FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

October 30, 1995

BILLY R. McCLANAHAN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 95-9-D
	:	MSHA Case No. NORT CD 95-1
WELLMORE COAL INCORPORATION, Respondent	:	Preparation Plant
	:	Mine ID No. 44-05236

DECISION

Appearances: Billy R. McClanahan, Grundy, Virginia, Complainant;
Louis Dene, Esq., Abingdon, Virginia, Counsel for Complainant;
Ronald L. King, Esq., Grundy, Virginia, Counsel for Respondent;
Richard Farmer, Esq., Grundy, Virginia Corporate Counsel for Wellmore Coal Corporation.

Before: Judge David Barbour

This is a discrimination proceeding brought pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. ' 815(c)(3)) by Billy R. McClanahan against Wellmore Coal Corporation. McClanahan=s complaint was filed with the Secretary of Labor (Secretary) on November 7, 1994. The complaint was investigated by the Secretary=s Mine Safety and Health Administration (MSHA). On December 14, 1995, MSHA advised McClanahan that it concluded no violation of section 105(c) had occurred. On January 6, 1995, McClanahan filed a complaint on his own behalf with the Commission.

The essence of McClanahan=s complaint is that he was fired from his job as a haulage truck driver because he objected to hauling loads whose weight made them unsafe. McClanahan seeks reinstatement, back pay, benefits and legal fees. Wellmore denies the allegations. A hearing was conducted in Grundy, Virginia. Both parties were represented by counsel.

THE FACTS

BACKGROUND

In 1978, McClanahan, who had extensive experience in the maintenance and repair of large equipment, including haulage

trucks, began working for United Coal Company (United) as a haulage truck driver (Tr. 47-50). United had a number of Adivisions@ or associated companies, two of which were Wellmore and Knox Creek Coal Company (Knox Creek). (McClanahan was uncertain of the exact relationship between United and the divisions. (Tr. 51, 132) He and other witnesses frequently referred to them collectively as Athe company.@).

McClanahan worked as an employee until August 1992. On August 20, McClanahan and the other truck drivers were advised by David Wampler, the president of Wellmore, that the company was going to cease its trucking operations (Tr. 315). Wampler told the drivers that although they were going to be terminated as company employees, they could purchase the trucks and the company would help with the financing. If they purchased the trucks, the drivers could continue to haul for the company under a contractual arrangement (Tr. 55-57, 459).

Wampler stated that the decision to contract-out trucking was based upon the desire of the company to reduce operating costs. By divesting itself of the trucks the company could shift costs such as maintenance, insurance and workers= compensation to the purchasers (Tr. 317,342).

The company sold eleven trucks to its former employees (Tr. 430, 458). Under the contractual arrangements, three of the purchasers were required to work primarily at Knox Creek and eight were required to work primarily at Wellmore=s facilities (Tr. 430-431).

McClanahan decided to purchase the 1990 Ford truck he had been driving. The contract, dated August 21, 1992, was between McClanahan, operating under the name of Shanash Trucking Company, Knox Creek and Wellmore (See Resp. Exh. R-1). Under the contract, McClanahan, who had been hauling refuse primarily at Knox Creek=s No. 3 Preparation Plant, was to continue to do so, although the work could include hauling at other facilities, including Wellmore=s preparation plants (Tr. 225-226; see Comp. Exh. 8).

McClanahan was to be paid on an hourly basis when he hauled at Knox Creek. He also was to be paid on an hourly basis at Wellmore=s No. 7 Preparation Plant. However, when he hauled slate or filter cake, at Wellmore=s No. 8 Preparation Plant, he was to be paid by the ton (Tr. 153-154, 320; Comp. Exh. 8 at 24). (AFilter cake@ is defined in part as, A[t]he compacted solid or semi-solid material separated from a liquid . . . @ (U.S. Department of the Interior, A Dictionary of Mining Mineral and Related Terms (1968) at 426).) McClanahan=s work hours and haulage routes were to be specified by the preparation plant managers (Tr. 65-66).

McClanahan maintained that prior to divesting itself of the trucks, the company had no formal policy regarding the minimum weight of loads. McClanahan thought they usually weighed between 18 and 20 tons (Tr. 67).

In late December 1993, or in early January 1994, a new refuse fill area was opened at Knox Creek. The area added about two miles (round trip) to the route of the trucks. Because of the change, it took the trucks longer to travel the distance required to dump refuse (Tr. 297). In addition, the new route involved a hill where the road was one lane. The trucks had to wait to go up or down the hill. This also added to the time it took to haul refuse (Tr. 68-69).

THE WEIGHT REQUIREMENT

Around this time, David Fortner, Wellmore=s Vice President, William AJunior@ Gross, Knox Creek=s preparation plant supervisor, Danny Estep, Wellmore=s trucking superintendent, and Wampler, discussed the weight of the load=s being hauled at Knox Creek (Tr. 300). As a result, the company instituted a policy requiring the hauling of loads weighing at least 25 tons. (The requirement later was modified to 24 tons in order to give drivers a one ton Aleeway@ (Tr. 154, 228, 349-350).) Fortner stated:

> We required 25 tons to be hauled in order to move the refuse away at a rate that would allow the [preparation] plant to run . . . [W]e were not getting some of the trucks to haul the total amount so there was instituted a policy of weighing trucks because the trucks were being paid to haul by the hour and not by the ton . . . so the trucks would be . . . occasionally . . . weighed to ensure that . . . [they] were hauling a sufficient amount (Tr. 300-301, see also Tr. 302).

The company enforced the limit by weighing trucks at random (Tr. 77-78, 366). McClanahan stated that, at times, two or three trucks were weighed during a shift. Gross testified that Knox Creek kept a record of all the drivers who were weighed and of the results (Tr. 369; Resp. Exh. 4). The records were kept in a composition book in the control room of the preparation plant. Subsequently, the results were recorded on a table that was entered into evidence (Resp. Exh. 4; Tr. 419).

Imposition of the weight limit lead to a series of events that ended with the termination of McClanahan=s employment at

Knox Creek. McClanahan, his witnesses, and the company=s witnesses described these events. (McClanahan had kept notes that detailed his version of what happened and he testified from these notes (Exh. 4; Tr. 69).)

EVENTS LEADING TO MCCLANAHAN=S TERMINATION

! January 12, 1994 -- McClanahan was asked by Junior Gross to weigh the truck=s load. The load weighed 21 tons (Tr. 70-71).

! January 27, 1994 -- McClanahan was asked by Gross to weigh the truck=s load. The load weighed 23 tons (Tr. 72). According to McClanahan, Estep told McClanahan that haulage traffic was being slowed and that McClanahan should Awatch himself@ and should start hauling 25 tons (Tr. 73-74). McClanahan testified that he responded that it was dangerous to haul 25 tons, that hauling loads of 25 tons damaged the roads and the trucks (Tr. 73-75).

! January 31, 1994 -- Estep advised all truck drivers via the CB radio that a new company policy required them to haul at least 25 tons and that if they hauled under that amount they would not be able to work the next day. (At first, the company allowed a driver whose load was under the limit to finish the shift. Later the rule was changed to require the driver to stop work the moment it was confirmed the load was underweight and to not work the following day.) McClanahan testified that he responded that it is unsafe and unfair to require people to choose between being injured or going home. (Tr. 123, 444-445).)

! February 1, 1994 -- Estep again advised drivers via the CB radio of the weight policy. McClanahan testified that he told Estep that it was unsafe and the company should not put drivers in a situation where they were required to haul an unsafe weight (Tr. 78-79).

! February 4, 1994 -- McClanahan asserted he complained via the CB radio about the Aoverloading being so hazardous@ (Tr. 79).

! February 17, 1994 -- The truck of driver William Ling was weighed. The load weighed 23.62 tons (Resp. Exh. 4 at 1). Ling was told the truck could not haul the next day (Tr. 182, 349, 370, 345).

! February 18, 1994 -- McClanahan contended that Ling talked to Wampler about unsafe conditions and that Wampler simply responded, Ato[o] bad@ (Comp. Exh. 4 at 1). However, Wampler denied that Ling ever raised the subject of safety (Tr. 357-358).

(Ling did not testify.)

! February 23, 1994 -- McClanahan=s load was weighed. The load weighed 21.59 tons (Resp. Exh. 4 at 1; Tr. 371). McClanahan stated that Estep called him at home that evening and told him he could not work the next day. McClanahan testified he told Estep about the problems drivers were having because of Aexcessive weight@ (Tr. 84).

! February 24, 1994 -- McClanahan called Charles Carter, a Wellmore official. Carter was not in (Tr. 86).

! February 27, 1994 -- Carter returned McClanahan=s telephone call. McClanahan asserted that he told Carter he was Ascared to [try] to haul that much weight because of the hazards@ (Tr. 87). According to McClanahan, Carter responded that he would get back to McClanahan (Tr. 88). He did not (Tr. 95).

! March 1, 1994 -- McClanahan=s load was weighed. It weighed 26.57 tons (Tr. 91; Resp. Exh. 4 at 1).

! March 2, 1994 -- Estep climbed into McClanahan=s truck and told him to weigh. The load was 100 pounds under 24 tons. Estep told McClanahan he could not work the following day (Tr. 93, 546; see also Tr. 372-373, 443-444.) It had been snowing and McClanahan stated that he told Estep he was Ascared to death@ to haul and that the snow made it worse (Tr. 93). Estep told McClanahan that Fortner would fire him if he refused to haul 24 tons. McClanahan stated that he responded that he was not refusing to haul 24 tons because he did not want to work but because he was afraid, that he considered it extremely hazardous to haul that much.

McClanahan testified he also told Estep the truck=s gross vehicle weight (GVW) sticker stated that it was hazardous to haul the required weight. He tried to get Estep to look at the sticker, but Estep responded A[b]ull@ (Tr. 94). Estep denied that McClanahan ever mentioned the GVW sticker or any other safety concerns(Tr. 479).

According to McClanahan, a GVW of 56,800 pounds represented the gross weight the truck was manufactured to haul. The truck weighed 26,900 pounds empty. Therefore, the truck was built to haul approximately 15 or 16 tons (Tr. 230-231, 232). McClanahan admitted that when he was driving the truck as an employee of the company and was hauling loads that weighed more than 25 tons, he never talked to anyone about hauling more than the recommended

GVW (Tr. 161). McClanahan stated, AI was doing what I was ordered to do. I was told to haul whatever they put on me and I hauled it@ (Tr. 233, see also Tr. 253).

McClanahan also agreed that in 1993, when the truck was owned by the company, it was licensed in Kentucky to operate at a GVW of 80,000 pounds and that the company obtained an extended permit, which allowed it to be operated at a GVW of 90,000 pounds (Tr. 169-171, 432; Comp. Exh. 8 at 27). In Virginia it was licensed to operate at a GVW of 60,000 pounds (Tr. 172, 432). In other words, in both states it was licensed to be operated at weights that exceeded the GVW recommended by the manufacturer. In Kentucky it was licensed to haul loads of approximately 26.5 tons. In Virginia it was licensed to haul loads of approximately 16.55 tons.

! March 3, 1994 -- McClanahan went to the mine office and spoke with Wampler. According to McClanahan, as soon as he walked into Wampler=s office, Wampler told him he had to haul at least 24 tons. McClanahan responded that much weight scared him. According to McClanahan, Wampler stated that if McClanahan did not want to haul 24 tons, the company would take back McClanahan=s truck for what he owned on it. (McClanahan had paid approximately $20,000 on the truck and the book value was approximately $40,000. McClanahan described the Adeal@ as Athey would take a forty-thousand dollar . . . truck for twenty thousand . . . and leave me owing the bills@ (Tr. 97).) McClanahan maintained he tried again to get Wampler to look at the GVW information in the truck owner=s manual, and Wampler refused (Tr. 98).

Wampler, however, maintained that McClanahan never mentioned safety. Wampler claimed that the closest thing to a safety concern that McClanahan ever expressed prior to filing his complaint of discrimination with MSHA was to state once that the road needed grading. According to Wampler, the company graded the road the following day (Tr. 324-325).

Wampler testified that at the March 3 meeting, McClanahan stated that he would not haul more than 24 tons because of the wear and tear on the truck -- that he would not be like other drivers who Ajust ran their trucks into the ground@ (Tr. 323). Wampler claimed that some time after this conversation, Pam McClanahan, McClanahan=s wife, called and asked Wampler if the company was going to raise the hourly rates for contract truckers -- that because of the cost of repair, of parts, and of taxes, the truckers needed Arelief@ (Tr. 328).

! March 4, 1994 -- McClanahan testified that he called MSHA about the hazardous conditions at Knox Creek and that whomever he spoke with (he did not recall a name) stated MSHA could not help. He testified that he also called the state department of mine land reclamation about making the road at Knox Creek safer to travel. McClanahan spoke with state reclamation inspector, Lawrence Odum, who stated that he knew the road was Aa mess@ and that he would come to the mine the next working day to determine what could be done (Tr. 98-99).

! March 7, 1994 -- Odum met McClanahan at the mine. (Odum believed the meeting was on March 6, 1994.) At the meeting, McClanahan expressed to Odum his concern about dumping refuse near the slurry basins where the filter cake was deposited. He was afraid his truck would get too near the edge of one of the basins and would fall in (Tr. 33, 35, 43). The weight he was hauling would make it more likely that the edge would give way (Tr. 45). Odum suggested that McClanahan contact MSHA or the Occupational Safety and Health Administration (OSHA) (Tr. 26, 43).

! March 10, 1994 -- The loads of McClanahan and another driver were weighed. McClanahan=s load weighed 24.30 tons (Resp. Exh. 4 at 1; Tr. 104).

! March 15, 1994 -- McClanahan=s load was weighed. It weighed 24.50 tons (Resp. Exh. 4 at 1) (Knox Creek=s records indicate that this occurred on March 14 rather than on March 15, 1995 (Id.).)

! March 18, 1994 -- McClanahan=s load was weighed. It weighed 27.86 tons (Resp. Exh. 4 at 1).

! April 2, 1994 -- McClanahan=s load was weighed (Tr. 108-109). It weighed 25.58 tons (Resp. Exh. 4 at 1). (Knox Creek=s records indicate that this occurred on April 5, not April 2 (Id.).)

! May 25, 1994 -- McClanahan testified he called Carter. He told Carter that he was still having problems with hauling excessive weights. According to McClanahan, Carter=s response Amore or less@ was to ask if McClanahan wanted to sell back his truck (Tr. 111-112).

! May 26, 1994 -- According to McClanahan, Estep asked him why he had called Carter. Estep stated that the company would end up getting the truck if McClanahan refused to haul the required weight (Tr. 112-113).

! June 6, 1994 -- McClanahan=s load was weighed (Tr. 113-114). It weighed 25.07 tons (Resp. Exh. 4 at 2).

! June 20, 1994 -- McClanahan=s load was weighed (Tr. 114). It weighed 25.74 tons (Resp. Exh. 4 at 2).

! June 23, 1994 -- McClanahan was in Durham, North Carolina and another miner was driving the truck. The other driver=s load was weighed (Tr. 114). It weighed 28.35 tons (Resp. Exh. 4 at 2).

! August 3, 1994 -- McClanahan=s load was weighed (Tr. 115). It weighed 24.74 tons (Resp. Exh. 4 at 2).

! September 1, 1994 -- McClanahan testified that he complained about the condition of the road because it had been raining and the road was slick (Tr. 117).

! September 12, 1994 -- McClanahan=s load was weighed. It weighed 23.65 tons (Resp. Exh. 4 at 2). According to McClanahan, Estep stuck his finger in McClanahan=s face and told McClanahan to Astraighten up [his] attitude@ (Tr. 117). When McClanahan responded that he would bite off Estep=s finger, Estep stated that McClanahan would be Ahistory@ (Tr. 117).

Estep did not deny he told McClanahan he would be Ahistory,@ but he was adamant that McClanahan never brought up safety concerns (Tr. 451). Rather, Estep maintained that when he confronted McClanahan about the weight of the load and pressed McClanahan about whether he was going to haul the required weight, McClanahan told him, AWell, I might be light again and I might not@ (Tr. 450-451). McClanahan was told to go home and not to come to work the next day (Tr. 118-119).

! September 14, 1994 -- McClanahan=s load was weighed. It weighed 22.74 tons (Resp. Exh. 4 at 2). McClanahan was sent home for the rest of the shift and was told not to report to work the following day (Tr. 120).

! September 19, 1994 -- McClanahan=s load was weighed. It weighed 23.50 tons (Resp. Exh. 4 at 2). McClanahan was laid off for the rest of the shift and for the next day (Tr. 121).

! September 21, 1994 -- McClanahan=s load was weighed. It weighed 24.96 tons (Resp. Exh. 4 at 3; Tr. 122).

! September 22, 1994 -- Around 9:00 a.m., Estep

called McClanahan via the CB radio and told him to stop at the shop. Estep, Fortner, and Gross were there. According to Fortner, the meeting was prompted by the fact that McClanahan recurrently was hauling underweight loads (Tr. 286-287).

Estep stated:

> We were going to talk to . . . McClanahan and offer him an alternative job and give him the option . . . If he did not want to haul the required weight . . . [W]e had an alternative job that we could put him on and pay him by the ton (Tr. 448).

According to McClanahan, Fortner told him that he would be fired if he again hauled loads that weighed under the limit (Tr. 123). Fortner testified that this was the first time he discussed a weight limit with McClanahan (Tr. 285). He stated that he did not consider the limit to be unsafe and that he based his opinion upon the fact that company trucks frequently had hauled that much in the past (Tr. 304-305).

Fortner asked McClanahan if he would rather haul at the Wellmore No. 8 facility where he could be paid by the ton. (Tr. 306). In that way McClanahan could haul the tonnage with which he felt comfortable (Tr. 155). Fortner stated:

> I asked him if he would be interested in exercising his [contract] agreement . . . where he could go to Wellmore No. 8 and haul refuse by the ton so that he would not get in a problem of not hauling enough weight, and he said that he could not do that, that was crazy (Tr. 306-307).

Fortner stated that McClanahan also responded that at Wellmore No. 8 Mine he would have to haul more tons than he was hauling at Knox Creek in order to make what he was making at Knox Creek (Tr. 287). According to Fortner, at no point during the discussion did McClanahan raise any safety issues (Tr. 309).

Gross testified that McClanahan advised the group that if he went to Wellmore No. 8, he would have to haul heavier loads than at Knox Creek just to make the same money. Estep testified that McClanahan stated that he Ahardly [could] make it hauling what he was hauling@ (Tr. 449). Gross too insisted that McClanahan never raised the subject of safety (Tr. 417, 423).

McClanahan maintained that he rejected the suggestion because he heard that truck drivers at Wellmore No. 8 had

exceeded the GVW by more than double Ajust to make a living,@ that the drivers were having Aall kinds of problems@ (Tr. 123).

! September 23, 1994 -- Around 1:00 p.m., McClanahan=s load was weighed. It weighed 22.96 tons (Tr. 114; Resp. Exh. 4 at 3). McClanahan asked Gross, AAm I terminated?@ and Gross responded, AYes@ (Tr. 248, see also Tr. 124). McClanahan left the property (Tr. 248-249).

Gross testified that aside from the instance involving Ling=s truck, none of the other drivers who were weighed were found to be carrying loads of under 24 tons (Tr. 377). Knox Creek=s records indicate that between the time when random weighing started, and September 22, when McClanahan was last weighed, six different drivers of eight different trucks were weighed 90 times (Resp. Exh. 4; see Tr. 391-392). McClanahan was weighed 20 times and Ling was weighed 15 times. The rest of the weighings were scattered among the others (Tr. 396). McClanahan=s loads weighed under 24 tons on seven occasions (Exh. R-4).

! September 27, 1994 -- McClanahan went to the company=s trucking office to get a copy of his termination papers. According to McClanahan, the receptionist called Fortner on the telephone. McClanahan and Fortner engaged in a conversation in which Fortner told McClanahan, AI=m sorry for firing you. It=s nothing personal. I hate to do it. You didn=t deserve it, but I was just doing what I was told@ (Tr. 126). McClanahan stated that he responded that some day he and Fortner would talk about it. Fortner denied the conversation occurred (Tr. 288).

MCCLANAHAN=S PRACTICE PRIOR TO THE WEIGHT REQUIREMENT

Records introduced by McClanahan and by management indicate that prior to January 1994, McClanahan regularly hauled loads that weighed more than 24 tons. The weight of the loads was recorded on the company=s work reports. The reports were completed and signed by McClanahan, and I credit the information they contain. (See Comp. Exh. 8 at 28-33; Resp. Exh. 2.)

On January 4, 1990, McClanahan hauled four loads whose weights ranged between 25.91 tons and 32.31 tons (Tr. 138; Comp. Exh. 8 at 31).

On January 5, 1990, McClanahan hauled four loads whose weights ranged between 26.73 tons and 28.39 tons (Tr. 138; Comp. Exh. 8 at 33).

On October 12, 1990, McClanahan hauled two loads that

weighed 27.57 tons and 27.59 tons (Comp. Exh. 8 at 54).

On December 20, 1990, McClanahan hauled two loads that weighed 24.35 tons and 28.93 tons (Tr. 219; Resp. Exh. 2 at 27).

On February 15, 1991, McClanahan hauled a load that weighed 28 tons (Tr. 147; Resp. Exh. 2 at 68).

On April 30, 1991, McClanahan hauled four loads that weighed 30.79 tons, 30.75 tons, 29.88 tons and 31.89 tons (Tr. 135-136, 148; Comp. Exh. 8 at 28, Resp. Exh 2 at 80).

On July 27, 1992, McClanahan hauled six loads, four of which weighted more than 24 tons (Tr. 150; Resp. Exh. 2 at 46).

In addition, on numerous instances, McClanahan estimated the weight of his loads at 25 tons (e.g., January 25, 1990, January 26, 1990, June 1990, July 1990, August 1990, September 1990, April 9, 1992 (see Comp. Exh. 8 at 29-30, 32; Resp. Exh. 2 at 1-14).)

THE LAW

Section 105(c)(1) of the Act protects miners from retaliation for exercising rights protected under the Act, including the right to report a safety hazard. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" because, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S.Rep. No. 95-181, 95th Cong. 1st Sess., at 35 (1977), reprinted in 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 623. 2nd Sess.(1978)).

A miner alleging discrimination under the Act establishes a prima facie case by proving that he or she engaged in protected activity and that 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 F2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (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 (Pasula, 2 FMSRHC at 2799-2800). If the operator cannot rebut the prima facie case, 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 (Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-818; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987; Donovan v. Stafford Const. Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F. 2d 194, 195-196 (6th Cir. 1983 (specifically approving the Commission's Pasula-Robinette test)).

It is settled that a miner has a right under the Act to make safety complaints to his or her employer. It is likewise settled that a miner has a right to refuse to abide by an unsafe work rule. However, in order to be protected by the Act, the safety complaint and work refusal must reflect the miner=s good faith, reasonable belief that a hazard exists (Robinette, 3 FMSHRC at 810-812).

When a miner has expressed a good faith, reasonable belief in a hazard, an operator has an obligation to address the danger perceived by the miner Ain a way that his [or her] fears reasonably should have been quelled@ (Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989); see Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1520, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984) aff=d sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985)). A miner=s continuing complaint after an operator has taken reasonable steps to dissipate fears and to ensure the safety of the challenged task or condition may make the complaint and any related work refusal unreasonable and withdraw them from the Act=s protection (Boswell v. National Cement Company, 14 FMSHRC 253, 258 (February 1992)).

MCCLANAHAN=S PRIMA FACIE CASE

To prove the allegation that he was a victim of unlawful discrimination, McClanahan must first establish that he engaged in protected activity and as a result suffered an adverse action.

McClanahan=s contention that he engaged in protected activity is based upon his claims that he complained about the safety of the minimum load requirement at Knox Creek. The complaints fall into two categories: occasional complaints about having to dump refuse weighing the required amount or more into the slurry basins, and general and repeated complaints about how unsafe it was to haul loads weighing the required amount or more. (At the hearing, McClanahan also contended that he complained on several instances about the condition of the haulage road at Knox

Creek. However, these complaints are outside the scope of this proceeding. McClanahan=s complaint of discrimination did not allege complaints about the road to be a cause of his termination -- A[T]hey fired me for my fear of hauling excessive weight@ (Complaint, Exh. 1 at 5) -- and the record fully supports finding that the adverse action -- i.e., his termination as a contract hauler -- was because he did not haul the weight required and was in no way connected to complaints about the road.)

The first question is whether McClanahan made the complaints. If he did, the second question is whether he made them in good faith and whether they were reasonable, recognizing that the answer to the latter question may involve an analysis of management=s response, if any, to the complaints.

DUMPING INTO THE SURRY BASINS

McClanahan believed that he Aprobably@ complained about hauling at least 24 tons of refuse and dumping the loads into the slurry basins because he feared the weight of the loads could cause the walls of the basins to give way and the truck to slide in (Tr. 163). The evidence supports finding that McClanahan in fact expressed such fears to mine management. Gross, who at the time was the supervisor at Knox Creek, testified that McClanahan complained about the situation via the CB radio (Tr. 380), and Hess, the water truck operator and former haulage truck driver confirmed that he heard McClanahan state something to the effect that he did not believe that it was safe to back up to the basins to dump (Tr. 487-488). McClanahan also shared the same concerns with Odum when Odum came to the mine (Tr. 33, 35, 45). I conclude from this testimony that concerns about dumping 24 tons or more into the basins were on McClanahan=s mind and that he in fact raised the concerns with management.

I also conclude that the evidence supports finding that management responded to McClanahan=s fears. Gross and Hess maintained, and McClanahan agreed, that Gross told McClanahan if he was afraid of the truck sliding or sinking into the basins while he was dumping, he should dump the refuse in front of the particular basin involved and the bulldozer operator would push it in (Tr. 163, 380, 488).

McClanahan acknowledged that this addressed his concern regarding slate, but he maintained that it did not address his concern regarding the dumping of filter cake. AWe never dumped [filter cake] and let the dozer push it . . . . If you dump the [filter cake] out[,] it=s like water and it runs everywhere@ (Tr.163-164).

However, I find that Gross addressed McClanahan=s fears about dumping filter cake in another manner, one that was equally as effective as dumping other refuse in front of the basins. McClanahan=s concern about getting too near the basins was conditioned upon the fact that a berm was sometimes lacking when he had to dump the filter cake and that he therefore might back too near the edge. This was especially true when Odum came to Knox Creek on March 7. McClanahan described it: A[T]here was no berm around that filter cell. The only berm that you have is when you backed up and your truck sank, you kind of made your own berm@ (Tr. 100). Gross responded to this concern, in that he told McClanahan that if he was apprehensive about the berm to Aget the dozer operator, contact him on the radio and get him up here and let him fix the berm for you@ (Tr. 380). I credit this testimony. It was consistent with the testimony of Odum, a disinterested witness, that Gross and Aanyone up there@ (i.e., anyone at the refuse dump) were usually fully responsive to requests regarding work that needed to be done (Tr. 34).

Thus, I conclude that while McClanahan may have expressed a good faith, reasonable belief that dumping refuse at the slurry basins was hazardous, his concerns were met with a response that reasonably should have dissipated them. To the extent McClanahan persisted in his concerns he did not do so in good faith, and they were not protected.

GENERAL HAZARDS OF THE WEIGHT REQUIREMENT

McClanahan testified that from its inception he repeatedly protested the weight limit because it was unsafe. He maintained that on January 27, 1994, he told Estep that it was dangerous to haul loads of 25 tons (the limit at that time) because the weight would damage the trucks and roads (Tr. 73-73); that on January 31, he told Estep it was unsafe and unfair to require drivers to take a chance of getting injured (Tr. 77-78); that on February 1, he told Estep via the CB radio that the weight requirement was unsafe and the company should not put drivers in a situation where they had to haul unsafe loads (Tr. 78-79); that on February 4, he complained via the CB radio about Aoverloading being so hazardous@ (Tr. 80); that on February 27, he told Carter that he was afraid to haul the required weight because of the hazards (Tr. 87); that on March 2, he expressed his fears to Estep again; that on March 3, he complained to Wampler that hauling at least 24 tons scared him (Tr. 97); that on May 25, 1994, he complained again to Carter (Tr. 111); that on September 22, 1994, at a meeting with Estep, Fortner and Gross, he stated again that he regarded the weight limit requirement to be

hazardous.

Gross, Estep and Wampler all stated that McClanahan never discussed the safety of the weight limit with them (see e.g., Tr. 324, 417, 423, 437, 497). Rather, they maintained that his concern was for the wear-and-tear the requirement put on his truck. I do not fully credit their testimony. As I have previously noted, McClanahan carefully documented the dates and substance of his purported complaints (Comp. Exh. 4). Indeed, he showed such an aversion to the weight requirement once he became a truck owner that I find it entirely likely he raised both kinds of objections -- objections based on safety and objections based on wear-and tear -- in order to get out from under the requirement.

In any event, there is no question that by September 22, at the latest, management understood that McClanahan was using safety as at least one basis for objecting to the weight requirement. Fortner, who was at the September 22 meeting with McClanahan and the others, stated that he explained to McClanahan that the weight requirement was not unsafe (Tr. 304-305). Fortner=s explanation did not come out of the blue, and I infer it was elicited by McClanahan=s expression of his safety concerns.

Having concluded that McClanahan expressed his general safety concerns regarding the weight limit, the next question is whether they were based on a good faith belief that hauling loads of 24 tons or more was, in fact, hazardous. I find that they were not.

In my view, McClanahan=s purported good faith belief in the hazards of the weight limit is completely discredited by his documented history of repeatedly hauling loads that were as heavy or heavier than the limit when he was a salaried employee, and of doing so without meaningful complaint. I conclude that while McClanahan may indeed have had concerns, they were those of a truck owner for the cost of the requirement to his business and not those of a driver for his and others= safety.

To me, it speaks volumes that prior to becoming a truck owner McClanahan repeatedly hauled loads weighing more than 24 tons without making known his supposed safety concerns to either management or to MSHA. McClanahan=s own carefully kept records indicate that the first time he complained to management about hauling 24 tons or more was in late January 1994, shortly after the weight limit went into effect and after he had purchased the truck (Comp. Exh. 4). Yet, the record is replete

with previous instances when McClanahan hauled more than 24 tons.

As I have already noted, on January 4, 1990, he hauled four loads that weighed between 25.91 tons and 32.31 tons (Tr. 138; Comp. Exh. 8 at 31); on January 5, 1990, he hauled four loads that weighed between 26.73 tons and 28.39 tons (Tr. 138; Comp. Exh. 8 at 33); on October 12, 1990, he hauled two loads that weighed 27.57 tons and 27.59 tons (Tr. 217; Resp. Exh. 8 at 54);

on December 20, 1990, he hauled two loads that weighed 24.35 tons and 28.93 tons (Tr. 219; Resp. Exh. 2 at 27); on February 15, 1991, he hauled one load that weighed 28 tons (Tr. 147, Resp. Exh. 2 at 68); on April 30, 1991, he hauled four loads that weighed between 29.88 tons and 31.89 tons (Tr. 135-136, 148; Comp. Exh. 8 at 28, Resp. Exh 2 at 80); on July 27, 1992, he hauled four loads that weighed between 24.32 tons and 27.77 tons (Tr. 150; Resp. Exh. 2 at 46). (While some of these loads were hauled in a truck other than the one he purchased and at different sites, McClanahan did not maintain that the trucks or the sites essentially differed.)

McClanahan testified that on October 2, 1990, when he was recorded as hauling loads of 27.57 tons and 27.59 tons, he told a company official it was Atoo much weight@ (Tr. 144-145; Resp. Exh. 2 at 54) and that later he told Estep to try to get the person loading the trucks to Alighten up@ (Tr. 218)). Even if I credit this testimony, it will at most establish that on these two occasions McClanahan complained about the weight he was hauling. However, there is no indication he linked the complaints to fears for his or others= safety.

Likewise, McClanahan maintained that on December 20, 1990, when he hauled loads of 24.35 tons and 28.93 tons, he told Clifford Hurley, who was then a supervisor, that the load was too heavy, but, again, there is no testimony that this statement was linked to safety concerns (Tr. 219, Resp. Exh. 2 at 27).

Moreover, and equally compelling, McClanahan=s lack of a genuine safety concern is shown by the fact that without complaint on occasion he signed work reports estimating the weight he was hauling to be 25 tons (Tr. 140; see Comp. Exh. 8; Resp. Exh. 2). McClanahan maintained that when he estimated a weight of 25 tons, the actual tonnage always was less, but I do not believe him (Tr. 215). The numerous records of loads that were weighed and were over 25 tons indicates the contrary.

In any event, it strikes me as completely incongruous to McClanahan=s purported belief in the inherent hazards of hauling

more than 24 tons, that he would have indicated he was engaging consistently in hazardous work.

I believe it is more than a coincidence that McClanahan=s complaints concerning the hauling of 24 tons or more are definitely documented as linked to safety only after he became the owner of the truck. The financial burden of upkeep and maintenance was suddenly his, not the company=s. Obviously, if the truck was going to have to haul 24 tons or more each time it was loaded, there was going to be wear and tear on the truck and hence expense to McClanahan. Once he became an owner he had a decided financial incentive for protesting the weight requirement, an incentive that was quite apart from safety.

Finally, I view McClanahan=s failure to complain to MSHA about the purported hazards of the weight limit also as indicative of his lack of good faith.

Section 105(c) does not provide the only path a miner may follow to protest against working conditions he or she believes hazardous. A miner may also pursue a parallel path by invoking section 103(g) (30 U.S.C. ' 813(g)). The provisions of section 103(g) authorize a miner who reasonably believes a violation of the Act or any mandatory health or safety standard exists or an imminent danger exists to request and to obtain an immediate inspection by notifying MSHA of the violation or danger. In addition, the law requires the name of the miner requesting such an inspection to be kept confidential and to not be revealed to the operator. McClanahan did not avail himself of this option.

McClanahan testified that on March 4, 1994:

> I ... called MSHA about the hazardous conditions and at the time I didn=t write down who I talked to or anything. They just said they couldn=t help (Tr. 98; see also Tr. 162).

I do not credit this testimony for three reasons. First, McClanahan later modified his testimony and stated that either he or his wife called -- he could not recall who (Tr. 257-258). Second, and as counsel for Wellmore pointed out at the hearing, the fact that McClanahan could not remember who placed the telephone call or to whom he or his wife talked is entirely at odds with the carefully written records he kept of all of the conversations and incidents that related to his ultimate termination (Comp. Exh. 4). Third, if in fact either of the McClanahans reported to MSHA on-site hazardous conditions or practices, I find it highly unlikely that either would have been told there was nothing MSHA could do. MSHA does not operate like that. While complaints about on-site hazards must be in writing,

they may be received orally and later reduced to writing. Moreover, it is the policy of the agency to advise miners of their rights and how they may proceed in conformance with those rights. It simply does not ring true that a miner would call MSHA, report what he or she believed to be a work place hazard and be told the agency was powerless.

It may be that Mrs. McClanahan called to complain about the use of trucks weighing more than their licenses permitted on state roads. McClanahan=s testimony that Ashe had called and related the weight problem, and . . . they said they just couldn=t help because it was off road or not an issue@ suggests as much (Tr. 257). However, if in fact she had complained about hazardous work conditions at the mine, it is not credible to me that she would have been told the agency could not help her husband. As I stated, the agency does not work like that. (In this regard, I find McClanahan=s apparent assertion that it was inherently dangerous to haul loads that put the truck over the manufacturer=s recommend GVW to be totally unsupported by the record. Not only did McClanahan himself consistently haul loads that weighed more than that recommended by the manufacturer, the Commonwealths of Kentucky and Virginia licensed the truck to haul loads beyond the manufacturer=s recommended GVW (Tr. 169-179, 233-234, 250, 432).)

Further, McClanahan also stated that he did not file a formal complaint with MSHA because he was Afearful for [his] job@ (Tr. 257). When I asked him whether he was aware that under the Act he had the right of confidentiality, he responded AI know I have that right, but it [isn=t] the way it always works@ (Id.). Undoubtedly, it is true that there have been instances when confidentiality has not been protected. However, it also is true that those instances are few and far between. The agency takes the right very seriously. It has codified it in its regulations (30 C.F. R. ' 43.2, ' 43.4) and emphasized it in its official policy manual (Program Policy Manual, III.43-1 at 3). MSHA goes to great lengths to protect from disclosure the identity of miners who report hazards. While McClanahan=s skepticism of the efficacy of MSHA efforts in this regard provides him with a convenient excuse, it raises an equal skepticism on my part of his good faith belief in the purported hazards he encountered.

ORDER

For the reasons set forth above, I conclude McClanahan=s safety complaints were either addressed so that their continuation was unreasonable or were not made in good faith. Therefore, his complaint of discrimination is **DENIED** and this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution:

Billy R. McClanahan, P.O. Box 498, Grundy, VA 24614

Louis Dene, Esq., P.O. Box 1135, Abingdon, VA 24210

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main St., Drawer 1560, Grundy, VA 24614

Richard Farmer, Esq., P.O. Box 901, Grundy, VA 24614

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