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EUGENE GREY V. RIVERTON COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EUGENE GREY, APPLICANT	Application for Review of Discrimination Complaint
v.	Docket No. HOPE 79-77
RIVERTON COAL COMPANY, RESPONDENT	Eagle No. 1 Mine

DECISION

This proceeding was brought by Eugene Grey, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for review of an alleged act of discrimination.

The case was heard at Charleston, West Virginia, on April 13, 1979. Counsel for the parties have submitted their proposed findings and conclusions and supporting briefs following receipt of the transcript.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Applicant was employed by Respondent as a coal mine section foreman from about October 1, 1976, to April 7, 1978. Applicant worked at Respondent's No. 35 Mine until his transfer to the Eagle No. 1 Mine in November, 1977.
2. Respondent was, at all pertinent times, the operator of the No. 35 and Eagle No. 1 Mines in Fayette County, West Virginia.
3. Applicant was hired as a section foreman by William Sublett on October 1, 1976, at the No. 35 Mine. At that time, Mr. Sublett was mine superintendent for the No. 35 Mine. Applicant continued as a section foreman at the No. 35 Mine until early November 1977, when he was transferred to Riverton's Eagle No. 1 Mine. The transfer was made because of a reduction in the work force due to Respondent's decision to close the No. 35 Mine.

4. Mr. Sublett and Bob Samuels, then the general mine foreman for the Eagle Nos. 1 and 2 Mines, chose Applicant for the transfer over two other section foreman from the No. 35 Mine because he had more mining experience, they found him better qualified as a foreman, and he had more time with the company than the other men. The use of seniority in determining job reassignment was the normal practice at Riverton.

5. Applicant worked in the new section foreman position, on the day shift, at the Eagle No. 1 Mine until Friday, April 7, 1978. At the end of his shift on that date, Applicant entered the office trailer and met Mr. Samuels, who had recently been promoted to mine superintendent for the Eagle Nos. 1 and 2 Mines. Mr. Samuels informed Applicant that he wanted him to start working on the evening shift the following Monday, April 10, 1978, until management could open a new section. Applicant refused this assignment, and said that he would quit before working on the evening shift. Applicant had never expressed any resistance to working on the night shift before this time.

6. Mr. Samuels determined that the transfer of a day shift foreman to the evening shift was necessary because the general mine foreman on the evening shift, who had more seniority than any of the section foremen on the day shift, was transferring to the day shift. Mr. Samuels chose to transfer Applicant to the evening shift because he had the least seniority of the day shift section foremen at the Eagle Mine. It was Mr. Samuels' normal practice to base this type of transfer on seniority, as was the case when Applicant had transferred to the Eagle No. 1 Mine in November, 1977, over men junior to him in seniority.

7. When Applicant told Mr. Samuels that he would quit before going on the evening shift, Mr. Samuels reminded Applicant that a new section was being prepared and promised Applicant that he would be brought back to the day shift as soon as the new section was ready to begin production. Applicant refused to consider a transfer to the evening shift and as he left the office he stated "I quit." He then went to see Mr. Sublett, who at that time was general manager of Riverton Coal Company and was over Mr. Samuels.

8. Before Applicant arrived at Mr. Sublett's office, Mr. Samuels called Mr. Sublett and told him that Applicant had quit and that they would need a section foreman to replace him. Mr. Sublett responded that he would begin searching for a replacement.

9. Applicant arrived at Mr. Sublett's office shortly after Mr. Samuel's telephone conversation with Mr. Samuels. Applicant went to Mr. Sublett's office to try to convince him to allow Applicant to remain on the day shift or if that was not possible, to promote him to the general mine foreman's position on the evening shift.

Mr. Sublett rejected these suggestions, as another man had been hired to be the general mine foreman on the night shift. He also stated to Applicant that he did not think that Applicant was qualified to be the general mine foreman because "he did not have the company's interest at heart." At that point in their conversation, Mr. Sublett's telephone rang and he motioned for Applicant to leave the office in order to conduct his conversation in private. He did not intend this as a signal that Applicant could not come right back to resume their discussion. Applicant left the mine site before Mr. Sublett got off the telephone. Applicant did not return for work on Monday and did not indicate at any time to either Mr. Samuels or to Mr. Sublett that he would accept a transfer from the day shift to the night shift as a section foreman. He never returned to talk to Mr. Samuels or Mr. Sublett.

10. Mr. Sublett testified that although Applicant was a good section foreman, he had not displayed a willingness to put in the extra time that would be required of a general mine foreman, and that he had found that Applicant tended to arrive at work at the last minute and would leave immediately at the end of his shift.

11. On July 18, 1978, Applicant filed a discrimination complaint. In that complaint, he alleged that the termination of his employment with Respondent was due to three previous complaints he had made concerning mine safety. MSHA investigated the complaint and informed Applicant by letter dated September 25, 1978, of its determination that he had not been discriminated against in violation of section 105(c) of the Act. Although this initial complaint was filed after the 60 day period provided in the Act, MSHA did assert jurisdiction. On October 19, 1978, Applicant filed a complaint with the Commission alleging that he had been discharged on April 7, 1978, for making three safety complaints during the course of his employment with Riverton. This complaint was filed within the time prescribed in the Act for filing a complaint after the Secretary's decision, and is basically the same as the one filed with MSHA.

12. The first safety complaint alleged by Applicant occurred in early 1977. It concerned water accumulations in the No. 35 Mine and the alleged failure of Respondent to provide an up-to-date mine map. Many of the miners in the No. 35 Mine had been concerned that the accumulations of water were coming from the abandoned Hickory Camp Mine that was adjacent to the No. 35 Mine. The situation had first been brought to Mr. Sublett's attention in 1974. At that time, Mr. Sublett hired a surveying company to determine the location of the abandoned mine and plot its location on Riverton's map of the No. 35 Mine. The survey showed that active mining in the No. 35 Mine was more than 2,000 feet away from the old works, this report was announced to the miners, and concern among the miners about water accumulations diminished. Mining in that section ceased, and was later resumed in December 1975.

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13. After mining resumed in that section, water again began to accumulate. Almost every employee voiced concern to Mr. Sublett about the water. As mining continued, concern about the water accumulations and the accuracy of the survey grew. In early 1977, Applicant expressed his concern to a Federal mine inspector regarding the faintness of the drawing of the Hickory Camp Mine on Riverton's No. 35 Mine map. The inspector asked Mr. Sublett to prepare a new edition of the map that would show more clearly the location of the abandoned works. Mr. Sublett immediately complied with this request and no citations were issued by MSHA on the basis on Applicant's complaint.

14. The employees remained concerned about the accumulations of water and Mr. Sublett authorized the drilling of bore holes in the direction of the abandoned works in May 1977. These test bore holes were not required by MSHA because the map showed that mining was about 1,400 feet from the old works and section 317(b) of the Act required drilling bore holes only if the active workings were within 200 feet of abandoned areas. Once the drilling was begun, all comment concerning the water ceased.

15. The second incident alleged by Applicant as the basis for his discrimination complaint occurred on August 4, 1977, when the No. 35 Mine was not operating due to a strike. Applicant and another employee, Mr. John Westfall, were instructed to conduct a preshift examination and to bring a roof bolter to the mouth of the mine. After making the preshift examination, Applicant attempted to call the portal and report that the mine was clear, but no one answered his call. In the meantime, Mr. Sublett and general mine foreman John Bickford had entered the mine and proceeded to a portal on the other side of the mountain.

16. On their return through the mine, they met Applicant and Mr. Westfall and told them that two State mine inspectors were at the portal issuing notices of violation to the men for entering the mine without filling out the fireboss book. Applicant complained to the State inspector that there was no one on the surface to answer his call.

17. No one was cited for this alleged violation involving the communications section of the Act (Applicant's complaint). The State inspectors cited the men for entering the mine without completing the fireboss book. These notices of violation were subsequently withdrawn by the West Virginia Department of Mines.

18. The third incident relied on by Applicant in his complaint occurred at the Eagle No. 1 Mine in late November or early December of 1977. On this occasion, Mine Superintendent Samuels and a Federal mine inspector were in Applicant's section. The inspector remarked that loose coal needed to be cleared away from the ribs and

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Mr. Samuels instructed the Applicant to get the scoop and clean the area. When the inspector and Mr. Samuels returned, they found that Applicant had instructed his men to clean the ribs with shovels rather than with the scoop.

19. Mr. Samuels asked Applicant why he had not gotten the scoop. Applicant replied that he felt that the scoop was dangerous because it lacked a canopy. Mr. Samuels stated that the use of the scoop was less dangerous because the operator would be about 8 feet from the rib when he was using a scoop, while miners using a shovel to clean the coal around the rib would be directly under the rib.

20. The inspector agreed with Mr. Samuels' assessment and Applicant finally agreed to use the scoop. The operator had not been required to install a canopy on this scoop by MSHA because it was used outby the last open break. The scoop was used daily on every shift. Applicant made no further mention of this incident and Mr. Sublett was not informed that it had occurred.

21. The first two incidents occurred at the No. 35 Mine prior to Applicant's transfer to the Eagle No. 1 Mine. Applicant admitted that these incidents were "water under the bridge" at the time of his transfer in November 1977. The third incident occurred shortly after his transfer. There was no proof that Mr. Samuels' decision to transfer Applicant to the evening shift as a section foreman was related in any way to these three incidents. I find the decision to transfer Applicant was based on the fact that he had the least seniority of the day shift section foreman. This was the normal practice for job reassignment of foreman at Respondent's mines.

22. The preponderance of the evidence shows that Applicant refused to accept the decision by the mine superintendent to transfer to the evening shift and informed him that he would quit rather than accept the transfer, and he did quit. He then went to Mr. Sublett to see if he could get a promotion to general mine foreman or to be allowed to remain on the day shift.

23. Mr. Sublett would not agree to overrule Mr. Samuels' decision and Applicant gave no indication that he was willing to work on the night shift as a section foreman.

24. I find that Applicant's charge that he was discharged because of prior safety complaints is without merit. There was no evidence in the record to show any relationship between the three above-mentioned incidents allegedly involving Applicant's safety complaints and either the decision by management to transfer him to the night shift or management's decision to accept his resignation when he refused to accept the transfer.

DISCUSSION

Section 105(c)(1) of the Act protects miners from discrimination in retaliation of their exercise of safety complaint rights. Applicant has failed to show that he was discriminated against in any manner. Respondent's decision to transfer him to the night shift was based upon an established, non-discriminatory seniority practice. Applicant gave his employer an ultimatum that either he be allowed to stay on the day shift or he would quit. The employer accepted the resignation.

There is no evidence that either Respondent's decision to transfer Respondent or its decision to accept this resignation was in any way related to his prior safety and health complaints. The evidence instead supports the finding that the transfer was based on Applicant's mine seniority, as was his earlier transfer to the Eagle No. 1 Mine over other section foremen at the No. 35 Mine who were laid off when production was curtailed.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and the subject matter of the above proceeding.
2. Respondent's Eagle No. 1 Mine and No. 35 Mine, at all pertinent times, were subject to the provisions of the Act.
3. Applicant has failed to meet his burden of proving that Respondent violated the Act as alleged.
4. The application for review should therefore be DENIED.

All proposed findings and conclusions inconsistent with the above are hereby rejected.

ORDER

WHEREFORE IT IS ORDERED that the application for review is DENIED and the proceeding is DISMISSED.

WILLIAM FAUVER
JUDGE