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SOL (MSHA) v. B & B MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, Complaint of Discharge
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), Docket No. VA 80-128-D
ON BEHALF OF
CLARENCE BALL, NORT CD 80-14
COMPLAINANT
v. No. 1 Mine

B & B MINING COMPANY, INC.,
LAUREL MOUNTAIN MINING COMPANY,
ROBERT ESSEKS,
JODA BLANKENSHIP,
RESPONDENTS

DECISION

Appearances: Barbara K. Kaufmann, Esq., at the hearing and David T. Bush,
Esq., on the Brief, Office of the Solicitor, U.S. Department of
Labor, Philadelphia, Pennsylvania, for Complainant
Robert T. Copeland, Esq., Copeland and Thurston, Abingdon,
Virginia, for Respondent B & B Mining Company, Inc.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by the Secretary of Labor,
Mine Safety and Health Administration, (hereinafter "MSHA") on
behalf of Clarence Ball alleging that Clarence Ball was
discharged from his employment at B & B Mining Co., Inc.,
(hereinafter "B & B") on March 7, 1980, because of activity
protected under section 105(c) of the Federal Mine Safety and
Health Act of 1977, 30 U.S.C. 815(c) (hereinafter "the Act").
Upon completion of prehearing requirements, a hearing was held in
Abingdon, Virginia on August 5, 1981. Clarence Ball was the only
witness who testified about the merits of this case.

At the hearing, B & B objected to MSHA's attempt to propose
a civil penalty herein without following the procedures set forth
in 30 C.F.R. 100.5 and 100.6 and 29 C.F.R. 2700.25. I
sustained B & B's objection, severed the civil penalty proposal
from the amended complaint, and remanded the civil penalty
proceeding to MSHA to begin the civil penalty assessment process.

ISSUES

Whether B & B violated section 105(c) of the Act in discharging Complainant and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. 815(c) provides in pertinent part as follows:

(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

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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 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.

STIPULATIONS

The parties stipulated that the mine in question is a coal mine within the meaning of the Act and that the administrative law judge has jurisdiction over this matter.

Motions to Suspend Proceedings and to Take Deposition of Mack Gamble

After Complainant completed the presentation of his case in chief, B & B moved to suspend proceedings and to take the deposition of Mack Gamble. Counsel for B & B stated that the whereabouts of Mack Gamble had not been ascertained until 2 days before the hearing. In support of the motions, B & B contended as follows: (1) Mack Gamble was the person who discharged Complainant; (2) no one was aware of Gamble's whereabouts; (3) Joda Blankenship, former President of B & B, stated to a representative of B & B's counsel that he didn't know where Gamble could be found; and (4) 2 days prior to the hearing, Gamble was found to be working for Joda Blankenship at another mine. Complainant opposed these motions for the following reasons: (1) Neither the attorneys for B & B nor Gentry Blackwell attempted to find Mack Gamble's home telephone number, checked the U.S. Post Office, or checked B & B's employment records to find Gamble's last known address or telephone number; (2) the complaint identified Mack Gamble as the person who discharged Complainant and B & B had ample notice that he would be a key witness in this proceeding; and (3) assuming that the motions were granted and Gamble testified contrary to Complainant at a deposition, there would be no way for the judge to resolve the credibility issue between Complainant and Gamble since the judge would have no opportunity to evaluate Gamble's demeanor at the deposition.

In addition to the above, it should be noted that present counsel for B & B entered his appearance on May 22, 1981. The Notice of Hearing was

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issued on May 28, 1981. At no time prior to the date of hearing did counsel for B & B request a subpoena for Mack Gamble or notify the judge that B & B had been unable to locate this key witness. In fact, it was only after Complainant rested his case in chief that B & B raised the matter of the whereabouts of Mack Gamble and his unavailability to testify.

After considering the testimony presented concerning this matter and the arguments of counsel, I denied the motions for the following reasons: (1) B & B failed to establish good cause for a continuance of the hearing to take Mack Gamble's deposition; (2) there is no evidence that Mack Gamble concealed his whereabouts or attempted to make himself unavailable to give testimony; (3) B & B failed to request a subpoena prior to hearing which could have been served on Mack Gamble to insure his presence at the hearing; and (4) although B & B knew at all times that Mack Gamble would not appear at the hearing, it failed to request any postponement of the hearing. I hereby reaffirm that decision for the reasons stated.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. B & B was the owner and operator of an underground coal mine in Dickinson County, Virginia, until approximately July 24, 1979.
2. On approximately July 24, 1979, B & B turned over the operation of the mine to Laurel Mountain Mining Company, (hereinafter "Laurel Mountain"), which operated the mine until approximately February 20, 1980.
3. On approximately February 20, 1980, B & B filed Chapter 11 proceedings in the U.S. Bankruptcy Court for the Western District of Virginia. (Exh. G-1).
4. On February 27, 1980, the U.S. Bankruptcy Court for the Western District of Virginia ordered Laurel Mountain, to "relinquish and turnover all property belonging to" B & B's representatives. (Exh. G-1).
5. On September 15, 1979, Complainant was hired as a section foreman at the mine in question by Laurel Mountain. Three weeks later, he was promoted to mine superintendent. Until late February, 1980, Complainant's immediate supervisor was Ernest Brown.
6. On approximately February 16, 1980, Complainant received a telephone call from a representative of Joda Blankenship, President of B & B, to withdraw all men from the mine and send them home and that, thereafter, only supervisory personnel consisting of Complainant and three section foremen would be employed at the mine.

7. At some time between February 16, 1980 and March 3, 1980, Mack Gamble was designated by B & B as general manager of this mine. Thereafter, Mack Gamble was Complainant's supervisor.

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8. During the week of March 3, 1980, the only persons working at the mine were Complainant and three section foreman. On March 3, 1980, Mack Gamble instructed Complainant to load rock dust from outside the mine and deliver it to the 001 section. Complainant loaded the rock dust but did not deliver it to the section because all other employees left to work at another mine and he did not believe it was safe to enter the mine when no one was outside. The rock dust was delivered to the section by a foreman during the next working shift.

9. On March 4, 1980, Mack Gamble instructed Complainant to clean the production sections and shoot down the coal at the faces. Gamble said he would return in a few days. While Gamble was gone, Complainant and two of the foreman did all of the cleaning necessary to prepare the sections for production, i.e., ventilation, rock dusting, scooping, shoveling, moving belts and equipment, and maintenance.

10. Complainant did not shoot down coal at any of the 21 faces of the mine or instruct his foremen to shoot coal because neither Complainant nor the foremen were trained or licensed to handle or detonate explosives.

11. When Mack Gamble returned to the mine on March 7, 1980, he told Complainant that he was not satisfied with Complainant's work. In response to a request for specifics, Gamble stated that Complainant did not deliver the rock dust to the section. When Complainant responded that the rock dust had been delivered to the section, Gamble stated that Complainant did not shoot down the coal. The following conversation then took place:

Complainant: "Do you expect me to go on the section and shoot the coal by myself?"

Gamble: "Yes."

Complainant: "I won't do it."

Gamble: "We'll find someone who will. Give me the truck keys and catch you a ride home."

12. Complainant was discharged by B & B's general manager, Mack Gamble, on March 7, 1980.

13. At the time of Complainant's discharge, he was being paid \$125 per day.

14. About 1 week after his discharge, Complainant applied for other employment. During the next 3 months, Complainant inquired about or applied for work at the following: MSHA; State of Virginia; Clinchfield Coal Co.; Norella-Ohio; Virginia Iron, Coal and Coke; Russell County, Virginia Board of Education; Jim Walters Resources in Alabama; and U.S. Office of Surface Mining. Complainant also visited the Virginia Employment Commission in Bristol, Virginia.

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15. Beginning in approximately June, 1980, Complainant entered into discussions with Virginia Iron, Coal and Coke concerning lease arrangements for Complainant to open his own mine. On July 15, 1980, Complainant filed an application with the State of Virginia for a permit to open his own mine. On September 5, 1980, he received authorization from the State of Virginia to open the mine.

16. Complainant had no income from wages or self-employment from March 7, 1980 to September 5, 1980. Complainant contends that B & B should be required to pay him backpay between March 7, 1980 and September 5, 1980.

17. The complaint filed herein on July 3, 1980, states in pertinent part: "No application for temporary reinstatement has been filed as Applicant Clarence Ball does not desire to be reinstated by Respondent."

DISCUSSION

Complainant contends that he was discharged as superintendent of the mine because of his reasonable and good faith refusal to perform or order others to perform hazardous work. Specifically, he alleges that he was ordered to shoot or blast down coal by the use of explosives when neither he nor any of the employees under his supervision at the time was licensed or trained to handle or detonate explosives. Complainant further asserts that after his discharge, he made a reasonable and diligent effort to find other employment but that he was not successful until September 5, 1980, when he opened his own mine. B & B's Brief does not challenge any of Complainant's claims concerning the circumstances of his discharge but alleges the following: (1) Complainant should not receive backpay after July 15, 1980, because he was no longer actively seeking employment after that date; (2) Complainant failed to mitigate damages prior to July 15, 1980, because he did not conduct a reasonable job search; and (3) Complainant's recovery of backpay is limited to after tax income rather than gross per diem wages.

A. Violation of Section 105(c)(1) of the Act

Since B & B does not contest Complainant's version of the facts leading to his discharge, a brief review of the applicable law concerning the liability of an operator under section 105(c) of the Act will suffice. In Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) (hereinafter "Pasula"), the Federal Mine Safety and Health Review Commission (hereinafter "Commission") analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held: "We hold that in this case the miner's refusal to work was protected under the 1977 Mine Act His good faith belief was reasonable, and was directed to a hazard that we consider sufficiently severe" Pasula at 2793. The Commission went on to hold as follows:

We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. *Id.* at 2799-2800.

The undisputed facts in the instant case establish that prior to this incident, the operator of the mine filed a Chapter 11 proceeding in the U.S. Bankruptcy Court and terminated the employment of all hourly employees. The only employees remaining at the mine were the Complainant, who was the superintendent, and three section foreman. Mack Gamble, B & B's general manager, ordered Complainant to shoot or blast the coal. Neither Complainant nor the section foreman were trained or licensed to handle or detonate explosives. Complainant refused to comply with this order. Mack Gamble discharged Complainant for failure to obey this order. The evidence establishes that Complainant's good faith belief that it would be hazardous for untrained and unlicensed men to shoot or blast coal was reasonable and was directed toward a severe hazard. Hence, I find that Complainant's refusal to work in the manner ordered by B & B's general manager was protected under the Act. Since general manager Mack Gamble stated that Complainant was being discharged for failure to shoot or blast the coal, I find that Complainant has met his burden of persuasion and established a prima facie case of violation of section 105(c)(1) of the Act. B & B did not present any evidence on the merits during the hearing. Thus, B & B failed to meet its burden of persuasion or establish an affirmative defense. Complainant has sustained his complaint of discharge.

B. Complainant's Duty to Seek Other Employment and Mitigate Damages

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part that where the National Labor Relations Board (hereinafter "NLRB") finds that the charged party engaged in an unfair labor practice, it may take affirmative action, "including reinstatement of employees with or without backpay" The Supreme Court held that the NLRB must consider the issue of mitigation of damages by deducting from lost earnings, any amounts which the employee failed to earn during the backpay period. See *NLRB v. Seven-up Bottling Co.*, 344 U.S. 344 (1953) and *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951). An employee must make reasonable efforts to find other employment and must remain in the labor market for the backpay period. See *J. H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223 (5th Cir. 1973) cert. den., 414 U.S. 822 (1974) and *NLRB v. Pugh and*

Barr Inc., 207 F.2d 409 (4th Cir. 1953).

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In the instant case, B & B argues that Complainant failed to mitigate damages because he did not conduct a reasonable job search. B & B does not challenge Complainant's testimony that he applied for or inquired about work at eight potential employers and visited the unemployment office. B & B apparently contends that there were other coal mines within several hours driving time of Complainant's residence where he did not apply for work. However, B & B produced no evidence that work was available at any coal mine or other job for which Complainant was qualified. I reject B & B's contention that Complainant failed to make a reasonable job search. Complainant acted reasonably and B & B failed to establish that any amount should be deducted from Complainant's backpay because of a failure to mitigate damages during the period following his discharge by B & B.

C. Complainant's Failure to Seek Rehiring or Reinstatement

The complaint filed with the Commission on July 3, 1980, states that Complainant does not desire to be reinstated by Respondent. Since MSHA determined that the Complainant's complaint was not frivolously brought, Complainant had the right to immediate reinstatement pursuant to section 105(c)(2) of the Act. If Complainant had pursued that right, he would have been reinstated, required to work regular hours, and been paid at his regular rate. The fact that he elected not to be rehired or reinstated tolls the operator's backpay obligation. This is analogous to the rule in NLRB cases that an employer who offers reinstatement, which the employee rejects, is released from backpay obligations as of the date the offer is rejected. *NLRB v. Huntington Hospital Inc.*, 550 F.2d 921 (4th Cir. 1977). Moreover, it would be unfair and improper to require a mine operator to pay backpay to a former employee for a period of time when the employee has unequivocally stated that he does not wish to return to his former employment. Since Complainant elected not to be rehired or reinstated on July 3, 1980, B & B's obligation for backpay ends on that date.

D. Award to Complainant

The evidence establishes that Complainant was earning \$125 per day, 5 days a week, at the time of his discharge on March 7, 1980. B & B's liability for backpay terminated on July 3, 1980. Complainant had no earnings from wages or self-employment between March 7, 1980 and July 3, 1980. Thus, Complainant is entitled to an award of \$125 per day for 83 days for a total award of \$10,375.

B & B submits no authority for its novel contention that "recovery of back wages should be based on after tax income rather than gross per diem wage." B & B Brief at 6. On the contrary, the uniformly followed rule in backpay cases is that discriminatees are entitled to an award of gross backpay where there have been no interim earnings. See *NLRB Casehandling Manual*, par. 10,530 (1977).

The complaint herein also requests, "that interest be added

to the backpay until the date of payment at the rate of .09 per centum [sic]." I

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assume that Complainant is requesting an award of interest on the backpay at the rate of 9 percent per annum. Complainant cites no authority for the award of this amount of interest. To my knowledge, the Commission has not awarded a rate of interest in excess of 6 percent per annum. See Peabody Coal Co., 1 FMSHRC 1785, 1792 (1979). Therefore, B & B is ordered to pay Complainant the sum of \$10,375 as backpay plus interest at the rate of 6 percent per annum from the dates such payments were due until the date such payment is made.

E. Dismissal of Other Respondents

In addition to B & B, the amended complaint lists the following Respondents: Laurel Mountain, Robert Esseks, and Joda Blankenship. Although all three of these Respondents are in default for failure to answer or appear, Complainant produced no evidence of liability on their part at the hearing. Accordingly, Laurel Mountain, Robert Esseks, and Joda Blankenship are dismissed as parties herein.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant and B & B were subject to the Act.
2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
3. During the week of March 3, 1980, Complainant engaged in activity which is protected under section 105(c)(1) of the Act as follows: He reasonably and in good faith believed that a hazardous condition would result if he obeyed his superior's order to shoot down coal at the face or order his section foreman to shoot down coal because neither Complainant nor his foremen were trained or licensed to handle or detonate explosives.
4. Complainant's refusal to work was protected under the Act.
5. Complainant was discharged on March 7, 1980, by B & B because of his refusal to work, supra.
6. Complainant established a prima facie case of violation of section 105(c)(1) of the Act because he established that he engaged in a protected activity and that his discharge was motivated by the protected activity.
7. B & B failed to establish that it would have discharged Complainant for reasons other than his protected activity.
8. Complainant was discharged by B & B in violation of section 105(c)(1) of the Act.
9. Complainant made a good faith effort to find employment following his discharge and B & B failed to establish that Complainant did not act reasonably to mitigate damages.

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10. On July 3, 1980, Complainant elected not to be rehired or reinstated by B & B and B & B's obligation for backpay was tolled as of that date.

11. Complainant is not entitled to an award of backpay after July 3, 1980 due to his election on that date not to be rehired or reinstated.

12. Complainant is entitled to a backpay award for 83 days at \$125 per day for a total award of \$10,375 plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

13. Although Respondents Laurel Mountain, Robert Esseks, and Joda Blankenship are in default in this proceeding, Complainant has presented no evidence to establish the liability of any of these Respondents. Accordingly, Respondents Laurel Mountain, Robert Esseks, and Joda Blankenship are dismissed from this proceeding.

ORDER

WHEREFORE IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED.

IT IS FURTHER ORDERED that B & B shall pay to Complainant the sum of \$10,375 plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

IT IS FURTHER ORDERED that Respondents Laurel Mountain Mining Co., Robert Esseks, and Joda Blankenship are DISMISSED from this proceeding.

IT IS FURTHER ORDERED that MSHA's proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings pursuant to 29 C.F.R. 2700.25.

James A. Laurenson Judge