

CCASE:

WILLIAM ROBISON V. SO. UNION COAL

DDATE:

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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

WILLIAM A. ROBISON,  
COMPLAINANT

v.

SOUTH UNION COAL COMPANY,  
RESPONDENT

Complaint of Discharge,  
Discrimination, or Interference

Docket No. WEVA 80-246-D

Jamison No. 12 Mine

DECISION

Appearances: David P. Born, Esq., and Richard Bunner, Esq., Fairmont,  
West Virginia, for Complainant  
William H. Higinbotham, Esq., Morgantown, West Virginia,  
for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued July 29, 1980, a  
hearing in the above-entitled proceeding was held on September  
30, 1980, in Clarksburg, West Virginia, under section 105(c)(3)  
of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of  
evidence, I rendered the bench decision which is reproduced below  
(Tr. 209-211):

This proceeding involves a discrimination complaint  
filed in Docket No. WEVA 80-246-D on February 25, 1980,  
as supplemented on April 10, 1980, alleging that  
complainant was employed by South Union Coal Company as  
a section foreman at its Jamison No. 12 Mine. On or  
about May 5, 1979, complainant alleges that he was  
unlawfully discharged by South Union's general mine  
foreman for his failure to perform acts which would  
have caused complainant to violate a mandatory health  
and safety standard. Complainant seeks the relief  
available under section 105(c)(3) of the Federal Mine  
Safety and Health Act of 1977 for the alleged violation  
of section 105(c)(1) of the Act. (FOOTNOTE 1)

Complainant first filed a complaint with the Mine  
Safety and Health Administration (MSHA) on May 8, 1979.  
On February 4, 1980, MSHA notified complainant that its  
investigation had revealed that no violation of section

105(c)(1) had occurred. Since that finding meant that MSHA would not file a complaint with the Commission on complainant's behalf under section 105(c)(2) of the Act, complainant filed his own complaint with the Commission under section 105(c)(3) of the Act and the hearing has been held under section 105(c)(3) of the Act.

The issue in this case, of course, is whether a violation of section 105(c)(1) did occur, when the general mine foreman discharged Mr. Robison on May 5, 1979. I shall make some findings of fact on which my decision will be based. I shall make the findings in numbered paragraphs.

(1) William A. Robison began working for South Union Coal Company on November 10, 1978, as a section foreman. Prior to that time, Mr. Robison had worked for about 19 years in various capacities for Consolidation Coal Company.

(2) South Union Coal Company has stipulated that it is subject to the Commission's jurisdiction and to the provisions of the Federal Mine Safety and Health Act of 1977. The company did not produce coal continuously during the month of September 1980 because of the poor coal market existing at that time, but its normal production is from 5,500 to 6,000 tons per month. The company normally employs about 50 coal miners and has seven salaried employees.

(3) On May 3, 1979, Mr. Robison went to work on his normal evening shift which ran from 4 p.m. to midnight. He made a check of the working faces, without including an air reading at that time, and indicated to the operator of the continuous-mining machine, Mr. Frank Shorter, that he could commence mining in the No. 6 entry.

(4) Mr. Shorter began mining, but found that there was an unusual amount of dust coming back over the continuous-mining machine. Therefore, Mr. Shorter and his assistant, Mr. Randy Martin, determined that they would not run the continuous-mining machine in the midst of an excessive amount of dust. They stopped running the machine and told Mr. Robison that they would not operate the machine until ventilation conditions were improved.

(5) Mr. Robison had them cut another shuttle car or so of coal, so that he could try to determine why there was so much dust. After he had seen the amount of dust that existed, he agreed something needed to be done to improve ventilation.

(6) Mr. Robison began checking the stoppings and he also called outside and reported that ventilation problems existed. At the same time, or very shortly after that, Mr. Charles Gorbey called outside and asked that the safety committee, which worked the day shift, should come to the mine to examine ventilation conditions.

(7) Before much longer, the mine superintendent, Mr. Beres, and the mine foreman, Mr. Kincell, came into the mine. The safety committee also came into the mine. All are in agreement that there was an insufficient amount of air at the beginning of the shift.

(8) After several stoppings had been tightened and other work had been done on the ventilation system, the proper amount of air was obtained and the mine foreman, Mr. Kincell, was able to get an air reading with his anemometer showing that a volume of 3,100 cubic feet of air per minute existed behind the brattice curtain coming into the No. 6 entry. When Mr. Robison left the mine at the end of his shift, he was able to report that about 12,000 cubic feet of air existed at the last open crosscut.

(9) After Mr. Kincell, the mine foreman, had determined that an adequate amount of air existed at the working face, he asked Mr. Robison to get Mr. Martin and Mr. Shorter to work in the actual production of coal, while the other men continued to work on the ventilation system.

(10) Mr. Shorter and Mr. Martin declined to work in response to Mr. Robison's request, but when Mr. Robison reported to Mr. Kincell that the two men were unresponsive to his request, it was agreed that Mr. Kincell personally should ask them to work. Mr. Kincell did ask the two men to work, and they agreed to resume production of coal for the remainder of that shift. The result was that Mr. Robison was able to report about 21 shuttle cars of coal having been produced on May 3, which was about an average amount because production ranged from 21 to 46 cars of coal on an average working shift.

(11) When Mr. Robison reported for work on the next day, which was May 4, 1979, Mr. Kincell, the mine foreman, asked him to make certain before he began producing coal that the ventilation was up to the required amount before he began producing coal. Mr. Robison again found that there was not an adequate amount of ventilation at the beginning of the shift. It was again necessary to do some tightening of curtains and stoppings in order to get the proper amount of air before production was begun.

(12) On May 4, Mr. Robison encountered other difficulties in that a shuttle car had a defective cable which required a splice. That put the shuttle car out of commission from about 7:30 to 8 p.m. A roof-bolting machine also had a problem and was out of service from about 10 to 10:45 p.m. Additionally, the roof-bolting machine was mired in mud from time to time, which kept the miners from being able to bolt as rapidly and in the places they would like to have bolted. Finally, about 11 p.m. the tramming chain on the continuous-mining machine broke, so that toward the end of the shift on May 4 Mr. Robison found that he had a number of problems to deal with.

(13) On May 5, which was a Saturday, Mr. Robison received a call from Mr. Kincell, the mine foreman, who advised Mr. Robison that he was going to have to discharge Mr. Robison. Mr. Robison asked that he be permitted to come to the mine and discuss the matter in person with Mr. Kincell.

(14) Mr. Robison did go to the mine and they did have a discussion. What was said by both men during that discussion is largely uncontroverted by either man. Mr. Kincell gave as his primary reason for discharging Mr. Robison the fact that a lot of backstabbing was going on, which Mr. Kincell did not think he could continue to tolerate. During the course of the conversation, Mr. Kincell did tell Mr. Robison that he believed Mr. Robison could have persuaded Mr. Shorter and Mr. Martin to work on Thursday, May 3, if he had really wanted to do so.

(15) In his testimony, Mr. Kincell explained that by "backstabbing" he meant the fact that he had received, over a period of time, comments from the men on Mr. Robison's shift statements to the effect that Mr. Robison was ambitious and would like to see Mr. Kincell terminated from his job as mine foreman so that Mr. Robison could achieve that position.

(16) At first Mr. Kincell discounted such statements, but eventually became convinced that his authority in the mine was being eroded by Mr. Robison's comments. Mr. Kincell believed that he should have been able to receive more loyalty on the part of his section foreman than Mr. Robison had been demonstrating.

(17) Another reason that Mr. Kincell gave for Mr. Robison's discharge was that he had found Mr. Robison's work to be unsatisfactory in several respects. The primary aspect that he found unsatisfactory was that Mr. Robison had failed to cut head coal with the continuous-mining machine,

so as to increase the height of one of the entries for the purpose of converting it into a haulageway. Both the day-shift section foreman and the evening-shift section foreman are supposed to do some of the cutting of the head coal. Cutting head coal is not as productive as normal cutting with the continuous-mining machine. The result is that the section foreman who cuts head coal loses a certain amount of production. When the day-shift section foreman complained to Mr. Kincell that the evening shift--that is, Mr. Robison's shift--was not cutting the proper amount, or fair amount of head coal, the day-shift section foreman stopped cutting also. Therefore, Mr. Kincell found it necessary to speak to Mr. Robison a few times about his failure to cut head coal.

(18) Another criticism Mr. Kincell had about Mr. Robison was that Mr. Robison had failed to follow the roof-control plan on or about May 3, 1979, because Mr. Robison had violated the roof-control plan by starting a cut in the crosscut from the No. 4 entry, at the same time that a cut had been made from the No. 3 entry into that same crosscut at a time when the roof had not been bolted after the first cut had been removed. Mr. Kincell stated that it was a combination of all of these matters which caused him to conclude in a discussion with the mine superintendent, Mr. Beres, that Mr. Robison should be discharged.

I think that the findings above summarize the pertinent facts in this proceeding.

This type of case is always difficult to decide. The testimony in this case is actually more consistent and all the witnesses have demonstrated a greater degree of credibility than in almost any one of these cases I have ever had. There is a very little real controversy about what happened.

The difficulty in all these cases, however, is that I am always faced with the question of whether respondent discharged complainant for the reason respondent says he was discharged, or whether respondent discharged the complainant because the complainant had been engaging in a protected activity which disturbed the respondent so much that it wanted to eliminate that particular individual from its payroll. I never find in one of these cases a situation in which the respondent's representative comes in and says, "Yes, that's right. I discharged this employee in violation of section 105(c)(1)." So it is always up to me to try to determine what really was the reason for the discharge.

I do not think that there is any doubt but that Mr. Robison sincerely feels that he was discharged because he could not get Mr. Shorter and Mr. Martin to run the continuous-mining machine because Mr. Kincell agreed he had mentioned that as one of the things that was discussed on the day of the discharge. Nevertheless, I do not think the preponderance of the evidence will permit me to find that the company did discharge Mr. Robison for that reason. I believe that the evidence shows that Mr. Robison was discharged for the reasons that Mr. Kincell gave, rather for the fact that Mr. Robison could not get some men to work in unsafe conditions with the result that a violation of section 105(c)(1) of the Act occurred.

I shall give a few reasons for my coming to that conclusion. As I indicated in my questions of Mr. Kincell and I do not think Mr. Kincell ever really understood what I was driving at, but one of the things that has been inconsistent in Mr. Robison's complaint from the beginning was that I could not understand why Mr. Kincell would caution Mr. Robison when he went into the mine on May 4 to make sure that he had an adequate amount of ventilation, if Mr. Kincell would then discharge Mr. Robison the next day for failing to have persuaded two men to work when the air was less than it should have been on the section. I feel the fact that Mr. Kincell did tell Mr. Robison before he went in the mine on May 4 to make sure he had an adequate amount of ventilation is a very good reason for believing that Mr. Kincell would not have discharged Mr. Robison for failing to get two men to work at a time when the ventilation was not up to standard.

I do not like to criticize Mr. Robison, but the evidence in this case does show that he did know certain things were not being done in the mine, but he said nothing about those things to his mine foreman, Mr. Kincell, or to the mine superintendent, Mr. Beres. Specifically, I am talking about the fact that Mr. Robison indicated in connection with his Exhibit 9 that he knew the brattice curtain was improperly hung on the right side of entry No. 6. He said when it was on the right side, the air would flow up the right side and then come down across the continuous-mining machine and that such air flow was not proper.

Mr. Robison said that in his opinion the curtain should have been hung on the left side of the entry so that the air would have been directed only across the front of the continuous-mining machine, then behind the curtain, and down the No. 6 entry. Despite the fact that he knew that the curtain had been improperly installed, Mr. Robison did not say anything to Mr. Kincell about it. Mr. Robison said he had

learned to keep quiet about things like that because you just do not upset the mine foreman unnecessarily by telling him about things that are wrong. Now if Mr. Robison had learned to cooperate like that and not rock the boat, so to speak, I believe he was not complaining about safety in the mine or health conditions in the mine to such an extent that Mr. Kincell would have had a motivation for discharging him because of his failure to violate some safety or health standard at the request of the mine foreman.

Also, again I do not like to be critical of Mr. Robison, but the evidence does show that he did not know what the last open crosscut volume of air should be under the company's ventilation plan. It is required under the plan to be 9,000 cubic feet at the last open crosscut. Section 75.301 of the regulations requires the same thing. Mr. Robison had access to the ventilation plan (Tr. 183) and should have known what the volume of air was that was required at the last open crosscut. Otherwise, he would not know when he had an amount of ventilation that was adequate and when he did not.

Likewise, it is a fact Mr. Robison indicated he had started that crosscut to the left of the No. 4 entry, when in fact the crosscut had not been bolted on the side beginning from the No. 3 entry. Additionally, Mr. Robison said that he generally had a higher production level on his shift than existed on the day shift. Maintenance of a high production level is indicative of a person who is ambitious and wants to get ahead. There is nothing wrong with being ambitious, except that there may have been some undercutting or undermining of the mine foreman in various remarks Mr. Robison may have made about him. In other words, the preponderance of the evidence supports a finding that the reasons Mr. Kincell gave for the discharge of Mr. Robison were the ones that brought about his discharge, rather than the reason that Mr. Robison thinks was the cause of his discharge.

I find that Mr. Robison's discharge was not the result of his participation in a protected activity under section 105(c)(1) of the Act; therefore, Mr. Robison's complaint will have to be denied.

After the bench decision set forth above had been rendered, the Commission issued on October 14, 1980, its decision in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC ÅÅÅÅÅÅ, 80-10-13, holding that a prima facie case is made if a complainant shows that he engaged in a protected activity and that the adverse action or discharge was motivated in any part by the protected activity. The Commission noted that complainant has the burden of showing that his discharge was in any part caused by his

~3265

engaging in a protected activity. The Commission also held that if respondent's evidence shows that the discharge was in part the result of complainant's participation in a protected activity, respondent has the burden of showing that the discharge would have taken place in any event because of complainant's unprotected activity.

Application of the rationale of the Pasula case to the facts in this proceeding does not require any change in my findings or conclusions. Although respondent's mine foreman agreed that he had mentioned during the discharge discussion that he believed that complainant could have persuaded the miners to work on May 3, 1979, the request that the miners resume operation of the continuous-mining machine was made after ventilation had been restored (Finding Nos. 9 and 10, supra; Tr. 178-179, 189-191). Therefore, the complainant was never asked to have miners work at a time when a proper volume of air was unavailable. The mine foreman referred to complainant's inability to get the miners to work on May 3 as an example of the failure of complainant, who was a section foreman, to provide the mine foreman with the type of support which the mine foreman believed that complainant should have provided at that time as well as on other occasions.

I find that complainant did not sustain his burden under the Pasula case of showing that the mine foreman ever asked him to have miners to work when there was inadequate ventilation. In other words, in this case, complainant never did prove that the discharge was motivated in part by the fact that complainant was engaged in a protected activity.

WHEREFORE, it is ordered:

The complaint filed in Docket No. WEVA 80-246-D is denied for failure to prove that complainant's discharge involved a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

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

~FOOTNOTE\_ONE

1 Section 105(c)(1) provides in pertinent part that no person shall discharge a miner because he has "\* \* \* filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent \* \* \* of an alleged danger or safety or health violation in a coal or other mine \* \* \*."