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CARL AMBURGEY V. BRIGHT COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

CARL AMBURGEY,  
COMPLAINANT

Complaint of Discrimination

Docket No. KENT 82-141-D

v.

BRIGHT COAL COMPANY,  
RESPONDENT

DECISION

Appearances: Carl Amburgey, Whitesburg, Kentucky, pro se  
Ronald G. Polly, Esquire, Whitesburg, Kentucky,  
for the respondent

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns a discrimination complaint filed by the complainant with the Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Complainant Carl Amburgey asserts that he was discharged from his employment with the respondent because he refused to drive a scoop which he believed was unsafe because it would not steer. The complaint was filed pro se after Mr. Amburgey was advised by the Secretary of Labor, Mine Safety and Health Administration, (hereinafter MSHA), that its investigation of his complaint disclosed no discrimination against him by the respondent.

By notice of hearing duly served on the parties, a hearing was conducted in this matter in Pikeville, Kentucky, on February 23, 1983, and the parties appeared and participated fully therein. Testimony and evidence was taken on the record, and the parties made oral arguments on the record in support of their respective positions. They waived the filing of any post-hearing proposed findings, conclusions, and briefs.

Issues

The critical issue presented in this case is whether Mr. Amburgey's discharge was prompted by protected activity under section 105(c)(1) of the Act. Specifically, the crux of the case is whether Mr. Amburgey's refusal to continue operating a scoop because he believed it was unsafe due to an alleged problem with the steering is protected activity under the Act. Additional issues raised in this case are identified and discussed in the course of the decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).
3. Commission Rules, 29 CFR 2700.1, et seq.

Discussion

The record in this case reflects that at the time of the discharge on December 30, 1981, the complainant was employed as a scoop operator at an hourly wage of \$9.00. The Bright Number 9 Mine is a nonunion mine, and the company fringe benefits are limited to payment of employee hospitalization benefits. The record also reflects that the complainant worked at the mine in question for approximately three months up to the date of discharge, but prior to that time worked at other mines operated by the respondent, and that his total period of employment prior to his discharge was eight months. The complainant advised that since his discharge, he has been continually employed with another coal mine operator, and has been so employed since February 1982 (Tr. 2-5; 39).

Complainant's testimony and evidence

Complainant Carl Amburgey testified that on the morning of December 30, 1981, while operating a scoop on the section at approximately 7:15 a.m., he had difficulty maneuvering his scoop into a cut of coal because "the scoop just wouldn't steer into the cut", and he informed assistant underground foreman James Noble of that fact. Mr. Noble responded "you couldn't drive it if it was a brand new car", and ordered him out of the mine by telling him "well, just go to the outside. We don't need you nohow". Mr. Amburgey then left the section and told general mine foreman Jack Collins about the incident (Tr. 13-14). Mr. Collins asked him if he had quit his job, and Mr. Amburgey stated that he did not respond. At approximately 9:30 a.m., the mine fan went off and all the miners were sent home. He then called mine owner Jim Hogg and asked for his job back. Mr. Hogg informed him that Mr. Collins told him (Hogg) that he caught Mr. Amburgey and fellow miner Clifford Gilbert sitting at the section loading point not doing their job, and as a result of this "lie", Mr. Amburgey filed his discrimination complaint with MSHA (Tr. 14).

Mr. Amburgey testified that he took Mr. Noble's instruction to "get to the outside" to mean that he had been fired, but he did not know whether Mr. Noble had the authority to fire him. Mr. Amburgey confirmed that he did not answer Mr. Collin when he asked him whether he had quit, and had the mine not been idled he would have tried to find a way home (Tr. 16). Mr. Amburgey also confirmed that when he called Mr. Hogg, he (Hogg) informed him that he was told that Mr. Collins was the person who had fired

him (Tr. 17).

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Mr. Amburgey confirmed that he had operated the scoop in question during the time he was employed at the Bright No. 9 Mine, and he filed his complaint because he believed his discharge was illegal. He also confirmed that he received unemployment benefits until February 1982 when he obtained other employment (Tr. 18).

On cross-examination, Mr. Amburgey confirmed that there were three scoops on the section where he worked, and he operated them at different intervals. As to his operation of the particular scoop which he claims had a steering problem, he could not state how often he operated it prior to December 30, but indicated that it was "once or twice" (Tr. 20). He stated that he had encountered steering problems with the scoop two or three weeks prior to that date, but the problem was taken care of (Tr. 22). He confirmed that an MSHA inspector was at the mine on December 30, but he did not check the scoop in question (Tr. 24).

Mr. Amburgey testified that the scoop he was operating on December 30, would not steer in the corner where a shot had just been made in a fresh break, and he was concerned that it might strike the rib, curtain, or people. Mr. Noble was located right at the rib where he attempted to steer around the corner, and Mr. Amburgey stated that he mentioned nothing about safety, but simply told Mr. Noble that he couldn't steer the machine. After some words between the two, Mr. Amburgey got off the scoop and told Mr. Noble "well, you drive it, then" (Tr. 26).

Mr. Amburgey confirmed that he had never known Mr. Noble to fire anyone, and when he told him "to go outside" he did not specifically state that he had been fired (Tr. 28). When he encountered Mr. Collins on the surface, he told him that Mr. Noble had sent him outside and he did not tell Mr. Collins that the scoop was unsafe and would not steer (Tr. 29). Mr. Amburgey confirmed that he had no previous trouble steering any of the scoops on the section (Tr. 31). He also confirmed that Mr. Collins hired him to work for the respondent, and has known him for a number of years (Tr. 36-37). He also confirmed that he was "going to forget about the whole episode" but "got mad" when he believed that Mr. Collins "lied" to Mr. Hogg about the circumstances of his leaving respondent's employ (Tr. 38).

In response to certain bench questions, Mr. Amburgey respondend as follows (Tr. 41-42):

Q. When you say you were having trouble steering this scoop, was it because of the way the coal was cut or was something mechanically wrong with the scoop?

A. It just wouldn't steer like it should, you know. No matter where you would point it, it wouldn't steer like it was supposed to steer.

Q. You said it had had some problems with the steering on it before?

A. Yes.

Q. And it was taken care of?

A. They worked on it, yes.

Q. What specifically was wrong with the scoop?

A. They put steering caps and stuff on it. That's all I know.

Q. You had an MSHA inspector there that day?

A. Yes.

Q. After Mr. Noble sent you out of the mine did you ever think about getting the inspector over there to take a look at the scoop?

A. No, I didn't.

Q. Why not?

A. When he told me to go to the outside, that's when I went to the outside.

Q. When he tells you to go outside, you went outside. And when you went outside you said nothing to Mr. Collins?

A. I just told him that Noble told me to come outside.

Q. Why didn't you tell Mr. Collins why? Why didn't you tell Mr. Collins you were having trouble with the scoop? I assume he's the superintendent. He would go down there and check it out, wouldn't he?

A. I guess he would.

Q. But he wouldn't do that unless you told him, would he?

A. No, I don't guess.

Q. Why didn't you tell him?

A. I don't know. I was just upset. I told him that Noble told me to go outside, that he didn't need me nohow.

Q. You claim that Mr. Noble said some words to the effect that you couldn't drive it if it were brand new and he didn't need you anyway. This leads me to believe that you and Mr. Noble didn't hit it off too well. It is kind of unusual for two people to get along at work, and a worker and a supervisor to have words over a steering and him telling you, "Well, you dumb so-and-so, you couldn't operate that thing if it was new, and get out. I don't need you." That leads me to believe that you and Mr. Noble had been going at it for quite a while. Is that right?

A. Every once in a while he would call me a dumb ass.

Q. Over what?

A. I don't know.

Q. Did he make it a habit of calling his workers names like that?

A. He would act a fool and go on with them all the time, but every once in a while he would get mad and call them a name or something.

Q. Was this in jest?

A. I don't know.

Q. Or was this shop talk?

A. He would just get mad every once in a while and call you a dumb ass or something.

In response to further bench questions, Mr. Amburgey admitted that a week or so prior to his claimed discharge he operated a scoop on the section with an inoperative front light for practically the entire shift, that he knew the light was out, but said nothing about it because "something like that, I usually don't pay no attention to it". At the end of the shift as he was driving along the belt line along a curtain, he nearly struck Mr. Noble and an MSHA inspector. When asked about the light at the time, he told Mr. Noble that it had been out all day, and the next morning Mr. Noble "got mad" at him and "cursed me out" for admitting the light had been out. Mr. Amburgey did not know whether the inspector issued a citation for the defective light, and he did not tag the machine out (Tr. 43-48).

With regard to the scoop that he claimed had a steering problem, Mr. Amburgey confirmed that he had not experienced prior steering problems with the machine before December 30, and he confirmed that he did not check the machine before he operated it that day, but "guessed" that a repairman did (Tr. 48, 50).

Testimony and evidence adduced by the respondent

Jack Collins, mine superintendent, testified that he has known Mr. Amburgey for 10 to 12 years and that at one time he was married to one of his relatives. He confirmed that he had no previous problems with Mr. Amburgey, and he stated that all underground equipment is preshifted by the foreman one hour before the actual start of any shift. He stated that Mr. Amburgey was originally hired as a timber man and "extra inside man" doing odd jobs. After expressing a desire to be a scoop driver, Mr. Collins trained him for this job and Mr. Amburgey began operating the scoop "a couple of weeks" after the opening of the Number 9 mine. Prior to this time, while Mr. Amburgey told him he had prior experience as a scoop operator, his experience was limited to trammig it and he had no prior coal production experience with a scoop (Tr. 54).

Mr. Collins testified that Mr. Amburgey's trammig scoop experience consisted in pulling a load of coal tied to a "ram car" without a bucket, and he instructed the foreman to let him learn the actual coal loading process using a scoop with a bucket, which required the actual knowledge to load coal out, and that this was a more difficult task (Tr. 56). Mr. Collins stated that five scoops were available on the section, and that each driver had a particular one which he operated. He confirmed that he found out about Mr. Amburgey knowingly operating a scoop with a defective light after the fact, and had he been advised the day it happened, he would have discharged Mr. Amburgey. He did not do so because Mr. Amburgey had already gone underground the day after the incident to work, and one or two weeks had passed, but he did "chew him out" over the incident and told him never to drive any equipment underground without lights on it (Tr. 59).

Mr. Collins stated that on December 30, 1981, when Mr. Noble sent Mr. Amburgey out of the mine, he spoke with Mr. Amburgey in the mine office, and when he asked him what the problem was Mr. Amburgey replied "I've quit. I can't get along with that foreman (Noble) up there" (Tr. 61). Mr. Collins testified as follows concerning this conversation (Tr. 61-62):

A. I asked him what he quit for and he said, "I can't get along with that foreman up there." He said, "I can't drive a scoop to satisfy him." I said, "Carl, I've got a job open on the tail piece if you want it, shoveling on the tail piece up there." He said, "No, I've quit. I can't get along with him." I said, "Now, you might ought to think this over, Carl." I said, "Right now a job is hard to find, and when you go off this hill and I hire another man in your place I can't take you back." He said, "I've quit." I said, "Well, that's up to you."

Mr. Collins testified that after Mr. Amburgey left the mine, he called him that same evening seeking his job back, but he had hired someone else. Mr. Collins denied ever asking Mr. Amburgey to leave and



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never told him that he was fired or discharged (Tr. 64). He confirmed that Mr. Amburgey never mentioned to him anything about any unsafe condition on the scoop or that he was having difficulty steering it. Mr. Collins stated that he first learned about this situation when Mr. Noble came out of the mine the day Mr. Amburgey left, and he testified as follows with regard to the incident in question (Tr. 65-67):

Q. When Noble came outside, what did he tell you?

A. He told me that Carl was up there trying to load that scoops, and he had two (2) scoops behind him held up; holding up production. He said he told Carl to move his scoop back on this side and load over here and let them other two scoops go on and get in that coal, because he was holding them up. The pin man was held up; the shooting man was held up; he had a whole crew held up there trying to load that scoop. He said Carl told him, "I can't drive it to suit you. Drive it yourself."

Q. Well, did Noble say anything about why he was holding up everybody and why he couldn't drive the scoop?

A. He just told me that Carl wasn't going to make a scoop operator. He said he was just holding up production.

Q. Did he say anything about the steering; that it wouldn't steer?

A. No.

Q. Did he say anything to you--did Noble say anything to you that Carl Amburgey said that it wouldn't steer?

A. No. Amburgey told Noble to drive it himself, and he did drive it. He drove it the rest of the shift himself. If there had been something wrong with the steering he couldn't have drove it.

Q. Did you talk to Jim Hogg about Carl Amburgey?

A. No.

Q. You never did?

A. I never did.

Q. You heard Amburgey testify that he called Jim Hogg and Jim Hogg told him that you had told Jim Hogg that you found Clifford Gilbert and Carl Amburgey sitting at the loading point not working and that you sent them outside?

A. I heard him testify that, yes.

Q. Did that occur? Did you tell Jim Hogg that?

A. No. I didn't even talk to Jim Hogg, period, about him. He never questions what I do. If I hire or fire or dismiss or do anything I want to, I am in complete charge of the mine and what comes, it has to come through me before it goes anywhere. No man can be hired or fired unless it comes through me only, you know.

Q. Did Noble have the authority to fire Carl Amburgey that day?

A. No.

Q. Did you mention that to Carl Amburgey? Did he know--did he have any reason to know that?

A. I never told Carl that Noble couldn't fire him. The word "Fire" was never brought up. I had no reason to tell him that. The word "Fire" was never brought up in our conversation; not Carl's and mine.

During a bench colloquy, Mr. Amburgey denied that he told Mr. Collins he had quit, and his testimony on this point is as follows (Tr. 72):

MR. AMBURGEY: I never did come right out and say I'd quit, no.

JUDGE KOUTRAS: You say you never came right out and said it. Did you say anything that gave Mr. Collins the impression that you were quitting?

MR. AMBURGEY: I just told him that Noble had sent me to the outside, you know.

Regarding his knowledge of any defective steering on the scoop in question, Mr. Collins testified as follows (Tr. 75-78):

Q. After you talked to Mr. Amburgey, you never went back underground to check the scoop out, or anything, did you?

A. The scoops come outside.

Q. They come out?

A. Yes.

Q. Did you ever check the scoop out after Mr. Amburgey had left, or after that day, to determine whether or not there was actually anything wrong with the steering?

A. I was never aware that there was anything wrong with it. I didn't check it. I was never aware that there was something wrong.

Q. When did you find out that Mr. Amburgey was having problems with the steering?

A. I never did find out that he was.

Q. You must have found out when he filed the complaint in this case?

A. Oh, yes. I knew about it then, but that was probably a month or so later.

Q. Was that the first time you found out?

A. Yes, that there was something wrong with the scoop. I was never aware that there was because the drivers kept on driving the scoops and pulling cars.

Q. That is what I am driving at. After Mr. Amburgey left, he said nothing to you about the scoop and him having problems with it, or anything?

A. No.

Q. All he told you was that Noble sent him outside the mine?

A. He said--no, he didn't even tell me that Noble sent him out. He just told me, "I've quit. I can't get along with that foreman."

Q. After he left that day--December 30, 1981 would have been a Wednesday, of course, on my calendar. Okay.

A. Yes.

Q. You say he called you back that night trying to get his job back?

A. That's right.

Q. That you had already hired somebody?

A. I hired a man that day.

Q. So, the next Thursday when you went back to the mine was that same scoop that he had worked on the previous day used in the mine?

A. I don't really know. You see, I had five (5).

Q. At any time after December 30 up until the time that this complaint was filed by Mr. Amburgey did you ever have occasion as mine superintendent to have someone inspect that scoop for steering or anything like that?

A. Yes. My repairman goes over the scoops every day.

Q. Did anyone ever bring to your attention the fact that he was having problems with the steering?

A. No.

Q. Was that scoop ever cited by an MSHA inspector after you left?

A. Not on the steering.

Q. Not on the steering?

A. Not on the steering.

Q. The only time it was cited was for that light. Was this the same scoop that we are talking about where the light was out?

A. I really don't know if it was the same scoop he was on or not.

Q. Did you talk to Mr. Noble the next day?

A. Yes.

Q. And he told you essentially what you testified to in response to Mr. Polly's question, that he thought Mr. Amburgey would never make a scoop operator and that he was holding up production, and that sort of thing, and asked him to get out of the way and that Mr. Amburgey told him, "Well, you drive it," and he did the rest of the shift? That was the extent of your conversation?

A. That's right

Q. And Mr. Noble never mentioned anything to you about Mr. Amburgey saying he was having problems with the steering?

A. No. He didn't mention it to me at all.

Q. And your assumption was, since Mr. Noble went ahead and operated it the rest of the shift, that there was nothing wrong with the steering?

A. Evidently.

James E. Noble, underground mine foreman, Bright No. 9 Mine, testified that on the day in question when Mr. Amburgey was operating his scoop he was "gouging the scoop" trying to get into an area, and after attempting to show him how to pull into the area, Mr. Amburgey uttered an obscenity, and he (Noble) sent him out of the section, telling him "Go on to the outside, then. I don't need you" (Tr. 81). At the time Mr. Amburgey was assigned to the mine he was an "extra man", and was used to shoot coal or set timbers. He filled in as a scoop operator when someone missed work, and he had been driving the scoop two months prior to the incident of December 30, 1981 (Tr. 82)/

Mr. Noble stated that he had production troubles with Mr. Amburgey because he was slow, but he "overlooked it hoping he'd get better". Mr. Noble stated that in his attempts to maneuver into the area where he was to load coal out, Mr. Amburgey was "gouging the bucket" and "tearing it up", and after an exchange of words, Mr. Amburgey told him "drive it yourself", and Mr. Noble did in fact complete the work with the same scoop and there was nothing wrong with it. Mr. Noble simply believed that Mr. Amburgey was not a good scoop operator, and Mr. Amburgey said nothing to him about any defective or unsafe steering (Tr. 83-85). Had he mentioned anything to him, he (Noble) would have taken the machine "to the outside" for repairs (Tr. 85).

Mr. Noble confirmed that he had never fired anyone who worked for the respondent, had no such authority, and he stated that if it had to be done he would bring the matter to Mr. Collins' attention (Tr. 87). By sending Mr. Amburgey "to the outside", he meant that he was to see Mr. Collins. Had Mr. Collins seen fit to give Mr. Amburgey other work that day, he could have returned to his section the next day, but that it was up to Mr. Collins to put him back to work (Tr. 89). Mr. Noble confirmed that he loaded five or six loads of coal with the scoop on December 30, after he ordered Mr. Amburgey out of the mine (Tr. 89). He confirmed that by his inability to load the coal with the scoop, Mr. Amburgey had two experienced scoop drivers waiting behind him holding up production, and they were agitated over this (Tr. 90, 92).

Mr. Noble confirmed the incident over the defective front scoop light took place a week or two before December 30, and that he "chewed him out" over the incident because Mr. Amburgey admitted he had operated the car the entire shift with the light out and said nothing to anybody (Tr. 95).

Stanley Caudill, testified that he has worked as a miner for 36 years. He testified that he was at the mine on December 30, 1981, and that his job is to help repair the scoops. After observing two scoops parked outside, he asked Mr. Amburgey "what's the matter", and Mr. Amburgey replied "I've quit". Mr. Caudill then summoned Mr. Collins and he overheard Mr. Amburgey tell Mr. Collins "Me and Noble can't get along. I'll just quit". Mr. Collins then told Mr. Amburgey to "think twice about it" and offered to put him to work "on the tailpiece". Mr. Amburgey said nothing about any steering problems at that time, and Mr. Caudill did not hear Mr. Collins fire Mr. Amburgey (Tr. 99-100). Mr. Amburgey declined to cross-exam Mr. Caudill or to ask any additional questions (Tr. 101).

Rondell Roark, formerly employed by the respondent, testified that he worked at the No. 9 Mine on December 30, 1981, as a roof bolter operator, and he was present on the section and witnessed the incident over the scoop car. His testimony is as follows (Tr. 103-105):

A. The best I remember, Carl come up in that place and was trying to clean it up. If he said anything about the steering I did not hear it. I can't remember it. As far as I know, he didn't.

Q. What did you see? Tell the Judge what you saw Carl do.

A. He was trying to clean that place up and James told him to go on to a new cut and let them other two (2) scoops get in there and finish cleaning that up where I could get in there and bolt it. Carl took a load out and he came back. He started to hit the same cut again and James told him, "Go to a fresh cut and let these other fellows do it."

Q. Did you see anything wrong with what he was doing on that cut?

A. No, sir. He weren't running it like an expert, you know, but that would be expected with him just being in training.

Q. Did you know he was just in training?

A. Yes, sir. But James told him to go on to another cut and let the other two (2) experienced scoop drivers get in there and finish cleaning that up. Then they got into it and Carl jumped off the scoop and said, "There. You run it." James told him to go outside.

Q. Did you hear the entire conversation between them?

A. Not all of it.

Q. If Carl Amburgey had said something to James Noble that day about the scoop steering not working, something being wrong with the steering, or it being unsafe or dangerous, would you in all likelihood have heard it?

A. Most likely I would have. I wasn't paying much attention. I just set there and I'd wait for them to clean it up. Then I'd go in and bolt it. I didn't pay much attention. Like I said, if he said anything about the steering I don't remember it or I didn't hear it.

Q. If he had said anything about it ....

A. If he had, I think I would've heard it. I was setting there beside of him. I don't know. I can't remember. It's been a year.

Q. If that had been the case and if he had said anything about the steering, do you think it would be likely that you would remember it?

A. I don't know. I wasn't paying that much attention. I might have. He wasn't fired. I can say that. James just told him to go outside.

Q. He was not fired?

A. He just told him to go outside.

Q. Would you have took that as him being fired, or you being fired, if you had been told that?

A. No. I'd have went outside. Let me clarify about James. He cursed and hollered and went on back in there, acting crazy all the time. You never know when he was serious and when he wasn't. Most likely, if Carl had just cursed him right back and went on about his business there wouldn't be nothing to it, because we just carried on. Sometimes in there you'd think they was going to fight and they'd just be horse playing.

Q. Did Noble get on the scoop and drive it then?

A. The best I can remember, he did.

Q. Did you see him load coal with it?

A. I can't remember. They were moving on to the next cut and then I went in to bolt it.

Q. Did you ever become aware that there was anything wrong with the steering after that?

A. No, sir, not till here the other day when they said this case was coming up.

Mr. Amburgey declined to cross-examine Mr. Roark or to ask him any additional questions (Tr. 106). Mr. Amburgey was recalled by me and he confirmed that at the time he spoke with Mr. Collins after being sent out of the section by Mr. Noble, he did not say anything to Mr. Collins about any scoop steering problems (Tr. 107). Mr. Amburgey denied that Mr. Collins subsequently told him that he had hired someone else to replace him, and he stated that he took Mr. Noble's directive to "go on outside. I don't need you anymore" to mean that he had been fired. He confirmed that he told Mr. Collins he could not get along with Mr. Noble, and when asked whether he denied telling Mr. Collins that he had quit, he replied "I never did come out and tell him I quit" (Tr. 109).

Mr. Amburgey testified further that he could not recall Mr. Collins offering him other work at the tail piece on December 30, and he confirmed that Mr. Noble had not previously questioned his ability as a scoop driver, nor could he recall Mr. Noble telling him to back the scoop out and go to another cut (Tr. 112). He did confirm that after an exchange of curse words between them, he got off the scoop and told Mr. Noble to drive it, and at that point, Mr. Noble ordered him "to the outside" (Tr. 113). Mr. Amburgey confirmed that he did not know why the scoop would not steer, nor did he know what was wrong with it or whether it was defective (Tr. 114).

#### Findings and Conclusions

As indicated earlier, the issues in this case are whether Mr. Amburgey's refusal to continue operating a scoop because of his belief that the steering mechanism was somehow defective and unsafe is protected activity under the Act, and whether his asserted discharge for this refusal was proper. Refusal to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, if the belief is a reasonable one, and if the reason for the refusal to work is communicated to the mine operator. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982); Secretary of Labor/Dunmire and Estle v. Northern Coal



Co., 4 FMSHRC 127 (1982).

One initial question for determination is whether or not Mr. Amburgey was actually discharged on December 30, 1981, or whether he voluntarily quit or abandoned his job. The mine in question is a nonunion mine, and it would appear from the record here that at the pertinent time in question there were no formal grievance or discharge procedures, and it seems clear that no written notice of any kind was given to Mr. Amburgey when he departed the mine on December 30, 1981.

Mr. Collins testified that he has the sole authority to discharge or otherwise discipline miners and that he did not actually fire or discharge Mr. Amburgey, and his testimony is corroborated by Mr. Caudill who overheard a conversation between Mr. Collins and Mr. Amburgey concerning the incident in question. Underground foreman Noble testified that he did not actually tell Mr. Amburgey that he had been fired at the time he ordered him out of the mine, and he also testified that he had no authority to fire anyone. On the other hand, Mr. Amburgey testified that when the foreman ordered him out of the mine, he thought he had been fired. Other witnesses who testified in this case stated that Mr. Amburgey stated that he had quit because he could not get along with foreman Noble. Mr. Amburgey's testimony that he telephoned Mr. Collins on the evening of December 30, 1981, in an attempt to get his job back supports his assertion that he believed he had been fired. Mr. Collins' testimony that Mr. Amburgey did in fact call him, and his hiring of another man to replace Mr. Amburgey does lend some support to Mr. Amburgey's belief that he had been fired.

On the basis of all of the credible testimony in this case, I believe it is reasonable to conclude that at the time of the incident in question Mr. Amburgey had reasonable grounds to believe that he had been discharged by the foreman. However, in view of my findings and conclusions which follow below on the question of whether or not his work refusal was protected activity, the question of whether he was fired or actually quit becomes moot.

The record establishes that after Mr. Amburgey was ordered out of the section by the foreman and sent to the surface, he encountered Mr. Collins, and Mr. Collins testified that he offered Mr. Amburgey other work on the tailpiece. This was corroborated by the testimony of Mr. Caudill. Mr. Amburgey denies that he was offered other work, and later that same day the mine was idled because the fan went down and everyone went home, including Mr. Amburgey. At no time did Mr. Amburgey mention anything to Mr. Collins about any defective steering on the scoop machine in question, and at no time did he tell Mr. Collins that he was concerned for his safety.

After careful consideration of all of the testimony in this case, I cannot conclude that Mr. Amburgey has established through any credible testimony or evidence that the scoop car in question was in fact defective and that his refusal to operate it was protected activity. It seems clear to me from all of the testimony in this case, that Mr. Amburgey and foreman Noble had a

dispute over Mr. Amburgey's ability to operate the scoop car in question, and that after the dispute escalated into a shouting match between the two, Mr. Amburgey was ordered out of the mine.

Mr. Amburgey conceded that at no time did he advise Mr. Collins that he was having any problems with the steering on the scoop car, and Mr. Noble's credible testimony is that he drove the car without incident after Mr. Amburgey refused to operate it. Mr. Caudill corroborated the fact that Mr. Amburgey never mentioned anything to Mr. Collins about the car being unsafe, and since Mr. Caudill was responsible for maintaining the cars I would think that any unsafe condition of the car would have come to his attention. Further, even though an MSHA inspector was on the property on the day in question, Mr. Amburgey said nothing to him about the alleged defective steering.

Having viewed all of the witnesses on the stand during the course of the hearing, I conclude that Mr. Amburgey's complaint in this case was filed because of a personal dispute with mine management unrelated to any real safety concerns on his part with respect to the scoop car in question. Mr. Amburgey admitted that he filed his initial complaint with MSHA after learning that Mr. Collins had "lied" about the circumstances of his leaving the mine on December 30, 1981.

With regard to Mr. Amburgey's allegation that he was "cursed out" because he would not lie to an MSHA inspector about the light being out on his scoop car, I take note of the fact that this allegation was never made to MSHA as part of his initial complaint, but was stated in his letter of August 19, 1982, to the Commission after MSHA advised him that no discrimination had occurred. At the hearing, respondent's counsel objected to the interjection of this allegation as part of the complaint, and he established that Mr. Amburgey had never served respondent with a copy of the letter (Tr. 6-10).

The record here establishes that the defective scoop light incident took place a week or two prior to December 30, 1981, and Mr. Amburgey admitted that he knowingly drove the car with one light out and had failed to report that condition to mine management. While it is true that Mr. Amburgey was "chewed out" by Mr. Collins and Mr. Noble for not informing management of the defective light, I cannot conclude that there is any credible testimony to support his allegation or inference that mine management "cursed him" or otherwise harassed him for not lying to an MSHA inspector about this incident.

#### Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Amburgey, and that his rights under the Act have not been violated. Accordingly, his discrimination complaint IS DISMISSED.

George A. Koutras  
Administrative Law Judge

