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SOL (MSHA) V. UNITED CASTLE COAL
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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), EX REL.
THOMAS ROBINETTE,
APPLICANT

Complaint of Discharge,
Discrimination, or Interference

Docket No. VA 79-141-D

United Castle Mine No. 1

v.

UNITED CASTLE COAL COMPANY,
RESPONDENT

DECISION

Appearances: James H. Swain, Esq., and Kenneth L. Stein, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Applicant
Michael L. Lowry, Esq., Ford, Harrison, Sullivan,
Lowry and Sykes, Atlanta, Georgia, for Respondent

Before: Chief Administrative Law Judge Broderick

Statement of the Case

On September 20, 1979, Applicant filed an Application for Temporary Reinstatement of Thomas Robinette together with a finding by the Secretary of Labor that the complaint of discriminatory discharge had not been frivolously brought. Based on the application and finding, and pursuant to section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), an order was issued September 24, 1979, requiring Respondent to temporarily reinstate Thomas D. Robinette in the position from which he was terminated or in a comparable position at the same rate of pay and with the same or equivalent work duties as were assigned him immediately prior to his termination. The complaint was filed on October 11, 1979, alleging that Robinette was discharge on or about June 4, 1979, because he filed a discrimination complaint with MSHA, and because he complained about working on the belt feeder without an operative cap light.

Pursuant to notice, the case was heard on the merits in Norton, Virginia, on November 28, 1979. Thomas Robinette, Teddie Joe Fields

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and Isaac W. Fields testified on behalf of Applicant. Fuller B. Helbert, Denver Cook and Percy Sturgill testified on behalf of Respondent. Both parties have filed posthearing briefs. To the extent that the contentions of the parties are not accepted in this decision, they are rejected.

STATUTORY PROVISION

Section 105(c) of the Act provides in part:

(c)(1) 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 for employment has instituted or caused to be instituted any 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.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending

final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

* * * * *

Issue

Whether Thomas Robinette was discharged because of activity protected under section 105 of the Federal Mine Safety and Health Act?

FINDINGS OF FACT

1. In May and June 1979, and prior thereto, Respondent United Castle Coal Company was the operator of an underground coal mine in Wise County, Virginia, known as the United Castle Mine No. 1.

2. In May and June 1979, and prior thereto, Applicant Thomas D. Robinette was employed by Respondent in its United Castle Mine No. 1 as a miner.

Complaint to MSHA May 30, 1979

3. When Robinette reported for work on May 30, 1979, he was informed by the section foreman, Percy Sturgill, that another miner, Ike Fields, had been assigned Robinette's former job as miner helper and that Robinette was to work on the belt feeder as the feeder man, a lower paying job.

4. The reason given for the transfer was the fact that Fields had filed a complaint with MSHA alleging that he was removed from the position of miner helper in January 1979, when he refused to operate the miner "because there was no air."

5. When Fields was put back on the miner helper job in May 1979, he and the Respondent signed an agreement wherein Fields withdrew his complaint and Respondent agreed not to interfere with miners in the exercise of their rights under the Act.

6. After finishing work on May 30, 1979, Robinette went to the MSHA office in Norton, Virginia, and executed a complaint alleging discrimination on the part of Respondent in changing his work status.

7. There is no evidence as to the nature of the discrimination alleged in the MSHA complaint. Specifically, there is no indication that Robinette charged that he was given a new job because of safety-related activities.

8. On May 31, 1979, when Robinette reported for work, Sturgill told him that he would be assigned to driving a shuttle car and would receive the same rate of pay as a miner helper. This job was to begin the following Monday. On May 31, Robinette worked about 2 hours on the miner and the remainder of the shift on the belt feeder.

9. On May 31, 1979, Robinette told Sturgill that he had filed a discrimination complaint with MSHA.

10. Sturgill replied that if Robinette wanted "to play it that way," he could play it that way too. He also told Robinette that in the future he must bring a doctor's slip anytime he is off work. Previous company policy required a doctor's slip for 2 or more days absence.

Discussion

I have accepted Robinette's version of this conversation which is different from Sturgill's version largely because Robinette's testimony is indirectly corroborated by the testimony of Isaac Fields (Tr. 47-48). Sturgill was clearly upset because in trying to resolve one MSHA complaint (that of Fields), he apparently precipitated another (that of Robinette).

11. The nature of the complaint made to MSHA by Robinette is not clear. Robinette testified that the complaint was filed "because of my job being changed and my pay rate being cut." There is no evidence that it was related to any health or safety matter.

12. On May 31, 1979, Robinette worked for a time operating a shuttle car, and on relief as a miner helper. He ran over a cable

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with the shuttle car and destroyed some line curtain with the miner. Sturgill reprimanded him for these incidents. He was also reprimanded by Tiltson for failure to properly grease the feeder tail shaft.

THE INCIDENT OF THE CAP LAMP CORD

13. On June 1, 1979, while Robinette was working on the belt feeder, it went out of line. In attempting to realign it, Robinette's head lamp cord was caught in the roller and severed. He called to the shuttle car operator to inform Sturgill that he had no light and would have to shut down the feeder. There was no other illumination in the area.

Discussion

It is Respondent's position that the cutting of the Robinette's lamp cord was not accidental but deliberate; and that it was caused not by being caught in the roller, but by being cut with a knife or other sharp instrument. Respondent attempted to demonstrate in the courtroom and by testimony the impossibility of a cord being severed in the way Robinette's was by being caught in a roller. I find that Respondent failed to establish these contentions, and there is no adequate reason to reject Robinette's testimony.

14. Robinette shut down the feeder because he believed that it was not safe to work in an unlighted area.

15. The belt feeder operator is required to remove or break up rocks moving on the belt to permit the coal to pass. It is necessary on occasion to shut down the feeder to remove larger rocks. To permit the belt to continue running when the operator has inadequate illumination would create a hazardous situation for the operator and other miners.

16. After some delay, Sturgill came to the area of the belt feeder, and, as he approached, saw Robinette disconnect the mine phone.

Discussion

Robinette denied that he disconnected the mine phone. I accept the testimony of Sturgill that he did so. His motive apparently was frustration over his cap light being out and Sturgill's delay in responding to his request for assistance.

17. Sturgill repaired Robinette's lamp and the mine phone. The two men exchanged harsh words as to the shutting down of the belt feeder, as to how the lamp cord had been broken, and the disconnection of the telephone. Sturgill told Robinette to come to the mine office at the end of the shift.

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18. Robinette went to the office and was scheduled to meet with Jack Tiltson, Vice President of Respondent company, Denver Cook, the Mine Administrator and Sturgill. Tiltson, however, was not available at the time so Robinette went home.

19. After Robinette departed, Sturgill discussed the incidents involving Robinette with Tiltson and Cook. Thereafter, Tiltson and Cook went over Robinette's file which contained a number of warnings for unsatisfactory work.

20. On Monday, June 4, 1979, when Robinette reported for work, Tiltson told him he was discharged.

21. Prior to the actual discharge, an "Employee Warning Record" was completed by Denver Cook and entered in Robinette's file. It states "Employee became disobedient with section foreman. Was not maintaining the belt feeder in a clean and safe condition, the job requires the feeder to be greased and shoveled at all times. Disconnected the mine phone interrupting communication." This was based on information furnished by Sturgill at the meeting on Friday, June 1.

22. When Tiltson discharged Robinette, he told him that "it was for what had happened that Friday, and what had happened in the past" (Tr. 19). He stated that Robinette had no reason to shut down production because his cap lamp did not work. When Denver Cook raised a question about operating the equipment without a light, Tiltson replied that "Robinette could have got out of the way and that the tailpiece would have took care of itself" (Tr. 41).

23. The effective cause for Applicant's discharge was his refusal to continue operating the feeder after his lamp cord was cut. This was a bona fide refusal to work under what he considered to be, and what objectively were, unsafe conditions. The other reasons given for the discharge--insubordination and inferior work--were not the primary motives for the discharge.

CONCLUSIONS OF LAW

1. At all times relevant to this proceeding, Applicant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. On June 4, 1979, Applicant Thomas Robinette was discharged from his position with Respondent because of his refusal to work under unsafe conditions. This refusal is activity protected under the Act.

4. Applicant Thomas Robinette was discharged and discriminated against in violation of section 105 of the Act.

Discussion

Respondent established that Applicant's work was less than satisfactory. Applicant was obviously belligerent and uncooperative with his foreman Sturgill as a result of his change in job classification. The evidence clearly establishes, however, that the effective cause for his discharge was his refusal to continue operating the belt feeder after his cap lamp cord was cut. Applicant concluded, and I agree with him, that to continue operating the belt feeder would be hazardous. Refusal to continue working under hazardous conditions is protected activity under the Act. See *Phillips v. Interior Board*, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1974).

ORDER

Respondent, United Castle Coal Company is ORDERED:

1. To reinstate Applicant Thomas Robinette to the position from which he was discharged on June 4, 1979, or to a comparable position at the same rate of pay and with the same or equivalent work duties. The reinstatement shall take effect as of June 4, 1979.
2. Respondent is further ORDERED to pay for the time lost by Applicant prior to the Order of Temporary Reinstatement issued herein, with interest thereon at the rate of 9 percent per annum.
3. Respondent shall remove all references to the discharge of Applicant from his personnel file.
4. Respondent shall post a copy of this decision on the bulletin board at the mine office for a period of 30 days.
5. The Secretary of Labor is directed to file with the Commission a proposal for a penalty for the violation of the Act found herein to have occurred. Because the Act and the Commission Rules of Procedure provide specific steps to be taken in connection with penalty assessments, I declined to entertain evidence during this proceeding involving a claim of discrimination, and I decline to assess a penalty for the violation found herein. I conclude that a separate proceeding is required.

James A. Broderick
Chief Administrative Law Judge