

CCASE:
CHARLES CONATSER V. RED FLAME COAL
DDATE:
19880329
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CHARLES CONATSER,
COMPLAINANT

v.

RED FLAME COAL COMPANY, INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 87-168-D
MSHA Case No. PIKE CD 87-04

No. 2 Surface

DECISION

Appearances: Tony Opegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, for the Complainant;
Ronald G. Polly, Esq., Polly, Craft, Asher & Smallwood, Whitesburg, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the Complainant, Charles Conatser, against the respondent Red Flame Coal Company pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), on January 26, 1987. After completion of an investigation of the complaint, MSHA advised the complainant by letter dated May 22, 1987, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, on June 8, 1987, the complainant filed a pro se complaint with the Commission, but subsequently retained counsel to represent him.

The complainant, who was employed by the respondent as an endloader operator at its No. 2 Surface Mine, alleged that he was discharged by mine foreman Zachary Mullins on January 26, 1987, after refusing the foreman's order to drive a rock truck. The complainant asserted that his refusal to drive the truck was based on the fact that there was 11 to 12 inches of snow on the ground; that he did not know how to operate the truck;

~417

and that his prior experience driving such a truck was limited to "a few days" during the summer months when he operated a truck on level ground under dry weather conditions. The complainant asserted further that his lack of truck driving experience, coupled with the prevailing adverse weather conditions, presented a possible safety hazard. The complainant has alleged that his discharge because of his refusal to drive the truck was in violation of section 105(c)(1) of the Act.

The complainant subsequently amended his complaint to include an allegation of an additional violation of the Act. In this regard, the complaint alleged that the respondent's refusal to reinstate him after it had received a copy of his complaint and had been informed of the safety reasons for his work refusal during a meeting with him on February 27, 1987, further violated section 105(c)(1) of the Act.

In its answer to the complaint, the respondent admitted that the complainant refused the request of his foreman to operate the rock truck in question. However, the respondent asserted that the respondent quit his job; that his actions in refusing the foreman's request were not justified; that the equipment, prevailing conditions, and request by the foreman for the work were reasonably safe; and that the complainant had had previous experience in the operation of a rock truck under similar circumstances.

Issues Presented

(1) Whether the complainant was fired or quit his job.

(2) Whether the complainant was engaged in protected activity on January 26, 1987, when he refused his foreman's request to operate the rock truck in question, and whether his work refusal was reasonable and justified in the circumstances.

(3) Whether the complainant communicated his alleged safety concerns and reasons for refusing to drive the truck to the respondent.

(4) Whether the respondent's subsequent refusal to reinstate the complainant was discriminatory and in violation of the Act.

Additional issues raised by the parties are identified and disposed of in the course of this 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 C.F.R. 2700.1, et seq.

Procedural Rulings

The following rulings were made by me in the adjudication of this matter:

1. The complainant's motion to amend his complaint was granted (Tr. 6, 44).
2. Respondent's motions for summary decision in its favor on the basis of the complainant's prehearing deposition was denied (Tr. 154).
3. Respondent's motion for a summary decision in its favor at the close of the complainant's case at the hearing was denied (Tr. 269).
4. Complainant's request for the admission of certain training records, exhibit CÄ5, was granted (Tr. 264Ä265).
5. Respondent's motion to quash the complainant's prehearing request to take the depositions of several of its witnesses was granted. However, the complainant's counsel was afforded the opportunity to interview these individuals before the taking of any testimony at the hearing (Tr. 10Ä11, 34).
6. Complainant's request for the introduction of a written statement executed by MSHA Inspector Avon Pratt during the course of MSHA's investigation of the complaint was denied, and the statement (exhibit CÄ4) was rejected (Tr. 528).

7. Complainant's request to take the depositions of two witnesses posthearing was granted, and the respondent's objections were denied (Tr. 528). However, the respondent was granted an opportunity to take and file any posthearing rebuttal depositions (Tr. 533).

8. The parties were subsequently afforded an opportunity to take and file additional posthearing depositions.

Complainant's Testimony and Evidence

Complainant Charles Conatser testified that he worked at Red Flame Coal Company from June, 1986, until his last day of work on January 26, 1987. Prior to that time, he worked at No. 8 Ltd. of Virginia from 1978 until August, 1985, and again from January to June, 1986. During his employment with No. 8 Ltd. he was a coal and rock endloader operator. He also operated a rock truck "a few times," but was never assigned as a permanent rock truck driver. When he operated a truck "it was always fair weather conditions, dry roads, hills, just in places where the foreman knew I could handle the truck." His foreman at that time was Bill Meade, and he would assign him to drive a rock truck when he was short-handed. Mr. Conatser stated that he was never given any task training in the operation of a rock truck, and would never drive in bad weather, and that "my whole desire is to be a loader operator" (Tr. 55-62).

Mr. Conatser stated that during his second term of employment with No. 8 Ltd., he was employed as a utility man loading drill holes, and that "I remember two times that I was on a rock truck" (Tr. 63). He also began operating a rock loader again. He recalled one occasion when Mr. Meade assigned him to fill in for another driver on a Saturday, and he drove an 85-ton 777 rock truck that day hauling rock from the pit to the dump on level ground. On another occasion, Mr. Meade assigned him to haul some stockpile coal in a 50-ton 773 rock truck along "fairly level ground" to the parking lot, and there were no steep hills (Tr. 63-68). During this period of time at No. 8 Ltd., he received no training or task training in the operation of a rock truck (Tr. 70).

Mr. Conatser stated that during the year prior to his discharge, he drove a rock truck two times. Prior to that time he drove one "five other times," and in his entire career "in heavy equipment," he has only driven a rock truck "maybe seven times" (Tr. 68-69). He was never trained in any way to

~420

drive a rock truck while at Red Flame. His job was a rock and coal endloader operator. He also operated a sweeper or farm tractor a few times sweeping up coal dust, and has also operated a dozer pushing dirt over a hill at the dump, but he does not consider himself to be a qualified dozer operator. He also operated a road grader during 1978-1985 grading roads out of the pit, but does not consider himself to be a qualified grader operator (Tr. 72).

Mr. Conatser stated that upon his arrival at work on the morning of January 26, 1987, he observed dozers "over the hill working on the road." His foreman Zack Mullins informed him that his loader was down, and assigned him to assist the mechanic to help start and prepare some equipment. Mr. Mullins called later on the CB radio and instructed the mechanic to start up a WABCO 85-ton rock truck, and when he arrived at the truck he motioned him (Conatser) to the truck and informed him that he wanted him to drive the truck. Mr. Conatser explained what transpired next at (Tr. 75-77):

* * * I told him I couldn't drive a rock truck. And, he said that he had two or three other people that was learning how to drive a rock truck and if they could do it you could do it too, and if you didn't want to do it you could get your stuff and take your ass to the house.

Q. What did you say after he said that?

A. I was just in shock. I didn't know what to say. I just stood there for a few minutes looking at him and then turned around and, as I was getting ready to walk off, I told him you are making me go to the house. And, I went over to get in my jeep and remembered my safety toes that was in the endloader I used to run. I asked him if he would get my shoes for me and he said he never had time, that I could get them on my way out. So, I left.

Q. Okay. Why did you refuse to drive the rock truck?

A. Because it was unsafe for me to drive the rock truck. I hadn't been trained to operate

on any kind of hills or any kind of slick conditions and I wasn't qualified to drive it.

* * * * *

THE WITNESS: Because I hadn't been trained to drive the truck and I am afraid to drive a truck in any kind of slick conditions. I thought it was going to be hazardous to my health. I thought I might have a chance to kill myself. So, I never went.

Mr. Conatser stated that there was 10 to 12 inches of snow, and that the roadway where he was expected to drive the truck was up and down hills from the pit to the hollow dump, a distance of approximately 200 yards, three-fourths of which was on a steep grade. While employed at Red Flame, he has observed rock trucks on that particular hill, and when it is raining or snowing, trucks will slide down the hill, and during the times he did drive a rock truck at No. 8 Ltd., he never drove one down a hill as steep as the one at Red Flame. He also observed trucks sliding down hills at No. 8 Ltd., and he generally was afraid of rock trucks because they cannot be controlled when they are going to stop and he does not know what to do to control one in a slide, and does not believe that he has the ability to control a truck in a slide (Tr. 78-79).

Mr. Conatser stated that he believed Mr. Mullins wanted him to drive the 85-ton WABCO because he had previously instructed him to start it up and it was the only truck in the parking lot. Even if Mr. Mullins had asked him to drive a 777 Caterpillar truck, he would still not drive it because "I haven't got the experience to drive one. I am afraid of them and I just don't think I could handle one on a hill. If I went into a slide, I honestly don't think I can" (Tr. 81).

Mr. Conatser stated that after he left the mine on January 26, he went straight home, which was 3 miles away, and that it took him no longer than 5 minutes to get there. He was crying, and when he arrived home he told his mother and father that "they fired me for not driving a rock truck, that I wasn't qualified to drive a rock truck I thought" (Tr. 82). His father then called his brother who advised him to go to MSHA to file a report. He then went to MSHA and filed his discrimination complaint.

Mr. Conatser stated that prior to his father telling him that his uncle was of the opinion that the Federal mine safety

~422

laws gives surface miners the right to refuse to do something if they think it is unsafe, he was unaware of this, and that he was also unaware of it at the time he told Mr. Mullins that he would not drive the truck. Mr. Conatser stated "I just thought I was fired and that was going to be the end of it" (Tr. 84).

Mr. Conatser stated that after his discharge, he called Wesley Burke, the president of No. 8 Ltd., the parent company that owns Red Flame, and asked to speak with him about getting his job back. Mr. Burke invited him to come in and speak with him on February 27, a Friday, and he then met with Mr. Burke and superintendent Cruce Davis on that day (Tr. 86). Mr. Conatser stated that during the meeting, he told Mr. Burke and Mr. Davis that "I was afraid to drive a rock truck and that I didn't think I was qualified to drive a rock truck and that I feared for my life." Mr. Burke then advised him that "he would get back to me" (Tr. 87). He heard nothing further from Mr. Burke, and called him a week later, and Mr. Burke informed him that he would not be rehired. Mr. Conatser asked Mr. Burke if he "wanted to make any other kind of settlement" and that Mr. Burke informed him that he had no authority to do this (Tr. 88).

Mr. Conatser confirmed that MSHA investigator South suggested that "it wouldn't hurt to go back and ask for my job back, and so I did" (Tr. 88). Mr. Conatser also confirmed that since his discharge, he has not had any coal mining employment, but has looked for work, and he explained his attempts to find work. He did receive \$50 a week for taking care of his girlfriend's house, and limited unemployment benefits (Tr. 53, 88-90).

On cross-examination, Mr. Conatser confirmed that he quit his first job at No. 8 Ltd., after a dispute with Mr. Meade, and he left because he was mad at Mr. Meade (Tr. 94). Mr. Conatser could not recall the dates that he drove the rock truck while at No. 8 Ltd., during 1978 to 1985. It could have been five times, but he could not recall, and he reiterated that he has driven a rock truck for a total of seven times during his 12 years of employment as a surface miner (Tr. 96). He would never get into a truck in any kind of "slick weather" and he is afraid of the truck. He stated that he agreed to drive a rock truck "because I was asked to and I knew the conditions I would be running in," but that he would prefer to drive a loader because "that's what I chose to do" (Tr. 97).

Mr. Conatser testified as to a prior statement he made to the Kentucky Department of Employment Services in connection

~423

with his unemployment claim in which he states that "I had probably one months experience in 12 years driving a rock truck" (Tr. 101, Exhibit RÄ1). He acknowledged signing the statement, but claimed that he never read it before signing it, and stated that he told the interviewer that he had "possibly a month but it is probably less" experience as a truck driver (Tr. 102).

Mr. Conatser confirmed that when he drove a rock truck at No. 8 Ltd., from January to June, 1986, he drove one truck for an 8Ähour shift in March, 1986, and a second one for half a day in April, 1986 (Tr. 106). He confirmed that on January 26, 1987, he wanted to operate the loader (Tr. 107). He confirmed that when it snowed and rained at the No. 8 Ltd. site, graders or dozers were used on the haulroads, and the trucks were operated over the roads after they were scraped (Tr. 109). He confirmed that Mr. Mullins and Mr. Davis always had the roads scraped, and he had no reason to believe that they did not comply with safety regulations (Tr. 109Ä110).

Mr. Conatser stated that while there was 11 to 12 inches of snow on the ground on the day of his discharge, it had just quit snowing and the haul roads were being graded, but "after you grade the snow off, you still got all that mud" (Tr. 111). He drove to work that day in his four-wheel drive vehicle and the roads were "sloppy" and he had no problem getting to work (Tr. 111). He also drove up the mountain, which is a steep grade, and parked his vehicle on the parking lot (Tr. 112). He confirmed that he knew how to operate the brakes on the rock truck, but denied that he knew what gear to put it in while "driving off the mountain," and he then proceeded to explain how to "gear down" the truck (Tr. 113Ä114).

Mr. Conatser stated that prior to January 26, 1987, he never told Mr. Mullins or Mr. Davis that he did not know how to drive a rock truck because they never asked him and he had no reason to tell them. He stated that he told Mr. Meade that he was not a qualified rock truck driver, and that Mr. Meade "knows what I can do in a rock truck and what I can't," and that "he never put me in any place that I thought was unsafe for me to operate it" (Tr. 114). He also stated that Mr. Meade always put him in places where he was not afraid to drive the truck "just hauling around the top of the hill and mainly in level areas" (Tr. 115).

With regard to his conversation with Mullins on January 26, 1987, Mr. Conatser stated as follows at (Tr. 116Ä119):

A. I told him I couldn't drive the rock truck and he said he had two or three other people that were training to learn how to drive a rock truck and that if they could do it that you could do it too, either drive the rock truck or get your ass to the house. Then, when I turned around and left, when I was walking toward my jeep, I turned around and said that you are forcing me to go to the house or you are making me to go to the house.

* * * * *

Q. You never said anything to Zack about the weather or the steepness of the grade?

A. No.

Q. You never said anything to Zack about it being unsafe?

A. No.

Q. Did you use the words I don't know how to drive a truck?

A. No.

Q. Did you request any task training with Zack Mullins that morning?

A. No.

Q. Did you mention anything to him about putting somebody in the truck with you while you were driving there about anything that you might not feel comfortable about?

A. No.

Mr. Conatser denied that he refused to drive the truck because other drivers were available, or that he was upset because Mr. Mullins would not assign someone else to drive. He insisted that the only reason he left was because he could not drive the truck, and he assumed that Mr. Mullins knew that he did not know how to drive (Tr. 119).

With regard to his prior statement in connection with his unemployment claim, Mr. Conatser stated as follows (Tr. 121):

Q. Does that statement say, and I quote, "There was a rock truck driver operating another endloader and I felt he could have driven the truck and the foreman could have let me operate the endloader as that was my regular job."; does it say that?

A. Yes, but this was two weeks after it happened. By that time, I had had time to think about it and I thought there was a possibility that somebody else could have drove the truck.

Q. Did you make that statement at that time?

A. This statement right here.

Q. Yes.

A. Yes, sir.

Mr. Conatser confirmed that he never said anything to Mr. Mullins about assigning any of the available truck drivers who were operating loaders to drive the rock truck in question. He also confirmed that he and the mechanic were discussing the truck assignment as he observed Mr. Mullins approaching, and he suspected that Mr. Mullins would select him to drive the truck, and that he mentioned this to the mechanic. Mr. Conatser stated that "the only thing I was thinking about when he said that was whether I could drive the truck, and I come to the conclusion that I couldn't drive it" and that it never crossed his mind to suggest any alternative to Mr. Mullins. In response to a hypothetical question as to whether he would have refused to drive the truck if Mr. Mullins had asked him to do so during the summertime, Mr. Conatser responded "if it was on a hill, I would ave refused because I couldn't--well, unless he would have trained me" (Tr. 124).

Mr. Conatser confirmed that his refusal of January 26, 1987, was the only time he had refused to do anything, and that this was the first time that Mr. Mullins ever asked him to drive a truck (Tr. 125Å126). In response to questions concerning his knowledge of a rock truck, Mr. Conatser stated as follows (Tr. 125Å126):

JUDGE KOUTRAS: Now, on the trucks you operated previously, you knew where to put the ignition

key, know where the brakes are, know where the gear systems are, know where the headlights are, and all the other equipment, right?

THE WITNESS: Right.

JUDGE KOUTRAS: So, you know how to operate a truck.

THE WITNESS: I know how to operate a truck on level ground.

JUDGE KOUTRAS: Well, let's leave the level ground out of it for a moment.

THE WITNESS: Okay.

JUDGE KOUTRAS: Do you know how to operate a rock truck?

THE WITNESS: I know how to operate a rock truck.

JUDGE KOUTRAS: So, when you told Mr. Mullins on the day of January the 25th that you didn't know how to operate a rock truck, what did you have in mind when you told him that?

THE WITNESS: That I couldn't operate a rock truck in any kind of conditions like that.

JUDGE KOUTRAS: But you didn't tell him that, did you?

THE WITNESS: I just figured it would be common.

JUDGE KOUTRAS: You figured that he would --

THE WITNESS: I figured he would know.

JUDGE KOUTRAS: You assumed that he would know that.

THE WITNESS: Yes, I assumed that he would know that.

Mr. Conatser denied that he ever offered to operate a rock truck in the presence of Tommy Dotson while employed at

~427

Red Flame. He also denied that he had already made his mind up not to drive the truck before being asked by Mr. Mullins and while speaking with the mechanic (Tr. 128). He stated that his offer of settlement made to Mr. Burke was his own idea (Tr. 132-133). He also stated that he did not know whether he offered any explanation as to his prior statement in connection with his unemployment claim at the time of his October 20, 1987 deposition, and respondent's counsel confirmed that he did not (Tr. 136). Mr. Conatser also confirmed that since his deposition, he has seen the statement in his counsel's office when they discussed it, but the explanations that he was now offering are his own (Tr. 134, 137-138).

Mr. Conatser confirmed his prior statement of February 2, 1987, to MSHA Investigator South during his investigation of his complaint (Exhibit CÄ3, pg. 6Ä60), during which he stated "I did not have an opportunity to tell Mullins that I feared for my safety that day but that was what I was thinking and what I was implying as well as my lack of experience at operating a rock truck." Mr. Conatser confirmed that Mr. South asked him whether he had communicated a safety complaint (Tr. 139). He also confirmed that Mr. South asked him whether he had said anything to Mr. Mullins about being afraid or scared, and that he informed Mr. South that he never said anything to Mr. Mullins, but that "I told him that in my mind at that time was my fear for my life driving that truck" (Tr. 140-142).

Mr. Conatser stated that he had spoken to Mr. Mullins on many occasions, and although he indicated that Mr. Mullins "wasn't waiting around for no long-term explanations. He was ready to go," on the morning of January 26, Mr. Conatser confirmed that Mr. Mullins did not prevent him from saying anything (Tr. 143).

In response to further questions, Mr. Conatser confirmed that his unemployment claim statement previously referred to was not in his handwriting, and that it was reduced to writing by the person who interviewed him (Tr. 146), and that his statement with regard to the availability of other drivers was in response to a question put to him by the interviewer (Tr. 146-147). With regard to his prior statement that he had no opportunity to explain to Mr. Mullins about his safety concerns, Mr. Conatser stated that everything happened so fast and that he was shocked and did not know what to say. He also stated that Mr. Mullins did not ask him for any reasons as to why he could not drive the truck, and said nothing about ever observing him drive a truck or that he was qualified to drive one (Tr. 149). Mr. Conatser confirmed that the statement he

~428

gave to Mr. South and signed was in Mr. South's handwriting (Tr. 153).

Elmer Conatser, father of the complainant, testified that he is a retired underground mine foreman, and that on the day his son lost his job he came home crying and upset and stated that "they told me to drive a rock truck and I told them that I couldn't and then he told them that he was afraid to under them conditions, and he said the foreman fired him and told him to get his things and go home" (Tr. 158). Mr. Conatser stated that he telephoned his brother, a retired Bureau of Mines employee, and his brother advised him to "get an investigator over there as quick as possible and not willy around with it" (Tr. 160).

Mr. Conatser stated that his son told him that although he drove a rock truck one or two times on level, rather than steep ground, he was not experienced, and said that he never drove one "under no conditions like that" (Tr. 160).

On cross-examination, Mr. Conatser stated that he told his son to go to the MSHA office, but that he did not go with him. He stated that his son told him that he had informed his foreman that "he was inexperienced on the rock truck, and the bad weather, that he had never drove under them conditions, and he was afraid." His son did not tell him that he had informed the foreman that the grade was too steep, or that it was too slick, and "the only thing he said was that the snow and weather was so bad that he was afraid to drive it," and that he had so informed his foreman (Tr. 166-168).

Mr. Conatser stated that his son talked to his uncle later and that "all that I heard them talk about was the conditions." He had no knowledge that his brother had spoken with anyone at MSHA, and simply advised his son to go and talk to the MSHA people (Tr. 170).

Cyrus Boggs, rock truck driver, Red Flame Coal Company, testified that he worked with Mr. Conatser at Red Flame from October, 1986, until the end of January, 1987, and at the No. 8 Ltd. strip site for approximately 3 years before that time. He never observed Mr. Conatser drive a rock truck at Red Flame, and Mr. Conatser operated a rock and coal loader during this time. He recalled that Mr. Conatser drove a rock truck at No. 8 Ltd., 3 years ago while stockpiling coal, but he could not state how many times he drove a truck, nor could he recall any details (Tr. 171-176, 180). Mr. Boggs did not consider Mr. Conatser to be a truck driver, and stated that his job was mostly a coal loader (Tr. 181).

Mr. Boggs confirmed that he drove a rock truck on Mr. Conatser's last day of work on January 26, 1987, and he recalled that there was snow and that he drove on the same hill road that Mr. Conatser would have driven down that day had he driven a rock truck. Mr. Boggs described the road as "wet and slick," and he confirmed that the road was being scraped. He drove down the road after it was scraped, and while he could not remember its condition after it was scraped, he recalled that it was wet. He could not remember whether he slipped on it, and stated that it was not unusual for a truck to slide on a wet road (Tr. 183).

Mr. Boggs was of the opinion that while the road in question is bermed, an inexperienced driver would not know how to handle a truck that went into a slide. If he had never driven a rock truck before and someone asked him to drive down the hill on the day in question, he would not have done it because "that's a big piece of equipment and you don't know how it is going to act." He explained that once a truck starts to slide "I don't know if you would know to pull the retarder and give it fuel or hold the brakes and give it fuel and keep the wheels from sliding" (Tr. 186). He confirmed that his father-in-law, who is an experienced driver, flipped a truck backwards once, and he has heard of trucks tipping over while going down hills (Tr. 187). He did not believe that any snow was on the roadway in question after it was scraped (Tr. 188).

On cross-examination, Mr. Boggs stated that at the time he observed Mr. Conatser drive a truck 3 years ago, he appeared to be able to handle it, and in his opinion, one had to drive a truck for 6 or 7 months to be considered "experienced." Mr. Boggs learned to drive a rock truck in 3 hours after someone showed him how, and he believed that one should know how to handle it in a couple of weeks, and that "if the weather conditions come up in those few weeks, I guess he would have to learn" (Tr. 192). Based on his observation of Mr. Conatser driving a rock truck, he had no reason to believe that he could not drive it under different weather conditions (Tr. 193).

Mr. Boggs confirmed that during his employment under the supervision of Mr. Davis and Mr. Mullins, they always reacted favorably to any of his requests for rocking or scraping the roads, and he could recall no problems in this regard (Tr. 194). He confirmed that the extent of his training as a rock truck driver consisted of 3 hours, and that he had never driven one before this time. He also confirmed that while there is a difference in driving a truck on level ground and

~430

going up and down hills, he believed that an inexperienced driver "would just take a few loads to get used to driving on a wet hill" (Tr. 195).

When asked whether anyone who can drive a pick-up can also drive an 85-ton rock truck, Mr. Boggs replied "they are more or less the same except for the size and just the judging" (Tr. 197). He stated that he would not want anyone who had not driven such a truck to start driving up and down hills by themselves if they did not know how. He stated that he would want to drive with that person first to show him a few things, and would want to "haul a few loads with him" (Tr. 198). If his foreman asks him, he would accompany anyone who was asked to drive a truck on a hill even if that person had never driven a truck before (Tr. 199-201). He later clarified his answer and stated that he would go with such a person as long as he were able to show him how to drive, and in Mr. Conatser's case, he would have ridden with him on the day in question because he had seen him operate a truck in the past (Tr. 206).

Mr. Boggs confirmed that although it had snowed, the roads were scraped and had no snow on them, but that the trucks driving up and down would force the water out of the ground, and the roads would not be dusty (Tr. 207). He believed that "a little bit of training" is necessary to drive on a hill, and he would have trusted anyone to drive down the hill on the day in question as long as he was seated next to them to be prepared to control the truck (Tr. 208-209).

Mr. Boggs stated that the Red Flame haulroads are approximately 40 feet wide, enough for trucks to pass, and that the average speed of the trucks, filled and empty, is 10 miles an hour. He was not aware of any haul truck accidents or fatalities at Red Flame or No. 8 Ltd. (Tr. 212). When asked for an opinion as to whether or not Mr. Conatser could have driven a rock truck down the hill in question because he had driven one in the past on level ground, Mr. Boggs responded "I guess he could have tried" (Tr. 222). He stated that if he were the foreman, he would not want anyone to operate any equipment if they were afraid of it (Tr. 223).

Russell Akers, coal and rock loader, No. 8 Ltd., testified that he worked with Mr. Conatser at Red Flame Coal Company for 6 months until the spring of 1987, when he moved back to his present job. On January 26, 1987, he was working as a rock truck driver at Red Flame, and he has 3 1/2 years of experience driving 50 and 85 ton trucks. He never observed

~431

Mr. Conatser drive a rock truck while working at Red Flame or at No. 8 Ltd. (Tr. 224-249).

Mr. Akers stated that he could not remember the weather conditions on January 26, 1987, but did recall that the haulroad was "pretty slick" and that Mr. Mullins instructed the men not to go down the hill until it was cleared and dried up. Mr. Akers was not sure whether he actually drove a truck that day, but confirmed that no one drove up and down the hill in question until the roadway was cleared up. If he were an inexperienced driver, he would be afraid to drive down the hill if it were wet because driving down a "slick little slope would be sort of scary like" (Tr. 232). He has observed trucks slide down wet hills, and he has slid but has been able to control the truck (Tr. 233). He has never heard Mr. Conatser offer to "trade out" with any truck driver (Tr. 234).

On cross-examination, Mr. Akers stated that one should know how to drive a rock truck after "one or two trips." He confirmed that on January 26, 1987, the hill was dried up before any trucks were allowed to go down, and that Mr. Davis and Mr. Mullins never refused any of his safety requests. Mr. Mullins instructed him not to go down the hill until it was cleared, and has never attempted to put him in any danger (Tr. 235). Mr. Akers was of the opinion that 7 days was long enough for one to learn to drive a rock truck, and that in 30 days, "you ought to be good at it" (Tr. 236).

Mr. Akers stated further that once the snow is scraped from the roadway, it should remain dry the rest of the day, and he estimated that scraping 3 inches deep would render the roadway dry (Tr. 237). He also estimated that it took 15 or 20 minutes to scrape the snow off the hill on January 26, and that the roadway was about 500 to 600 feet long, bermed, and trucks could pass on it. The roadway was not slick after it was scraped (Tr. 240).

Lloyd Day, Jr., dozer operator, No. 8 Ltd., testified that he worked at the Red Flame site for approximately 10 months starting in the spring of 1986. He was working at Red Flame on January 26, 1987, and there was snow on the ground. He recalled that the hill haulroad from the pit to the hollow field was "pretty rough" before he and Jerry Sturgill scraped the snow off with a dozer and a grader. He observed trucks driving up and down the hill and "imagined" that he saw some of them sliding down the hill because "they slide anyway, whether it is wet or dry" (Tr. 245). The roadway was slick until it dried off, but it was still "a little

~432

wet and slick after you get the snow off," because it would have to be cut 6 to 8 inches deep to get it dry, and it was still wet after the snow was scraped off (Tr. 246).

Mr. Day stated that he never observed Mr. Conatser drive a rock truck while at the Red Flame site, but did observe him drive one "a couple of times" while at No. 8 Ltd. (Tr. 247). The day that he observed him, he was working alone loading and hauling coal in the fall, under dry conditions. He has never heard Mr. Conatser offer to "trade out onto a rock truck." Mr. Day did not consider Mr. Conatser to be an experienced rock truck driver because "the only thing that I have ever known Chuck Conatser done was run an endloader" (Tr. 250). Although Mr. Day stated that he could drive a rock truck, he did not consider himself to be an experienced truck driver. If his foreman had asked him to drive a rock truck on January 26, he would have done so "because he asked me to," and that he may or may not have had problems with the truck. He confirmed that he has "filled in" as a rock truck driver at Red Flame (Tr. 248-252).

On cross-examination, Mr. Day stated that when the road was scraped on January 26, "we went down beyond the snow," but he could not recall how deep they penetrated the roadway surface. Once the roadway was cut, the trucks started hauling, and the more they hauled the roadway conditions improved. In his opinion, the roadway was cut sufficiently enough for the trucks to operate safely (Tr. 257). He could not recall the number of hours Mr. Conatser drove a truck on the two occasions he observed him at No. 8 Ltd. (Tr. 258). Mr. Akers confirmed that he has driven a rock truck on the job up and down hills, but compared to other drivers who do this every day, he did not consider himself to be an experienced rock truck driver (Tr. 259). He confirmed that he received no training when he began driving a rock truck, but that he had driven coal trucks and tractor trailers prior to that, and that is why he could simply get into a rock truck and drive it (Tr. 260).

Wesley Burke, testified by deposition that he serves as the president of the No. 8 Ltd. of Virginia and the Red Flame Coal Company mines, both of which are incorporated under the laws of Virginia, and authorized to mine in the State of Kentucky. He confirmed that both companies conduct strip mining operations, and that No. 8 Ltd. owns the Coaland Corporation, which in turn owns the Red Flame Coal Company (Tr. 1-5).

Mr. Burke confirmed that when Mr. Conatser was discharged on January 26, 1987, he (Burke) was president of Red Flame.

~433

He also confirmed that the training of miners is under the authority of mine superintendent Cruce Davis, and he believed that the designated health safety official is foreman Zack Mullins (Tr. 15Ä16).

Mr. Burke stated that he learned of Mr. Conatser's discharge late in the morning on the day of his discharge, and that Mr. Davis informed him that Mr. Conatser had been discharged or quit his job for refusing to operate a rock truck (hauler). Mr. Burke stated that Mr. Davis told him that Mr. Mullins had informed him that he (Mullins) gave Mr. Conatser the option of driving the truck or going home, and that Mr. Conatser had chosen to go home (Tr. 17Ä18). Mr. Burke confirmed that later that same day, he discussed the matter with Mr. Davis and Mr. Mullins, and he explained what transpired as follows (Tr. 19Ä21):

Q. Okay, and tell me what was said at that conversation?

A. Again, exact words I can't remember, I just remember the situation. Chuck was gone and we were trying to find out the details why, and Zack was the foreman on the job and had been involved in it so we went and talked to him. And, basically, he told us that they'd had some trouble getting the men lined out, they didn't have enough men to do what he wanted to do, so he had to change plans. And that he'd asked Chuck to run the hauler, and Chuck had refused. He'd told Chuck to either run the hauler or go home, and he said that Chuck got his dinner bucket and his shoes and went home.

Q. Did Zack say which rock truck - that's what you're referring to as a hauler, right?

A. Right.

* * * * *

Q. Did you ask Mr. Mullins which truck he had instructed Conatser to operate?

A. I can't remember. All I know is it was a discussion over a hauler, and I might have asked him and I might not have. I don't know.

Q. Was there any discussion with Zack Mullins about the condition of the hill that Mr. Conatser would have had to drive down had he driven the rock truck?

A. No. The only thing that, along those lines that I can remember, is I asked him if there was any certain reason why Chuck wouldn't have wanted to have run it, and he said no, none that I know of.

Q. You asked Zack Mullins if he knew of any certain reason why Chuck wouldn't have wanted to drive the rock truck, and he said no?

A. Uh-huh.

Mr. Burke stated that the weather was cold, and he could not recall whether there was a foot of snow on the ground, and that when he arrived at the mine "if there was a foot of snow it had melted when I got there" (Tr. 21). He could not remember whether he asked Mr. Mullins whether or not Mr. Conatser was qualified to drive a truck, and he assumed that Mr. Davis had discussed this with Mr. Mullins before he arrived at the mine. Mr. Burke could not recall Mr. Mullins telling him that Mr. Conatser informed him that he could not drive the truck, and "The way it was posed to me was that Zack had given Chuck the option to either run the truck or go home. That's the way I understood it" (Tr. 23).

Mr. Burke confirmed that he received a copy of Mr. Conatser's complaint in the mail, and vaguely remembered Mr. Conatser's claim that he was not qualified or experienced enough to drive the rock truck on the day in question. Mr. Burke stated that he did not at that time check any company training records to see if Mr. Conatser had the training to qualify him as a rock truck driver, but that he did ask Mr. Davis about it, and Mr. Davis informed him that Mr. Conatser could drive the truck. Mr. Burke stated that he had no personal knowledge as to whether Mr. Conatser was qualified to drive the truck, and stated that "the way I envision it is if somebody can run one piece of heavy equipment they can run another" (Tr. 24). He explained that the fact that a person can operate one piece of equipment does not qualify him automatically to operate another one if they were not trained, and that "given proper training and opportunity, I would think a person would be able to pick it up" (Tr. 25).

Mr. Burke confirmed that after Mr. Conatser's discharge, Mr. Conatser telephoned him at his office, and that "the main topic of the conversation was Chuck getting his job back, or reaching some type of settlement" (Tr. 25). Mr. Burke confirmed that he later met with Mr. Conatser and Mr. Davis in his office, and he explained what transpired as follows (Tr. 26-28):

A. Well, again Chuck came in and wanted to get his job back or get some kind of settlement. He said he had some payments that he needed to make and he was out of a job.

Q. Okay, what else was said?

A. Well, I can't remember exactly. I remember Cruce asking him why he refused to run the hauler.

Q. What did Chuck say?

A. I don't remember his explanation. It was something to the fact that he didn't think that he could do it, and Cruce being the superintendent, and in more charge of the situation, I felt like that that was wrong, that he could, in fact, do it.

Q. Do you remember Chuck telling you and Cruce that he didn't feel it was safe to operate the truck because he hadn't been trained, or he wasn't qualified?

A. I remember generally there was some discussion about that, but exactly what was said I can't tell you.

Q. At this point, when you met with Chuck and with Cruce to talk about the situation, you knew that Chuck was saying it would have been unsafe for him to drive the truck on the day in question?

A. I'm saying that I assumed that he felt like he had a reason for doing that, yeah.

Q. But I'm talking about a safety reason for refusing to drive the truck.

A. Safety reasons, no I wouldn't say safety. I'm assuming-- I was assuming when he came in that he had a legitimate reason for doing that. And that's what the discussion was to be about, and that's why Cruce was there. And like I said, Cruce is much more in tune with the situation than I am, and he and Chuck just didn't see eye to eye on it.

Respondent's Testimony and Evidence

Shawn Sturgill, dozer operator, confirmed that he went to work at the Red Flame Strip operation in June, 1986, with Mr. Conatser, and that prior to that time worked at the No. 8 Ltd. Strip operation from 1982 or 1983 until going to Red Flame. Mr. Sturgill confirmed that he operated a 773ÄB 50Äton rock truck at Red Flame and at No. 8 Ltd., and that he first learned to drive the truck at No. 8 when his father rode around with him one Saturday during the summer, and when he later drove around one or two times with another driver until he learned to drive the truck. He did not know whether the respondent ever filed a training certificate on his behalf confirming that he had received task training in the operation of a rock truck.

Mr. Sturgill confirmed that while at the No. 8 Ltd. operation, he observed Mr. Conatser driving a rock truck "maybe 10 times," but he could not recall whether he did so during the winter, and that it may have been late summer or early fall, but he was not sure.

Mr. Sturgill confirmed that he was out of town on the day Mr. Conatser was discharged. Mr. Sturgill also confirmed that he has driven the rock truck down the haul road at Red Flame, and that the road has a curve in it which requires the braking of the truck. He described the length of the road as less than a football field, and confirmed that it was bermed. He also confirmed that any snow on the road would be scraped off, and that foreman Mullins and superintendent Davis never hesitated in responding to any requests to remove any snow on the road.

Mr. Sturgill confirmed that when he observed Mr. Conatser driving the rock truck at No. 8 Ltd., he would pass him on the roadway or see him at the pit area, and he observed nothing unusual about his operation of the truck. Mr. Sturgill was of the opinion that there were no differences in operating a rock truck at Red Flame or No. 8 Ltd. "if you have driven one long enough" (Tr. 269Ä281).

On cross-examination, Mr. Sturgill stated that he never observed Mr. Conatser drive a rock truck at Red Flame during the period he was there from June, 1986 until the day Mr. Conatser was fired. He also confirmed that he worked with Mr. Conatser for 4 to 5 years at No. 8 Ltd., and observed him driving a rock truck there "maybe 10 times." He denied that he ever told Mr. Conatser that he had not seen him drive a rock truck for 5 years. He confirmed that when he observed Mr. Conatser driving the truck, it was always on level ground at the No. 8 Ltd. site.

Mr. Sturgill stated that his training on the rock truck consisted of driving once with his father, and five or six trips consisting of an hour and a half with a mechanic who showed him how to operate the truck.

Mr. Sturgill stated that a slick roadway would make a difference to an inexperienced truck driver, and in his opinion it would not be safe for such a driver to drive a truck down a slick hill. He would not want an inexperienced driver to be "the first one down the hill."

When asked for his opinion as to whether a truck driver with 7 days of experience driving a rock truck would be considered inexperienced, Mr. Sturgill stated that it would depend on the individual, and that each person is different. However, he would consider anyone with a month of driving experience to be an experienced driver.

Mr. Sturgill confirmed that he has observed trucks sliding on the haulroad in question at Red Flame, and that he has himself done this when encountering small patches of ice, when the road was watered down, or when it rained. However, he was able to control the truck, and if the snow was scraped off the road, it was "o.k." (Tr. 281-294).

Mr. Sturgill confirmed that he has observed trucks sliding down hills, and that he too has slid down a hill. He believed that if an inexperienced driver slid down a hill, it might present problems for him (Tr. 297). Sliding would occur when its raining and the road is wet, but he can control a slide. He would not expect any sliding if the road was scraped (Tr. 298).

Robert Yeary, rock truck operator, confirmed that he has worked for the respondent for a year and a half, and has operated a rock truck for 7 to 8 months. He stated that he first learned how to drive the truck after informing his foreman

that he wanted to learn. He accompanied another rock truck driver on four or five trips during the fall season, and considered himself to be trained. He could not recall that the respondent ever filled out any papers certifying that he was trained as a rock truck driver.

Mr. Yearly confirmed that at the time Mr. Conatser was fired in January, 1987, he (Yearly) was working as a parts runner and did not work at the Red Flame operation "on the hill." Mr. Yearly stated that he has driven a rock truck on the Red Flame haulroad in question and had no particular problem doing so when it rained and the road was slick. He confirmed that when it snowed, the snow was always trammed off the roadway down to the mud or dirt. In his opinion, if someone had previously driven a rock truck, it would be "o.k." for him to drive on the roadway in question. Mr. Yearly confirmed that he never observed Mr. Conatser drive a rock truck at anytime prior to his discharge (Tr. 298-304).

On cross-examination, Mr. Yearly confirmed that his initial rock truck training consisted of four to five trips with another driver for a total of 40 to 45 minutes, and he was shown how to operate the brakes and retarder before driving the truck himself. This training was on level ground during normal production time, and before Mr. Conatser's discharge.

Mr. Yearly was of the opinion that there are differences in operating a rock truck down a hill under wet road conditions, and on level, dry ground. One has to be more cautious going down hill. When asked whether he considered 45 minutes to be sufficient training to operate a rock truck, Mr. Yearly stated that he could not say, and he pointed out that he had volunteered to learn how to drive the truck and that the respondent did not suggest that he do so.

Mr. Yearly confirmed that he has observed trucks sliding down the Red Flame haul road, and that this would occur if one were driving on the wet road or applied the brakes. He never observed a truck flip over. Mr. Yearly could not state whether it was safe for an inexperienced driver to drive down the roadway when it was wet, but he believed that such a driver would need to take several trips down the road in order "to be shown the ropes."

Mr. Yearly was of the opinion that a driver with 7 days experience at driving a rock truck should be able to drive down the Red Flame haul road after 11 to 12 inches of snow had been scraped from the roadway. The same was true in the case

~439

of a driver with 10 to 30 days of driving experience (Tr. 304-312).

Roy Porter confirmed that he has worked for the respondent for 3 years. He started work at the No. 8 Ltd. strip mine operation, and for the last year has worked at the Red Flame strip. His duties included shooting coal, operating a drill, and operating a rock truck.

Mr. Porter stated that he learned how to drive a rock truck after Cyrus Boggs showed him how to operate the brakes and controls, and after "a few trips down the hill." Mr. Porter believed that learning how to operate a rock truck was a simple matter, and that most of his fellow workers could readily learn how to drive one.

Mr. Porter confirmed that he has worked with Mr. Conatser at the No. 8 and Red Flame operations and that he never observed him driving a rock truck. Mr. Porter stated that he was familiar with the haulage road at the Red Flame operation where Mr. Conatser was expected to drive the rock truck, and he confirmed that it was always kept in good shape, and that mine foreman Zack Mullins and mine superintendent Cruce Davis always kept the road scraped of snow and otherwise addressed and took care of any safety concerns of the men.

Mr. Porter was of the opinion that with 7 days of experience at driving a rock truck, Mr. Conatser should be experienced enough to drive it down the haul road in question, while others may not. Mr. Porter stated that none of the other men who worked at Red Flame and who drove a rock truck ever took as long as 7 days to learn how to drive the truck (Tr. 313-323).

On cross-examination, Mr. Porter stated that as far as he personally was concerned, there was no difference in driving a rock truck down a hill or on level ground, and that this would pose no problem for him. He confirmed that when he first learned to drive a rock truck, he did it on the rainy haulroad in question, and although the truck slid, it did not bother him. He confirmed that he has observed rock trucks sliding on the roadway in question while going downhill, and he believed that this was normal.

Mr. Porter confirmed that he received his rock truck driving training before Mr. Conatser was fired, and that when he was first trained by Mr. Boggs, he had never previously driven any trucks other than a powder truck, and that his initial training was over the wet haul road (Tr. 323).

Robert Terry Boggs, stated that he has been employed by No. 8 Ltd. since 1980, and has only visited the Red Flame job site on two occasions, but has never worked there. Mr. Boggs stated that he is a rock truck driver, and that he has operated a dozer, loader, and grader. Mr. Boggs stated that he learned how to drive a rock truck by "getting in it and driving it." He had someone ride with him one day to show him how to drive the truck, and this was during snow and icy weather. He stated that when he first learned to drive the truck, he was asked to drive it to fill in for a regular driver who was off, or if his own equipment was down. He has since driven a rock truck on a regular basis for at least 5 years.

Mr. Boggs stated that he worked with Mr. Conatser at the No. 8 Ltd. job site for approximately 5 to 6 years, and observed him driving a rock truck 2 to 4 years ago hauling coal from the pit up and down a hill. He also observed him driving a smaller rock truck on another occasion back and forth over a haul road for a distance of one-half a mile one-way, and that on both occasions the weather conditions were dry. He also observed him on another occasion hauling from under a back hoe, and indicated that Mr. Conatser had filled in on other days for the regular 777 rock truck driver. Mr. Boggs could not state the number of times he observed Mr. Conatser driving a rock truck, and indicated that on some days he may have hauled one truck load, and on others, four truck loads. The weather conditions were always dry, and Mr. Conatser's travels would take him to the pit.

Mr. Boggs stated that when he observed Mr. Conatser driving he appeared to be "O.K.," but that he was afraid to back up the truck close to the dumping area, and would dump his load 10 to 15 feet from the dump area. Mr. Boggs stated that he never observed anything which would lead him to believe that Mr. Conatser was not qualified to drive a rock truck.

Mr. Boggs believed that he last saw Mr. Conatser drive a rock truck in June, 1986. When asked whether driving a truck 7 days would qualify one to drive a rock truck, Mr. Boggs replied that "it would depend on the individual," and that he would have to ride with the person to observe him driving before he could conclude that he was a qualified driver. However, based on his observations of Mr. Conatser while he was driving rock trucks, Mr. Boggs believed that he was a qualified driver.

Mr. Boggs stated that he would have no problem driving a rock truck in snow, ice, or mud, and he confirmed that snow

~441

was always scraped from the haul roads. He also confirmed that he has accompanied new drivers while training and showing them the operator's controls and otherwise instructing them in the operation of the truck.

Mr. Boggs confirmed that Mr. Mullins has always responded to any of his safety concerns and always assigns people to clear the haul roads of any rocks or snow. Mr. Boggs also confirmed that he has never known Mr. Mullins or superintendent Davis to ever ask anyone to do anything which was unsafe (Tr. 334-359).

On cross-examination, Mr. Boggs confirmed that he never observed the haul road at the Red Flame job site. He stated that wet roads are more hazardous than dry ones, and that he has observed experienced truck drivers slide on hills. Although he has heard of rock trucks turning over, he has never seen one.

Mr. Boggs stated that before learning to drive a rock truck, he had 5 years of prior experience driving coal trucks, including driving in snow conditions. He also indicated that even though snow may be scraped off a haul road, it may still be wet because of freezing and thawing.

Mr. Boggs confirmed that some of his fellow miners have expressed a desire not to drive rock trucks because they find it boring, or would rather operate their own equipment. He has never known of anyone refusing to drive a truck because of any safety reasons. He also confirmed that he did not speak with Mr. Conatser about his refusal to operate the rock truck in question, and that he observed Mr. Conatser operate up and down the pit area at No. 8 Ltd. on two occasions (Tr. 359-375).

Tommy Roger Dotson, confirmed that he is employed by No. 8 Ltd., as a loader operator, but is assigned to work at the Red Flame job site. He has been so employed since July, 1986, and he worked with Mr. Conatser until his discharge in January, 1987. Mr. Dotson confirmed that he can operate a rock truck, and that he learned to drive it by observing other operators, and familiarizing himself with it by riding and taking four or five loads. He learned how to drive on his first day on the truck.

Mr. Dotson stated that he observed Mr. Conatser operate a rock truck at Red Flame only once when he got into a 50-ton truck on the parking lot and backed it up for some 30 to 40 feet. He stopped the truck and reparked it after a foreman

~442

indicated that the truck was not needed and would not be used. Mr. Dotson confirmed that he was at work with Mr. Conatser on the day of his discharge and that he was working on a scraper to clear the haul road of snow (Tr. 376-381).

On cross-examination, Mr. Dotson confirmed that he worked with Mr. Conatser on a regular basis, and with the exception of the one instance when he observed him backing up his truck, he has never observed him driving a rock truck. At the time Mr. Conatser backed up the truck, Mr. Dotson believed that Mr. Conatser was going to load and haul coal from a pile near the parking lot to a storage pit at the other end, a distance of no more than 100 feet over fairly level ground (Tr. 381-383).

Zachary J. Mullins, testified that he was the foreman at Red Flame from April, 1985 to July, 1987, and that he is currently working at the No. 8 Ltd. site. He confirmed that Mr. Conatser worked for him at Red Flame from July 14, 1985 to January 26, 1987, and that he would also be assigned to the No. 8 Ltd. site to load coal. He stated that Mr. Conatser operated the loader while at Red Flame, but that on one occasion, he observed him driving a rock truck "coming off down in the hollow field," during the summer, but did not know how many trips he made. He assumed that Mr. Conatser had "switched off" that day with another operator, but he was not sure. Since Mr. Conatser did not seek his permission to switch with the truck driver, and since he observed him in the truck, he assumed that he could drive it, and he observed nothing that would indicate otherwise (Tr. 383-397, 409).

Mr. Mullins confirmed that there was 10-12 inches of snow on the ground on January 26, 1987, but that the clearing of the haulroads began before anyone arrived for work. His usual practice was to clear the roads before any trucks used them. Mr. Mullins stated that he assigned one of the truck drivers to operate a drill that day, and since Mr. Conatser's loader was down for repairs, he asked Mr. Conatser to drive the rock truck and "he said no. So, I told him he could drive the hauler or go to the house" (Tr. 398). Mr. Mullins stated that Mr. Conatser gave him no explanation for refusing to drive the truck, and simply asked him to retrieve his hard-toed shoes from the loader, and "I told him he could get his hard-toes on his way out" (Tr. 399).

Mr. Mullins stated that Mr. Conatser did not state that he could not drive the rock truck, and simply told him "no"

~443

twice. Mr. Mullins explained that "to me, he was just refusing to drive the hauler, period, I felt like that he felt like that he just considered himself to be nothing but a loader operator" (Tr. 399). Mr. Conatser made no requests other than to retrieve his shoes, and had he asked for someone to accompany him in the truck, or informed him that he was incapable of driving it, Mr. Mullins would have assigned someone to go with him, or he would have personally gone with him to show him how (Tr. 400). Mr. Mullins did not ask Mr. Conatser for his reasons for refusing to drive the truck because he believed it was incumbent on Mr. Conatser to voice any doubts to him (Tr. 402).

Mr. Mullins stated that he was satisfied that Mr. Conatser was qualified to drive the rock truck, and that this conclusion on his part was based on the fact that he had previously observed him drive a rock truck one time down to the hollow fill, and the fact that he had a "general reputation" of being capable of driving a rock truck (Tr. 409). He also vaguely recalled one other occasion at Red Flame where Mr. Conatser backed up a rock truck for 15 feet. In view of the fact that Mr. Conatser took it upon himself to drive the truck, Mr. Mullins assumed he could drive it. Mr. Mullins confirmed that when Mr. Conatser refused to drive the truck he said nothing to him about the weather conditions, or that driving the truck would be unsafe, and he made no statements that he was not qualified to drive the truck (Tr. 412). Mr. Mullins stated "if he felt like it was unsafe that he would have told me that it was unsafe instead of telling me to get his hard-toes" (Tr. 414). He explained further as follows at (Tr. 415-417):

At that point I had never told him he was fired. At that point I felt like that he knowed he was going to go to the house one way or the other, whether it would be quitting or me firing him, and was the reason that he asked me to get his shoes.

JUDGE KOUTRAS: When he told you twice no, no, and you told him to get on to the house, that meant he was fired, didn't it?

THE WITNESS: When he told me no, I said, well, you can drive the hauler or go to the house.

JUDGE KOUTRAS: You gave him a choice?

THE WITNESS: Yes. I said Larry and all them other boys, I said they drove them and there is no reason you can't. And, he said no again.

* * * * *

JUDGE KOUTRAS: Well, if you tell a fellow to go on to the house, what does that mean in normal modern talk? That means a man is fired, right?

THE WITNESS: Well, it --

JUDGE KOUTRAS: You gave him a choice. You claim you gave him a choice, to either operate the truck or go on to the house, right? So, he opted to go on to the house.

THE WITNESS: No, it don't necessarily mean you are fired.

JUDGE KOUTRAS: What does that mean, take the day off, go home, and then come back tomorrow?

THE WITNESS: At times that's what you do.

JUDGE KOUTRAS: How about this time?

THE WITNESS: This time I meant that he was fired.

Mr. Mullins explained his procedure for teaching someone to drive a rock truck as follows (Tr. 420-421):

A. You show them everything about one. You tell them the hazards of it. You show them how to keep it maintained as far as engine, you know, and the lubricant system of it. That's the first thing you show them before they climb in it. Basically there is two seats in a hauler. It is the only piece of equipment on the job that two can ride. The driver will more than likely sit in the passenger seat and show whoever is learning everything about it and ride with him.

Q. How long does it normally take?

A. Probably one or two trips and it will give you the basic idea about driving one. You learn something every day. I would say it would basically be the person.

Q. Would seven days be enough?

A. Yes.

On cross-examination, Mr. Mullins confirmed that he discharged Mr. Conatser on January 26, 1987, and that the only basis that he had to conclude that he was qualified to drive the rock truck in question was his observation the one time he drove it down the hollow fill at Red Flame, and the "talk" among the miners that Mr. Conatser drove a truck at No. 8 Ltd. before he came to work at Red Flame. Mr. Mullins confirmed that Mr. Conatser had not previously informed him that he could drive a rock truck (Tr. 423-424). Mr. Mullins stated the one time that he saw Mr. Conatser drive at Red Flame was when he drove a 50-ton 773 rock truck, and that he "thought" and "assumed" that Mr. Conatser had traded off with Maynard Harris (Tr. 428-429).

Mr. Mullins confirmed that when he discharged Mr. Conatser, he did not ask him whether he was qualified to drive the truck, nor did he offer to train him because "he give me no reason to." He insisted that Mr. Conatser simply told him "no" when he asked him to drive the truck, and "if he had told me he can't drive a rock truck, I would ask him why" (Tr. 429). He did not recall Mr. Conatser stating "I can't drive the truck" (Tr. 423). Mr. Conatser did not tell him that he should only have to operate the loader, and at no time did he tell him that he was only a loader operator (Tr. 433).

Mr. Mullins confirmed that he never gave Mr. Conatser any task training in driving a rock truck at Red Flame, and that when he worked at No. 8 Ltd., Mr. Mullins assumed that Mr. Conatser had received such training (Tr. 432). He also confirmed that Mr. Conatser had never previously refused to operate any equipment or stated that he was only going to operate an endloader (Tr. 434).

Mr. Mullins stated that on the day of the discharge no coal was hauled "because the coal trucks couldn't get to it," and that no haulage at all was done "in the hollow field," and that "we hauled to the level." He could not recall "if we had made it to the pit with them or not" (Tr. 437). He confirmed that he did not check his training records to determine

~446

whether Mr. Conatser was qualified to drive a rock truck because "I had seen him driving a hauler" (Tr. 439).

Mr. Mullins stated that if Mr. Conatser had told him anything but "no," or given him a reason for not driving the truck, or felt that it was endangering his life or safety, he would not have required him to drive the truck (Tr. 442). Mr. Mullins confirmed that he did not ask Mr. Harris whether or not Mr. Conatser had switched out with him, nor did he actually observe Mr. Conatser backup a rock truck (Tr. 443).

Mr. Mullins stated that after the discharge, neither Mr. Davis or anyone else from management asked him whether or not Mr. Conatser was qualified to drive a rock truck. Mr. Davis and Mr. Burke never asked him to check the training records to determine whether or not Mr. Conatser had been trained to operate the truck. Mr. Mullins could not recall whether Mr. Burke ever asked him about the condition of the hill on the day of the discharge (Tr. 449-450). He confirmed that the decision not to rehire Mr. Conatser was made "because basically we all three felt like he was qualified to do it and he just flat out refused to do it," and "we thought he was qualified" (Tr. 451, 453). Mr. Mullins also confirmed that when he met with Mr. Burke and Mr. Davis, he knew that Mr. Conatser had filed a discrimination complaint and that another reason for not reinstating him was because he surmised that Mr. Conatser did not have a case, and the respondent did (Tr. 454).

Mr. Mullins stated that when the decision was made not to rehire Mr. Conatser, no one checked the respondent's training records to determine whether he had been trained to drive a rock truck because "if someone gets on something or other and drives it, you assume that they know what they are doing, especially when they have been on a job for 12 years or whatever" (Tr. 455). He also stated that "I assumed he had enough ambition to go down the hill" (Tr. 456). Mr. Mullins confirmed that he never previously fired anyone for refusing to do a job that he knew he was qualified to do (Tr. 457).

Cruce Davis, Superintendent, No. 8 Ltd. and Red Flame, testified that he has observed Mr. Conatser driving a rock truck on three different occasions at the No. 8 Ltd. site during March, 1986, and he described what Mr. Conatser did as follows (Tr. 474):

He took the endloader, as he said the other day, around the hill to a pit of coal that we needed to stockpile. He loaded it himself. If

I am not mistaken, that was sometime during March. To the best of my knowledge, it was good weather, dry. The terrain, there was -- well, it wasn't completely level. The road around the bench had a dip in it and you go down a little hill and up another hill. There was a curve in it and he went up a pretty steep grade on the bench and loaded the truck and then came back off and dumped it in the stockpile.

Mr. Davis stated that Mr. Conatser hauled coal for 3 days, but he was not sure whether he did it for full days. He hauled along a road grade of approximately 150 feet long, and it was "quite a bit steeper than the road over at Red Flame." Based on his observations of Mr. Conatser driving the rock truck on these occasions, Mr. Davis had no reason to believe that Mr. Conatser had any problems driving the truck, and he was of the opinion that he was qualified to drive it (Tr. 475). Mr. Davis confirmed that he first learned of Mr. Conatser's claim that he was not qualified to drive a rock truck after he was discharged, and he did not believe him (Tr. 477).

Mr. Davis stated that when he spoke with Mr. Mullins on the morning when Mr. Conatser was discharged, Mr. Mullins informed him that he had asked Mr. Conatser to drive the rock truck and "he told him no, that he couldn't" (Tr. 479). Mr. Davis was of the opinion that Mr. Conatser's refusal to drive the truck was based on the fact "that he just didn't want to drive the truck that day" and that "I feel like he looked at himself as being a loader man, strictly a loader man. He didn't want to do anything else but run a loader." Mr. Davis stated further that "he felt like Zack should have taken some of the other truck drivers that had been driving trucks from time to time and put them on the truck and let him run the loader" (Tr. 480).

Mr. Davis confirmed that he and Mr. Burke met with Mr. Conatser after he was discharged, and the decision not to rehire Mr. Conatser was based on the fact that he refused to do something he was qualified to do, and that "we don't tolerate that" (Tr. 481). Mr. Davis also stated that Mr. Conatser had a "terrible work record" and missed a lot of work, but he confirmed that this had nothing to do with his discharge. Mr. Davis was of the opinion that Mr. Mullins acted reasonably in discharging Mr. Conatser, and while he had never observed Mr. Conatser drive a rock truck at Red Flame he believed that

~448

"if you can drive a hauler on one job you can drive it on another job" (Tr. 484).

Mr. Davis stated that there was no unusually steep hills at the Red Flame site, and that the hill where Mr. Conatser was expected to drive the truck had a grade of approximately 11 to 12 percent, and while it did snow, he did not believe that this was unusual inclement weather for the wintertime (Tr. 487). Mr. Davis stated that had Mr. Conatser informed Mr. Mullins that he was afraid to drive the truck, Mr. Mullins would either have assigned someone to show him how, or would have assigned Mr. Conatser to a loader and put someone else in the truck. Mr. Davis did not believe that Mr. Mullins would ever endanger anyone in a piece of equipment, and if he did, he would fire Mr. Mullins (Tr. 488).

On cross-examination, Mr. Davis stated that while he did not know exactly how many hours Mr. Conatser operated the truck on the 3 days that he observed him at the No. 8 Ltd. site, he did observe him coming and going 12 to 20 times during those 3 days while driving the 50 ton 773 rock truck. Mr. Davis confirmed that he had previously stated in his pretrial deposition that he "thought" that Mr. Conatser had operated a rock truck at Red Flame after swapping out with Maynard Harris, but that he did not actually know that for a fact, and never observed him driving a truck. He also confirmed that he never asked Mr. Harris whether he and Mr. Conatser had "swapped out" (Tr. 490-494).

Mr. Davis confirmed that Mr. Mullins told him that Mr. Conatser stated "no, I can't" when he asked him to drive the truck. He also confirmed that while he has been the superintendent at Red Flame and No. 8 Ltd., Mr. Conatser has received no rock truck driving task training, and that Mr. Conatser never told him that he would not operate any equipment other than an endloader. Mr. Davis stated that if anyone told him "I can't drive a rock truck," this would mean "that I would train him" (Tr. 497-501).

Complainant's Rebuttal

Maynard Harris, loader operator, Red Flame Coal Company, confirmed that he has been so employed since May, 1986, and that he worked with Mr. Conatser from that time until his discharge in January, 1987. He stated that he never observed Mr. Conatser operating a rock truck. Mr. Harris also confirmed that while he is a loader operator, he has driven a rock truck, and he denied that he has ever "traded out" with

Mr. Conatser so that he could drive his rock truck. He confirmed that he knows of no one else who has "traded out" with Mr. Conatser (Tr. 507-511).

Mr. Conatser testified that his previous rock truck driving experience has always been on level ground, and that he has never been trained on a rock truck, and knew nothing about the retarder or what gear to put the truck in while going down hills (Tr. 513-517, 521). He denied that he ever backed up a rock truck while working at Red Flame (Tr. 519). Although he knew how to operate the rock truck foot brakes, steering wheel, and lights, he was "always scared" of the truck, but was not afraid to drive one on level ground because "it's just there ain't no danger of anything happening to you there" (Tr. 520). He denied that he ever operated a truck on a hill (Tr. 522).

Mr. Conatser admitted that he never said anything to Mr. Mullins about his safety concerns at the time of his refusal to drive the truck because "I was just in shock" and "never thought to" and "I didn't know I had to." He also admitted that before Mr. Mullins asked him to drive the truck, he discussed with the mechanic the probability that Mr. Mullins would ask him to do so, and that he would have to drive it down the haulroad (Tr. 522-525). Mr. Conatser confirmed that he learned that telling Mr. Mullins about his fear of driving the rock truck was critical to his case after he talked with MSHA Inspector South, and that "he said that you had to tell them that you were in fear for your life" (Tr. 525). When asked whether he was aware of the fact that he was supposed to bring any safety concerns to the attention of his supervisors, Mr. Conatser responded "I guess so" (Tr. 527).

Complainant's Posthearing Depositions

Bill Meade, self-employed long-distance trucker, testified that he worked for No. 8 Ltd. from 1975 through September, 1986, as a mechanic foreman, and that from the Spring of 1983 until he quit in September, 1986, he was the foreman of the No. 8 Ltd. strip mining site. He confirmed that Mr. Conatser worked for him at the No. 8 Ltd. site for 6 to 7 years, and that he was his supervisor during that time. Mr. Conatser's job was an endloader operator, and he loaded some rock, but mostly coal. Mr. Meade stated that Mr. Conatser was one of his best endloader operators, and that he would hire him if he were in business.

Mr. Meade stated that he was an experienced rock truck driver, and has driven trucks on level and steep ground, and

~450

in wet and dry conditions. He considers a rock truck to be the most dangerous piece of equipment on a strip job, and depending on the conditions under which it is operated, and if one is not trained in all of its controls, "it is very dangerous because it can get away from you at the bat of an eye" (Tr. 11). Mr. Meade described the controls of different models of rock trucks used at the No. 8 Ltd. site, including the braking systems, and the skills required to operate the trucks on hills, steep ground, and under wet conditions. He indicated that the vehicle manual that comes with the Model 777 or 773 rock truck states "do not operate this machine on steep ground during wet or slick conditions" (Tr. 12-18).

Mr. Meade confirmed that he has observed rock trucks sliding down hills in wet conditions, and that this is a common occurrence. He also confirmed that while he was employed at the No. 8 Ltd. site, he was aware of rock truck accidents. He stated that Cyrus Boggs, an experienced driver, put an 85-ton 777 truck into a ditch while driving down a slick road, and bent the fenders. Mr. Boggs also had another problem coming up a slick hill, but it did not damage the truck. Jerry Sturgill wrecked a 773-B truck, and it had to be pulled out with a dozer. Robert Yeary, an inexperienced driver, damaged a 777 truck engine when the truck got away from him on a steep hill, and Roy Porter, who was also inexperienced, recently damaged a 777 truck at Red Flame's operation when he backed it into the pit and damaged the bumper. Shawn Sturgill, an inexperienced driver, bent the drive shaft on a 773-B truck when it got away from him at the No. 8 Ltd. site and went into the hollow fill. Mr. Boggs was also involved in two or three incidents with a 3311 Terex, 85-ton truck, and a 40 ton 3307 Terex truck on slick ground (Tr. 19-27). Mr. Meade described some of the problems that a rock truck driver could encounter driving down hills in wet conditions (Tr. 27-30).

Mr. Meade confirmed that Mr. Conatser operated a 773-A rock truck at the No. 8 Ltd. strip site, and during the 6 years he was there he drove it five to six times in level areas during the spring of 1986. He did not drive the truck into the hollow fill. On one day, Mr. Conatser filled in for another driver, and he operated a 777 model while hauling rock over a flat and level area 300 to 500 feet wide, and over a distance of a few hundred yards. He hauled rock in and out of a level pit area (Tr. 30-35).

Mr. Meade was of the opinion that Mr. Conatser was not qualified to drive a rock truck up and down hills in wet conditions because he had no experience at all and was not capable

~451

of hauling in any steep or dangerous territory (Tr. 39). Mr. Meade was not aware that Mr. Conatser ever drove a truck while stockpiling coal over 3 consecutive days, and the longest time that he ever drove a truck was for 8 hours when he filled in for the driver previously mentioned. Mr. Meade believed that Mr. Conatser probably drove a truck for a total of 3 full days during all of the time he was employed at the No. 8 Ltd. site (Tr. 40).

Mr. Meade believed that Mr. Conatser went to work at the Red Flame site in June, 1986, and he stated that the steepness of the hollow fill hill at Red Flame did not compare with the pits at No. 8 Ltd. where Mr. Conatser drove a truck. The hill at Red Flame was 18 degrees in some places, and the areas at No. 8 Ltd. were level, and at no time while he was there were the roads as steep as at Red Flame (Tr. 43).

Mr. Meade confirmed that when he was foreman at the No. 8 Ltd. site, it was his practice to use alternative level dumping sites and to never go down hills when it snowed or rained (Tr. 45). He stated that roads which are scraped after a 12 inch snow in 25-30 degree weather would be muddy after scraping, and that the snow would be melting all day and the roads would not freeze unless the temperature was "in the teens." He was of the opinion that the road would have to be cut 3 to 4 inches deep to reach dry ground, but that melting snow on the roads would prevent them from staying dry (Tr. 47).

Mr. Meade was of the opinion that anyone who had driven a rock truck only on level ground would have to be task trained if he were assigned to drive the truck up and down hills because "it's a complete different operation" (Tr. 48). He confirmed that while he was foreman at No. 8 Ltd., if anyone told him that they did not want to operate a piece of equipment, he would assign someone else in their place. If anyone told him that they were afraid, or could not operate the equipment, he would find someone else because he did not believe in assigning anyone work which they did not normally do on a daily basis because they would endanger themselves and others (Tr. 48-50). In his opinion, Mr. Conatser was a qualified endloader operator, and although he has seen him operate a dozer, he did not believe he was a qualified dozer operator (Tr. 51).

On cross-examination, Mr. Meade confirmed that as a supervisor and foreman, he has trained employees to operate a rock truck, and he explained how this was done. He also confirmed that he trained Mr. Conatser to drive a rock truck on level

~452

ground during the spring of 1986, and this consisted of riding with him "a trip or two" (Tr. 55). Mr. Meade also confirmed that since Mr. Conatser was not hired as a rock truck driver, his training was limited to operating the truck on level ground, and he was not aware of any other training received by Mr. Conatser at No. 8 Ltd. prior to 1986 (Tr. 56).

Mr. Meade stated that during the time Mr. Conatser worked for him at No. 8 Ltd. from 1978 to 1985, he had no knowledge that he ever operated a rock truck, and he never assigned him to drive a truck. He also was unaware of Mr. Conatser ever offering to "swap out" with a rock truck driver, and he indicated that this was against company policy because it was dangerous and expensive (Tr. 60). In those instances where he assigned someone to work in someone's place during their absence, he always made sure that the replacement was certified or trained to do the work (Tr. 61).

Mr. Meade stated that Mr. Conatser was trained every year that he worked at No. 8 Ltd., but that his training was limited to his job as an endloader operator. He also stated that the miners were not trained to operate every piece of equipment, and switching jobs was not practiced, unless he personally selected someone to replace another and was assured that he was trained to do a particular job (Tr. 63-64). He never permitted any of his truck drivers to go up and down hills when it was wet or slick, and if it was snowing and 25 degrees or above (Tr. 71). Mr. Meade confirmed that while he was foreman at No. 8 Ltd., task training was only given to those men who were moved from one piece of equipment to another, and that initial training was given to those men hired to drive rock trucks (Tr. 77).

Mr. Meade confirmed that he observed Mr. Conatser drive a rock truck five to seven times during the 6-month period from January to June, 1986 (Tr. 72). Mr. Conatser's total hours of driving a rock truck would have amounted to 1 day for the two or three times he drove, and 6 1/2 hours when he replaced a driver, and 2 to 3 hours on the other occasions that he drove (Tr. 74-75). He estimated that Mr. Conatser's total rock truck driving experience was approximately 3 working days (Tr. 95), and he explained further as follows (Tr. 100):

Q. When you worked at the #8 strip site, did Chuck Conatser have a reputation as being a rock truck driver or a hauler operator?

A. Chuck Conatser was a loader man. That's all that Chuck - everybody that knows Chuck

Conatser knows that he's a loader man. And, I mean, it's a known fact that's all he does. Chuck started out as a loader man, and that's all he ever wanted to be. And to me that's the only reputation he had with me, was he was my loader man.

Q. Okay.

A. As a matter of fact, he resented everytime I would try to get him haul that stuff because he told me that he was afraid.

Q. The times that you assigned him to operate the hauler he didn't like it?

A. Yeah, he didn't really like it, no. But, you know, he would go along if it was in a safe condition.

Mr. Conatser denied that he had ever offered to swap out with Mr. Maynard Harris so that he could drive Mr. Harris' truck while Mr. Harris operated his loader. With regard to Mr. Meade's testimony that he operated a rock truck five to seven times at No. 8 Ltd. during the spring of 1986, Mr. Conatser stated that he only operated a rock truck on two occasions as he testified to at the hearing in this case.

Respondent's Posthearing Depositions

Cruce Davis testified as to certain task training certificates which he located for various equipment, and he was unable to locate any other certificates covering the period prior to his employment at No. 8 Ltd. in February, 1986. Approximately 24 to 28 equipment operators were employed at the No. 8 Ltd, site, and while he believed that no one would be allowed to operate equipment unless they were trained, he did not believe that any training certificates were filled out for these employees. In his opinion, the dozer would be the most dangerous piece of equipment to operate since it would be pushing materials over the hill at high elevations. The Caterpillar 777 rock trucks do not have right and left steering brakes because they were disconnected or not there when he came to the site, and the retarders would only be used when the trucks are driven on hills or under wet conditions.

Mr. Davis stated that the dozers and graders make the hills safe to operate on during wet or slick conditions, and sometimes the trucks are placed elsewhere to operate under

~454

such conditions. On January 26, 1987, the roads were made safe for the trucks after they were scraped, and the trucks have enough braking power to operate on the hills. He had no knowledge that Cyrus Boggs, Jerry Sturgill, Robert Yearly, Roy Porter, Shawn Sturgill, or Terry Boggs ever wrecked a rock truck, and if they did, he would be aware of it. Although he has observed rock truck wheels sliding, he never saw them go "in the wrong direction," but given the right conditions such as an "awful slick" road, this was possible. Although there were no hollow fills at the No. 8 Ltd. site when he worked there during the spring of 1986, there were some "small hills" at a 9 to 10 percent grade coming out of the pit. He was not aware that Red Flame was in "any trouble" due to the steepness of the hill going to the hollow fill. He was unaware of any truck collisions at the sites.

Mr. Davis stated that while anyone can operate a rock truck on level ground, this is not true on hills, and one "has to be used to it." He would not put just anyone on a rock truck on level ground, and just "turn him loose," but that if one "gets used to the truck controls" on level ground, after 15 to 20 minutes, he should be able to drive the truck downhill. Task training is given to those who are newly hired, those who have never operated a piece of equipment before, and those who go from one piece of equipment to another. He knows of no one who has operated a rock truck on level ground being task trained to operate a truck on hills. He was aware of some employees refusing to operate a dozer after being asked, and after stating that they were unable to operate it. However, those who were known to be able to operate equipment have never refused, and if anyone expressed any fear in operating equipment, they would not be assigned to do so. Mr. Meade threatened him over some differences between them, and he has also threatened to shut the Red Flame job down several times. These threats were made over the C.B. radio, and Mr. Davis recognized Mr. Meade's voice. Mr. Davis conceded that rock trucks could have wrecked at the No. 8 Ltd. site before he worked there and that he may not have heard about it.

Cyrus Boggs denied ever wrecking a rock truck, but recalled that he may have slid on the wrong side of the road and "put one into a ditch on the level," but not on a hill. One can slide backwards on slick road going uphill until the road is scraped, and he regularly operated rock trucks at No. 8 Ltd. up and down hills when it was raining, wet, or snowing, and "you would have to try."

Shawn Sturgill denied that he ever wrecked a rock truck at No. 8 Ltd. or Red Flame, but did get stuck in the mud and fill one time, but did not damage the truck and was in no danger. He has operated trucks at No. 8 Ltd. or Red Flame when the roads were wet or when it snowed, but the roads were scraped or cut.

Terry Boggs denied that he had ever wrecked a rock truck or been hurt in one. He has had mechanical and transmission problems. The roads are scraped or rock is dispersed on the road in order to dry them out. He has operated trucks on hills when they are wet, and in the rain or snow, but the roads are always "fixed" before going up hills. On one occasion, he rolled backwards on a hill about 50 feet into "a little valley" when the truck "kicked out of gear" after he experienced transmission problems, and the truck gears have "kicked out" many times. He knew of one driver at No. 8 Ltd. who mired his truck into the spoil while turning and dumping, and he had to be pulled out with a dozer. Shawn Sturgill also got stuck in the mud with a truck while backing out of a dump.

Roy Porter denied that he ever wrecked a rock truck at No. 8 Ltd. or at Red Flame, but did recall that a wheel fell over once while he was turning on top of a shot. Dozers are used to drag the roads, and he has driven trucks in snow and rain. He has a total of 3 weeks of experience at driving a rock truck, and stated that "I can drive it." He is sometimes used to drive a truck when substituting for someone who is sick.

Robert Yeary confirmed that on one occasion while driving down the hollow fill road at Red Flame, a wheel fell off his rock truck and the front-end was damaged and parts had to be replaced. The incident was unexplained, and he was driving at normal speed in dry weather, and he was not hurt. He is unaware of any truck accidents while working at Red Flame. He has a year of truck driving experience, and drove one on one night shift at No. 8 Ltd., but Mr. Meade never observed him driving.

Maynard Harris testified that during July, 1986, at Red Flame, he was operating an old rock truck which was not air conditioned, and Mr. Conatser was operating an air conditioned loader. Mr. Conatser called him over the radio and offered to swap jobs with him. Mr. Harris was operating the truck "out of the pit down into the hollow fill," and the road was steep. The first hill would have been as steep as it was on January 26, 1987, and had the swap occurred, Mr. Conatser would have driven on that road. However, they did not swap.

Findings and Conclusions

In this case, Mr. Conatser's employment with the respondent terminated on the morning of January 26, 1987, after he refused his foreman's (Mullins) request to operate a rock truck. Although the respondent initially took the position that Mr. Conatser quit his job, it subsequently abandoned this position and it is clear from the testimony of Cruce Davis, and Zachary Mullins' own admissions that he discharged Mr. Conatser for refusing his request to drive the rock truck.

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 of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981); Secretary on behalf of Jenkins v. Hecla Day Mines Corporation, 6 FMSHRC 1842 (August 1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983).

The operator may rebut a 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 it was also motivated by the miner's unprotected activities alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir.1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corporation, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Complainant's Termination

It seems clear to me from the record in this case that the complainant was discharged from his job by foreman Mullins on January 26, 1987, for refusing the request by Mr. Mullins that he drive a rock truck, and Mr. Mullins admitted that this was

~457

the case. Consequently, the respondent's initial assertion that Mr. Conatser quit his job is rejected, and I conclude and find that he was in fact discharged.

Complainant's Work Refusal

A miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that his continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. Brock v. Metric Constructors Inc., 766 F.2d 469, 472-73 (11th Cir.1985). However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous conditions exists. Simpson v. Kenta Energy, Inc. & Roy Dan Jackson, 8 FMSHRC 1034, 1038-40 (July 1986); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir.1982) (approving Dunmire & Estle communication requirement); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

Mr. Conatser asserts that his refusal to drive the rock truck in question was based on his fear for his safety because he had not previously driven a rock truck on hills or in wet conditions, and he did not feel that he was qualified to drive the truck on the Red Flame haul road to its hollow fill. Mr. Conatser further asserts that due to his extremely limited experience driving rock trucks, which was confined to level terrain in dry conditions, his safety concerns on January 26, 1987, were clearly reasonable, and that his refusal to drive the truck was made in good faith.

The hollow fill road over which Mr. Conatser was expected to drive was described as "steep" by several witnesses. The evidence establishes that the roadway was approximately 40 feet wide, 100 to 600 feet long, and that trucks could pass each other on the roadway. The average truck speed was estimated at 10 miles per hour, and while there were incidents of mechanical break-downs and trucks being bogged down, there is no probative evidence of any truck collision accidents or injuries. The roadway was bermed, and the truck that Mr. Conatser was asked to drive was in good operating condition.

The evidence establishes that the respondent generally made it a practice to scrape and clear the roadways when it

~458

snowed, "rocked" them to prevent sliding under wet and rainy conditions, and watered them down under dry conditions to keep the dust down. The evidence also establishes that foreman Mullins and superintendent Davis consistently addressed the safety concerns of drivers with respect to road conditions, and took appropriate action to insure that the roads were safe before permitting any trucks to operate over the roads. Drivers were instructed not to operate their equipment until the roads were made safe.

With regard to the road conditions on the morning of January 26, 1987, while it had snowed and there was 10-12 inches of snow on the ground, the evidence establishes that the hollow fill road in question was bermed and cleared of snow before any trucks were permitted to operate. However, truck driver Cyrus Boggs, who drove a truck on the hill that day, testified that the road was wet after it was scraped, and that it was not unusual for a truck to slide on a wet road surface. Dozer operator Lloyd Day, who worked on the road on the day in question, described the road as "pretty rough" before it was scraped, and he confirmed that it was still wet after the snow was scraped off. Although he believed that the road was safe after it was scraped, he also believed that trucks will slide on a hill regardless of whether the conditions are wet or dry. Truck driver Robert Boggs testified that once snow is removed from a roadway, the roadway is still wet and that "it ain't no more than water in the road" (Tr. 353). Former mine foreman Meade testified that in 25 to 30 degree weather, once snow is removed from a roadway, the roadway remains "wet and muddy" and that "it's gonna lay there and melt and run all day long" (Deposition pgs. 45-47).

Roy Porter confirmed that he had previously driven a rock truck over the roadway in question under rainy and wet conditions, and that the truck would slide. Shawn Sturgill testified that he has observed rock trucks sliding on the roadway, and that while operating trucks on that very same roadway, he has experienced a slide while encountering small patches of ice under wet conditions. Foreman Mullins confirmed that he has observed trucks sliding on the roadway in question when the road was slick, and he agreed that a sliding truck indicates that its not braking properly. Rock truck driver Robert Yearly confirmed that he has observed trucks sliding on the road in question and that this would occur when the road was wet or when the driver applied the brakes. Mr. Conatser testified that prior to his discharge, he observed rock trucks operating on the hill road on a daily basis, and that when it snowed or rained, or when the road froze and thawed, it was impossible to take a trip without sliding.

Although one can conclude that the roadway in question was made reasonably safe after the snow was removed, and some drivers experienced no difficulty in driving on the roadway, I conclude and find from the credible testimony of the aforementioned witnesses that the roadway was wet, and probably muddy, after the snow was removed, and that given these conditions, it presented a possible sliding and slipping hazards for the trucks which were scheduled to operate on the morning of January 26, 1987. As a matter of fact, foreman Mullins stated that the roadway was not used at all that day because "the coal trucks couldn't get to it" and "we hauled to the level" (Tr. 437).

With regard to Mr. Conatser's ability to drive a rock truck, a distinction must be made as to whether he is totally incapable of driving a truck, or whether, as he contends, he lacks the necessary experience and training to drive it under inclement weather conditions on a steep inclined road. On the basis of the evidence presented in this case, I conclude and find that Mr. Conatser can basically operate and drive a rock truck, and his denials to the contrary are rejected. The evidence establishes that prior to his discharge, Mr. Conatser drove a rock truck at the No. 8 Ltd. site, and he admitted that he knows how to operate a rock truck, on level ground, but denied that he knew how to "gear it down" on a hill (Tr. 113Ä114; 125Ä126).

With regard to Mr. Conatser's actual rock truck driving experience, his former supervisor at No. 8 Ltd., Bill Meade, testified that during the 6 or 7 years that Mr. Conatser was employed at that site, when the occasion arose for Mr. Conatser to drive a rock truck, he always drove it on level ground in an environment that posed no hazard to him. Cyrus Boggs confirmed that while he observed Mr. Conatser drive a truck while stockpiling coal at the No. 8 Ltd. site 3 years ago, he had no recollection of the particular details, and he did not consider Mr. Conatser to be a truck driver. Shawn Sturgill testified that when he observed Mr. Conatser driving a rock truck at No. 8 Ltd., he always drove it on level ground, and Mr. Sturgill was not certain as to the weather conditions. Tommy Dotson testified that the only time he observed Mr. Conatser in a rock truck was one time when he backed it up on the level Red Flame parking lot for a distance of 30 to 40 feet. Robert T. Boggs confirmed that when he observed Mr. Conatser driving a truck at the No. 8 Ltd. site 2 to 4 years ago, he was hauling coal from the pit up and down hills, but under dry road conditions. Superintendent Davis confirmed that he never observed Mr. Conatser drive a rock truck at Red Flame, and while he

observed him driving a truck on three occasions while at the No. 8 Ltd. site during March, 1986, the weather was clear and dry, and the road was not completely level, and included "a dip," "a little hill," and a "steep grade on the bench."

Mr. Mullins' testimony that he had previously observed Mr. Conatser driving a rock truck on the Red Flame hill in question during the summer of 1986 prior to his discharge is rejected as less than credible. I have carefully reviewed Mr. Mullins' testimony in this regard, and find that his purported observation of Mr. Conatser was based on his assumption that Mr. Conatser had swapped out with rock truck driver Maynard Harris. During the hearing, Mr. Harris denied under oath that he had ever swapped out with Mr. Conatser, and he said nothing about any offer by Mr. Conatser to drive his truck. Later, during his posthearing deposition, Mr. Harris stated that Mr. Conatser offered to swap out with him, but given the lack of time, the swap never occurred. Weighed against the credible testimony of all of the other witnesses who testified that they never observed Mr. Conatser drive a rock truck at Red Flame, and were unaware of any offers on his part to swap out with other equipment operators, I simply do not believe Mr. Harris' testimony concerning the purported offer by Mr. Conatser. As for Mr. Mullins, I take note of the fact that in his pretrial deposition, he made a statement that Mr. Conatser had switched out with Mr. Harris and drove the rock truck for one day, making three or four trips down the hill in question (Pgs. 34-35). However, at the hearing, Mr. Mullins completely contradicted himself and testified that he only "thought" and "assumed" that Mr. Conatser had switched with Mr. Harris (Tr. 428-429).

While it is true that several witnesses were of the opinion that Mr. Conatser's prior driving experience qualified him to drive a rock truck, some of these same witnesses expressed reservations over an inexperienced driver operating a rock truck on a hill under wet road conditions. Drivers Cyrus Boggs and Shawn Sturgill testified that an inexperienced driver would not know how to handle a truck in a slide and would have problems, and Mr. Sturgill believed that it was unsafe for such a driver to operate a truck on a slick hill. Mr. Conatser's former foreman at No. 8 Ltd., Bill Meade, opined that Mr. Conatser was not qualified to operate a rock truck on a hill on wet roads because of his total lack of experience in driving under such conditions. Mr. Meade stated that driving on hills "is a completely different operation" from driving on the level, and that a driver whose experience was limited to driving on level ground would need to be task trained to drive on hills.

Drivers Robert Yeary, Cyrus Boggs, and Russell Akers confirmed that there were differences in driving on hills and on the level, and Mr. Akers confirmed that if he were an inexperienced driver, he would be afraid to drive on a wet hill road because it would be "scary." Superintendent Davis agreed that while anyone could drive a rock truck on level ground, this would not be true on hills, and that a driver would have to get used to driving on hills if he had not done so in the past. Cyrus Boggs believed that some training was required in order to learn how to drive a rock truck on a hill. Robert T. Boggs opined that wet roads are more hazardous than dry ones, and that he has observed experienced drivers sliding on hills.

The evidence in this case clearly establishes that Mr. Conatser's principal job with the respondent was that of an endloader operator, and except for the possibility that he may have on one occasion backed up a rock truck for a very short distance on the parking lot, there is no credible evidence that he otherwise drove a rock truck during the 7 or 8 months that he worked at the Red Flame site. Mr. Conatser's principal job at the No. 8 Ltd. site during his 7 years of employment was other than that of a truck driver, and the credible evidence establishes that at best, Mr. Conatser drove a rock truck for at least 3 consecutive days at the No. 8 Ltd. site, with three or four additional sporadic days of driving at that location. The evidence also establishes that Mr. Conatser's rather limited truck driving experience was confined to driving on level ground under clear and dry weather conditions, and that he has had no experience at driving on wet or steep roadways, and never received any truck driving training during his entire employment tenure with Red Flame and No. 8 Ltd., except for riding with Mr. Meade for one or two trips.

Given all of the aforementioned circumstances, including the fact that Mr. Conatser was an inexperienced rock truck driver, had never driven a rock truck on a wet hill or roadway, had never been trained to operate a truck under those conditions, and the potentially hazardous nature of the wet roadway over which Mr. Conatser was expected to drive at the time he was requested to drive the rock truck in question, I conclude and find that his refusal to drive the truck was reasonable.

The respondent has suggested that Mr. Conatser's refusal to drive the rock truck was based on his desire to operate only an endloader, and his belief that foreman Mullins should have assigned other available drivers to drive the truck in question. In support of this conclusion, respondent relies on a statement given by Mr. Conatser to the State unemployment office in which

~462

he indicated that another available driver should have been assigned to drive the rock truck in question.

Apart from the statement relied on by the respondent, the record is devoid of any other evidence that Mr. Conatser has ever taken the position that Mr. Mullins should have assigned someone else to drive the truck. Mr. Conatser made no such assertion in his initial complaint to MSHA, and the respondent has conceded that Mr. Conatser had never previously declined to operate any equipment other than his loader when asked to do so. Further, at the time of his work refusal, Mr. Conatser said nothing which would have lead Mr. Mullins to believe that his refusal was based on his desire to operate only an endloader, or that Mr. Mullins should have selected someone else for this job. The same is true at the time Mr. Conatser met with Mr. Burke and Mr. Davis after his discharge. Indeed, during his entire working career at No. 8 Ltd. and Red Flame, a period in excess of 8 years, Mr. Conatser had never taken the position that he "was only an endloader operator" and would not operate any other equipment. The record here establishes that Mr. Conatser has operated a dozer, a scraper, and a rock truck, in addition to his usual job as an endloader, and there is no evidence to show that he did so other than willingly.

Although Mr. Conatser's statement to the state unemployment office raises an inference that his refusal to drive the truck was made for reasons other than his safety concerns, and is therefore "tainted," I cannot conclude that this isolated statement, made after the work refusal, is sufficiently probative, standing alone, to support a conclusion that Mr. Conatser's work refusal on January 26, 1987, was made in bad faith. Accordingly, respondent's argument in this regard is rejected.

Complainant's Safety Communication to the Respondent

The crucial and difficult determinative issue in this case is whether or not the complainant communicated his safety concerns to the respondent prior to or reasonably soon after his work refusal, and if not, whether unusual circumstances excused his failure to do so. In Secretary/Dunmire and Estle v. Northern Coal Company, supra, at 4 FMSHRC 133, the Commission formulated the rule as follows:

Where reasonably possible, a miner refusing to work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue.

"Reasonably

possibility' may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily' in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

In *Secretary of Labor ex rel. Paul Sedgmer et al., v. Consolidation Coal Company*, 8 FMSHRC 303 (March 1986), the Commission affirmed a Judge's decision dismissing a discrimination complaint brought by several equipment operators who were suspended for refusing to operate heavy mobile equipment at speeds which they considered to be unsafe. With regard to the failure of the miners to communicate their safety concerns to mine management, the Commission stated as follows at 8 FMSHRC 309: " * * * While such communications are not only expected, in ordinary course, in work refusal situations, their absence also lends weight to the conclusion that the disagreement here as to the operating speed did not have a sound basis in safety concerns."

In *Miller v. FMSHRC*, 687 F.2d 194 (7th Cir.1982), the Court affirmed the dismissal of a discrimination complaint filed by a section foreman who was discharged after refusing to start up a longwall miner on the grounds that he was incapable of operating it; that he was unfamiliar with the control panel; and that in order to start the machine, it would have been necessary to short out its methane detector. Although the foreman felt that this would be in violation of safety laws, he did not immediately communicate his safety concerns to mine management, but waited until later in his work shift to do so, and only after the mine manager telephoned him. The Court noted as follows at 687 F.2d 196:

The specific requirement of promptly reporting the hazard to the employer which the Commission has read into the Act is not only a natural corollary to the general requirement that the work stoppage be reasonable but also a device well suited to promoting the Act's fundamental objective of promoting mine safety and health. It gives the worker an incentive to bring a safety hazard to his employer's attention, for

by doing so he gains the protection of the Act against retaliation (provided that his belief that there is a hazard is reasonable). The requirement also serves an evidentiary purpose: it helps the Commission distinguish between genuine and spurious invocations of the Act's protections. The worker who does not promptly report an alleged hazard to his employer is less likely to be sincere in his belief that there is a hazard than the worker who does. * * *

In *Simpson v. Kenta Energy, Inc.*, supra, Judge Broderick upheld the discrimination complaint of a miner who left his job out of concern over the lack of a foreman on the job and the failure to conduct preshift and onshift examinations. With regard to the safety communication issue, although Judge Broderick found that the miner had not communicated these safety concerns to his foreman (Jackson), he nonetheless concluded that the communication was not necessary because the foreman was deemed to have known about these conditions and the communication would have been futile. Judge Broderick stated "I do not consider that it is necessary in order to invoke the protection of Section 105(c), that it be shown that the operator was specifically aware of the reason for a miner's work refusal, if the operator was aware of the hazardous conditions which prompted the refusal . ." 6 FMSHRC at 1462.

The Commission reversed, and while it agreed that Simpson had valid and reasonable safety concerns in leaving his job, it found that Simpson had not communicated his safety concerns to his foreman, thus negating the foreman's opportunity to address them. In this regard, the Commission stated as follows at 8 FMSHRC 1040: "Even assuming, as the Judge did, that Jackson was aware of the absence of a foreman and the failure to conduct the required pre-shift and on-shift examinations, we cannot presume that Jackson would have taken no action had Simpson communicated his concerns to Jackson." (Emphasis added.)

Although the Court of Appeals for the D.C. Circuit reversed and remanded the Simpson case to the Commission for further consideration of the issue of whether Simpson should be excused from meeting the communication requirement because notice would have been futile, it nonetheless accepted the Commission's application of the communication requirement set forth in the Northern Coal and Miller cases, supra. Simpson

v. FMSHRC, Court of Appeals, D.C. Circuit, Case No. 86-1441, Slip opinion pgs. 12-13, decided March 18, 1988.

In Dillard Smith v. Reco, Inc., supra, an employee of a battery servicing company who had received no underground mine training was discharged when he refused to carry out a work assignment at an underground mine. The employee was asked to go on a service call by his supervisor, and after ascertaining that the call was at an underground mine, the employee told his supervisor that "he was not going." The employee left the premises and neither he or his supervisor said anything further. Later that same day, the discharged employee returned to the office to inquire about his pay check, and he informed a secretary to advise the president of the company that he had left because he did not want to go underground because his training had expired. Judge Broderick found that the employee's refusal to go underground because of his lack of training was justified and reasonable and therefore protected activity under the Act. However, he dismissed the discrimination complaint on the ground that the discharged employee had failed to communicate his lack of training as grounds for refusing to go underground. 8 FMSHRC 1597. In affirming Judge Broderick's decision, the Commission stated as follows at 9 FMSHRC 995-996:

* * * * *

Among other salutary purposes, the communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work.

* * * * *

Dillard was asked several times at the hearing why he had not communicated his asserted training concern, but provided no answer other than that Williams had failed to ask him his reasons for refusing his work assignment. The responsibility for the communication of a belief in a hazard that underlies a work refusal rests with the miner.

* * * * *

Thus, Dillard failed to make the necessary communication of a belief in a hazard and, accordingly, his work refusal was not protected

under the Mine Act. Because Dillard's work refusal was not protected, his termination by Reco because of that refusal did not violate the Act.

* * * * *

To the extent that the judge held that Dillard had engaged in a protected work refusal apart from his failure of communication, the judge erred. Proper communication of a perceived hazard is an integral component of a protected work refusal in the first instance rather than a wholly separate requirement. (Emphasis added.)

Mr. Conatser's father testified that his son told him that he had informed Mr. Mullins that he lacked the experience to drive a rock truck, and was afraid to drive it because he had never driven one under "bad snow and weather." However, complainant Conatser contradicted this testimony when he subsequently testified under oath at the hearing that the only statement he made to Mr. Mullins at the time of his work refusal was "I couldn't drive a rock truck." Mr. Conatser admitted that he said nothing to Mr. Mullins about the weather, or the steepness of the road in question; did not use the words "I don't know how to drive a truck;" requested no task training; mentioned nothing about putting someone else in the truck with him; and said nothing about his inability to operate the truck under the then prevailing conditions. Indeed, the record clearly establishes that at no time during his conversation with Mr. Mullins, did Mr. Conatser say anything about any safety concerns.

The critical part of the conversation which took place between Mr. Conatser and Mr. Mullins at the time of the work refusal is in dispute. There were no witnesses to the conversation. Mr. Mullins claimed that Mr. Conatser simply stated "no, no" when he asked him to drive the rock truck, and Mr. Conatser denies this and asserts that he informed Mr. Mullins that "I can't drive a rock truck." Superintendent Davis, who arrived at the scene shortly after Mr. Conatser left the mine, testified consistently by deposition and at the hearing that Mr. Mullins told him that Mr. Conatser had told him that he could not drive a rock truck. I find Mr. Davis to be a credible and believable witnesses, and his testimony supports Mr. Conatser's version of the conversation in question. Accordingly, while I conclude and find that Mr. Conatser informed Mr. Mullins that he could not drive a

~467

rock truck at the time of his work refusal, I also find that he did not elaborate further or explain to Mr. Mullins the reasons for his purported inability to drive the truck.

Complainant's suggestion that the words "I can't drive a rock truck" were clearly sufficient to put Mr. Mullins on notice that he was raising a safety concern is rejected. When asked to explain why he refused to operate the rock truck in question, Mr. Conatser gave several reasons beyond a simple "I can't." He explained that his refusal to drive was based on his belief that (1) he was not qualified to drive, (2) he had never been trained to drive on hills or under wet or slick conditions; (3) he thought it would be hazardous to his health; and (4) he thought that there was a chance that he would kill himself. He further explained that he had reservations about driving the rock truck on the hill in question because he had observed trucks sliding on the hill in the past, he was generally afraid of the trucks because of his asserted lack of ability to control them in a slide, and while he drove trucks in the past at the No. 8 Ltd. site, he never drove one down a hill as steep as the one at Red Flame. Yet, none of these reasons or safety concerns were communicated to Mr. Mullins at the time of the work refusal, and I decline to read them into Mr. Conatser's brief statement to Mr. Mullins.

Complainant contends that foreman Mullins clearly understood the plain meaning of his words "I can't drive a rock truck," but failed to address his safety concerns. Conceding that he did not advise Mr. Mullins that it would be unsafe for him to drive the truck because of his lack of training, complainant nonetheless maintains that his statement to Mr. Mullins was sufficiently clear to put him on notice that he was raising a safety concern, and that the testimony of Mr. Mullins and Mr. Davis clearly establishes that Mr. Mullins understood that the complainant was making a safety complaint. In this regard, complainant points to the testimony of Mr. Mullins that the phrase "I can't drive a rock truck" connotes lack of ability or knowledge, and Mr. Davis' testimony that in the event someone told him he couldn't drive a truck this would mean "that I would train him." Complainant concludes that this testimony of Mr. Mullins and Mr. Davis clearly establishes that a safety issue is raised when a miner says "I can't drive a rock truck."

Complainant's argument is rejected. As stated earlier, Mr. Conatser's claim that he could not drive a truck was not true. His claim is that he lacked the experience to drive a truck on a hill under wet road conditions, and it is clear from the record that this safety concern on his part was in no

way communicated to Mr. Mullins at the time of the work refusal. Although Mr. Conatser subsequently stated in a February 2, 1987, statement to MSHA (exhibit CÄ3), that at the time he refused to operate the truck he "was thinking" and "implying" that he feared for his safety because of his lack of rock truck driving experience, I find these statements to be self-serving, and I have given them no weight. It seems obvious to me that when this statement was given to MSHA, Mr. Conatser had the benefit of advice from his uncle, as well as the MSHA investigator who interviewed him, and he would naturally attempt to put his case in the most favorable light to support his claim of discrimination. As a matter of fact, Mr. Conatser admitted that he learned that communicating any safety concerns to management was a critical element of his case when he spoke with the MSHA inspector to whom he made his complaint after his discharge. When asked during the hearing whether he was aware of the fact that he had to bring safety concerns to the attention of his supervisors, Mr. Conatser responded "I guess so."

Foreman Mullins testified that had Mr. Conatser told him that he feared for his life or safety, or given him a reason for not driving the rock truck, he would not have required him to do so. Superintendent Davis testified that Mr. Mullins would not endanger anyone's life, and if he did, he would fire him. The miners who testified in this case corroborated the fact that Mr. Davis and Mr. Mullins were concerned for their safety and always addressed their concerns over the road conditions. Mr. Davis further confirmed that had Mr. Conatser informed Mr. Mullins that he was afraid to drive the truck, Mr. Mullins would have assigned someone to go with him, or assigned another driver. Former foreman Meade also confirmed that if anyone expressed fear or reluctance in operating a piece of equipment, he would either assign them to other work, or not require them to operate the equipment. In view of this testimony, which I find credible, it would appear to me that management at Red Flame and No. 8 Ltd. took appropriate action to address communicated safety concerns. However, in Mr. Conatser's case, since he did not communicate his safety concerns to his foreman at the time of his work refusal, the foreman had no opportunity to address them and take corrective action.

Mr. Conatser claimed that he was "in shock" and had no opportunity to communicate to Mr. Mullins the reasons for his refusal to operate the truck. I find this difficult to believe. Having observed Mr. Conatser during his testimony, and having review his testimony during his depositions, he does not impress me as a timid individual who would back away

from a confrontation with a supervisor. Mr. Conatser impressed me as a rather combative individual who is quick to take a position and not back off. I note that Mr. Conatser's work refusal on January 26, 1987, was not the first time that he has experienced a job separation situation or encounter with a supervisor. The record reflects that he was discharged from a mining job in 1978, after being accused of "doing too much talking and not enough working" (Tr. 92). He also walked off his job at No. 8 Ltd. at one time after he and Mr. Meade engaged in a confrontation over his work and Mr. Conatser got mad and left his job (Tr. 93).

The evidence establishes that after Mr. Conatser refused to drive the truck, he engaged Mr. Mullins in further conversation and accused him of "forcing me to go to the house." Mr. Conatser also had the presence of mind to request permission to retrieve his safety shoes from the loader machine before leaving. Further, Mr. Conatser confirmed that prior to his work refusal, he had surmised from previous conversation with Mr. Mullins over the CB radio, and with the mechanic who was present, that Mr. Mullins would more than likely assign him to drive the rock truck (Tr. 523-524). Mr. Conatser conceded that Mr. Mullins did not prevent him from speaking, and that he had spoken to Mullins on many occasions in the past. Given all of these circumstances, I conclude that Mr. Conatser had an ample opportunity to communicate his safety concerns to Mr. Mullins, and I find no mitigating reasons or extenuating circumstances to excuse Mr. Conatser's failure to do so.

In view of the foregoing, I conclude and find that Mr. Conatser failed to make the necessary communication of a belief of a safety hazard with respect to his refusal to drive the rock truck in question. Accordingly, his work refusal was not protected under the Act. Since his work refusal was not protected, I further conclude and find that Mr. Conatser's discharge by the respondent because of that work refusal did not violate the Act.

Refusal to Rehire

During the course of the hearing, complainant's counsel suggested that the failure by the respondent to reinstate Mr. Conatser after he met with Mr. Burke and Mr. Davis subsequent to his discharge constituted a second violation of section 105(c) of the Act. However, counsel makes no mention of this issue in his posthearing brief, and no further arguments have been forthcoming by the complainant in this regard. I find no probative credible basis for concluding that the

~470

respondent's failure to reinstate Mr. Conatser after his discharge was in violation of the Act. Accordingly, the complainant's claim to the contrary is rejected.

ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge