

CCASE:
JOSEPH CAMBELL V. THE ANACONDA
DDATE:
19811023
TTEXT:

~2438

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

JOSEPH A. CAMPBELL,
COMPLAINANT

v.

THE ANACONDA COMPANY,
RESPONDENT

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE

DOCKET NO. WEST 80-221-DM

MD 80-12

MINE: Carr Fork

DECISION

Appearances:

James E. Hawkes Esq.
Gump & Ayers Building
2120 South 1300 East, Room 301
Salt Lake City, Utah 84106,
For the Complainant

Karla M. Gray Esq.
Anaconda Copper Company, Legal Department
P.O. Box 689
Butte, Montana 59701,
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

On February 19, 1980, Complainant filed a complaint alleging discriminatory acts based on section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act"). (FOOTNOTE 1) The Complainant alleged that his employment with the Respondent had been terminated on October 26, 1979, because he had refused to drive Respondent's truck. He alleged that the air brakes on the truck had an air pressure leak and that a "retarder," built into the automatic transmission, did not work and that the truck was, therefore, unsafe to drive. The Respondent generally denied Complainant's allegations.

FACTS STIPULATED TO BY THE PARTIES

1. Respondent "Anaconda" operates a copper mine, known as the Carr Fork Mine, in Tooele, Utah, which mine is under the jurisdiction of the Federal Mine Safety and Health Act of 1977.
2. On October 26, 1979, Joseph Campbell "Complainant" was employed as an equipment operator at Anaconda's Carr Fork Mine.
3. Mr. Campbell had been employed by Anaconda at that location for approximately three years.
4. On October 26, 1979, Mr. Campbell was assigned to transport a standby generator, weighing approximately 23 tons, to the exhaust shaft using a Peterbilt tractor, serial number 78314P, commonly referred to as Unit #36. Such assignment was within the usual course of Mr. Campbell's work duties.
5. Mr. Campbell refused to perform the assignment and was sent home.
6. Mr. Campbell was subsequently released from employment with Anaconda.
7. At the time of his refusal to drive Unit #36, Complainant complained about the safety of the unit to John Bishop, his temporary supervisor.
8. Several times prior to the incident which led to his termination, Complainant had made safety complaints concerning Unit #36 to his regular supervisor, Whitey Thomas.

ISSUES

The principles to be followed in deciding this case are those set forth in two leading cases: Secretary of Labor, on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) and Secretary of Labor, Mine Safety and Health Administration (MSHA), ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Thus, the following questions must be answered in order to determine whether or not the Respondent violated section 105(c) of the Act when it fired the Complainant.

1. Did Complainant engage in protected activity?
2. If so, was the firing of the Complainant motivated in any part by the protected activity?
3. If Complainant was engaged in protected activity and Respondent fired Complainant partially because of that protected activity, was Respondent also motivated to fire Complainant because of any unprotected activity of the Complainant?

~2440

4. Would Respondent have fired Complainant in any event because of unprotected activity?

5. In refusing to drive Unit #36, did Complainant have a good faith reasonable belief in a hazardous condition and, if so, was Complainant's honest perception a reasonable one under the circumstances of this case?

These questions shall be discussed in the above order.

DISCUSSION

1. The Complainant did engage in protected activity when he complained to his temporary supervisor about the condition of Unit #36.

The Complainant made a complaint to his supervisor of an alleged danger or unsafe condition in regard to the operation of Unit #36. The assignment given to Complainant was to drive Unit #36, attached to a 23-ton generator-trailer, from the shop area at the Carr Fork Mine, in Tooele, Utah, to the exhaust shaft at Bingham, some distance away. In order to get to Bingham, it would have been necessary for Unit #36 to drive up or down grades estimated at 9% to 13% on the road down through Tooele and Bingham Canyon. The reason given by the Complainant for refusing to drive Unit #36 was that there were air pressure leaks in the air brake system and there was no retarder working in connection with the transmission. The Complainant offered to transport the equipment using his regular truck, Unit #35, but he was told by his supervisor that he would have to drive Unit #36. Thus, the Complainant complained to his supervisor, on October 26, 1979, of an alleged danger and this conduct constituted protected activity.

2. The firing of the Complainant was motivated in some part by the protected activity.

It is undisputed that after Complainant refused to drive Unit #36 on October 26, 1979, he was fired. After the plant general foreman had been informed of that refusal, the foreman instructed Complainant's supervisor to notify the Complainant that his employment with Anaconda was terminated. The reason given was "inability to perform duties assigned."

Thus, I conclude that Respondent was motivated, in some part, to fire the Complainant for his having engaged in protected activity.

3. The Respondent was also motivated, in part, to fire the Complainant because of unprotected activity.

Respondent stated in its opening statement that Complainant was fired for refusing without reasonable grounds to perform his job and for past problems with accepting other assignments. In support of this contention, Respondent introduced evidence to show that Complainant on one occasion, in January 1978, had

refused to work with a "Mexican" fellow employee and walked off the job. For this incident, Complainant was reprimanded and received a one day suspension imposed by the Respondent.

~2441

Respondent also introduced evidence that in April 1977, Complainant had refused to work with a woman. In the course of assigning laborers or utility people on a regular rotation basis to truck drivers, a woman was assigned to Complainant's truck to work with him. Complainant refused to have the woman work with him because he did not believe a woman should be working on the particular job assigned at that time. Taking this evidence in a light most favorable to the Respondent, I find that Respondent was motivated, in part, to fire Complainant because of this past unprotected activity.

4. Respondent would not have fired Complainant in any event because of unprotected activity.

Respondent's evidence on this point falls far short of showing that Respondent would have fired Complainant because of unprotected activity alone. The activity previously described, involving Complainant's refusal to work with a "Mexican" and with a woman, took place one year and ten months and two years and six months, respectively, before Complainant was fired. If these incidents of unprotected activity did not concern Respondent sufficiently enough to have resulted in further adverse action against the Complainant at those times, they are not persuasive now.

There is no substantial evidence on which to base a conclusion that Complainant would have been fired in any event because of unprotected activity.

5. In refusing to drive Unit #36, the Complainant did have a good faith reasonable belief that there was a hazardous condition and Complainant's honest perception was a reasonable one under the circumstances of this case.

Although Complainant had worked for Respondent only a little over three years as a truck driver before he was fired, he had considerable experience in that occupation. He had a total of 32 years experience as a driver of diesel trucks, including semi-trailer trucks, gasoline trucks, as well as smaller trucks.

Prior to October 26, 1979, Complainant had made several complaints about the mechanical condition of Unit #36. Complainant testified that he had complained to his supervisor several times about an air pressure loss in the air braking system and that the "retarder" did not work in conjunction with the transmission to slow the movement of the truck when necessary.

Complainant defined a retarder as a braking device built into the transmission. Oil under pressure is forced through the device. This process slows down the transmission and, as a result, the vehicle is slowed

~2442

down. If there is no retarder on the transmission, then only the brakes are used to slow the vehicle, according to this testimony. There had never been a retarder device on the transmission of Unit #36, but Complainant was never informed of this fact. Complainant reasonably believed that there was one on the transmission and that it just did not work properly. However, there were other trucks with automatic transmissions belonging to the Respondent which did have retarders.

The last complaint made by the Complainant before the one made on October 26, 1979, when he was fired, was made in July or August of that year. Complainant also testified that he made several written complaints on driver's reports about these problems. Two other truck drivers testified as to the unusual loss of air pressure in the braking system of Unit #36. One of these drivers stated that he had made complaints to the Respondent's mechanics about the problem. Complainant testified that he could visually observe the air pressure loss as recorded on the air pressure gauge in the truck while the brakes were in use. He stated that the pressure would drop from 120 pounds to approximately 60 pounds of pressure. If the pressure does drop below 60 pounds, the emergency "maxy" brakes lock up. The maxy brakes are ordinarily used as a parking brake. Another truck driver testified that the pressure had dropped to 90 pounds when going down a hill and it was a "a little scary."

There is a direct conflict in the testimony as to whether or not the Complainant was told on October 26, 1979, that the brakes had been safety checked by the mechanics. Complainant denied that he was told this by his temporary supervisor. In any event, if a statement was made to the Complainant about the safe conditions of the brakes, it was not sufficient to convince Complainant that Unit #36 was a safe vehicle to operate with the load of equipment it was to haul. Complainant's conclusions were reasonable under the circumstances since he had made several complaints before, as had other drivers, and there was no evidence that Respondent had ever acknowledged that there was any performance problem in regard to air pressure in the braking system. Respondent's heavy equipment maintenance worker, who testified for the Respondent, stated that he had heard about a complaint in July or August of 1979 regarding an air leak in Unit #36. There was a minor leak, but after recycling the "treadle valve" there were no further leaks. Respondent's garage foreman testified that he test-drove Unit #36, stopping it repeatedly on a hill in July 1979, but experienced no air pressure loss. Significantly, two truck drivers other than Complainant, whose job it was to drive these trucks, testified as to the air loss, but the mechanics, whose job it was to fix them, testified that there was none. In deciding this case, I am not making a determination as to whether or not the braking system was, in fact, defective. Whether it was defective or not, Complainant's perception that the system was defective and that it presented a hazardous condition was a reasonable one under the circumstances.

One driver testified that he began driving Unit #36 a month or two after Complainant was fired and that there was still an

air pressure leak in the braking system at that time. While driving and applying the brakes, he observed a loss of air pressure on the gauge in the vehicle and could hear the air leaking when the motor was stopped.

~2443

I find it significant that Complainant would not have refused to transport the generator-trailer to Bingham if he had been permitted to do so driving Unit #35, which he had been driving without problems. It is understandable and reasonable that Complainant would not want to drive Unit #36 pulling a 23-ton load up and down grades of 9 to 13 percent considering the continuing problems complained of by Complainant and other drivers. The fact that he would have driven Unit #35 in order to carry out the assignment fortifies the conclusion that Complainant did have a good faith reasonable belief that there was a hazardous condition in connection with the operation of Unit #36. This perception was reasonable under the circumstances.

I find that in discharging the Complainant, the Respondent did violate section 105(c) of the Act. I will retain jurisdiction of the case until the relief to be awarded is determined.

CONCLUSION OF LAW

1. The Act gives me jurisdiction over the parties and the subject matter of these proceedings.

2. Respondent violated section 105(c) of the Act when it discharged Complainant on October 26, 1979.

ORDER

1. Respondent, the Anaconda Company, shall offer reinstatement to Complainant, Joseph A. Campbell, in the position from which he was terminated, at the rate of pay fixed for that position on the date of reinstatement.

2. Respondent shall pay to Complainant back pay covering the period from October 26, 1979 until the day he is offered reinstatement. Back pay shall equal the gross pay that Complainant would have received minus any interim earnings. Respondent shall be responsible for withholding from the award the amounts required by State or Federal law and for making any additional contributions which those laws require. Eight percent interest on the net back pay award shall be paid to Complainant.

3. Respondent shall pay a reasonable attorney fee for the services rendered by counsel for Complainant.

4. Respondent shall pay a civil penalty in the amount of \$1,000.00 for its violation of the Act, and this amount shall be paid within 30 days of the issuance of my order finally disposing of the present proceedings.

5. Respondent shall expunge from Complainant's employment record any adverse references relating to his discharge and transmit to him a copy of his employment record reflecting the deletion of any adverse references relating to his discharge.

6. Counsel for both parties shall advise me in writing by November 16, 1981, whether they have agreed on the amounts due under paragraphs 2 and 3 of this Order. If so, they shall submit those amounts to me for

~2444

approval. If approved, I will issue an order which finally disposes of these proceedings. If counsel are unable to agree, further post hearing orders will be issued.

Jon D. Boltz
Administrative Law Judge

AA

~FOOTNOTE_ONE

1 Section 105(c)(1) reads in pertinent part as follows: "No person shall discharge . . . any miner . . . because such miner . . . has . . . made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine"