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SOL (MSAH) V. BRIGHT COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION,(MSHA),

ON BEHALF OF
GEORGE ROY LOGAN,
COMPLAINANT
v.

BRIGHT COAL COMPANY,
RESPONDENT

Complaint of Discharge
Discrimination, or Interference

Docket No: KENT 81-162-D
(PIKE CD 81-10)

No. 2 Mine

DECISION

Appearances: William F. Taylor, Esq., and Ralph D. York, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Michael G. Finnie, Special Investigator, MSHA, Pikeville, Kentucky, for Complainant
Ralph G. Polly, Esq., and Gene Smallwood, Jr. Esq., Whitesburg, Kentucky, for Respondent

Before: Judge Moore

This is a discrimination case and the principle issue is one of credibility. George Roy Logan says that on January 19, 1981, Superintendent Jack Collins told him to go under bad roof to set safety posts. He says that he told Jack Collins that he would go if Jack Collins or someone else would accompany him to assist, but that he would not go alone. He then says that Jack Collins told him "if you won't do that you might as well go on home and I'm going to get rid of you." Jack Collins admits that he fired George Roy Logan, but says he had not asked him to go under bad roof. He says that he fired Logan for threatening the foreman, failing to do his job of keeping the tailpiece clean, and mistreatment of the scoop when he was driving a scoop.

No one overheard the conversation of January 19, 1981, and both Roy Logan and Jack Collins gave their testimony in a straight-forward manner with no indication that I could detect of any hesitancy or signs of deceitfulness. From hearing the testimony of both, I have no way of knowing who was telling the truth, but credibility is the essential issue and must be resolved on

the basis of other instances and the surrounding circumstances. If either were willing to perjure himself with respect to some other incident involved in the case, I have to assume that he might be willing to perjure himself when testifying about the most crucial incident. In judging the credibility issue I must consider all of the aspects of this case.

At the outset is the discovery issue. At the request of Respondents, I ordered the government to produce any exculpatory information that might be contained in its files. The government did not deny that it had such material but instead resisted disclosure invoking the informers privilege, the executive privilege, and the so-called privilege involving the work product of an attorney. It did not properly invoke the executive privilege (even if it had, it would not have been pertinent) and Respondents were not seeking the work product of the government's attorney. They were seeking the information discovered by the government's investigating inspector which would have supported their contentions that there were ample reasons for firing Roy Logan other than an unlawful discrimination under the Act. I ruled that the informers privilege was also inapplicable because a witness who gave evidence favorable to the Respondent was not an informer. I ordered production of the exculpatory material, but the government refused to comply with the order. Prior to trial I issued a subpoena duces tecum requring the production of the information at the trial, but the government refused to comply with that subpoena. I then offered the Respondents the opportunity to seek court enforcement of the subpoena.

By letter of June 24, 1982 Respondent's attorney advises that both he and the U.S. Attorney decline to seek court enforcement on the ground that I had no authority to delegate subpoena enforcement to a private party. While I would not agree with that without seeing some authority I think the answer given by the U.S. Attorney begs the question. The delegation was not merely to a private party. It was to Mr. Polly "and to the United States Attorney. . ." If I can not delegate the authority to file an enforcement action to someone, then the authority is of little value because I can not appear in court as a litigant against a party appearing before me. The enforcement proceeding would be ancillary to the instant proceeding and in a sense I would be an advocate in a case over which I was presiding. I would have to recuse myself in order to enforce the subpoena.

Respondent's had asked to me to dismiss the case because of the government's refusal to produce the material, but I considered that too drastic a remedy in view of the fact that Mr. Logan was not being representd by his own counsel but by government counsel, and I did not wish to punish him for something government counsel did. At the trial, government counsel denied that they were representing Mr. Logan, but I think they were mistaken in this denial. They were representing Mr. Logan. I nevertheless refused to dismiss.

The most reasonable sanction I can impose is to assume that

there is exculpatory material similar to the evidence produced by Respondents on defense in this case. I cannot assume any exculpatory evidence as to the key

issue of whether, on January 19, 1981, Respondent Jack Collins ordered Roy Logan to go under unsafe roof and discharged him when he refused to do so. But I will make assumptions adverse to the government with the respect to other phases of the evidence. I would like to emphasis that these assumptions could have been avoided if the government had denied existence of exculpatory information. If the government had offered to let me look at the material in camera I might have been able to see good reason why it should not be disclosed. No such offer was made, however, and I made no request that I be allowed to see the entire file.

Because of the credibility issue at the very heart of this proceeding, I allowed evidence to be introduced which, while not directly relevant to the events leading up to Mr. Logan's discharge might nevertheless bear on the credibility of the witnesses. One example of that type of evidence is the section 103(g) inspection that was made subsequent to Mr. Logan's firing. During the course of the discrimination investigation, a miner alleged to an inspector that unsafe conditions existed at the mine, and he requested an immediate inspection. The inspection was made and while a citation was issued, it was unrelated to the nine specific charges made by the miner in question. I find that there was nothing in the evidence concerning this inspection that would bear on the credibility of any of the witnesses. (FOOTNOTE 1)

There were other post discharge events testified to which, as it turned out, do not have a bearing on the credibility issue herein. One such incident occured when Mr. Logan met Mr. Mike Joseph to exchange a company (Joseph Brothers) lamp and battery charger for Mr. Logan's final paycheck. There was a 22 rifle lying across either the trunk or the hood of Mr. Logan's car. But there was no evidence that would justify a finding that Mr. Logan was attempting to threaten Mr. Joseph with the rifle. I accept Mr. Logan's explanation that he and his brother had merely been "plinking" at tin cans and bottles in the river.

While Mr. Logan alleges that he was fired because of his refusal to work under bad top alone on January 19, 1981, Respondents allege that he was fired for a number of reasons including the manner in which he operated his scoop, including unsafe and reckless operation which damaged the scoop, insubordination, threats to a foreman, and failure to perform his job after he was taken off of the scoop. There was also an allegation that he took food from the other miners' lunch boxes, but whether this added to the other items as a part of the reason for Mr. Logan's discharge is unclear.

On January 15, 1981, Mr. Paul Reid of Celtite Corporation conducted a pull test in Respondent's mine. While the pull test was not described in detail the idea is to pull out a roof bolt and see just how much force it takes to pull it out. There is disagreement as to what time of day the pull test was made, but all who testified as to the date agreed that it was January 15, 1981. Mr. Logan's immediate supervisor, foreman Scott Johnson, told Logan that he could watch the test if his tail piece area was clean. It is at this point that the versions of what took place differ. Roy Logan says that before the first part of the pull test was completed Scott Johnson came up to him and embarrassed him in front of his fellow workers by telling him to get back to work. Logan says he then threatened Johnson with words such as "I'll whip you before I leave" and said that several others should have heard his statement. This testimony by Logan was given in his deposition which was, without objection, made part of the record. At the trial, however, he said he sort of muttered the threat and did not intend anyone to hear it. While no one else at the pull test including Johnson, Collins, and several others, testified that they heard the threat, several heard either Collins or Johnson or both tell Logan to get back to work. According to Johnson and Collins the first part of the pull test was over. Johnson said that when they went to test the second bolt, a part of the testing equipment broke so there was no point in allowing anybody to remain because the pull test was then over, at least for that day. Scott Johnson testified that he had to tell Logan three times to get back to work. Willard Blair heard Johnson tell Logan to go back to work. He did not say how many times. Eugene Lewis a state mine inspector heard Jack Collins tell Logan to go back to work at least twice, but said that Logan just sat there. And Jack Collins said he told Logan to go back to work two times when the first test was over and that Scott Johnson told him to go back to work two times. The weight of the evidence is that if Logan went back to the tail piece to work, he did not do so when he was instructed by his two superiors to get back to work.

State Inspector Eugene Lewis testified that on the day of the pull test but prior thereto, he saw Roy Logan at the tail piece and Roy Logan told him that he was going to whip Scott Johnson. Later in the day, Lewis related that information to Jack Collins and Jack Collins at some unspecified time thereafter relayed the information to Scott Johnson. Both Scott Johnson and Jack Collins corroborate Mr. Lewis' version of the way the threat was communicated to Mr. Johnson. It is noted that Mr. Logan's statement at the trial, that he did not mean for anyone to hear him and sort of muttered the threat, is inconsistent with the statement in his deposition that four to six people probably heard him tell Johnson that he would whip him before he left.

The above incidents involving the pull test all took place January 15, 1981, the discharge took place on January 19, 1981. The rest of the incidents that will be considered took place at unspecified dates, either before January 15, or subsequent to the discharge on January 19. Scott Johnson testified that when Logan first came to work for Bright Coal Company, he was a very good

scoop operator. He then began to slow down and appeared to avoid the foreman; that is, when the foreman was on the outside, Logan would be at

the face and when the foreman was in the mine, Logan would be broken down outside. Buford Stonic testified that Logan's scoop seemed to be broken down an awful lot. Jack Collins testified that Logan "tore up" his scoop all the time. Gears, universal joints and other items were constantly being over-stressed because of Logan's reckless driving. Levon Williams, a foreman at the other mine, said that Logan was sent to his mine at one time and managed to get his scoop stuck in an area sideways. Mr. Williams was uunable to explain clearly what happened but he thought it was deliberate and it took several hours to correct the matter. He left instructions that Logan should not be sent to his section again. Although both scoops in the mine were fairly new, Logan had the newest one, and according to Mr. Collins, the other scoop driver had no trouble with his scoop. It was just Logan's scoop that broke down all the time.

Another incident that is alleged to have occurred at an unspecified time (which Mr. Logan denies), is a near accident involving the other scoop driver. The other scoop driver, Jim Cornett, said that he was driving the scoop underground when Roy Logan who had been engaged in some hazardous horse play jumped out in front of Cornett's scoop. He considered it very fortunate that he did not run over Logan. He related this incident to Jack Collins when he saw him. Jack Collins testified that Jim Cornett had almost run over Logan while Logan was asleep and that after hearing about it, he went back down into the face area and found Logan asleep. Mr. Cornett did not see Logan asleep nor has he seen anyone asleep in the mines although he had heard, he thinks from Jack Collins that Logan had been asleep. At his deposition Logan denied both allegations although he did not present any rebuttal testimony at the trial. There were other predischarge events testified to by Mr. Logan during the course of his deposition, but they will be considered later.

Mr. Logan testified, both in his deposition and at the trial, that on the day of the firing, January 19, 1981, after the shift was over, it was decided by Mr. Jim Hogg that Logan could ride to and from work with Mr. Jack Collins. Logan said he put his knee pads in Collins' Bronco expecting to be picked up the next morning at a store between his house and the mine. He says the next morning he was at the store which had been the agreed meeting place and that Mr. Collins drove right on by. Mr. Collins denies that there was an arrangement to pick up Mr. Logan. Mr. Jim Hogg was on the stand at the trial but nobody bothered to ask him whether he had been a party to any arrangement whereby Jack Collins would pick up Roy Logan on the day after he had been fired.

Roy Logan says that on the evening of January 20 he learned indirectly from his brother that he had been fired and that he phoned Scott Johnson and Jack Collins to ask about it. He said Jack Collins denied any knowledge and suggested that he call Jim Hogg. He said when he called Jim Hogg, Jim suggested that he call Jack Collins and that when he again called Jack Collins, Jack told him he had been fired. Scott Johnson, testified that Mr. Logan had called him and that he, Scott Johnson, had said he knew

nothing about the firing. Mr. Collins testified that Logan called him to try to get his job back and that when he refused, Logan threatened him with such words

as "your time is coming" and added "I know where you live and I know where your children go to school." Logan denies making the statement about the children although he concedes saying something about "your time is coming". Jack Collins said that he and his wife and daughter were shopping in a store later when Logan came up and called him a "son-of-a-bitch" in front of his family. He said he took Logan out of the store and knocked him down. Logan denies all of this.

After Logan was fired from Bright Coal Company, he went to work for Joseph Brothers as a scoop operator. After a short time, Charles Joseph fired him because he was damaging the equipment with his reckless driving. Mike Joseph corroborated the fact that Logan could not keep the scoop running because he was too rough on the equipment. They even thought Logan deliberately let the air out of the tires to avoid work. Logan denied that he had been fired but during the course of his deposition he did say that it was almost the same as being fired. He said that Joseph Brothers had laid off the second shift but let the others continue working anyway. He nevertheless denied being directly fired. Mike Joseph said he fired him.

Near the end of the trial, counsel for Respondents offered preshift examination reports to show that the required examinations had in fact been made. Government counsel objected on the grounds that they were not relevant because the government had at no time charged or contended that the proper preshift examinations were not being made. When counsel for Respondents asked if the government was abandoning its claim that proper preshift examinations were not made, government counsel stated that he was not abandoning the contention, because he had not made it in the first place. The government was simply not contending that there was any flaw in Respondent's preshift examination procedures. At Mr. Logan's deposition, however, he made quite a point of the fact that proper preshift examinations were not being made. He said they were never made and that he had argued with Scott Johnson about not making them. He alleged that neither Jack Collins nor Scott Johnson ever went into the mine before Logan himself went in. Johnson would sometimes come in after they started working and put his initials in places, but he was faking the preshift examination according to Logan. He even complained to Jack Collins about Logan not making the preshift but Collins said there wasn't any point in making one. Logan stated that the only time Johnson would mark anyplace on the roof with his initials was when he had to come up to the face for some other reason and it was in no way a preshift examination. He also said that he complained to the MSHA inspector's about the failure of the company to make preshift examinations. He also mentioned a time prior to the discharge and pull test when Jack Collins asked him to go under what he considered bad roof to rock dust. He refused to do so.

All of the above would tend to establish a very poor policy on Respondents' part regarding mine safety. All would have been in support of a discriminatory discharge. None of these items were brought forth during the trial, however. None of the miners

who testified alleged that they had been asked to work in unsafe conditions, none mentioned the failure of Respondents' to make preshift examinations, and Mr. Logan did not testify at the trial

concerning these matters. In my opinion, the circumstances give rise to the inference that the government does not believe the sworn statements of Mr. Logan regarding these matters. If the government had information tending to disprove the statements of Mr. Logan, it was obliged, under Brady v. Maryland 273 U.S. 83 (1963), to disclose that information. Since it has neither denied that it has such information, nor disclosed such information to Respondents, I am making the assumption that it has such information.

I make the further inference that if Mr. Logan made misstatements under oath as to the items referred to above, he may well have made similar misstatements under oath as to the principle issue herein, i.e., why he was fired. I have no similar evidence that would indicate that Mr. Collins may have made misstatements under oath.

Considering the inferences that I have made, it is obvious that the government has failed to satisfy its burden of proof that Mr. Logan was discharged because he refused to work under unsafe roof. I therefore render judgment for the defendants Bright Coal Company and Jack Collins and the case is DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

1 During a colloquy concerning of the 103(g) inspection, I called counsel to the bench for an off-the-record discussion. I asked if Mr. Logan, in his deposition, had not already revealed himself as one who complained to MSHA about unsafe conditions and the lack of preshift examinations. Both Counsel agreed that the matters referred to in Mr. Logan's deposition were not the ones giving rise to the 103(g) inspection. Inasmuch as I do not know who made the complaint I cannot use the results of the inspection as affecting the credibility of any witness.