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ROBERT YOUNG V. LEHIGH PORTLAND CEMENT
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ROBERT B. YOUNG, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. YORK 88-9-DM
v.	MD 88-05
LEHIGH PORTLAND CEMENT COMPANY, RESPONDENT	Cement Plant and Quarry

DECISION

Appearances: Dennis B. Schlenker, Esq., and Zachary Wellman, Esq., Albany, NY, for Complainant;
Christopher S. Flanagan, Esq., for Respondent.

Before: Judge Fauver

This proceeding was brought by Robert Young under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., alleging a discriminatory discharge. Respondent contends Mr. Young was discharged for insubordination and not for any activity protected by 105(c).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion that follows.

FINDINGS OF FACT

1. Based upon the parties' stipulated facts (Jt. Exh. 1), the following facts are incorporated as findings of fact:

a. Complainant, Robert Young, was hired by Lehigh Portland Cement Company on August 10, 1978, and discharged on October 2, 1987, by John Jones, Plant Manager of Lehigh Portland Cement Company's plant and quarry in Cementon, New York.

b. At the time of his discharge, Complainant was a yard foreman.

c. Complainant was directed by Ed Moran, his supervisor, to issue a verbal warning to B. Buley, brakeman, following a locomotive accident on September 29, 1987.

d. Complainant was also directed by John Jones to issue a verbal warning to B. Buley, arising from the same incident.

e. Complainant refused to issue a verbal warning to Mr. Buley despite the direction of Messrs. Moran and Jones.

f. Complainant's job responsibility included the supervision of those employees performing the tasks of locomotive operator and brakeman.

2. Respondent's letter of termination, October 2, 1987, from the plant manager, John J. Jones, to Complainant stated:

> Your employment with Lehigh Portland Cement Company is terminated as of October 2, 1987 due to your insubordination when you refused to follow my specific instructions regarding an employee's disciplinary matter on September 30, 1987.

3. The employee disciplinary matter involved a railroad collision and derailment at Respondent's cement plant. A locomotive was pushing a string of cars when the cars collided with a line of standing railroad cars at a switching junction, resulting in a derailment and damage to two railroad cars. The cause of the accident was an error by the brakeman, Bruce Buley, who failed to position himself properly to observe the movement of the front of the train when he signaled the engineer to move the train forward.

4. Mr. Buley was near the mid-point of the train when he signaled the locomotive operator to move the train forward. He could not see the track ahead when he signaled the engineer, and he admitted to Mr. Jones that he did not position himself properly to observe the movement of the train, and that he had taken a short cut in performing his brakeman duties. Mr. Buley also acknowledged at the hearing that the purpose of walking the cars is to make sure they fit on the track and do not hit anything, and that had he followed the procedure of walking the cars, the collision and derailment would not have occurred.

5. By custom and practice, and the exercise of ordinary care, the brakeman is required to be in the lead car or alongside the front of the train when the train is being moved forward, so he can see the track ahead. After the

accident, Complainant orally reprimanded Mr. Buley because he had not been in the proper position to observe the movement of the train at the time of the accident.

6. Mr. Jones, the plant manager, personally investigated the train accident before he discharged the Complainant. He also consulted and sought the approval of his superior at corporate headquarters before discharging Complainant. The action of discharging a foreman for insubordination was not without precedent. Mr. Jones had terminated Andrew Jasiewski, process foreman, in 1985, for refusing to come to work in time to relieve another supervisor.

7. On September 30, 1987,(FOOTNOTE 1) Complainant was instructed by Ed Moran, his supervisor, to issue a verbal warning to B. Buley, brakeman, following the locomotive accident on the previous day. Mr. Jones also directed Complainant to issue a verbal warning to B. Buley on September 30, 1987.

8. A "verbal warning" as used by Respondent is an oral warning that is recorded in the employee's file. An example is the verbal warning given to Mr. Buley by supervisor Moran on September 30, 1987 (after Complainant refused to give such a warning), and entered in Mr. Buley's file as a "Record of Employee Verbal Warning" (Jt. Exh. 2). The verbal warning was for improper work performance, not misconduct, and cautioned Mr. Buley in the future to make sure that he walked the cars while moving trains in the yard. A verbal warning is not designed to be punitive, but is viewed by Respondent as a training tool, used to modify and correct improper work performance. The first official step of Respondent's progressive disciplinary program is a written warning. A verbal warning may support the later imposition of a written warning for a repetition of the original improper performance, but it is not intended to have any punitive impact per se.

9. Complainant refused to issue a verbal warning to Mr. Buley despite the direction of his supervisors Moran and Jones. Complainant's stated reasons for his refusal to issue a verbal warning to Mr. Buley were the absence of an established disciplinary policy for safety incidents and the

fact that the employee or his union had previously requested a written job safety analysis for the brakeman position and it had not been made as of September 29, 1987.

DISCUSSION WITH FURTHER FINDINGS

In order to establish a prima facie case of discrimination under 105(c)(1)(FOOTNOTE 1) of the Act, a miner has the burden of proving that (1) he engaged in a protected activity, and (2) an adverse action against him was motivated in any part by the protected activity. In order to rebut a prima facie case an operator must show that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense; the ultimate burden of persuasion that discrimination has in fact occurred does not shift from the miner. Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC 803 (1981).

Complainant has failed to prove that he was engaged in a protected activity at the time of the Buley matter, or that his discharge was motivated in any part by an asserted prior protected activity.

Complainant was discharged on October 2, 1987, for insubordination relating to an employee disciplinary matter. Specifically, he was terminated because he refused to obey a directive of the plant manager to issue a verbal performance warning to an employee under his supervision, one Bruce Buley, following a locomotive accident.

The Buley disciplinary matter involved a railroad collision and derailment on September 29. After a thorough investigation of the matter, the plant manager, Jones, decided that Buley was at fault and directed Complainant to issue a verbal warning to Buley for improper job performance.

A verbal warning to Buley would not have involved a threat of danger to any one, including Complainant, or a violation of a safety or health standard. Complainant's refusal to comply with Mr. Jones' order was therefore not protected as a work refusal under 105(c)(1).

Nor was Complainant's expression of concern about the fairness of a warning to Buley a protected activity under the Act. Complainant may have held sincere reservations about the fairness of a verbal warning to Buley, and for his own reasons he may have disagreed in good faith with Jones' judgment on the matter. However, disagreements of this kind are not protected by 105(c) of the Act. The plant manager was justified i interpreting Complainant's refusal as an act of insubordination that warranted discharge. From his viewpoint, Complainant's refusal threatened to undermine management's decision to give safety direction and training to a brakeman who had just endangered a locomotive engineer, a trainee and himself and caused substantial property damage in an avoidable train collision and derailment. The facts do not point to a discriminatory motive. Indeed, the verbal warning Jones directed Complainant to give to Buley was essentially the same as the warning Complainant had already given to Buley. Complainant's opinion that, "I figured what I gave him [Buley] was enough - - sufficient telling him about what he should do" (Tr. 206), was simply Complainant's opinion that Jones' managerial decision was wrong. However, as stated, manager/subordinate disputes or disagreements of this kind are not protected activities under 105(c)(1).

The prior request for a job safety analysis of the brakeman position does not support Complainant's claim of discrimination. It was well within Jones' authority as plant manager to order a verbal warning of Buley regardless of the status of a request for a job safety analysis of the brakeman job. Even if Buley had decided not to walk the cars because he perceived it dangerous to do so (and I do not find such a concern was his actual reason for staying at the midpoint of the train), he would not have been justified in playing "Russian Roulette" with the safety of the engineer and others by signaling the engineer to move the train forward when he (Buley) could not see the track ahead. Jones was therefore justified as plant manager in deciding to have Complainant issue a verbal warning to Buley. There has been no showing that Jones' decision and his enforcement of it were in any part motivated by discrimination against Complainant.

At the hearing Complainant testified that Jones and Moran did not give him a direct order to issue a verbal warning to Buley, and that, had he realized that they meant to give him such an order, he would have given the verbal warning to Buley in order to save his job. I do not find this testimony either convincing or relevant. First, it is contrary to the parties' stipulation that Moran and Jones directed Complainant to issue a verbal warning to Buley and he refused to do so. Also, Jones testified that he gave Complainant a direct order to issue a verbal warning to Buley and Complainant refused. I credit Jones' testimony on this point. Considering the record as a whole, I hold the parties bound by their factual stipulations. Secondly, even if Complainant interpreted Moran's and Jones' statements as mere opinions of management, and not orders, Complainant assumed the risk of miscalculating Jones' managerial intention. The risk was not insured by 105(c) of the Act.

Complainant has not shown a nexus between his discharge and any protected activity before the Buley matter. His activities before September 29, 1987, were not shown to be particularly safety-active, and the reliable evidence does not show a prior safety complaint by Complainant that is any way connected with his discharge.

Finally, I accept management's evidence that Complainant was discharged solely because of his insubordination on September 30 1987.

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CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Complainant has failed to prove a violation of 105(c)(1) of the Act.

ORDER

The Complaint is DISMISSED.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. The September 30 date corrects a conflicting date in the testimony of Mr. Jones and in Stipulated Facts #3 and #4 in Jt. Exh. 1. I find that a preponderance of the evidence shows the correct date was September 30, 1987.

1. Section 105(c)(1) provides: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."