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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-243-M
A.C. No. 04-00036-05523

v.

Mojave Cement Plant

CALIFORNIA PORTLAND CEMENT
COMPANY,
RESPONDENT

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor,
San Francisco, California,
for Petitioner;
Scott H. Dunham, Esq., O'Melveny & Myers,
Los Angeles, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, California Portland Cement Company, with violating 30 C.F.R. 56.9047, (FOOTNOTE 1) a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held in Los Angeles, California.

The parties filed post-trial briefs.

STIPULATION

At the commencement of the hearing the parties stipulated as follows:

1. The respondent is the owner and operator of the subject mine.

2. The respondent and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in this case.

4. The Federal Mine Safety and Health Administration ("MSHA") inspector who issued the subject citation was an authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject citation was properly served upon respondent.

6. A copy of the subject order or citation and narrative findings for a special assessment at issue are authentic and may be admitted into evidence for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. The imposition of the civil penalty in this case will not affect the respondent's ability to continue in business.

8. The alleged violation was abated in good faith.

9. The respondent's history of prior violations is described in the narrative findings for special assessment.

10. The respondent is a large operator.

11. Ronald Harrison, an employee of the respondent, was seriously injured when a train of seven Southern Pacific Company railroad cars rolled down a track and hit him.

12. The train of seven cars was parked on approximately a 4% grade approximately 164 feet beyond where the employee was welding on the track. The cars had been parked on the track for at least five hours prior to the time the accident occurred.

13. Before beginning work on the track, the employee visually inspected the first car and determined that the air brakes were engaged on that car and tightened the pull chain which provides an additional manual brake on the cars.

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14. The cars of the train were not blocked in any way.

15. The employee began work on his shift at 3:00 p.m. on February 19, 1988. At approximately 8:00 p.m., the brakes which had been holding the cars of the train in place failed to the extent that the cars rolled from their parked spot on the track striking the employee.

16. An engineering analysis of the brakes on the railcars conducted by an independent laboratory following the accident revealed that the brakes on the four westernmost cars of the train were defective. (A copy of a preliminary analysis as well as a final analysis by Vollmer-Gray, Engineering Consultants, is attached hereto as Exhibit A.) The valve connecting the fourth and fifth cars was also frozen in a closed position. Thus, there was no air brake application affected on the easternmost three cars. The movement of the railcars was caused by air leakage from the air brake system of the four westernmost cars. This resulted in a pressure decay which eventually (over a period of approximately 6-1/2 hours) released the brakes on all the railcars.

ISSUES

On the undisputed facts the issues are whether a violation of 30 C.F.R. 56.9047 occurred. If a violation occurred, then what penalty is appropriate.

THE EVIDENCE

EARL WAYNE MCGARRAH, an MSHA inspector, is a person experienced in mining (Tr. 10, 11).

On February 22, 1988, he conducted an accident investigation at respondent's cement plant. During his inspection he learned that a string of seven parked and loaded railcars, had been moved from their parking spot and rolled over a welder's hand. At the time the welder was welding a frog(FOOTNOTE 2) on the track (Tr. 11, 12; Ex. P-1, P-2). Inspector McGarrah also observed the brake shoes on the railcars. On car number 3 there were three missing brake shoes (Tr. 15, 16; Ex. P-3). This condition was obvious and it was not necessary to crawl under the car to take pictures of the condition (Tr. 16).

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The air valve on the fourth car was frozen in a closed position. It could not be opened by hand (Tr. 17; Ex. P-4). A valve in this position prevented the air from setting the brakes on the following three railcars. Since the parked cars were not blocked they rolled. The brakes did not hold them effectively.

A block under a wheel, on the downgrade side, will keep cars from rolling (Tr. 18).

After the accident the cars were blocked with a factory-type block (Tr. 19).

Inspector McGarrah learned the company had set the air brakes and one hand brake(FOOTNOTE 3) before the accident occurred.

REUBEN PAUL VOLLMER testified for respondent. Mr. Vollmer, a professional engineer, specializes in reconstructing accidents and failures involving train accidents (Tr. 27 - 30).

On February 22, 1988, he inspected the railcars involved in this accident (Tr. 32).

He found the brake linings were adequate on all the railcars with the exception of car No. 3 which had broken shoe material. On two of the brakes the shoe material was completely worn away (Tr. 33). The lack of brake lining would not affect a train at rest (Tr. 38, 46).

He also learned that each of the four cars had been charged with air prior to the accident. In addition, the angle valve on the brake pipe between cars 4 and 5 was closed. Due to the closed valve(FOOTNOTE 4) the air brakes would not be functioning on the easternmost three cars (Tr. 33).

Mr. Vollmer did a leakage test on the brakes. The charging system was set at 70 pounds per square inch. The test was made to determine if the brake locks tightened on the wheels of the cars when the brakes were applied (Tr. 34, 35). Mr. Vollmer's test established the brake system was functional and operating on the four cars (Tr. 35).

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Other tests by witness Vollmer included monitoring the air cylinders which operate the linkage to the brake locks of each wheel. It was found that cars 1, 2 and 4 bled down in approximately one and one-half hours. Car No. 3, the one with the least service, held for approximately six and one-half hours before it bled. In other words, the brakes on Car No. 3 were effective for six and one-half hours. If the brakes were set on one car of a seven-car train and there was no air leakage the brakes would effectively hold the train "forever" (Tr. 35, 36).

A test was also conducted by applying leak-detector solution to all the fittings visible on the railcars. This test indicated there were relatively significant leaks on Cars 1, 2 and 4. There was no indication of the air leaks unless a person got close to the fittings. In such a position you could audibly hear the air movement, similar to a sizzling sound (Tr. 36, 37, 42). The air leaks caused the cars to move. However, the cars had been held effectively braked for six and one-half hours (Tr. 44).

DISCUSSION

The regulation 56.9047, simply provides that parked railcars "unless held effectively by brakes" shall be securely blocked. The regulation itself does not further define nor discuss the meaning of "effectively held by brakes." It is accordingly appropriate to consider the ordinary meaning of the words.

Webster's dictionary(FOOTNOTE 5) defines "effective," the adjective, as "producing a decided, decisive or desired effect." Effectively is listed as the adverb for "effective."

This definition, which is its primary meaning of the word, indicates the brakes here did not produce the desired nor decisive effect.

Respondent contends no violation occurred because the brakes held for at least five hours. (In fact, the evidence establishes the brakes held for six and one-half hours.) Respondent argues the Secretary's interpretation is improper because it would render the phrase "unless effectively blocked" meaningless. By phrasing the regulation in the terms it did, the Secretary intended that railcars could be parked without the use of blocks.

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Respondent also argues that if the Secretary desires that railcars always be blocked, she could have explicitly so stated (Brief at 5). In short, respondent argues the Secretary's position emasculates the regulation and eliminates the portion providing "unless held effectively by brakes" (Tr. 9).

I disagree with respondent's contentions. Respondent's construction would rewrite the regulation to read that "railcars, unless held effectively for at least five hours, by brakes, shall be blocked securely." Such a regulation would not promote the safety of miners.

The Commission and the appellate courts have repeatedly stated that if there is a conflict between an interpretation that promotes safety and an interpretation that would serve another purpose as a possible compromise of safety the first should be preferred. *District 6, United Mine Workers of America, v. United States Department of Interior Board of Mine Operations Appeals*, 562 F.2d 1260, 1265 (D.C. Cir. 1977). See also *Pittsburg and Midway Coal Mining Company*, 8 FMSHRC 4, 6 (1986).

Section 56.9047 reasonably addresses the various safety issues that may be present in any factual scenario. Whether parked railcars can be held effectively by brakes would no doubt depend on the number, weight and length of the railcars, the track grade and the condition of the braking systems (air and manual).

I have considered respondent's engineering analysis and the testimony of its expert witness. But I conclude Mr. Vollmer simply confirmed the railcars moved when air leakage caused a pressure decay in the air brake system (Tr. 46, 47). I further note that this air leakage could have been detected. In addition, the frozen closed valve on Car No. 4 was readily observable. The leakage of air and the closed valve reduced and eventually eliminated the braking capacity of the railcars.

For the foregoing reasons the citation herein should be affirmed.

CIVIL PENALTIES

The statutory criteria for assessing a civil penalty is contained in Section 110(i) of the Act, now codified at 30 C.F.R. 820(i)

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Considering these factors I conclude that respondent is a large operator (Stipulation 10).

The imposition of a penalty will not affect respondent's ability to continue in business (Stipulation 7).

A favorable history appears in that respondent has been assessed for 23 violations in the preceding 24 months (Stipulation 9).

Respondent's negligence is moderate. The operator could have detected the leaking air in the brake system or observed the closed valve.

The gravity is high inasmuch as a workman's hand was severed.

Respondent abated the violative condition and is entitled to statutory good faith.

On balance I deem that a civil penalty of \$600 is appropriate.

For the foregoing reasons I enter the following:

ORDER

Citation No. 3287171 is affirmed and a civil penalty of \$600 is assessed.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. The cited regulation reads as follows:

56.9047 Securing parked railcars.

Parked railcars, unless held effectively by brakes, shall be blocked securely.

~FOOTNOTE_TWO

2. A frog is part of the switch that guides the cars onto another track (Tr. 12, 13).

~FOOTNOTE_THREE

3. The end hand brake looks like a wheel on the top of the westernmost car on the downgrade (Tr. 20, 25). The brake works like an emergency brake on an automobile (Tr. 25). It furnishes additional braking power (Tr. 26).

~FOOTNOTE_FOUR

4. This valve appears in Exhibit P-4 (Tr. 34).

~FOOTNOTE_FIVE

5. Webster's New Collegiate Dictionary, 1973, at 359.

