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VINCENT BRAITHWAITE V. TRI-STAR
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

VINCENT BRAITHWAITE,
COMPLAINANT

v.

TRI-STAR MINING, INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. WEVA 91-2050-D
MORG CD 91-06

DECISION

Appearances: Vincent Braithwaite, Piedmont, WV, Pro Se;
Thomas G. Eddy, Esq., Eddy & Osterman,
Pittsburgh, PA, for Respondent.

Before: Judge Fauver

This case was brought under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq, alleging a discriminatory discharge.

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

FINDINGS OF FACT

1. At all times relevant, Tri-Star Mining, Inc.,1 operated a strip mine where it employed about 27 employees on one production shift, producing about 800 tons of coal daily for sale or use in or substantially affecting interstate commerce.

2. Complainant was employed by Respondent at such mine from July 24, 1989, until April 2, 1991, when he was discharged for refusing to operate a Euclid 120-ton rock truck (known as a Euclid R-120). Previously, he was employed by Respondent's affiliate, BTC Trucking Company, from October 14, 1988, until he was laterally hired by Respondent on July 24, 1989. At BTC

Trucking Company, Complainant regularly drove a coal truck and a loader and occasionally drove Respondent's Cline 50-ton dump truck on an "as needed" basis.

3. On July 24, 1989, Complainant was called to Respondent's office and told that he was being "transferred to Tri-Star Mining. . . . to be a Cline operator." Tr. 36. Complainant was told to initial various entries showing training or experience on MSHA Form 5000-23, and to sign the form. It was also initialed by his foreman, Ray Tighe, and signed by George Beener, mine superintendent, certifying that Complainant was a "Newly Employed, Experienced Miner" qualified to operate the following equipment:

Crusher
745 Loader Cline Truck
945B Loader
555 Loader
FB 35 Loader
Euclid R-120 Truck
Euclid R-100 Truck
FD50 Dozer

4. As of July 24, 1989, Complainant had only the following experience or training concerning the above equipment:

Equipment	Experience or Training as of July 24, 1989
Crusher	None
Cline Truck	Some experience running it.
745 Loader	None
945 B Loader	None
555 Dresser	None
FB 35 Loader	Some experience running it.
Euclid R-120 Truck	None
Euclid R-100 Truck	None
FD50 Dozer	None

5. On September 25, 1990, Complainant's foreman, Ray Tighe, asked him to operate the Euclid R-120. Complainant did not feel qualified to operate the truck safely, and told Tighe he did not feel comfortable running it. Tighe sent him to see George R. Beener, the President of Respondent and superintendent of the mine. Complainant told Beener that Tighe wanted him to operate the R-120, but that he did not feel comfortable running it, and that Tighe sent him to see Beener. Beener considered the matter and told Complainant to return to work to run the Cline truck and if it needed repairs, he could help the mechanic (Jeff Coleman) work on it; "Dale Jones is going to run the Uke." Tr. 123.

6. The only training or experience that Complainant had on the Euclid R-120 truck from July 24, 1989, when he was hired, until September 25, 1990, when he refused to operate the Euclid R-120, was as follows: Once he rode with William Durst, an operator of the Euclid R-120, for about one hour and observed him operate it, and then switched places with Durst and operated the machine for about one-half hour. Another time, for about two or three days in a row, there was no other work and he ran the Euclid R-120. Complainant summarized his experience in this period as follows: "Well, 7/24/89 to September 25th, like I said, was five, six times. . . . " Tr. 137. He corrected his prehearing unsworn statement that he ran the Euclid R-120 5 to 10 times "from the latter part of 1990 to April 2, 1991," testifying that this was in error and that he ran the Euclid R-120 5 or 6 times before September 25, 1990, and only two hours after that date. Tr. 137. I credit Complainant's testimony.

7. Complainant did not feel confident, safe, or properly trained to operate the Euclid R-120. It was much larger than his regular truck (the Cline truck), it leaned from side to side when he operated it, and it regularly traveled over uneven terrain. Out of concern for his own safety and the safety of others, he did not feel comfortable operating the R-120.

8. The Euclid R-120 was used to haul overburden from the coal pit to a dumping point. The driver would back the truck under the shovel -- a large earth-moving machine -- which would load the truck. The truck was then driven to the edge of the dumping pile, where the driver dumped the load of rocks and dirt.

9. On September 27, 1990, Respondent asked Complainant to sign another MSHA Form 5000-23, certifying that he was trained to run the same equipment listed on the July 24, 1989, form plus a number of other vehicles. Complainant testified that he believed he signed this form in blank, and someone else must have filled in his initials indicating training on various equipment. Whether he signed it in blank or initialed the entries, it is clear that this form was an inaccurate representation by Respondent as to Complainant's actual training and qualifications to operate Respondent's equipment. MSHA Inspector Aaron B. Justice signed an interview statement, taken by an MSHA special investigator (who investigated Complainant's initial complaint to MSHA alleging a discriminatory discharge) indicating that he examined the September 27, 1990, MSHA Form 5000-23 on Complainant and concluded as follows:

> In my opinion it does not appear that Braithwaite could have possibly been properly trained in the operation of the equipment listed. For a miner to be trained in the operation of a piece of equipment it takes time to make sure that he is competent in the

operation of that equipment.

10. On April 2, 1991, about 1:00 p.m., Foreman Tighe told Complainant he wanted him to operate the Euclid R-120. Tighe told him to "park the Cline" because "there was no work with the Cline" (Jt. Ex. 1). Complainant told Tighe he felt "uncomfortable running it" and "I already talked to Mr. Beener about it." Tr. 30. When he refused, Tighe told him to turn over the maintenance records for the Cline truck and to "hit the road." Complainant took that to mean that he was fired, and left the mine.

11. Complainant did not quit on April 2, 1991, and reasonably concluded that his foreman's order to turn over his truck records and to "hit the road" meant he was fired.

DISCUSSION WITH FURTHER FINDINGS

Respondent's action on April 2, 1991, through Foreman Tighe, in telling Complainant to turn over the maintenance records on the Cline truck and to "hit the road" constituted a discharge. Cf. Conaster v. Red Flame Coal Company, Inc., 11 FMSHRC 12, 14 (1989).

To establish a prima facie case of discrimination under 105(c) of the Act, a miner has the burden to prove that (1) he engaged in protected activity and (2) the adverse action complained of was motivated "in any part" by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either 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 nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone.

A miner's refusal to perform work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1988); Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366 (4th Cir. 1986). It is further required that "where reasonably possible, a miner refusing work should ordinarily communicate . . . to some representative of the operator his belief in the safety or health hazard at issue." Secretary on behalf of Dunmire and

Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (1982); see also Simpson v. FMSHRC, supra, 842 F. 2d at 459; Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (1986), aff'd mem., 829 F.2d 31 (3rd Cir. 1987).

Responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner. Dillard Smith v. Reco, Inc., 9 FMSHRC at 992, 995,-96 (1987). Among other purposes, the communication requirement is intended to avoid situations in which an operator is forced to divine the miner's motivations for refusing to work. Dillard Smith, supra, 9 FMSHRC at 995. The communication of a safety concern "must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used and the results, if any, that flow from the communication." Hogan and Ventura, supra, 9 FMSHRC at 1074. A "simple, brief" communication by the miner of a safety or health concern will suffice (Dunmire & Estle, supra, 4 FMSHRC at 134). An expression of fear or reluctance in operating a piece of equipment may suffice, if the circumstances reasonably indicate the miner's safety concern.

Complainant had a good work record, and had not previously refused to carry out any work orders. On September 24, 1990, he communicated to his foreman that he did not feel comfortable operating the R-120 truck and on the same day communicated more fully to the mine superintendent that he did not feel safe operating the equipment. Considering Complainant's overall cooperative work attitude and history of compliance with all work orders, and the nature of his complaint to his foreman and mine superintendent, I find that, on September 24, 1990, Complainant gave a sufficient communication of a safety concern to Respondent, indicating that he did not feel properly trained or qualified to operate the R-120 truck safely. Respondent could have addressed this safety concern by giving Complainant more training on the equipment or by relieving him of the duty to operate the equipment. On September 24, 1990, the mine superintendent resolved the matter by relieving Complainant of the duty to operate the Euclid R-120. When Complainant returned from his meeting with the superintendent, he told the foreman that the superintendent said he did not have to operate the Euclid R-120. The foreman testified that, after Complainant told him that, he spoke to the mine superintendent privately on September 24, 1990, and the superintendent told him that Complainant would regularly drive the Cline truck but on occasion would be required to operate the Euclid R-120. However, the foreman never told Complainant of his conversation with the mine superintendent. After the foreman talked to the mine superintendent, he had an obligation to tell Complainant, if such were the case, that the mine superintendent said Complainant would be required to drive the R-120 on occasion or lose his job. Indeed, if the mine superintendent gave such instruction to the

foreman, the foreman had a duty to address Complainant's safety concern and offer further training to help Complainant meet the superintendent's requirement. Instead, by remaining silent, the foreman left Complainant in the position of believing that he was relieved from any duty to operate the R-120, because of what the superintendent told Complainant on September 24, 1990, and what Complainant relayed to the foreman. Specifically, when Complainant returned from talking to Beener on September 25, 1990, Tighe asked him what Beener had said and Complainant told Tighe that Beener said, "[Y]ou do not have to run a Euclid, that we will keep you on a Cline." Tr. 126. Tighe never told Complainant that Beener changed his instructions.

Complainant's only experience with the Euclid R-120 after September 24, 1990, was operating it one hour on one day and one hour on the following day. Complainant explained these occasions as follows:

> ***Then after September the 25th, I ran it approximately two hours because we worked late one night and they asked me to run it for --- it was only a short haul, I figured I could do it and I did it just for that.
>
> Judge Fauver
>
> Was that the last time you ran it?
>
> A: Yes, Sir.
>
> Judge Fauver
>
> Was that a few days after September 25th?
>
> A: It was like a month or so after.
>
> Judge Fauver
>
> You ran it for two hours?
>
> A: Well, like an hour one day, we hauled coal out late and like a couple days later it was supposed to rain and we worked down what they called phase two. It's like down at the bottom of the hill there. They was supposed to get the coal out so I ran it just enough to get the rocks off and I ran down and got a dump truck. It was down at BTC Shop and I ran a dump truck that one day.

> Did you have any problems in running it those two days when you ran it for a couple hours?
>
> A: Just like any other day, you know, I just felt uncomfortable running it, but I tried to help them out. I'm not going to just leave them set. I tried it. [Tr. 32-33.]

On April 2, 1991, Tighe told Complainant to "park the Cline" because "there was no work with the Cline" and that he wanted him to drive the Euclid R-120. Complainant told Tighe he felt "uncomfortable running it" and that "I already talked to Mr. Beener about it." Tr. 30; Joint Exhibit 1. Complainant had a good faith belief that he was not qualified to operate the R-120 safely and reasonably believed that Beener had relieved him of any duty to operate that equipment. Instead of telling Complainant that Beener later told him that Complainant would have to run the R-120 on occasion or lose his job, Tighe fired him, by telling him to turn over the maintenance records on his truck (the Cline truck) and "to hit the road."

Complainant testified that, had Tighe told him that Beener changed his mind and told Tighe that Complainant would have to drive the R-120 on occasion or lose his job, then Complainant would have asked Respondent for more training on the R-120 in order to keep his job. I find that Respondent did not properly address his safety concern, because Tighe did not correct Complainant's belief that Beener had relieved him (on September 24, 1990) of any duty to drive the R-120. If Tighe had told Complainant of what he (Tighe) understood Beener to say on September 24, 1990, Complainant could have asked for more training on the R-120, to save his job. Such a request, considering the little training he had received on the R-120 as of April 2, 1991, would itself have been a protected work refusal under 105(c).

The reliable evidence preponderates in showing that Complainant's work refusal on April 2, 1991, was a protected activity and Respondent's response by discharging him was in violation of 105(c) of the Act.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent discharged Complainant on April 2, 1991, in violation of 105(c) of the Act.

3. In light of Complainant's rejection of an offer to

reinstate him on April 29, 1992 (at the hearing of this case), Complainant is entitled to back pay and other appropriate damages accruing from April 2, 1991, to April 29, 1992, with interest, plus litigation expenses. He is not entitled to a new offer of reinstatement.

ORDER

1. A separate hearing on damages will be scheduled by separate notice.

2. This Decision shall not be a final disposition of this case until a supplemental decision on damages is entered.

William Fauver
Administrative Law Judge

FOOTNOTE START HERE-

1. The caption is hereby amended to include "Inc." in the Respondent's name, to conform to the evidence.