

CCASE:  
SOL (MSHA) V. MAYNARD BRANCH  
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2. For about a year and a half before his discharge on May 16, 1984, Bryan Pack was employed by Respondents as a night-time security guard and fill-in laborer. He usually worked alone, from 11:00 p.m. to 7:00 a.m.

3. On May 15, 1984, before he left home to go to work, Bryan Pack was told by his brother, Jeffrey Pack, a former employee of Respondents, that the company was storing dynamite in the glove compartment of a school bus used as an office and storage facility at the dredging site. Since Bryan Pack spent most of his time in the school bus as a night security guard, he was very concerned about his safety when he heard that dynamite was being kept in the glove compartment.

4. When he arrived at work, around 11:00 p.m., on May 15, 1984, he carefully checked the glove compartment, where he found dynamite and blasting caps. He slowly and carefully closed the glove compartment, left the bus, and spent the rest of the night in his truck or near it.

5. He did not follow company procedure of telephoning the foreman at home to notify him of any danger or serious condition found at the mine. Also, the next morning, at the end of his shift, he left the mine site without telling management or any of the incoming employees about the dynamite. He left the job site with his father, who drove there to pick him up.

6. He told his father about the dynamite and as they drove by a restaurant his father recognized a Federal mine inspector's car in the parking lot. They pulled in, and Bryan Pack located two Federal inspectors in the restaurant. He told them about the dynamite and blasting caps.

7. One of the inspectors, Bryan Wilson Lawson, went to the dredging site. He told the foreman he had a complaint about improper storage of dynamite. He then inspected the glove compartment, where he found two and a half sticks of dynamite and blasting caps.

8. Inspector Lawson issued a citation to the company charging a violation of 30 C.F.R. 77.1301(a). The company was assessed a civil penalty and paid it without contest.

9. Respondent Roger Kirk is the president of the company, and owns one-third interest in the business. He personally supervised the dredging facility. Kirk asked the inspector for

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the name of the person who had made the complaint about the dynamite. The inspector told him he did not get his name, but described him. Kirk recognized the description very well and stated, "We know who it is." Kirk believed that the complainant was Bryan Pack.

10. After the inspector left the dredge, Kirk told the foreman, Rocky Fitzpatrick, to fire Bryan Pack.

#### DISCUSSION WITH FURTHER FINDINGS

Kirk testified that, before the dynamite incident, Pack's foreman wanted the company to fire him for a number of incidents, but Kirk gave Pack another chance. Kirk stated that Pack's failure to report the dangerous storage of dynamite and detonators to the company was "the straw that broke the camel's back." He explained this position in the following testimony:

Q. What was there about this one particular incident that caused you to finally fire him?

A. Like I said, it is pretty serious that you have people coming—he is a security guard, he is a night watchman, he is on the job. He testified a while ago how dangerous and how scared he was. Then you have six or seven guys coming back on the property to go to work, and instead of saying, hey, there's powder in there, do this and do that, he just runs off and leaves them. That is pretty serious in my book. [Tr. 193.]

I find that the seriousness of Pack's misconduct as a security guard—in discovering a very dangerous situation and failing to report it to the foreman or oncoming crew—jeopardized their safety and motivated Kirk to discharge him. I also find that Respondents would have discharged him on that ground alone even if Pack had not complained to the inspectors.

The Secretary made a prima facie case of discrimination. He proved that Pack engaged in a protected activity (notifying the inspectors of a danger and safety violation) and that Respondents were motivated at least in part by such protected activity in discharging him. However, Respondents rebutted the prima facie case by convincing proof that Respondents were motivated by serious unprotected misconduct of the employee and would have discharged him on that ground alone even if he had not complained to the inspectors.

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CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. On balance, the evidence does not establish a violation of section 105(c) of the Act as charged in the complaint.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver  
Administrative Law Judge