

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

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June 28, 1999

ARTHUR R. OLMSTEAD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 99-106-D
v.	:	
	:	Savage Mine
KNIFE RIVER CORPORATION,	:	
Respondent	:	Mine I.D. 24-00106

DECISION

Appearances: Arthur R. Olmstead, Savage, Montana, Pro se;
David M. Arnolds, Esq., Jackson & Kelly, Denver, Colorado, for
Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Arthur R. Olmstead against Knife River Corporation ("Knife River") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that Knife River suspended Mr. Olmstead without pay and demoted him to a lower paying position in October 1998 in violation of section 105(c). A hearing in this case was held in Sidney, Montana, on May 25 and 26, 1999. For the reasons set forth below, I find that Mr. Olmstead did not establish that he was discriminated against and I dismiss his complaint of discrimination.

I. FINDINGS OF FACT

Knife River operates two open pit coal mines. The Beulah Mine in North Dakota produces about 2.7 million tons of coal a year and employs about 130 miners. The Savage Mine near Savage, Montana, is a much smaller mine that employs about eight to ten miners. Mr. Olmstead has worked at the Savage Mine for about 33 years. During this time, he has held a number of positions and has operated most of the equipment at the mine.

On June 30, 1995, when Mr. Olmstead was discharged from his employment at the Savage Mine, he filed a discrimination complaint under section 105(c) of the Mine Act. Mr. Olmstead injured his wrist and decided to have his wrist fused. He did not immediately return to

work after his surgery. The stated reason for Mr. Olmstead's discharge was dishonesty for failure to advise management that the doctor had released him to return to light duty work.

A hearing was held before Commission Judge T. Todd Hodgdon in February 1996. Judge Hodgdon determined that Knife River had discharged Mr. Olmstead in violation of section 105(c) of the Mine Act. *Secretary of Labor o/b/o Arthur R. Olmstead v. Knife River Coal Mining Co.*, 18 FMSHRC 1103 (June 1996). Judge Hodgdon found that Mr. Olmstead engaged in protected activity. The judge credited the testimony of Mr. Olmstead and concluded that while "Mr. Olmstead was ostensibly discharged for dishonesty, I find that he was really discharged for continually raising safety concerns at the mine." *Id.* 1116. Judge Hodgdon ordered Mr. Olmstead reinstated to his previous position and awarded him back pay.

Mr. Olmstead was reinstated in July of 1996 to his previous position as tippie operator. Soon after he was reinstated, he bid on the loader operator position. This position is at the highest rate of pay for an hourly employee. Because of his seniority, he was awarded this position. The loader operator scoops up coal that has been blasted and dumps it into coal trucks for transportation to the preparation plant. The loader is a very large piece of equipment with an 18-yard bucket and tires that are about 8 feet tall. (Tr. 170, Ex. C-2M). It weighs about 90 tons.

Knife River has a written disciplinary policy in its employee handbook. (Ex. R-7). Rule 11 concerns carelessness and negligence. This rule states that it applies whenever an employee: (A) demonstrates carelessness or negligence in the performance of work assignments; or (B) damages property or product due to carelessness or negligence in the operation of equipment. *Id.* Under a section entitled "Penalty for Violation," the rule states: "First Offense - Warning Letter; Second Offense - Disciplinary Suspension; Third Offense - Dismissal." *Id.* Knife River contends that the actions that it took against Mr. Olmstead were pursuant to Rule 11 of the employee handbook and section 2(C) of the employee manual.

The first event at issue in this proceeding occurred on or about March 12, 1997. Duane "Chuck" Reynolds, an electrician at the Savage Mine, went to the mine superintendent, Carl "Junior" Etzel, to complain about Mr. Olmstead's operation of the loader. As stated above, the loader is used to load coal but, on occasion, it is used to move submersible sump pumps in and out of holes dug to dewater the area. A chain is attached to the pump and a tooth on the bucket of the loader. An electrician on the ground uses hand signals to guide the loader operator to raise or lower the bucket and to move forward or backward. The pumps are very heavy. Mr. Etzel testified that Mr. Reynolds told him that "Art pays absolutely no attention to [his] direction of when to lower, when to raise, when to tip the bucket back, when to tip it forward, and that he had come close to catching his fingers in the chain." (Tr. 174).

Mr. Reynolds testified that when he gave hand signals to Mr. Olmstead, who was operating the loader, Reynolds would never know which way Olmstead would go. (Tr. 338). Reynolds stated that when he gave a signal to stop, Olmstead would follow it some of the time and ignore it other times. Reynolds complained that Olmstead was not consistent with respect to the same hand signals. Reynolds testified that he told Mr. Etzel that he felt he was putting his

life in jeopardy when he worked with Mr. Olmstead. (Tr. 339-40). Reynolds testified that this was not the first time that Mr. Olmstead failed to follow his hand signals.

Following Mr. Reynolds' complaint, Mr. Etzel talked to Mr. Olmstead about the incident. Mr. Olmstead told Etzel that Reynolds did not know what he was doing and did not know how to give proper hand signals. (Tr. 174). Mr. Etzel told Mr. Olmstead that he should try to be more careful, but Mr. Reynolds felt that the situation was more serious than that. Mr. Etzel called Larry Duppong, vice president of operations, to discuss the situation. Mr. Duppong works at the company's headquarters in Bismarck, North Dakota. About a week later, Mr. Duppong traveled to the Savage Mine to attend a meeting with Messrs. Etzel and Olmstead. It was agreed that a system of uniform hand signals would be adopted. (Tr. 176). Nevertheless, Etzel and Duppong did not believe that it was really a hand signal issue. (Tr. 176, 291). Other mine employees had told Mr. Etzel that "it doesn't really matter what you do, Art does not pay any attention to you." (Tr. 176-77). Two of the employees who complained to Etzel were Leroy Miller and Garry "Bink" Miller.

Management considered this meeting as an oral warning to Olmstead. (Tr. 291). Etzel put his notes of the meeting in Olmstead's personnel file but a copy was not given to him. (Tr. 177; Ex. R-6). Mr. Olmstead did not consider this meeting to be an oral warning. Indeed, Etzel's written notes do not indicate that the discussions were an oral warning. Olmstead believes that the hazards created were entirely the result of Mr. Reynolds' lack of understanding of hand signals. Olmstead does not believe that he was at fault.

The second event occurred on April 20, 1998, when Mr. Olmstead ran the loader into a beam supporting the overhead walkway at the fuel station. (Tr. 79, 178). Mr. Olmstead approached the fuel station from the east, misjudged the distance between his bucket and the support beam, and pushed the beam to the west. (Tr. 178). The beam was made of 12-inch pipe filled with concrete, which helped support the walkway and protect the fuel station. Mr. Etzel attempted to straighten it by using a chain and a backhoe, but he was only partially successful. (Tr. 179).

Mr. Olmstead testified that the accident was not his fault. (Tr. 79). He stated that the fuel station was not properly designed and that, on that particular day, he had to approach it from an angle because a pile of rocks was in his way. (Tr. 80). He also testified that the area was very muddy. He stated that he gave the pipe only a "glancing blow." *Id.*

As a result of this accident, Mr. Etzel issued Mr. Olmstead a warning letter for carelessness and neglect under rule 11 of the employee handbook. (Tr. 180; Ex. R-4). The letter states:

This is a warning letter regarding your violation of Rule #11,
Carelessness and Negligence of Knife River Corporation's Rules of
Conduct.

On April 20, 1998, while preparing to fuel the 992 loader, you hit the fuel station with the loader bucket, causing the station guard to tip backward.

After examining the incident, I have resolved that no real monetary damage was done, other than labor costs to straighten the guard back up to the proper position.

Nevertheless, Art, it is critical for your safety and the safety of your fellow employees that due care be exercised at all times on the job.

(Ex. R-4). Mr. Olmstead refers to this letter as "Step 1" discipline. He contends that this letter was unfairly issued because other employees have had accidents which caused more significant damage or resulted in lost production in which no disciplinary action was taken. He testified about several accidents. These accidents are discussed later in this decision.

Mr. Etzel stated that he issued the letter because it is his practice to issue warning letters to employees who have a significant accident. He also took into consideration the fact that he had received a number of safety complaints about Mr. Olmstead from other employees. (Tr. 180-81). He discussed the letter with Mr. Duppong before he issued it. (Tr. 183, 291).

The final event in this case is the accident that occurred on September 24, 1998. Olmstead's loader is parked in a garage during the night to protect it from the elements. At the end of his shift on September 23, he drove the loader into the garage bucket first as was his practice. He arrived at the mine on September 24 at about 5:30 a.m. to begin his shift at 6 a.m. He entered the garage from the back, pre-shifted his loader, and entered the cab. Using the remote control inside the cab for the large garage door, he opened the door. It was still pretty dark outside. After looking in his rear view mirrors, he backed out and hit a company pickup truck that was parked outside. The pickup was demolished. (Exs. C-2H, R-1). There are no yard lights in the vicinity of the doors for this garage.

Generally, vehicles are not parked behind these garage doors. On the evening of September 23, repair work was being performed on another vehicle in the other bay of the garage. The repair crew needed parts to complete the repair. Mr. Etzel drove to Glendive, Montana, procured the parts, and returned to the mine. He parked the pickup by the large garage doors because he believed that a winch might be necessary to remove the heavier parts from the truck. The repair crew would be able to easily get to the parts from that location. He parked the pickup about 12 feet back from and parallel to the garage door. This placed the pickup directly behind and perpendicular to the loader that was behind the closed garage door. Mr. Etzel then left the mine at about 6:30 p.m. to start his vacation.

The repair crew was not able to complete the repairs that evening. When the crew left the mine, they did not move the truck. Mr. Olmstead left the mine after the end of his shift on September 23 before the pickup was parked near the garage. Mr. Olmstead testified that he did

not see the pickup and, because it was still dark, it would have been very difficult to see from inside the cab of the loader. The pickup was a deep red color and there were no yard lights in the area. The headlights on the back of the loader were working, but they are about ten feet off the ground. There is an obstructed area behind the loader than cannot be seen from the cab.

Knife River conducted an investigation of the accident. In Mr. Etzel's absence, Leroy Miller did a preliminary investigation. He apparently concluded that Mr. Olmstead failed to look behind the loader when he backed out. (Tr. 184). When Mr. Etzel returned to the mine a week later, he parked a pickup in the same general area and got into the loader's cab at about 6 a.m. to find out what could be seen. He testified that it was hard to see the pickup in the right mirror, but that it was easy to see the pickup in the left, driver's side mirror. *Id.* He stated that the mercury vapor lights inside the garage provided enough illumination to see the truck from inside the cab of the loader. (Tr. 185).

Mr. Etzel also testified that he did not know that Mr. Olmstead was using the remote control device to open the garage door from the inside of his cab. (Tr. 186-87). He stated that he would have removed the remote control from the cab if he had known that Olmstead was using it to open the door upon exiting the garage. (Tr. 234). He stated that the proper procedure was to open the garage door using the button on the wall of the garage so that the loader operator can check the area behind the loader. (Tr. 188, 233-34). The remote control device was placed in the cab so that the operator could open the door to enter the garage without getting out.

Mr. Alan Abbey, the safety director for Knife River, also conducted an investigation at the request of Mr. Duppong. (Tr. 293). Mr. Abbey is normally stationed at the Beulah Mine. He traveled to the Savage Mine, met with Mr. Olmstead, and tried to reenact the accident scene. Mr. Olmstead explained how the accident happened and showed Mr. Abby where the pickup was parked. Mr. Abbey returned to the Savage Mine at 5:30 a.m. the next day, parked his red pickup in the location that Mr. Olmstead had indicated, and got in the cab of the loader to find out what he could see using the rear view mirrors. (Tr. 257-59). Mr. Abbey testified that he could clearly see the pickup from the rear view mirrors. (Tr. 262; Ex. R-13). He stated that he could see it even more easily by standing on the platform just outside the left door of the loader that the operator uses to enter the cab. (Tr. 260-61). He concluded that Mr. Olmstead failed to look behind the loader before he backed out of the garage. (Tr. 263-64). In his accident report, Mr. Abbey stated that he "could see the pickup quite well with the illumination from [t]he shop lights." (Ex. R-8). Mr. Abbey testified the photographs that he took accurately represent what he saw that morning. (Tr. 262; Ex. R-13).

Knife River distributes a safety booklet to all employees. (Ex. R-9). Rule 39 in the section entitled "Loading and Haulage" provides as follows:

Prior to backing a machine with restricted rear visibility, the operator, or a guide, is responsible to inspect the area to the rear of the machine. In all cases, the operator has the ultimate responsibility for the safe operation of the machine.

(Ex. R-9). Based on these investigations and Knife River's safety rule No. 39, Mr. Etzel determined that Mr. Olmstead was responsible for the accident. When Etzel and Duppong discussed the accident, they were concerned that Mr. Olmstead might be having vision problems because everyone else could see the pickup from the cab of the loader. (Tr. 293). Mr. Olmstead has diabetes and they wanted to make sure that it was not affecting his eyesight. Duppong called a physician in Sidney, Montana, who agreed to see Mr. Olmstead. The physician also suggested that Olmstead see an ophthalmologist in Williston, North Dakota. *Id.* Knife River's employee manual at section 9(G) provides that an employee can be required to undergo a medical examination if the company reasonably believes that the employee "poses a danger to himself or to other employees because of a physical or mental impairment." (Ex. R-11).

Mr. Olmstead was given leave with pay so that he could see these two physicians. (Tr. 193-94, 294; Ex. R-10). The physicians subsequently advised Knife River that there was nothing about Mr. Olmstead's health or eyesight that should prevent him from operating the loader safely.

Messrs. Etzel and Duppong discussed the accident and Mr. Olmstead's "track record with the operation of the [loader]." (Tr. 294). They were especially concerned because whenever Mr. Olmstead was involved in an accident or a safety dispute with another employee, Mr. Olmstead always denied any responsibility. *Id.* It was always "somebody else's fault." *Id.* Knife River decided to suspend Mr. Olmstead for four days without pay for the accident and to demote him to a general equipment operator position. He was assigned to operate the dozer because he would not be working around other employees in that position. The dozer operator is paid \$20.19 an hour while a loader operator is paid \$20.86 an hour; a difference of 67 cents an hour.

The suspension letter was sent to Olmstead on October 19, 1998. It states that Olmstead failed to insure that the area behind the loader was clear. (Ex. 12). The letter further states that the accident was the result of Mr. Olmstead's "recklessness and carelessness" in the performance of his duties. *Id.* The letter advised Mr. Olmstead that under rule 11 of the employee handbook he was being suspended for four days because this was his second offense within 12 months. (*See* Ex. R-7). The letter also advised him that under section 2(C) of the employee manual he would "revert to a general equipment operator position" upon his return to the mine. (Ex. R-12). Section 2(C) of the employee manual provides that if an employee "cannot perform his present job due to health or safety considerations, he may revert to a general laborer position or be assigned to another classified position, if able to perform the duties of that position." (Ex. R-11).

Mr. Olmstead contends that the accident of September 24, 1998, was not his fault. First, he maintains that Mr. Etzel should not have parked the pickup behind the garage doors. He testified that Etzel knew or should have known that his loader was parked in the garage and that he would be backing out the following morning. Furthermore, Olmstead contends that Etzel knew or should have known that it was his habit to open the garage door from inside the cab of the loader rather than from the floor of the garage. Second, Olmstead contends that Leroy Miller was at fault for not warning him that the pickup was there. He testified that Mr. Miller was

responsible for doing the preshift inspection of the mine and that this inspection should have included the area behind the garage. Third, Olmstead contends that the repair crew that was working on the vehicle in the other bay should have moved the pickup when they did not use the parts in the bed of the pickup that evening. The crew should at least have warned him. Fourth, Olmstead testified that he had asked that a yard light be installed behind the garage and that additional lights be installed on the loader. Fifth, Olmstead believes that windows should have been installed in the garage doors so that he could look out before he opened the door. Sixth, Olmstead states that because no small vehicle had been parked behind the door since he began operating the loader, he “saw no reason to change his method of [opening the garage door], because [he] could usually see something that was big enough to be seen....” (Tr. 122). Finally, Olmstead disagrees with Knife River’s safety rule that places responsibility on loader operators to make sure that the area behind their vehicle is clear. He believes that the driver of a small vehicle, such as a pickup, should not be allowed to park behind a large vehicle, such as a loader.

It is Mr. Olmstead’s contention that he was treated differently from other employees in part because he had been reinstated to his job in 1997 under Judge Hodgdon’s decision finding that he had been discriminated against under section 105(c) of the Mine Act. He believes that other employees have caused accidents that are as serious or more serious than his accidents and that these employees have not been disciplined as severely as he has.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing that, “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. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev’d on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The mine 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did Arthur Olmstead Engage in Protected Activity?

Mr. Olmstead engaged in protected activity when the Secretary of Labor filed a discrimination complaint on his behalf and he was ordered reinstated by Judge Hodgdon. In his decision, Judge Hodgdon found that Mr. Olmstead “was well known for raising operational and safety matters, both with management and state and federal mine inspectors.” 18 FMSHRC at 1104. Although Mr. Olmstead asked for more lighting around the garage and on the loader, there is no evidence in the present case to indicate that he was actively engaged in safety issues or that he discussed safety issues with mine inspectors. Nevertheless, I adopt Judge Hodgdon’s findings in this regard.

B. Was Arthur Olmstead's Suspension and Demotion Motivated in any part by his Protected Activity?

In determining whether a mine operator’s adverse action was motivated by the miner’s protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir 1983). “Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.” *Id.* (citation omitted).

Mr. Olmstead is claiming disparate treatment. He points to a number of events to establish that he was treated differently than other miners. I find that Mr. Olmstead failed to show that he suffered disparate treatment. Indeed, the events that he relies upon are reasonably consistent with Knife River’s decision to suspend and demote Mr. Olmstead.

The first event relates not to a previous accident, but to the failure of Knife River to discipline a former mine superintendent, Richard Kalina. Mr. Kalina was the superintendent when the Secretary filed the previous discrimination complaint on Mr. Olmstead’s behalf. He was also the superintendent when Mr. Olmstead was reinstated. Apparently, Olmstead was operating a loader that was having starter problems on one particular day in February 1997. Olmstead shut down the loader during his lunch break. When Olmstead was not able to start it after lunch, Kalina became angry with Olmstead for not letting the loader idle through lunch. (Tr. 89-91). Kalina apparently thought that Olmstead’s actions were malicious and he shoved Olmstead against the door of the loader. Kalina was not disciplined. Instead, the record indicates that he was given a desk job “in the basement in the Bismarck office” the next day. (Tr. 22). Etzel succeeded Kalina as superintendent. Rule 4 of the employee handbook provides for immediate dismissal for assaulting another individual.

The second event that Olmstead relies upon occurred when Bud King overturned a scraper in October 1995. Mr. King was using a scraper on top of a soil pile and his front left tire went off the edge of the pile. Rather than trying to back off the pile, Mr. King decided to raise the bowl of the scraper and drive forward down the hill. (Tr. 16, 87-88). The scraper overturned as he was descending the hill. (Ex. C-1). Mr. King was not disciplined for this accident. (Ex.

R-3). The cab windows, left fender, air filter, and muffler were damaged. *Id.* Mr. Etzel was not the superintendent at the time of this accident and knew nothing about it.

The third event occurred in 1994 when a coal truck that Bink Miller was operating went off the road and overturned. Bryan Carr, who testified on behalf of Mr. Olmstead, believes that the accident occurred because Mr. Miller fell asleep. (Tr. 49). Mr. Olmstead was involved in the recovery effort and felt that the truck was damaged but did not suffer "serious heavy damage." (Tr. 93). He believes that Mr. Miller should have been disciplined for the accident. Knife River did not discipline Mr. Miller because the truck was only slightly damaged and the incident was not considered to be an accident. (Ex. R-3). Mr. Etzel testified that after the truck was uprighted it was in good enough shape to be returned to service the same day. (Tr. 200-01). Although Mr. Etzel was an hourly worker at the time of this incident, it is his understanding that the berm gave way and the incident was attributed to road failure not operator error. (Tr. 202).

The fourth event concerns two incidents involving pickup trucks operated by Carl Vender. Mr. Vender is an engineer at the mine who is sometimes required to drive through reclamation areas. On two occasions he drove through areas that had suffered heavy erosion and damaged the pickup he was driving. Although Mr. Olmstead testified that these two incidents occurred a few months apart, Knife River's records establish that the first accident occurred in July 1996 and the second occurred in October 1998. (Ex. R-3). Mr. Vender received an oral warning for the first accident. The second event occurred at night and, after it began raining heavily, his pickup slid into a gully. (Tr. 204). The vehicle was not damaged and no disciplinary action was taken because it was not attributed to operator error. (Tr. 205). Instead, Mr. Vender was instructed to use an "older junkier pickup" whenever he traveled in reclamation areas. (Tr. 95).

The fifth incident occurred when a coal truck operated by George Swisse ran into a pickup operated by Bink Miller in March 1966. The coal truck was a large vehicle with an obstructed rear view. There had been a blockage in the tipple and Mr. Swisse parked his coal truck in the area until the blockage was removed. In the meantime, Mr. Miller parked a pickup behind the coal truck. When Mr. Swisse backed up after operations resumed, he ran into the pickup. Mr. Swisse received a written warning under Rule 39 of the company's safety booklet, quoted above, for not making sure that the area was clear before backing the coal truck. Mr. Miller did not receive any discipline. As stated above, Mr. Olmstead does not agree with this safety rule and believes that Mr. Miller should have received the written warning for parking a pickup in the blind spot behind the coal truck. (Tr. 96-98).

The sixth incident that Olmstead relies upon to establish disparate treatment involved two draglines, which were in the same confined area in February 1994. The dragline that was operating had just been moved and the operator, Mr. Leroy Miller, swung it around to see if there was enough clearance between the two draglines. The cable on his dragline hit the other dragline and damaged it. Mr. Miller received a written warning. (Tr. 100, 205-06).

The final incident also involved Leroy Miller. In April 1997, Mr. Miller damaged the east wall of the garage when he was moving an engine with a loader. A Caterpillar dealer had brought an engine to the mine and Mr. Miller was using the loader to lift it out of the truck when he struck the wall of the garage and damaged it. A representative from the dealer was on the ground guiding Mr. Miller. (Tr. 101-02, 206-07). Mr. Miller received an oral warning.

I find that these incidents do not establish that Mr. Olmstead was treated more harshly than other employees who were involved in accidents. Knife River looks primarily at the carelessness and negligence of the equipment operator when determining whether discipline is warranted. Mr. King, for example, had been regularly operating the scraper for only a few days when the accident occurred. (Tr. 34-35). Although his actions might have been negligent, it appears that he was given the benefit of the doubt. When Leroy Miller ran into the wall of the garage with a loader, he was only given an oral warning because management took into consideration that fact that he was relying on a guide on the ground.

Knife River's handling of the George Swisse-Bink Miller accident is entirely consistent with the discipline of Mr. Olmstead in this case. The operator of the larger coal truck was given a written warning and the operator of the pickup was not disciplined. Although Mr. Olmstead disagrees with the rule that puts the responsibility for making sure that an area is clear on the operator of the larger vehicle, that is the rule at the Savage Mine and it appears that the rule has been consistently applied.

The other accidents that Olmstead referred to are either different or the discipline given is consistent with the discipline that Mr. Olmstead received. The incident concerning Mr. Kalina is not really relevant here. Although Kalina could have been disciplined, he was a management employee. He was immediately removed from the mine property.

The record in this case indicates that no other employee at the Savage Mine had caused two significant accidents within a 12-month period, at least since 1996 when Olmstead returned to work. His suspension and demotion is directly related to the fact that he had two accidents within six months and other employees were complaining to Mr. Etzel about Olmstead's ability to safely operate the loader. The record reveals that Olmstead typically blamed others whenever safety issues were raised. For example, he only grudgingly accepted partial responsibility for backing into the pickup truck. (Tr. 145-46).

When Olmstead requested more lights on the loader, Mr. Etzel looked into the matter. An MSHA inspector advised Etzel that as long as all the lights installed on the loader by the manufacturer are working, the loader complies with MSHA lighting requirements. Etzel apparently was not aware that Olmstead had requested a yard light near the garage doors. (Tr. 224). I credit the testimony of Messrs. Etzel and Duppong concerning the chain of events that led to Mr. Olmstead's suspension and dismissal.

I find that Mr. Olmstead could have seen the pickup behind his loader on September 24 if he had looked more carefully. Although it may have been a little difficult to see using the rear

view mirrors, he could have looked from the platform adjacent to the door to the cab or from the floor of the garage. The discipline he received was consistent with Knife River's written policies and as well as its practices. The record establishes that other Knife River employees have been suspended under rule 11 of the employee handbook and at least one employee at the Beulah Mine has been taken off equipment for safety considerations. (Tr. 265; Ex. R-7).

At the hearing, I asked Mr. Olmstead why he thought he was suspended and demoted by Mr. Etzel. It appears that he believes that the principal reason was to allow Bink Miller to operate the loader. (Tr. 140). Apparently Bink Miller operated the loader prior to Olmstead's reinstatement. Olmstead was able to bump Bink Miller from that position after he returned because he had greater seniority.

I find that Mr. Olmstead established a *prima facie* case that his discipline may have been motivated, at least in part, by his protected activity. If Olmstead was demoted because Etzel wanted to return Bink Miller to the loader, Etzel was motivated, at least indirectly, by Olmstead's protected activity. The evidence to support Mr. Olmstead's claim is not very convincing but I am giving Mr. Olmstead the benefit of the doubt because he proceeded in this case without the benefit of counsel.

I find, however, that Knife River successfully rebutted Mr. Olmstead's case. I find that Knife River established that, even if it was motivated in part by Mr. Olmstead's protected activity, it would have taken the adverse action for the unprotected activity alone. I base my conclusion on the facts described above. I credit the testimony of Etzel and Duppong as to their reasons for disciplining Mr. Olmstead. In analyzing motivation, I have taken into consideration that fact that Mr. Olmstead was reinstated in July 1996 and the suspension and demotion involved in this case occurred over two years later. Although people can hold grudges for a long period of time, I did not get any sense of that in this case. Moreover, Mr. Etzel was not involved in the decision to discharge Olmstead in 1995 and Mr. Kalina was not involved in any discipline against Olmstead in this case.

Both Etzel and Olmstead testified that their personalities clashed to a certain extent. The Savage Mine is a small operation and personalities can play a large role when there are less than ten employees at a work site. Olmstead testified that his relationship with Etzel improved when Etzel became the superintendent at the mine. They did not get along particularly well when they were both hourly employees.

Mr. Olmstead believes that his suspension and demotion were unfair. I do not have the authority to determine whether this discipline was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). I conclude that Mr. Olmstead's suspension and demotion did not violate section 105(c) of the Mine Act.

III. ORDER

For the reasons set forth above, the complaint filed by Arthur R. Olmstead against Knife River Corporation under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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RWM