

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1981

SECRETARY OF LABOR,	:	COMPLAINT OF DISCHARGE,
MINE SAFETY AND HEALTH	:	DISCRIMINATION OR
ADMINISTRATION (MSHA),	:	INTERFERENCE
on behalf of J. C. DUNCAN,	:	
WILLIAM DUNCAN, T. C. GALLION,	:	Docket No. KENT 81-87-D
and TOMMY TURNER,	:	Bakersport Mine
Complainants	:	
v.	:	
T. K. JESSUP, INC.,	:	
Respondent	:	

DECISION

On August 25, 1980, six men comprising the second shift at Respondent's mine refused to start work. As a result, they were fired. Four of them subsequently filed complaints with the Mine Safety-and Health Administration (MSHA). The issue is whether they were discharged in violation of **§ 105(c)** of the Mine Act, 30 U.S.C. **§ 815(c)**.

A hearing was held, pursuant to 'notice, in Evansville, Indiana, on June 9 - 10, 1981. Witnesses for the Secretary of Labor were J. C. Duncan, T. C. **Gallion**, Tommy Turner, William Duncan, Jerry Van Crick, Jerry Vincent, James Greg East, and Boyd **Mathis**, all former employees of Respondent T. K. Jessup, Inc. Witnesses for Jessup were T. K. Jessup, the mine owner, Robert Sykes, former **superintendent**, William Jerry Anderson, night foreman, Michael Oates, reclamation and safety director, and James Utley, an MSHA inspector. The parties have filed briefs setting forth their positions. Based on the whole record, my decision is as follows.

Findings of Fact

1. At all times relevant herein, Jessup owned and operated the Bakersport Mine in Dawson Springs, Hopkins County, Kentucky. It produces coal by strip mining the surface.
2. During the-months preceding their discharges on August 25, 1980, 1/ the complainants notified management of a

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1/ Two other miners were discharged with the complainants that day, James Greg East and Boyd **Mathis**. However, Jessup offered reinstatement to them a week later and they returned to work within one month. Neither is a party to this case.

number of problems with their equipment. Some repairs were completed and some were not by August 25, 1980. Complainers rarely notified management of equipment problems on the report slips intended for that purpose. Instead, the complaints were predominantly oral.

3. On August 23, 1980, Robert Sykes returned to the mine to check on the progress of work during the second shift. He had just finished sharing a six-pack of beer with Michael Oates. When he arrived, he found that James East was operating a dozer on a **highwall** in what Sykes considered an unsafe and unproductive manner. Sykes then got a dozer and proceeded to show East how he wanted the job done. The other men on the shift were watching and thought he was being reckless with the machine. They smelled alcohol on his breath and thought he was intoxicated and were very upset because of this. I find that Sykes was not intoxicated and was, in fact, trying to demonstrate a safer and more productive method of operating the dozer. However, East and the other men misunderstood his explanation and thought East was being told to operate the dozer in an unsafe manner.

4. After Sykes left the mine on the night of August 23, the men spoke with foreman Jerry Anderson and expressed their dismay at Sykes's conduct and their general dissatisfaction with him as a superintendent. They asked Anderson to arrange a meeting between them and Sykes and T. K. Jessup on August 25. Anderson agreed. Anderson attempted to contact Jessup but was unsuccessful. On August **25, before** the second shift, he confronted Sykes with the men's concerns. Sykes admitted that he was wrong to visit the mine after drinking. Anderson did not tell Sykes that the men wanted a meeting.

5. At the start of the second shift on August 25, Anderson told the men that their problems had been "taken care of." The men were still dissatisfied and demanded a meeting with Sykes. J. C. Duncan then saw Sykes approaching in a road grader and motioned him to stop. Duncan related the men's concerns but did not raise specific safety complaints. Rather, he alluded to the incident on August 23 and stated the men's belief that they were being mistreated and were being required to operate unsafe equipment in an unsafe manner. Sykes and Duncan became quite hostile and finally Duncan dared Sykes to fire him. At that, Sykes fired him.

6. Next, Sykes went to each member of the second shift in turn and asked if he was going to work. Each of them expressed solidarity with Duncan and with the group as a whole. Sykes fired each of them.

7. The next day, the men went to the local MSHA office and filed a § 103(g) request for an inspection, listing their complaints. An inspector arrived at the mine on August 27, 1980, and subsequently issued two citations and one withdrawal order.

#### Issue

Did the complainants engage in activity protected under § 105(c) and, if so, were they discharged because of it?

#### Discussion

In Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), the Commission announced its formula for weighing the evidence in a discrimination case. To establish a prima facie case, the Secretary must demonstrate that the Complainants engaged in protected activity which played some role in the decision to discharge them.

The parties agree that during the months preceding their discharges, each complainant notified management of various problems with his equipment affecting safety. These ranged from broken mirrors and windshields to faulty brakes. The fact that the complaints were registered orally, rather than written on slips of paper as required by company rules, is immaterial. The complaints constituted protected activity.

By the date of their discharges, dissatisfaction with Robert Sykes had been building for months among the miners on the second shift. No doubt, personality clashes played a major role. J. C. Duncan, in particular, believed neither Anderson nor Sykes were running the mine as it ought to be run. When Sykes arrived at the mine on August 23, 1980, with beer on his breath, the miners decided that he was unfit to supervise them. They therefore requested a meeting with Sykes and Jessup. Whether concern for their safety was the dominant motive for the request is unclear. The fact that it figured in the request is enough, however. The request for a meeting was protected under § 105(c).

On August 25, 1980, the miners on the second shift found that no meeting had been arranged. They were determined to air their grievances before commencing work, so J. C. Duncan stopped Sykes, who was working a short distance from them, and began to relate the miners' concerns. Sykes and Duncan began to argue almost immediately, so Sykes left.

Sykes soon returned and once again exchanged heated words with J. C. Duncan. Beyond raising the incident of August 23, Duncan did not relate any specific safety concerns but rather expressed general dissatisfaction with the way the mine was being operated. Finally, Duncan dared Sykes to fire him, which he did.

Again, the fact that concern over safety played some role in J. C. Duncan's complaints to Sykes on the miners' behalf is enough to bring the complaints within the protection of **§ 105(c)**. Although the complaints were voiced in a provocative and combative tone, I cannot conclude that Duncan's conduct was so opprobrious as to forfeit the protection of the Act. Cf. American Telephone and Telegraph Co. v. NLRB, 521 F. 2d 1159 (2d Cir. 1975).

Before they were discharged, the miners on the second shift collectively and individually refused to work. Whether a refusal to work is protected under **§ 105(c)** depends on whether a miner has a good faith, **reasonable** belief that continuing work 'would pose a safety hazard. Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 812 (1981). In my judgment, none of the complainants satisfied this standard.

I assume, as Respondent's brief concedes, that the complainants honestly believed their jobs presented unjustifiable risks from time to time. However, while generalized complaints over safety are protected under **§ 105(c)**, they cannot form the basis for a refusal to work. Reasonableness requires, at a minimum, that the miner's refusal to work concern a condition actually confronting him at the time. 2/

Only two miners on the second shift expressed any concern over the safety of the tasks they **were** about to perform. James East, who did not join the complainants in this action, renewed his misgivings about the brakes on his dozer. Sykes responded that the dozer had been taken out of service for repairs and that he would lay off East temporarily and recall him when the brakes were fixed. East

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2/ Reasonableness cannot be established after the fact. The day after they were fired, the complainants prepared a list of unsafe conditions and presented it to the local MSHA office, requesting an inspection under **§ 103(g)**. Had they coupled their refusal to work with such specific complaints, I could then analyse whether their beliefs in these allegedly dangerous conditions were reasonable. As it was, even this threshold element of reasonableness was not present.

declined, preferring to remain with the group. According to Sykes, Tommy Turner claimed that the mirrors on his truck had not been fixed. Sykes told him they were fixed earlier in the day. Still, Turner refused to work.

The actual safety of the work the complainants were about to perform has some bearing on the reasonableness of the complainants' refusal to work. An MSHA inspector visited the mine two days after they were discharged, with a list of their complaints. Two citations were issued, one for an inoperative back-up alarm and one for a missing fire extinguisher. One withdrawal **order** was issued, covering a road grader with faulty brakes, which none of the complainants had operated. The equipment that caused them the greatest concern had been removed from service. I cannot conclude, on the basis of this record, that complainant's refusal to work was reasonably related to conditions believed to be unsafe.

Whether the Secretary has established that the complainants' protected activity figured in the decision to discharge is academic at this point. Even if it did, the record is clear that they would not have been discharged had they not refused to work. Therefore, Respondent has established an affirmative defense under Pasula, supra, at 2799 - 2800.

Based on the above, I find that Respondent did not violate **§ 105(c)** when it discharged the complainants.

#### Conclusions of Law

1. I have jurisdiction over the parties and the **subject-matter** of this proceeding.
2. Respondent did not violate **§ 105(c)** when it discharged the complainants.

#### Order

1. The complaint of discrimination in this case is DISMISSED.

2. Any proceedings aimed at assessing a civil penalty against Respondent for the allegations in the complaint are hereby ordered DISMISSED. No penalty shall be assessed.

*James A Broderick*

James A. Broderick  
Chief Administrative Law Judge

Distribution: By certified mail.

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