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Federal Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Complaint of Discharge, Discrimination, or Interference
	Docket No. SE 80-46-DM
ON BEHALF OF: WILLIAM JOHNSON, COMPLAINANT	MD 79-138
v.	Tenoroc Mine
BORDEN, INC. (CHEMICAL DIVISION, SMITH-DOUGLASS), RESPONDENT	

DECISION

Appearances: Shaka M. Shedeke, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Complainant;
William R. Neale, Esq., Borden, Inc., Columbus, Ohio, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) on behalf of William Johnson alleging that William Johnson was discharged from his employment at Borden, Inc., Chemical Division, Smith-Douglass (hereinafter Borden) on April 26, 1978, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (hereinafter the Act). On May 10, 1978, William Johnson filed a complaint with the Occupational Safety and Health Administration (hereinafter OSHA) concerning his discharge. OSHA investigated the complaint and subsequently referred the matter to MSHA.

On December 31, 1979, MSHA filed this action on behalf of William Johnson. Upon completion of discovery and prehearing requirements, a hearing was held in Tampa, Florida, on December 2-4, 1980. The following witnesses testified on behalf of Complainant: Gerald E. Harper, Charles DeCroes, William Johnson,

and Donald Fancher. The following witnesses testified on behalf of Borden: Kenneth Snow, Richard Daniels, and Joseph Lang. Because of the onset of a sudden illness, Joseph Lang was unable to complete his testimony at the hearing. Pursuant to an agreement of the parties, Mr. Lang completed his testimony by means of a deposition in Atlanta, Georgia, on December 18, 1980.

At the hearing, Borden objected to MSHA's right to propose a civil penalty herein without following the procedures set forth in 30 C.F.R. 100.5 and 100.6 and 29 C.F.R. 2700.25. Borden's objection was sustained and the civil penalty proposal was severed from the complaint and remanded to MSHA to begin the civil penalty assessment process.

ISSUES

Whether Borden violated section 105(c) of the Act in discharging Complainant William Johnson and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. 815(c), provides in pertinent part as follows:

> (1) 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.
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days

> after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation, shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner, to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

STIPULATIONS

The parties stipulated the following:

1. Borden is an "operator" of a "mine" as those terms are defined in the Act.

2. William Johnson was employed as a "miner" by Borden from October 29, 1973, to and including April 26, 1978, as that term is defined in the Act.

3. During the period of Johnson's employment with Borden as a miner, immediately prior to his termination on April 26, 1978, Johnson was employed at the Tenoroc Mine facility.

4. William Johnson was employed by Borden pursuant to the terms and provisions of a collective bargaining agreement between Borden and Local 37,

International Chemical Workers' Union. Until the final disciplinary action on April 18, 1978, Johnson had never received any oral or written reprimand, suspension, or discharge from or with respect to his job performance and employment with Borden.

5. Pursuant to the Collective Bargaining Agreement, particularly Article XI, Paragraph 9, "[n]o employee can be discharged without first being suspended, the suspension to become automatically a discharge within seven calendar days of its issuance unless otherwise directed by the management or modified by the grievance procedure."

6. Pursuant to such collective bargaining agreement, Borden retained the right to discipline and discharge, but had no published rules of conduct for employees.

7. On or about April 4, 1978, William Johnson made a nuisance report to the Polk County Health Department about filthy restrooms.

8. An inspection was made on April 7, 1978, and a follow-up inspection on April 14, 1978, showed correction of the situation.

9. On April 13, 1978, William Johnson returned to the machine shop at Tenoroc and removed tools from his locker.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. At all times relevant herein, Borden was the operator of the Tenoroc Mine (hereinafter the mine) in Polk County, Florida.

2. William Johnson (hereinafter Johnson) was employed as a "miner" by Borden from October 29, 1973, to April 26, 1978. At the relevant times herein, Johnson worked as a machine shop helper and recovery plant oiler. Prior to the incident leading to Johnson's discharge, no disciplinary action had been taken against him by Borden. Johnson earned $4.58 per hour at the time of his discharge and his pay would have increased to $4.83 per hour on July 1, 1978, pursuant to a collective bargaining agreement between Borden and Local No. 37, International Chemical Workers' Union (hereinafter the Union).

3. Labor-management relations at the mine were governed by the collective bargaining agreement. Although Johnson did not belong to the Union, the Union was recognized as the exclusive bargaining agent for all production and maintenance employees at the mine.

4. During the time prior to April 4, 1978, William Johnson complained about the filthy condition of the restroom facilities at the mine. On April 4, 1978, he telephoned the Polk County, Florida, Department of Health

(hereinafter Department of Health) and complained about filthy restrooms at the mine.

5. On April 7, 1978, Johnson was notified by his supervisor, Larry Bradford, that the restrooms would be inspected and that Johnson should clean them prior to the inspection.

6. On April 7, 1978, Gerald E. Harper, a sanitarian employed by the Department of Health inspected the restrooms at the mine. During this inspection, he was accompanied by mine manager, Jim Calandra. Of the three restrooms inspected, two were found to be in satisfactory condition, the third restroom was ordered closed, and minor violations were noted by the sanitarian. During the course of the inspection, mine manager Jim Calandra made several references to the person who filed the health complaint and stated, in response to a question from the sanitarian, that he knew that Johnson filed the complaint.

7. On April 10, 1978, Borden posted a notice that the position of machine shop helper at the mine would be eliminated effective April 17, 1978. Johnson and one other employee were the only employees classified as machine shop helpers at the mine. Thereafter, Johnson claimed a temporary job for 1 week as a recovery plant oiler but did not attempt to "roll" or "bump" into a permanent job prior to the time of his discharge.

8. In late 1977, Johnson enrolled in a welding course. Borden was aware of this fact and gave Johnson permission to practice welding at the mine after working hours on his own time. Borden's superintendent, Richard Daniels, testified that Johnson was instructed that he could practice welding only when a supervisor was present. Johnson testified that Superintendent Daniels only instructed him that he should practice welding after his regular shift but not on weekends when no one was present.

9. At one of the two entrances to the mine property, there were gates and a guard shack. Borden contracted with an independent security firm to provide guard services at this entrance. Often, the guard shack was unoccupied. The other entrance to the mine property was unguarded. It was the practice of miners employed at the mine to return to the mine property after working hours and on weekends to go fishing on the mine property. It was not the custom or practice of the miners to stop or sign in at the guard shack. Frequently, miners would be accompanied by nonemployees during their fishing expeditions.

10. On April 13, 1978, at approximately 7 p.m., Johnson returned to the mine to practice welding. Upon entering the property, he bypassed the guard shack and entered the unguarded entrance. Prior to this time, there had been a heavy rain. When Johnson attempted to begin welding, he got an electrical shock due to the wet floor conditions. He discontinued welding but decided to clean out his lockers since he only had 1 more working day before he began work at a different building at the mine.

11. The mine had no written rules or policies concerning the procedure for checking out lockers, but Superintendent Daniels claimed that he and Larry Bradford, Johnson's immediate supervisor, told Johnson and the other machine shop helper not to remove tools until their lockers had been checked. Johnson denied that he received such an instruction from Bradford or Daniels. Neither Bradford nor the other machine shop helper testified at the hearing.

12. On Friday, April 14, 1978, Superintendent Daniels notified Johnson that he intended to check his locker before Johnson reported to his new assignment as a recovery plant oiler. Johnson advised Daniels that he had no tools in his locker since he took them home on the previous night.

13. On Monday, April 17, 1978, Superintendent Daniels called Joseph A. Lang, industrial relations manager of Borden's Smith-Douglass Division, and informed Lang that Johnson had violated his instructions and that something should be done about it. A meeting to discuss the situation was scheduled for the next day.

14. On Tuesday, April 18, 1978, a meeting was held at the mine with the following in attendance: Joseph Lang, Richard Daniels, Larry Bradford, Kenneth Snow--the Union shop steward at the mine, and Johnson. During this meeting, Johnson conceded that he had removed certain tools--some belonging to Borden and some of his own tools--from his locker on April 13, 1978. Johnson denied receiving an instruction from Superintendent Daniels or Supervisor Bradford that he have his locker checked out before removing tools. Contrary to the assertions of Lang and Daniels, Johnson was not asked to return the tools. At the conclusion of the meeting, Johnson was given a Termination Notice signed by Daniels stating that he was "suspended for 7 days to automatically end in termination on 4-26-78" for the following reasons: "Unauthorized plant entry, unauthorized removal of tools and failure to follow specific instructions of Supervisor."

15. Borden's employment and personnel records show that prior to April 18, 1978: (1) several employees were suspended, without being discharged, for up to 7 days for failure to follow instructions or insubordination, but only one employee was discharged for "gross insubordination"; (2) several employees were discharged for theft of company property; and (3) no employees were subject to discipline for unauthorized plant entry or unauthorized removal of tools.

16. Johnson was unemployed from April 26, 1978 to August 7, 1978 when he commenced employment at Church's Fried Chicken, Inc., at a salary of $175 per week.

17. Johnson paid Sun Personnel Services the sum of $951.33 for its services in obtaining employment for Johnson at Church's Fried Chicken, Inc.

18. Johnson was employed at Church's Fried Chicken, Inc.,

until May 1979. Between May 1979, and February 1980, Johnson worked for three different employers as a grinder operator, a life insurance salesman, and a

clerk. Since February 18, 1980, he has been employed by Piper Aircraft Corporation. Johnson's current rate of pay at Piper Aircraft Corporation is $5.68 per hour.

DISCUSSION

A. Applicable Law and Contentions of the Parties

Section 105(c)(1) of the Act provides in pertinent part: "No person shall discharge * * * any miner * * * because such miner * * * has filed or made a complaint under or related to this Act * * * of an alleged danger or safety or health violation * * *." Recently, in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar antiretaliation issues arising under other Federal statutes. The Commission held as follows:

> We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. Id. at 2799-2800. [Emphasis in original.]

MSHA, on behalf of Johnson, contends that Johnson was discharged by Borden because of his complaints to Borden and the Department of Health concerning filthy restrooms at the mine. Complainant further asserts that Borden's stated reasons for discharging Johnson are a pretext to conceal an unlawful motive. Johnson claims that he is entitled to reinstatement, back pay, and other consequential damages.

Borden asserts that Johnson did not establish a prima facie case because of the following: (1) his complaint to the Department of Health about filthy restrooms is not protected

activity under section 105(c)(1) of the Act;

(2) he did not establish that his discharge "was motivated in any part by the alleged protected activity"; (3) Borden had a "legal and rational basis to discharge Mr. Johnson", i.e., unauthorized plant entry, unauthorized removal of tools, and failure to follow specific instructions of supervisor; and (4) Johnson is not entitled to the remedies he seeks.

B. Did Johnson Engage in Protected Activity

Johnson asserts that he complained to Borden about the filthy and unhealthful conditions of the restrooms at the mine and, when no action was taken by Borden, he called the Department of Health about this complaint. Borden contends that Johnson did not intend to exercise his statutory right under section 105(c)(1) of the Act and, hence, this was not activity protected under the law.

It should first be noted that sanitary toilet facilities are the subject of a mandatory MSHA regulation applicable to metal and nonmetallic open-pit mines. 30 C.F.R. 55.20-8(b) provides in pertinent part: "(Toilet) facilities shall be kept clean and sanitary." Thus, I find that a complaint about the unclean and unsanitary toilet facilities is activity protected under section 105(c)(1) of the Act. Furthermore, it matters not that the complaint was made to the Department of Health as opposed to MSHA. The fact is that the complaint is a health complaint which constitutes protected activity.

Borden is unable to cite any authority to support its contention that a miner must establish that he intended to invoke his statutory rights at the time he made his complaint. Where the miner established that he did, in fact, engage in protected activity under section 105(c)(1) of the Act, I find that there is no additional requirement that the miner establish an intent to invoke the statutory rights.

I conclude that Johnson has established that he engaged in protected activity pursuant to section 105(c)(1) of the Act in connection with his complaint about unsanitary toilet facililties at the mine.

C. Was Johnson's Discharge Motivated in Any Part by His Protected Activity

On the issue of Borden's alleged unlawful motivation for Johnson's discharge, MSHA and Johnson presented no direct evidence. However, they assert that Borden was aware of Johnson's complaint to the Department of Health; Johnson was identified as the complainer; and shortly thereafter Johnson was discharged. All of the relevant events occurred in April 1978, as follows: April 4--Johnson complained to Department of Health; April 7--Department of Health inspected the mine and ordered corrections and repairs; April 14--Final inspection by the Department of Health finding violations to be abated; and April 18--Johnson was suspended with intent to discharge. Although not articulated as such, Complainant apparently contends that the above circumstances give rise to an inference of unlawful

motivation sufficient to establish a prima facie case.

Borden contends that Complainant has failed to establish a prima facie case because he presented no evidence "that the adverse action was motivated in any part by the alleged protected activity." Moreover, Borden asserts that the testimony of its management employees who made the determination to discharge Johnson--Superintendent Daniels and Industrial Relations Manager Lang--establish that neither of them was aware of the fact that Johnson made the complaint to the Department of Health until long after Johnson was discharged.

The first issue to be resolved is whether Borden was aware of the fact that Johnson made the complaint to the Department of Health. Department of Health sanitarian Gerald Harper testified that he performed the inspections in question. During the initial inspection on April 7, 1979, he was accompanied by mine manager Jim Calandra. Harper stated: "On the way back, Calandra made references to the person who filed the health complaint saying he was in the bargaining unit but not in the Union * * *. I then asked him if he knew who filed the complaint and he said Johnson did." (Exh. G-6-E) Jim Calandra did not testify at the hearing.

Johnson testified that his supervisor, Larry Bradford, told him prior to the initial inspection by the Department of Health, that since he was concerned about clean toilet facilities, he should clean them himself. Larry Bradford was also present at the meeting when Johnson was suspended but he did not testify at the hearing.

While Joseph Lang may have been unaware of the fact that Johnson initiated the health complaint, it is inconceivable that Superintendent Daniels was unaware of it since both of the other supervisors of the mine had such knowledge. Curiously, these two supervisors did not testify at the hearing. Superintendent Daniels' testimony, that he had no knowledge of Johnson's complaint concerning the unsanitary toilet facilities, is rejected. On this issue, I find that Johnson's testimony, concerning Superintendent Daniels' statements admitting knowledge of Johnson's complaint prior to his discharge, is more credible. Moreover, Johnson's other evidence corroborating Borden's knowledge of his complaint was not rebutted by Borden. Thus, I conclude that Borden was aware of the fact that Johnson made the complaint to the Department of Health.

Turning next to the question of the alleged unlawful motivation of Borden in discharging Johnson, I find that the sequence of events is relevant. Johnson worked for Borden for 4-1/2 years prior to April 1978, without any disciplinary action being taken against him. On April 4, Johnson filed his health complaint. On April 7, because of Johnson's concern about the toilet facilities, he was ordered to clean them prior to their inspection. Upon completion of the inspection on April 7, Borden's mine manager Jim Calandra expressed a personal animus towards Johnson as set forth above. On April 10, Johnson's job was abolished or terminated. On April 14, the final inspection by the Health Department took place and Johnson was questioned

about unauthorized plant entry and unauthorized removal of tools. On April 18, Johnson was called to a meeting and suspended with an intent to

discharge. I conclude that these circumstances give rise to an inference that Johnson's discharge was motivated by his protected activity. Therefore, the preponderance of the evidence establishes a prima facie case of violation of section 105(c)(1) of the Act.

D. Did Borden Establish a Legitimate Reason for Johnson's Discharge

Under the standard announced by the Commission in Pasula, supra, once the Complainant establishes a prima facie case of violation of section 105(c)(1) of the Act, Borden may affirmatively defend by proving by a preponderance of the evidence that its decision to discharge Johnson was also motivated by his unprotected activities and that it would have discharged him for the unprotected activities alone. In this regard, Borden asserts that Johnson engaged in serious misconduct--unauthorized plant entry, unauthorized removal of tools, and failure to follow specific instructions of supervisors--which constitutes a legal and rational basis for his discharge. Thus, it is necessary to examine and analyze, individually and cumulatively, these contentions by Borden.

The issue of Johnson's alleged unauthorized plant entry on April 13, involves the limits of Johnson's privilege to use the Borden facilities to practice welding after regular working hours. The evidence establishes that Johnson enrolled in a welding course in 1977 and Borden was aware of this fact. Johnson asserts that he was initially given permission to use Borden's equipment and facilities to practice welding in connection with this course. In late 1977, Superintendent Daniels and Johnson discussed the terms under which Johnson would be permitted to practice welding. Apparently, there were no witnesses to this conversation and nothing was reduced to writing. Superintendent Daniels testified that he instructed Johnson that he was only permitted on the premises if a supervisor was present or the plant was in operation. Johnson testified that the only limitation on his access to the plant was that Johnson could not practice welding on weekends when no one was there.

At the hearing, there was much ado about security at this mine. Suffice it to say that I find that during the period in question, Borden failed to establish that Johnson was required to check in with the guard or that he attempted to conceal his entry. The evidence also establishes that security was lax and it was common practice for miners to enter the site after regular hours, sometimes accompanied by nonemployees, for the purpose of fishing on waters within Borden's property.

In any event, Superintendent Daniels and Industrial Relations Manager Lang concede that no employee had ever been disciplined for unauthorized plant entry before and that even by their version of this incident, Johnson's unauthorized plant entry, standing alone, would not merit more than a short suspension. Therefore, I find that Johnson's alleged unauthorized plant entry, even if true, would not justify his discharge.

Borden's contentions concerning Johnson's alleged unauthorized removal of tools and failure to follow specific instructions of his supervisor are interrelated. Superintendent Daniels contends that both he and Johnson's supervisor, Larry Bradford, told Johnson that he was not to remove his tools until his lockers had been checked out. Daniels cannot recall the date of his instruction to Johnson but thinks he gave this instruction on Tuesday or Wednesday, April 11 or 12. Again, supervisor Larry Bradford did not testify. Johnson claims that neither Daniels nor Bradford gave him any instruction concerning the removal of his tools prior to April 14. In any event, Johnson conceded that when he went to the mine during the evening of April 13 to practice welding, he also removed some of his own tools along with welding tools belonging to Borden. Johnson's stated reason for the removal of the welding tools was that his job in this location was to terminate the following day and that he was to begin a temporary assignment for a period of 1 week beginning on Monday, April 17. Although Borden has established a record of disciplining other employees previously for theft of its property, it never accused Johnson of theft. Moreover, while Borden asserts that it ordered Johnson to return its tools on several occasions, the evidence fails to support this claim. Johnson denies that he was ever asked to return the tools. Kenneth Snow, the Union shop steward and a witness called by Borden, testified that he attended the meeting of April 18 at which Johnson was suspended, but could not recall Johnson being asked to return the tools. To this date, almost 3 years after the incident in question, Borden has taken no action to retrieve the tools in question.

Although Borden contended that it was standard practice that employees' lockers had to be checked before they were reassigned to another site, the evidence again fails to support this claim. Borden had no written rule or policy concerning the removal of property from miners' lockers. The evidence fails to support Borden's contention that such a verbal rule or practice was enforced. Borden has never alleged that Johnson committed theft in taking the tools. The evidence fails to establish that Borden at any time requested the return of the tools. The evidence does not establish that Johnson violated a supervisor's instruction and the testimony of Superintendent Daniels to the contrary is rejected because it is not credible. In short, the evidence shows that Borden's claims concerning the unauthorized removal of tools and failure to follow specific instructions of the supervisor are a pretext to conceal its unlawful motive of discharging Johnson in retaliation for his complaint to the Department of Health. Borden has failed to establish its affirmative defense. Since Borden failed to establish its affirmative defense, Complainant has sustained his complaint of discharge in violation of section 105(c)(1) of the Act.

E. Award of Complainant

Section 105(c)(2) of the Act provides in pertinent part that if the charges are sustained, Complainant shall be granted such relief as is appropriate "including but not limited to, the

rehiring or reinstatement of the miner to his former position with back pay and interest." The evidence of record establishes that the mine in controversy was closed by Borden in

late 1978. On August 1, 1980, Borden sold all of its remaining mines to Amax Phosphate, Inc. The terms of the agreement between Borden and Amax Phosphate, Inc., are not in the record. However, I note that the record establishes that all employees of Borden on the date of the sale were automatically transferred to Amax Phosphate, Inc. In an analogous case, the Commission ordered a successor operator to reinstate an employee who was unlawfully discharged in violation of section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969. See Glenn Munsey v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463 (December 4, 1980). In any event, Borden is ordered to rehire and reinstate Johnson to his former position. If Borden is unable to comply with this order, the parties may apply to the Commission for additional relief. Although Johnson claims that he wishes to be rehired and reinstated by Borden, there is no explanation in the record for MSHA's failure to seek an order of temporary reinstatement for him pursuant to section 105(c)(2) of the Act. Moreover, since Johnson is presently employed at Piper Aircraft Corporation at wages higher than he earned at Borden, there is some question whether he truly is seeking to be rehired and reinstated. For the foregoing reasons, Johnson shall notify Borden within 15 days after the date on which this decision becomes final, whether he will accept reinstatement to his former position at Borden. A failure of Johnson to notify Borden within the above period will constitute a waiver or forfeiture of Johnson's right to be rehired and reinstated.

Turning to the question of back pay, the evidence establishes that Johnson was unemployed from April 26, 1978, until August 7, 1978. I find that Johnson's rate of pay would have been $4.58 per hour between April 26, 1978, and June 30, 1978. His rate of pay, pursuant to the agreement between Borden and the Union would have been $4.83 per hour beginning on July 1, 1978. I find that Johnson lost 47 days' wages at 8 hours per day at $4.58 per hour and 25 days' wages at 8 hours per day at $4.83 per hour. Therefore, Johnson is entitled to an award of $2,688.08 for the period during which he was unemployed following his discharge. Exhibit G-15, which shows the wages paid to the recovery plant oiler during Johnson's period of unemployment, is received in evidence over Borden's objection. I find, however, that this document is entitled to little weight because of Complainant's failure to establish that he would have held this position during his period of unemployment.

On August 7, 1978, Johnson accepted a job paying $175 per week. While his base pay at Borden would have been approximately $18 per week more, Johnson was vague concerning increases in his wages. He conceded that he was earning approximately $195 per week at times and at other times was earning a commission of approximately $100 per week. Thereafter, Johnson changed jobs frequently. The evidence presented by Complainant concerning his claim for back pay after August 7, 1978, is speculative and insufficient to establish any valid claim. Therefore, the claim for back pay after August 7, 1978, is denied.

After being discharged by Borden, Johnson attempted to find

other employment. Since he was unsuccessful, he contracted with Sun Personnel

Services, Inc., for assistance in finding employment. When the employment agency located a job for Johnson, he paid a fee of $951.33 for its services. Borden argues that this fee should be disallowed because Johnson failed to exhaust "job opportunities available to (him) without outside paid help" and "the fee is not for comparable employment but for a complete change of career." Borden submits no authority in support of these contentions and they are rejected. I find that this employment agency fee is the type of consequential damages which is authorized by section 105(c)(2) of the Act. Complainant is awarded the additional sum of $951.33 with interest at 6 percent per annum from July 3, 1978.

Johnson also seeks reimbursement of $20 paid by him for tape recordings of his unemployment compensation hearing. Johnson failed to establish a valid reason for the need for these tape recordings as a reimbursable item of consequential damages. The claim for $20 for tape recordings of the unemployment compensation hearing is denied.

Finally, Borden is required to expunge all references to Johnson's discharge from his employment records.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Johnson and Borden were subject to the provisions of the Act.

2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. On April 4, 1978, Complainant Johnson engaged in the following activity which is protected under section 105(c)(1): Telephone call to the Department of Health complaining about filthy restrooms at Borden's mine.

4. Complainant Johnson established a prima facie case of a violation of section 105(c)(1) of the Act because he established by a preponderance of the evidence that he engaged in a protected activity and that he was discharged under circumstances which give rise to an inference that the discharge was motivated by the protected activity.

5. Borden's justification for discharging Complainant--unauthorized plant entry, unauthorized removal of tools, and failure to follow specific instructions of the supervisor--is a pretext to conceal the true reason for Complainant's discharge.

6. Borden failed to establish that it would have discharged Complainant for the unprotected activities cited in the Notice of Termination.

7. Complainant William Johnson was discharged by Borden in violation of section 105(c)(1) of the Act.

8. Complainant Johnson shall be rehired and reinstated with full seniority rights.

9. During the period beginning on April 26, 1978, and ending on August 7, 1978, Complainant would have earned $4.58 per hour until July 1, 1978, and $4.83 per hour thereafter for 40 hours a week for a total of $2,688.08. Complainant has failed to establish his claim for back pay subsequent to August 7, 1978. Complainant is entitled to an award of $2,688.08 as back pay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

10. Complainant is entitled to an additional sum of $951.33, the amount paid to Sun Personnel Services, Inc., on July 3, 1978, for services in obtaining employment at Church's Fried Chicken, Inc., commencing on August 7, 1978. Complainant is also entitled to interest on this sum at the rate of 6 percent per annum from July 3, 1978 to the date such payment is made.

11. Complainant has failed to establish entitlement to an award of $20 for obtaining recordings of his unemployment compensation hearing.

12. MSHA failed to follow the procedures concerning proposed assessment of a civil penalty as set forth in Commission Rule of Procedure 25, 29 C.F.R. 2700.25 and, therefore, the proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED and Complainant shall be rehired and reinstated with full seniority rights provided that he notifies Borden of his desire to be rehired and reinstated within 15 days after this decision becomes final.

IT IS FURTHER ORDERED that Borden shall pay to Complainant the following sums: (1) $2,688.08 for back pay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date payment is made; and (2) $951.33 for an employment service fee paid by Complainant in connection with subsequent employment, plus interest at the rate of 6 percent per annum from July 3, 1978, to the date payment is made.

IT IS FURTHER ORDERED that Borden shall expunge all references to Complainant's discharge from his employment records.

James A. Laurenson Judge