

CCASE:
LARRY E. BURNS v. D.H. BLATTNER & SONS
DDATE:
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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

LARRY E. BURNS,
COMPLAINANT

v.

D.H. BLATTNER & SONS, INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. WEST 90-166-DM
MD 89-118

Basin Creek Mine

DECISION

Appearances: Eula Compton, Esq., Bozeman, Montana,
for Complainant;
Thomas E. Hattersley III, Esq., Michael S. Lattier,
Esq., GOUGH, SHANAHAN, JOHNSON & WATERMAN, Helena,
Montana,
for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) (herein the Act). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) under section 105(c)(2) of the Act was dismissed.

Complainant contends that he was discharged on August 13, 1989, for refusing to drive an unsafe truck. (I-T. 72-73).

Respondent contends inter alia that Complainant did not make safety complaints and was discharged for abuse of equipment and unacceptable behavior.

Complainant contends that he informed his foreman Ted Roberts of three separate safety concerns he had with respect to the "A" model truck No. 583 (with 3-speed automatic transmission) which he was directed to drive on the day he was discharged (August 13, 1989) involving the transmission, the canopy, and exhaust fumes. (I-T. 42).

Respondent (1) denies that any safety concerns were communicated by Complainant Burns to any of Respondent's management personnel on the day he was terminated (I-T. 26) and (2) contends that he was discharged primarily for abuse of equipment (II-T. 104, 114, 126, 130, 176) together with his belligerent conduct toward supervisors and his unexplained refusal to drive Truck No. 583 (II-T. 104, 126, 130, 150, 176-177, 202-203, 214).

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Order Substituting Estate.

The Complainant, Larry E. Burns, passed away subsequent to the hearing in the matter. (Footnote 1) It appears that his estate was opened on April 1, 1991, under a special administrator who has requested an order substituting the estate for the decedent as a party in this matter. Respondent, having no objection (see Complainant's motion received April 12, 1991), the Estate of Larry Burns is hereby substituted as complainant in this section. See Secretary of Labor v. Metric Constructors, Inc., 4 FMSHRC 791, 808 (April 1982). Rule 25(a) F.R.C.P.

It is well-established that the Act is remedial and clothed in the public interest. Since the remedy provided for a discriminatee represents reimbursement of a lost property right, i.e., back pay, it is found to survive his death and to be subject to an award in an action brought by the appropriate government agency on his behalf. See Secretary of Labor v. Metric Constructors, Inc., 4 FMSHRC 791, 808 (April 1982).

FINDINGS (Footnote 2)

A. GENERAL

Respondent at material times was a Minnesota corporation engaged in highway, mining, and heavy construction and was the mining contractor for the Basin Creek open pit gold mine engaged in constructing roads, leach pads, pad extensions and ponds, and excavating and hauling ore from pits.

Complainant Burns was hired by Respondent on July 10, 1989, as a haul-truck driver (I-T. 57) and was discharged on August 13, 1989 (I-T. 74).

In August 1989, Respondent's management personnel at the mine site were Superintendent Lance Power, overall operational Foreman Rusty Giulio, Head Mechanic Randolph R. "Randy" Wiener, and Ted Roberts (who served as acting foreman when Rusty Giulio was absent). (I-T. 57, 58, 60; II-T. 6, 19, 140).

On August 13, 1989, Complainant Burns was assigned to drive truck No. 583, a spare truck (I-T. 215). His normally assigned truck was No. 589 (I-T. 32) which had "broken down" and was "being worked on." (I-T. 215). (Footnote 3) His work assignment to haul overburden (common excavation) from the leach pad extension to a dump one-half mile away. (I-T. 32, 215, 218).

On August 13, 1989, Complainant's immediate supervisor was leach pad foreman Ted Roberts. (I-T. 57, 214; II-T. 140). The hours of his shift were 6 a.m to 4:30 p.m. (I-T. 147, 214) seven days a week. On this day, when Mr. Roberts assigned Mr. Burns to drive Truck 583, Mr. Burns made no complaint about driving it. (I-T. 84, 85, 216). Mr. Burns had operated the truck on two or three prior occasions (I-T. 35-36, 75). When Mr. Roberts made the assignment, he told Mr. Burns that 583 was an older truck and was the only one available, and thus Mr. Burns "could take it

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easy" and didn't have to "cycle," i.e., keep up with another truck. After Mr. Burns had been making his runs on a fairly regular schedule, at some point he did not show up, and Mr. Roberts got in his pickup and drove up the haul road looking for along his route. (I-T. 217-218).

After hauling overburden for one and one-half hours, Complainant parked the truck allegedly because "the canopy on the truck was unsafe" (I-T. 32) and he was due to start working in a more dangerous area called the PPD. (I-T. 85).

Before Mr. Roberts found Complainant, a significant incident happened resulting in a conversation between Complainant and Head Mechanic Wiener.

Mr. Wiener was on the haul road near the maintenance department and saw Complainant pull off the road and talk to another truck driver. After finishing the talk, Complainant "let the truck roll back . . . revved the engine up and dropped it into first gear and took off." When he dropped it into first gear, the front of the truck raised up on the suspension approximately six inches. (II-T. 19, 24-27). The truck had a full load at the time. Complainant then drove off. On what appears to be the Complainant's next load, Mr. Wiener stopped him and told him that he (Mr. Wiener) didn't want him to do that again, and that if it happened again, Complainant would be sent home, to which Complainant responded, "Do me a favor." Mr. Wiener gave this account:

A. He told me, do him a favor. That was his words.

Q. Did he say anything else to you?

A. No, he didn't.

Q. Did he say anything about why he started the truck that way, why he revved it up and put it into gear?

A. No.

Q. Did he say anything to you about problems or concerns that he had with the safety of the truck?

A. No, he didn't.

Q. Did he say anything to you about a hole in the canopy or problems with the exhaust?

A. No.

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Q. So the only thing he said to you was, "Do me a favor."?

A. Yes.

Q. What did he do after that?

A. What did I do or what did he do?

Q. What did Larry do after that. Did he drive off?

A. He drove off, yes. (II-T. 21).

On August 13, 1989, Mr. Wiener was not aware of problems with Truck 583 and in his conversation with Complainant on that date, Complainant made no safety complaints or reference to problems with the truck (II-T. 35, 42, 75-79, 83). Mr. Wiener did not authorize Complainant to park the truck (II-T. 49).

Later in the day in a conversation with Mr. Roberts, Mr. Wiener learned that Mr. Roberts had sent Complainant home, and that evening Mr. Wiener received a call from Rusty Giulio (II-T. 48) inquiring if he had observed Complainant abuse the truck. (Footnote 4) At this point, Mr. Giulio had not made up his mind about discharging Complainant. (II-T. 23) (Footnote 5)

At approximately 7:30 a.m. (I-T. 220), Mr. Roberts came upon Mr. Burns approximately midway along the one-half mile route between the leach pad and the dump--near a junction of haul roads and near the employee parking lot. (I-T. 218, 222). Mr. Roberts remained in this pickup and Mr. Burns approached him in agitated fashion, stating as he came up, "I am not driving that piece of

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s___ anymore." Mr. Roberts credibly denied that Mr. Burns expressed any safety problems or concerns with truck 583 in this conversation. (I-T. 219, 220, 228). (Footnote 6)

Mr. Roberts replied to Mr. Burns that "If you are not going to drive the truck, then you'd just as well take your stuff and go home." Mr. Burns made no offer to do other work. (I-T. 220). Mr. Roberts had no other work for Mr. Burns to do. (I-T. 120, 214, 215, 220, 222, 223).

Complainant, whose testimony I have found unreliable, testified that he gave Mr. Roberts three reasons for not driving the truck, i.e., "the canopy, the transmission, and the smoke from the exhaust." (I-T. 42). (Footnote 7)

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After Mr. Burns left, two other employees (oilers) approached Mr. Roberts and asked him what had happened. Mr. Roberts told them that he had sent Larry Burns home and they informed Mr. Roberts that Head Mechanic Randy Wiener had, just previously, "jumped" Mr. Burns about abusing the truck. (I-T. 221). As above noted, later in the day Mr. Roberts discussed the matter with Randy Wiener who confirmed "he had said something" to Mr. Burns about abusing the truck, i.e., revving it up and dropping it into gear. (I-T. 223).

That evening Mr. Roberts called Rusty Giulio and advised him of the problem he had with Mr. Burns, of what Mr. Wiener had told him, and that he had sent Mr. Burns home "because he refused to drive the old truck." (I-T. 224). Mr. Roberts also mentioned the language Complainant used in referring to the truck (II-T. 147). Mr. Giulio then contacted Randy Wiener and discussed the truck abuse incident. He also called Superintendent Lance Power and told him what he heard about the incident. Mr. Power advised Giulio to do "whatever was necessary." (II-T. 149).

Giulio then telephoned Complainant to discuss the matter, and get Complainant's "side of the story." (II-T. 149, 168). (Footnote 8) Giulio recounted the conversation as follows:

A. I said I had heard there was a problem on the job today, and he said, "Yeah, there was, I'm not going to run that piece of s___."

Q. He used the same language as with Mr. Roberts?

A. That's correct.

Q. What did you reply?

A. I said, "If you're not going to run a truck, then I guess we don't have any use for you."

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Q. Did you discuss the abuse he had done to the equipment?

A. No, he hung up on me then. (Footnote 9)

* * * * *

Q. Was he hostile in talking with you?

A. Yes, he got a little heated.

Q. At any time during your discussion with Mr. Burns .
. . did he raise any concerns to you at all about the
condition of the truck or any safety and mechanical
problems whatsoever?

A. No. At no time that Larry worked on the mine site
did he ever raise questions concerning safety. (II-T.
149-150).

Mr. Giulio, whose testimony I credit over that of
Complainant Burns for the reasons indicated in this decision,
also indicated that Complainant did not, during his conversation,
tell him anything to justify his actions (II-T. 150), and that
his impression was that Complainant simply was not going to drive
the truck. Thus, on cross-examination he gave these answers:

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Q. Had he agreed to drive the truck, would he have come in the next day?

A. He wasn't going to drive it. As far as I could get out of him, he wasn't going to drive the truck anyway.

Q. My question is, if he agreed to drive the truck, would you have said, "Show up at 6:00 tomorrow?"

A. Yes.

Q. You didn't inquire what his complaints were at all as to the truck?

A. No, we didn't get that far. (II-T. 168-169).

Mr. Giulio denied ever giving Complainant authority to rev up the truck and drop it into gear. (II-T. 151). Mr. Giulio's primary reason for terminating Complainant was for "abuse of equipment (II-T. 150-151). He also took into consideration Complainant's "conduct toward the other supervisors and personnel and his attitude basically was smart and belligerent, and also for the refusal to drive a truck." (II-T. 150-151).

Truck No. 583 on August 13, 1989, was unsafe. (Footnote 10) (I-T. 175-176; Ex. C-1 to C-9; II-T. 129). On August 13, 1989, supervisorial personnel Roberts, Wiener, and Giulio were unaware of the unsafe condition of Truck 583. (I-T. 216, 220, 229, 231; II-T. 9-10, 13, 35, 184).

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B. RESPONDENT'S POLICIES AND PROCEDURES

Respondent at material times had no "formal step" disciplinary procedure or structured termination policy. (II-T. 135).

Respondent relies to a considerable extent on so-called "bitch slips" (shift tickets) to identify problems with equipment. Equipment operators, including truck drivers, are required to fill out bitch slips after each shift whether or not a truck has problems, and a lack of problems is indicated by checking a box thereon labeled "satisfactory." (I-T. 76, 103-104, 109-110; II-T. 11-12). The majority of bitch slips which were turned in contain no request for repairs. (II-T. 97).

Under Respondent's maintenance program, approximately 50 percent of equipment problems are detected through inspection. Significantly, the rest are discovered through the participation of equipment operators and drivers who either fill out shift tickets, inform their supervisor, or bring equipment directly to Chief Mechanic Randy Wiener and his personnel. (I-T. 76, 109, 112; II-T. 7-14, 87-88). (Footnote 11)

Complainant, a short time prior to August 13, 1989, had brought his regularly assigned truck (No. 589) directly in to the maintenance shop for repairs and, at that time, referred to it as "a piece of s___." It was repaired immediately. (II-T. 16-18). It is inferred from this and other evidence (I-T. 55, 77) that (a) Complainant knew he could have had the canopy on No. 583 repaired on August 13, 1989, by taking the truck directly to the maintenance shop, and (b) Complainant, in conversations with management personnel, repeatedly referred to the equipment he was assigned to drive as a "piece of s___," or other disparaging way. In this connection, it is noted that Complainant conceded at hearing that he was not aware of a single person who was ever fired by Respondent because of having made a safety complaint about equipment. (I-T. 76).

C. RESOLUTION OF CREDIBILITY

I have generally credited the testimony of Respondent's witnesses over the testimony of Complainant with respect to whether Complainant made a safety complaint to Leach Pad Foreman Roberts

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on August 13, 1989, and whether supervisors Rusty Giulio and Randy Wiener were aware of any safety problems with Truck 583. Specifically, I have credited the denials of Roberts, Wiener, and Giulio (1) that Mr. Burns made safety complaints about the truck on August 13, 1989, and (2) that they were aware of safety problems, including the hole in the canopy, at the time Complainant Burns was discharged.

Based on observation at the hearing of the demeanor of the witnesses, the various reasons appearing in this decision, and the convincing testimony of Respondent's witnesses, the accounts of Complainant Burns have been determined not to carry the same degree of reliability as those of Respondent's primary witnesses, Roberts, Giulio, and Wiener.

Additional factors weakening Complainant's testimonial trustworthiness follow.

Respondent established prior instances where Complainant had quit a number of jobs when he had "cash in hand" and was dissatisfied with working conditions. Thus, he quit one truck-driving job after three months because he felt the trucks were "junk." He quit another truck-driving job after five months because he was unhappy with his tax burden while his sister was on welfare. He quit another job partly because of what appears to be problems with other persons and threats. (I-T. 80-85). (Footnote 12)

Although Complainant testified that being assigned to work in the PD-44 area (an hour or so after he had commenced work on August 13, 1989) increased the danger of driving the truck, (I-T. 32, 78), he thereafter saw Randy Wiener and made no safety complaint to Mr. Wiener, much less asking that the truck be repaired--a procedure he accomplished previously and which, I infer from this record, would have been feasible for him to have followed on the day he was discharged had he had genuine safety concerns. (I-T. 83-87; II-T. 16-18).

Complainant considered refusing to drive Truck 583 the first time he was assigned to do so in July 1989. (I-T. 69). He also considered complaining about it another time before August 13, 1989 (he only drove the truck two or three times during his 31-day employment) but alleged he thought he might be discharged if

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he did. (I-T. 69, 76). Yet, he admitted he was not aware of anyone being discharged for making a safety complaint about equipment. (I-T. 76). (Footnote 13)

DISCUSSION AND ADDITIONAL FINDINGS

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity, and (2) 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., and 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. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

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The disposition of this case turns on whether Complainant's refusal to drive the truck was based on a belief (and reasonable communication) that the truck was unsafe or whether it was due to some subjective reasons and attitude, and whether Complainant communicated any safety concerns to management personnel prior to being discharged and, assuming that he did, whether he was discharged for this protected activity or for the reasons assigned by Respondent, meaning his non-protected activities, abuse of equipment, insubordinate conduct, (Footnote 14) and unexplained refusal to drive the truck.

Under the Mine Safety Act, discriminatory motive may not be presumed but must be proved. *Simpson v. Kenta Energy, Inc. and Jackson*, 8 FMSHRC 1034, 1040 (1986).

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom *Donovan v. Phelps Dodge*, 709 F.2d (D.C. Cir. 1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398-1399 (June 1984). The instant record contains no reliable direct evidence that Respondent was illegally motivated nor does it support a reasonable inference of discriminatory intent.

In reaching the conclusion that Complainant failed to establish a prima facie case by failing to establish that his discharge was discriminatorily motivated, consideration also has been given to the fact that the instant record does not reflect a disposition on the part of Respondent's management personnel, individually, or collectively, to engage in such conduct. A history of, or contemporary action indicating antagonism or retaliatory reaction to the expression of safety complaints was not shown.

Although not elaborated on herein, Respondent established in this record that it has at least a reasonable approach to safety and that operators and drivers are encouraged to bring safety

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problems into its repair shop immediately and directly for repair. (I-T. 16, 108-110, 112-114, 131-132, 140, 224-226; II-T. 7-10, 13, 36-37, 87, 88).

Further, I have credited the version of the facts of Respondent's supervisorial witnesses with respect to the question of whether Complainant made safety complaints concerning Truck No. 583 on August 13, 1989, and find that no such complaints were registered. (Footnote 15) Thus, in this respect also, Complainant failed to establish the prerequisites of a prima facie case under the Act, since the unexplained work refusal is not an activity protected under the Act. *Dillard Smith v. Reco, Inc.*, 9 FMSHRC 992 (June 1987).

Finally, even assuming for the sake of argument that such complaints were made, Respondent established by a preponderance of credible and reliable evidence that its reasons for discharging Complainant were his abuse of equipment together with his hostile conduct and approach to driving Truck No. 583. (Footnote 16) Stated another way, Respondent carried its burden--even under the hypothesis that a safety complaint had been made--that it was motivated by Complainant's unprotected activities and that it had good reasons and would have taken the adverse action in any event for such.

It is concluded that Complainant Burns was discharged for the reasons assigned by Respondent, abuse of equipment, together with his accompanying belligerent attitude and conduct toward his supervisors and the circumstances of his refusal to drive Truck No. 583. It is further found that Respondent's management had

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sufficient basis in terms of both business and disciplinary reasons to justify the discharge of Complainant.

As the Commission stated in *Bradley v. Belva Coal Company*, 4 FMSHRC 981, 991 (June 1982): "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

The record in this matter is convincing that Respondent was motivated for the reasons and justifications it claims. Complainant's evidence was not found to be persuasive that his discharge was due in any way to any alleged expression of safety complaints.

CONCLUSIONS

Respondent's motivation in discharging Complainant was for his unprotected activities and the decision to take such adverse action was justified. This adverse action was not wholly or in part discriminatorily motivated. Thus, Complainant has failed to establish a prima facie case of discrimination under Section 105(c) of the Mine Act.

Even assuming arguendo, that it was established by a preponderance of the reliable probative evidence, that Complainant's discharge was motivated in part by protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by Complainant's unprotected activities and that it would have taken the adverse action in any event for such. *Gravelly v. Ranger Fuel Corp.*, 6 FMSHRC 729 (1984).

ORDER

Complainant, having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. The Federal Mine safety and Health Act contains no provision with respect to whether the claim of an employee for back pay and other monetary remedies survives his subsequent death. With some few exceptions, the federal statutes contain no express provisions for survivability of causes of action in the federal courts (1 Am. Jur. 2d, Abatement, Survival and Revival, S 112, p. 128), and where no specific provision for survival is made by federal law, the cause survives or not according to the common law. At common law, the basic principle of survivability is that survivable actions are those in which the wrong complained of affects principally property and property rights,

including monetary interests, and in which any injury to the person is incidental, whereas nonsurvivable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental. *Pierce v. Allen B. Du Mont Laboratories, Inc.*, 297 F.2d 323 (3d Cir. 1961); 1 Am. Jur. 2d Abatement, Survival and Revival, S 51, p. 86.

2. The hearing was held on two hearing days, January 30 and 31, 1991. For both days of hearing there is a separate transcript beginning with page one. Accordingly, the transcript citations will be prefaced with "I" and a "II" for January 30 and January 31, respectively.

3. No. 583 was an "A" model with a three-speed automatic transmission; No. 589, a "B" model, was equipped with an automatic seven-speed transmission. (I-T. 32, 76, 215; II-T. 152).

4. Complainant's action in revving up the engine of the truck "real high" and throwing it into gear, as observed by Mr. Wiener, is found to constitute severe abuse of the power train (I-T. 224; II-T. 20, 24-32) which could have resulted in repair costs of \$5,000 to \$15,000. (II-T. 31, 32).

5. The record is clear that Mr. Roberts' sending Complainant home earlier did not constitute a discharge.

6. Mr. Roberts explained the reasons for his certainty in this connection:

Q. You have stated that Larry Burns just described this truck in general terms, and you have stated that he did not tell you about any of the problems with the truck.

A. No, he didn't.

Q. Are you sure that he didn't, or do you not recall him doing so?

A. I am sure he didn't, and the reason that I am sure is because it was brought to my attention the first thing the next morning.

Q. Who was that brought to your attention by?

A. Lance Power asked me what had taken place, and he wanted to know word for word of what he said, because an MSHA inspector was coming on the job. (I-T. 228).

7. Of the three reasons allegedly given to Mr. Roberts, the hole in the canopy was the most serious. After being discharged in the evening of August 13, 1989, Complainant made a complaint to MSHA and the following day (August 14) two citations were issued on the canopy and transmission, and on August 16, a citation was issued on the exhaust (Exs. C-1 through 9). It is found that Truck 583 was in unsafe condition on August 13, 1989.

8. Giulio specifically testified that at this juncture he had not made up his mind what action to take regarding Complainant. (II-T. 150, 167, 168, 169, 177).

9. While Mr. Giulio subsequently added to his testimony that he also told Complainant that "we couldn't handle equipment abuse." (II-T. 150, 167, 168, 169, 177). I do not consider this an inconsistency in his testimony since discussion of equipment abuse was cut off by Complainant's hanging up the phone. Complainant's accounts of this conversation are essentially the same as Mr. Giulio's, other than when testifying as a rebuttal witness Complainant did not mention that it was for safety reasons that he refused to drive the truck (I-T. 44, 71; II-T. 214-215). On the issue of whether Complainant voiced safety complaints concerning Truck 583, it is also observed that the accounts of Messrs. Giulio, Weiner, and Roberts, are relatively steady throughout, whereas Complainant engaged in a major "perfecting" of his testimony on rebuttal (II-T. 213-214) from that on his case in chief. (I-T. 42, 71).

10. Nevertheless, as noted elsewhere in this decision, this does not excuse Complainant's abuse of the truck, neutralize the legal effect of the failure of Complainant to communicate safety concerns to his supervisors, or justify his belligerent, provocative behavior toward supervision. There is considerable evidence in the record overall that Complainant's essential motivation in refusing to drive the truck was less of a safety concern than it was for some personal, subjective resentment and desire to terminate employment. It is ultimately concluded herein that Respondent's motivation in discharging Complainant was not due to anti-safety motivation or other discriminatory intent cognizable under the Act.

11. During Mr. Wiener's three-year tenure as head mechanic, there were no accidents at the mine due to unsafe equipment. (II-T. 13).

12. Complainant was employed by Respondent only a total of 34 days. (I-T. 80).

13. Complainant's own witness, Project Office Manager Opal Holsworth, also conceded this major point in Respondent's favor in the following colloquy:

Q. Would you believe any employee who refused to drive a piece of equipment or a truck because it was unsafe would be fired?

A. I don't believe that any employee would have been fired, because sometimes employees did more severe things than refused to drive a truck and got fired, and other people didn't do hardly anything and got fired. It just depended on the person that was been taken into consideration. (I-T. 140).

14. The use of profanity in the belligerent context Complainant used it in on August 15 can itself be an unprotected activity sufficient upon which a discharge can be legitimately

based. Hicks v. Cobra Mining, Inc., 18 FMSHRC 623, 532 (April 1991).

15. Since Complainant, at the time he refused to drive the truck, did not communicate his alleged safety concerns to Mr. Roberts (or later to Mr. Giulio) Respondent had no opportunity to understand the basis for the refusal and to take any corrective action. See Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989).

16. Rather than taking the truck to the maintenance department for repair, Complainant parked it, refused to drive it, was insubordinate, and this attitude and conduct precipitated his discharge. By analogy to the concept of a mine operator's constructive discharge of an employee, Complainant's actions approached being a constructive resignation. In this case, it appeared that Complainant forced the issue, that is, he forced the adverse action taken against him.