CCASE:
CLYDE C. COLE v. CANYON COUNTRY ENTERPRISES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

CLYDE C. COLE, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. WEST 91-191-DM
CANYON COUNTRY ENTERPRISES, D/B/A CURTIS SAND & GRAVEL, A CORPORATION, RESPONDENT	Soledad Canyon Mine

DECISION

Appearances: David P. Koppelman, Esq., International Union of Operating Engineers, Local 12, Pasadena, California, for Complainant;
Ben W. Curtis, President, CURTIS SAND AND GRAVEL, Canyon Country, California, for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) (herein "the Act"). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) resulted in MSHA's issuance of a Section 105(c)(2) complaint in his behalf which was originally filed on April 9, 1990, in Docket No. WEST 90-165-DM, and which was amended on June 18, 1990. On December 14, 1990, MSHA and Respondent Curtis filed its "Stipulation for Dismissal" indicating, inter alia, that "Having undertaken and completed discovery, the Secretary and Curtis now agree that the matter should be dismissed with prejudice." By my Decision entered January 22, 1991, the proceeding initiated by MSHA in Docket No. WEST 90-165-DM was dismissed. After petition for Commission review was filed, the Commission on March 1, 1991, denied Cole's petition, affirmed my decision, gave Cole 30 days to initiate a proceeding under Section 105(c)(3), and provided that "The record in the 105(c)(2) proceeding case may be noticed judicially in any such new proceeding."

The discrimination complaint by Cole individually was then filed in the instant docket on February 12, 1991, alleging that Respondent Curtis "discriminated against Clyde C. Cole when it terminated his employment on or about July 19, 1988."

ISSUES

1. Whether the Complaint with MSHA (filed beyond the 60-day period provided in Section 105(c) of the Act) was untimely; whether the determination of the Labor-Management Adjustment Board issued pursuant to the grievance procedures of the collective bargaining agreement between I.U.O.E. and the Rock Products and Ready-Mix Employers of Southern California is preclusive of the action; and assuming arguendo that both the Complaint and this action are viable, whether Complainant was discriminatively discharged on July 19, 1988, for refusing to operate what he alleges to be an unsafe front-end loader (#5312).

2. Respondent contends Complainant quit. Complainant contends he was discharged. Respondent contends Complainant did not communicate a safety complaint when he left employment on July 19, 1988. Two final questions arise:

a. Whether Complainant was constructively discharged by being given a choice by his foreman of operating a loader which he reasonably believed was unsafe or of being sent home and being deemed to have quit employment.

b. Whether reasonable basis existed for Complainant Cole's alleged safety concern and complaint about the loader on July 19, 1988.

Timeliness of Filing Discrimination Complaint

Respondent contends that Cole's discriminatory "discharge" complaint was untimely and should be dismissed since it was not filed until some four months after he left employment on July 19, 1988. Timeliness questions are to be resolved on a case-by-case basis. Joseph W. Herman v. Imco Services, 4 FMSHRC 2135 (December 1982). It appears that Mr. Cole actually filed two complaints with MSHA.

Complainant Cole filed his first MSHA Complaint (Ex. C-8) on August 1, 1988, which alleged inter alia that he was assigned for work at Curtis on May 16, 1988, and that

> "I am currently in grievance procedures against Curtis Sand and Gravel because I refused to run an unsafe piece of equipment. The piece of equipment I am referring to is a Cat 988, #5312. These are the things that I feel are unsafe about this loader:

1. Center pins are completely worn out.

2. The steering locks and will hardly turn from right to left.

3. Steering pins are worn out.

4. Brake pressure is on the red, with very little braking power, like only one wheel has a brake. That could also be a part of steering problem. (The steering is a lot harder in tight places when loading trucks while using the brakes).

5. No backup alarm.

6. No parking brake.

This is not the only piece of equipment that I feel is unsafe. I also see some hazards in the plant area of the Long Plant. The surge pile escape tunnel is crushed. The catwalks are loose and coming apart. There are no guards on tail pulleys. Not all but there are a few more than is safe. It only takes one to get a man killed. I have never seen a lockout used there. It seems to be a general lack of concern for the working men and safety. Whatever we can get away with seems to be the motto.

I hope it isn't going to take someone to get hurt bad or even maybe killed to get some things to change there. I certainly hope not. That's why I am writing this letter today. Thank you very much for your cooperation in this matter.

It is concluded after careful scrutiny of the wording of this complaint and the record that Mr. Cole did not at this time complain to MSHA about his allegedly unlawful discharge. Thus, his August 1 complaint does not actually mention he was discharged, but does specifically mention that he was "currently in grievance procedures," listed what he felt was unsafe about Loader #5312, complains that other equipment was unsafe, and complains about other "hazards." MSHA apparently did not consider this to be a complaint of discriminatory discharge (T. 123) and I conclude properly so.

On or about August 10, 1988, MSHA commenced investigation of this first complaint, confined to the "safety" allegations therein (Footnote 1) and on August 10, 1988, a "Notice of Negative Finding" (see Exs. R-2 and C-9) was issued indicating that the alleged hazards did not exist. (Footnote 2)

Mr. Cole's second complaint was filed on or about December 15, 1988, nearly five months after he left Curtis's employment. This complaint alleges:

> I, Clyde C. Cole, feel I have been discriminated against because I refused to run what I knew to be an unsafe front-end loader #5312. In violation of Article VI, Section 1, RSG contract. I want to be reinstated to my previous position with full back pay from July 19, 1988, to whenever I am reinstated, benefits and seniority. And due to mental anguish, discrimination and harassment over this wrongful termination and conspiracy to cover the wrongful termination, I am seeking restitution in the amount of $150,000 over and above the previously mentioned items.

This document does comprise a complaint of unlawful discharge cognizable under the Act and the question of timely filing is analyzed with respect thereto.

Section 105(c)(2) of the Mine Safety and Health Act provides that "[a]ny miner . . . who believes that he has been discharged,

interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination." 30 U.S.C. 815(c)(2). (Emphasis added).

Significantly, Respondent did not allege or establish any specific direct prejudice from the three-month-late filing of the complaint. Complainant testified that, after filing his "safety" complaint, he was never advised by MSHA that he should file a discrimination complaint (T. 79-80, 123) and that he had not held any union positions or filed MSHA complaints prior to July 1988. (T. 128-129). He indicated it was after November 2, 1988, that he found out he had to file a discrimination complaint and that he thought everything "was taken care of" by his first "safety" complaint. (T. 123).

While some general prejudice would ordinarily be inferred from the passage of several months after the allegedly adverse action before a complaint is filed and a party is put on notice that it must defend a claim of discriminatory discharge, it is noted that here the Respondent, because of a grievance brought by Complainant, was brought into the process of defending itself from a similar charge (Ex. C-5, Grievance dated July 20, 1988) and thus cannot convincingly contend that it was deprived of an early opportunity of investigating the facts of the incident, or perpetuating testimony by taking statements from its witnesses, etc. Sometimes a delaying complainant can achieve overwhelming advantage springing from tardy filing. While Complainant's asserted justification for late filing was not convincing, nevertheless in view of the immediate bringing of the grievance and filing of the "safety" complaint, it cannot be said that the instant discrimination complaint was a completely stale claim from Respondent's standpoint. Nor can it be concluded that the Respondent mine operator actually demonstrated specific prejudice attributable to the delay, Secretary of Labor on behalf of Hale v. 4-A Coal Company, 8 FMSHRC 905 (June 1986).

On the other hand, Cole's failure to file a discrimination complaint with MSHA nearly five months after the date his employment terminated and after (1) he filed both a grievance under the labor contract and a safety complaint with MSHA and, (2) both complaints had been denied, constitutes the basis for inference

of some prejudice to his employer. (Footnote 3) Certainly, Respondent was not aware until December 15, 1988, that it had to defend a claim of the nature of a federal action under the Mine Act for discriminatory discharge with its complexity and impressive potential economic remedies available to a successful complainant. Having been the subject of a specific MSHA investigation for safety violations after Cole's complaint thereto was filed promptly after he left employment, Respondent would have been entitled to believe that the MSHA processes were over and that further litigation of the matter was not in prospect. More specifically, while it was on notice to defend the grievance (a very informal process more specifically desribed subsequently herein) and the various MSHA safety matters raised by Mr. Cole, it was in no way on notice to prepare for and defend a Mine Act discriminatory discharge proceeding. I thus infer and find that on the unique circumstances of this case and the one-at-a-time manner in which Complainant proceeded in filing various actions that Respondent would have incurred general prejudice. (Footnote 4)

More particularly and decisively, it is found that this question is governed by the decision of the Federal Mine Safety and Health Review Commission in David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 25 (January 1984).

The circumstances in Hollis, supra, are similar to those presented in this action. The miner in Hollis alleged that he was discharged on September 29, 1980, in retaliation for safety concerns expressed to both MSHA and his employer. Rather than immediately filing a complaint under the Act, the miner, David Hollis pursued a grievance under the collective bargaining agreement, filed a charge with the National Labor Relations Board, and initiated proceedings before the state human rights commission. Not until seven months after his discharge, and before the resolution of his alternative actions, did Hollis file his MSHA complaint. Shortly thereafter, based on the 60-day statute of limitations, his employer moved to dismiss the action as untimely.

During argument on the motion to dismiss, Hollis contended that he was unaware of his rights under the Act until March 1981, and that he filed his complaint within 60 days of discovering those rights. Since he allegedly was not aware of his rights before that time, Hollis argued that he justifiably failed to file his complaint in a timely manner. The Commission, however, rejected his assertion. Observing that he served his union as chairman of the safety committee, and that Hollis had filed a grievance through his union, a charge with the National Labor Relations Board, and a complaint with the West Virginia Human Rights Commission, the Commission concluded that Hollis knew of his rights, but chose to pursue alternate avenues of relief. It held that "a miner's late filing [will not be excused] where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act." (Emphasis added).

Similarly, in Herman v. Imco Serv., supra, the miner alleged that he was terminated because of his numerous complaints about the safety of a suspended storage bin. Despite his numerous contacts with MSHA officials both shortly before and after his discharge, Herman delayed filing his complaint until 11 months after his termination. Granting his employer's motion to dismiss, the Commission held that Herman's

> prolonged hesitation in filing a discrimination complaint cannot be attributed to his being mislead as to or a misunderstanding of his rights under the Act. Rather, the record

reveals that he had direct contact with MSHA officials during the period that the events now complained of occurred, as well as after his termination. Quite simply, he had abundant opportunity and the ability to go forward with his complaint in a more timely fashion, if he had then desired to do so. (Emphasis added).

The 60-day rule, as applied by the Commission in both Hollis and Herman, compels dismissal of Cole's complaint. There is no dispute that, less than two weeks after resigning his employment, Cole complained to MSHA and filed a charge with that agency alleging safety hazards on the replacement loader. Cole was in direct contact with MSHA as early as August, was aware of his rights under the Act, and was also familiar with the procedures required to file an MSHA complaint. Like the miner in Herman, Cole's "prolonged hesitation in filing a complaint cannot be attributed to his being mislead as to or a misunderstanding of his rights under the Act."

Moreover, like the miner in Hollis, Cole pursued an alternate avenue of relief, a grievance under the Agreement, and not until he lost that claim did he file the subject complaint. As the Commission made clear in Hollis, an untimely filing will not be excused "where a miner has invoked the aid of other forums while knowingly sleeping on his rights under the Act."

Accordingly, on this basis, Complainant's initial complaint with MSHA is found untimely and this proceeding is to be dismissed. Discussion of the issues of preclusion and the merits of the discriminatory discharge allegation follow.

Respondent's Defenses--Res Judicata, Collateral Estoppel: Preclusion

Although not repeated in its post-hearing brief, Respondent in its answer to the Complaint and during this proceeding has argued that the complaint is (a) barred by the doctrines of res judicata and collateral estoppel, and (b) that Complainant's exclusive remedy for any alleged discrimination is pursuant to the Labor Agreement the grievance procedures of which Complainant pursued to their conclusion.

Precedents of the Federal Mine Safety and Health Review Commission govern the issues raised by these defenses and guidance therefrom and U.S. Court decisions are utilized in the following determination. First, a brief summary of the background pertaining to these issues is helpful.

Complainant left employment on July 19, 1988. Grievance procedures provided in Article XIV of the 1985-1989 Agreement between International Union of Operating Engineers, Local No. 12, A.F.L.-C.I.O. and Rock Products and Ready Mix Concrete Employers of Southern California (Footnote 5) (Court Ex. 1) establish a Labor-Management Adjustment Board to issue decisions which "shall be final and binding on either or both parties." The objective of the Board, however, is "for the express purpose of interpreting and enforcing all the terms and conditions" contained in the Agreement. The Grievance procedures also provide for Arbritration in the event the Board does not reach a decision (Article XIV, Section 1(b). The Board did reach a decision and the matter thus never went to an arbitrator. (Footnote 6)

Mr. Cole filed a Grievance form (Ex. C-5), and after being turned down at Steps 1 and 2 of the Grievance procedures (Sections 2(a) and (b) of the Agreement) he proceeded to Step 3 which is referral to the Labor Management Adjustment Board.

The six-member Board (3 union and 3 management) met on November 2, 1988, at the union offices in Los Angeles, California, and heard and decided the cases of some five grievants including Complainant on that date. The provision of the Agreement shown by the Board's decision (Ex. R-1) to be the point of reference was Article VI, Section 1 which provides:

ARTICLE VI
Work Performance

> Section 1. Discipline. The Employer is the judge as to the competency of any worker. All employees must perform their work to the satisfaction of the Employer, provided, however, that no employee shall be discharged without good cause or discriminated against because of his membership in the Union or Union activities.

This provision framed the issue in the grievance process: Whether Curtis violated Article VI, Section 1 of the Agreement by allegedly discharging an individual employee without "good cause." See "Judgment on Stipulation for Entry of Judgment" entered by the Superior Court of the State of California for the County of Los Angeles on August 17, 1990. (Ex. R-5, par. 5). The parties to the Stipulation upon which the Judgment was entered were Curtis and the union. The Judgment confirmed in all respects the decision of the Labor Management Adjustment Board denying Cole's grievance. (Ex. R-5, pg. 6).

It is clear that the Court's judgment was based on the stipulation for it to do so by Curtis and the union and was not based on judicial review of the matter. Cole, who brings this action as an individual complainant under the Act was not a party to the stipulation. The stipulated Judgment did not directly or indirectly determine his rights under the Act or attempt to resolve his rights other than under the Labor Agreement in question. The effect of the Judgment, as indicated in the last sentence thereof, merely confirmed "in all respects" the decision of the Labor Management Adjustment Board denying Mr. Cole's grievance. It was not a judgment by a court on the merits of the litigation. See Bradley v. Belva Coal Company, 4 FMSHRC 982, 986 (June 1982). Examination of the Board's decision then is in order to determine its adequacy in terms of judicial fact-finding, procedural due process, and consideration and application of Mine Act discrimination formulae and concepts. The Board's decision provides:

> Dispute:
>
> Clyde Cole protests termination.
>
> Contract Reference: Article VI, Section 1

Company Position:

The grievant is a loader operator and was hired May 23, 1988, at the Company's Soledad Canyon Plant. On July 19, 1988, the loader that the grievant normally operates broke down and he was assigned to operate a different loader. (Both loaders were of the same type and approximate age.) When he was told to operate the other loader, he refused alleging that the loader was unsafe. He stated that he would do other work and the Supervisor thereupon told him that that was the only work he had for him and further that if he elected not to do the work and left the Plant he would be considered a voluntary quit. One of the Company mechanics with approximately 15 years of employment stated that the loader was safe to operate. Further subsequent to the Step Two meeting on August 1, 1988, the grievant filed a charge with MSHA and as a result of that investigation the inspector found that the loader was indeed safe to operate. (On the notice the box saying "alleged hazard did not exist" was checked.)

Union Position:

The grievant admitted refusing to operate the loader but alleged he had been told to go home if he was not going to operate that loader. Although at the time he did not state why he believed the loader was unsafe, he said at the hearing that since the loader had to go on the highway he didn't believe it was safe because of the steering.

Decision:

Moved and seconded that based on the evidence presented in this case the claim of the Union be denied. Motion Carried. (Emphasis added).

Analysis of this decision of the Board--actually only "minutes" of its proceeding--shows that the actual principles underlying the decision are not ascertainable. The findings of fact

are exceedingly limited. (Footnote 7) It is concluded that the Board's fact-finding process was not equivalent to judicial fact-finding, and more particularly in any way comparable to that of the Commission. Certainly, the record of its proceedings, including notes thereof (Ex. C-6), is not as thorough or complete. Respondent has the burden of establishing the applicability of its defenses seeking to preclude litigation of the discrimination issues in this matter on the basis that such were litigated and adjudicated by a court or forum of competent jurisdiction on the merits in a prior proceeding, i.e., res judicata. On the basis of the record presented in this matter, such a determination can not be made, although it does clearly appear that the Mine Law's discrimination formulae were not in issue, were not applied, and were not determinative. (Footnote 8) Thus, it is concluded that this litigation under the Mine Act is not precluded. Further, since it does not appear that precise issues relevant under the Mine Act including some that were specifically raised in this proceeding (Such as whether Complainant quit voluntarily, was discharged, or was constructively discharged by being given the forced choice of (1) either working under unsafe conditions or (2) going home and being considered to have quit, were raised and discussed and determined in the Board's proceedings, Respondent is found not to have carried its burden inherent in its defense of issue preclusion, i.e., collateral estoppel.

Accordingly, Respondent's defenses of res judicata and collateral estoppel are rejected. Bradley v. Belva Coal Company, supra.

Nevertheless, as the Commission has held with respect to the decisions of arbitrators, although the Commission is not bound by the determination of Labor-Management Adjustment Board, within the boundaries of sound discretion some weight can be accorded to its specialized competence in labor-management relations matters.

Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980); David Hollis v. Consolidation Coal Co., supra.

Discrimination

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., supra, rev'd on other grounds sub nom., and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981).

The Commission has held that a miner's work refusal is a protected activity under the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. Secretary on behalf of Pasula v. Consolidation Coal Co., supra, Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., supra. See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982).

Ultimate determination of the merits of the discrimination issue turns on whether Complainant's refusal to operate Loader #5312 was based on a reasonable belief that it was unsafe (and whether such was reasonably communicated to management) or whether it was due to some subjective reason or Complainant's temperament. (Footnote 9)

The 33-year-old Complainant has equivalency of a high school education. He commenced employment with Curtis on May 16, 1988, and worked as a heavy equipment operator (loader operator) for 65 days until his employment terminated on July 19, 1988. He regularly operated front-end Loader #5303, which was one of approximately seven such loaders in use.

Complainant's account of pertinent events differs sharply with Respondent's. We start first with Mr. Cole's version.

Complainant testified that in mid-June 1988 (T. 62), he operated Loader #5312--the one he subsequently refused to operate--for a period of five hours and that at that point he determined the brakes "were poor," the center pins "were shot," and that it would "jolt" left or right "whichever way it wanted

to go." (T.59). Since the center pins are what hold the machine together he said that if the machine "should come apart half way" there was a good chance of having both legs crushed and of death. (T. 60). After getting off the machine, he testified, he told his plant foreman Juan Moran that the loader was "flat unsafe" to run (T. 63) but he did not tell Moran what was unsafe about it. (T. 63-64). He also testified he told Mechanic Homer Pennington that the loader was unsafe. (T. 63).

About one week before July 19, 1988, Cole again operated Loader #5312 for 15 minutes and he testified no safety repairs had been performed on it, i.e., to the brakes, steering, back-up alarm and center pins. (T. 65). He decided at this time he would not run it if asked to do so again and he testified he asked Homer Pennington for a red tag so he could keep it available if he was asked to run #5312 again. Pennington advised him the company did not have red tags.

On July 19, according to Complainant, his regular machine #5303 broke down and the crucial conversation with his foreman Juan Moran was given by Mr. Cole as follows:

> Just shortly thereafter Mr. Moran came up and asked what the problem was with the machine (5303), and I told him that the tilt wouldn't work, the bucket wouldn't roll back, or it wouldn't dump. He asked me if I could make it up to the Soledad Plant with the machine, and I said yeah . . . .
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> * * * * *
>
> And so I had the Euclid drive out from underneath the bucket and I lowered it down and I took the machine up to the Soledad Plant. This is a narrow, two-lane highway, blacktop, open to civilian personnel. Up an incline to the Soledad Canyon Plant at which point I parked the machine and Juan (Moran) called for Homer Pennington to come up and take a look at it. Homer came up and climbed up on the machine and he moved the lever back and forth and back and forth, and him and Mr. Moran had a conversation, and then Juan told me to go over on 5312, take 5312 down in the mud hole and run it, and I refused at that point to run the machine.
>
> * * * * *

> Mr. Moran told me to run 5312; take number 5312 down to the mud hole and continue working. At that point I refused to operate machine number 5312 and spelled out exactly what I felt was unsafe about the equipment, starting with number one, the center pins, the steering, the brakes, no backup alarm. Then he told me he didn't have anything else for me to do that day, if I wasn't going to run 5312, and he thought it was safe enough to run down in that mud hole, to go home.
>
> I asked him if he was firing me and he said, no. I says I'll go down to the Lang Station Plant. I said I will be more than happy to run a scraper; I said I will stay here; I said I will shovel tail pulleys, I will go down to the Lang Station Plant and shovel the tail pulleys. (T. 68-69). (Emphasis added).
>
> He told me to go home. And I asked him if he was firing me and he said no. I says okay. And then got my lunch box off the machine and he said if you leave, you quit. I said I thought you just said you weren't firing me? He says I am not, I am just sending you home. I said okay. So I got in my car and I left. (T. 70).

The other party to the primary events of July 19, 1988, Respondent's plant foreman, Juan Moran, testified in direct contradiction to the main points of Mr. Cole's presentation, i.e., as to whether Loader #5312 was unsafe, whether he (Moran) sent Mr. Cole home, whether Mr. Cole quit, whether Mr. Cole said the loader was unsafe, and whether Mr. Cole specified the various items (brakes, steering, backup alarm, center pins) that he considered unsafe on the loader.

Mr. Moran testified he has been an employee of Respondent Curtis for some 20 years and has been plant foreman since 1976. As plant foreman, he was at pertinent times, in charge of Curtis's two operations, Lang Station (which had approximately 100 employees in 1988) and Soledad Canyon which had approximately 8 employees. (T. 56, 131).

Mr. Moran testified that he had never heard of or had experience with a center pin breaking, that he had never had to refuse to operate equipment at Curtis in order to get it repaired, and that while the center pins on loader 5312 were loose they were not unsafe. (T. 132-133).

According to Mr. Moran, on the day that Mr. Cole quit employment, he then ran #5312 for three hours and two other employees, Efrem Ramirez and Neal Wallens, also ran it without complaint. (T. 133-234). (Footnote 10)

Portions of Mr. Moran's testimony--which I credit as being the more trustworthy and persuasive over Complainant's--concerning events and conversations on July 19 after Complainant's #5303 loader broke down with hydraulic pump failure follow:

> . . . Like he described before, I told him to let the Euclid to pull for under the loader and I knew that he can drive it to the upper plant--to the plant--and I told Homer we've got a problem with a loader, don't want to tilt. Homer looked at it and says the pump went out. I said to him, how long will it take to fix it. He said approximately about two days by the time I get parts and all that. I said okay.
>
> I looked at Mr. Cole and I said, Cole, we've got 5312 over here which is generally our spare loader for a few hours or a day or two, will you get the loader and go down to the pond to continue working, we've got three other guys working over there and he said, no, I won't go on the loader. Homer Pennington asked him why. He said I just don't like it; I won't run it. And he proceeded to go back into the loader 5305 loader which he was running, picked up his lunch, came down and started walking away. I said, you mean you are quitting? He turned around and said to me, he said, no, are you going to fire me? I said I don't have no reason to fire you; all I am asking you is to continue working so we can keep doing bailing of all the silt out of the pond. And as soon as your loader is ready, you will go back to your loader.
>
> He said, no, I won't do that. I don't like the loader. Homer said--in fact Homer Pennington said oh, you are one of those operators that

likes to ride Cadillac like, not Chevrolet. I said what is the difference between operators? And he continued to walk away and my remark to him was if you walk away from the plant, that means you just quit. And he continued to just walk away. (T. 134-135).

* * * * *

Q. So you went immediately to work loading trucks while someone went to get another operator to relieve you so you could continue with your duties?

A. Exactly.

Q. Did you feel at the time you got on that loader that is was unsafe?

A. No. If I felt I would get hurt on the loader I wouldn't get in it, especially when we have to travel a short distance over the highway with a loader.

Q. Prior to that date, do you recall Clyde Cole telling you and/or Homer in your presence about the center pins being bad to the point of this loader being unsafe?

A. No, he never mentioned it to me anything about being unsafe. He run the particular loader, I believe, was twice, and a short period of time-five hours or four hours. Whenever he is loaded, he will go around and he will use that one and I think it happened twice in the short time that he was with us. He never got to run 12 on Soledad.

Q. Did he ever request from you that the loader be red-tagged because it was unsafe?

A. Never.

Q. When he refused to run 5312 did you tell him? "Go home."

A. No.

Q. Did he volunteer to shovel on the conveyor belts and do other work in lieu of running a loader?

A. No, he never asked for anything else.

Q. So when he left, what did you assume his intentions were?

A. He was quitting. (T. 136-137).

Mr. Moran contradicted Complainant and denied telling him on the following morning that he (Cole) had been replaced, pointing out that Mr. Cole was never replaced. (T. 147-148). Mr. Moran also credibly testified that because of the way such heavy equipment is built it has a center pin and that "they wear a little they feel like they are going to fall apart, but that does not mean they are unsafe." (T. 150). It also appears that Curtis does not have the equipment to change such pins (Tr. 155, 158) which further supports Mr. Moran's testimony and deletes the viability of Complainant's position on this point. (Footnote 11)

Mr. Moran's opinion that Loader #5312 was safe to operate was shored up to some extent by the fact that he drove it after Mr. Cole left on July 19, 1988, that two other employees also drove it without complaint, and that no repairs were made on it. (T. 156-157).

Complainant did not actually establish that Loader #5312 was unsafe due to defective center pins or the other problems complained of. Thus, in his deposition (Ex. C-21) Inspector Wilson testified that during the MSHA inspection following Cole's safety complaint that the backup alarm was working, that the brakes were not checked during the inspection, that the union representative, Mr. Pat Stubbins, felt there was nothing wrong with the loader, and that Complainant was a "bitcher." (Wilson deposition, pp. 15-17, 18). The other safety complaints made by Mr. Cole not related to the loader were found not to have any basis also. (Ex. C-21, p. 18).

I conclude that the MSHA inspection following Complainant's safety complaints supports the testimony of Mr. Moran that the loader was not unsafe (see also T. 155-158), and that the center pins were not replaced also casts serious doubt on the reliability of Complainant's testimony generally. (Footntoe 12)

Based on the foregoing findings, resolution of conflicts in testimony based on observation of the demeanor of witnesses and the harmonizing of testimony with the general record, it is concluded

a. that on July 19, 1988, Loader #5312 was safe to operate;

b. that Complainant refused to operate such without justifiable reason for doing so;

c. that Complainant's alleged belief that the loader was unsafe, assuming arguendo that such was in good faith, was not reasonable and accordingly was not an activity protected under the Mine Act, Bush v. Union Carbide Company, 5 FMSHRC 993, 997 (June 1983);

d. that in refusing to operate Loader #5312 Complainant did not communicate safety concerns to his foreman, Juan Moran; (Footnote 13)

e. that the termination of Complainant's employment occurred as a result of his voluntarily quitting employment and not as a result of his being contructively discharged by Mr. Moran by being given a choice between

operating an unsafe piece of equipment or being deemed to have quit employment.(Footnote 14)

ORDER

Complainant's complaint of discriminatory discharge under the Mine Act is found (a) to be without merit, and (b) to have been untimely filed, and on these two independent bases, this proceeding is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

1. The allegedly hazardous conditions investigated were those mentioned in Mr. Cole's August 1, 1988, complaint, to wit, bad center pins, poor steering, poor brakes, no back alarm, and also poor condition of escapeway, lockouts not being used, tail pulleys not guarded, and loose handrails.

2. Insofar as the alleged hazards pertaining to Loader #5312 are concerned, the investigation was not dispositive one way or the other whether the tail pin complaint made by Mr. Cole actually showed unsafe conditions. (Ex. C-21, p. 15). The deposition of the MSHA inspector, Bill Wilson, strongly indicates that there was no basis to Mr. Cole's safety complaints about Loader #5312, as well as the other items of his complaint (Ex. C-21, Deposition pp. 15, 16, 17, 18 and attached notes pertaining to Inspector Wilson's inspection).

3. The sequence of various pertinent dates in 1988 is as follows:

1. Cole hired: 5-16
2. Cole quit: 7-19
3. Grievance Filed: 7-20
4. MSHA Safety Complaint Filed: 8-1
5. MSHA Safety Complaint Denied (Negative Finding): 8-10
6. Cole's Grievance Denied: 11-2
7. MSHA Discrimination Complaint Filed: 12-15

4. Complainant's grievance was filed the day after he quit (I subsequently conclude he was not discriminatorily discharged) and reflects his allegation that he was wrongly discharged and his desire for reinstatement. Yet his first complaint with MSHA--filed after his grievance--while mentioning that there was a grievance proceeding alleges only safety complaints. I find this inconsistent with a deliberate choice made at the time by Cole to proceed through the labor agreement's grievance procedure to redress any wrong about his employment status and to simultaneously proceed against his employer with the MSHA safety complaint. His testimony that he thought "everything was taken care of" by the safety complaint does not ring with credibility, but seems more to be calculated to skirt the ban of the 60-day filing limitation. It was only after the failure of these first two complaints that the discrimination complaint was forthcoming.

5. Of which Respondent Curtis is a member.

6. Even in arbritration, as the U.S. Supreme Court in Alexander v. Gardner-Denver Company, 94 S. Ct. 1011, 415 U.S. 36, 39 L. Ed. 147 (1974) noted, ". . . the fact-finding process . . . usually is not equivalent to judicial fact-finding. The record of arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trial, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." Such procedures are generally available in the Mine Act proceedings before the Commission, however.

7. One of the Board's findings from its proceeding, that "Although at the time he (Cole) did not state why he believed the loader was unsafe, he said at the hearing that since the loader had to go on the highway he didn't believe it was safe because of the steering," is found significant and mentioned subsequently herein.

8. There certainly appears to be good reason "to doubt the quality, extensiveness, or fairness of procedures followed" in the prior proceeding before the Labor-Management Adjustment Board insofar as the determination of the "preclusion" questions are concerned. See Montana v. United States, 440 U.S. 147 (1979).

9. See T. 102, 140-141, 148, 169-160.

10. I have considered this evidence as one of the factors leading to the conclusion that Complainant's alleged safety concern was unreasonable.

11. See also Statement (Declaration) of Homer Pennington, lead mechanic, attached to Respondent's Motion for Summary Decision dated September 5, 1991, indicating that the center pins were never replaced and remained on the loader until his retirement in October 1990.

12. In summary, the record in its entirety indicates that foreman Moran, Master Mechanic Pennington, Union Representative Pat Stubbins, and MSHA Inspector Bill Wilson all concluded that there was no basis to Mr. Cole's safety complaints. Further, the Labor-Management Adjustment Board, after deliberation (T. 165-166), denied Mr. Cole's grievance. I have considered this as one of the factors to be weighed in resolving the conflicting testimony of Moran and Cole in Moran's favor. In rejecting Mr. Cole's testimony I also have considered that the safety complaints concerning other matters involving the #5312 loader did not prove out and that his explanation concerning the late filing of his MSHA discrimination complaint, while tidy, was more convenient than logical and convincing.

13. Where reasonably possible a miner refusing to work should ordinarily communicate, or attempt to communicate, to some representative of the operator his belief in the safety hazard at issue. At least one purpose of this rule is to weed out "work

refusals infected by bad faith." Secretary on behalf ofDunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

14. Secretary v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984).