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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),

PETITIONER

Complaint of Discharge,  
Discrimination, or  
Interference

CHARLES W. MILLER,

APPLICANT

Docket No. LAKE 79-282-D  
CD 79-158

No. 24 Mine

v.

OLD BEN COAL COMPANY,

RESPONDENT

DECISION

This is a proceeding under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Applicant alleges that he was removed from his position as face boss at Old Ben's No. 24 Mine because of his "insistence that the men working under me do so under safe conditions and in compliance with [F]ederal law." A hearing was held in St. Louis, Missouri, on November 28 and 29, 1979. The parties were represented by counsel, and have filed post-hearing briefs.

At the hearing, Applicant, J. B. Gibbs, John Barwick, George Jenkins, and Dennis Bennis testified for Applicant. Lester Grogan, Roger Roper, Robert Travelstead, and James Green testified for Respondent. Ernest Duckworth testified for Applicant as an adverse witness, and for Respondent.

FINDINGS OF FACT

The parties stipulated and I find:

1. Old Ben Coal Company (Old Ben) is engaged in the coal mining business in the State of Illinois, with its home office at 125 South Wacker Drive, Chicago, Illinois 60606, and a regional office at 500 North DuQuoin Street, Benton, Illinois 62812.
2. Charles W. Miller was employed by Old Ben as an underground miner from June 3, 1974, to July 25, 1977.
3. On or about July 25, 1977, Mr. Miller was promoted by Old Ben to a management position as a section boss (sometimes referred to as a "face boss").

4. Mr. Miller performed his management duties at Old Ben's No. 24 Mine.

On February 27, 1979, Old Ben fired Applicant. Applicant contends that he was discharged because he had made complaints regarding various safety matters. Old Ben contends that Applicant was fired because he disobeyed orders and in other respects was not a satisfactory employee.

In support of his case, Applicant alleges that his conduct in connection with four separate safety-related incidents resulted in his discharge. These incidents are:

1. The "four-violation incident," which occurred on or about July 18, 1978;

2. The "telephone incident," which occurred on or about July 21, 1978;

3. The "roof-bolting incident," which occurred in mid-December 1978; and

4. The "longwall incident" of February 26, 1979.

#### The Four-Violation Incident

On July 18, 1978, Applicant worked the 4 p.m.-to-midnight shift as the face boss of a continuous miner crew. When he entered the company's conference room at approximately 3:30 p.m., he learned that a Federal inspector had discovered certain safety violations in his section of the mine. Four of these violations had to be corrected by 8 a.m. the following morning, and Applicant was told that this would have to be done by his crew. (FOOTNOTE 1) The key issue with respect to this incident concerns Applicant's testimony that he was directed by mine superintendent Lester Grogan to correct the violations and load coal at the same time. Applicant stated that when Mr. Grogan found out that no coal had been loaded on Applicant's shift, he became angry. Applicant testified that Robert Travelstead, Old Ben's safety director, shut down the continuous miner until a broken bolt under the seat was fixed. Applicant contends that it would have been unsafe to operate the continuous miner without first correcting the violations, and therefore that his refusal to follow Mr. Grogan's instructions was justified. Additionally, Applicant stated that there was no rock dust in his section of the mine, and thus he was unable to correct the rock dust violation.

Respondent's witnesses testified that Applicant was not told to operate the machinery while the violations remained uncorrected. Mr. Grogan testified that he told Applicant to fix the electrical violation and the headlight on the continuous miner before operating it. He added that when he later learned of the broken bolt under the seat, and Mr. Travelstead's order to shut down the machine, "the matter was dropped \* \* \*." Mr. Grogan's version of these events was corroborated by the testimony of Mr. Travelstead. None of the testimony of Applicant's fellow employees confirmed Applicant's testimony that he was ordered to mine coal and repair the violations simultaneously.

#### The Telephone Incident

Applicant's testimony concerning the telephone incident is essentially consistent with that of Respondent's witnesses, as well as several of Applicant's co-workers. The telephones broke down in Applicant's section around July 21, 1978, and were inoperable for two or three days. Management claims that it did not know that the phones were broken, and that the situation was remedied as soon as the problem was made known to it. Applicant and his fellow employees contend that management was informed of the situation, and that after one or two days the workers refused to mine coal until the telephones were repaired. The workers felt that this was an unsafe situation. Management agreed that the miners should not mine coal in the section until the telephones were repaired, and the miners were given jobs shoveling coal elsewhere. There is no evidence, however, that Applicant was responsible for, or involved in, this refusal. One of the miners testified that Applicant "had nothing to do with it." Nor does it appear that management blamed him for this incident.

#### The Roof-Bolting Incident

Toward the end of November 1978, Applicant became a section boss of a crew that operated a longwall miner.(FOOTNOTE 2) When he was transferred to this position, he received eight hours of instruction on the operation of this equipment. For about the first two weeks, he worked under an experienced face boss on the longwall miner, and then assumed those duties himself. He was not, as other mine personnel were, sent to Rend Lake College for longwall instruction.

The roof-bolting incident occurred in mid-December 1978 in the longwall area during the midnight-to-8 a.m. shift. Some of the roof had fallen, and there was a crack in the roof which made it appear unsafe. Applicant's crew had planned to cut down the roof area around the fall, since Applicant felt it would be unsafe to bolt the roof. However, Ernest Duckworth, the longwall coordinator, instructed the crew to bolt it anyway. At this point, Duckworth left the area. The men started to bolt the roof when Roger Roper,

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the mine manager, arrived. When Roper learned of the situation, he told the men to move the roof-bolting machine back out of the way because the roof looked unsafe. Shortly after the machine was moved, the roof fell in. Applicant testified that men could have been killed if they had been under the roof, and the machine could have been damaged. Apparently, an argument ensued in which Roger blamed Applicant for doing bolting which was dangerous, and Applicant blamed Duckworth for giving him the order to do something which Applicant felt was wrong. Applicant also resented the fact that Duckworth usurped Applicant's authority. There is no indication, however, that Applicant made a safety complaint in connection with this incident.

#### The Longwall Incident

On February 26, 1979, there was a severe blizzard along the eastern seaboard of the United States. Of between 100 and 125 men who were supposed to work the midnight-to-8 a.m. shift at Old Ben's No. 24 Mine, only six, including Applicant, reported to the mine. These six men were assigned to a make-shift crew on the longwall machine. Another man who reported to work was posted at the face of the mine to relay telephone messages for safety purposes. The crew on the longwall machine included Applicant, another foreman named Palmowski, and four other men who were either trainees or just off of trainee status. None of the other men knew how to operate a longwall miner. At the beginning of the shift, Superintendent Grogan told Palmowski that he wanted Applicant, who was in charge of the crew, to have the men replace some "flights"(FOOTNOTE 3) on the longwall machine. Approximately 75 flights on the chain had to be bolted into place, a task which required that the machine be started and the chain moved into position. The equipment did not have to be actually operated, however, and it was not near the face. Applicant contends that he did not know how to operate the machine; that his crew was incapable of operating it; that he was totally unfamiliar with the machine's control panel; and that in order to start the machine, it would have been necessary to short out its methane detector.(FOOTNOTE 4) Applicant felt that this would be a violation of safety laws. Respondent pointed out that Applicant was not being asked to mine any coal with the machine, but merely to start it and move the belt so that the flights could be replaced.

Applicant's crew did not replace any flights on that day. He assigned the men to do other work. It was not until three or four hours after the shift began that Mr. Roper telephoned the crew and learned of this. Applicant was fired the following day.

Concluding Findings and Conclusions of Law

For Applicant to prevail in this action, he must show that his safety-related actions constituted "protected activity." This concept has received considerable attention from the courts under both the 1969 and 1977 Mine Acts. The leading case is *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). There, the Court held that the plaintiff's notification to his foreman of possible dangers was an "essential preliminary stage" of those actions which bring the protection of the Act into play. (FOOTNOTE 5) Id. at 779. This view, in the Court's opinion, represented a compromise between two extremes which the parties had urged upon it:

"We do not think that merely because a discharge originates in a disagreement between a foreman and a miner that the Mine Safety Act is automatically brought into play. Nor do we adopt the other extreme, take the bare words of the statute with their most limited interpretation, and hold that before a miner's safety complaint is accorded the protection of the Safety Act the coal miner must have instituted a formal proceeding with the Secretary of Interior or his representative. Rather, we look to: the overall remedial purpose of the statute \* \* \*; the practicalities of the situation in which government, management, and miner operate; and particularly to the procedure implementing the statute actually in effect at the \* \* \* mine."

The issues to be determined are whether Applicant's action in any of the incidents crossed the line from a "disagreement" to "notification \* \* \* of possible dangers \* \* \*."

With respect to the four-violation incident, Applicant made no safety complaint. Applicant's testimony that he was directed to repair the violations in question and load coal simultaneously was not corroborated by the testimony of any of his fellow miners, and was expressly contradicted by Mr. Grogan and Mr. Travelstead. Similarly, the telephone incident did not involve such a complaint. Applicant merely informed management of the need for a telephone in his section of the mine. There is no evidence that he was responsible for the refusal of his men to work until the phones were repaired, nor is there any indication that management blamed him for the workers' refusal.

The roof-bolting incident was, in my opinion, a mere "disagreement" between Applicant and management. Admittedly, Applicant was caught between the orders of two of his superiors and, as is often the case in such a situation, some hard feelings resulted. Applicant believed that Mr. Duckworth gave him an instruction to do something which was dangerous. When his men started to carry out those orders, Applicant found himself arguing with

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Mr. Roper. Roper agreed with Applicant that the roof should not be bolted, and ordered the crew to move the equipment away from the roof. Clearly, there was no safety complaint made by Applicant to Mr. Roper, as the two men agreed that the situation was unsafe. Furthermore, Applicant's discussion with Mr. Duckworth did not cross the line from a "disagreement" to a "complaint."

Thus, if Applicant is to prevail in this case, he must show that there was something about the longwall incident which resulted in his being discriminated against for making a safety complaint.

It is pertinent to note that none of the prior incidents occurred within three months of the date of Applicant's discharge. Although Mr. Grogan and other management witnesses indicated that they never placed any information in Applicant's personnel file, nor issued anything else in writing, which indicated that they were in anyway dissatisfied with Applicant's performance, there was considerable credible testimony concerning various sources of friction between Applicant and other management officials. For example, Applicant testified that he was always very safety-conscious, and that he often became concerned when the crew before him did not clean up the worksite properly, attach the sucker hose, (FOOTNOTE 6) or bolt and maintain the roof in a safe condition. Grogan testified that it was common for each crew to blame the previous one for such circumstances. He added that Applicant often did not clean up his own area as much as he should have, and that as a result, Applicant's section was the source of an abnormally high number of safety violations. Grogan testified that Applicant often disobeyed instructions, and blamed other shifts and upper management for his own problems. There was also testimony that Applicant resented being assigned to the longwall crew since this entailed working on Saturdays and Sundays.

I agree with Mr. Grogan's assessment of Applicant as a very intelligent worker with a good deal of potential. Obviously, there was some friction between the parties, but I do not find that this was due to Applicant's having made safety complaints. The pivotal question here is whether Applicant's refusal to obey his orders to replace the flights on the longwall miner constitutes a safety complaint for which he can claim protection under the Act. The evidence indicates that Applicant was not as well trained in the operation of the longwall miner as he should have been. Although he may have been able to figure out how to start the machine on the day in question, he was justified in declining to do so without further instructions. However, I am more impressed with the fact that he was told to replace the machine's flights at the beginning of his shift, and although a telephone was available, he did not inform management of his feelings until the shift was almost half over and then only after Mr. Roper telephoned him. I think it was incumbent upon Applicant to register his complaint immediately, and tell his supervisor that he could not perform his

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assigned duties without further instructions on the operation of the machine. Instead of doing this, Applicant simply disobeyed his supervisor's directions. That type of conduct is not protected under Section 105(c) of the Act.

ORDER

The complaint is DISMISSED.

Edwin S. Bernstein  
Administrative Law Judge

~FOOTNOTE 1

Applicant testified that correcting the violations involved replacing a headlight on a continuous miner, replacing a broken bolt in an electrical panel under the seat of the continuous miner, cleaning up the area, and doing rock dusting. The testimony of Respondent's witnesses, including Old Ben's safety director, Robert Travelstead, indicates that the four violations found by the MSHA inspector did not include the broken bolt under the seat, but did include a permissibility electrical violation. Mr. Travelstead and Old Ben's mine superintendent, Lester Grogan, testified, and I find, that the broken bolt was found after the inspection. I do not believe, however, that this fact is material to the legal issues presented in this case.

~FOOTNOTE 2

A longwall miner is a complicated and sophisticated machine which moves along a section of face approximately 460 feet long, shearing off coal as it moves. Twelve people are required to operate such a device, which costs approximately seven million dollars. The section boss thus holds a very responsible position.

~FOOTNOTE 3

A flight is a metal bar about four inches in diameter and twelve inches long which is attached to a chain that drags coal towards the conveyor after it is cut from the face. The flights had to be installed because the longwall miner had recently been moved to a new panel. During the move, the flights had been removed.

~FOOTNOTE 4

The methane detector on a longwall miner is a device which stops the machine from operating if methane is sensed. On the day in question, the detector was broken, rendering the machine inoperable unless the detector was circumvented.

~FOOTNOTE 5

While Phillips was decided under the 1969 Act, it remains the leading case defining the concept of "protected activity" under the 1977 Act.

~FOOTNOTE 6

A sucker hose is an exhaust hose which keeps the mine face



free of methane and other harmful gases.