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GERALD BOONE V. REBEL COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GERALD D. BOONE, COMPLAINANT v.	Complaint of Discharge, Discrimination, or Interference Docket No. WEVA 80-532-D
REBEL COAL COMPANY, RESPONDENT	Rebel Coal No. 2 Mine

DECISION AND ORDER AWARDING DAMAGES AND COSTS

Appearances: Larry Harless, Esq., United Mine Workers of America, Charleston, West Virginia, for the Complainant
Frederick W. Adkins, Esq., Cline, McAfee & Adkins, Norton, Virginia, for Respondent

Before: Judge Melick

On July 8, 1981, a decision was issued in this case holding that Mr. Boone was discharged by the Rebel Coal Company (Rebel) in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. | 801 et seq., hereinafter the "Act"). A subsequent hearing was held in Abingdon, Virginia, on December 15, 1981, limited to the issue of the amount of damages and costs that should be awarded the Complainant as a result of that unlawful discharge. This decision is likewise limited to that issue.

Back Pay

It has been determined that Mr. Boone was unlawfully discharged by Rebel on May 28, 1980. The evidence shows that at the time of his discharge, he was working a regular 5-day work week with periodic overtime on Saturdays. According to John Lockhart, assistant superintendent of the Rebel No. 2 Mine, the Saturday work was alternated among the employees so that each would work one or two Saturdays a month. I find this testimony to be credible and conclude that Mr. Boone was performing overtime work on alternate Saturdays. Boone's regular rate of pay at that time was $9.81 an hour and the time-and-a-half rate was accordingly $14.72 an hour. On his regular work days, Boone earned his regular rate for 7-1/4 hours and the time-and-a-half rate for 45 minutes each day. For his Saturday work he received 7-1/4 hours of pay at the time-and-a-half rate. Mr. Boone was paid for 4 hours' work on the day of his discharge, May 28, 1980, and was reinstated by Rebel on July 23, 1980.

He requests back pay for the work lost between those dates. I find that he is entitled to such pay in the amount of $3,670 plus interest at the rate of 12 percent per annum computed from the dates such pay would ordinarily have been due to the date such payment is made.

The credible evidence further shows that after Mr. Boone was reinstated on July 23, 1980, he continued to work for Rebel only until August 20, 1980. On the latter date, he was injured on the job and was treated and released from a local hospital. Even though he was subsequently able to return to work, he never did. Boone never filed for any benefits to which he may have been entitled as a result of those work-related injuries and I do not therefore find that he is entitled in this proceeding to any additional pay for lost work due to those injuries. I also find that by leaving his job on August 20, 1980, and never returning Boone waived and abandoned entitlement to back pay from that date until October 9, 1981, the date he was ordered permanently reinstated following a hearing and decision on the merits. (FOOTNOTE 1) This determination is consistent with decisions under the National Labor Relations Act wherein the employer is released from back pay obligations as of the date the employee rejects an offer of permanent reinstatement. NLRB v. Huntington Hospital, Inc., 550 F.2d 921 (4th Cir. 1977).

I reject Mr. Boone's contention that he refused to return to work only because of mistreatment. He alleges that the operator forced him to walk back to the job site from the hospital that day. The credible evidence supports the operator's position that it was necessary to send Complainant to the hospital in an ambulance and that it was a well-established practice to reimburse the employee's taxi fare from the hospital. There is no evidence that Boone was mistreated.

I therefore find, commencing as of October 9, 1981, and continuing thereafter for each regular work day for which Mr. Boone is not reinstated by Rebel that he is entitled to the amount of $96.40 (to reflect the new hourly rate of $11.51 per hour) and for each alternate Saturday commencing with October 10,

1981, until Mr. Boone is reinstated, he is entitled to back pay of $125.21. Interest is to be paid on those amounts at the rate of 12 percent per annum computed from the date he would have ordinarily have been paid to the date he is actually paid those amounts.

Evidence has been produced which suggests that Mr. Boone has performed occasional work assisting in his father's restaurant business since August 30, 1980, which might ordinarily be considered as an offset to the back pay award. The evidence shows, however, that this work was not performed in an ordinary employer-employee relationship and was sporadic. Boone received no fixed income from that work but took cash from the cash register for his expenses as needed. No receipts or other records were kept with respect to the amounts withdrawn in this manner and Boone conceded that he filed no income tax returns with respect those monies. It appears under the circumstances that this "expense" money was actually not related to any employment relationship but rather constituted a form of parental support or charity and therefore should not be considered as "earnings" deductible from the back pay award. Such expense money should be treated in the same manner as welfare, unemployment benefits and other collateral benefits which are not generally considered "earnings" to be deducted from back pay awards. Cf. NLRB v. Marshall Field & Company, 318 U.S. 253, 255 (1943); NLRB v. Gullet Gin Company, Inc., 340 U.S. 361, 369 (1951).

Costs

a. Travel, Meals, and Lodging for Complainant to Attend Hearings:

In a petition filed by Daniel Hedges, Esq., on August 28, 1981, Complainant seeks reimbursement for $138.64 in expenses for attending the hearing in this case on April 28, 1981. Complainant also seeks expense reimbursement for attending the December 15, 1981, hearing. That claim is $142.54. These amounts are not contested.

b. Attorney's Fees and Expenses:

Daniel F. Hedges, Esq., an employee of the Appalachian Research and Defense Fund, Inc., petitioned on August 28, 1981, and September 17, 1981, for a fee of $1,650 plus expenses of $139.84 for representing Complainant at the April 28, 1981, hearing. Larry Harless, Esq., petitioned on December 24, 1981, for fees and expenses of $882.05 for representing Complainant at the December 15, 1981, hearing. I have examined the claims and do not find them to be unreasonable. However, since the necessity of conducting a second hearing in this case was the direct result of the failure of Complainant's first counsel to be prepared to present evidence as to damages and costs at the initial hearing in this matter, I am deducting from the award to that attorney the fees and expenses incurred by Complainant and Respondent at the second hearing. Since the latter fees and

expenses ($882.05 for Attorney Harless and $677.50 for Attorney Adkins) exceed the amount billed by Mr. Hedges for the first hearing, I do not find Rebel to be responsible for Mr. Hedges' fee. Mr. Harless is entitled to a fee of $882.05 to be paid by Rebel.

ORDER

Rebel Coal Company is ORDERED to pay Gerald D. Boone, within 30 days of this date, the following amounts:

a. Back Pay (May 28, 1980 - July 22, 1980): $3,670.

b. Back Pay (October 9, 1981, and continuing through date of actual reinstatement): $96.40 for each regular work day and $125.21 for each alternate Saturday.

c. Interest on the above amounts computed at 12 percent per annum from the date these amounts were due to the date actually paid:

d. Expenses: $276.18.

Rebel Coal Company is further ORDERED to pay Larry Harless, Esq., within 30 days of this date, attorney's fees and expenses of $882.05.

It is further ORDERED that the Secretary of Labor commence review of this case for consideration of assessment of civil penalties against the Rebel Coal Company.

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE_ONE

1 I find that this action by Boone also constituted a waiver by him to temporary reinstatement but not to permanent reinstatement. Likewise, I do not find that Boone's subsequent express written waiver of temporary reinstatement (see transcript of temporary reinstatement proceedings dated September 2, 1980, and written waiver signed by Boone) had any effect on his right to permanent reinstatement. The rights are separate and distinct and it could work inappropriately and oppressively against the miner should a waiver of temporary reinstatement be also held a waiver of permanent reinstatement. In the case of a temporary reinstatement, there is no guarantee that the miner will obtain permanent reinstatement after hearing on the merits and should he wish to obtain other employment during that interim period he should not be discouraged from doing so by risking his rights to permanent reinstatement. As the Commission has said, "unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee." Secretary ex rel. Gooslin v. Kentucky Carbon Corporation, 4 FMSHRC ---- (January 6, 1982), citing Goldberg v. Bama Mfg. Corp., 302 F.2d 152 (5th Cir. 1962).