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JUAN MUNOZ v. SUMMIT MINERALS  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

JUAN N. MUNOZ, AKA JUAN MUNOZ NATIVIDAD, COMPLAINANT	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE
v.	DOCKET NO. CENT 80-331-DM
SUMMIT MINERALS, INC., RESPONDENT	MINE: Summit

DECISION AND ORDER

Appearances: Frederick H. Sherman Esq.  
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Deming, New Mexico 88030,  
For the Complainant

John W. Reynolds Esq.  
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Silver City, New Mexico 88062,  
For the Respondent

Before: Judge Jon D. Boltz

Statement of the Case

On June 19, 1980, Juan N. Munoz [hereinafter "Munoz"], brought this action pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) [hereinafter cited as "the Act" or "the 1977 Act"]. In his complaint, Munoz alleges that Respondent, Summit Minerals, Inc. [hereinafter "Summit"], unlawfully discriminated against him by discharging him from his employment at Summit's mine on February 1, 1980, in violation of the Act. Munoz alleges that he had engaged in activities relating to health and safety protected by section

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105(c) of the Act prior to the time of his discharge.(FOOTNOTE.1) Munoz requests relief in the form of a finding of discrimination, reinstatement to his former position, back pay plus interest from the time of his discharge, and costs, including attorneys fees. Summit, on November 10, 1980, filed an answer to the complaint containing a general denial and a prayer for relief seeking dismissal of the proceeding at Complainant's cost. Pursuant to notice, the matter came on for hearing on April 7, 1981, in Las Cruces, New Mexico. Submission of post hearing briefs was completed on May 28, 1981.

#### FINDINGS OF FACT

1. Summit is operator of an underground precious metals mine located in Grant County, New Mexico, known as the Summit Mine.
2. Juan N. Munoz was employed by Summit as a miner for slightly over two years, until February 1, 1980, the date of his discharge.
3. Munoz performed various jobs during his tenure at the mine. Initially, he worked at timbering. After two or three months on the job, he was moved to a drilling position because he was too slow in his work. Munoz worked as a drill operator for only four days. Management then assigned him to work as a locomotive motorman, again, because he was too slow in his work. As a locomotive motorman, Munoz with the aid of a helper, was responsible for filling ore car trains with production from the stopes and for transporting them to the surface. Munoz was employed in this capacity at the time of his discharge.

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4. In the months preceding his discharge, concern was evidenced by individuals comprising Summit management that Munoz was not filling ore car trains and transporting them to the surface at a fast enough rate. Both the foreman, Guillermo Ortega, and the mine owner, Douglas E. Hanson, repeatedly warned Munoz that he must produce more ore. A month or so prior to his discharge, Ortega and Hanson discussed firing Munoz, but because of the miner's advanced age, Hanson deferred taking such action.

5. On January 15, 1980, at a safety meeting conducted by Alfredo D. Duran, an inspector employed by the New Mexico Bureau of Mine Inspection, Munoz registered a complaint about dust problems and poor ventilation in the main haulage tunnel, where he worked. Munoz told Duran that whenever the State came by to check on the amount of dust raised in attempts to blast free clogged ore chutes, Summit management would refrain from blasting because they felt that existing ventilation was inadequate and that the State would make them take corrective action. Munoz also complained about the fatigue caused by his work. Ortega, the foreman, was present at the meeting and aware of Munoz' complaints.

6. At some point following the meeting, Ortega told several employees that if Summit had to install additional fans, the mine would close down and they would lose their jobs. Ortega renewed his efforts to get Hanson to fire Munoz, but Hanson declined.

7. On or about January 28, 1980, Hanson gave a \$10.00 a day raise to everybody at the mine. Although he had been told that Munoz was still not doing his job and, therefore, didn't deserve a raise, Hanson gave Munoz the raise to see if it would make him work a little harder. Additionally, Hanson did not want to show favoritism toward anybody.

8. On February 1, 1980, with encouragement from Ortega, Hanson decided to terminate Munoz. Hanson determined that Summit had given Munoz every opportunity to increase his individual effort, but that results were not forthcoming. Ortega communicated Hanson's decision to Munoz.

#### ISSUES

By discharging him from his employment at the Summit Mine, did Summit unlawfully discriminate against Juan N. Munoz in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977?

#### DISCUSSION

In its decision of Secretary of Labor on behalf of David Pasula v. Consolidated Coal Company, 2 FMSHRC 2786 (October 14, 1980), the Federal Mine Safety and Health Review Commission set forth the test to be used to determine whether or not the discharge of a miner who engages in both protected and unprotected activity was discriminatory. The Commission

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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).

Section 105(c)(1) of the Act sets forth certain enumerated types of employee activity which are protected by a prohibition against discrimination or interference, including:

"... a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act."

The evidence establishes that Munoz was engaged in protected activity when he made his safety complaints known at the January 15th meeting. Although that meeting was conducted by an inspector employed by the New Mexico Bureau of Mine Inspection, the meeting was held on mine property with the permission of the operator. Through this meeting, the State inspector served as the operator's agent with respect to Munoz' complaints. Further buttressing a finding of protected activity is the fact that Ortega, the foreman, was present at the meeting and aware of Munoz' complaints.

However, I am unable to conclude that Complainant has proven, by a preponderance of the evidence, that the discharge was motivated in any part by the protected activity. The evidence establishes that at some point following the safety meeting, Ortega renewed his efforts to get Hanson to fire Munoz, but Hanson declined. Ortega testified that Munoz' remarks at the

safety meeting had nothing to do with his telling Hanson that he wanted

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Munoz fired. However, Munoz testified that he noticed a change in the way Ortega treated him after his complaints at the safety meeting. Munoz was aware of a seriousness in Ortega and of a lack of direct communication between the two of them regarding working orders. Though it may appear somewhat inconsistent, I find both witnesses' testimony to be credible. Hanson, however, held ultimate responsibility for the decision to discharge Munoz. According to his testimony, the sole reason for his decision to dismiss Munoz was based on lack of production. I find his testimony to be credible.

Assuming, arguendo, that the discharge was motivated in any part by the protected activity, I must nevertheless conclude that Summit has proven, by a preponderance of the evidence, an affirmative defense to Complainant's cause of action. The evidence clearly establishes that Summit management was sufficiently motivated to dismiss Munoz for his inability to fill ore car trains at a fast enough rate. Also, the evidence shows that management would have dismissed him for this one reason alone. I conclude that Summit ultimately did discharge Munoz for that reason.

#### CONCLUSIONS OF LAW

1. Respondent Summit Minerals is a mine subject to the provisions of the 1977 Act.
2. At all times relevant to this Decision, Complainant Juan N. Munoz was a miner as defined in the Act and entitled to the protection afforded by the Act.
3. The presiding Administrative Law Judge has jurisdiction over the parties and subject matter in these proceedings.
4. On January 15, 1980, Complainant Munoz engaged in activities protected by section 105(c)(1) of the Act, to wit, complaints to New Mexico State Mine Inspector Alfredo D. Duran, in the presence of Mine Foreman Guillermo Ortega, concerning dust problems and poor ventilation.
5. On February 1, 1980, Respondent Summit Minerals discharged Complainant Munoz from his employment. That decision, however, was not motivated in any part by the protected activity described above.
6. Respondent Summit Minerals established that it did in fact consider Complainant Munoz deserving of discipline for engaging in unprotected activity alone and that it would have disciplined him in any event.
7. Respondent Summit Minerals' discharge of Complainant Munoz on February 1, 1980, was not in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

