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SOL (MSHA) V. SHANNOPIN MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION
ON BEHALF OF GEORGE MATELESKA,
APPLICANT

Application for Review of
Discrimination

Docket No. PENN 81-209-D
MSHA CASE No. PITT CD 81-10

v.

SHANNOPIN MINING COMPANY,
RESPONDENT

Shannopin Mine
Sol No. 12874

DECISION

Appearances: Covette Rooney, Esq., for Applicant
Jane A. Lewis, Esq., for Respondent

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor on behalf of George Mateleska, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. The Secretary charges a violation of that section, concerning Respondent's action in suspending Mateleska for five days without pay in March, 1981, and seeks back pay and other relief.

The case was heard in Pittsburgh, Pennsylvania.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated an underground coal mine known as Shannopin Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. George Mateleska, a miner at Shannopin Mine, was a member of the miners' Safety Committee from January 1980 until May 1981.

3. On March 4, 1981, when Mateleska reported for work on the midnight shift, he was informed that, because of a water problem, the crew would be reassigned to another section of the mine.

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4. I credit Mateleska's testimony as to the events that followed, including the following part of the transcript of his testimony (Tr. pp. 10-16):

Q. Could you describe for us the events that occurred when you reported for work on that shift?

A. At 12:01, we was notified by foreman Jess Fox, that we wasn't going to go to our assigned job areas, and the crew in 213 Section was to be idle, due to the water at 11 Butt, and that we were supposed to go down the cage, and go to this waiting room, for job assignments.

Q. Did you go to that area?

A. Yes, ma'am, we did.

Q. And what happened at that point?

A. At that point, there was approximately seven to eight guys in that waiting room, and Jess Fox told us that we were going back to 6 Flat A Section to retrieve 7200 cable.

At this time, Jess Fox told Ed Martin and myself, to get two motors, and a flat car and proceed back, and that Don Deal's and Floyd Hornick would be back to 13 Butt to the pump, and Tommy Kurilko was the shift foreman, or the foreman on the section with these other foremen, he was to proceed with the jeep with these other men back to the section.

Well Art Vernon was in the waiting room, he asked Jess Fox how he was going to get these men back into A section, he told him that there was a water problem at 6 Flat 13 butt, and he wanted to know how he would get the men around the water, and Jess asked him if there was any kind of transportation on the other side of the water, and Art told him yes, that his little eight ton motor was on the other side, that they could walk them around, and put them three or four at a time on the motor, and take them back to the section.

Q. Let me ask you this, were you present when that conversation took place?

A. Yes, man'am.

Q. Okay.

A. So Mr. Martin and I left, and everybody else left, the fire boss left, and Mr. Hornick left with Don Deal and Tommy Kurilko, and the rest of the men.

So we went up to the dispatcher shanty, where we called the dispatcher to find out where our motors were located, we picked our motors up, and our flat car, and we proceeded on 4 Main, and then we crossed over to 3 Main, and down to the mouth of 6 Flat, and we called the dispatcher and got the right of way on back to 6 Flat 13 Butt, where we met with Art Vernon around 4 Butt, 6 Flat, and we had to wait for Art to move out of our way, so that we could proceed on down to our jobsite.

So we got down to 6 Butt, 13 or 6 Flat 13 Butt, and Floyd Hornick was present, Ed Martin, the foreman Don Deal and myself.

Tom Kurilko and the rest of the crew had already switched their jeep out the switch and had already proceeded back to retrieving the 7200 cable.

So upon arrival at 6 Flat 13 butt, I asked Don Deal how these men got around the water, and he pointed to the left side, and wire side, of the section, so I went over and took a look, went over one block, and down, and there was no possible way for these men to get around this way, because there was a fall back there, so I come back out, and I talked with Floyd Hornick, in the pop house, and I come back out, and I told Don Deal, I says, I don't think that these men should be back in this area, due to the water problem, and I just feel that I should go out and get consultation with Danny Barzanti, because he is the Chairman of the Safety Committee, and I can't take it upon myself to do anything, so I asked him to stop my time, and I was going out on union business.

Don said I think you are wrong George, but he said okay, he said go ahead, but call the first phone, you call Jess Fox, the shift foreman, so I did that, and he told me to take the motor and go ahead out, so I took the motor and went in to the phone, and called Jess Fox, and told him the situation that I was coming out on union business, he okayed it, called the dispatcher back, he told me to proceed to the Mouth of 6 Flat, and to get further clearance from there.

So as I proceeded up the haulage Art Vernon was there in my road, he was checking the pumps and whatever his job assignment was, but I would also like to state that Art Vernon was not fire bossing that night in that area, that he was on other assigned job somewhere else in the mine, but he was to check that pump or something.

So I proceeded to mouth 6 Flat, where Art Vernon had switched out, and I called the dispatcher again, and he told me that Jess Fox had called him back, and for me to get in touch with Jess again, so he give me this number to call, and I called, at the mouth of 6 Flat, I kept calling, couldn't get through, and finally, I did get through to Jess, and he asked me, he told me rather, that he called Al Smalara, the superintendent of mines, and Al wanted to know if I was going to use my individual safety rights, I said, no, sir, and he said if you were, he said, I will have to assign

you to another worksite, to another area of that mine, I said, no, sir, it doesn't prevail here, I just want to talk with the chairman of the safety committee, and discuss this problem, I had already told Don Deal, and Jess Fox on the phone, that I wanted my time stopped, I was coming out on union business, and I proceeded out from the mouth of 6 Flat, I called Dan Barzanti, once I hit topside, and told him the situation, he came to the mine, and the next morning --

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Q. Okay, before we go into the next morning, back to when you were at the location where the water was, you said that you went to the left of the water?

A. Yes, man'am.

Q. And you felt that the men could not get around that water, did you ever go to the right of the water?

A. No, I didn't.

Q. And for what reason?

A. Because the foreman informed me that the men went to the left.

Q. What hazard, or what problem did you see with the presence of the water in the section?

A. The problems was it was so deep and so long, it was approximately three hundred feet long, and approximately eleven to thirteen inches deep, and considering that they was going back there to retrieve 7200 cable, how would we get this cable out, and if one of the men would get hurt back on that section, how would we get them back out of the mine, around that water, we would have to carry them a long distance, I didn't know if there was communications back there on the section, which I didn't go back to the section, I only went to the water at 6 Flat, 13 Butt, and I just felt that the men shouldn't be back in that area, as that part of the mine hasn't been worked for approximately two and one half years, and what was the big hurry, for the 7200 cable that evening, to be retrieved.

5. The section to which Mateleska and the rest of the crew were reassigned on March 4, i.e., 6 Flat A Section, was an inactive area that had not been an active working section for about 2 1/2 years.

6. Art Verna, union fireboss, asked Jess Fox, shift foreman, how miners would get back into A section, because he had examined the area the day before and there was a water problem at 6 Flat 13 Butt. Fox asked him if there were any kind of transportation on the other side of the water. Verna informed him that an 8-ton motor vehicle, which could hold 3-4 men at a time, was available on the other side of the water but the men would have to walk around the water.

7. Verna felt that the limitation of one vehicle which could hold only 3-4 men presented a danger. Additionally, he was concerned because the phone in the assigned area was inoperative (he had checked the phone the day before), and there was no radio on the motor. If an accident had occurred, the miners would have been isolated in the area without any communication.

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8. Metelaska had no means of contacting Barzanti while on the section. Mateleska did not attempt to stop any other miners from working, nor did he disrupt the work force when he left the area.

9. There was another safety committeeman, Joe Varna, working on the midnight shift at 5 Face. Mateleska did not want to consult with him because this would have required Varna to leave his section and travel a long distance to get to Mateleska's assigned section. If Varna left his section there would have been a disruption of production.

10. Mateleska's safety concern was that, in the event of an emergency, there might be serious difficulty in getting men out of the assigned area and around an accumulation of water 300 feet long and 11-13 inches deep. An injured man would have had to be carried a long distance, and Mateleksa did not know whether there was any communication back there.

11. When Mateleska called Barzanti, he told him about the water, and he also told him about some other conditions that he considered hazardous. Mateleska had observed these other conditions on his way out of the mine. He had not stopped to record them or to make an examination of mine safety conditions.

12. Barzanti took notes of the water problem and the other safety problems Mateleska had mentioned, and compiled these into a list.

13. When Smalara arrived at the mine on the morning of March 4, Mateleska, Barzanti and two mine committee members, Art Verna and Andy Wanto, met with him. Mateleska's action and the safety items he raised were discussed with Smalara.

14. As a result of that meeting, Barzanti, Mateleska, Verna, and Wanto understood that Smalara would take care of the listed safety items and that the matter of Mateleska having left his job site would be forgotten.

15. About 4:45 p.m. on the same day, Mateleska received a phone call from Smalara, who informed him he had consulted with the president of the company, Dominic Esposto, and it was decided that Mateleska would be given a 5-day suspension without pay.

16. On March 5 and 6, 1981, Mateleska filed a Mine Grievance Form and a Safety Grievance Form, after having consulted with his union representatives. Both grievances have gone through the first two grievance steps and are being held in abeyance pending the outcome of this case.

17. On March 6, 1981 after his suspension, Mateleska submitted a 103(g) complaint to MSHA. An MSHA inspection on March 9, 1981 produced negative findings.

18. On March 12, 1981, the union Safety Committee made a safety run of the area, to inspect the matters listed by Barzanti and to inspect the safety of the mine at specified locations.

This indicated that only one item on Barzanti's list had been corrected.

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19. On April 6, 1981, Mateleska filed another section 103(g) complaint, this time alleging that a pre-shift examination had not been made of the A section before his shift on March 4. On April 8, 1981, MSHA investigated the complaint and issued a 104(a) citation because the pre-shift examination had taken place 3 1/2 hours prior to the beginning of the shift.

20. On a previous occasion, Mateleska had participated in a fatality investigation at the mine and Dominic Esposto remarked that Mateleska was too harsh during the investigation and he wanted to see Mateleska off the safety committee. Later, in March 1981, at a meeting between the Mine and Safety Committees and management concerning Mateleska's suspension, Dominic Esposto stated that, if Mateleska had invoked Article III of the contract, he would have "had him." When he came out of one meeting concerning Mateleska's 5-day suspension and the list of safety items, Esposto stated to another management official, "I told you I was going to get him (Mateleska) off the Safety Committee."

21. Floyd Hornick, Ed Martin and Art Verna, all miners on the March 4 midnight shift, felt that the water presented a potential safety hazard, but they did not refuse to work on the section.

DISCUSSION WITH FURTHER FINDINGS

On March 4, 1981, George Mateleska was given a 5-day suspension without pay for the following purported reasons: 1) abandoning his job duties and alleging to go out of the mine on union business, 2) resorting to self-help instead of using the procedures of Article III (i) and (p) of the labor-management contract, and 3) acting as a "safety committee" in gathering a list of alleged unsafe conditions in violation of Article III (d)(4) of the contract.

On the midnight shift on March 4, Mateleska was advised of a water problem at 6 Flat A section, an area that had not been worked in for over 2-1/2 years. He and other members of his crew were assigned to work in by the water. The water prevented readily accessible transportation into and out of the area. In the event of an emergency or injury, only three or four men could be transported at a time in the small motor vehicle available in by the water and once the motor reached the water the men would have to walk a long distance around it. At the time, Mateleska had a bona fide, reasonable belief that there were dangers involved in having the men work in by the body of water with limited transportation and possibly no communication in that area. He was a member of the Safety Committee and wanted to consult the chairman of committee in order to determine whether action by the committee should be taken. He asked his foreman, Deal, whether Deal would take him off the clock (i.e., stop his pay) so that he could leave the mine on union business to call the Safety Committee chairman, Barzanti. His foreman said he thought he was wrong about the safety problem, but gave him permission to leave the section on union business, and said he

should call Jesse Fox, the next higher foreman, on his way out of the mine. Mateleska complied, and called Fox, who told him to call him back at a later point in his travel out of the mine.

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Mateleska did so. Fox then said he had talked to Smarlara, the mine superintendent, who wanted to know whether Mateleska was exercising his individual safety rights under the contract. Mateleska said, "No," that he was going out on union business. Fox said that, if Mateleska was exercising his individual safety rights, he would be assigned to other duties, meaning that during the time the safety matter was being investigated Mateleska could be assigned other duties. Mateleska repeated that he was not exercising such rights, but was going out on union business to discuss the safety matter with the chairman of the Safety Committee. Fox said, "Okay," and gave him clearance to leave the mine.

Mateleska's time was stopped as he requested, and the union paid for his time from the time he left the section with Deal's permission. At no time did Deal or Fox refuse Mateleska permission to leave the mine on union business. Mateleska did not disobey any order from a management. In addition, there was a custom and practice, including a history with the predecessor owner of the mine, of permitting union committee members to leave the mine on union business.

The miners' Safety Committee is an important link in the discovery and transmission of safety problems and complaints to MSHA, and it has the authority, as representative of the miners, to initiate section 103(g) investigations by MSHA. The importance of this link is evident from section 105(c) of the Act, which states in part:

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 * * * 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. * * *

Mateleska was acting as a member of the Safety Committee, in behalf of other miners and himself, in bringing a bona fide safety concern to the attention of his supervisors and in requesting and obtaining permission to leave the mine to discuss this concern with the chairman of the Safety Committee. These actions were protected activities within the meaning of section 105(c) of the Act.

Concerning the first ground for management's disciplinary action, I find that the attempt to deny management's previous permission to Mateleska to pursue the safety matter as union business outside the mine, on union time, was not in good faith and was in controversion of the clear facts. The facts showed, further, management animus toward Mateleska because of his safety work on the Safety Committee and a discriminatory intent by Esposto, the owner of Respondent, to get him off the Committee.

Bad faith and a discriminatory intent on the part of management are also shown by the second ground for the discipline of Mateleska. The allegation that Mateleska resorted to "self help" and should have exercised his rights under Article III(i) and (p) cannot be sustained. The contractual rights of section III(i) are limited to a narrow class of hazards, those that are "abnormally and immediately dangerous . . . beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." This was not Mateleska's situation. Mateleska felt the condition was abnormal but he was not sure that it presented an imminent or immediate danger. That is why he wanted to discuss the matter with the chairman of the Safety Committee. Section III(i) of the contract does not override the safety complaint rights guaranteed by section 105(c) of the Act. An attempt to discipline a miner for failure to rely on the narrower scope of complaint rights under section III(i) contravenes the purpose of section 105(c) of the Act. Nor could section III(p) be used to lessen Mateleska's rights under the Act. This contract section provides a procedure for settlement of health and safety disputes, which includes the filing of a grievance within 24 hours. That right exists under the contract, but it cannot override the greater protection of section 105(c) of the Act. Management cannot discipline a miner because he chooses other means of calling safety problems to the attention of his supervisors, his union, or MSHA.

Finally, the third ground for management's discipline of Mateleska shows discrimination and bad faith. Mateleska did not compile the list of safety problems or attempt to conduct a Safety Committee investigation in violation of section III(d)(4) of the contract. The list of safety problems was drawn up and presented by Barzanti, the chairman of the Safety Committee, who wrote down the conditions Mateleska had observed in going out of the mine. If management were in good faith in alleging this list and its presentation to be a violation of section III(d)(4), it would have charged Barzanti as well as Mateleska. Its action against Mateleska alone showed a discriminatory intent directed at him. Moreover, all miners are statutorily guaranteed the right to make complaints to their employers concerning alleged safety or health hazards or violations. An attempt to discipline a Safety Committee member for presenting safety hazards to management contravenes the provisions and purpose of section 105(c) of the Act.

The preponderance of the evidence shows that management discriminated against Mateleska because of safety-complaint

activities that were protected by the Act.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. On March 4, 1981, Respondent violated section 105(c) of the Act by suspending George Mateleska for five days without pay, as found above.

Proposed findings or conclusions inconsistent with the above are rejected.

PENDING A FINAL ORDER

The Secretary shall have ten days from the date of this decision to submit a proposed order granting relief for the violation found above, with service of a copy on Respondent. Respondent shall have ten days from receipt thereof to reply to the proposed order.

WILLIAM FAUVER
JUDGE