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SOL (MSHA) V. MOUNTAIN TOP FUEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF PERRY R. BISHOP, COMPLAINANT	Complaint of Discharge, Discrimination or Interference Docket No. KENT 79-161-D
v.	No. 4 Surface Mine
MOUNTAIN TOP FUEL, INC., RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. KENT 80-98 Assessment Control No. 15-10188-03006
v.	No. 4 Surface Mine
MOUNTAIN TOP FUEL, INC., RESPONDENT	

DECISION

Appearances: Thomas P. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, for Complaint and Petitioner Herman W. Lester, Esq., Pikeville, Kentucky, for Respondent

Before : Administrative Law Judge Steffey

Pursuant to an order providing for hearing, consolidating issues, and requiring furnishing of documents issued February 28, 1980, a hearing in the above-entitled proceeding was held on March 18 and 19, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves a complaint of discharge filed on August 7, 1979, by the Secretary of Labor and MSHA on behalf of Perry R. Bishop against Mountain Top Fuel, Incorporated, in Docket No. KENT 79-161-D.

The complaint alleged that respondent had violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 and asked that Mr. Bishop be reinstated to his former job, be awarded back pay from the time of his discharge on February 14, 1979, and be given other relief.

Subsequently, the complainant filed a motion for dissolution of the order of temporary reinstatement which had been issued on June 19, 1979, and reaffirmed on July 3, 1979, by Chief Administrative Law Judge Broderick after a hearing

held on June 29, 1979, with respect to the issue of whether the Secretary had properly found that the complaint was nonfrivolous.

The reasons that a motion for dissolution of the order of temporary reinstatement was filed was that Mr. Bishop had secured a job elsewhere and did not any longer wish to be reinstated at respondent's No. 4 Surface Mine.

I issued an order on October 24, 1979, granting the motion for dissolution of the order of temporary reinstatement. Complainant still seeks an award of back pay and all other relief previously sought in his complaint.

Respondent's petition for review of the order of temporary reinstatement was dismissed as moot by the U.S. Circuit Court of Appeals for the Sixth Circuit upon agreement of the parties that the action was moot in view of the dissolution of the order of temporary reinstatement.

I also issued an order on February 28, 1980, consolidating for hearing and decision in this proceeding the civil penalty issues raised by the Secretary's filing on February 14, 1980, of a Petition for Assessment of Civil Penalty in Docket No. KENT 80-98 alleging that respondent had violated section 105(c)(1) of the Act by refusing to reinstate Mr. Bishop to his job pursuant to the order of temporary reinstatement and seeking to have a civil penalty assessed for that alleged violation.

The order of February 28, 1980, also provided for the hearing in this consolidated proceeding to be held in Pikeville, Kentucky, on March 18, 1980.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 375-395):

> My decision in this proceeding will be based on the findings of fact which I am first going to make. An explanation of my credibility determinations will be given after the findings of fact.
>
> These findings of fact will be given in numbered paragraphs and I shall give the numbers at the beginning of each paragraph.
>
> 1. Complainant, Perry R. Bishop, began working for respondent, Mountain Top Fuel, Inc., on September 22, 1977. Mr. Bishop at first drove a truck for respondent for a period of nine or ten months. Then Mr. Bishop became the operator of a front-end loader which was used to remove overburden at respondent's No. 4 Surface Mine. Thereafter, respondent, at Mr. Bishop's request, transferred Mr. Bishop to the position of operating a Michigan 275 front-end loader which was used to clean the final five or six inches of overburden off the coal seam and for loading the coal into trucks which haul an

average of 25 tons each.

2. On February 14, 1979, Mr. Bishop reported for work as usual at about 6:45 a.m. for a nine-hour shift beginning at 7 a.m. The temperature on February 14 was below freezing. Mr. Bishop checked

the fluid levels in the Michigan front-end loader and noticed that the brakes were inoperative. The brakes were operated by an air system which is subject to malfunctioning in below-freezing temperatures because of condensation which forms in the air lines and freezes so as to prevent air pressure from moving the brake drums. An alcohol container is built into the system which is designed to mix alcohol with the condensation and prevent ice from forming in the brake lines. Mr. Bishop did not check the alcohol level on February 14.

3. The first work done by Mr. Bishop on February 14 consisted of tramming his end loader from a location near the mine office to a coal stockpile situated about 2,000 feet from the office. Mr. Bishop loaded three trucks with the stockpiled coal. About one-half truck load of coal remained in the stockpile. Mr. Bishop then trammed his loader down to the pit area where another pile of coal had been prepared by the preceding evening shift. Mr. Bishop loaded two additional trucks from that pile of coal and once again about a half truck load of coal remained after those two trucks had been loaded in the pit area.

4. About 15 minutes were required to load the three trucks at the stockpile area. Mr. Bishop trammed the Michigan loader to the pit area between 7:15 and 7:30 a.m. Mr. Bishop loaded the two trucks in the pit area between 7:30 and 8 a.m. and began cleaning rocks and dirt off the top of the coal seam at about 8 a.m. About 9 a.m. a sixth truck driven by Mr. Billy Cool arrived in the pit area. Although Mr. Bishop could have loaded Mr. Cool's truck with the half-load of coal at the stockpile plus the half-truckload of coal in the pit area or by using coal which had already been uncovered between 8 and 9 a.m., Mr. Bishop continued to remove overburden from the coal seam instead of loading Mr. Cool's truck.

5. While Mr. Cool was waiting to get his truck loaded, he ate a sandwich and some other food, cleaned his windshield and lights, and went to the bathroom. Since truck drivers get paid for the number of loads hauled, rather than for the number of hours worked, Mr. Cool grew impatient about further waiting and decided to go home. As he was passing the mine office on his way home in his truck, he saw Mr. David Childers near the mine office and stopped to complain about having to wait from 15 minutes to 30 minutes to get a load of coal. Mr. Childers, who is vice-president, part owner, and foreman, persuaded Mr. Cool to return to the pit and asked Mr. Michael Adkins to load Mr. Cool's truck.

6. Mr. Childers then drove down to the pit in his truck and asked Mr. Bishop why he had not promptly loaded Mr. Cool's truck. Mr. Bishop's sole excuse for not loading the truck was that he was still cleaning

off coal as he had been instructed to do it and that he couldn't have loaded the truck so as to satisfy Mr. Childers' instructions any sooner than he had done it.

Mr. Childers saw that Mr. Bishop had already cleaned off about ten loads or 250 tons of coal and couldn't understand why Mr. Bishop had not promptly loaded Mr. Cool's truck. Mr. Childers had had other complaints from truck drivers who were upset about having to wait for coal to be loaded. Mr. Childers had previously emphasized to Mr. Bishop the importance of loading trucks promptly. Therefore, Mr. Childers told Mr. Bishop that he was discharging Mr. Bishop at that time, which was about 9:30 a.m., for failure to load coal trucks promptly.

7. Since Mr. Bishop had parked his truck that morning at a place about ten miles from the mine site and had ridden to the mine with another employee, it was necessary for Mr. Childers to use his own truck to transport Mr. Bishop to the place where Mr. Bishop's truck had been left.

8. Counsel for MSHA on May 18, 1979, called Mr. Childers and advised him that he was shortly expecting to file a statement with the Commission which would result in the issuance of an order of temporary reinstatement which would require respondent to reinstate Mr. Bishop to his position as operator of the end loader. At that time MSHA's counsel asked Mr. Childers if he would voluntarily reinstate Mr. Bishop so as to make it unnecessary for MSHA's counsel to ask for an order of temporary reinstatement. Mr. Childers' response was that he did not intend to reemploy Mr. Bishop voluntarily, but Mr. Childers stated that he had partners whose opinions he would like to obtain before giving counsel a final answer. Therefore, Mr. Childers stated that he would provide MSHA's counsel with a final answer on Monday, May 21, 1979. When MSHA's counsel thereafter called Mr. Childers on May 21, Mr. Childers stated that respondent would not voluntarily reemploy Mr. Bishop.

9. Chief Administrative Law Judge Broderick issued on June 19, 1979, an order of temporary reinstatement. Respondent did not comply with the order on June 22, 1979, when Mr. Bishop appeared at respondent's mine. An MSHA inspector then issued on June 22, 1979, Citation No. 713218 alleging a violation of section 105(c) of the Act because of respondent's failure to reinstate Mr. Bishop on June 22, 1979. Citation No. 713218 gave respondent until June 25, 1979, within which to comply with the order of temporary reinstatement. On June 25, 1979, Mr. Bishop and the inspector returned to respondent's mine. When respondent still declined to reemploy Mr. Bishop, the inspector issued on June 25, 1979, an order of withdrawal for failure of respondent to abate Citation No. 713218 within the time provided. As indicated in the first part of this decision, an action in the Sixth Circuit concerning the order of temporary reinstatement was dismissed as moot after Mr. Bishop found a job

elsewhere and requested that the order of temporary reinstatement be dissolved because Mr. Bishop no longer wished to be reemployed at respondent's mine.

10. Counsel for MSHA filed on February 14, 1980, in Docket No. KENT 80-98 a Petition for Assessment of Civil Penalty seeking to have a penalty assessed for the violation of section 105(c) alleged in Citation No. 713218 described in Finding No. 9 above. By order issued February 28, 1980, I granted the motion of MSHA's counsel for consolidation of the Petition for Assessment of Civil Penalty for hearing and decision with the issues raised by the complain filed in Docket No. KENT 79-161-D.

11. At the commencement of the hearing on March 18, 1980, MSHA's counsel asked that I assess a penalty if I found that respondent violated section 105(c)(1) in discharging Mr. Bishop. He also asked that I assess a penalty for respondent's having laid off all men on the second shift on May 18, 1979, in order to avoid having to reinstate Mr. Bishop.

12. As Finding No. 6 above indicates, respondent did not violate section 105(c)(1) when it discharged Mr. Bishop.

13. The evidence does not support MSHA's claim that respondent violated section 105(c) when it laid off the second shift on May 18, 1979. And Mr. Piliero, MSHA's counsel, agreed that was a fact this morning in his summation. The evidence shows that respondent was having difficulty in selling its coal as fast as it was being produced and that respondent decreased its work force to achieve economy in its operations. The decision to reduce the number of employees at respondent's mine had been made 2 weeks prior to May 18, 1979, at one of respondent's weekly meetings and that reduction in force was made effective on May 18, 1979.

14. The claims made by respondent to explain its reduction in employees are supported by the production data submitted in response to MSHA's questions. During the four quarters of the year 1978, respondent employed from 21 to 23 persons and produced from 10,378 tons in the first quarter of that year to 38,421 tons in the second quarter of that year. The large production shown in the second quarter was accompanied by a much larger number of hours worked than were reported in any other quarter. During the year 1979, respondent produced 27,922 tons in the first quarter and 24,954 tons in the second quarter with 21 employees. The third and fourth quarters show that the coal production dropped to 21,013 tons in the third quarter and 20,867 tons in the fourth quarter after respondent had reduced its number of employees to 13 and 11, respectively.

15. Respondent's president testified that when two 9-hour production shifts are worked, more equipment is down for repairs than when one shift is worked and that

production time is wasted by the time lost in overlapping of the two shifts of miners leaving and arriving at the mine site and that a one-shift operation is more economical from a cost standpoint that a two-shift operation.

16. Respondent's president testified that the choice of the reduction in employees was made on the basis of both seniority and efficiency and for that reason some of the men retained would have had less seniority than Mr. Bishop if he had still been working for respondent on May 18, 1979, when the reduction in personnel occurred. Therefore, respondent said that Mr. Bishop would have been laid off on May 18, 1979, if he had still been working for respondent when that reduction in force occurred. For example, the elimination of the miners working on the night shift required the transfer of the night -shift supervisor to the day shift. The need to retain that valuable employee required the subsequent layoff of a person who had been working on the day shift.

17. On an annual basis respondent's No. 4 Mine produced 94,756 tons in 1979 according to Exhibit C or 101,623 tons annually if one uses the figure in the Assessment Order in Docket No. KENT 80-98. Assuming that the mine produced coal on an average of 250 days each year, the daily average tonnage would have ranged from 379 tons to 406 tons per day.

That concludes my findings.

There are several reasons for the credibility determinations which have resulted in my making findings which support my conclusion that Mr. Bishop was discharged for reasons other than the protected activities set forth in section 105(c)(1) of the Act. I am going to list the aspects of the testimony which have caused me to rule in favor of respondent. The items I shall discuss are listed as they occur to me and not with the intention of giving any item as being more important than another.

Mr. Bickford, who was responsible for repairing the brakes on the Michigan end loader stated that when he examined the alcohol container at the end of the day on February 14, 1979, the day of Mr. Bishop's discharge, he found that the container was empty. Mr. Bishop agreed that it was his responsibility to check the alcohol level in that container from time to time and yet he admitted that he had not checked the container on February 14 or for several days prior to February 14. Mr. Bishop agreed that it was important and necessary to drain water out of the air tanks to prevent freezing. Mr. Bishop also was aware of the importance of the alcohol in preventing freezing. He contributed to the malfunctioning of the brakes by not properly doing the maintenance work for which he was responsible.

Mr. Bishop's claim that the brake pedal remained flat on the floor board did not withstand cross-examination. Mr. Bickford testified that the brake pedal was held up by a spring and that it would not remain in a depressed

condition even if there was no air pressure at a given time. When Mr. Bishop was cross-examined

about that claim, he did not deny that the spring existed but contended that the brake pedal sometimes would stick. When he was asked if he tried to raise the pedal to see if it was stuck, he said he did raise it, but it fell back to the floor. The logical conclusion from those admissions is that the brake pedal was not stuck in the down position or it would have remained upright when pulled up manually.

Mr. Bickford testified that the brakes on the end loader would not work on February 14 because of a freezing problem and that another mechanic corrected the problem by making a bypass around the frozen area. Mr. Bickford did not recall having been working on a water pump as alleged by Mr. Bishop on February 14 when Mr. Bishop asked him to check the brakes on the end loader and Mr. Bickford said that his answer to Mr. Bishop about repairing brakes on the end loader would not have been given in terms of what Mr. Childers might assign for him to do on that day.

Mr. Cool insisted that there was enough coal already prepared to provide a load for his truck and that he would not have driven away after waiting from 15 to 30 minutes to be loaded if the only coal available had still been intact in the coal seam and unavailable for immediate moving. Even though Mr. Cool's testimony may be motivated by self-interest, there is no way to explain Mr. Cool's displeasure at having to wait for a load of coal unless Mr. Bishop was taking an unreasonable amount of time in loading Mr. Cool's truck. Mr. Cool had been driving trucks for 17 years and said that he generally obtained a load of coal within four or five minutes. Even though the brakes were bad on the end loader on February 14, Mr. Bishop had loaded three truck-loads at the beginning of his shift in a period of 15 minutes. There is nothing in the record to show that Mr. Cool's complaint about undue waiting was without merit or justification.

Mr. Bishop does not deny that several months before his discharge he turned over a truck hauling rock in order to avoid hitting a road grader driven by Mr. Childers. On that occasion Mr. Bishop claimed the truck's brakes were defective, but Mr. Childers claims they were in operating condition immediately after the truck was pulled back upon its wheels. Even though some rock fell from the truck to the place where Mr. Childers would have been sitting if he had not jumped out of the grader before the rocks landed, Mr. Bishop says that Mr. Childers did not become upset over the incident. Mr. Childers' ability to remain calm was demonstrated by the way he conducted himself in that instance and I believe his forebearance in that case shows that he is not a person who would be likely to discharge an employee who simply reports defective brakes on two occasions. In other words, we do not have in this case

a long list of alleged safety complaints or evidence indicating that Mr. Childers was indifferent about safety matters.

Mr. Bishop's complaint filed with the Mine Safety and Health Administration was introduced as Exhibit 1 in this proceeding. Mr. Bishop states in that complaint, "I wish to make a discrimination complaint against Mountain Top Fuel. I was fired by David Childers (the boss) when I told him I couldn't work as fast as he ordered me to because the end loader I was running didn't have brakes on it." Mr. Bishop's own testimony in this proceeding does not support the wording of his complaint.

There is no evidence in the record to cast any doubt on Mr. Childers' claim that he drove the Webco truck to test its brakes after Mr. Bishop had stated that its brakes were defective. It seems quite credible that Mr. Childers would have made, as he claimed, a similar effort to check the brakes on the end loader when Mr. Bishop complained about its brakes being defective about five days before Mr. Bishop was discharged. At that time Mr. Childers says he instructed Mr. Bickford to repair the brakes and that Mr. Bickford reported to him that the brakes had been repaired. Therefore, Mr. Childers assumed that the brakes were operative on February 14, 1979, when he discharged Mr. Bishop because Mr. Bishop did not mention the defective brakes to Mr. Childers at the time Mr. Childers asked for an explanation of Mr. Bishop's failure to load Mr. Cool's truck. One of the least convincing aspects of Mr. Bishop's case has always been that he would fail to mention the defective brakes to Mr. Childers on February 14 until after Mr. Childers had discharged him and he was being driven by Mr. Childers down the mountain in Mr. Childers' truck.

MSHA's counsel says that Mr. Bishop's having asked Mr. Bickford to fix the brakes on February 14 is sufficient to show that Mr. Bishop was discharged for having engaged in a protected activity under section 105(c)(1), that is, for having made a safety-related complaint. I do not think the facts in this case support that argument. While it may be said for some purposes that knowledge of an agent may be attributed to the principal, there was a time element here which cannot be satisfied by that argument. Neither Mr. Bishop nor any other witness has been able to show that Mr. Childers knew of a defective brake claim on February 14 when Mr. Bishop was discharged.

Before I can make a finding that Mr. Bishop was discharged for having made a safety-related complaint, I must be able to cite evidence clearly showing that there was a pattern of activity by the complainant which so annoyed the respondent that the respondent dishcarged the complainant for that pattern of conduct rather than for the reason respondent gave for discharging the complainant. Two complaints about defective brakes to Mr. Childers a few days before the

discharge simply are insufficient to show that Mr. Childers really discharged Mr. Bishop for complaining about brakes rather than for failing to load coal trucks promptly.

The next part of this decision will be related to Docket No. KENT 80-98.

Docket No. KENT 80-98

I have already made findings regarding the civil penalty issues insofar as the finding of occurrence of a violation is involved. Finding No. 9 above shows that respondent refused to comply with the order of temporary reinstatement while it was in force. Section 105(c)(3) of the Act provides that, "Violations by an person of paragraph (1) shall be subject to the provisions of Sections 108 and 110(a)." Paragraph (1) referred to in the foregoing quotation, among other things, prohibits any person from interfering with the exercise of a miner's statutory rights under the Act. Respondent violated paragraph (1) in refusing to comply with the order of temporary reinstatement. Section 110(a) requires that a civil penalty be assessed for a violation of any provision of the Act. Section 110(i) requires that penalties be assessed after giving consideration to the six criteria set forth in section 110(i).

The first criterion is respondent's history of previous violations. It has been stipulated by MSHA's counsel that respondent has not previously violated section 105(c) of the Act. Therefore, I find that there is no history of previous violations to be considered in this instance.

The second criterion is the appropriateness of the penalty to the size of respondent's business. As indicated in Finding Nos. 14 and 17 above, respondent's No. 4 Mine once employed a toal of 23 miners and now employs 11 miners to produce about 379 tons of coal per day. On the basis of those data, I find that respondent operates a small mine and that any penalty assessed should be in a low range of magnitude insofar as the size of respondent's business is concerned.

The third criterion is the question of whether payment of penalties would cause respondent to discontinue in business. Respondent has introduced no financial data to show that payment of penalties would have an adverse effect on its ability to continue in business. In the absence of any evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business.

The fourth criterion is whether the operator was negligent in violating the Act. The evidence shows that respondent deliberately refused to reinstate the complainant. In the preliminary hearing on the issue of whether the complaint was frivolous, respondent stated that it was paying into an escrow account the

money it would otherwise have paid Mr. Bishop if he had not

been discharged on February 14, 1979. I agree with Chief Judge Broderick's statement at the preliminary hearing that payment of wages into an escrow account will not satisfy the purpose of the temporary reinstatement provisions of the Act because the purpose of temporary reinstatement is to provide the discharged miner with income while the merits of his complaint are being determined. It may seem harsh to assess a penalty in a case in which respondent's position has been upheld on the merits, but Congress has already balanced those considerations and has provided for temporary reinstatement. The deliberate refusal to comply with the order of temporary reinstatement and the refusal to abate Citation No. 713218 is tantamount to gross negligence because management knew they were obligated to comply with the order but steadfastly refused to do so.

The fifth criterion is the question of the gravity of the violation. MSHA's counsel has stipulated that respondent's refusal to reinstate Mr. Bishop did not expose any miners to the likelihood of injury. If the criterion of gravity is intended to refer only to the physical exposure to danger, I believe that the criterion of gravity is inapplicable in this instance. On the other hand, if gravity is interpreted from the standpoint of the loss of a family's income by the operator's refusal to reinstate a complainant, the gravity of the violation could be considered as being a serious one. Also, if one thinks of gravity from the standpoint of the damage done to the miner's faith in the Act if the Commission's orders can be ignored with impunity, the violation would be serious from that viewpoint. I think that all aspects of the violation have to be considered and I find that the violation was serious under the aspects I have just explained.

Finally, the sixth criterion is the demonstrated good faith of respondent in attempting to achieve rapid compliance after notification of the violation. The evidence shows that respondent exerted no effort to comply with the order of temporary reinstatement after Citation No. 713218 was issued. It was respondent's refusal to attempt to achieve compliance which caused the inspector to issued Withdrawal Order No. 713219. Since that order was labeled by the inspector as a "non-area closure order," it had no adverse effects upon respondent's coal-producing activities.

My consideration of the six criteria would require assessment of a maximum penalty of $10,000.00 except for the important fact that respondent is a small company and has no prior history of violating section 105(c). Taking into consideration the other matters I have discussed above, requires assessment of a penalty of $1,500.00

ULTIMATE FINDINGS AND CONCLUSIONS

(1) Complainant failed to prove that he was discharged on February 14, 1979, because of any activity protected under section 105(c)(1) of the Act; therefore, the complaint filed in Docket No. KENT 79-161-D should be dismissed.

(2) Respondent violated section 105(c) of the Act by refusing to comply with the order of temporary reinstatement issued June 19, 1979, as confirmed on July 3, 1979, and respondent should be assessed a penalty of $1,500.00 for that violation.

(3) Respondent, as the operator of the No. 4 Surface Mine, is subject to the Act and to the Regulations promulated thereunder.

WHEREFORE, it is ordered:

(A) The complaint filed on August 7, 1979, in Docket No. KENT 79-161-D is dismissed.

(B) Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $1,500.00 for the violation of the Act referred to in paragraph (2) above.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)