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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF KENNETH E. BUSH,	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE DOCKET NO. WEST 81-115-DM
COMPLAINANT	MD 80-152
v.	
UNION CARBIDE CORPORATION,	
RESPONDENT	

DECISION AND ORDER

Appearances:

James H. Barkley Esq.
Office of the Solicitor
United States Department of Labor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294,
For the Complainant

John W. Whittlesey Esq.
Union Carbide Corporation
Law Department
270 Park Avenue
New York, New York 10017,
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

The Secretary, on behalf of Kenneth E. Bush, filed a complaint against the respondent alleging that on or about July 25, 1980, respondent discharged Bush contrary to Section 105(c)(1) (FOOTNOTE 1) of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act") for exercising his statutory rights under the Act.

Respondent answered that Bush was not a miner as defined in the Act, and that respondent discharged complainant because of insubordination, refusal to carry out work assignment, and for making threatening and derogatory remarks and gestures toward the plant superintendent. Additionally, respondent denies that there is jurisdiction of the Act in these proceedings.

At the commencement of the hearing, respondent moved to dismiss the proceedings on the following grounds: (1) that procedural rule 41 (FOOTNOTE 2) requires that prior to the issuance of a discrimination complaint the Secretary must file a written determination of violations and that the complaint must be filed within 30 days of that determination. Since no such written determination was served on the respondent, there was no jurisdiction to issue the complaint; and (2) that MSHA has no jurisdiction over respondent's facility because it is not a "mine" within the meaning of the Act.

FINDINGS OF FACT

1. At all times relevant to these proceedings, respondent operated a facility for processing vanadium. The facility is hereinafter referred to as the "Rifle Plant".

2. Vanadium is contained in an ore that is mined or extracted from the ground. After the vanadium ore is processed at another location, respondent's Rifle Plant receives the vanadium in a concentrated liquid solution shipped in by truck.

3. At the Rifle Plant the concentrated liquid solution is made into several finished products, including modified vanadium oxide.

4. For several years prior to July 1980, sulfuric acid arrived at the Rifle Plant by railroad tank car, and the acid was unloaded from the railroad tank cars into storage tanks. In July, 1980, it became necessary to change the procedure so as to off load sulfuric acid from tank cars into tank trucks and from tank trucks into storage tanks. It was also necessary to load the acid from storage tanks into tank trucks.

5. After the railroad tank car arrives at the plant, the acid is removed by means of compressed air piped into the tank cars which forces

the acid into the trucks. The pipe from the rail car empties acid into a manhole on top of the tank truck.

6. As the compressed air forces the acid into the truck, there is a "blow back" when the tank car empties all the acid into the truck, and the air is still being blown into the man hole on top of the truck. The "blow back" causes acid to spray out of the manhole.

7. Complainant was a heavy duty auto mechanic employed for about five years as such by respondent at the rifle plant. As part of complainant's duties he was asked by a supervisor in July, 1980, to participate and learn the procedure for unloading sulfuric acid.

8. The first sulfuric acid was loaded onto trucks on July 21, 1980. The complainant complained to a supervisor that there was a lack of valves in the procedure for unloading the acid, there were some leaks of acid, the air pressure regulator was working improperly, and that there was possible "blow back" of acid from the truck.

9. On July 22, 1980, there were two leaks of acid in the line to the tank truck and both leaks were fixed. On the same date the acid "blow back" problem was rectified by leaving an amount of acid in the railroad tank car so that air pressure would not blow into the truck unless it was forcing acid into the manhole. This would prevent the acid from blowing back on the workers.

10. On July 22, 1980, complainant was to participate in "breaking in" or learning to unload the acid from trucks coming in, but he informed the mine maintenance foreman that he was not going to do it, that it was unsafe and it always had been, and, besides, it was not his job.

11. On July 23, 1980, an employee of the respondent had received an "acid splash" while in the process of unloading acid.

12. On July 23, 1980, at the office of complainant's supervisor, complainant was asked what the safety hazards were in regard to unloading acid. Complainant mentioned several problems and complainant's supervisor discussed each one as having been taken care of already. The supervisor then asked complainant to unload acid, but complainant refused stating that it was unsafe, and it was not his job. Complainant did not state as to what was now unsafe in regard to unloading the acid.

13. On July 24, 1980, complainant was again asked by his supervisor to continue "breaking in" on the acid unloading work with another employee. Complainant said he would go to the area and observe, but that he would not do anything further. The plant manager, who was standing nearby, then told complainant that complainant was suspended for failure to do his job.

Complainant than said that acid loading was not his job, and it was unsafe.

The plant manager stated he would not discuss the safety matter with complainant and ordered him to leave. Confronting the plant manager as complainant was leaving, complainant stated, "You mousey little bastard, I ought to break your fucking nose." After other comments were exchanged, complainant left the property.

14. Complainant received a letter on July 25, 1980, instructing him that his employment with respondent was terminated, because of insubordination, refusal to carry out work assignments, and for making threatening and derogatory remarks and gestures toward the plant superintendent.

ISSUES

1. Did the Commission lose jurisdiction of this case if the Secretary failed to file a written determination that a violation occurred and did not serve it on respondent within 30 days before the discrimination complaint was filed?

2. Does the Act give the Commission jurisdiction over a plant that does nothing more than process vanadium which is received at the plant in a concentrated liquid solution form?

3. Did respondent violate Section 105(c)(1) of the Act when respondent terminated complainant's employment on July 25, 1980?

DISCUSSION

Respondent asserts that a condition precedent to the filing of a discrimination complaint by the Secretary is that a written determination that a violation occurred must be made by the Secretary. Respondent assumes that since no such written determination was served on the respondent, the condition precedent had not been followed and, therefore, there was no jurisdiction to issue the complaint.

The respondent overlooks the fact that procedural rule 41 does not state that the written determination must be served on the respondent. Indeed, the rule is silent as to what, if anything, is to be done with the written determination. In any event, the requirement that the Secretary file the complaint within 30 days of the written determination is for the benefit of the miner on whose behalf the Secretary is to file a complaint. This provision in the rule acts to insure that the Secretary take prompt action in filing the complaint. Therefore, I find no merit in respondent's argument.

Respondent also asserts that the Act does not provide for jurisdiction over its Rifle Plant, because the operation of the plant fails to meet the definition of a "mine". Respondent argues that the facility is merely a chemical processing plant and not a "coal or other mine" as defined in Section 3(h)(1) of the Act.

Although the vanadium processed at the rifle plant arrives in a concentrated liquid solution which is shipped in by truck, it is undisputed that vanadium comes from ore which is mined or extracted from the ground. It is also undisputed that vanadium is a mineral. Section 3(h)(1) states in pertinent part as follows:

> "Coal or other mine" means . . . (C) . . . facilities, equipment, machines, tools, or other property . . . used in . . . the work of preparing . . . other minerals . . .

The definition is broad enough to include the operations of the Rifle Plant. Vanadium is a mineral and the facilities at the plant are used in the work of preparing the mineral into several saleable products including vanadium oxide. Accordingly, I find that the rifle plant is a "mine" according to the definition contained in the Act, and that the Commission has jurisdiction over the parties and subject matter of these proceedings.

The principles to be followed in deciding the remaining issues in this case are those set forth in two leading cases: Secretary of Labor, on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) and Secretary of Labor, Mine Safety and Health Administration (MSHA), ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Thus, the following questions must be answered in order to determine whether or not the respondent violated section 105(c)(1) of the Act when it fired the complainant.

1. Did complainant engaged in protected activity?

2. If so, was the firing of the complainant motivated in any part by the protected activity?

3. If complainant was engaged in protected activity and respondent fired complainant partially because of that protected activity, was respondent also motivated to fire complainant because of any unprotected activity of the complainant?

4. Would respondent have fired complainant in any event because of unprotected activity?

5. In refusing to unload acid, did complainant have a good faith reasonable belief in a hazardous condition and, if so, was complainant's honest perception a reasonable one under the circumstances of this case?

The complainant did engage in protected activity in that he complained that the new procedure for unloading acid was unsafe. The complaint was made to complainant's supervisor on several occasions, and including July 24, 1980, the day complainant was suspended. A safety complaint involving a condition adjudged by the miner to be unsafe constitutes conduct protected by the Act.

Since complainant did engage in protected activity, the next question is whether the firing of complainant was motivated in part by the protected activity. In order to answer this question, it is only necessary to restate the wording contained in the letter dated July 25, 1980, from respondent directed to complainant informing him that he was terminated effective immediately for the "totality of your conduct on Thursday July 24, 1980, including insubordination, refusal to carry out work assignments, and for making threatening and derogatory remarks and gestures toward me [plant superintendent]."

The letter states that part of the reason for complainant's termination was he refusal to carry out work assignments. The work assignments in question was the assignment to continue "breaking in" on the work of unloading sulfuric acid. Complainant was referring to this assignment when he stated that the work was unsafe and not his job. I conclude that the firing of complainant was motivated in part by complainant's protected activity.

Respondent was also motivated to fire complainant because of complainant's unprotected activity. Again, referring to respondent's letter to complainant dated July 25, 1980, respondent cites insubordination, and making threatening and derogatory remarks and jestures toward the plant superintendent as additional reasons for complainant's termination of employment. These activities were not protected by the Act and according to respondent's letter, they were part of the reason for complainant's termination.

The evidence does not support a conclusion that respondent would have fired complainant in any event because of unprotected activity. Respondent argues that complainant would only have been suspended for refusing to unload acid but was fired only for reasons unprotected by the Act, namely, for his abusive treatment of the plant superintendent. However, both respondent's letter of July 25, 1980, and the testimony of the plant superintendent contradict that assertion. The letter mentions complainant's refusal to carry out work assignment as a ground for termination. The plant superintendent against whom complainant made the abusive remarks testified that "we will not do anything in the heat of an incident other than to suspend."

In refusing to continue to "break in" on the work of unloading the acid on the basis that it was unsafe, complainant's perception was not a reasonable one under the circumstances of this case. In addition to stating to his supervisors several times that the work was unsafe, complainant also stated that it was not his job to do it. Complainant's job classification was

heavy duty auto mechanic, and the evidence shows that it clearly was his duty to work on unloading acid.

When safety complaints were made by complainant in regard to the new procedures for unloading acid, the evidence shows that those complaints had been acted upon by the respondent. The problems including "blow back" of acid while loading the trucks, and the problem of acid leaks while disconnecting lines had been rectified.

After the solution of all the complaints had been explained to complainant in his supervisor's office on July 24, 1980, complainant was again asked to break in on the work of unloading the acid. Complainant again refused, stating that it was unsafe, but when he was asked in what way it was unsafe, complainant offerred no explanation. Complainant also stated, as he had before, that "besides, its not my job." The only conclusion I can come to is that complainant would not unload acid under any circumstances. The evidence left no doubt that unloading acid is a dangerous job, but when all precautions have been taken, it does not mean that an employee may safely refuse to do the work under the protection of the Act.

Under the circumstances of this case complainant's refusal to work in unloading acid cannot be considered reasonable.

CONCLUSION OF LAW

Complainant has failed to prove by preponderance of the evidence that respondent violated section 105(c)(1) of the Act when it discharged complainant on July 25, 1980.

ORDER

The complaint is dismissed.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 105(c)(1) reads in pertinent part "No person shall discharge . . . any miner . . . because such miner . . . has . . . made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine . . . ."

~FOOTNOTE_TWO

2 Section 2700.41 When to file.

(a) The Secretary. A complaint of discharge, discrimination or interference shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.