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STEPHEN JUNGERS V. U.S. BORAX  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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February 24, 1993

STEPHEN D. JUNGERS, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 92-226-DM  
U.S. BORAX : WE MD 91-03  
Respondent : Boron Mill

DECISION

Appearances: Stephen D. Jungers, North Edwards, California,  
Pro Se;  
Michael G. McGuinness, Esq., Los Angeles,  
California,  
for Respondent.

Before: Judge Cetti

Statement of the Case

This case is before me upon the Complaint by Stephen D. Jungers 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 a five day disciplinary suspension without pay by U.S. Borax

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(Borax) in violation of section 105(c)(1) of the Act. (Footnote 1) More specifically, the Complainant alleges that he was unlawfully suspended without pay commencing 2 hours after the start of his work shift on August 12, 1990, and continuing thereafter through his normal scheduled work days of August 21, 24, 25 and 26th. Complainant contends the disciplinary suspension was imposed on him for having made safety complaints to management on August 12, 1990 concerning the practice and procedures used by Respondent's production foreman Dick Moore in handling the sodium dithionite fires that had been occurring in the White 5 Mol area of the plant where Complainant had been assigned to work that shift.

Mr. Jungers, the Complainant, seeks to have his personnel record purged of the August 12, 1990, Personnel Action Notices and (2) back pay for the 38 hours of work missed on August 12, 21, 24, 25 and 26, 1990 due to the suspension.

Complainant's position with Respondent U.S. Borax in August 1990 and at all relevant times herein was chief production operator at Respondent's Boron Mill earning \$15.99 an hour. Mr. Jungers worked at Respondent's Boron Mill for 12 years. He testified he hired on as a laborer and within a few months took a bid under the union agreement with ILWU, Local 30 to Primary Process Plant One, where he started as a helper and then worked his way through the ranks to the chief position in the matter of a year or two.

The Respondent, U.S. Borax, is incorporated under the laws of Delaware as United States Borax Chemical Corporation.

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1 Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the 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.

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(Ex. 2). Respondent operates an open pit mine in Boron, California, where it extracts and refines borax.

Mr. Jungers as a chief operator at the Boron Mill monitored the process in which liquid borax and borate elements are removed and separated from solid elements such as rock and silt. Mr. Jungers worked in plant one at the Boron facility, and was assigned primarily to an area commonly referred to as the "mud birds." Mud birds are mechanical devices, shaped like cylinders, which separate the liquid borates from the non-usable rocks and silt as the first step in the refining process.

On August 12, 1990, at the beginning of his shift, Mr. Jungers started to perform his usual duties at the plant's mud birds area when a fellow employee approached him and informed him that she had just received a telephone message directing her to switch positions with the Complainant. The switch would result in Mr. Jungers working at the White 5 Mol area where borax is chemically treated to bleach it and make it have a rich white color. This task requires a miner such as Mr. Jungers to add sodium dithionite, a potentially hazardous chemical, to the refining process. Mr. Jungers, on occasion, had performed this task before.

On August 10, 1990, two days before Mr. Jungers' suspension, there had been a sodium dithionite fire at the White 5 Mol area which is the area Mr. Jungers had been directed to switch to at the beginning of his shift on August 12, 1990. Mr. Jungers felt that the fire had been handled in an unsafe manner. Mr. Jungers believed that the production foreman at White 5 Mol, Dick Moore, used unsafe and hazardous procedures in handling sodium dithionite fires. Dick Moore would be Mr. Junger's supervisor at the White 5 Mol facility in approximately two hours as a result of the August 12th job switch.

It was undisputed that sodium dithionite liberates sulfur dioxide (SO<sub>2</sub>) when it decomposes. It decomposes when it contacts moisture such as drops of condensation. It decomposes when it smolders and starts to burn. (Tr. 101-102). There was over 4,000 lbs. of sodium dithionite in the bin at the White 5 Mol.

Even before the White 5 Mol facility was installed in the plant in September 1989, Complainant and other employees heard of the hazards involved in the use of the chemical sodium dithionite. Prior to his suspension Mr. Jungers had access to Occupational Health Guidelines for Chemical Hazards (Ex. 5) and other similar material. To show the reasonableness of his safety concerns Mr. Jungers read into the record, page 14 of Complainant's Exhibit 5 under the subheading "Major Hazards" as follows:

"Sulfur dioxide (SO<sub>2</sub>) is a highly irritating gas to the mucous membranes of the upper and lower respiratory tract. Short-term, high dose exposures have resulted in work-related fatalities due to marked airway obstruction. Liquid or gaseous sulfur dioxide can cause both skin and eye burns."

Then continuing on the same page of Exhibit 5, under "Acute Effects", Mr. Jungers read into the record the effects of exposure to different concentrations of SO<sub>2</sub> as follows: "From 50 parts per million, marked irritation to eyes, nose and throat and lower respiratory tract occurs. Exposure to a concentration of 500 parts per million for 30 to 60 minutes is dangerous to life."

"A few fatalities has followed exposure to unknown but very high concentrations of gas. One report describes a case of chemical bronchial pneumonia that ended in death after 17 days."

Mr. Jungers explained that these are the types of concerns he and others had regarding the hazards of exposure to SO<sub>2</sub>. He stated that concentrations of SO<sub>2</sub> fumes produced during a sodium dithionite fire are dangerous and hazardous to life.

As previously stated it is undisputed that sodium dithionite liberates sulfur dioxide (SO<sub>2</sub>) when it decomposes. It decomposes when it contacts moisture and when it smolders and starts to burn. (Tr. 101-102).

Complainant stated that he and his fellow workers "wouldn't seem to get answers to a number of questions such as how much SO<sub>2</sub> they were being exposed to." (Tr. 29). Several times Mr. Jungers had coughing fits he attributed to the SO<sub>2</sub> fumes even when there was no fire.

Mr. Jungers testified "I wanted to make sure that before I worked with him (foreman Dick Moore) on shift again at the White 5 Mol with the possibility of a fire, that he (Dick Moore) was certain and I was certain that he was certain about what the safe procedures were in handling the fire."

Mr. Jungers stated that one of his main safety concerns was that the foreman, Dick Moore, not ask him to fight a sodium dithionite fire once it started and that he (Jungers) would be allowed to be evacuated along with the other employees and that he would be allowed to bring the hazardous material team in as is and was the stated company policy at the time.

Asked if there was any reason to be concerned that Dick Moore would not follow company safety policy in handling a dithionite fire, Mr. Jungers replied "Yeah. The fire we had on Friday, while we were all evacuated, and even though we were an eighth of a mile, or a quarter -- however far it is from the

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White 5 Mol, it was bad enough for us to be evacuated. He (Dick Moore) didn't evacuate Chuck Jones who was working at the White 5 Mol on Friday during the fire." ... .

Dick Moore tried to get Chuck Jones to fight the fire and tried to prevent or at least discourage him from calling the hazardous materials team to fight the fire. (Tr. 34). (Ex. 8 and Ex. 9 are signed statements of Chuck Jones concerning the August 10, 1990 fire.)

Mr. Jungers testified there was a tendency by some people in management to try to circumvent the company's policy on fighting fires in the White 5 Mol. Production foreman, Dick Moore, would request regular untrained and unequipped employees to assist in fighting sodium dithionite fires instead of having all the em-ployees evacuate the area and calling the hazardous material team to handle the fire.

Mr. Jungers testified that two days before he voiced his safety concerns to management, there was a sodium dithionite fire at the White 5 Mol. All the employees were evacuated approxi-mately a quarter of a mile away except Chuck Jones. Mr. Jones told Mr. Jungers that Dick Moore tried to get him (Chuck Jones) to fight the fire and discouraged him from calling the hazardous material team. (Tr. 34). He was also concerned that Dick Moore had stated to Chuck Jones that he (Dick Moore) and Jungers (Com-plainant) had put out fires by themselves without calling the hazardous material team.

On August 12, 1990, when he heard he was to switch jobs and work at the White 5 Mol Mr. Jungers went to the office of the production foreman on duty at that time, Roy Beaver, to talk about his safety concerns. Mr. Jungers asked Chuck Jones (a union steward) to go with him as a witness. Mr. Jungers testi-fied "I was very concerned and I was pretty -- waiting till Mon-day, which would have been the next day to bring a concern up to Bob Delyser (Plant One supervisor), who I wanted to have in my presence, in the presence of Dick Moore, make very certain what we were going to do in the event of another fire because I did not want to just have Dick tell me that we're going to do it a certain way. I wanted to make sure that Dick knew that I knew and the supervisor knew that company policy as to the safe procedures would be followed in handling any sodium dithionite fire." Dick Moore was going to be Mr. Jungers foreman on that part of the shift Mr. Jungers would be working at the White 5 Mol.

Mr. Jungers testified as to what occurred in Mr. Beaver's office as follows:

And we went to the office (of production foreman Beaver) and talked about the whole

thing. I talked about what I was concerned about, what I've already delineated here. Chuck mentioned things that he thought were -- specifically needed to be looked at. He mentioned the teflon liner, because that's one of the ways in the past the fires had initiated, where the liner would slip out, cause the powder to miss its distribution drop and end up on top of a mixing unit and be exposed to moisture at that point, enough to cause a fire.

So he was concerned with the lining and plus the fact that he wasn't very confident working the area. He was relatively new to -- he wasn't -- hadn't had a whole lot of training. So he was kind of scared as far as having the fire on Friday. He was asthmatic to begin with. He had gone through some things, like he had vomited and coughed and he had a bad time on Friday when they had the fire, ... .

He came mainly as a -- I asked him to come as a witness but he began to express concerns he had too, that since the subject was safety and from -- this is quite of a side point to this whole case, but I've never refused to work anywhere since I've been at Borax. It's one of my -- one of the things that -- about me.

And I really didn't refuse (to work at the White 5 Mol) that day either. The strongest words I used was I would rather not until we can get this safety question out of the way, my safety question being how the fires would be handled in terms of evacuating the person there and getting the HAZ-MAT team to put the fire out. ... .

I figured that by my example of saying I'd rather not work there for that one day that some -- I would get the attention of Bob Delyser (and we could have) the meeting with Dick Moore. That was my whole intention. ...  
Roy Beaver said you -- there will be no discipline. You won't be getting in trouble over this. He said he would call some other people in.

Jungers stated that his foreman, Beaver, told me and Chuck to go back to the dissol-vers and help them start up a line that we were starting up. And it -- we did that. And about a half hour later we were called back to the office.

And Chuck and I went back to the office. And Ben Gray (all plant supervisor) was there. . . . And he said we're going to take you to the gate and I -- at that point Roy Beaver was there. I looked at Roy and I said, what is this? And I said, Roy, what about what we just talked about for 30 minutes, that there would be no discipline and on down the whole list there?

He told me that he had called Bob Delyser at home and Bob had made a decision. And at that point I said, right then I said, is it too late And he goes, yes, it's too late. And I just said wow!

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#### Discussion

It is undisputed that there had been at least 5 fires involving sodium dithionite at the White 5 Mol. It is also undisputed that when this chemical burns it produces an abundance of potentially hazardous (SO<sub>2</sub>) fumes. It is company policy that the area be evacuated and a hazardous material team called to put out the fire even if they are at home because they are experienced and have the training and the equipment such as self-contained breathing apparatus to handle such fires.

I credit the testimony of the Complainant Jungers. I find he had a good faith reasonable safety concern and safety complaints that he wanted to discuss and bring to the attention of management. This is not a work refusal case. I credit Mr. Jungers' testimony that he never refused to work anywhere on August 12, 1990, or any other day. He just wanted it clear to management that he had a serious safety concern and rather not work at the White 5 Mol until as he states it "until we can get this safety question out of the way, my safety question being how the fires would be handled in terms of evacuating the person there and getting the HAZ-MAT team to put the fire out." He wanted to be sure that in the event of a fire, foreman Dick Moore would not require him (Jungers) to stay and help put out the fire rather than permit him to evacuate the area and call the hazardous material team to handle the fire.

The evidence leads me to the conclusion that Mr. Jungers and his fellow employee Chuck Jones wanted to bring to management's attention and discuss with management legitimate safety concerns. They did have a discussion of their safety concerns with lower management and indicated that they preferred not to work at the White 5 Mol until their concerns were dealt with. As soon as they left lower management (Beaver) made a call to upper management. Upper management may or may not have gotten an accurate picture of what the situation was but nevertheless made the decision to take immediate adverse disciplinary action against Mr. Jungers and Chuck Jones.

As Mr. Jungers aptly stated, he and Jones made safety complaints to management with the assurance from lower management that there would be no retaliation and return to the work management (Beaver) assigned to them and 30 minutes later were called into the office, taken to the gate and relieved of their hard hats and badges.

## II

### Further Discussion and Findings

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an operator's attention hazardous conditions or practices in the work-place or engages in other protected activity.

The basic principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (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 nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford

Construction Co., 732 F2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

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, 2510-11 (November 1981), rev'd on other grounds sub nom *Donovan v. Phelps Dodge Corp.*, 709 F2d 86 (D.C. Cir. 1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator. *Chacon*, supra at 2510. See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir. 1983); and *Donovan v. Stafford Construction Company*, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also *NLRB v. Transportation Management Corporation*, 462 U.S. 393, (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

On the basis of the most credible evidence presented I find that this is not a work refusal case. Mr. Jungers simply wanted to bring to management's attention legitimate safety concerns and either through a deliberate intent to retaliate against Mr. Jungers for this protected activity or possibly through a negligent misunderstanding of the true facts on the part of higher

management, Mr. Jungers was "taken to the gate" and relieved of his badge and hard hat approximately 30 minutes after he voiced his safety concerns and complaints to management.

It is clear from the Commission's analysis in Chacon, supra, that the coincidence in time between the protected activity and adverse action such as we clearly have in this case is strong circumstantial evidence of the retaliatory motivation for the disciplinary suspension Respondent imposed on Mr. Jungers.

On careful evaluation of all the evidence I find Mr. Jungers was "taken to the gate" on August 12, 1990, and suspended in re-taliation for Mr. Jungers' protected activity. Respondent failed to rebut Mr. Jungers' prima facie case. Respondent also failed to prove as an affirmative defense that it would have discharged Mr. Jungers in any event for his unprotected conduct alone.

In sum on the basis of the preponderance of the most credible evidence I find that Respondent suspended Mr. Jungers in re-taliation for engaging in protected activity in violation of section 105(c) of the Act.

### III

#### Timeliness

Although the issue of the timeliness of Mr. Jungers' complaint was not raised at the hearing, Respondent in its answer contends that "Jungers failed to timely file his complaint with the Secretary." The violation of section 105(c) occurred during the period August 12 - 26, 1990, Mr. Jungers filed his complaint on October 30, 1990. Thus it was filed just a few days in excess of the 60 days period specified in section 105(c)(2).

The purpose of this time limit is to avoid stale claims, but a late filing may be excused. The time limit in section 105(c)(2) is not jurisdictional in nature. *Christian v. South Hopkins Coal Company*, 1 FMSHRC 126, 134-136 (April 1979); *Bennett v. Kaiser Aluminum & Chemical Corporation*, 3 FMSHRC 1539 (June 1981); *Secretary v. 4-A Coal Company, Inc.*, 8 FMSHRC 240 (February 1989).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the Respondent shows material, legal prejudice attributable to the delay. Cf. *Secretary/Hale v. 4-A Coal Company, Inc.*, supra. No such showing has been made here. Under the facts and circumstances presented at the hearing in this case the late filing is excused. Respondent's request for dismissal of the complaint is denied.

Conclusions of Law

1. Jurisdiction over this action is conferred upon the Federal Mine Safety and Health Review Commission under section 105(c) and section 113 of the Act.

2. Respondent's Boron Mill is a mine, as defined in section 3(b) of the Act, and its products affect commerce under section 4 of the Act.

3. Respondent at all relevant times was an operator within the meaning of section 3(d) of the Act.

4. Steven D. Jungers was a miner at all relevant times within the meaning of section 3(g) of the Act.

5. Mr. Jungers engaged in protected activity when on August 12, 1990 he brought to Respondent's attention his safety concerns and complaints. At the time he articulated his safety concerns he had a good faith reasonable belief as to the hazards involved.

6. Mr. Junger's claim is not barred by his failure to file a written complaint within 60 days of his suspension.

7. Mr. Jungers' suspension was directly motivated at least to a large extent by his articulation to management his safety concerns and complaints.

ORDER

Based on the above findings of fact and conclusions of law, it is ORDERED:

1. Respondent shall pay to Complainant Steven D. Jungers within 30 days of the date of this decision the sum of \$569.62 representing back pay for 38 hours of work missed during the suspension beginning on August 12, 1990, with interest thereon in accordance with the Commission decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) aff'd, 895 F2d 773 (D.C. Cir. 1990) calculated proximate to the time payment is actually made. In that case interest was calculated at the short-term federal rate used by Internal Revenue Service for the underpayment and overpayment of taxes plus 3 percentage points.

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2. Respondent shall expunge from its personnel records maintained on Steven D. Jungers the Personnel Action Notices of August 1990 and all references to the August 1990 suspension of Steven D. Jungers.

August F. Cetti  
Administrative Law Judge

Distribution:

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