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ERNEST DIALS V. WOLF CREEK
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ERNEST DIALS,
 COMPLAINANT
 v.
WOLF CREEK COLLIERIES,
 RESPONDENT

Complaint of Discharge,
Discrimination, or Interference

Docket No. KENT 81-89-D

DECISION

Appearances: Reginald E. Wilcox, Esq., Kirk & Wilcox, Inez, Kentucky,
for Complainant;
Donald Combs, Esq., Stephens, Combs & Page, Pikeville,
Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order issued July 15, 1981, as amended August 5, 1981, October 1, 1981, October 16, 1981, and November 2, 1981, a hearing in the above-entitled proceeding was held on November 6, 1981, in Prestonsburg, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 282-303):

This hearing involves a Complaint of Discharge, Discrimination or Interference filed on February 19, 1981, in Docket No. KENT 81-89-D, by Ernest Dials pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, alleging that complainant was discharged by respondent, Wolf Creek Collieries, on November 20, 1980, in violation of section 105(c)(1) of the Act because complainant had made health or safety complaints to respondent or respondent's agent regarding conditions at respondent's mine.

The issue in this case is whether respondent violated section 105(c)(1) of the Act so as to entitle complainant to the relief of payment of backpay and reinstatement to his former job as requested in his complaint. The pertinent part of section 105(c)(1) which is involved in this proceeding, reads as follows:

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 * * * 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 * * *.

I shall make some findings of fact on which my decision will be based. The findings will be set forth in enumerated paragraphs.

1. Complainant, Ernest Dials, had been working for respondent, Wolf Creek Collieries for about 11-1/2 years before he was discharged on November 20, 1980. His official job title was truck foreman on the second shift but, because of an injury unrelated to performance of his work for respondent, complainant had been unable to work for about 6 weeks. During complainant's recuperation, respondent appointed another employee, Raymond Haney, to be truck foreman in complainant's absence.

2. When complainant reported to work after his illness, he was given many different kinds of work to do, ranging from constructing a bridge floor to substituting for other foremen when they were absent because of vacation or other reasons. Complainant received his full salary during his convalescence and his salary was not reduced after he returned to work and was given a wide variety of duties to perform.

3. The events of November 18, 19, and 20 leading up to complainant's discharge were discussed by several witnesses. On Tuesday, November 18, complainant worked with two other men under supervision of the mine superintendent, Luster Sluss, in installing a floor in a bridge. On Wednesday, November 19, complainant was ill and did not report for work on the day shift, but complainant did come to the mine office about 4:00 p.m. on that day to discuss with the Vice President of Operations, Raymond Freal Mize, a report to the effect that complainant had taken two tires after work on Tuesday night. Mize had already checked on the tires and found that they had been taken from the mine site for use on a piece of respondent's equipment which had previously been loaned to the Sheriff of Martin County.

4. Mize told complainant that no one was blaming him for the tires' disappearance and Mize advised complainant to go home and report back to work on the day shift at 6:30 a.m. the next day. After Mize left the office, he went to the supply shop and talked to a mechanic named Cecil Butcher. Some spare parts were loaded into the truck which complainant was driving and complainant started to drive to the 10D Mine which was located some 4 or 5 miles from the mine office. On complainant's way to the 10D Mine, he came to an end loader which was idle. The operator of the end loader, Brian Webb, was standing near the end loader and complainant asked Webb if the end loader was in safe condition. Complainant then proceeded to check the lights, the back-up alarm and other aspects of the end loader and found them to be in satisfactory condition. Complainant then asked Webb if the brakes were

satisfactory and Webb stated that the brakes on the 560 end loader being used at that time were not as good as the brakes on one of the other 560 end loaders, but that the brakes were satisfactory for the work being done at that time. When Webb indicated to complainant that the brakes might not be sufficiently adequate on a hill to stop the end loader readily, complainant ordered Webb to park the end loader and not operate it until a mechanic had been called to check the brakes.

5. Complainant did not get out of his truck to operate the end loader and simply took Webb's statement to be an indication that the end loader was unsafe. Complainant then called the supervisor on the second shift, Raymond Haney, and told him that the end loader had been parked and would not be operated until it could be checked by the mechanic. Complainant had already advised Haney that the trucks which were hauling coal from the place where Webb was working were unsafe and would not be permitted to operate. Complainant thereafter called Cecil Butcher, the mechanic, and asked him to come and check the end loader's brakes. The mechanic was not certain that complainant had authority to request him to check the brakes and called Haney to ask if he should do so. Haney told the mechanic to go ahead and check the brakes.

6. Butcher went to the location of the end loader and examined the brakes and decided to adjust them but he did not get into the end loader and operate it. After he had adjusted the brakes, Butcher left without checking to see whether the end loader's brakes were in any better condition after the adjustment than they had been before the adjustment. The operator of the end loader resumed loading coal because Haney had succeeded in getting some trucks back to the mine site after he had examined the trucks and determined that they were satisfactorily equipped with adequate brakes.

7. Complainant subsequently went from the site of the end loader to the 10D Mine where the spare parts which had been put in his truck were unloaded. At approximately that time, complainant received a call from the Vice President of the company, Freal Mize, to report to the guard house. Complainant went to the guard house where there were other personnel, including two truck drivers and a security guard. While Mize and complainant were talking, the Sheriff of Martin County also came to the guard house. Mize and complainant had a discussion during which some additional reference was made to the incident of the tires having been taken and also to the fact that complainant had stopped the end loader from operating; finally, Mize told complainant that he should leave the mine site and go home and return to work the next day, as he had previously been instructed to do.

8. Complainant states that Mize indicated, at that time, that if complainant did not get off of the mine property and start following instructions that he might be discharged and complainant asked Mize if that meant that he was discharged and Mize said that complainant could interpret that remark any way he wished to.

9. The next morning, November 20, 1980, complainant returned to the mine as he had been instructed to do. Complainant went to the mine office and stayed in the vicinity of the mine office because he claimed that he

could not locate Sluss, the superintendent, to whom he had been instructed to report on November 20. After complainant had been in the vicinity of the mine office for approximately 1-1/2 hours, Mize appeared and told complainant that he was being discharged for unsatisfactory work.

10. Complainant contends that the only reason that Mize could have had for discharging him was that he had stopped the end loader and trucks from operating on the previous day and that Mize was upset with his having done so. Complainant also states that it was a frequent, in fact, almost daily, occurrence that he would order equipment to be taken out of service because it was unsafe. He also alleges that he was told to operate a truck, on one occasion, with defective Jacobs brake at a time when the oil gauge showed only 30 pounds of pressure, whereas, according to complainant, the oil pressure should be in the neighborhood of 85 pounds in order for the Jacobs brake to work properly. Complainant also contends that he was told to allow equipment to be operated on other occasions when he considered it to be unsafe.

11. The Vice President of Operations, Freal Mize, testified that complainant had been discharged on November 20 for the many disruptive acts that he had committed on November 19. After Mize had returned home and had eaten dinner on November 19, he started getting reports about complainant's activities at the mine site. Around 8:30 p.m. Mize was informed that complainant had returned to mine property and had been challenged by the security guard, but the guard had allowed entrance because complainant had said that if the security guard didn't let him go by the guard house, that there were other ways he could enter mine property. Even though the security guard allowed complainant to enter mine property, he called Mize about it because he was not sure that complainant should be on mine property at that time of night because it was not complainant's working shift at that time.

The activities in which complainant engaged that evening are hereinafter described. Complainant went to the area of the unloading of coal and told Haney, who was supervising the surface activity of the loading and unloading of coal on the second shift, that he was going to close down Haney's operation. Complainant then went to the 10D underground mine and talked to Clay Dials, who was working at the 10D Mine, and advised the employees in the 10D Mine that they should come out of the mine because a Federal inspection was going to be made at the mine at 9:00 p.m. Complainant thereafter went to the No. 11 underground mine and used the mine telephone to call underground and talk to a roof bolter named Joey Stepp. A considerable discussion ensued which was overheard by the mine foreman, Roger Scott. At first, complainant tried to get Stepp to have the men leave the mine because complainant said that he was on strike because of his treatment by the Vice President. According to Scott, the latter part of Stepp's and complainant's conversation showed that complainant had decided not to ask the men to walk out on strike. Instead, complainant asked Stepp to meet

him about 12:30 a.m., after the second shift had been completed, for the purpose of helping complainant to set up a picket line at the mine site.

12. Mize also testified that complainant had returned to mine property so late in the evening of November 19 that the security guards were worried about his presence and Mize advised them to find complainant and remove him bodily from mine property. The security guards were reluctant to do so by themselves. Therefore, a deputy sheriff was asked

to come and assist the security guards in getting complainant to leave mine property. As it turned out, the security guard and the deputy sheriff were unable to find complainant and it is assumed that complainant left mine property by some exit other than coming by the guard house. It was Mize's contention at the hearing that he had discharged complainant because complainant had interfered with the mine's operation and had tried to close down the surface activity, as well as the underground mine Nos. 11 and 10D. Complainant has never had any authority at all in the operation of the underground mines and, as has been indicated above, complainant's employment status on November 19 was not that of a truck foreman on any of the shifts. Instead, after the convalescence referred to in Finding No. 2 above, complainant had been given work as a substitute foreman and had been assigned other kinds of work on a day-to-day basis.

13. The testimony of Mize was corroborated in this proceeding by other witnesses. Raymond Haney, the truck foreman on the night shift, stated that it was a fact that complainant had tried to close down his operation on the evening of November 19. Haney testified that he checked the end loader after its brakes had been adjusted by Butcher, the mechanic, and that Webb, the operator of the end loader, was satisfied that the brakes were in satisfactory condition; that there was no reason that coal could not be loaded without any hazardous exposure of miners to injury. Haney also testified that, insofar as a Jacobs brake on a truck is concerned, he had operated a truck for a number of years even though he does not have a left arm. Since a Jacobs brake is operated by a lever located in the left corner of the windshield, it would have been difficult for him to have used such a brake because of his missing left arm. Therefore, Haney stated that he never used a Jacobs brake and felt that any truck was safe so long as its other brakes were working. In fact, Haney did not even think Jacobs brakes were desirable. Haney stated that he checked with the drivers of the coal trucks on the evening of November 19, and that they assured him their brakes were satisfactory. He asked a number of the drivers to stop their trucks while loaded, and they were able to stop in a normal distance; therefore, he believed that there was no basis for complainant's contention that the trucks were unsafe.

14. Brian Webb, the operator of the end loader, which was ordered to be parked by complainant, stated that he was standing by the end loader at the time that complainant came by and that he had not stopped operating the end loader because of any unsafe condition on it, but because there were no trucks available to load at that moment, and he had gotten out of the end loader to stretch himself and to get close to a nearby fire to warm himself. He said the end loader was parked at complainant's instructions only

because complainant had previously been a foreman and Webb had never been told not to take instructions from complainant even though Webb knew on November 19 that complainant was not his immediate supervisor on that shift. After the brakes had been adjusted by Butcher, Webb continued to load coal on the second shift without any further problems. Webb also testified, contrary to complainant's contention, that he had not been told by the mechanic that the end loader should be used only on the level on which it was being used the evening that complainant had required the end loader to be stopped.

15. The mechanic who repaired the end loader, Cecil Butcher, stated that he could not recall for certain whether he had ever told Haney or Webb that the end loader should be used only on level ground; that is, that it should not be taken down a hill. Butcher's testimony is somewhat inconsistent as to whether he did or did not know that the end loader needed additional work to be done on its brakes because he first stated that he might or might not have said that the end loader should not be operated on a hill. Later he stated that he had not operated the end loader, personally, on November 19 and could not state for certain whether it was safe on a hill or not. Thereafter, though, he stated that about a week after the incident of November 19, the brakes on the end loader had been overhauled. Therefore, it is possible that the brakes on the end loader would not have been sufficient to hold it on a hill; but since complainant didn't operate the end loader and Butcher did not personally operate the end loader, the only testimony in the proceeding which is reliable and probative is the testimony of the operator of the end loader, Brian Webb, who stated that the brakes were satisfactory; that he had had no problem with them before complainant ordered the end loader to be stopped, and that he had no problem with the end loader after the brakes had been adjusted.

16. The superintendent or foreman at the No. 11 Mine, Roger Dale Scott, testified that it was correct that complainant had come to his No. 11 Mine about 8:30 p.m. and had asked to speak to Joey Stepp on the mine phone; that Scott allowed complainant to do so, and it was at that time that Scott overheard complainant state that he was going to set up a picket line. There are exhibits in evidence which show that complainant did subsequently set up a picket line at the mine and it was necessary for respondent to get a temporary restraining order to prohibit complainant from continuing to picket at the mine.

The above findings of fact are sufficient for rendering a decision in this case. Although it is true that complainant on November 19 did have an end loader to stop operating because there was a doubt about the effectiveness of the end loader's brakes, there has been no testimony by anyone that any of the trucks which were stopped by complainant actually had defective brakes. Even complainant did not state that he personally had examined any of the trucks and knew for a fact that their brakes were defective. Therefore, if there is to be any finding to the effect that complainant was discharged because of his having made safety complaints at respondent's mine, that finding would have to be made with respect to the end loader.

It is probably true that Mize, the Vice President who discharged complainant, was upset about complainant's having stopped the end loader from operating because of alleged unsafe brakes. The testimony, however, shows

that Mize was upset more because complainant had done that stopping of the end loader at a time when he was not officially in charge of the personnel who were working at the mine. The complainant had been told to go home and return the next day to work on the day shift. Complainant had come to the mine on his own volition on November 19 to complain about questions having been raised as to his integrity in allowing tires

to be put on some of respondent's equipment which had been loaned to the sheriff. Complainant then ignored his supervisor's instructions about his need to be on mine property. Consequently, even though the brakes may have needed adjusting on the end loader, the fact that that adjustment was performed and that complainant had asked that the brakes be inspected, appears in no way to have had a bearing on complainant's discharge.

It is a fact that when complainant was told to leave the mine on November 19 in the neighborhood of 5:00 p.m., and later in the neighborhood of 7:00 to 7:30 p.m., there was no mention that he had been discharged for certain. If complainant had known that he had been discharged, or thought for certain that he had been discharged on November 19, he, of course, would not have reported for work at the mine on November 20, as Mize had instructed him to do.

The fact that complainant was discharged early in the morning on November 20 shows that something unusual had to have occurred between the time complainant left the mine on November 19 and the time that he was dscharged on November 20. Since complainant had engaged in a large number of disruptive activities which were certainly not in pursuit of tasks that he had been officially hired to do, his authority for engaging in any of the aforementioned activities on November 19 is entirely lacking. Complainant tried to justify his having stopped the end loader on November 19, on the basis that he had previously been a supervisor and that it was the company's policy that any supervisor could stop unsafe activities no matter when he saw those activities or whether they occurred on his own shift or some other supervisor's shift.

It is significant that no specific action was taken by Mize to fire complainant on November 19 at a time when the only knowledge Mize had as to complainant's activities was that he had stopped the end loader until its brakes could be checked. If Mize was upset over that incident enough to have discharged him, there is no reason for Mize to have told complainant that complainant could use his own judgment as to whether Mize's remarks meant that complainant had been discharged on November 19. On November 20, when Mize did discharge complainant, he left no doubt about the fact that complainant had been discharged. The reason for the discharge on November 20 was solely related to complainant's unauthorized and unwarranted attempt to cause trouble at three different mines in retaliation for the fact that complainant had been told to go home and come back to work the next day when his anger about the incident of the tires had subsided.

It should be noted that complainant's action of trying to get the superintendent of the 10D Mine to withdraw

his miners because there was allegedly going to be a Federal inspection at the mine at 9:00 p.m. was especially reprehensible conduct in view of the fact that section 110(e) of the Act provides that "[u]nless otherwise authorized by this Act, any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment for not more than six months, or both." In light of the fact that complainant had violated the spirit of the Act in

deliberately announcing a bogus inspection as part of his retaliatory conduct of November 19, it ill behooves him to come into this proceeding with a claim that he was discharged because respondent had violated section 105(c)(1) of the Act by discharging him because of alleged complaints about the lack of adequate brakes on an end loader.

In *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980), (FOOTNOTE 1) the Commission stated that if a miner's evidence, in general, shows that he engaged in a protected activity and that the adverse action or discharge was motivated in any part by the protected activity, it is complainant's obligation to prove that he was discharged for such protected activity. The Commission stated that if complainant sustains his burden in the first instance, respondent then has the burden of showing by a preponderance of the evidence that even if some aspects of its discharge were motivated by the complainant's protected activity, that complainant would, nevertheless, have been discharged in any event for unprotected activities alone.

At the conclusion of complainant's testimony, I denied a motion by respondent's counsel to dismiss the complaint because of complainant's failure to maintain a prima facie case of discharge for protected activity. On the basis of complainant's testimony, if it had not been completely rebutted by respondent, I would have held that there was no apparent reason for complainant to have been discharged other than for his having stopped the end loader from operating on November 19.

Now that I have heard respondent's evidence, however, it is clear that complainant's credibility has been greatly impaired by his omission of occurrences on November 19 and by his failure to explain or justify his activities at the mine on the evening of November 19. Respondent's evidence supports a finding that complainant would have been discharged regardless of his alleged protected activity and shows, in addition, that respondent's reason for discharging complainant had no actual relationship to the stopping of the end loader from operating. The most that can be said as to complainant's alleged protected activity is that he stopped an end loader from operating at a time when he was not on official duty and was not clothed with supervisory powers. After complainant had stopped the end loader, he thereafter tried to stop normal mining activities at three different mines even though he made absolutely no allegations that his disruptive acts had any relation to health or safety matters of any kind.

Consequently, I believe that the *Pasula* case, *supra*, is inapplicable to this proceeding because respondent's evidence shows that complainant was solely discharged for reasons other than his alleged protected

activities.

