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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

CHARLES H. SISK,  
COMPLAINANT

v.

E.R. MINING, INC.,  
D.B.A. E.R. TRUCKING, CO.,  
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 87-212-D  
MADI CD-87-3

Charolais No. 1 Mine

DECISION

Appearances: Daniel N. Thomas, Esq., Thomas & Ison, P.S.C., Hopkinsville,  
Kentucky for Complainant;  
Pam Corbin, Esq., Little & Corbin, Madisonville,  
Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Charles H. Sisk under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that he was discharged by E.R. Mining, Inc., (E.R.) in September 1986 in violation of section 105(c)(1) of the Act. (Footnote 1)

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In order to establish a prima facie violation of section 105(c)(1) Mr. Sisk must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co. 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). A miners "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir.1982); Robinette, supra. The case law addressing work refusals also contemplates some form of conduct or communication manifesting an actual refusal to work. See e.g. Sammons v. Mine Services Co., 6 FMSHRC 1391 (1984).

In this case the Complainant, Mr. Sisk, alleges that on September 23, 1986, at approximately 4:00 p.m. he was fired for refusing to operate a truck which he considered unsafe in that it purportedly had no brakes.

The evidence shows that after his arrival at work around 4:00 p.m., on September 23, 1986, Mr. Sisk asked contract mechanic Bill Rider to adjust the brakes on one of the haulage trucks. Adjusting the brakes on these trucks is relatively simple, requires only 5 to 10 minutes and is a procedure that many of the drivers perform themselves. According to Rider, Sisk knew or should have known because of his experience as a truck driver, of the simplicity and brevity of the procedure. As Rider was nearly finished adjusting the brakes on the one truck Sisk reappeared, told Rider that he was working on the wrong truck and asked Rider to then adjust the brakes on another truck identified as "Uke 51". Rider responded that he would "get to it in a minute". According to Rider, Sisk was "loud and abrasive" used profanity and was "awfull ill" toward him. Rider completed the brake adjustment on truck No. 51 in about 10 minutes but Sisk never returned.

Although Rider believed that the brakes on truck No. 51 needed no adjustment he nevertheless tightened them to satisfy Sisk. He observed that the truck had been driven the previous Saturday, Monday and earlier that same day and he received no

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complaints about the brakes. Rider concluded moreover that Sisk could not have known the condition of the brakes that afternoon because he had not yet even driven the truck.

According to the joint stipulations of fact submitted in this case, upon being told by Rider that he would complete the brake adjustment on the first truck before proceeding to the second truck, the Complainant "lost his temper and began complaining to Tommy Beddow [the day shift foreman] in a loud and excited voice about working conditions, including the conditions of the brakes." According to the stipulations the following then occurred:

Claimant left the area in which Mr. Rider was working and approached Tommy Beddow, complaining that the brakes were bad on the spare truck but instead of working on it, Mr. Rider was working on another truck. Claimant told Tommy Beddow that, in the condition that the brakes were in, the risk existed that he could run the spare truck into a piece of equipment or an employee because of his inability to stop it. Claimant was loud and abrasive in his speech toward Tommy Beddow and as he did not want claimant operating the spare truck in the mood that he was in, claimant then went to talk to mine superintendent, Jimmy Beddow, and he sent claimant home. Claimant asked him if he were to return the next day and Mr. Beddow told him that he would be contacted. Claimant was discharged on September 25, 1986.

Thomas Beddow testified that he had just emerged from the pit area upon completion of the first shift and pulled up to the truck area when Sisk began complaining angrily that Rider was adjusting the brakes on the wrong truck. Sisk was in a "bad mood" and was "pretty upset". Sisk yelled at Beddow that he was "going to kill somebody" if he had to run the truck without brakes and Beddow yelled back "well don't get in it and don't run it". According to Beddow, Sisk never refused to drive the haulage truck but suddenly drove off in his own truck. Beddow claims that he neither fired Sisk nor told him to go home. He assumed that by driving off the job Sisk just quit.

Later, Mine Superintendent James Beddow reported that Sisk had asked him if he was to return to work the next day as if there was no other work for him that day. A day or so later there was meeting at which James Beddow told Sisk he was "not going to have someone tell him when and how to operate his business." According to Thomas Beddow, Sisk had a bad attitude,

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would drive the trucks too fast, would "drowse-off" on the job, and was frequently "run down and tired" apparently from working two jobs.

James Beddow testified that Sisk was "an average worker" but often drove too fast, would sleep on the job and was generally worn out. According to Beddow, Sisk did not wait long enough to find out what other work was to be done but rather was already prepared to leave the job. James Beddow met with Sisk on the 25th of September and then discharged him primarily because of Sisk's "attitude with his employees". Beddow did not want Sisk to "get away with" talking to his employees and supervisors in an abusive manner.

Sisk testified that under normal preoperation procedures the drivers test the brakes on the way to the pit. If the brakes are then working properly management would be asked to adjust them. Because of a tire blow-out on his regular truck (No. 56) a week earlier, Sisk had been assigned truck No. 51. Sisk claims that he had driven truck No. 51 the previous Friday, Saturday and Monday, and found that "there weren't any brakes on it". According to Sisk, truck No. 51 had on three prior occasions backed over the edge of the pit area because of inadequate brakes. He purportedly complained of this to both of the Beddow brothers. Sisk also claims that on the day before the 23rd the brakes were still inadequate.

On September 23rd, Sisk was at the job site a few minutes before his 4:00 p.m. shift. Sisk says that he asked Rider to adjust the brakes on one truck but later realized it was the wrong truck. Rider told him he would adjust the brakes on the second truck in "just a minute." Sisk nevertheless complained to Beddow that the adjustment would not help even though the brakes were admittedly out of adjustment. Sisk maintains that he told Beddows that he "really did not want to run the truck until the brakes were fixed" but does not claim that he was told to drive the truck before the adjustment. Tommy Beddow reportedly then told him to get "the hell out of here and don't come back" Sisk did not ask for alternative work. When he reappeared for the meeting on September 25th, Tommy Beddow said "he could not have anybody tell him how to run his business and needed a man who would give him 100 percent".

Sisk testified that he had never been insubordinate but admitted talking in a loud voice because he was purportedly wearing ear plugs. On cross examination Sisk admitted that it was company policy to note any problems on your vehicle on your time card or tell management of the problem. He claims that he

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did not follow this procedure on September 22nd because no action had been taken on his reporting a defective tire on truck No. 56 and he did not believe it would do any good. He also claims that management was told about the defective brakes so there was no reason to write it down. Sisk explained that on September 23rd he thought an adjustment of the brakes on truck 51 would however correct the problem.

According to Roy Poole, Sisk's supervisor on the second shift, truck No. 51 was to be checked out by Sisk before it was operated and if any problems developed the procedure would be to report them to Poole. Sisk never did report any brake problems to Poole nor to anyone else between September 20 and September 23. Poole denied that Sisk had had any problems backing into soft ground at the pit area around this time but rather those problems had occurred when he first started on the job months earlier.

Poole was also at the job site on Tuesday, September 23rd, before the shift began. He directed Sisk to drive truck No. 51 and Sisk asked if he could drive one of the other trucks. Poole advised Sisk that "just because you are a senior man you don't get to drive somebody else's truck." According to Poole, Sisk was cursing and proceeded to the area where Rider was working. Poole later again talked to Sisk and Sisk again requested to drive another truck. Poole acknowledged that truck No. 56 was a better truck with better brakes and a better engine but that it was then being repaired. Poole testified that Sisk never complained about truck No. 51 being unsafe but complained that it was "a damn pile of junk". Poole had had problems with Sisk sleeping on the job and noted that he was often completely exhausted. On occasion he had to remind Sisk to slow down.

Within this framework it is apparent that there is not even sufficient evidence to show that the Complainant engaged in a work refusal. According to the credible testimony of the day shift foreman, Thomas Beddow, Sisk angrily approached him as the second shift was about to begin on September 23rd, and complained that the mechanic was adjusting the brakes on the wrong truck. At one point Sisk, yelled at Beddow that he was going to kill somebody if he drove the truck and Beddow responded--"well don't get in it and don't run it". Shortly thereafter and without determining whether the brakes on his assigned truck had been adjusted Sisk just drove off the premises in his own truck.

In any event, even assuming, arguendo, that Sisk did refuse to drive the subject truck it is clear that he could not have then entertained either a reasonable or a good faith belief that



exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.