

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 19, 1981

JOHNNY HOWARD,	:	COMPLAINT OF DISCHARGE,
Complainant	:	DISCRIMINATION, OR
v.	:	INTERFERENCE
	:	
MARTIN-MARIETTA CORPORATION,	:	Docket No. SE 80-24-DM
Respondent	:	
	:	MSHA Case No. MC 79-93

DECISION

Appearances: Nathan Kaminski, Jr., Esq., Schneider' & O'Donnell, Georgetown, South Carolina, for Complainant;
Elliott D. Light, Esq., Assistant General Counsel, Martin-Marietta Corporation, Bethesda, Maryland, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant was discharged on July 31, 1979, from his job as a front-end loader operator with Respondent. Complainant contends that his discharge was the result of his refusal to work on an unsafe machine and his calling for a Federal inspection of the machine. Respondent contends that Complainant was discharged for insubordination and leaving the job site without permission.

A hearing was held, pursuant to notice, in Georgetown, South Carolina, on March 26, 1981. Lawrence Snider, Mark Martin, Evelyn **Statz**, Johnny Howard, and Ezra Lee **Killian**, a Federal Mine Inspector, testified for Complainant. Jackie Wilson, Eddie Mazyck, Buck Ridgeway, David Foy, Plant Foreman for Respondent, and David Brisley, Plant Manager, testified for Respondent. Both parties have submitted post hearing briefs. Based on the record and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Martin-Marietta operates a rock quarry in Jamestown, South Carolina which produces crushed stone for the construction industry. Johnny Howard was employed there from June 1977 until July 31, 1979. At **various times**, he operated a front-end loader, a bulldozer, and a drag line. From April 1979 to the date he was discharged, he operated a front-end loader.

2. Soon after his employment began, Howard experienced problems **with the** 980 front-end loader to which he was assigned. He periodically notified management that the brakes did not perform properly and management adjusted them.- The adjustments would last no more than a day before the brakes became faulty again. This was a source of concern to Howard, for he believed the brakes were beyond repair.

3. The loader's faulty brakes created a safety hazard. The physical exertion required to operate the loader tended to aggravate Howard's back condition, which was known to management. The procedure required to keep the loader stable while loading trucks was so unwieldy that the operator risked dropping the load or running into the truck.

4. Howard arrived at work at about 6:00 a.m. on July 24, 1979. He loaded 3 or 4 trucks and found that the loader had no brakes. **He** became angry, and **told** his foreman, David Foy, that the loader still was not working properly and he was leaving to call the Occupational Safety and Health **Administration (OSHA)**. **Foy**, aware of Howard's anger and **believing** he might be quitting, acquiesced in Howard's decision to leave.

5. As **he was** leaving the premises, Howard met Plant Manager David Brisley, who asked him where he was going. He told Brisley that he was dissatisfied with the brakes on the loader and was leaving to call OSHA. Brisley urged him to stay and help repair the loader but he refused.

6. Howard called OSHA while off the premises. **OSHA** referred his complaint to MSHA. He returned to work at approximately 3:00 p.m. and waited for 45 minutes outside **Foy's office**, intending to talk to him. Foy did not emerge and, because it was then quitting time, Howard left.

7. The next day, Howard returned to work and began to operate another front-end loader. He found its brakes too tight and decided to postpone work until Foy arrived. When Foy arrived, Howard asked him what he should do. Foy told him that he thought he had quit or had been fired, so Howard left the premises. He stopped at a nearby store. Brisley found him there and asked him to return to Brisley's office. Once there, Brisley told him that the company did not seem to be, able to satisfy him, that he was making people mad at 'him, that he had few friends left at the company, and that he ought to seek other employment. Brisley told him to take the day off. Later, he advised him to return on July 31, 1979, when the company would decide what to do with him.

8. On July 25, 1979, MSHA inspector Ezra Lee Killian, responding to Howard's request for an inspection, issued a citation 1/ to the company for failing to tag out Howard's loader.

9. Howard returned to the quarry on July 31, 1979, and was told that he was being -terminated, according to Brisley, "for leaving the job and insubordination with the plant foreman." 2/

STATUTORY PROVISION

Section 105(c) (1), 30 U.S.C. § 815(c) (1), 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.

1/ The inspector did not state when he arrived at the quarry or when he issued the citation and the citation was not introduced in evidence.

2/ Martin-Marietta seems not to- have reduced this termination to writing. If it did, it did not introduce it in evidence.

ISSUE

Did Martin-Marietta violate **§ 105(c)** when it discharged Johnny Howard?

DISCUSSION

In Secretary of Labor, ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), the Commission announced a four-part test for weighing the evidence in a discrimination case. Id. at 2799-2800. To establish a prima facie case, **Howard must** show that he engaged in protected activity which played some role in the decision to fire him.

Howard's complaints about the brakes on his loader were certainly protected by **§ 105(c)**. The parties agree that the brakes were often faulty. The risk of harm this posed to individuals operating the loader or working near it is uncertain, but **§ 105(c)** protects a miner when he notifies his employer of an "alleged" danger.

It is equally clear that Howard's call to OSHA was protected by **§ 105(c)**. The statutory right to request a safety inspection is the centerpiece of the Mine Act. 30 U.S.C. **§ 813(g)**. Congress believed that "[i]f our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35, reprinted in (1977) U.S. CODE CONG. & AD. NEWS at 3435. It is immaterial that Howard called OSHA rather than MSHA. A layman cannot be expected to be familiar with the jurisdictional boundaries between the two agencies.

The more difficult issue is, whether Howard's absence from work on July 24, 1979, was protected by **§ 105(c)**. His absence actually resulted from two events: his refusal to work on the loader and his departure from the premises to call OSHA.

Howard's refusal to work on the loader was protected by **§ 105(c)**. A miner may refuse an assigned task if he honestly and reasonably believes that the task is hazardous to him. Secretary of Labor, ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Howard's good faith and reasonableness were corroborated by witnesses for Martin-Marietta, who agreed that the brakes on the loader were faulty at the time he complained and on many previous occasions. The risk of harm posed by the faulty brakes is uncertain, but it is a fair inference that faulty brakes are a safety hazard. If it is reasonable to refuse to work on a machine that gives one a headache, Pasula, supra, at 2793, surely it is reasonable to refuse to work on a machine with faulty brakes.

Howard's departure from the premises on July 24, 1979, presents a close question. An employee has the right to remove himself from danger, but as a general rule, he is not protected when he leaves the premises, making himself unavailable for alternate work and disrupting production. However, Howard did more than simply leave the premises. Before he left, he told his foreman and the plant supervisor that he was leaving to call OSHA. He testified that he believed company policy prohibited him from using a phone on the premises for this purpose. Neither Foy nor Brisley disabused him of this belief. Had one of them informed Howard that he could call OSHA without leaving work, I might view his departure in a different light. But when a miner believes that there exists a situation requiring an immediate safety and health inspection, I hold that he has an absolute right to leave company property to call for an inspection if he believes he cannot do so on company property. Martin-Marietta made no issue of the fact that Howard did not return until late in the afternoon. Therefore, I find that his absence from work from approximately 7:00 a.m. to 3:00 p.m. on July 24, 1979, was protected by § 105(c).

It is clear that Howard's protected activity played some role in the decision to discharge him. Brisley testified that "he was terminated for leaving the job and for insubordination with the plant foreman." Tr. at 165. "Leaving the job" obviously refers to Howard's conduct on July 24, 1979. .

Martin-Marietta may affirmatively defend by showing that Howard engaged in unprotected activity and that he would have been fired for that activity alone. Pasula, supra, at 2799-2800. It has pointed to a number of factors which supposedly contributed to its decision to discharge. Brisley alleges that Howard had a drinking problem. However, he was disciplined for this months before the incident in question and there was no testimony that the alleged problem recurred. Howard once left work while he was on medication for his back problem. He testified that he had his supervisor's permission, however, and none of Martin-Marietta's witnesses contradicted him. He left work one night in October of 1978 because some truck drivers were teasing him. Brisley, however, came to his house to ask him to return since he valued him as an employee. He received no discipline for the incident.^{4/} He left work on July 25, 1979, soon after arriving in the morning. But he was told

^{4/} "[I]f the unprotected activity did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." Pasula, supra, at 2800.

by Foy that he had been fired or quit. When Brisley found him at the store and asked him to return, he obeyed.

The evidence simply does not support an inference that Martin-Marietta relied on any of these considerations when it fired Howard. Still, it did rely on "insubordination with the plant foreman," meaning his behavior toward Foy on the morning of July 24, 1979. Assuming that Howard was insubordinate, 5/ I cannot conclude that he would have been fired if his insubordination had not been coupled with his departure from the premises to call OSHA.

In my judgment, Howard was fired for requesting a safety inspection. I seriously doubt that there was even a "mixed motive" on the company's part, for while it has chronicled a number of unprotected activities, none of them played a role in Howard's discharge. **Brisley's** testimony shows that rather than invoking specific instances of misconduct, he told Howard that the company could not seem to satisfy him, that he was making people mad at him, that he was hurting feelings and losing friends. These remarks, coming so closely on the heels of Howard's announcement that he would call OSHA, lead me to believe that what upset Brisley was the fact that he had taken his complaint to "outsiders." Still, Brisley had apparently not decided what to do with Howard at the time he uttered these remarks. Only after the company had been visited and cited for a violation by an MSHA inspector did the company decide to discharge him. Under these circumstances, Respondent has a heavy burden to show that Howard would have been fired for reasons unrelated to his call for an inspection. It has failed to carry this burden.

Therefore, I find that in discharging Howard. **Martin-Marietta** violated **§ 105(c)**. I will **retain** jurisdiction of this case until the relief to be awarded is determined.

CONCLUSIONS OF LAW

1. I have jurisdiction over the subject matter and parties to this proceeding.
2. Martin-Marietta Corporation violated **§ 105(c)** of the Mine Act when it discharged Johnny Howard on July 31, 1979.

5/ There is room for doubt on this matter. As commonly understood, insubordination is more than simply a display of anger and frustration directed at a machine and the company in general. It would seem to require some defiance or displeasure directed at a specific superior.

ORDER

1. Martin-Marietta shall offer reinstatement to Howard in the position from which he was terminated, at the rate of pay fixed for that position on the date of reinstatement.

2. Martin-Marietta shall pay to Howard back pay covering the period from July 31, 1979, until the day he is offered reinstatement. Back pay equals the gross pay Howard would have received minus **interim earnings**. Martin-Marietta shall be responsible for withholding from the award the amounts required by state or Federal law and for making any additional contributions which those laws require. Interest on the net back pay award shall be computed at a rate of 6% for that portion attributable to the period July 31, 1979, through January 31, 1980, and 12% for the period thereafter.

3. Martin Marietta shall pay a reasonable attorneys* fee for services rendered by counsel for Howard.

4. Upon being notified that the decision in this case has become a final order of the Commission, the Secretary of Labor shall institute proceedings to assess a civil penalty against Martin-Marietta for the violation found herein.

5. Martin-Marietta shall cease and desist from interfering with the rights of its employees covered by the Mine Act to bring safety or health complaints to the attention of state or Federal authorities. It shall post in a conspicuous place a notice that it has committed such a violation, that it will refrain from doing so in the future and that it encourages its employees to exercise their rights under the Federal Mine Safety and Health Act. The notice shall be submitted to me for prior approval.

6. Counsel for the parties shall advise me in writing by July 10, 1981, whether they have agreed on the amounts due under paragraphs 2 and 3 of this order. If so, they shall submit those amounts to me together with the notice described in paragraph 5. Upon approval, I will issue an order which finally disposes of the present proceedings. If they are unable to agree, further post-hearing orders will be issued.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

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