

FEDERAL **MINE SAFETY** AND **HEALTH** REVIEW **COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

2 8 AUG 1980

JACK COLLINS, : Complaint of Discharge,
Complainant : Discrimination, or
: Interference
v. :
: Docket No. KENT 80-88-D
CHAPPERAL COAL COMPANY, :
Respondent : No. 2-A Mine

DECISION.

Appearances: Francis D. Burke, Esq., Burke, Stalnaker & Scott, Pikeville,
Kentucky, for Complainant;
Marrs Allen May, Esq., Stratton, May & Hays, Pikeville,
Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued June 2, 1980, as amended July 18, 1980, a hearing in the above-entitled proceeding was held on July 23, 1980, in Pikeville, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 160-169):

This proceeding involves a complaint of discharge, discrimination, or interference filed in Docket No. KENT 80-88-D on December 4, 1979, as supplemented on December 13, 1979, by Jack Collins alleging that Chapperal Coal Company discriminated against him by discharging him because of his concern about respondent's failure to provide safe working conditions for miners at respondent's No. 2-A Mine.

The hearing has been held under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. That section provides that a miner may file his own complaint with the Commission if the Secretary of Labor fails to find a violation of section 105(c)(1) of the Act so as to cause the Secretary to undertake the filing of a complaint on the miner's behalf under section 105(c)(2) of the Act.

The Department of Labor had advised Mr. Collins on November 20, 1979, that the Department's investigation had indicated to it that no violation of section 105(c) had occurred and since Mr. Collins made his filing by December 4 in this proceeding, it was timely filed.

The issues raised by the complaint in this instance are whether Mr. Collins' discharge was in violation of section 105(c)(1) of the Act. That section provides that:

"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 * * *."

That is the portion of section 105(c)(1) which would have to be shown to have been violated in order for the complaint in this proceeding to be granted.

I shall make some findings of fact on which my decision will be based, as set forth in the following enumerated paragraphs:

(1) Complainant, Jack Collins, began working for Chapperal Coal Company on August 6, 1979, as a repairman and electrician. He was assigned to the 3:00 p.m. to 11:00 p.m. shift.

(2) Mr. Collins was asked to sign for tools used on his shift and he was responsible for keeping them from being *lost*. Some miners borrowed them and did not always return them. As a result, Mr. Collins often argued with some of the men on the section about their using the tools. Mr. Collins complained to his section foreman, Mr. Chester **Thacker**, about having to loan tools to other men and still being held responsible for them. He was told by his section foreman that the mine foreman wished Mr. Collins to continue loaning the tools to the men if they needed the tools and that the person who borrowed the tools should be held responsible for returning them.

(3) On August 20, 1979, Mr. Collins, in the company of Mr. Mike Stalker, the safety inspector for the company, found that wires had been placed on the ground monitoring system which had the effect of preventing circuit breakers from

kicking out. Mr. Stalker discussed this occurrence with both Mr. Thacker and the mine foreman, Mr. Sloan, **and** both of them told Mr. Stalker that these conditions should be eliminated and the system should be restored to proper condition. On the following day, Mr. Collins made another inspection and found one more bridged-out monitoring system for one of the shuttle cars and again the bridging was removed. Mr. Collins didn't find any more bridging of the monitoring system after that date, that is, after August 21, 1979.

(4) Mr. Collins' primary claim that his discharge resulted from his making safety complaints relates to the underground power center which steps down voltage for the purpose of supplying electricity to the equipment used on the section, including a continuous-mining machine, a roof-bolting machine, and two shuttle cars. Mr. Collins says that even though he found the ground monitoring system bridged out on only two days, that the circuit breakers constantly jumped out and much of his time was spent in going to the power center to **replug** the circuit breakers. He said he complained on a daily basis to the section foreman, Mr. Thacker, about the malfunctioning of the circuit breakers but Mr. Thacker was not responsive to his complaints.

(5) Mr. Chester Thacker, who was Mr. Collins' immediate supervisor, states that Mr. Collins was not proficient in the repair of mining equipment and that it was necessary to have other people come to the section where Mr. Collins was working to assist him in the repair of equipment.

Mr. Thacker indicated that early after Mr. Collins' employment, Mr. Collins' ability was not considered to be satisfactory, but the mine foreman advised Mr. Thacker at that time that he should let Mr. Collins continue working awhile to see if his efforts and abilities would improve. Mr. Thacker says that Mr. Collins' ability as a repairman did not improve, that Mr. Collins and some **of** the other men had frequent arguments about the tools, and that eventually he was told by Mr. Sloan that the question of whether Mr. Collins should be kept as an employee was a decision that Mr. Thacker would have to make.

(6) On September 13, 1979, Mr. Thacker says that he personally was aware of a rather hot argument between Mr. Collins and another employee concerning the use of the tools and that on that occasion Mr. Thacker advised Mr. Collins about 9:00 p.m. that he was going to have to discharge him, but that he could work out the remainder of the shift. At the end of the shift Mr. Thacker told Mr. Collins that he should remove from the mine any of his personal tools **because that** would be the last day that he would be employed by Chapperal Coal Company.

I think those are the primary findings that are required. One of the remarks Mr. Collins made in his pleadings was that we judges who preside over these hearings must recognize that the company is not going to come to the hearing and admit that it discharged a given person because of his complaints about safety.

I have presided over a number of these cases and Mr. Collins is correct. I've never had the representatives of the company come in and volunteer the information that they discharged a certain person or discriminated against him because of his complaints about safety. But I have to base my findings on the preponderance of the evidence, and if the evidence doesn't support a finding that a person was discharged because of his complaints about safety, then it is impossible for me to make a decision in which I find a person is discharged because of his complaints about safety.

The company agrees that Mr. Collins correctly and properly called to the company's attention the fact that these monitoring systems had been bridged out on two different days. But those days were both consecutive and Mr. Collins didn't find any bridging after that. Nevertheless, he says he, on a daily basis, complained to Mr. Thacker about the fact that the circuit breakers were jumping out more frequently than they should have and that the frequent kicking of the breaker was an indication that something was wrong, either with the trailing cables or with the power center itself.

Mr. Collins says he asked Mr. Thacker to let him work on the power center until such time as he could discover the problems and correct them and that he was not given that time.

Mr. Sloan, who testified in this proceeding and who is a certified electrician also, as well as a mine foreman, said that it would have been possible to check the continuity of the ground in the trailing cable with an ohmmeter and it would be a very simple matter to go down the trailing cable, if there was a grounding problem in it, and locate any bad splice there might be in the trailing cable.

Additionally, Mr. Sloan says that both of the trailing cables on the two shuttle cars were replaced shortly before Mr. Collins started working for the company; and those are the two pieces of equipment which most frequently had the circuit breakers jump out. Consequently, the evidence won't support a finding that there was something hazardous about the equipment which would have endangered the men working on it.

Additionally, Mr. Collins testified that he was given the opportunity to work on Saturdays but that he declined to do so. He could have checked out the trailing cables on those occasions without interfering with production. so I cannot make a finding that his efforts to be conscientious about the safety of the power center was something that he absolutely was prevented from working on if he had been inclined to do so.

The company insists through both of its witnesses that the primary reason which led to Mr. Collins' discharge was the fact he did have a lack of experience in repair of mining equipment and that it was necessary for them to send men from other shifts and other sections to help him from time to time to do repairs on his section.

Mr. Collins agreed during his testimony that men had come in to help repair equipment. While he says he didn't ask for them to be there, he agrees that it was necessary or at least that people were sent to work there from time to time. So the testimony certainly supports the company's position that Mr. Collins lacked the experience that would have been desirable in order for them to have kept him as an employee.

Insofar as the problem of the tools is concerned, that is not a safety-related issue, and while I agree with Mr. Collins that he was placed in an unfair position by having to sign for tools and then being required to loan them to other employees who did not always return them promptly, if at all, the fact remains that the tool-lending arrangement is not a safety-related complaint that I could take into consideration in determining the outcome of this proceeding. Mr. Collins does not contend that the practice of having to loan tools to other employees prevented him from being able to keep the equipment operating in a safe manner. Mr. Collins also admitted he had had some arguments with men on the section about the tools.

It was Mr. Thacker's decision that Mr. Collins should be discharged and he based the discharge on two primary factors. One was that Mr. Collins had too many arguments with the men over the tools and the second one was that Mr. Collins had been unable to perform his assignments in a fashion that was satisfactory.

I believe I have covered the primary points that were given by Mr. Collins in his complaint and I have covered the company's position as well.

WHEREFORE, it is ordered:

For the reasons hereinbefore given, the Complaint of Discharge filed by Mr. Jack Collins in Docket No. **KENT** 80-88-D is denied.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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