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ELIAS MOSES v. WHITLEY DEVELOPMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ELIAS MOSES, COMPLAINANT	Complaint of Discharge, Discrimination, or Interference
v.	
	Docket No. KENT 79-366-D
WHITLEY DEVELOPMENT CORPORATION, RESPONDENT	Becks Creek Surface Mine

Appearances: William E. Hensley, Esq., Corbin, Kentucky, for Complainant
David Patrick, Esq., Harrodsburg, Kentucky, for Respondent.

DECISION

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 5, 1980, as amended by an order issued September 24, 1980, a hearing in the above-entitled proceeding was held on November 18, 1980, in Barbourville, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3).

Completion of the Record

At the conclusion of the hearing, I requested that counsel for the parties provide me with supplemental information. It was agreed that the supplemental data would be marked as exhibits and would be received in evidence at the time I prepared my decision in this proceeding. The requested materials were submitted by counsel and are marked for identification as follows:

There is marked for identification as Exhibit A a 35-page compilation of repair bills pertaining to Caterpillar Tractor Serial No. 66A7485 for the year 1976.

There is marked for identification as Exhibit B a seven-page compilation of repair bills for Caterpillar Tractor Serial No. 66A11561 for the year 1977.

There is marked for identification as Exhibit C a repair bill for Caterpillar Tractor Serial No. 90V2938 for the year 1977.

There is marked for identification as Exhibit D a 10-page compilation of repair bills for Caterpillar Tractor Serial No. 66A7485 for the year 1977.

There is marked for identification as Exhibit E a 21-page compilation of repair bills for Caterpillar Tractor Serial Nos. 90V2938 and 66A7485 for the year 1978.

There is marked for identification as Exhibit F a 34-page compilation of repair bills for Caterpillar Tractor Serial Nos. 66A11561, 66A7485, and 90V2938 for the year 1979.

There is marked for identification as Exhibit G a one-page accident report regarding the turning over of a D-6 Caterpillar on June 19, 1979, at Whitley Development Corporation's Becks Creek Mine.

There is marked for identification as Exhibit H a one-page copy of payroll data regarding Elias Moses for the period from May 9, 1979, to June 28, 1979.

Pursuant to stipulation of counsel, Exhibits A through H are received in evidence (Tr. 284).

Issues

The evidence in this case raises some novel issues concerning what constitutes violations of section 105(c)(1) of the Act. Those issues are listed below:

(1) Was complainant actually discharged on July 3, 1979?

(2) Assuming complainant was discharged on July 3, 1979, and assuming further that complainant was not engaged in an activity protected under section 105(c)(1) of the Act, can respondent, nevertheless, be found to have violated section 105(c)(1) if the evidence supports a conclusion that respondent discharged complainant because respondent thought complainant had performed an act which is protected by section 105(c)(1) of the Act?

(3) Is it a violation of section 105(c)(1) of the Act for respondent to harass an employee and upset his peace of mind because respondent suspects that the employee has performed an act which the employee had a right to perform under the Act but did not perform?

(4) Assuming that respondent did not discharge complainant as alleged in his Complaint, is it a violation of section 105(c)(1) for respondent to refuse to allow complainant to continue working when the sole reason for the refusal is the fact that complainant filed a complaint under section 105(c) of the Act?

Counsel for both parties waived the filing of briefs (Tr. 285).

Findings of Fact

My decision in this proceeding will be based on the findings

of fact set forth below:

1. Whitley Development Corporation, the respondent in this proceeding, operates two strip mines which are about three-fourths of a mile apart. At the present time, the corporation produces about 107,000 tons of coal annually and employs a total of approximately 37 persons at both job sites and at its tipple (Tr. 280-281). The corporation is owned by Pascual White and his wife (Tr. 242).

2. The complainant in this proceeding, Elias Moses, worked for about 20 years in a steel mill in Ohio. Moses had some time off from the steel mill in 1970 and came to Kentucky where he obtained a job working as a laborer for Pascual White. When it came time for Moses to return to the steel mill in Ohio, he tried to obtain an extension of his leave, but it was refused, so he returned to work in the mill for the remainder of the year. The following summer, he returned to Kentucky and eventually worked a total of about 6 years, or from about 1973 to 1979, as an operator of bulldozers (Tr. 14; 19).

3. Moses applied with Pascual White, or Whitley Development Corporation, for a job as a dozer operator. After Moses had asked for the job, Ben Bunch, an MSHA inspector who is Moses' brother-in-law, asked White to hire Moses. Inasmuch as Bunch was the inspector who was assigned by MSHA to inspect White's mines, White said that it was expedient to hire Moses (Tr. 27; 243).

4. White instructed Moses to report for work to Richard McClure who was White's mine foreman and mechanic at two strip mines, known as the Red Bird job and the Becks Creek job (Tr. 40-41; 184). Moses reported for work on Wednesday, May 9, 1979, as instructed, and McClure assigned Moses the job of operating a D-9 Caterpillar Tractor at the Becks Creek job. Moses was told to prepare a bench for Bob Durham, the shot firer, and to grade the roads which were being used by trucks for hauling coal. McClure then left the Becks Creek job and traveled to the Red Bird job (Tr. 185). After Moses had operated the dozer for about 2 hours, two Kentucky mine inspectors appeared at the Becks Creek job. They inspected the Caterpillar dozer Moses was operating and found that it had a hole in the fuel tank, that oil was dripping onto a hot engine, that the dozer had no brakes, and that the dozer was not equipped with a fire extinguisher. The Kentucky inspectors told Moses to stop operating the dozer until it had been repaired (Tr. 42-43; 216-217). After the Kentucky inspectors stopped Moses from operating the dozer, Moses was assigned to assist McClure in doing some mechanical work (Tr. 219).

5. On June 19, 1979, after Moses had worked at the Becks Creek job for about 6 weeks, Moses heard that a D-6 Caterpillar Tractor had been overturned by its operator, Andy Raines, who was not injured in the accident (Tr. 8; 56; 185-186). On June 20, 1979, the day after the D-6 had turned over, Moses was operating a dozer and observed a helicopter land at the mine. From his location, Moses could not see what the people in the helicopter did, but he saw the helicopter leave (Tr. 9; 59). Afterwards, Moses learned that the helicopter had brought MSHA inspectors to

the mine site to investigate the overturning of the D-6 Caterpillar (Tr. 59-60). After the inspectors had left, McClure asked Moses if he was the person who reported the D-6 accident to

MSHA (Tr. 60; 187). Moses replied that he had not reported it. Although McClure testified that he believed Moses when Moses stated that he had not reported the accident (Tr. 187), Moses claims that McClure mentioned the reporting of the accident to MSHA on at least two additional occasions (Tr. 62). Moses claims that McClure accused him of calling his brother-in-law, Ben Bunch, who is an MSHA inspector (Tr. 10; 63-64). Moses was incensed about being accused of calling the inspectors and stated that he would make McClure prove the allegation that Moses had reported the accident to MSHA (Tr. 64).

6. At the end of June 1979, all three of respondent's D-9 Caterpillars were out of order and one of the D-9 Caterpillars was sent to Whayne Supply Company for extensive repairs. The other two D-9's were being repaired also and Moses was told that he could remain at home for a few days and that he would be called back to work when the dozers had been repaired (Tr. 64; 192).

7. On July 2, 1979, before the repairs on the D-9's had been completed, Moses went to respondent's repair shop and office in Williamsburg, Kentucky, to pick up his pay check. Moses went into the repair shop, where respondent's owner, Pascual White, was working, and asked White if he had accused Moses of reporting the D-6 accident to MSHA. White stated that he believed Moses had reported the accident and exclaimed, "and by God, you did call them" (Tr. 68). Moses then told White that he would make White prove that allegation. White told Moses that if he did get his brother-in-law, Ben Bunch, the MSHA inspector, White would see to it that Moses did not work around there any more (Tr. 69).

8. McClure, White's foreman, was also in the shop at the time. Moses felt that White had come so close to firing him, that he believed it necessary to ask McClure if he (Moses) still had a job. McClure told Moses that his job was still available when the D-9 had been returned from the supply shop (Tr. 188-189).

9. Dorothy Moses, complainant's wife, was sitting in Moses' truck when her husband went to get his check. She became aware of loud voices coming from the repair shop, and decided that she should go to the shop and ask her husband to come home so as to stop the heated argument which was in progress. She testified that when she reached the door of the shop, she heard White say to her husband, "You don't work for them damn inspectors; I write your checks" (Tr. 170). She heard her husband say that he would make White prove his claim that Moses had reported the accident. She further stated that White told Moses to "Go ahead and get that damn Ben Bunch" (Tr. 171). Her husband retorted that he would go higher than Ben Bunch. In reply to her husband's statement, White said, "You'll not work around here no more. I'll see to that" (Tr. 117).

10. White's version of his encounter with Moses on July 2 is different from Moses' version. White claims that Moses came into the shop and stated that he had heard that White had accused him of reporting the D-6 accident to MSHA. White claims that he

told Moses that he did not care what Moses had heard (Tr. 250). White also claims that he told Moses, "Look, if I was you,

I'd run my own business, because you're not even working here today" (Tr. 251). White denies that he told Moses he would see to it that Moses did not work around there any more. White claims that he did tell Moses "If you want to stay around here, run your own damn business" (Tr. 251). McClure, White's foreman, who was present in the shop, denies that White said any of the things attributed to White by Moses and his wife (Tr. 189; 233).

11. Although Moses had been told by McClure on July 2, at the time of Moses' argument with White in the repair shop, that Moses still had a job when the D-9 Caterpillar had been returned to the job site, Moses reported to the Becks Creek job for work on July 3 because he still had the feeling that White had actually discharged him during the heated conversation in the repair shop on July 2 and Moses wanted to find out for certain on July 3 whether he still had a job. An employee named Bob Durham was in charge of drilling holes and setting off explosives on the morning of July 3. Durham asked McClure to assign someone to fill holes with explosives. McClure knew that Moses had performed that kind of work before and claims that he said to Durham that Moses was available and ought to make a good man for filling holes. Moses claims that McClure looked at him and said that Moses could help Durham fill holes because he was not good for anything else. Moses thereupon claims to have stated, in effect, that he might not be good for anything else, but that he was not a rat who would report accidents to MSHA (Tr. 12; 70).

12. Both McClure and Moses agree that some profane or other objectionable language was used. Both men also agree that McClure said something to the effect that if Moses was not going to work, it would be better for Moses to get in his truck and return home. Moses claims that McClure told him to get off the hill and Moses also contends that when he stopped to talk to Andy Raines and Bob Durham for the purpose of trying to convince them that he had not reported the D-6 accident to MSHA, McClure told him twice more to get off the hill. Both men agree that the entire conversation took place in the neighborhood of 7 a.m. (Tr. 12; 75-76; 190-191).

13. The primary difference between Moses' and McClure's interpretation of the comments made on the morning of July 3 is that Moses claims that McClure used words which, in Moses' mind, clearly meant that McClure had fired him (Tr. 103-104). On the other hand, McClure claims that he did not use a term which meant that he had discharged Moses and that, in fact, it was not his intention to discharge Moses (Tr. 194). McClure claims that if Moses had gone ahead and filled holes, Moses would have been allowed to work on July 3 (Tr. 194), but that since Moses declined to do the only work available, McClure had no choice but to tell Moses to go to the house because there was no work for Moses to do until the D-9 had been returned from the repair shop (Tr. 206; 236).

14. McClure testified that the D-9 was returned from the repair shop about Wednesday of the week following Moses' claimed discharge, that is, July 11, and Moses was not called to come

back to work because by then respondent's management had received a letter stating that Moses had filed a complaint alleging that he had been discharged in violation of the Act. McClure says that they did not call Moses back to work after learning that

the complaint had been filed because they just did not follow the "right procedures." In fact, McClure stated, "I think we could work something out--if he hadn't filed the complaint" (Tr. 241).

15. After Moses' heated conversation with White on July 2, 1979, about the allegations that Moses had reported the D-6 accident to MSHA, Moses went to the home of Kenneth T. Howard, an MSHA supervisor of inspectors, and told Howard about his concern over having been charged with reporting the D-6 accident to MSHA (Tr. 61). Moses asked Howard to "clear" his name and Howard agreed to make a trip to discuss the matter with White and advise White that the D-6 accident was reported to MSHA by a woman whose name would have to be kept confidential (Tr. 69; 116).

16. On the morning of July 3, Howard went to the Becks Creek job to report to respondent that Moses was not the person who had reported the D-6 accident to MSHA. White was out of town and Howard talked to McClure. Howard told McClure that Moses had been to his home the night before and had asked Howard to "clear" his name about the identity of the person who had reported the D-6 accident. Howard told McClure that Moses had not reported the accident and Moses feared that he would be discharged that morning when he came to work. McClure told Howard that he had already fired Moses. Howard then explained to McClure that he might want to discuss the matter with White so that they could reconsider Moses' discharge in light of the discrimination provisions in the Act because Howard was of the opinion that Moses would file a discrimination complaint if he should be discharged (Tr. 116-118).

17. Howard also testified at the hearing that it is contrary to MSHA's policy for inspectors to examine mines where the inspector's relatives are working and that Inspector Ben Bunch, Moses' brother-in-law, would not have been sent to investigate the D-6 accident with two other inspectors if MSHA had known that Bunch's brother-in-law was working at the Becks Creek Mine (Tr. 124).

18. White claims that he soon realized after hiring Moses that Moses was not a proficient dozer operator. White then belatedly checked with management at the K-Nab Company, where Moses had previously operated a dozer, and learned that Moses was considered to be a "cowboy" on the equipment, that is, handled the equipment in a rough manner (Tr. 244). White felt obligated, however, to keep Moses on his payroll, even though Moses allegedly damaged the dozers by rough treatment, because White wanted to keep in the good graces of Moses' brother-in-law, Ben Bunch, who was an MSHA inspector (Tr. 252; 255). Also, White said that he kept Moses as an employee because he hoped to be able to switch Moses back to doing manual labor, such as loading holes with explosives, even though he knew he would have to pay Moses the same salary he was paying Moses as a dozer operator (Tr. 252; 258; 280). White inconsistently stated that it takes 2 or 3 years to learn to operate a dozer properly and that although he himself has been operating dozers for 21 years, good dozer operators still show him how to do new things with a dozer (Tr.

258).

19. James Davis appeared as a witness at the hearing in response to a subpoena. He now works for Sterling-Garrett Coal Company as a back-dump

operator, but in May, June, and July 1979, he worked for Pascual White as a serviceman on all of the equipment used at all of White's jobs (Tr. 128-129; 140). Davis said that he saw Moses at least once every day and did not see Moses abusing or misusing the equipment (Tr. 131; 145). In Davis' opinion, the dozers were old and could be expected to give mechanical problems. Davis saw nothing about the equipment malfunctioning which could be attributed to Moses' operation of the equipment (Tr. 134; 138). Davis said that about 2 days after the D-6 accident had occurred, McClure, the foreman, stated that he believed that either Davis or Moses had reported the accident to MSHA. Davis denied that he had called the inspectors and stated that if he were going to call them, he would do so to report the defective brakes on the truck which he was driving (Tr. 133). Davis said that sometimes minor problems would occur on the dozers, but the mechanic would not be able to repair them right away. They would continue to be used and the minor problems would result in major breakdowns from lack of attention (Tr. 146).

20. Bobby G. Durham, at the time of the hearing in November 1980, was working for J. L. White who is Pascual White's brother. Durham appeared as a witness in response to a subpoena (Tr. 158). Durham said that he would not lie to favor either Moses or Pascual White (Tr. 164). Durham was working for Pascual White as a shot firer before and after the time that Moses worked for White (Tr. 150; 158). Durham worked with Moses and showed Moses where he wanted a bench made just as he does for other operators (Tr. 151). In Durham's opinion, Moses was an average dozer operator and Durham did not think that Moses was a "cowboy" on the equipment (Tr. 154). Durham said that McClure asked him, after the D-6 accident, if Durham thought Moses was telling the truth when Moses denied having called the inspectors. Durham told McClure that he believed Moses would tell the truth about the matter and that Durham believed Moses when he said that he had not reported the accident to MSHA. Durham testified that McClure replied to him that he also felt Moses had told the truth (Tr. 155).

21. Durham was present on the morning that McClure told Moses to get off the hill and Durham said that he heard McClure tell Moses that once, if not twice (Tr. 167). Durham thinks that McClure would have allowed Moses to work on July 3 if Moses had been willing to fill holes (Tr. 168). Durham did not hear all that was said between Moses and McClure on July 3 and stated that there may have been more to their conversation than he was aware of. Although Durham did not hear McClure tell Moses not to return, Durham said that McClure might have done so (Tr. 160-161). Durham stopped working for Pascual White because he was not given the help that he needed. Durham said that men were at the mine site who could have helped him fill holes, but they were not allowed to do so (Tr. 159).

The Question of Whether a Discharge Occurred

Before a determination can be made in this proceeding with respect to whether respondent violated section 105(c)(1) of the

Act, a decision must first be made as to whether Moses was actually discharged by respondent. I conclude from the preponderance of the evidence that Moses was discharged. Several aspects of the testimony support that finding.

As indicated in Finding Nos. 2 and 3 above, Moses had worked for Pascual White in 1970 as a laborer. Moses thereafter worked for other companies and became a bulldozer operator. In 1979, Moses was unemployed and asked White for a job as a dozer operator. After Moses had asked for the job, White received a request from Moses' brother-in-law, Ben Bunch, who was, and still is, an MSHA inspector, to the effect that Bunch would appreciate it if White could find a job for Moses. White said that he hired Moses as a dozer operator, without first checking into his ability to operate a dozer, because Bunch's duties at that time included inspection of White's mines.

White's testimony shows that he is generally sensitive to pressures brought by MSHA upon the way he conducts his business (Tr. 242; 252; 255; 260; 270). In such circumstances, there is reason to believe that White would have resented the reporting of an accident at his job site to MSHA. McClure, White's foreman, admits that he tried to find out the identity of the person who reported the D-6 accident to MSHA and that, at least once, he asked Moses if he was the person who reported the accident (Finding No. 5, supra). McClure also admits having discussed the reporting of the accident with another employee named Durham and that he discussed the reporting of the accident with White (Tr. 231-232). There can be no doubt, therefore, but that White and McClure were very interested in determining the identity of the person who reported the accident. The fact that Moses had been hired because of subtle pressure placed upon White by Moses' brother-in-law, who was an MSHA inspector, would have been likely to cause White and McClure to suspect Moses as the one who had reported the accident although the testimony of Howard, an MSHA supervisory inspector, shows beyond all doubt that Moses did not report the D-6 accident to MSHA (Finding Nos. 15 and 16, supra).

Moses' sensitivity about being accused of reporting the D-6 accident can be explained on two bases. In the first place, Moses seems to have had a very strong desire to be liked by his fellow employees because he went to great lengths to convince them that he was not the one who reported the accident to MSHA. Moses continually referred in his testimony to his dislike for being considered a traitor who would report his employer and fellow employees to MSHA (Finding Nos. 5, 11, and 12, supra). Secondly, even if McClure did not actually say to Moses that Moses had reported the accident to his brother-in-law, Moses seems to have been acutely conscious of the relationship and over-reacted to the suggestion that he had reported the accident to MSHA.

White's testimony shows that he was displeased with Moses in a number of ways. As indicated above, White said that he had hired Moses because of pressure from an MSHA inspector; White found that Moses was, at best, an average dozer operator; White suspected Moses as being a person who might report violations of safety standards to MSHA; White was disappointed when Moses did not follow through with a threat to resign on one occasion (Tr. 248); and White classified Moses as having the worst attitude toward his employer of any person he had hired in his 21 years of

experience (Tr. 260). In such circumstances, there is no reason to doubt but that White had made it clear to his foreman, McClure, that McClure was free to discharge Moses any time that an opportunity presented itself.

McClure recalls his final words to Moses on July 3, 1979, the date of Moses' claimed discharge, to be, "If you're going to work, let's go to work. But if not, you'd just as well get in your truck, and go to the house" (Tr. 236). Moses claims that McClure stated, "Get off the hill; I've got nothing for you" (Tr. 12). The MSHA supervisory inspector unequivocally stated that McClure told him on the morning of July 3 that he had already fired Moses (Tr. 117). McClure stated at the hearing that he told Howard that he had sent Moses "to the house" and that Howard might have interpreted that statement to be equivalent to a statement that he had discharged or fired Moses, but that he did not intend for Howard to interpret his statement in that manner (Tr. 206).

Despite McClure's denial of an intention to discharge Moses, it is a fact that the phrase "send to the house" is frequently used in the coal fields as being equivalent to firing or discharging a person. For example, when Pascual White was testifying, he stated that one of his dozer operators once admitted to White that he had negligently failed to notice that the dozer was running low on oil and, as a result of that negligence, the engine was burned out. The dozer operator was aware of the fact that new engines cost a lot of money, so he stated to White, "I just forgot to check the oil, Pat. I don't blame you if you send me to the house" (Tr. 265). White claims that he told the man that he could make whatever decision he wanted to about quitting and the man "never did show back up to work" (Tr. 265).

Howard, the supervisory inspector, who testified that McClure told him on July 3, 1979, that he had fired Moses, is not the type of person who jumps to unwarranted conclusions. Howard testified that he explained to McClure the provisions in the Act regarding the filing of discrimination complaints and Howard stated that McClure said he did not care what Moses filed. It is highly unlikely that McClure would have listened to a detailed discussion about the filing of discrimination complaints pertaining to unlawful discharges without explaining to Howard that Howard had misunderstood him if, in fact, McClure had not intended for his remarks to Moses on July 3 to be interpreted as words of discharge (Tr. 118).

I believe that the discussion above shows that the preponderance of the evidence supports a finding that Moses was discharged on July 3, 1979, as alleged in Moses' Complaint filed in this proceeding.

The Question of Whether a Violation of Section 105(c)(1) Occurred

Section 105(c)(1) of the Act reads as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in

any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the

> operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The language of section 105(c)(1) shows that an operator may violate that section by discharging, discriminating against, or otherwise interfering with the exercise of a miner of his rights under the Act. Section 103(g)(1) of the Act provides that a miner may report unsafe conditions to the Secretary (or MSHA). Section 103(g)(1) also provides that an immediate inspection of a mine may be obtained if a miner believes that a hazard exists at the mine. The section further provides that the name of the miner reporting the hazard is not to be made available to the operator of the mine.

The findings of fact in this proceeding, particularly Nos. 15 and 16, show that the complainant in this proceeding did not report to MSHA the accident which occurred at respondent's mine on June 19, 1979, but the accident was reported to MSHA, and three inspectors came to respondent's mine on June 20 to investigate the accident. Complainant in this proceeding not only abstained from reporting the accident to MSHA but, in addition to not reporting the accident, complainant went to the extreme length of asking a supervisory inspector to "clear" his name of the allegation that he was the person who reported the accident. Therefore, on first impression, it appears that respondent cannot be found to have violated section 105(c)(1) by having discharged a complainant who was engaged in the protected activity of making a safety-related complaint to MSHA.

If the Complaint in this proceeding could be brushed aside on the basis stated above, I would have no difficulty in finding that a violation of section 105(c)(1) was not proven in this proceeding. That sort of easy disposition, however, fails to consider other aspects of section 105(c)(1). As noted above, section 103(g)(1) provides that the name of the person who reports a safety hazard to MSHA is not to be revealed to the operator. That provision means that all miners should be free from harassment by their employers as to whether they did or did not report hazards to MSHA. Therefore, it was improper for respondent or its agent to ask the complainant if he had reported the accident of June 19 to MSHA. Senate Report No. 85-181, 95th Cong., 1st Sess. May 16, 1977, states at page 35:

> * * * The Committee intends that the scope of the protected activities be broadly interpreted by the

Secretary, and

> intends it to include not only the filing of complaints seeking inspection under Section [103(g)] or the participation in mine inspections under Section [103(f)] but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

Complainant's foreman agreed in his testimony that he had asked complainant if he had reported the accident to MSHA. Although the foreman claimed to have mentioned the report of the accident only once, complainant contends that his foreman referred to the reporting of the accident at least three different times. Complainant alleges that his foreman made such remarks as, "Oh, he's happy now. He called his brother-in-law" (Tr. 10). If reporting of the accident had been mentioned only once, I do not believe that the matter would have become as much of an obsession to complainant as it turned out to be. Additionally, two of respondent's other employees testified that respondent's foreman asked them if they thought complainant had reported the accident to MSHA (Finding Nos. 19 and 20, supra). Therefore, I consider complainant's testimony to be more credible than that of the foreman when it comes to the number of times that the reporting of the accident was mentioned in complainant's presence (Finding No. 5, supra).

While it was improper for complainant's brother-in-law, who was an MSHA inspector, to ask respondent's owner to hire complainant, it was thereafter just as improper for respondent's management to make unwarranted claims about complainant's alleged role in the reporting of the accident.

For the reasons given above, I find that respondent violated section 105(c)(1) of the Act when it interfered with complainant's right to anonymity under the Act with respect to whether he reported the accident of June 19, 1979, to MSHA.

Discharge on Suspicion of Reporting Accident

Other questions with respect to section 105(c)(1) are raised by the facts in this case. One of them is whether respondent violated section 105(c)(1) when it discharged complainant because it suspected that he had reported the accident to MSHA even though, in fact, he had not. Inasmuch as complainant lost his job because of arguments pertaining to respondent's persistent attempt to implicate him with reporting the accident to MSHA, complainant was discriminated against under section 105(c)(1) by being suspected of reporting the accident just as much as he would have been adversely affected if he had actually reported the accident.

While respondent's owner, Pascual White, disavows that he accused complainant of reporting the accident when complainant asked him that question on July 2, the evidence, in general,

supports Moses' description of the argument which developed on that day. If White had said no more than that he did not

care what complainant had heard about White's allegations concerning the reporting of the accident, it is not likely that the conversation would have become as heated as it did. While Dorothy Moses was certainly motivated by self-interest in testifying on behalf of her husband, the complainant in this proceeding, there is reason to believe that she heard White say to complainant, "You don't work for them damn inspectors. I write your checks" (Tr. 170). I conclude that White would make such a remark because of his sensitivity about MSHA's attempts to influence his freedom to hire employees and carry on his business without MSHA's interference (Tr. 242; 252; 255; 260; 270). For the same reason, I believe that Dorothy Moses correctly quoted White when she claims that White told complainant to "Go ahead and get that damn Ben Bunch." Otherwise, there is no reason for complainant to have claimed that he told White he would go higher than Ben Bunch in getting proof that he had not been the person who reported the accident to MSHA.

Finally, there is little reason to doubt both complainant's and his wife's testimony to the effect that White said that he would see to it that complainant did not work around there any more. If White had not made a remark to that effect, there is no reason for complainant to have come away from the argument with the feeling that he had been fired, or would be, after he reported to work the next morning. White claims that he said to complainant that "If you want to stay around here, run your own damn business" (Tr. 251). That remark does not fit into the subject matter of the argument. There would have been no reason for White to make a remark about complainant's running his own business when complainant had discussed only complainant's business with White, namely, an effort to convince White that complainant was not the person who reported the accident.

The references by respondent's foreman to the reporting of the accident had begun to prey on complainant's mind to such an extent, that complainant believed it was absolutely essential that he convince his employer that he was innocent of the charge that he had reported the accident. An employer who was interested in maintaining a harmonious relationship with his employee would have wanted to assure his employee that the question of who reported the accident had been improperly raised in the first instance and that the employer no longer was giving the matter any attention. If White had simply told complainant that White believed him when he stated that he had nothing to do with reporting the accident, the whole matter would doubtless have been laid to rest on July 2.

I believe that the discussion above shows that respondent improperly discharged complainant in violation of section 105(c)(1) because its management believed that complainant had reported the accident to MSHA.

Failure To Retain Complainant After Complaint Was Filed

The fourth question that is raised by the facts in this proceeding is whether respondent's management violated section

105(c)(1) when it refused to retain complainant as an employee after management became aware of the fact that complainant had filed a complaint under section 105(c)(1) of the Act.

Section 105(c)(1) prohibits an employer from discharging an employee because the employee has "* * * instituted any proceeding under or related to this Act."

Although I have found in the first instance that respondent's foreman, McClure, discharged complainant on July 3, 1979, when he told complainant to go to the house, I believe, in the alternative, that if respondent had not discharged complainant on July 3, 1979, because of respondent's suspicion that complainant had reported an accident to MSHA, respondent's management was obligated when it learned of the filing of the complaint on or about July 9, 1979, to call complainant back to work and explain that he had mistakenly filed a complaint of discharge under an erroneous impression that McClure had discharged him on July 3 when McClure told him to go to the house. McClure had no explanation for his failure to retain complainant as an employee except that he had become aware of the filing of the complaint before the D-9 Caterpillar operated by complainant had been returned from the repair shop. In fact, respondent's foreman specifically stated, "I think we could work something out--if he hadn't filed the complaint" (Tr. 241; Finding No. 14, supra).

Even if all of the evidence in this proceeding is interpreted in accordance with respondent's version of the events which occurred before, during, and after complainant's period of employment at respondent's mine, the evidence shows unequivocally that complainant was allowed to pass into the category of an unemployed person solely because respondent's management had been advised that complainant had filed a discrimination complaint against respondent under section 105(c) of the Act. If respondent's management, as it claims, had not actually discharged complainant on July 3, then he was entitled to be called back to work on July 11, 1979, when the D-9 Catepillar he had been operating was returned to the mine site. Respondent's failure to retain complainant as an employee was, therefore, a direct violation of the prohibition in section 105(c)(1) that an employer may not discharge an employee because he has instituted a proceeding under the Act.

Reasons Given by Respondent for Discharging Complainant

Unskilled Operator. Respondent was forced to take alternative positions in this proceeding. Respondent's first defense to the Complaint is that it did not discharge complainant. Respondent's foreman admitted that complainant had not voluntarily quit or resigned when complainant left the Becks Creek job on July 3, 1979 (Tr. 191). It is a fact, however, that respondent had not had a job from the time he left the job site on July 3, 1979, up to the time of the hearing which was held on November 18, 1980 (Tr. 77). Respondent is able to account for complainant's lack of a job only by saying that it just failed to call him back after the D-9 he had been operating was returned to the job site after being repaired (Tr. 241).

Respondent had apparently reached the conclusion before the

hearing that its claim of not having discharged complainant would be rejected. Therefore, it gave several reasons for discharging complainant if it were held that

respondent did discharge complainant. The first and primary reason for discharging complainant was that he was an unskilled operator of a dozer. Respondent's co-owner, Pascual White, said that he would describe complainant as a dozer driver rather than a dozer operator. White described a dozer driver as a person who could move a dozer around on level ground from one place to another, whereas a dozer operator knows what to do and how to do it and knows what makes a dozer "tick" (Tr. 245). White said that he should have investigated complainant's ability to operate a dozer before hiring him, but he had hired complainant under pressure from complainant's brother-in-law (an MSHA inspector) and that he just did not check into complainant's abilities until after he had hired complainant and had realized that complainant was not a proficient dozer operator (Tr. 243-244).

Respondent not only categorized complainant as a poor operator of a dozer, but also claimed that complainant was a "cowboy" who was unnecessarily rough on the equipment (Tr. 244; 262). Respondent contended that complainant operated all three of respondent's D-9 Caterpillar tractors and that he tore all of them up so badly that all of them were sometimes in the repair shop simultaneously (Tr. 199-202). Respondent claimed that the repairs on its equipment increased dramatically during the period that complainant worked for respondent (Tr. 200; 246).

In order to check the accuracy of respondent's claims about its repair bills, I asked respondent to send me copies of its repair bills on its three D-9 Caterpillar tractors for the period of 1976 through 1979 (Tr. 284). Respondent's counsel submitted the repair bills as requested and they have been identified and received in evidence in the first part of this decision.

Close examination and tabulation of the data show the following results:

Cost of Repairs

Caterpillar Serial Nos.	1976	1977	1978	1979	Total by Serial Numbers
66A7485	$15,808	$5,174	$5,075	$ 7,562	$33,619
66A11561	Not Supplied	4,289	8,161	15,691	28,141
90V2938	Not Supplied	9	2,288	34,383	36,680
Total by Years	$15,808	$9,472	$15,524	$57,636(FN.1)	$98,440

(FN.1) The cover letter submitted on December 16, 1980, by respondent's counsel with the repair bill states that respondent's counsel added the repair costs for 1979 and arrived at a total amount of $80,157.67. I can account for the disparity between my figures and those of respondent's attorney only by noting that several amounts were shown on the repair bills as credits. I subtracted the credits, whereas respondent's attorney may have added the credits.

When one examines the data set forth above, it should be borne in

mind that complainant only worked for respondent from May 9 through June 28, 1979.

Although complainant was discharged on July 3, he did not work between the dates of June 28 and July 3 because the dozer he was operating was in the repair shop from June 28 to July 11.

It was respondent's contention at the hearing that complainant was so rough on the dozers that he kept all three of them torn up all the time. It was alleged that in the 8-week period that complainant worked for respondent, he caused all three dozers to have to be rebuilt and caused respondent to have to spend $54,000 for the repair of the newest Caterpillar with Serial No. 90V2938. The repair bills supplied by respondent show that during the entire year of 1979, a total of $34,383 was spent in repairing Caterpillar No. 90V2938. Since the newest Caterpillar was being used the most, it was reasonable for it to require extensive repairs after incurring the small amount in repair costs of $9 and $2,288 which had been spent on it in the years 1977 and 1978, respectively.

Another significant aspect of the repairs on the dozers may be seen if one examines the total cost of repairs on each dozer for the 3-year period involved in the comparative analysis. The repairs on each of the Caterpillars totaled very much the same for all the years involved in the study, as may be seen by looking at the totals shown in the last column of the tabulation above.

Respondent's foreman, Richard McClure, testified that a Caterpillar engine has to be overhauled every 3,000 to 4,000 hours. There are 2,000 working hours in a year, assuming the dozers are used 50 weeks each year for 40 hours per week. Therefore, the new Caterpillar would have needed to have its engine overhauled in 1979 if it had been used rather constantly during the years 1977 and 1978. McClure also claimed that the engines on two of the dozers had been recently rebuilt and should have lasted another 3,000 hours (Tr. 223). Respondent's owner said that the cost of a new engine is $37,000 and the cost of rebuilding an engine in respondent's own shop is about $17,000 (Tr. 266). The repair bills submitted by respondent fail to show that enough was spent on the dozers in 1977 or 1978 or in 1979, prior to the time that complainant began working for respondent, to support a claim that the engines on two dozers had been rebuilt or replaced shortly before complainant began working for respondent.

The witnesses who were called by complainant's counsel in support of complainant's case both testified that complainant was neither the poorest nor best dozer operator they had ever seen. Both of them considered complainant to be an average kind of operator and both of them stated that complainant was not a "cowboy" on the equipment and that they did not see him abuse the equipment (Finding Nos. 19 and 20, supra).

I conclude that the preponderance of the evidence supports a finding that complainant is not so poor an operator of equipment as to justify his discharge if that were the only consideration being used to warrant the discharge.

Abusive Language and Bad Attitude Toward Supervisors. Respondent's owner, Pascual White, testified that complainant has the worst attitude toward his

employer of any employee he has ever had work for him during his 21 years of experience (Tr. 260). Respondent's foreman, Richard McClure, also made it clear that complainant does not take well to constructive criticism (Tr. 220). On the day that complainant was discharged, McClure stated that complainant called both him and White names which McClure did not wish to state on the record (Tr. 190; 206; 236). During his testimony, complainant found it necessary to refer to "what you sit on" in lieu of the actual word which he used in talking to his foreman (Tr. 12; 70).

The record, therefore, supports respondent's claim that complainant does use rough language in talking with his supervisors. On the other hand, White had employed complainant back in 1970 as a laborer and must have known what sort of person he was hiring when he reemployed complainant in 1979 (Finding No. 2, supra). While the record shows that one of the reasons respondent gave for hiring complainant was that complainant's brother-in-law, who is an MSHA inspector, asked him to hire complainant, I am unwilling to accept that excuse as the sole reason for respondent's hiring complainant a second time.

One reason for my rejection of the MSHA pressure argument as the reason for respondent's hiring of complainant is that White stated that he knew he could have a different inspector assigned to inspect his mines if he asked MSHA to assign a different inspector because of any bias or prejudice which Ben Bunch might display if respondent declined to hire complainant (Tr. 260). Additionally, Howard, the MSHA inspector supervisor who testified in this proceeding, stated that MSHA did not assign inspectors to examine mines where the inspectors' relatives were working if MSHA had knowledge that that was occurring (Finding No. 17, supra). Respondent's owner showed a considerable expertise about regulatory agencies and would know how to deal with prejudicial inspections if he had declined to hire complainant and had felt that complainant's brother-in-law was thereafter deliberately trying to find violations at respondent's mine which would not normally be written apart from retaliation for an employer's refusal to hire an inspector's brother-in-law (Tr. 270).

In view of the fact that complainant had previously worked for respondent in 1970, I believe that the record fails to support a finding that complainant would have been discharged on account of his use of rough language and his attitude toward his employer if the rough language and bad attitude had been the only considerations leading up to the discharge. Moreover, much of the bad language and poor attitude resulted from respondent's improper attempt to find out whether complainant had reported the D-6 accident to MSHA.

Relief Sought

The relief requested in the Complaint is that complainant be reinstated to his former job and that he be awarded all back benefits. Exhibit H in this proceeding is a copy of the payroll data showing the amount that complainant was paid for all hours worked from May 9, 1979, through June 28, 1979. That exhibit

shows that respondent worked more than 40 hours during some weeks and less than 40 hours during other weeks. Since it is not possible to estimate the exact number of hours which complainant would have worked had he remained

on respondent's payroll from June 29, 1979, to the present time, I find that payment for 40 hours each week is a reasonable accommodatioin for computing back pay. Exhibit H also shows that complainant was paid $7.50 per hour, or $60 per day. Deductions were made from his check for tax and other purposes in a total amount of $76.80 for a 40-hour week, leaving an amount of $223.20 as complainant's net pay for a 40-hour week.

Interest in the amount of 10 percent should be added to the amount to be paid. In order to avoid the difficulty of computing the interest as it accumulates each week, respondent may, if it wishes, elect to assume that the full amount of back pay was generated halfway between July 3, 1979, and the date of payment and the interest of 10 percent on the total amount may be computed for half of the period involved.

Respondent will also be ordered to reimburse complainant for any medical costs he has incurred since July 3, 1979, if those costs would have been covered by any hospitalization which would have been applicable to him during his employment if he had not been discharged on July 3, 1979. Additionally, complainant should be paid any increase in hourly rate to which complainant would have been entitled if he had not been discharged. Finally, respondent will be instructed to expunge from its files all references to complainant's discharge on July 3, 1979.

Section 105(c)(3) of the Act provides for complainant to be reimbursed for attorneys' fees. According to the letter submitted on December 24, 1980, by complainant's attorney, no charges would have been made if the Complaint had been denied. Complainant's attorney states that he spent between 25 and 30 hours on this case, including time spent in drafting correspondence, in conferences with complainant, his wife, and other persons, in procurement of witnesses, and in representing complainant at the hearing. Complainant's attorney asks that he be paid $100 per hour in view of the fact that he would have received no payment if complainant had not prevailed.

The courts normally discount the time spent in conferences by from 20 to 35 percent (Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), and Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976)). Since complainant's counsel did not provide an exact breakdown of time spent in conferences, as opposed to difficult work, such as representing complainant at the hearing, I find that he should be paid for 25 hours of work instead of 30 hours. The courts have also allowed a higher hourly amount than might otherwise be appropriate when an attorney has agreed to represent a client for nothing if the client does not prevail, on the theory that lawyers will thereby be given an incentive to represent persons with little or no income (Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976)). For the foregoing reasons, I find that complainant's attorney should be paid $100 per hour for 25 hours of work in representing complainant in this proceeding. Inasmuch as complainant has not paid any attorneys' fees and was not obligated to pay any if he lost his case, my order will require respondent to pay the attorneys' fees directly to complainant's

counsel.

WHEREFORE, it is ordered:

(A) The Complaint of Discharge, Discrimination, or Interference filed on September 24, 1979, is granted for the reasons hereinbefore given.

(B) Respondent shall, within 30 days from the date of this decision, carry out the following types of relief:

(1) Reinstate complainant to his former or equivalent position at respondent's mine.

(2) Pay complainant back wages on the basis of a 40-hour week for the period from July 3, 1979, to and including the date of payment at the rate of $7.50 per hour (or at a higher hourly rate if complainant would have received an increase in salary but for his discharge on July 3), less deductions for tax, etc., as shown in Exhibit H in this proceeding.

(3) Reimburse complainant for any medical or hospital bills which complainant may have incurred after July 3, 1979, if such bills would have been covered by hospitalization insurance if he had not been discharged.

(4) Expunge from complainant's personnel records all references to his discharge on July 3, 1979.

(5) Pay to William E. Hensley, Esq., First National Bank & Trust Building, Corbin, Kentucky 40701, attorney's fees in the amount of $2,500.

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