CCASE:
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), ON BEHALF OF: ROBERT V. BEVINS, APPLICANT	Complaint of Discrimination Docket No. VA 79-99-D CD 79-128

v.

UNITED CASTLE COAL COMPANY,
RESPONDENT

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry & Sykes, Atlanta, Georgia, for Respondent

Before: Judge Edwin S. Bernstein

Applicant alleges and Respondent denies that in discharging Applicant from its employment on April 25, 1979, Respondent unlawfully discriminated against Applicant for engaging in actions protected by Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the Act).

A hearing was held on January 22, 1980 in Bristol, Tennessee. Applicant, Roger Jenkins, and Arnold D. Carico testified for Applicant, and Michael Forticq testified for Respondent. Upon consideration of the evidence, the demeanor of the witnesses, and the parties' posthearing briefs, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Applicant, Robert V. Bevins, began his employment with United Castle Coal Company in February 1979. He was employed as a section foreman in a preparation crew which worked the evening shift, from 3:30 to 11 p.m. The preparation crew prepared the mine for the production crew, which worked from 7 a.m. to 3 p.m. The preparation crew's duties included such tasks as cleaning up loose coal, cleaning and rock dusting the belts, doing extra roof bolting, and pumping water. His crew consisted of five men who worked inside the mine, and one who worked outside. Carl Fogarty, the mine's general foreman, was Applicant's immediate supervisor. Mr. Fogarty in turn was supervised by Jack Tiltson, the mine's general superintendent.

On March 16, 1979, an MSHA inspector issued Citation No. 0679915 to Respondent, which described the following alleged violation:

> The approved ventilation system and methane and dust control plan was not complied with in that approximately 20 permanent stoppings erected between intake and belt entries or returns and belt entry has substantial openings or were constructed partially of wood or both. The approved plan requires that the stoppings be constructed of incombustible material and constructed with sufficient strength to serve the purpose intended. Approximately 24,000 cubic feet of air of the 56,000 cubic feet. The permanent stopping lines in question were not repaired in a substantial or incombustible manner in that holes present in the stopping lines were covered by such materials as wood, paper and plastic line brattice and were then covered by a stopping sealant product. The holes were 8" x 18" in size and existed in the return stopping line between the portal and a point approximately 600 feet inby.

The MSHA inspector established April 5, 1979, as the date for abatement of this condition. This abatement period was subsequently extended to April 24, 1979.

On March 26, 1979, a rock fall occurred in the mine which caused production to stop until the condition was corrected. Production resumed on April 16, 1979. Applicant testified that he believed that he was discharged on April 25, 1979 because he did not work fast enough in cleaning up the rock fall. He stated that he could not work any faster without jeopardizing the safety of himself and his men. Therefore, he contended that he was entitled to the protection of Section 105(c)(1) of the Act. Applicant offered no evidence that he ever filed a safety or health complaint with either MSHA or his supervisors. His contention of discriminatory discharge was based upon one conversation between Mr. Tiltson and himself and the fact that he was later discharged.

Applicant testified that in the beginning of April 1979, about one week after the rock fall occurred and three weeks before his discharge, Mr. Tiltson told him that he was very unhappy with the progress of Applicant's crew in cleaning up the rock fall, and that unless there was better progress, Mr. Tiltson would discharge Applicant. Mr. Tiltson told Applicant that as far as Applicant's crew was concerned, "the tail is wagging the dog," meaning that Applicant was having difficulty supervising the crew and that the men were doing as they pleased. Applicant disagreed, and told Mr. Tiltson that he could not work faster because of the hazardous conditions involved, and that the work had to be performed with extreme caution. Applicant testified that this was the only time that Mr. Tiltson or any one of Respondent's officials threatened to fire him. On Thursday, April 12, 1979, Applicant sustained an injury on the job. He worked the next day and Monday through Thursday, April 19, the following week. On April 19, Applicant was

directed to repair the stoppings which were the subject of the MSHA citation quoted above. He worked at the mine's face area with two of his men, and left three other men to repair the stoppings in an area about three-quarters of a mile from the face. He was told that the three men repaired the stoppings, but he did not examine their work. At the end of the shift, he filed a written daily report with his supervisor which stated in part: "Worked on repairing stoppings from portal with 3 men. Repaired stoppings from portal down to where last rock fall was. Took 2 men and went to section. Scooped sump hole in No. 1. * * *"

On April 20, 1979, Applicant visited a doctor concerning his injury and, on orders of the doctor, did not return to work that month.

On April 25, 1979, Applicant met with Mr. Tiltson. The superintendent told Applicant, "I decided yesterday that I would just let you go." Applicant did not ask Mr. Tiltson why he was being discharged and Mr. Tiltson did not elaborate.

Roger Jenkins, a United Castle Coal Company employee testified that at the request of Mr. Tiltson, he observed Applicant cleaning up the roof fall in March 1979 and felt that the crew was working fast enough. He stated that this work had to be performed slowly because the miners work under unsupported roof at all times.

Arnold D. Carico, an MSHA inspector, stated that although he did not issue the original citation in connection with Respondent's defective stoppings, he visited Respondent's mine on April 24, 1979 because remedial

action was supposed to be completed by that date. He stated that MSHA had found 20 of a total of 40 or 50 stoppings in Respondent's mine to be deficient. On April 24, Mr. Carico was told by Respondent that the condition had been abated but when he inspected three of the first 10 or 12 stoppings going down into the mine from the portal or entrance, he found that the condition had not been abated, and therefore he issued a withdrawal order pursuant to Section 104(b) of the Act. The Order was terminated two days later, on April 26.

Respondent's president, Michael Forticq, stated that he visited the mine on April 24, 1979, and met with Mr. Carico after the MSHA inspector had completed his inspection. Mr. Carico told Mr. Forticq that the repair work on the stoppings was so poorly done as not to constitute a good faith effort to abate the violation. Upon inspecting the stoppings himself the following day, Mr. Forticq found pieces of cardboard, wood, and other combustible materials stuffed into the stoppings. He agreed with the inspector that the corrective work was so carelessly performed that the issuance of the withdrawal order was appropriate. He also stated that he was very upset about this. Mr. Forticq testified that he had attempted to build a good relationship with MSHA, and that he was very hurt that this situation had arisen. After speaking with the MSHA inspector on April 24, Mr. Forticq told Mr. Tiltson, the mine superintendent, that this was serious enough to warrant the discharge of the person responsible. It should be noted that at the time, Mr. Tiltson's job was in serious jeopardy, and he knew that he was also under consideration for possible discharge. Mr. Forticq testified that following their conversation, Mr. Tiltson determined that Applicant

was responsible for doing the work on the stoppings, and Mr. Tiltson discharged Applicant the next day. Mr. Forticq further testified that Mr. Tiltson was discharged in the end of May or early June after having been given a few weeks prior notice. Carl Fogarty, the mine's general foreman and Applicant's immediate supervisor, was also discharged because of "his apparent lack of concern for regulations and lack of diligence in seeing that they were properly adhered to."

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

Applicant's claim that he was discriminated against pursuant to Section 105(c)(1) of the Act rests upon a conversation with Mr. Tiltson in which the superintendent complained that Applicant was not proceeding quickly enough in cleaning up a roof fall. Applicant contends that Mr. Tiltson's complaint was an attempt to pressure him to proceed in a manner which he considered to be hazardous. There is no evidence that Applicant made any safety complaint to MSHA or to any other official. Applicant merely justified his slow progress in terms of his proceeding safely.

On the other hand, Respondent contends that Applicant was discharged because his crew repaired defective stoppings which were the subject of an MSHA citation in such a careless and faulty manner as to cause MSHA to issue a withdrawal order at the mine. Respondent thus asserts that it discharged Applicant because Applicant failed to do his job properly, and that this had nothing to do with a safety or health complaint. The testimony of Mr. Forticq, Mr. Carico, and of Applicant himself support Respondent's interpretation. Applicant was responsible for correcting defective stoppings. The men on his crew did a poor job, apparently unknown to Applicant since he did not examine the work. Applicant nevertheless reported that the work was done properly. As a result, Mr. Carico was told that the work had been done properly, and was surprised to find that the work was totally unsatisfactory. Mr. Carico's testimony substantiates the fact that the work was done poorly. I believe Mr. Forticq's testimony that

he was furious about the incident and that he directed Mr. Tiltson to discharge the person responsible. Mr. Tiltson, whose job was also in jeopardy and who was subsequently discharged himself, needed to find a responsible person and discharge him. Since Applicant's crew had performed the work, Applicant was held responsible for an incident which had resulted in a closure of the mine for two days. It seems clear to me that this incident was the cause of Applicant's discharge.

ORDER

The complaint of discrimination DISMISSED. The Solicitor's motion to assess a civil penalty is DENIED.

Edwin S. Bernstein
Administrative Law Judge