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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. WHEELING-PITTSBURGH STEEL CORPORATION, Respondent, and UNITED STEELWORKERS OF AMERICA, DISTRICT 23, LOCAL UNION NO. 1190, Authorized Employee Representative.	OSHRC Docket No. 89-3389

DECISION

BEFORE: FOULKE, Chairman, WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

On June 27, 1989, at Wheeling-Pittsburgh Steel Corporation's ("WPS" or "the company") Steubenville (Ohio) Works, locomotive 1258 ("1258" or "the locomotive") struck a disabled train while pulling five loaded hopper cars, killing the conductor. Following an investigation, the Occupational Safety and Health Administration ("OSHA") issued a citation alleging that the company had willfully violated section 5(a)(1) of the Occupational Safety

and Heath Act ("the Act"), 29 U.S.C. § 654,[1] when it "knowingly allowed/or required employees to operate locomotive number 1258 with a defective braking system and did not remove it from service until proper inspection, evaluation and adequate repairs were completed . . . ." A $10,000 penalty was proposed by the Secretary. WPS contested the citation, and a hearing was held before a Review Commission Administrative Law Judge, who affirmed the violation as willful and assessed a $10,000 penalty. The company contested the judge's decision and review was granted by the Commission. On March 4, 1993, the Commission heard oral argument in the case from the Secretary of Labor ("the Secretary"), WPS and the Authorized Employee Representative, Local Union No. 1190 of the United Steelworkers of America. For the reasons set forth below, we reverse the judge and vacate the citation.

Facts

The following facts are essentially undisputed. Locomotive 1258 was capable of being operated manually or by remote control. When operated manually, an engineer controls the movement and stopping of the train mechanically with controls inside the locomotive's cab. When operated in remote, the train operator normally controls the starting and stopping of a train electronically from outside the locomotive by manipulating a radio transmitter, or "black box."

Locomotive 1258 had a compressed air braking system. A series of air hoses, referred to as the "train line air," connected the brakes of each hopper car to the locomotive. Ninety pounds of air had to be pumped into the train line prior to train movement. Brake pressure was applied by releasing air from the train line. Air was released from the train line by manipulating the automatic brake. As air is drawn off, a piston pushes out against the train's brake shoes to slow the train. Normally, the release of 10 pounds of

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[1] Section 5(a)(1) provides:

> **Sec. 5. (a) Each employer--**
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]

air is adequate to engage the brakes for a locomotive and train ("drag") of connected hopper cars. The release of 20 pounds of air will normally stop a locomotive and drag of hopper cars.

In the week prior to the June 27, 1989 accident, three operators -- Kirk Jarrett, Dennis Westfall, and Don Finley -- experienced sporadic problems with respect to 1258's train line air while operating in the remote mode. On June 25, 1989, while operating 1258 on the 3:00 p.m.-11:00 p.m. shift, operator Jarrett attempted to make a 10-pound release of air to slow the train while it was going down hill. Instead of a 10-pound release of air, however, the air pressure was drawn off completely to zero, and the train stopped. Jarrett reported this condition ("turned it in") to yardmaster Ken Zomoida. Jarrett also noticed that the brakes shoes on 1258 were worn down to about an inch in thickness; he turned them in on June 25, 1989. Westfall, who operated 1258 in the remote mode on the 11:00 p.m. to 7:00 a.m. shift which ended about 12 hours before the accident occurred, testified that he turned in the brakes for 1258 because the train line air sometimes overcharged to 130 pounds instead of just staying at the required 90 pounds. Westfall also turned in the brake shoes on 1258 because they were worn down to a thickness of 1½ to 2 inches and were cracked. Finley, who operated 1258 in the remote mode during the shift prior to the accident, also turned in the brakes for 1258, because the train line air would continue to bleed off after a brake application and cause the train to stop unintentionally. All three operators also experienced the problems in the remote mode at other times during the week prior to the accident.

At about 11:00 a.m. on the day of the accident, after operator Finley had reported train line problems with 1258 on the shift prior to the accident, Bob Harper, an electronics shop repairman with 25 years of experience, examined the remote control mechanism for 1258 and determined that it was functioning properly. Harper concluded that there was a mechanical air brake problem with 1258, not an electronic (remote control) problem, and that it would need to be repaired by the locomotive shop, which dealt with mechanical problems. He testified, "The thing that we saw was a train line air problem. We had supercharged train line air, and it was causing that locomotive to go into the hole [release all the air and stop the train]." Harper reported his findings to yardmaster Terry Hosenfield

and wrote into a log maintained by the electronics shop as follows: "Had Terry H. call Loco Shop to explain that train line air would go to 130#, same as main air, & then go in hole."

In response to Harper's report, Richard Penn, WPS' locomotive shop supervisor, assigned mechanics Christ Vergitz and Jim Roberts to repair 1258's train line. Since neither mechanic knew for certain whether the problems with 1258's train line were in manual or remote, they brought equipment for both when they went to service it. When they arrived in the area where they expected the engine to be, however, Vergitz and Roberts learned that 1258 had already been put into service. Consequently, they did repair work on other locomotives and did not have an opportunity to look at 1258 before their shifts ended at 4:00 p.m. that day. Hosenfield told Vergitz that 1258 would not be back from its run until after Vergitz's shift was to end at 4:00 p.m., so Hosenfield knew that 1258 continued in operation under the remote control mode without repairs. Hosenfield also knew, because a notice had been posted a week beforehand, that 1258 was to be operated in the manual mode on the next shift by an engineer/trainee who was then only qualified to operate in manual.

The Accident

That evening, 1258 was servicing what was referred to as the No. 1 Coke Plant job, which extended from WPS' coke works in Follansbee, W.Va. across the Ohio River to its No. 1 blast furnace in Steubenville. Another locomotive, 1551, which was servicing what was known as the No. 1 Mingo job, had become disabled at the bottom of No. 1 hill while pushing about 30 hopper cars of raw materials on tracks also used by 1258 for its job. The conductor of 1551 radioed 1258 for a push through a switch onto an adjacent track about three car lengths away in order to clear the tracks.

Although, as mentioned above, 1258 was typically operated in the remote mode, it was being operated in manual on the night of the accident because it was being used to train an employee, Richard Pompa, who was only qualified to operate manually. Besides Pompa, the crew consisted of engineer/trainer Michael Yuricic, brakeman John Carducci, and conductor Michael Mallas. Yardmaster Zomoida was also on the train.

At about 8:00 p.m., after receiving the call from 1551, 1258 proceeded through a trestle bridge curve and down the No. 1 Hill toward 1551. It had been raining and the

tracks were wet. As the second hopper car came through the curve, engineer/trainee Pompa made a 10 to 12 pound brake application. No ascertainable brake response was felt by any of the train's crew.[2] When the train did not stop, Pompa made another application. Again, the brakes did not stop the train.

Pompa subsequently applied the emergency brake and then the independent brake, but neither adequately slowed the train. Zomoida, Carducci, and Yuricic had all jumped off the train before the train collided with 1551, but Pompa was still at its controls and Mallas was on a platform outside the cab at the head end of 1258. Number 1258 was completely demolished, Pompa was injured, and Mallas was killed.

Judge's Decision

The judge found that the Secretary established that 1258's braking system, consisting of its train line air and brake shoes, was defective and created a hazardous condition. He found that the company had knowledge of the hazards from the reports of train operators Jarrett, Westfall and Finley, but that yardmaster Hosenfield put the locomotive in service on June 27 before the brakes were repaired. The judge also found that employee testimony established the excessively worn condition of the brake shoes. He based his finding primarily on the "unequivocal" testimony of employee Westfall that the brakes shoes were "worn down further than they should have been . . . [w]ith cracks in them," rather than on the conflicting testimony of WPS' locomotive shop general foreman, Richard Penn.

Arguments of the Parties

The Secretary argues that the cause of the accident is not an issue in this proceeding. He states that the citation is based entirely on the fact that WPS' management was "aware of unresolved problems with the brakes on 1258 that constituted a hazard and were not fixed before 1258 was returned to service." Whether those problems caused, contributed to, or were a factor in the accident is "simply besides the point."

The Secretary contends that the information available to management about the problems with 1258's brakes did not rule out the possibility that brake problems would be

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[2] We make no attempt to ascertain the cause of the accident here. We note that it is unclear from the record whether the failure of the brakes to function may have been caused by environmental factors, such as weight, distance, rainy conditions and down slope, as WPS asserts.

encountered in the manual mode of operation as well as in the remote mode. He argues that electronics shop repairman Harper, who had 25 years of experience, had determined that 1258 had a mechanical, non-remote/non-electronic air brake problem. Given the persistent and very recent complaints of the previous train crews regarding air line malfunctions, the Secretary maintains that "it was clearly a hazard to allow 1258 to continue to operate without a definitive resolution of the reported problems." By continuing to operate 1258 without first resolving whether Harper's report of a mechanical air line problem was accurate is a violation of cited section 5(a)(1), the Secretary adds, under the dictates of *Con Agra, Inc., McMillan Co. Div.*, 11 BNA OSHC 1141, 1983-84 CCH OSHD ¶ 26,420 (No. 79-1146, 1983). He notes that in *Con Agra*, the Commission held that section 5(a)(1) was violated when employees of a grain elevator company tested the air in railroad cars delivering grain to the facility by sniffing the grain -- some of which had been fumigated with pesticides -- for staleness. The Secretary points out that even though OSHA did not find that chemical levels in the cars were above permissible exposure limits, the Commission upheld the citation because "the failure to test [by the use of instruments] in a confined atmosphere before possible exposure of employees to toxic substances" violates section 5(a)(1). *Id.*, 11 BNA OSHC at 1145, 1983-84 CCH OSHD at p. 33,527.

The Secretary argues that the company's knowledge that 1258 had been making unintentional stops should have informed it that 1258 would not stop at all. He contends that mechanic Harper's diagnosis of 1258's brake problem as a train line air problem "opened the ambit" of what could be wrong with the train and left open the possibility that brake problems could occur when 1258 was operated manually. The Secretary argues that WPS recognized the hazard of operating a train with reported brake problems because it had a procedure for dispatching technicians from its repair shops to check and repair defective equipment in the field or to bring it in to the shop for repair.

In a brief filed by the United Steelworkers of America, the union advances arguments that are essentially similar to those advanced by the Secretary. The union also directs us to (1) a June 22, 1989 entry in the Locomotive Inspection Reports for locomotive 1258 noting

that the left front dump line angle cock was leaking at the valve joint[3] and (2) a June 19, 1989 entry in the locomotive shop log book for 1258 noting that the yardmaster had wanted the brakes checked because they were slow in coming on and might need adjusting.

WPS argues that although 1258 occasionally had a problem with train line air overcharging, which unintentionally stopped the train, this problem did not adversely affect braking. Furthermore, WPS contends, this problem does not demonstrate the existence of any recognized hazard or a reason to remove 1258 from service. WPS also claims that this problem only manifested itself in remote operation, and yardmaster Hosenfield knew that 1258 was to be operated in the manual mode on the shift that followed repairmen Vergitz's and Roberts' shift. WPS contends that although electronics shop repairman Harper believed that the problems with 1258 were mechanical, he did not check the engine in manual operation to verify his theory and he admitted that he was not qualified to diagnose mechanical problems. Finally, WPS contends that the accident was caused by unpreventable employee misconduct and that it had a comprehensive and effective safety training program for its employees.

Proof of General Duty Clause Violation

To establish a violation of section 5(a)(1), the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to its employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Coleco Indus., Inc.*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶ 27,748 (No. 84-546, 1991).

Initially, we agree with the Secretary and the union that the causes that contributed to this accident, which we do not attempt to resolve here, are not at issue. The issue before us is that framed by the Secretary's citation, which alleges that WPS violated section 5(a)(1) by knowingly allowing 1258 to remain in operation with problems in its braking system.

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[3] Each train car has an angle cock. They are used to close off the lines on the air hose that is used to supply the air for the brakes. The angle cock is closed on the last car to complete the air hose line, while the angle cock on the engine is opened to add air.

In both his brief and at oral argument, the Secretary identified yardmaster Hosenfield as the WPS management employee who in essence "recognized" the existence of the hazard and allowed it to continue. The problem repairman Harper described to Hosenfield was going into the hole. When that occurred, the train stopped. Harper proposed that the locomotive shop attempt to rectify the problem because he believed that the problem was a mechanical, train line air problem, not an electronic one. The Secretary argues that WPS' knowledge that 1258 had been making unintentional stops should have informed it that 1258 would not stop at all. The Secretary also argues that Harper's diagnosis of the problem as a train line air problem "opened the ambit" of what could be wrong with 1258 and that brake problems could occur when 1258 was operated manually. The seriousness of the possibilities raised by the Secretary is obvious. However, we have carefully examined the record, and we have concluded that the Secretary has failed to show by a preponderance of the evidence that Hosenfield or anyone else at WPS recognized that the problem identified by Harper was causing or was likely to cause death or serious physical harm. Hosenfield's knowledge at the time he allowed 1258 to continue to operate instead of having it stopped for repairs was of 1258's unintentional stopping problems, not of problems that should have suggested to him that 1258 might fail to stop.

The Secretary contends that Harper's diagnosis of the problem "opened the ambit" of what could be wrong with 1258. The evidence does not establish any mechanical basis to suggest 1258 would not stop when necessary. While we agree with the Secretary that Harper's determination left unidentified what caused 1258 to go into the hole, the Secretary has provided us with no basis to draw the inference that Hosenfield's knowledge of 1258's unintentional stopping problems amounted to knowledge that 1258 would not or might not be able to stop. Nor do we find that WPS' efforts to repair 1258 establish that it recognized a hazard within the meaning of section 5(a)(1). The Commission and the courts have held that, absent other evidence, an employer's own safety precautions do not establish that the employer believed that such precautions were necessary to comply with the Act. *See Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1338 (6th Cir. 1978). *United States Steel Corp.*, 10 BNA OSHC 2123, 2131, 1982 CCH OSHD ¶ 26,297, p. 33,235 (No. 77-3378, 1982).

Moreover, the problem that the repair crew was dispatched to address here was that of unintentional stopping, which the Secretary has not shown to be hazardous on this record.

Furthermore, although Hosenfield learned from Harper that Harper believed the problems with 1258 were mechanical and not electronic, this does not satisfy the Secretary's burden of showing that a hazard existed as a result. Harper was working out of the electronics shop, not the locomotive shop, as he was not a mechanic. The record contains evidence that problems had been misdiagnosed in the past, that is, that problems diagnosed as mechanical problems were electronic problems and vice versa. Operator Finley testified that there were occasions when he reported a problem that an electronics shop repairman later determined to be mechanical rather than electronic. When the mechanical person came out to attempt repairs, however, he would say that it was not a mechanical problem but an electronics problem instead. Further, even if Harper's diagnosis of a mechanical problem was a correct one, his testimony is not sufficient to establish the existence of a hazard. Although having the train stop when it was not intended could be inconvenient, we cannot say that this is proof of a hazard that this locomotive would fail to stop.

Our conclusion here is consistent with the holding of the *Con Agra* case cited by the Secretary. In *Con Agra*, the Commission found that employees were putting themselves at risk of inhaling impermissibly high levels of toxic substances when they sniffed grain that might have been fumigated with pesticides. Here, the Secretary has not proven that any hazard is present.

Furthermore, the Secretary did not establish that the condition of the brake linings presented a hazard. Operator Jarrett testified that the brake linings were supposed to be about 3 inches thick, but were only about an inch thick. Operator Westfall testified in general terms that the brake linings "were worn down further than they should have been. With cracks," and the judge accepted his testimony. However, Westfall also testified more specifically that the brake linings were supposed to be 4 to 4½ inches thick, but were only 1½ to 2 inches thick.[4] Union representative Pastors testified, however, that "[w]henever the

[4] Westfall also testified that he did not consider those brake shoes to be unsafe and that he did not have trouble stopping the locomotive.

engineer and the operators were telling you three to four inches [of brake lining thickness], they're talking about the whole brake shoe, the line, the backing and everything. Very few of them know there's lining and then a backing like on a regular shoe on a car." Locomotive shop general foreman Penn testified that new brake linings have only a 1¼ inch facing and that it only becomes necessary to start watching the linings closely with an eye toward their eventual replacement when the linings are worn to a thickness of about ¼-inch. Penn testified that if a brake shoe is allowed to wear excessively it could weld itself into the brake head because of the heat. Then, "you have gone from a field repair to a shop repair. You have to bring it into the shop and burn the lug out of the brake head . . . You don't want to run it down to a point where you're going to spend a lot of time changing the thing hot." Furthermore, engineer Richard Pompa checked the brake shoes on the afternoon of the aceident and did not notice anything wrong with them.

The evidence above is not sufficient to establish that the brake shoes were excessively worn and that they therefore presented stopping problems. The primary testimony given to that effect was that of operators Jarrett and Westfall. That testimony, however, was influenced by how thick they thought the brake linings should have been, that is, 3 to 4½ inches thick. It is understandable to us that an employee with a belief that brake linings should be 3 to 4½ inches thick might testify that linings "only" 1 to 2 inches thick could be characterized as worn down further than they should have been and therefore required replacement. However, as mentioned above, locomotive shop foreman Penn testified that "new" brake linings are only 1¼ inches thick. Penn's testimony was essentially corroborated by the testimony of union representative Pastors to the effect that some employees are under a misapprehension about how thick brake linings are, and believe brake shoes to be thicker than they actually are, because they confuse the thickness of an entire brake shoe with the thickness of just that portion of the shoe that constitutes the lining. In light of this apparent misapprehension by operators Jarrett and Westfall, we conclude that the judge erred in deciding this issue on the basis of their testimony.[5] Consequently, we find that the

[5] The Secretary has also argued in his brief that operators Westfall and Yuricic testified that they sometimes had difficulty stopping the train. The testimony cited by the Secretary, however, does not establish that either employee reported those difficulties to a supervisory official.

Secretary clearly failed to establish that the brake linings were excessively worn and required replacement.

We also find that neither the Locomotive Inspection Reports entry about a leaky angle cock nor the locomotive shop log book entry about having brakes checked that were slow coming on -- as raised in the union's review brief -- provide us with enough information to establish that the problems described with locomotive 1258 presented hazardous stopping difficulties.

Accordingly, we reverse the judge and vacate the Secretary's citation alleging that WPS violated the general duty clause at section 5(a)(1) of the Act.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 27, 1993

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SECRETARY OF LABOR, Complainant, v. WHEELING-PITTSBURGH STEEL CORPORATION, Respondent, and UNITED STEELWORKERS OF AMERICA, DISTRICT 23, LOCAL UNION NO. 1190, Authorized Employee Representative.	Docket No. 89-3389

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 27, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

April 27, 1993
Date

Docket No. 89-3389

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor,
Complainant,

v.

Wheeling-Pittsburgh Steel Corp.,
Respondent,

and

United Steelworkers of America,
District 23, Local Union No. 1190,
Authorized Employee
Representative.

Docket No. 89-3389

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 3, 1991. The decision of the Judge will become a final order of the Commission on May 3, 1991 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary **on or before April 24, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

April 3, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-3389

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SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 89-3389
	)	
WHEELING-PITTSBURGH STEEL CORPORATION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED STEELWORKERS OF AMERICA, DISTRICT 23, LOCAL UNION NO. 1190,	)	
	)	
Authorized Employee Representative.	)	

APPEARANCES:

Christopher J. Carney and Mary Anne Garvey, Esquires, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Leonard A. Costa, Esquire, Pittsburgh, Pennsylvania, and Richard K. Montgomery, Esquire, Wheeling, West Virginia, on behalf of respondent

Mr. John Pastors, Steubenville, Ohio, on behalf of authorized employee representative

DECISION AND ORDER

SALYERS, Judge: Wheeling-Pittsburgh Steel Corporation ("Wheeling") is a steel manufacturer located in Steubenville,

Ohio. On June 27, 1989, a fatal train accident occurred on Wheeling's in-plant railroad. The deceased, Mike Mallas, was a conductor employed by Wheeling.

As a result of the fatal accident, OSHA conducted an inspection of the site. On October 13, 1989, OSHA issued a citation to Wheeling alleging two willful violations of section 5(a)(1), 29 U.S.C. § 654(a)(1), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Item 2 of the citation was withdrawn at the beginning of the hearing by the Secretary (Tr. 8). That leaves for consideration item 1 of the citation, which alleges a violation of the general duty clause for knowingly allowing employees to operate locomotive 1258 with a defective braking system. Wheeling contends that the locomotive in question did not have a defective braking system and that the locomotive was safe for operation in the manual mode in which it was being used.

Wheeling's Motions to Dismiss

At the close of the Secretary's case-in-chief, Wheeling moved for dismissal under Federal Rule of Civil Procedure 41(b). At the close of all the evidence, Wheeling moved for dismissal under Federal Rules of Civil Procedure 41(b) and 50(a). Both motions were held in abeyance and are hereby denied.

FACTS

The Secretary and Wheeling each submitted findings of fact and conclusions of law, along with posthearing briefs. Both the Secretary's findings of fact and her recitation of the facts in her posthearing brief are considered by the court to be accurate and in accordance with the facts disclosed by the record. Accordingly, the Secretary's recitation of the facts is adopted with only minor changes.

On Tuesday, June 27, 1989, locomotive 1258 (hereinafter referred to as "1258"), which was pulling five Conrail hopper cars of dolomite, collided with locomotive 1551 (hereinafter referred to as "1551"). At the time of the accident, 1258 was servicing the No. 1 Coke Plant job, commonly referred to as the No. 1 Hill job, and 1551 was servicing the No. 1 Mingo job. The No. 1 Coke Plant job stretches from the coke works on the West Virginia side of the Ohio River to the blast furnace on the Ohio side of the river (Tr. 74, 547). The No. 1 Coke Plant job and the No. 1 Mingo job use the same tracks for a portion of their respective runs (Ex. R-5).

Prior to the accident, 1551 became disabled at the bottom of the No. 1 Hill on tracks used by 1258 to service the No. 1 Coke Plant job (Ex. R-5; Tr. 547). Number 1551 was pushing approximately 30 hopper cars at the time it became disabled (Ex. R-5; Tr. 547). By two-way radio, 1551's conductor, James Raha, requested the assistance of 1258 (Tr. 551). Raha wanted

1258 to push 1551 through a railroad switch onto an adjacent track (approximately three car lengths) so as to clear the tracks (Tr. 551-553). Number 1258 was at the north blast furnace trestle when Raha made the request. Since 1258 was in the process of transporting dolomite to the blast furnace on the Ohio side of the river, Raha told 1258's conductor, Mike Mallas, to bring the five cars of dolomite when 1258 came to help (Tr. 552).

Like a number of Wheeling's locomotives, 1258 was capable of being operated in manual or remote control (Tr. 75-76, 303). When operated in manual on the No. 1 Hill job, the 1258 crew consists of an engineer, conductor and brakeman. The engineer controls the moving and stopping of the train, the conductor directs the overall movement of the locomotive and train, and the brakeman throws any switches that have to be made. When operated in remote on the No. 1 Hill job, the 1258 crew consists of a remote operator and conductor (Tr. 76). The operator controls train movement by manipulating a radio transmitter, commonly referred to as a "black box," and the conductor orchestrates the operator's movements.

Though typically operated in remote, 1258 was operated in manual on the night of the accident. This was so because 1258 was being used to train a new Transportation Department employee, Rich Pompa. Pompa was at a point in his training where he was only qualified to operate a locomotive in the manual mode (Tr. 301-303). At the time of the accident, 1258's

crew consisted of engineer/trainee Pompa, engineer/trainer Mike Yuricic, brakeman John Carducci, and conductor Mike Mallas (Tr. 304). This schedule had been posted approximately one week in advance of the shift (Tr. 302). Carducci, Mallas and Yuricic had almost fifty years of combined experience as railroad employees and all three were qualified operators, engineers and conductors (Ex. R-5; Tr. 369, 595). Respondent's railroad training instructor, Ralph Brady, described Pompa's level of competence as very good prior to the accident (Tr. 584, 591).

The brake system for 1258 is a compressed air system (Tr. 76). A series of air hoses connects the brakes of each hopper car to the locomotive (Tr. 76-77). This system of hoses is referred to as the train line air (Ex. R-5; Tr. 76-77). Ninety pounds of air is required to be pumped into the train line prior to train movement (Ex. R-5; Tr. 76). Brake pressure is applied by releasing air from the train line (Ex. R-5; Tr. 77). Air is released from the train line by manipulating the automatic brake. Assuming the brake system is functioning properly, the release of 10 pounds of air will stop a locomotive and drag of cars on a flat surface (Tr. 437-438).

After receiving the call from 1551, 1258 proceeded through the trestle bridge curve and down the No. 1 Hill. As the second hopper car came through the curve, Pompa made a 10- to 12-pound brake application (Tr. 308, 610-611). Since the brakes failed to respond to the first application, Pompa immediately made another application (Tr. 309-310, 611). The

second brake application was made when the fifth car had passed through the curve (Tr. 309-310, 611). Again, the brakes did not respond to the application (Tr. 310, 611).

At about the time of the first brake application, yardmaster Ken Zomoida, who had hitched a ride on 1258, jumped from the train (Tr. 387-388). John Carducci, who had been in the cab with Pompa and Yuricic and who had observed Pompa make the first application, became concerned and left the cab (Tr. 388). Before jumping from the locomotive, Carducci unsuccessfully attempted to convince Mike Mallas to jump (Tr. 386-387). Yuricic, the engineer/trainer, jumped from the locomotive shortly before impact with 1551.

After the brakes failed to respond to the second application, Pompa manipulated the automatic brake to the emergency stop position. Pompa also applied the independent brake (Tr. 311-313). Neither the emergency stop nor the independent brake slowed the train (Tr. 313). When the train collided with 1551, Pompa was still at the controls and Mallas was situated on a platform outside of the cab at the head end of 1258 (Tr. 314). Number 1258 was completely demolished, Pompa was injured, and Mallas was killed (Tr. 890).

In the week prior to the June 27, 1989, accident, three operators, Kirk Jarrett, Dennis Westfall and Don Finley, worked with 1258 on the No. 1 Hill job. All three reported brake problems with respect to 1258's train line air while operating in remote. Each employee indicated the problems occurred

sporadically (Tr. 83-87, 136, 171-172). In the same time frame, the three employees turned in the brake shoes for 1258 since they were visibly worn and cracked (Tr. 83-87, 128-129, 171-172). One operator, Kirk Jarrett, was informed by his yardmaster on the Sunday prior to the Tuesday accident that no replacement shoes were available (Tr. 87-88). Respondent's daily records reflect that on June 25, 1989, 1258 did need new brake shoes (Ex. R-9).

Dick Penn, Wheeling's locomotive shop supervisor, assigned Christ Vergitz and Jim Roberts, locomotive shop mechanics, to repair 1258's train line on the morning of the accident at the start of the 7:00 a.m. shift (Tr. 289-290). Since neither mechanic knew if the problems with 1258's train line were in manual or remote, they brought equipment for both when they went to service it (Tr. 291). Vergitz and Roberts were unable to repair 1258 because the yardmaster, Terry Hosenfeld, put 1258 into service even though he was aware of its train line problems (Tr. 294-295).

After Don Finley reported train line problems with 1258 on the shift prior to the accident, an electronics department employee, Bob Harper, was sent out to repair 1258. Harper inspected 1258 at approximately 11:00 a.m. on the date of the accident. Harper concluded that 1258's problems were not a remote problem but a problem with the mechanical braking system (Tr. 262-265). Harper reported this condition to Hosenfeld and informed him that the locomotive shop would have to repair the

problem (Ex. C-2; Tr. 266-267). The locomotive shop failed to inspect or repair 1258 prior to the 8:00 p.m. accident (Tr. 816).

LAW

The General Duty Clause

Section 5(a)(1) provides:

> (1) Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The Secretary charges Wheeling with the willful violation of this standard, claiming that Wheeling knowingly allowed its employees to operate locomotive 1258 with a defective braking system which Wheeling failed to remove from service for proper inspection and repair.

> To prove that an employer violated section 5(a)(1), the Secretary must show: (1) that a condition or activity in the employer's workplace presented a hazard to employees, (2) that the cited employer or the employer's industry recognized the hazard, (3) that the hazard was likely to cause death or serious physical harm, and (4) that feasible means existed to eliminate or materially reduce the hazard. United States Steel Corp., 12 BNA OSHC 1692, 1697-98, 1986-87 CCH OSHD ¶ 27,517, p. 35,669 (No. 79-1998, 1986).

Coleco Industries, Inc., ____ OSAHRC ____, 14 BNA OSHC 1961, 1963, 1991 CCH OSHD ¶ 27,748 (No. 84-546, 1991).

1. Hazardous Condition

The Secretary must prove that a condition or activity in the employer's workplace presented a hazard to employees. In the present case, the Secretary claims that 1258's braking system was defective, thus endangering the safety of employees.

The record establishes that at least three of Wheeling's employees experienced problems with the train line in the week prior to the accident. The employees, Jarrett, Westfall and Finley, each reported these problems to the locomotive shop. The employees also reported that the brake shoes were worn and needed replacing. Terry Hosenfeld, Wheeling's yardmaster, knew that 1258 had been experiencing train line problems, but he put the locomotive into service on June 27 rather than waiting until the locomotive shop repaired it.

The worn brake shoes and the train line problem presented the hazard of the train failing to stop when the brakes were applied. Wheeling disputed that the brake shoes were worn, based on the testimony of Richard Penn, the general foreman of the locomotive shop. Penn testified that the thickness of a new brake shoe is 1 1/4 inches (Tr. 762). Dennis Westfall stated that brake shoes were supposed to be 4 1/2 inches and that he observed them to be 1 1/2 to 2 inches (Tr. 129). John Pastors explained that most operators are not aware that there is a backing plate, as well as the brake lining on a shoe. When operators estimate the thickness of the brake shoe, they

are apt to include the backing plate in their estimate (Tr. 764). Nevertheless, Jarrett and Westfall are both experienced operators who actually observed 1258's brake shoes in the days before the accident. They are considered competent to testify as to whether the brake shoes were worn or not. Westfall's testimony regarding the shoes was unequivocal: "There wasn't much of them left. They were worn down further than they should have been. With cracks in them" (Tr. 129).

The Secretary has established that 1258's braking system, consisting of its train line air and its brake shoes, were defective, creating a hazardous condition.

2. Recognition of the Hazard

The Secretary must prove that Wheeling or Wheeling's industry recognized the hazard. Actual knowledge of the hazard by the employer satisfies the recognition requirement of the general duty clause. Brennan v. Vy Lactos Laboratories, Inc., 494 F.2d 460 (8th Cir. 1974).

Wheeling had actual knowledge of the defective braking system. Locomotive 1258 was turned in several times by three different employees in the week prior to the accident (Tr. 83-87, 128-129, 136, 174-175). A week to ten days before the accident, Albert Chappano, a conductor for Wheeling, told Rich Carter, Wheeling's general superintendent of its transportation department, that if something was not done about the defective equipment, somebody was going to get killed (Tr. 458). Still,

no action was taken to ensure that 1258 was taken out of service until the brake system could be repaired. On the day of the accident, Wheeling's yardmaster put 1258 into service knowing that the repair crew dispatched by Penn earlier that day had not gotten to it (Tr. 291, 295).

The record demonstrates that numerous supervisory personnel of Wheeling were aware of the repeated problems with 1258's braking system. The Secretary has satisfied the second element of her burden of proof for a section 5(a)(1) violation.

3. Hazard Likely to Cause Death or Serious Physical Injury

The Secretary must show that the defective brake system was likely to cause death or serious physical injury. It is self-evident that a locomotive, attached to other cars carrying freight and operating on a railroad which has a steep incline and where other locomotives also operate, can present a threat of death or serious physical injury to the employees on and around the locomotives. The fatal accident, which gave rise to this case, is a grim example of what can happen when a locomotive's brakes fail. The Secretary has established that 1258's defective braking system could result in death or serious physical injury.

4. Feasible Means of Abatement

Finally, the Secretary must establish that feasible means existed to eliminate or materially reduce the hazard. Wheeling

had a locomotive shop and a procedure in place for reporting any problems with the locomotives. Had the reports been followed up on, and had 1258 not been continued in service until it was fully repaired, no violation would have occurred. Wheeling had a feasible means of eliminating or reducing the hazard.

The Secretary has established that Wheeling was in violation of § 5(a)(1) for allowing employees to operate 1258, knowing that 1258 had a defective braking system.

Willful Classification

The Secretary charges Wheeling with a willful violation of § 5(a)(1). "Under Commission precedent, a violation is willful if 'it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety.' U. S. Steel Corp., 12 BNA OSHC at 1703, 1986-87 CCH OSHD at p. 35,675." Coleco Industries, Inc., 14 BNA OSHC at 1967.

Wheeling's employees repeatedly informed Wheeling of the problems with 1258's braking system. Wheeling repeatedly permitted its employees to operate 1258 without first requiring that the locomotive be repaired. Hosenfeld, Wheeling's yardmaster, failed to take 1258 out of service. Penn did not warn the 3:00 p.m. to 11:00 p.m. shift that 1258's braking problems had not been fixed.

Seven to ten days before the accident, Chappano went to Wheeling's general superintendent of transportation and warned him that if something was not done about the disrepair of the equipment, somebody would end up getting killed. Rich took no action after hearing Chappano's prophetic statement.

The record more than substantiates the Secretary's willful charge. Wheeling intentionally disregarded its duty to furnish a place of employment free from recognized hazards, and Wheeling demonstrated plain indifference to the safety of its employees by knowingly permitting them to operate 1258, a locomotive known to have a defective braking system. Wheeling was in willful violation of § 5(a)(1).

After due consideration, it is determined that the Secretary's proposed penalty of $10,000 is appropriate.

FINDINGS OF FACT

1. The accident occurred on Tuesday, June 27, 1989, at approximately 8:00 p.m. and respondent's employee, Mike Mallas, was killed.

2. Two locomotives, engine 1258 and engine 1551, were involved in the accident.

3. At the time of the accident, 1258 was being used to service the No. 1 Coke Plant job (Tr. 74). The No. 1 Coke Plant job extends from the respondent's coke works in Follansbee, West Virginia, to the Steubenville, Ohio, No. 1 blast furnace (Tr. 74).

4. The No. 1 Coke Plant job extends across the Ohio River and is commonly referred to as the No. 1 Hill job (Tr. 74).

5. No. 1551, which was servicing the No. 1 Mingo job, was disabled on the tracks used for the No. 1 Coke Plant job. No. 1551 had been pushing approximately 30 hopper cars of raw materials at the time it became disabled (Tr. 551).

6. No. 1258, which was pulling five hopper cars of dolomite, collided with No. 1551 at the bottom of the No. 1 Hill (Tr. 547).

7. No. 1258 was capable of being operated in remote or in manual. When run in remote, 1258 was serviced by a two-person crew consisting of an operator and a conductor. When run in manual, 1258 was serviced by a three-person crew consisting of an operator, conductor, and brakeman (Tr. 76, 167).

8. At the time of the accident, 1258 was operated manually. This was so because 1258 was used to train a new engineer/operator, Rich Pompa (Tr. 301-303).

9. Since 1258 was being used to train a new employee at the time of the accident, it had a four-person crew. The crew consisted of brakeman John Carducci, conductor Mike Mallas, engineer Mike Yuricic, and trainee Rich Pompa. This schedule had been posted approximately one week prior to the accident (Tr. 302, 304).

10. The brake system for 1258 is a compressed air system. A series of air hoses connect the brakes of each hopper car to the locomotive. This system of hoses is commonly referred to as the train line air (Tr. 76-77).

11. It is necessary to pump 90 pounds of air into the brake system prior to train movement. Brake pressure is applied by the release of air pressure from the train line (Tr. 76-77).

12. Normally, the release of 10 pounds of air is adequate to set the brakes for a locomotive and drag of hopper cars. The release of 20 pounds of air will stop a locomotive and drag of hopper cars if the brakes are working properly (Tr. 437-438).

13. On June 25, 1989, the operator of 1258 on the 3:00 p.m. to 11:00 p.m. shift, Kirk Jarrett, experienced brake problems while operating in remote. Specifically, 1258 would not stop until all air was drawn from the system. Jarrett reported this condition ("turned it in") to the yardmaster, Ken Zomoida. Jarrett further noted that this condition occurred periodically in the week prior to the accident and that he or his conductor reported the condition to their yardmaster each time it occurred (Tr. 83-87).

14. Jarrett also turned in the worn brake shoes for 1258 on June 25, 1989. He was informed by the yardmaster that no replacement shoes were available (Tr. 87).

15. Dennis Westfall, who operated 1258 on the 11:00 p.m. to 7:00 a.m. shift which ended approximately 12 hours prior to the accident, turned in the brakes for 1258 because 1258 would not stop in response to his controls and the train line overcharged to 130 pounds. Both conditions occurred off and on during the week prior to the accident (Tr. 136).

16. Westfall also turned in the brake shoes since they were visibly worn and cracked (Tr. 128-129).

17. Don Finley, who operated 1258 during the shift prior to the accident, turned in the brakes for 1258 since they would not respond to his controls (Tr. 174). In the week prior to the accident, Finley periodically experienced train line brake problems (Tr. 171-172).

18. At approximately 11:00 a.m. on the day of the accident, Bob Harper, an electronics department employee with 25 years' experience, examined the remote control mechanism for 1258 and determined it to be functioning properly (Tr. 262-265).

19. Harper concluded that there was a mechanical air brake problem with 1258, and he reported his findings to Terry Hosenfeld, the yardmaster, at the time (Tr. 289-290).

20. Christ Vergitz, a mechanic in respondent's locomotive shop, was assigned by his supervisor, Dick Penn, to service 1258's train line air at the beginning of his 7:00 a.m. to 3:00 p.m. shift on the date of the accident (Tr. 289-290).

21. Since Vergitz was unaware whether the problem was in remote or manual, he brought parts for both systems when he went to repair 1258 (Tr. 291).

22. By the time Vergitz reached the coke works in West Virginia, 1258 had been put into service by the yardmaster, Terry Hosenfeld (Tr. 291).

23. Hosenfeld indicated to Vergitz that he knew of 1258's train line problem (Tr. 295).

24. Because of repair work that had to be performed on other locomotives, Vergitz never repaired 1258's train line brakes. Vergitz explained this fact to supervisor Penn (Tr. 294).

25. Nobody from the locomotive shop repaired 1258's train line brake problem prior to the June 27, 1989, accident (Tr. 816).

26. At the time of the accident, the engineer trainee, Rich Pompa, was at the controls (Tr. 300-302).

27. On the run in which the accident occurred, the yardmaster, Ken Zomoida, was on the outside of 1258's cab, travelling with the train's crew (Tr. 302).

28. No. 1258 started from the blast furnace trestle, through the trestle curve, and down the No. 1 Hill. As the second hopper car came through the curve, Pompa made a 10- to 12-pound brake application (Tr. 308). No brake response was felt by any of the train crew (Tr. 308).

29. Almost immediately after the first application, Pompa made another 10-pound brake application (Tr. 309-310). Again, no brake response was felt (Tr. 310).

30. Pompa put 1258 into emergency stop by manipulating the automatic brake 10 to 12 car lengths from 1551 (Tr. 311-312). Pompa also applied the locomotive's independent brake (Tr. 313). No brake pressure was felt prior to the collision (Tr. 311-313).

31. All employees, except Pompa and Mallas, exited the train prior to the collision (Tr. 314).

CONCLUSIONS OF LAW

1. Wheeling, at all times material to this proceeding, was engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970 ("Act").

2. Wheeling, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter.

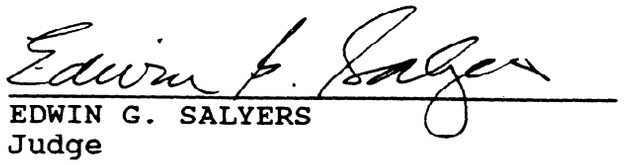
3. Wheeling was in willful violation of section 5(a)(1) for knowingly allowing employees to operate locomotive 1258 with a defective braking system.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED:

1. That item one of the citation is affirmed and a penalty of $10,000 is assessed.

2. That item two of the citation is vacated and no penalty is assessed.



EDWIN G. SALYERS
Judge

Date: March 28, 1991