

CCASE:  
KENNETH HOWARD V. B & M TRUCKING  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

KENNETH HOWARD,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 89-2-D  
BARB CD 88-56

B & M TRUCKING,  
RESPONDENT

No. 2 Mine

DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, Kentucky for  
Complainant;  
W. Henry Lawson, Esq., Pineville, Kentucky for  
Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Kenneth Howard under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging unlawful discharge by the B & M Trucking Company, Inc., (B&M) in violation of section 105(c)(1) of the Act.(FOOTNOTE 1)

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Counsel for Mr. Howard preliminarily claimed that Mr. Howard was fired on August 10, 1988, because he had requested training on a front-end loader he was directed to operate as an employee of B&M and because he later complained that he had not received such training.(FOOTNOTE 2) However in his testimony at hearing Howard denied any such claims. Howard further admitted at hearing that when he first reported for work as a truck driver for B&M, Mitch Sturgill, the President of B&M, told him that it would be necessary for him to load the coal himself with the front-end loader and that he told Sturgill, that he would try. Howard further concedes that he never complained to anyone about health or safety concerns and admits that he never even "came close to" injuring anyone while operating the front-end loader. Howard maintains only that he told Sturgill that he was "having trouble" operating the loader and, after three weeks on the job, told Sturgill that he would no longer operate the loader.(FOOTNOTE 3)

Sturgill testified that when he first telephoned Howard about working as a truck driver for B&M he told him "we have to load our own coal". This was required under the B&M haulage contract and, according to Sturgill, it is not unusual in eastern Kentucky for the truck drivers to have to load their own coal with a front-end loader. Indeed Howard's father-in-law had been working as a truck driver for B&M before Howard was hired and had been loading his own coal in this manner. It is clear from this evidence then that Howard knew when he was hired that his duties included operating a front-end loader. According to Sturgill, Howard told him before he was hired that he could "run a loader" and commented only that he was "not the best". Indeed Sturgill

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later observed Howard loading his truck and found that he did a "good job" and was "normal" but a "little slower". Howard, who claimed at hearing that he had never previously operated a loader, admitted that he never asked any questions about how to operate the loader even though Sturgill was present when he began work.

After three weeks of loading his own coal Howard suddenly refused to continue and Sturgill himself then loaded the trucks for 4 1/2 days. Around this time Sturgill also found that Howard was spilling large amounts of coal from his truck onto the public highway and was not cleaning it up. This was in violation of B&M's contract and resulted in a loss to B&M of one-half day of work while it was cleaned up. According to Sturgill, continued spillage could have resulted in the termination of the B&M haulage contract. Sturgill had previously warned his drivers, including Howard, that they were responsible for cleaning up their own spillage.

Sturgill testified that he decided to fire Howard at this time because of Howard's failure to clean up his coal spillage and because of his refusal to load his own truck. Sturgill testified that he could not afford at that time to hire a separate loader operator. I find Sturgill's testimony in this regard to be credible.

The credible evidence shows that Howard did not refuse to operate the loader until three weeks after he began working and then, by his own admission, simply refused to operate it because he was "having trouble". Howard admits that he never asked for training and it did not appear to Sturgill that he needed it. Accordingly I cannot find that either a safety or a health related complaint was made in connection with the operation of the loader. Moreover since no health or safety related basis for a "work refusal" was ever communicated to any agent of the operator, the Complainant could not in any event sustain his burden of proving that he engaged in a protected work refusal. *Conaster v. Red Flame Coal Co., Inc.*, 11 FMSHRC 12 (1989). See also *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988) and *Sammons v. Mine Services Co.*, 6 FMSHRC 1391 (1984). Indeed Mr. Howard has in this case failed to sustain his burden of proving that he engaged in any activity protected by the Act and his case must accordingly be dismissed.

