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R.E. DUNLAP V. CHAROLAIS COAL CORP.

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

RONALD E. DUNLAP,	APPLICANT	Application for Review of Discharge
v.		
CHAROLAIS COAL CORPORATION,	RESPONDENT	Docket No. BARB 78-66 No. 1 Mine

DECISION

Appearances: Ronald E. Dunlap, White Plains, Kentucky, pro se.
Joe A. Evans III, Esquire, Madisonville, Kentucky,
for the respondent

Before: Judge Koutras

Statement of the Case

On December 5, 1977, applicant Ronald E. Dunlap filed a discrimination complaint with the Office of Hearings and Appeals, U.S. Department of Interior, Arlington, Virginia, pursuant to section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, asserting that he was discharged by the respondent on November 14, 1977, and that his discharge was in violation of section 110(b) of the Act. The complaint states as follows:

On November 14th, I was discharged from my job as a Euclid driver for Charolaois Coal Corp. For sometime, I had been complaining about the brakes. We were moving the Euclids on November 4, from one mine to the other, when the first Euclid stopped to let an oncoming car pass. The brakes failed on the Euclid that I was driving, so I had to run the Euclid off the road to keep from hitting the car, and as a result I hit the back of the other Euclid. I was sent home after the accident. The Euclid was down for seven days to repair the brakes. I reported to work everyday until November 14th, when they informed me I was fired due to the accident. I was discharged by the company in violation of section 110(B) of the Federal Coal Mine Health and Safety Act.

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By letter dated January 17, 1978, from former Chief Administrative Law Judge Luoma, Mr. Dunlap was advised that his complaint had been docketed but that it appeared to be deficient in that there was no indication that a copy had been served on the respondent. He was advised to serve a copy on the respondent and to advise Judge Luoma's office that service was made on the respondent.

By letter dated February 22, 1978, Mr. Dunlap advised that a copy of his complaint was served on the respondent by MESA Special Investigator Jesse F. Rideout on December 28, 1977.

On March 27, 1979, Commission Chief Administrative Law Judge Broderick issued an order to the respondent to show cause why it should not be held in default and the manner summarily disposed of because of respondent's failure to file an answer.

On April 4, 1979, respondent filed a response to Judge Broderick's show-cause order, and on April 25, 1979, I issued an order indicating that respondent satisfactorily answered the show-cause order and should not be held in default. By notice of hearing issued May 9, 1979, the parties were advised that a hearing would be held in Evansville, Indiana, on August 21, 1979.

Issue Presented

The issue presented in this proceeding is whether the discharge of Mr. Dunlap from his truck driver's position was in fact prompted by his reporting of safety infractions to the Mining Enforcement and Safety Administration.
Applicable Statutory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq.
2. Section 110(b) of the Act provides in pertinent part that:

No person shall discharge or in any other way discriminate against or cause to be discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

Discussion

Applicant's Testimony

Ronald E. Dunlap testified that on November 4, 1977, while employed by the respondent as a Euclid truck driver, and while driving a truck which he believed had bad brakes, he ran the truck off the road in order to avoid hitting another car which had stopped on the road. He had previously complained about the bad brakes some 2 months prior to this incident. After the incident, mine foreman Tom Gamble sent him home, and he was subsequently fired by Mr. Bowles, the mine owner, and Mr. Bowles stated he fired him because he had received complaints about the manner in which the trucks were being operated on the road (Tr. 8-11).

Mr. Dunlap stated that he still does not know the reason why he was discharged by Mr. Bowles. After he was fired, he tried to obtain other employment but was unable to, and he believes it was because he "went to the Federal people over it" (Tr. 12). He called someone at MESA on the phone and complained about the truck brakes and he also sought help in filing his discrimination complaint. He subsequently went to work for Island Creek Coal Company in Madisonville on September 18, 1978, and is still employed there. Prior to that time, he was unemployed and was paid no unemployment benefits because of his discharge (Tr. 14).

On cross-examination, Mr. Dunlap confirmed that he was discharged on November 14, 1977, and that on November 26, 1977, he executed an affidavit alleging that he was fired because of reports of safety violations (Exh. R-1). He stated that sometime in mid-October of 1977 he called an unidentified man at the MESA Madisonville office to complain about the brakes on the truck in question. He did not file any written report, and to his knowledge, no one came to the mine to inspect or check on the condition which he reported. He continued to drive the truck after he complained about it and he was not discharged and continued to work with the respondent until his discharge on November 14 (Tr. 15-16).

Mr. Dunlap identified the manufacturer's specifications for a Euclid R-50 truck, the type of vehicle he was driving on the day of the accident (Exh. R-2). He described the truck braking system, and his duties entailed hauling spoil from one of the mine pits to a dumping area and this was done in tandem with another truck driver usually over an 8-hour daily shift. He confirmed that at the end of a shift he was required to fill out a slip stating the current condition of the truck, and he customarily filled it out by signing it and turning in the hours he worked (Exh. R-3, Tr. 17-23). He denied that he was ever informed that he was to report the condition of his truck on the report (Tr. 24). However, he stated he was not sure whether he has filled out any such reports indicating problems with his truck, but did identify one he turned in on October 12, 1977 (Exh. R-4).

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Mr. Dunlap stated that he was instructed to advise the mechanic about any problems with his truck, and he also turned in reports to his foreman (Tr. 26). He admitted that at no time did he ever fill out a report stating there were problems with his truck and this is because he always reported it orally (Tr. 27). He denied that anyone has ever advised him to slow down while driving around the pit (Tr. 29).

Mr. Dunlap testified with respect to the accident with his truck and he indicated that he had to run his truck into a ditch to avoid the stopped car, and that he could not stop in time (Tr. 30-37). He confirmed that he wrecked his brother-in-law's truck 2 days after the accident in question and believed bad brakes caused that accident also (Tr. 39). He also admitted stating to Mr. Gamble that he would not blame Mr. Bowles for firing him for wrecking the Euclid truck (Tr. 40).

In response to questions from the bench, Mr. Dunlap stated that on October 15, 1977, he called someone at MESA and advised him that he damaged the truck transmission because he could not stop the truck and had to put it in gear to keep it from going over a bank. He could not recall who he talked to and no one from MESA came in response to his call. He never saw any MESA or state inspectors at the mine and he has never complained to any state inspectors about truck brake conditions. He also indicated that he never told Mr. Bowles about his call to MESA, and he told no one at the mine about it (Tr. 40-44).

Respondent's Testimony

Donald E. Bowles, mine owner, testified that he is familiar with the Euclid truck operated by Mr. Dunlap on the day of the accident, and he discussed the truck braking system. Mr. Bowles stated he drove the truck after the accident to get it out of the road. The truck windshield was knocked out and one door would not close. The truck was purchased in January 1977, and a new one costs \$280,000 (Tr. 62-65). Mr. Bowles stated he was unaware of any complaints made by Mr. Dunlap to MESA, and he first learned about the matter when MESA representative Rideout interviewed him after Mr. Dunlap filed his complaint (Tr. 66).

Mr. Bowles testified he has observed Mr. Dunlap's driving habits and asked pit foreman Gamble on two occasions to slow him down. Prior to the accident, he was not aware of any serious brake difficulties with the Euclid truck. He denied that Mr. Dunlap was fired for complaining about safety violations (Tr. 66-67).

On cross-examination, Mr. Bowles testified that the truck in question was still under warranty at the time of the accident, and that in addition to Mr. Dunlap, it was also driven by Mr. Gamble. He confirmed that there was a brake problem with the truck, but indicated

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that it was caused by failure of the driver to use the retarder to slow it down and "riding the brakes" while going downhill (Tr. 70).

Mr. Bowles stated that he told Mr. Dunlap that a local county judge had complained about his driving too fast and reckless with the Euclid truck and that after the accident when he rode back with Mr. Dunlap to his car, Mr. Dunlap asked him if he were fired, and Mr. Bowles answered "I don't know" and told him he would have to talk to Mr. Gamble and Mr. Durall first and that he would let him know. On or about November 14, he told Mr. Dunlap that he was fired because of the complaints of his fast driving and that he could not permit anyone who was unsafe to operate his equipment (Tr. 71-72).

Mr. Bowles described the accident and indicated that one truck ahead of Mr. Dunlap had stopped to allow a car to pass by and Mr. Dunlap was trailing behind the lead Euclid truck which had stopped. Mr. Dunlap hit the truck which had stopped in the backend and ran off the ditch beside it (Tr. 73). Mr. Bowles stated that Mr. Dunlap's discharge was oral and he paid him his final check (Tr. 75).

In response to bench questions, Mr. Bowles testified that MESA does inspect his mine, but he could not recall the Euclid trucks being inspected in October or November 1977, nor could he recall any citations being issued against the trucks for deficient brakes (Tr. 76). He first met Mr. Rideout when he came to interview him concerning Mr. Dunlap's complaint. Mr. Rideout asked him to reinstate Mr. Dunlap and he told him he could not because he was not a safe workman (Tr. 77). He denied firing Mr. Dunlap for making any safety complaints and knows of no complaints that he may have filed with MESA, and Mr. Rideout mentioned none (Tr. 79).

Thomas E. Gamble, pit foreman, testified that Mr. Dunlap was a good worker but a "little bit fast" and sometimes a "little bit reckless" with his truck. He was aware of no complaints made to MESA by Mr. Dunlap and when he left the job he had received no complaints about bad truck brakes. He would not have permitted Mr. Dunlap to operate the truck if it were in fact in an unsafe condition. After the accident, Mr. Dunlap stated that if Mr. Bowles fired him "I guess I've got it coming" (Tr. 82-85).

In response to bench questions, Mr. Gamble stated that Mr. Dunlap worked directly for him and they were working together when the accident occurred (Tr. 86). Mr. Bowles consulted him as to whether Mr. Dunlap should be fired and he voted to fire him because of his reckless driving habits. Mr. Dunlap never indicated to him that he ever complained to MESA about any defective brakes on the trucks (Tr. 87). He is unaware of any citations issued against the trucks for defective brakes, and aside from his driving habits, Mr. Dunlap was a good worker (Tr. 89).

John S. Durall, pit foreman, testified he was aware of Mr. Dunlap's driving habits and that they were "average". On the day of the accident, he was driving the lead truck acting as a flag truck to slow down other vehicles coming from the opposite direction. The truck operator is responsible for filling out the slip tickets at the end of each shift. He is not aware of any MESA citations issued during October and November against the Euclid trucks (Tr. 92). He was not aware that Mr. Dunlap had registered any complaints with MESA.

Findings and Conclusions

On the facts and evidence adduced in this proceeding, I cannot conclude that Mr. Dunlap's discharge from his employment with the respondent was in any way connected with, or the result of, any discrimination resulting from any complaints which he may have made to MESA in connection with the brakes on the Euclid truck. As a matter of fact, there is no evidence to substantiate the fact that Mr. Dunlap ever complained to MESA about any defective brakes on the truck in question, and there is no evidence to substantiate the allegation that respondent was aware of such complaints and retaliated against Mr. Dunlap by discharging him. MESA's involvement in the case came after Mr. Dunlap filed his complaint, and from the record it would appear that this involvement was limited to a March 1978 interview by MESA inspector Rideout with the owner of the mine. Respondent's evidence and testimony establishes that Mr. Dunlap's discharge was prompted by the accident that he was involved in concerning the Euclid trucks owned by the respondent, and the fact that respondent considered Mr. Dunlap to be an unsafe truck driver.

During the course of the hearing, and in response to my question as to whether Mr. Dunlap had ever considered retaining counsel to represent him, he indicated that he had retained an attorney from Madisonville, Kentucky, who was aware of his complaint, but it was his understanding that he did not require an attorney. Out of consideration of the fact that Mr. Dunlap appeared pro se at the hearing, the record was left open for a period of 30 days to afford Mr. Dunlap an opportunity to contact his attorney further for the purpose of advising him as to the posture of his case and to afford the attorney an opportunity to file any further arguments in support of his claim (Tr. 93-96). No further information in this regard has been forthcoming either from Mr. Dunlap or his alleged attorney. Under the circumstances, I am of the view that Mr. Dunlap has had a full and fair opportunity to present his claim and he admitted as much at the hearing (Tr. 94-95). However, as indicated above, Mr. Dunlap has presented nothing to support his claim that his discharge was prompted by any protected activities afforded him under the 1969 Act.

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ORDER

In view of the foregoing findings and conclusions, applicant is not entitled to any relief under section 110(b) of the Act, and his application for review is denied and this case is dismissed.

George A. Koutras
Administrative Law Judge