CCASE:
UNITED WORKERS V. SOUTHERN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA,	Complaint of Discharge, Discrimination, or Interference
ON BEHALF OF JEFFREY LYNN SIMMONS, COMPLAINANT	Docket No. LAKE 82-74-D
v.	Meigs No. 1 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION

Appearances: Mary Lu Jordan, Esq., Washington, D.C., on behalf of Complainant
D. Michael Miller, Esq., and Alvin J. McKenna, Esq., Alexander,Ebinger, Fisher, McAlister & Lawrence, Columbus, Ohio, on behalf of Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant was discharged on December 31, 1981, from the position he had with Respondent as a mechanic. He contends in this proceeding that his discharge resulted from his refusal to perform work, and that the refusal was protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c).

Pursuant to notice, the case was heard on the merits in Columbus, Ohio, on June 2, 1982. The Complainant, Jeffrey Lynn Simmons, testified on his own behalf. Roy Pierce, Michael Ryan, Arthur Fleischer, William Wooten, Rodney Butcher, Michael Buskirk, Robert E. Davis, Dan Silvers and David Baker testified on behalf of Respondent.

Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the operator of the Meigs No. 1 Mine, located in Wilkesville, Ohio, the products of which mine enter interstate commerce.

2. Complainant Jeffrey Lynn Simmons was employed by Respondent as a miner from October 6, 1980, until his discharge on December 31, 1981.

3. Complainant worked for Simco Peabody Coal Company from January 1975 to August 1978. He first worked on the inside labor crew on a non production shift. His work included shovelling the belt line, rock dusting, setting concrete walls to control ventilation, and lubricating machinery. After about 1 year he became a belt mechanic. He received training in electricity and has an electrical card.

4. From August 1978 until June 1979, Complainant worked for Jeffrey/Dresser Mining Machinery as a Field Service Engineer or Field Service Technician. His duties included assembling and repairing defects in equipment sold by Jeffrey to mine operators. This equipment included continuous miners. Repairs were usually done on idle sections but occasionally on production sections.

5. Complainant was hired by Respondent as a mechanic. He worked originally in the "mule barn," an underground shop, where he repaired transportation equipment. He received 16 hours of safety training as a newly-employed experienced miner.

6. On about September 25, 1981, he was transferred to the job of section mechanic. As such he was required to inspect and make necessary repairs on mining equipment on the section, including the continuous miner. This work was usually performed at least one break outby the face, but on occasion was performed at the face and on a few occasions required that Complainant stand beside the miner operator while the miner was cutting coal.

7. When Complainant was assigned to the production section, the maintenance foreman, Dan Silvers, spent approximately 3 hours with him familiarizing him with the equipment, maintenance schedules, safety cautions and the general environment of the underground section. This procedure is referred to as a safety contact. On October 16, 1981, Complainant received 8 hours of electrical retraining and on October 23, 1981, he received 8 hours of annual refresher training in underground safety.

8. On one occasion while working on the section, Complainant told the maintenance foreman that he did not feel comfortable working under the head of a continuous miner.

9. Michael Ryan, the assistant shift foreman on the shift on which Complainant worked, stated that Complainant had the reputation that when he did not want to do a task, he said he did not know how.

10. When Complainant reported for work at midnight on December 31, 1981, he was assigned to the 009 section under foreman Roy Pierce. Complainant had never worked on the section or under Mr. Pierce previously. The crew was short-handed and bad top was encountered at the beginning of the shift. This caused a delay in production until about 4 or 4:30 a.m. The miner operator was off, and the continuous miner was being operated by the miner helper. He was assisted by a person classified as a general inside laborer.

11. At approximately 4:45 a.m., the shuttle car operator became ill and went home. Pierce assigned the person acting as miner helper to operate the shuttle car, and told Complainant to help on the miner. Complainant objected that he had never worked around a miner in production, and that he did not feel safe doing the job. Pierce told Complainant that he would train him and would "give you a safety contact slip and . . . even go up and even do the job for you, but I need somebody up there so I won't get a grievance filed on me." Complainant refused to go on the miner helper job and was sent out of the mine.

DISCUSSION

Pierce and Simmons disagree on two important aspects of the conversation they had involving Simmon's assignment to the miner helper job. Pierce asserts and Simmons denies that training was offered. Simmons asserts and Pierce denies that Simmons related his refusal to do the work to a concern for his safety. With respect to the first issue, I accept Pierce's testimony that training was offered. It seems to me inherently more probable than Simmons' testimony. It is also supported by the testimony of Mike Buskirk, personnel supervisor, and Rodney Butcher, chairman of the Local Union safety committee, both of whom testified that Complainant admitted in the first grievance meeting that Pierce had offered him training.

With respect to the second issue, I accept Complainant's testimony that he specifically related his refusal to take the job to a fear for his safety. This conclusion seems more in accord with the context of the conversation. It is also in accord with the testimony of Mr. Buskirk and Mr. Butcher as to what Complainant said at the first grievance meeting.

12. After Complainant's refusal to accept the assignment, but before he left the mine, Pierce asked mechanic Bob Porter to act as miner helper. Porter agreed and Complainant asked Pierce if he could remain and perform his mechanic duties. Pierce refused the request.

13. A miner helper is required to handle the cable, to keep it out of the way of the miner, check for methane, set temporary supports or roof jacks, to keep ventilation curtains up to within 10 feet of the face, and be alert for shuttle cars. An experienced miner who had not worked on a continuous mining machine could be trained for a miner helper job in about 30 minutes except for the task of moving the miner back across the section. It would require one shift to train an employee for the latter task. Pierce did not contemplate moving the miner back across the section during the shift in question.

14. It was common in the subject mine for mechanics to fill in on production jobs, and specifically on the job of miner helper.

15. The National Bituminous Coal Wage Agreement of 1981 in effect at the subject mine on December 31, 1981, prohibited any new inexperienced miner from working on or operating mining machines or mobile equipment until he completed at least 45 days of work underground. After 45 days, such an employee became eligible under the contract to bid on any vacant position.

16. After Complainant left the mine, Respondent decided to discharge him for insubordination and he received a written notice of "suspension subject to discharge" on December 31, 1981.

17. Complainant filed a grievance under the union contract. The grievance went to arbitration and the arbitrator upheld the discharge.

18. Complainant filed a complaint under the Mine Act within MSHA. After an investigation MSHA made a determination that a violation of the Act was not established.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

> (c)(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 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.

ISSUE

Whether Complainant's refusal to perform the job of miner helper on December 31, 1981, was protected activity under section 105(c) of the Act?

CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Mine Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Complainant did not establish that his refusal to work on December 31, 1981, was activity protected under the Mine Act.

DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act, if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

GOOD FAITH

Although there is some evidence that Complainant was less than a model employee and that he was reputed to have avoided disagreeable tasks by claiming inability to perform them, this evidence is nebulous at best and there is no good reason to reject Complainant's testimony that he refused to work as a miner's helper because he feared for his safety. Therefore, I conclude that his refusal to work resulted from a good faith belief that it posed safety hazards. I have found above that he communicated the reason for his refusal to Respondent.

The question remains whether Complainant's refusal to perform the work was "reasonable." See Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981). I conclude that it was not. As Judge Kennedy stated in a recent decision (Secretary/Bryant v. Clinchfield Coal Company, 4 FMSHRC ÄÄÄ (1982)), "fear on the part of an otherwise healthy miner of performance of a risky or dangerous task regularly performed by other miners is not, standing alone, a protected justification for refusing to attempt to perform the task." Since I found that Respondent had offered to give Complainant training; since Complainant was an experienced miner; since the job which he refused was not more risky or dangerous per se than any other job in the mine; since it did not involve a violation of a health or safety standard; and since it was regularly performed by other miners, I conclude that Complainant's refusal to perform it was unreasonable. Therefore, under the Pasula - Robinette test, it was not protected under the Mine Act and the action of Respondent in discharging him did not violate the Act.

Section 105(c) was not designed to enable miners to avoid difficult or distasteful tasks even when the avoidance is based in good faith on a concern for safety. To be reasonable, the refusal to work must involve a condition or practice which creates a safety hazard beyond the hazards inherent in the mining industry or occupation itself. Going underground and working in low coal (the height of the seam involved in this case was 54 inches) can result in a good faith concern for safety in some people. For a person employed as a miner, refusal to work because of such a concern is not reasonable. Compare Victor McCoy v. Crescent Coal Company, 3 FMSHRC 2211 (1981).

ORDER

On the basis of the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge