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RONALD McCRACKEN V. VALLEY CAMP COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RONALD H. MCCRACKEN,	COMPLAINANT	Complaint of Discharge, Discrimination or Interference
v.		
VALLEY CAMP COAL COMPANY,	RESPONDENT	Docket No. WEVA 79-116-D Valley Camp No. 1 Mine

DECISION

Appearances: John W. Cooper, Esq., and Abraham Pinsky, Esq., Wellsburg, West Virginia, for the Complainant Arthur M. Recht, Esq., Wheeling, West Virginia, for the Respondent Thomas P. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Mine Safety and Health Administration

Before: Judge Melick

This case is before me upon the complaint by Ronald H. McCracken (McCracken) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter referred to as the "Act"), alleging an unlawful discharge of him by the Valley Camp Coal Company (Valley Camp). A hearing was held on December 4 and 5, 1979, in Wheeling, West Virginia, at which both parties, represented by counsel, appeared and presented evidence.

The issue in this case is whether McCracken was unlawfully discharged by Valley Camp in violation of section 105(c)(1) of the Act because of his safety complaints regarding Valley Camp's No. 1 Mine. Section 105(c)(1) provides in part that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against * * * a miner [or] representative of miners * * * in any coal * * * mine subject to this Act because such miner [or] representative of miners * * * 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 miners at the coal * * * mine of an alleged danger or safety or health violation in a coal

> * * * mine, * * * or because such miner [or] representative of miners * * * 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 [or] representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act.

There is no dispute in this case that McCracken had made safety complaints within the scope of section 105(c)(1), that these complaints were made to the Federal Mining Enforcement and Safety Administration and that Valley Camp knew that McCracken had made the complaints. The record shows that from December 15, 1975, through July 8, 1976, McCracken was involved in making or filing complaints resulting in the creation of 17 investigative reports by the Federal agency. There is, in addition, no dispute that McCracken was discharged by Valley Camp on August 28, 1978, in a general reduction of force in which 137 other employees and 14 supervisors at the Valley Camp No. 1 Mine were also discharged. McCracken does not question the legitimacy of that reduction in force. I find, for the reasons that follow, that McCracken's discharge was not because of any safety or health complaint or complaints made by him, but rather was caused by a legitimate reduction in force and that McCracken's release was dictated by the terms of the union-operator contract then in effect, the National Bituminous Coal Wage Agreement of 1978 (Wage Agreement).

Article XVII, Section (b) of the Wage Agreement provides that "[i]n all cases where the working force is to be reduced, employees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work." McCracken argues that at the time of the lay-off, he was in fact a qualified underground coal miner and that upon the decision by management to discontinue his job classification (as greaser--preparation plant) he should have been given the opportunity to bid upon a job in the underground workings of the coal mine and, if necessary in order to obtain such a job, to displace persons with less seniority. He claims that he then had "the ability to perform available work" in the underground workings. Windsor disagrees and maintains that McCracken did not have any experience in underground workings that would qualify him for such work.(FOOTNOTE 1)

McCracken began employment with the Valley Camp Coal Company in 1967 as a deckhand on a riverboat for 3 or 4 months and then worked as a coal analyst. Around May 1968, he was classified as a "general laborer, surface," primarily working as a mechanic's helper in the coal preparation plant with additional overtime and substitute work in what is known as the Souttell Run Tunnel. McCracken testified that he became a "greaser" on February 14, 1973, and retained that position until laid off on August 28, 1978. Documents maintained by Valley Camp show that his job title was "greaser (preparation plant)" and I find that this was his position. He admits that he has performed no work in areas of an underground mine where coal is extracted, that he has in fact only twice visited such areas briefly and that during those visits the mine was not operating.

McCracken's experience in the Souttell Run Tunnel, from which he claims he obtained his "underground" qualifications, apparently began in May 1968, when he spent 3 to 5 months inserting grease fittings. Since then he reportedly spent 30 to 40 hours a week in the tunnel (estimated by him to account for 85 percent of his total work time) as a greaser performing such duties as pumping water, repairing pipe and changing rollers on the conveyor. McCracken explained that although his regularly assigned duties were performed in the preparation plant he worked as a tunnel greaser on an overtime basis or when the primary tunnel greaser, John Coffield, was on vacation. He did not work in the Souttell Run Tunnel while it was being constructed.

Valley Camp maintains that McCracken did not have "the ability to perform available work" in the underground workings where coal was being extracted. It contends that he had no working experience in such areas and that it was against long-standing company policy to permit such inexperienced personnel to work there without first completing a 6-month apprenticeship or "red hat" training program in the underground workings. McCracken contends that his work in the Souttell Run Tunnel provided him with such experience and qualified him to transfer immediately to the underground workings. Valley Camp disagrees and cites what it calls significant differences between the tunnel environment and the underground workings as the basis for its disagreement.

James Litman, Valley Camp's Vice President for Operations, described the tunnel and its distinctive features particularly with respect to the haulage and track systems, traffic patterns, roof control, ventilation, and the conveyor systems. This testimony in significant respects is not disputed. According to Litman the tunnel is essentially only a conduit for the transfer of coal from the preparation plant to transportation on the Ohio River. It contains a conveyor belt for coal and a track for transportation of personnel, equipment and coal. The tunnel consists of two parallel entries running about 9,000 feet in a straight line and contains no active workings. There is, in fact, no coal exposed in the tunnel and there is a 250-foot barrier separating it from the working sections of the mine. The overburden varies from 0 to over 120 feet. According to Litman,

the roof-support system in the tunnel was maximized to prolong the life of the tunnel. Wherever overburden exists, it consists of 7- and 10-foot conventional roof bolts, 3 to 4 inches of gunite encasing No. 10-gauge steel mesh and, at 10-foot intervals, horizontal "H" beams resting on braces embedded into the ribs.

Vertical beams centered at 10-foot intervals lend further support to the "H" beams. Some locust posts also remain and these and the ribs have also been covered with steel mesh and gunite. In the sections where there is no overburden, the tunnel is encased in steel liners. The tunnel is open at both ends and has no mechanically induced ventilation.

Only a small portion of the underground workings (estimated at .49 percent) on the other hand are gunited and various methods of roof control are employed in the remaining areas. Mechanical ventilation is required in all of the working sections. Also, in contrast to the tunnel, the underground workings contain a multitude of entries, some of which have been abandoned, have improper roof support and have inadequate ventilation. Litman emphasized that the underground miner must be able to identify these areas for the safety of himself and others. The miner must also learn the location of the ventilated escapeways through which safe exit can be made in an emergency. He must learn which doors to pass through and which doors not to pass through and must gain the experience to know whether roof support is adequate in a particular location. He must also learn to work safely around heavy mobile equipment that does not exist in the tunnel. The haulage and track system in the underground workings also differs from the tunnel. According to Litman, it involves complex interconnections as opposed to a single track in the tunnel. In summary, a number of serious hazards exist in the underground workings of the mine to which McCracken had never been exposed in the Souttell Run Tunnel.

Litman explained that in order to enable a person unfamiliar with the hazards unique to the underground working sections of the mine to learn to work safely in that environment, it has been the company policy since at least 1974 that underground experience in areas where coal is being extracted is a prerequisite to immediate employment in such areas. Such employees are first required to work with an experienced miner in the underground workings for 6 months as an apprentice or "red hat" to learn of the mine hazards. Grant King, an inspector for the West Virginia Department of Mines, testified that West Virginia had a similar training requirement in order to safely expose the unfamiliar miner to the hazards and dangers inherent in underground coal mining. According to Litman, company policy in this regard was even more stringent than that of West Virginia. I find that this long-standing and non-discriminatory policy is clearly justifiable and establishes a legitimate basis for McCracken's discharge. He did not in fact have the present ability to perform available work in the underground working sections of the mine because he did not have the requisite experience.

In reaching my conclusion herein, I have not disregarded the evidence of many similarities between the Souttell Run Tunnel and the underground working sections of the mine, that McCracken does, in fact, have many work-related skills, that he possesses what has been found to be a valid West Virginia miner's certificate, and that the Federal Mine Safety and Health

Administration and the West Virginia Department of Mines consider the Souttell Run Tunnel to be an "underground" facility for their enforcement

purposes. See also, Valley Camp Coal Company, Docket No. WEVA 79-111 (March 28, 1980). Under the circumstances of this particular case, however, these factors are immaterial.

Once the operator establishes a legitimate cause for discharge, the Applicant, to sustain his case, must then show by affirmative and persuasive evidence that the invocation of such cause was merely a pretext for an unlawful motive. Shapiro v. Bishop Coal Company, 6 IBMA 28 (1976). McCracken alleges three incidents as evidence of such an unlawful motive. In the first, he claims that the company manager for industrial relations, John Gotses, had, after the layoff of McCracken and several other miners who later filed grievances, once said that the company had once thought about "cutting a deal" in which the four other miners would be rehired if the union would withdraw McCracken's grievance. Gotses denied making any such statement and I am not at all convinced that it was made. Even assuming, arguendo, that such a statement was made, it is vague and imprecise, the identity of the person(s) suggesting such a "deal" was not disclosed, the reasons for the proposal were not revealed and there is no evidence that any such "deal" was ever proposed. Without some clarification of these details the statement has no probative value. It is apparent moreover that the four other miners in question were actually senior to McCracken and would in any event have been entitled under the Wage Agreement to have been rehired before McCracken.

McCracken next claims that company Vice President Litman once referred to McCracken and several others as "radicals" in connection with their union activities in a strike at the mine and reportedly said that if they ever quit, he would see that they would never get another union job in the valley. In light of Litman's denials, I am again unconvinced that any such statements were made. Even assuming, arguendo, that the statements were made, it is not at all clear that they would have involved a retaliatory motive on any basis protected by section 105(c)(1) of the Act. The alleged statements apparently were also made years before McCracken's layoff, too remote in time to bear any real causal connection. I note moreover that contrary to the import of the allegations Valley Camp has in fact recommended McCracken to other employers.

Finally, McCracken alleges that a former mine superintendent named Wilson had once called McCracken "a thorn in their side and that he cost them a lot of money." Even assuming that such a statement was made, and regardless of Wilson's personal feelings toward McCracken, it is clear that Wilson was no longer employed by Valley Camp when McCracken was laid off. There is no evidence that Wilson (who in fact may have left the employ of Valley Camp years before the layoff) had anything to do with the alleged discriminatory act, and therefore the comments attributed to him are immaterial to this case.

Under the circumstances, I cannot find any credible affirmative and persuasive evidence to show that the legitimate cause for McCracken's discharge was a pretext for an unlawful

motive. To the contrary, the

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evidence shows that more than 2 years elapsed between McCracken's last safety complaint and his layoff. This in itself is persuasive evidence that no connection existed between the two events. McCracken has failed to show that his discharge was the result of any discrimination proscribed by the Act and the complaint herein is therefore dismissed.

Gary Melick
Administrative Law Judge

~FOOTNOTE 1

In McCracken's grievance proceeding under the Wage Agreement, an arbitrator found that McCracken had not been reassigned to work in a classification of the underground facility which involved the mining of coal because he had in fact never performed work in such a classification and therefore had not demonstrated that he possessed the present ability to perform the duties of that classification. That determination is not however binding in this case. Phillips v. Interior Board of Mine Operations Appeal, 163 U.S. App. D.C. 104, 500 F.2d 772 (1974).