

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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JUL 26 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 83-101-D  
ON BEHALF OF Z.B. HOUSER, : MSHA Case DENV CD-82034  
Complainant :  
v. : Grass Creek Mine  
NORTHWESTERN RESOURCES CO., :  
Respondent :

DECISION

Appearances: James H. Barkley, Esq., and Robert J. Lesnick, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Complainant;  
Edward Bartlett, Esq., Northwestern Resources  
Company, Thermopolis, Wyoming,  
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

This case involves a discrimination complaint brought by the Secretary of Labor, on behalf of Z.B. **Houser (Houser)** under section **105(c)(2)** of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act) against Northwestern Resources Company (**Northwestern**). **Houser** alleges that Northwestern discriminatorily retaliated against him by recalling all of the other laid off mine employees except complainant after a production shut down of the mine in violation of section **105(c)** of the Act. Northwestern contends that **Houser** was not rehired because of his unsatisfactory work performance and further contends that the complaint is barred by time limitations.

A hearing was held, pursuant to notice, on March 21 and 22, 1984, in Thermopolis, Wyoming. Post-hearing briefs have been filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

## STATUTORY PROVISIONS

Section **105(c)(1)** of the Act provides in pertinent part 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 chapter because such miner, representative of miners, or applicant for employment has filed or made a complaint under **or** related to this chapter, 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. . . .

Section **105(c)(2)** of the Act, provides in pertinent part as follows:

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. . . .

Section **105(c)(3)** of the Act, provides in pertinent part as follows:

Within 90 days of the receipt of a complaint filed under paragraph **(2)**, the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own **be-**half before the Commission, charging discrimination or interference in violation of paragraph **(1)**. . . .

## FINDINGS OF FACT

1. Northwestern has operated a surface coal mine called the Grass Creek Mine at a location 35 miles from Thermopolis, Wyoming since 1979. In conjunction with the Grass Creek Mine, it maintained a load-out facility along the railroad tracks in Kirby,

Wyoming, which is approximately 60 miles from the mine. The load-out facility at Kirby consisted of a parcel of land approximately 100 feet wide by 400 feet long. Coal was hauled by truck from the mine and stockpiled at the Kirby site until it could be loaded in railroad **cars**.

2. The period of time involved in this case is from October 1, 1981 to September, 1982. **Houser** was hired by Northwestern as a crusher operator commencing work at the Grass Creek mine on October 1, 1981 (Transcript at **27**). On that date, there were two other employees at the mine, Frank Henning, a dozer operator and Roger Sprague, the mine foreman. Monte Steffans, mine manager, maintained an office in Thermopolis, Wyoming. Dick Meisinger worked at the Kirby load-out area loading coal on the rail cars.

3. **Harold Heeter** was hired to work at the Grass Creek mine as a crusher operator in November, 1981 (**Tr.** at 154). Ralph L. Allen was hired as an equipment operator during the latter part of November, 1981 (**Tr.** at 185). Dennis Householder was hired sometime after the above date as a temporary laborer to help Heeter build the scale and a scale house (**Tr.** at **30**).

4. In December, 1982, **Houser** was transferred to the Kirby load-out area where he remained for approximately two months before being transferred back to the mine (**Tr.** at **46**). **Houser's** residence was located in Kirby, approximately 300 to 400 yards from the load-out site. A 992 Caterpillar Tractor equipped with a ten yard capacity bucket was furnished the employee at the load-out area to stockpile coal, keep the area clean so the trucks could dump their loads, and to load coal on the railroad cars for shipment to Northwestern's customers. Also, the employee assigned to this job was expected to do maintenance work on the tractor including lubrication. The large size of the bucket on this machine made it possible for the operator to clean up a truck load of coal and stockpile it in approximately five minutes. A rail car could be loaded with a hundred tons of coal in ten to fifteen minutes. Usually there were ten rail cars to a shipment (**Tr.** at 37, **38**). **Houser** had considerable "free time" at the Kirby site which he spent greasing the tractor or sitting around waiting for the trucks to arrive. At times he went to his residence for coffee or to use the toilet and sometimes he would run his hunting dogs up and down the road (**Tr.** at **43**).

5. The trucks hauling coal from the mine to the load-out **site were** operated by independent contractors who were paid by the load. Hauling of coal commenced early in the morning and continued at times to eight or nine o'clock at night (**Tr.** at **41**).

**Houser's** regular hours at Kirby were from 7 o'clock in the morning to 3:30 p.m. with a half hour off for lunch. On some occasions, the truck drivers would use the loader at the mine to load their trucks and the loader at Kirby to clear an area to unload. This happened when they started early and worked beyond the Northwestern's employees regular working hours.

6. There is a sharp conflict in the testimony on the question of whether **Houser** did a satisfactory job while he was assigned to the Kirby load-out area. I generally accept the testimony of Roger Sprague, **Houser's** immediate supervisor, and Thomas C. Anderson, an independent contractor hired by the respondent to haul coal from the mine to Kirby during the period involved here. The main thrust of this testimony was that **Houser** was not always present when the trucks pulled in to unload which caused the drivers to wait for him to show up (Tr. at 319). Sprague testified that he received complaints about this from the truck drivers. Monte Steffans testified that he also found the complainant was absent from the load-out site when he was supposed to be there (Tr. at 221, 222). Anderson testified that after Meisinger replaced **Houser** at the Kirby site, those problems no longer occurred. However, he did admit that they changed the unloading area to a better site for their purposes (Tr. at 319). Sprague also testified that the loader was not maintained properly by **Houser**, that rail cars were overloaded, and **Houser** objected to using a smaller, substitute loader when the larger machine was not operating due to the engine being repaired (Tr. at 228).

7. After **Houser** had worked at the load-out facility for approximately two to three months, he was transferred back to the mine to work as lead man during the night shift. **Houser** operated the loader and Allen operated the crusher. The transfer occurred when Meisinger was involved in an automobile accident and was sent to the Kirby load-out area which was considered to be an easier job. In April of 1982, the night shift was suspended and **Houser** was transferred to the day shift (Tr. at 45-48). During this period, Henning continued to operate the dozer removing overburden and breaking up the coal (Tr. at 49). **Houser** loaded the coal in the crusher and, after it was crushed, into the trucks hauling to Kirby (Tr. at 50). Allen operated the crusher and occasionally traded off with **Houser** on the loader. Heeter was the utility man and Householder was a laborer.

8. In the spring of 1982, **Houser** expressed concern to Sprague about the dusty conditions at the mine (Tr. at 56).

Sprague then furnished him with painter's type paper dust masks. **Houser** did not find these satisfactory so Sprague furnished a better type of mask (**Tr.** at **57**).

9. During the spring of 1982, **Houser** operated a 7251 Terex front-end loader equipped with a cab. The glass in the side windows were both broken and the windshield had a gap between it and the frame. The rubber boots around the pedals and levers to keep dust out were not effective (**Tr.** at **55**). **Houser** complained to Sprague about the coal dust that entered the cab of the loader (**Tr.** at **56**). Glass in the doors of the Terex operated by complainant were broken several times due to the door not being kept latched. It was replaced as was the windshield (**Tr.** at 245).

10. In the middle of May 1982, a Mine Safety and Health Administration (**MSHA**) inspector arrived at the Grass Creek mine and placed dust sampling devices on **Houser** and Allen for a dust test. As a consequence of the results of this test, **Northwestern** was issued a citation on May 14, 1982, alleging that the average concentration of respirable dust in a designated work position exceeded the allowable amount. **Northwestern** was directed to take corrective action to lower the concentration of dust and sample each normal work shift until five valid respirable dust samples were taken (Exh. C-1).

11. **Houser** also complained on numerous occasions to Sprague about the steering mechanism on the Terex loader. He also wrote this on the machine's operator's log. Sprague's response was to keep on running it. After Sprague operated the loader at a later date, mechanics came out to the mine and repaired it (**Tr.** at 61, **62**).

12. On June 10, 1982, Steffans was advised that a major coal customer of the Grass Creek mine was curtailing its purchases. Steffans telephoned Sprague and discussed which employees at the mine would be "laid-off" due to the resulting reduction in coal production. It was decided that Henning would be retained to continue work on building the scale and scale house. Heeter would continue working operating the dozer for the stripping crew. Four employees were **to be** laid-off including **Houser**, Allen, Meisinger, and Householder. Steffans and Sprague were not laid-off. This was ultimately Steffan's decision although he discussed it with Sprague (**Tr.** at **356-358**).

13. On June 11, 1982, Steffans first went to his office

where he prepared pay-checks for the four employees to be terminated. After getting into his vehicle to go to the mine, he remembered that he also had to fill out termination reports on each miner. He returned to the office and prepared the required forms (**Exh. C-2**). After completion of the termination forms, Steffans **drove** to the mine arriving around the lunch hour. Steffans had mistakenly signed the four forms on the line designated for the supervisor's signature which would be Sprague. Steffans showed the forms to Sprague, crossed out his signature and placed it on the line designated "Reviewed". Sprague signed the forms as "supervisor". Each employee signed the termination report presented to him. After reviewing the termination report, **Houser** inquired of Sprague as to why he was rated lower than the other employees (**Tr. at 254**). Also, he wanted to know what "initiative" meant. The term was explained to him by Steffans and Sprague (**Tr. at 363**). Steffans had rated Meisinger the best employee of the four terminated, followed by Allen, **Houser**, and Householder (**Tr. at 365**)

14. Approximately two weeks after his termination, **Houser** met Steffans at a grocery store in Thermopolis and had a conversation in which Steffans indicated that the mine would start operating again soon (**Tr. at 65**). On July 19, 1982, Meisinger and Allen were called back to work at the mine (**Tr. at 65**). Householder returned to work on approximately September 1, 1982 (**Tr. at 66**). After Meisinger and Allen returned to work, **Houser** telephoned Steffans to find out when he would be going back. He did not remember the date but thought it was in July, 1982. Steffans told **Houser** that he was not being called back to work because Sprague did not want him back. **Houser** went to the office and talked to Steffans about the reasons Sprague did not want him back and was told that Steffans would check further into the matter (**Tr. at 69**).

15. In September, 1982, after Householder, who was originally employed as a temporary laborer, returned to work at the mine, **Houser** concluded he was not going to be called back to work and contacted Arthur Kunigee, the local business agent for the union that covered the employees at the mine. The agent contacted Mr. Neill, respondent's vice president, about the reason for not recalling **Houser**. Neill referred the inquiry to Steffans. In reply, Neill sent the business agent a memorandum from Steffans which contained the four following reasons for not rehiring **Houser**:

1. During the course of his employment it was found that the proper maintenance of equipment was not

being performed by him: Example - loader bucket pins had not been lubricated one week after replacement resulting in them being dry and having to replace them again.

2. During his tenure at the **loadout** site in Kirby, several times when the foreman went to check on how things were going, employee could not be found at the job site. It was discovered by the foreman that he was running his dogs during working hours.
3. Due to the fact that he was absent from the Kirby area at different intervals the coal stockpile was not worked regularly and the trucks did not have a place to dump until he would show up and move and load coal.
4. Direct insubordination of orders from the 'mine foreman. Z/B was told to load out trucks at the mine pit with two or three buckets of fines per truckload of coal, but was continually trying to load complete truckloads of coal with the fines materials.

(Exh. C-3).

16. On September 22, 1982, **Houser** filed a complaint of discrimination with MSHA (**Tr.** at **73**). On November 15, 1982, MSHA notified him by letter, with a copy to Northwestern, that a determination had been made that a violation of section **105(c)** of the Act had not occurred. On July 5, 1983, the Secretary of Labor filed a complaint of discrimination on behalf of **Houser** against Northwestern.

#### ISSUES

1. Is the complaint barred by the time limitations contained in **105(c)** of the Act?

2. Did Northwestern violate **§ 105(c)** when, after a lay off, it rehired other employees but not **Houser**?

#### DISCUSSION

**Houser's** initial complaint of discrimination was filed with MSHA on September 22, 1982, which was approximately three months after he had been laid off with other employees of the Grass Creek mine. However, **Houser** did not know he was not to be recalled until the middle of July, 1982 during a conversation with Steffans (Finding No. **14**). I find the original filing date was

within the 60 days provided by section **105(c)(2)**. After an investigation by MSHA, the Secretary made a determination that no act of discrimination had occurred and so notified **Houser** and Northwestern on November 15, 1982. However, on July 5, 1983, the Secretary of Labor reversed this decision and filed a complaint of discrimination with the Federal Mine Health and Safety Review Commission which was approximately 12 months after the complainant became aware he was not going to be called back. The Act provides in section **105(c)(2)** that if the Secretary finds a violation, "he shall immediately file a complaint with the Commission." The Secretary argues in his brief that the decision to file the complaint in this case occurred after a re-evaluation of **Houser's** case following discovery of material evidence in a companion case (Complainant's Brief dated May 30, 1984).

I conclude that none of the filing deadlines involved here are jurisdictional in nature. Rather, they are analogous to statutes of limitation which may be waived for equitable reasons. This determination is in line with prior decisions under the 1969 Coal Act which held that filing deadlines in discrimination cases are not jurisdictional. Christian v. South Hopkins Coal Co., 1 FMSHRC 126, 134-36 (1979). The same result was reached under section 111 of the 1977 Act, which **directs** mine operators to compensate miners while withdrawn from a mine pursuant to a government order. Local 5429, United Mine Workers v. Consolidation Coal Co., 1 FMSHRC 1300 (1979).

The proper test is whether tolling the filing period is consonant with the purposes of the statute. American Pipe and Construction Co. v. Utah, 414 U.S. 538, 557-58 (1974). Congress spoke plainly on **the subject** when it declared that the 60 day filing period "should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in, (1977) U.S. CODE CONG & AD. NEWS at 3436. The deadlines imposed on the Secretary also "are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings." Id.

**The** Secretary's delay in processing the complaint in this case cannot defeat the action in light of the legislative history as quoted above. Further, it is commonly held that the government is not affected by the doctrine of **laches** when enforcing a public right. See Intermountain Electric Co., 1980 CCH OSHD **Para.** 24,202 (10th Cir. 1980); Occidental Life Insurance Co., v. EEOC, 432 U.S. 355 (1977); Nabors v. NLRB, 323 F. 2d 686, 688 (5th Cir. 1963). I find no merit in Northwestern's argument as to the timeliness of filing the complaint in this case and reject it.



Northwestern also argues that the Secretary has no authority to file a complaint with the Commission after it had previously determined that no violation of discrimination occurred. However, Northwestern failed to cite any authority for such a position and in view of the legislative history and cases quoted above, this position is not persuasive. Northwestern has not claimed that it was prejudiced in any way by this delay in filing the complaint but rather argues that such a factor should not be considered. I reject this and believe that if any defense is valid to such a delay, it must involve a provable prejudice. That has not been done here and therefore Northwestern's arguments are rejected.

As to the merits of this case, it is necessary to consider the Commission's precedents in the area of **discrimination** law. The basic analytical guidelines in this field have been recited by the Commission in several recent cases as follows: In order to establish a prima facie case of discrimination under section **105(c)** of the Mine Act, a complaining miner bears the burden of production and proof to establish **(1)** that he engaged in protected activity and **(2)** that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that **(1)** it was also motivated by the miner's unprotected activities, and **(2)** it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The Ultimate burden of persuasion does not shift from the complainant Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F. 2d 194 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., No. **83-1566**, D.C. Cir. (April 20, **1984**) (**specifically** approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for **discrimination** cases arising under the National Labor **Relations** Act. NLRB v. Transportation Management Corp., \_\_\_\_\_ U.S. \_\_\_\_\_, 76 L. Ed. 2d 667 (**1983**).

The uncontroverted evidence in this case shows that during the spring of 1982, **Houser** made several complaints to Sprague, the mine foreman and his immediate supervisor, about the coal dust in the pit of the Grass Creek Mine. These complaints resulted in Sprague furnishing paper painter's type face masks. After further complaints by **Houser** that the paper masks were not satisfactory, Sprague secured a better type face mask (**Tr. at 54-56**). During this same period of time, **Houser** also complained to Sprague several times that the steering mechanism on the Terex loader he was assigned to operate was defective. Sprague replied that **Houser** was not to worry and to keep running the machine (**Tr. at 61**). After Sprague operated the machine and observed the problem, the steering mechanism was repaired (**Tr. at 62**).

I find these two actions on the part of **Houser** to constitute protected activity under the Act. The amount of coal dust allowed to exist in the pit and around the cab of the Terex loader prompted MSHA to issue a dust citation in May, 1982. This confirms that there was a safety problem and merit to **Houser's** complaints. Also, the fact that repairs were necessary to correct steering problems on the Terex loader further supports the validity of **Houser's** concern about the safety of operating this machine. In accord with the Commission's guidelines, I find that the dust in the pit and the faulty steering on the Terex loader were proper safety concerns communicated to Northwestern and constituted protected activity on the part of the complainant. This amounts to establishing a prima facie case of discrimination. The specified issue to be determined, then, is whether the complainant established the necessary casual connection between these complaints and respondent's decision not to rehire him after the lay off.

The evidence in this regard is in dispute. The testimony of the witnesses confirmed that complainant was not the only employee who complained about coal dust in the mine pit. **Houser** testified that other miners had also expressed concern during the spring of 1982 about the dust conditions to Sprague and Steffans. There was conversation about putting air conditioners or pressurizing the cabs on the crusher and loader (**Tr. 143, 144**). Henning testified that one time after a lunch period when he and Sprague were the last to leave the room, Sprague called **Houser** a "damn cry baby" for saying something about dust or the loader (**Tr. at 184**).

Heeter testified that Sprague stated to him on one occasion that he thought it was **Houser** who was turning the stuff into MSHA and that he did not want him back (**Tr.** at 160). Heeter also stated that he had expressed his concerns about the coal dust in the pit to Sprague and Steffans. Henning, Allen, and Meisinger had also discussed the dust conditions several times amongst themselves and also discussed it in the lunch room with Steffans and Sprague (**Tr.** at 164).

Henning and Allen testified that everyone complained about the dust at the pit including **Houser** (**Tr.** at 179, 189). Also, that Heeter had told each of them that Sprague had told him the reason **Houser** was not called back to work **after** the lay off was because Sprague thought he was a trouble maker and the one filing complaints with MSHA (**Tr.** at 179, 190). Henning indicated that Heeter told him this in late July or early August, 1982 when the subject came up as to why **Houser** was not recalled.

In his testimony at the hearing, Sprague denied he made the statement to Heeter as to the reasons why **Houser** was not recalled (**Tr.** at 284). He denied that health and safety matters were in any part a factor in the decision not to recall **Houser** (**Tr.** at 287).

This conflict in testimony relates to a material part of **Houser's** burden of proof in that the testimony by Heeter as to the conversation with Sprague is the only direct evidence which attempts to show that **Houser** was not rehired because of his protected activity. There is no evidence in this case to show that **Houser** had contact with or complained to MSHA about safety and health matters at the Grass Creek mine. There is testimony that Steffans called the miners "cowards" for going to MSHA after an electrical inspection in late September or October, 1982. However this was after **Houser** no longer was working at the mine (**Tr.** at 183). The evidence shows that there were only two inspections at the Grass Creek mine by MSHA while **Houser** worked there including the dust inspection in May, 1982. This does not appear to be a sufficient number of inspections to support a conclusion that the retaliatory action by Sprague against **Houser** was solely based upon such a cause. I find that the facts do show that **Houser** was more vocal than the other miners about dust conditions in the pit and also complained to Sprague about the dust masks and filters furnished him. **Houser** also complained about coal dust in the cab of the Terex loader because of broken and misfit glass in the doors and windshield and the machine's faulty steering mechanism.

Based on all the circumstances above, I conclude that **Houser** has established a prima facie case showing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in part by the protected activity. The Commission in Secretary on behalf of Chacon, supra, stated " . . . that direct evidence of motivation is rarely encountered and that reasonable inferences of motivation may be drawn from circumstantial evidence showing such factors as knowledge of protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment. 3 FMSHRC at 2510." The composite of the three later factors appear to apply in this case. There were the complaints of dust in the pit and the cab of the loader, the inspection by MSHA at about the same time, the failure shortly thereafter not to rehire **Houser**, and the statement to Heeter by Sprague that **Houser** was a "troublemaker and turning all this stuff into MSHA."

Throughout this proceeding, Northwestern has taken the position that its reason for not rehiring **Houser** was not because of his protected activities, but instead that it made its decision based upon complainant's overall (poor) job performance (**Resp's** Brief p. 12). These reasons were listed in Exhibit C-3, page 2, as improper maintenance of equipment, poor attendance and running dogs during working hours at the load-out site at Kirby, not keeping the coal at Kirby stockpiled so trucks could dump their loads, and direct insubordination of orders on loading fines at the mine. In light of the foregoing, I find that respondent has presented credible evidence to establish that there were sufficient reasons to create an issue as to why the complainant was not rehired. Under the Pasula test the respondent has presented an affirmative defense that even though part of its motive was unlawful, which it denies, it would have taken the adverse action against the complainant in any event for the unprotected activities alone creating a mixed motive type of discrimination case.

In Wayne Boich d/b/a W. B. Coal Company, supra, the Court stated as follows:

In summary, the proper test in considering mixed motives under the Mine Act is that, upon Plaintiff's showing that an employer was motivated in any part by an employee's exercise of rights protected by the Act, the employer has the burden only of producing evidence of a legitimate business purpose sufficient to create a genuine issue of fact. The plaintiff, who retains the burden of persuasion at all times, may of course rebut the employer's evidence "directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy

of credence., Burdine, 450 U.S. at 256. The plaintiff's ultimate burden is to persuade the trier of fact that he would not have been discharged "but for" the protected activity.

After a careful review of all of the evidence in this case, I find that complainant **Houser** has not established that he would have been rehired "but for" his protected activities. The basis for this conclusion is that the most credible evidence clearly establishes by testimony of **witnesses** that is corroborated by employer's written statements that **Houser's** job performance was unsatisfactory.

I find that two documents entered as exhibits in this case reflect the opinions of **Houser's** supervisors that he was less than a satisfactory employee. The termination report did state a recommendation to rehire but in the "comments" section, Steffans indicated **Houser** "could manage time more productively." Also as to initiative, it was written that he "could show improvement." The evidence shows that these forms were hurriedly prepared by Steffans just prior to the lay off. Steffans testified that of the 4 employees laid off at the mine, he would rate **Houser** third following Meisinger and Allen. Householder, the last employee hired on a temporary basis, was rated fourth. In that Householder was rehired whereas **Houser** wasn't raises the issue of disparate treatment. However, I am persuaded that there is no merit to such an argument. The facts show that no new employee was hired to replace **Houser** but rather that Householder remained on the payroll even though he previously had been considered a temporary employee. The fact remains that the employer decided to resume its operation with one less employee. Also, the union contract between Northwestern and the International Union of Operating Engineers, Local No. 800, contained no provision providing seniority (**Exh. C-6**).

Further evidence in support of Northwestern's defense is Exhibit C-3 which was the reply by Neill to an inquiry by the Union as to the reason for Northwestern's failure to rehire **Houser** after the lay off. This contained an attached sheet prepared by Steffans outlining the reasons as of August 23, 1982 that **Houser's** supervisors gave for the action they took. I find that the reasons given are significant for they were given shortly after the event occurred and not statements or testimony given several years later after the start of a discrimination action (**Exh. C-3, p.2**).

In conjunction with the foregoing, various witnesses testified to occurrences that support Northwestern's position. Sprague testified that he found **Houser** absent from the load-out area at Kirby at times when he expected to find him there. Also,

he had checked on **Houser's** attendance at the site as a result of complaints received from some of the truck drivers hauling from the mine to Kirby (**Tr. at 221-222**). Sprague stated he had to wait as long as 45 minutes to an hour on several occasions for **Houser** to show up (**Tr. at 222**). Also, that **Houser** did not keep the Kirby site in proper condition or maintain the equipment as requested (**Tr. at 226-227**). On one occasion in January, 1982, **Houser** informed Sprague that the substitute loader furnished as a temporary replacement for the larger Caterpillar was not large enough to do the job. Sprague sent **Houser** home and loaded the train himself with the smaller type loader. The next day, Sprague discussed this with Steffans and recommended **Houser** be discharged but Steffans wanted to give him an additional opportunity (**Tr. at 239-232**).

Sprague also testified that the cars on the coal train were not always loaded to the proper weight by **Houser** which required sending a truck and 2 men to Greybull, Wyoming, a distance of 80 miles from the mine, to shovel the excess coal off the cars (**Tr. at 232**). Also, that Meisinger, after a short period at the Kirby load-out area, seldom had an overloaded car (**Tr. at 234**).

Carl Bechtold, a driver of one of the independent coal haulers, testified that frequently he would arrive at the Kirby site and find that trucks had unloaded **before** his arrival and coal had not been moved or stockpiled requiring him to wait. Also, that on other occasions, **Houser** would not be there. He stated this would occur approximately twice a week during the hours **Houser** was supposed to be working (**Tr. at 336, 337**).

Thomas C. Anderson, the owner of the trucks **hauling** the coal to Kirby, testified that he had received a number of complaints about **Houser** not being at the site and the drivers having to sit and wait for him. Also, that after **Houser** was reassigned to the mine, the problem ceased. He did admit that a new and better site was acquired (**Tr. 318, 319, 330**). These complaints were related by Anderson to Sprague. Anderson further stated that complainant would stop loading his trucks at the mine before the regular time to stop for the lunch period requiring the drivers to wait. That Steffans was with Anderson on one occasion when this occurred and told **Houser** to go back and load the waiting truck (**Tr. at 323**). Also\* that complainant damaged sideboards on his trucks while loading them (**Tr. at 325**).

Sprague testified that there were two reasons for reassigning **Houser** from the Kirby site to the mine. He felt **Houser** would be more productive if he were not working alone, and to assist Meisinger to recover from injuries received in an automobile accident (**Tr. at 236**).

Sprague testified that the equipment **Houser** operated was not maintained properly. One example involved repair of the bucket on the loader in May, 1982. A contract mechanic was called out

to replace the pins on a bucket and felt they had not been properly lubricated (Tr. at 244). Also, Sprague felt that replacement of glass on the cab of the Terex loader was due to **Houser's** failure to latch the door properly (Tr. at 245-247).

Several of **Houser's** fellow employees testified that they thought he was a good employee and careful with his equipment. This included Allen, Henning, and Heeter. Allen and Henning are both presently employed by respondent and had **been subpoenaed to** testify against their present employer and supervisor. I do not discredit their testimony but must find that their statements were too general in terms as to what their opinions of **Houser** were. In contrast, I find the testimony of Sprague, Steffans, Anderson, and Bechtold more credible as it was specific as to times and occurrences in which they described instances of **Houser's** unsatisfactory job performance.

**Houser** argues that Northwestern retaliated against him by not recalling him as a result of management's belief that he was responsible for the MSHA inspections and its subsequent problems. This is supposedly apparent from statements made by management at company meetings and Steffans calling the employees "cowards" (Pet's brief at 11). This argument is not supported by the evidence. The meeting in which employees were called "cowards" occurred after the employees were recalled and did not include **Houser's** presence. Also, it was directed at all of the employees and arose over an electrical inspection which is too remote from the situation **that** existed in May, 1982.

From the conflicting evidence in **this case**, I have difficulty in relating the testimony of Heeter to the proven facts when Heeter stated that Sprague told him that he thought **Houser** was "turning all that stuff into MSHA, and he didn't want him back". I do have a problem with determining what "all that stuff" was as the record does not show a large number of **inspections** prior to the lay off. In fact, the dust inspection occurred during a regular inspection in May, 1982 and as of July, 1982, only one citation had been received (Tr. at 280, 281). Although the complaints of **Houser** about dust and equipment safety are-protected activity and apparently irritated Sprague, the evidence does not support a conclusion that this was sufficient cause to not rehire him. Everyone was complaining of dust at the pit. No facts are presented to show **Houser** made a report to MSHA of any safety factors and the inspection in May, 1982 was not unusual or special to indicate a complaint from any employee at the mine.

As I have determined that this is a mixed motive case, the specific issue is whether respondent would have rehired the complainant **"but for"** the protected activity. The Secretary contends in his brief that the credibility of Sprague's testimony

should be resolved against him and given little, if any, weight? (Pet's brief at 13). I do not agree. I find that much of Sprague's testimony is supported by specific times, dates, and other witnesses testimony. The fact that **Houser** was not always present during working hours at the Kirby site is supported by testimony from Steffans, Anderson, and Bechtold. Sprague was able to testify as to specific instances regarding lack of equipment maintenance and repairs that became necessary as a result of **Houser's** lack of maintenance. All the employees that testified as to their doubting Sprague's credibility did so in very general terms except for the instance involving the dust sampling following the May, 1982 inspection. This involves the possible falsification of dust samples. However, this was denied by Sprague and factually not proven. In contrast, a local banker and the Wyoming Deputy State Mine Inspector, who were both acquainted with Sprague testified that his reputation for truth and honesty is beyond reproach (**Tr.** at 203-205, 349).

I find that this case does not rest upon a general credibility question but rather on the facts that were supported by adequate indicia of probativeness and trustworthiness. The Neill memorandum of August 25, 1982, is a document that is closely related in time to the decision not to recall **Houser** and recites specific reasons. This is more credible than the testimony of witnesses given at a hearing approximately two years after the occurrence and stating in general terms that complainant "**was** a good worker" and "took good care of his equipment." Heeter admitted that he did not have first hand knowledge of **Houser's** activities at Kirby but opined that he "**was** doing a good job" (**Tr.** at 156). Henning also was not able to observe **Houser** at the Kirby site as he was employed at the mine (**Tr.** at 178).

Heeter left respondent's employment in July, 1983, after a disagreement over damage to his personal **vehicle** among other reasons (**Tr.** at 162, 163). Based upon this admission, **Heeter's** testimony must be weighed in light of his feelings about the company.

The termination report for **Houser** prepared by Steffans on June 11, 1982, further corroborates the testimony of Steffans and Sprague that they were not completely satisfied with **Houser's** job performance (**Exh.** C-2). Although a part of this document states that **Houser** was recommended for rehire and quality of work was "good", other items referred to a need for improvement. The evidence shows that this document was hurriedly prepared and signed by Sprague without time to reflect on its contents. However, it is material to the case for its relationship to the time of the alleged discrimination act and supports Northwestern's position as to motive for failure to rehire.



In conclusion, I find that Northwestern's proffered explanation for not rehiring **Houser** is more credible than **Houser's** argument that it was based upon his protected activity alone. Therefore, complainant's case must be dismissed.

CONCLUSIONS OF LAW

1. Northwestern at all times pertinent to this case was the operator of a mine and subject to the provisions of the Federal Mine Safety and Health Act of **1977**.


2. I have jurisdiction over the parties and subject matter of the proceeding.

3. Northwestern proved by a preponderance of the evidence that **Houser** was not rehired for reasons of unsatisfactory job performance.

4. **Houser** failed to prove that discriminatory reasons alone motivated Northwestern to not rehire him and that the reasons given by Northwestern were unworthy of credence.

DECISION

Based upon the above findings of fact and conclusions of law, IT IS ORDERED **that this proceeding is DISMISSED.**

  
Virgil E. Vail  
Administrative Law Judge

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