 6. This interpretation renders the standard similar to the familiar and well established driving rule that a vehicle must always be operated at a speed safe for the conditions of the road at any given time. Speed and position are different concerns, but in both instances safety is measured in terms of the variable surrounding circumstances.

Although we conclude that section 56.9-41, as written, lends itself to reasonable construction and application under the circumstances of this case, we also conclude that the Secretary can and should provide more specific guidance than he has on the subject of safe car dropping. We urge the Secretary at least to publish in the Federal Register interpretive guidelines identifying and discussing variables relevant to safe position during car dropping and the common dangers to be avoided during dropping. Moreover, as section 77.1607(v) shows (n. 4 below), safe

4/ 30 CFR §§77.1607(v)-(aa) apply to car dropping. Section 77.1607(v) is most relevant to the present case and provides:

Railroad cars shall be kept under control at all times by the car dropper. Cars shall be dropped at a safe rate and in a manner that will insure that the car dropper maintains a safe position while working and traveling around the cars.

This regulation identifies four aspects of safe car dropping: keeping the cars under control; dropping at a safe rate of speed; dropping in a safe manner; and maintaining safe position.

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position is not the only safety concern during car dropping. Keeping the cars under control and dropping at a safe rate of speed, to name two obvious factors, are equally important. We therefore also urge the Secretary either to rewrite the "9-41 series" or adopt supplemental regulations in order to identify the other major aspects of safe car dropping in addition to safe position.

Turning to the specific issues in this case, our interpretation distills the liability problem into a question of whether, under the circumstances present at the Jack Plant on August 10, was the lead front brake platform an unsafe position for Brown to have occupied? 5/ III.

We first consider whether it can ever be said that the front end brake platform is an unsafe position for car droppers. As we have already suggested, car dropping does not lend itself to per se safety rules: what is safe at one time or place may be unsafe at another.

However, we affirm the judge insofar as he held that front end riding may be unsafe. The common sense of this view is obvious: given the enormous weights of loaded railroad cars, a serious collision is likely to be fatal to a dropper riding in the exposed front position. Moreover, Lone Star has presented no argument inconsistent with this approach. This principle, however, has reasonable limits. For example, where the collision danger is remote, such riding may be safe. In short, under this approach, the safety of front end riding appropriately depends on the relevant variables.

The essence of the judge's decision is a determination that on August 10 the front brake platform was an unsafe position for Brown because of the unique configuration of human and technological variables affecting safe riding position at the Jack Plant. The judge expressly focused on three conditions affecting safe position, and his decision implies a fourth.

First, he found that at the Jack Plant there was a history of carelessness in keeping drawheads open during dropping, and that as a result miscouplings and "bouncing back" collisions were fairly common occurrences. The facts of this case appear to illustrate this carelessness. As noted above, the lead drawhead may well have been closed by the pushing vehicle during the initial push back up the track to the alternate loading site, a not uncommon occurrence when a drawhead was directly pushed. Despite that possibility, it appears that prior to the drop, no one checked to see whether, in fact, the drawhead had been closed during the initial push. Lone Star does not deny this history of carelessness and, indeed, concedes that the "vagaries of employee conduct" may be taken into account in determining whether riding in a given position is safe. Br. 11. We agree with Lone Star that human performance factors are as relevant to safety analysis as technological ones. On this point, we believe the judge was correct insofar as he found that this "human factor" created at least some risk of front end collision through miscoupling.

5/ There is no dispute in this case that Brown was an "authorized person" within the meaning of section 56.9-41 (2 FMSHRC at 3447) and that normal brake platforms are safe positions in general.

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Second, the judge found that there were many vehicular crossings of the dropping tracks--as many as 1,200 per day. Lone Star did not deny this fact, but rather emphasized it before the judge (2 FMSHRC at 3450) in support of its argument, analyzed below, that front end riding is safer because it affords the best view of the tracks ahead of the cars. We also agree with the judge that this heavy traffic created another risk of front end collision. The presence of this risk is borne out by the uncontradicted testimony of Mays (who frequently was a dropper) that cars being dropped had "occasionally

... come in contact with vehicles crossing the tracks." Tr. 168. Third, the judge found that the railroad cars were heavy and difficult to stop, and that Brown was riding with a huge load behind him--676,000 pounds of moving weight. We do not interpret this finding as meaning that Lone Star's cars were extraordinarily difficult to stop, and, indeed, there is no evidence to that effect in the record. We think the judge's decision merely means that given the factor of reaction time and the physical laws of momentum and inertia, some time and distance must be expended before these massive weights can be brought to a halt. We do not believe that this factor alone can support the judge's conclusion. Rather, we view it as a subsidiary consideration adding to the risk largely created by the other factors.

Fourth, implied in the judge's findings is the additional consideration that, so far as the record discloses, Lone Star had no formal or written policy regarding safe speed for dropping. Considering all of the above factors together, we think that the judge's conclusion that section 56.9-41 was violated is reasonable and consistent with the evidence. While dropping a heavy group of cars, Brown faced a risk of high impact collision either from a miscoupling accident or an unsafe vehicular crossing. In this view of the case, Lone Star's 20 year history of apparently fatality free front end riding was fortunate. The risks had been there for some time, and on August 10, luck ran out because a number of the worst hazards coincided. Further, we agree with the judge (2 FMSHRC at 3450, 3452) that these risks were not obscure or unique to Brown's drop. As we have already noted, there had already been miscoupling and vehicular crossing collisions. Hence, this is not a case where, from all that appeared, front end riding was relatively safe and was judged unsafe after the fact merely because something unexpectedly went wrong on one drop. In short, we conclude that safe position depends on the circumstances and that the circumstances present in this case at the Jack Plant rendered front end riding unsafe.

Lone Star's several objections to the judge's finding of liability lack sufficient weight to require reversal. Lone Star argues that the judge improperly ignored uncontroverted evidence of the following variables affecting safe riding position at the Jack Plant: the grade of the tracks was virtually level; the tracks were straight and in good condition; the brakemen were experienced; the brakes were of good quality; the twenty year history of car dropping at the Jack Plant did not indicate a risk of the accident of the type involved in this case; training programs at the Jack Plant were more stringent than federal requirements; and the

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droppers wore safety belts. Lone Star concludes that "these factors

supported the practice of car droppers riding the front of the lead rail car." Br. 8. We agree with Lone Star that these are relevant variables generally affecting safe position and we think that the judge's decision, both expressly and implicitly, recognized their presence at the Jack Plant. However, the crux of the case is the additional presence of the factors discussed above, i.e., coupling problems, extensive vehicular crossings, the time and distance required to stop heavy moving cars, and the absence of a formal policy regarding safe dropping speed.

Before the judge, Lone Star also contended that front end riding affords droppers probably the best view of the tracks ahead of the cars and that, therefore, even if some collision risks are present, they are best avoided by positioning the dropper where he can see them best and take preventive action. 2 FMSHRC at 3450. The judge rejected this argument by pointing to the difficulty of stopping the cars. *Id.* We do not entirely agree either with the judge or with Lone Star.

We agree with Lone Star insofar as it suggests that front end riding may sometimes be safe because of the enhanced view it affords, and our decision so recognizes. Nevertheless, if due to other variables, there is an unusual risk of front end collision and some compensating means of providing safe viewing, it is only prudent to avoid the risk by stationing the dropper elsewhere. The fatal flaw in Lone Star's argument is its failure to argue away the risk of front end collision generated by the miscoupling problems and heavy crossing traffic at the Jack Plant. As the judge found (2 FMSHRC at 3446, 3450), a dropper riding in the rear can view one side of the tracks while the pusher vehicle driver views the other. While this procedure is somewhat cumbersome, the judge found that Lone Star's adoption of it after the accident had proved feasible and safe. *Id.* at 3446.

Lone Star does not argue otherwise.

Lone Star also argues that the "real" cause of Brown's accident was his negligence in failing to ensure that the coupling was open and in dropping the cars at an excessive speed. We do not doubt that Brown's actions contributed to the risks present on August 10.

However, there was a history of miscoupling problems and resultant collisions at the Jack Plant, and the record does not show that Lone Star had established any formal policies regarding safe dropping speed. These latter factors were general risks present when Brown started his drop. In our view, his handling of the cars did not suddenly or anomalously create new risks or disclose unsuspected safety variables. Rather, his handling of the cars merely illustrated the existence and consequences of the risks already present. 6/

6/ At the hearing, Lone Star partially relied on an internal legal

memorandum prepared by the Secretary's Solicitor's Office for MSHA (2 FMSHRC at 3445, 3451; Rcs. Exh. A), and attached a copy of the memo to its petition for review. The memo discusses the surface coal regulation on car dropping (30 CFR §77.1607(v)(see n. 4 above)), and includes the opinion that the "flexibility of the standard allows MSHA to exercise judgment in determining what is a 'safe' position for car droppers." Res. Exh. A, p. 1. The memo expresses the view that, depending on particular circumstances, front end riding may be unsafe (id.), and

footnote 6 cont'd

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In sum, we think Lone Star fails to rebut the judge's finding that Brown was riding in an unsafe position given the circumstances at the Jack Plant. Therefore, the judge's liability finding, narrowly construed, is affirmed.

Finally, the judge assessed a \$6,000 penalty largely on the basis of the degree of Lone Star's negligence and the gravity of the violation. 2 FMSHRC at 3453 54. The judge focused on what he regarded as Lone Star's negligent failure to promulgate written safety rules pertaining to safe car dropping. Id. The judge also noted Lone Star's good faith compliance and its "safety-minded" record in other respects. Id at 3453. On review, Lone Star raises only a narrow penalty issue: the propriety of the judge's finding that it was negligent in not having written rules on car dropping. We agree with the judge that Lone Star's failure to control more effectively such underlying variables as safe drawhead opening, coupling procedure, and vehicular crossing of the tracks, is evidence of negligence, although we do not believe such control necessarily had to be effected through written rules. The judge's penalty assessment is based on the evidence and reflects correct consideration of the penalty criteria set forth in section 110 of the Mine Act. The penalty is appropriate under the circumstances of the case and will not be disturbed. See Shamrock Coal Co., 1 FMSHRC 469 (1979). For the foregoing reasons, we affirm the judge's decision.

Richard V. Backley,

Chairman

Frank F. Jestrab,

Commissioner

A. E. Lawson,

Commissioner

fn. 6 cont'd

recommends that if MSHA determines that front end riding is per se unsafe, or wishes to find it unsafe "on the basis of individual circumstances," it should first apprise industry of this viewpoint to

"allow an opportunity for compliance." Id. at 2. The judge concluded that his decision was entirely consistent with the memo's opinion that front end riding may be unsafe, "depending on the circumstances involved in a given situation." 2 FMSHRC at 3451. We do not think that the memo injects any major liability issue into this case on review. Lone Star now chiefly cites it for the proposition that section 56.9-41 requires a situational analysis to determine whether any particular riding position is unsafe--an interpretation with which we agree, as discussed above. We also think that although the Secretary should provide further guidance on safe car dropping in the future, the situational risks at the Jack Plant were highly foreseeable and Lone Star should have prohibited front end riding until they were removed.

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