

CCASE:
JIMMY SIZEMORE V. DOLLAR BRANCH COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JIMMY SIZEMORE AND
DAVID RIFE,

COMPLAINANTS

v.

DOLLAR BRANCH COAL COMPANY,

RESPONDENT

DISCRIMINATION PROCEEDINGS

Docket No. KENT 83-130-D

MSHA Case Nos. CD 83-07

CD 83-10

No. 3 White Oak Mine

DECISION

Appearances: Tony Opegard, Esq., and Martha P. Owen, Esq.,
Hazard, Kentucky, for Complainants
Thomas W. Miller, Miller, Griffin & Marks,
Lexington, Kentucky, for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

Complainants Jimmy Sizemore and David Rife contend they were discharged from their employment by Respondent, on November 10, 1982, because of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act"). Pursuant to notice, the case was called for hearing on April 18, 1983, in Hazard, Kentucky. At the commencement of the hearing, the parties stated that a settlement had been reached with respect to the claim of David Rife, whereby Rife agreed to withdraw his complaint before the Commission, and to withdraw a complaint filed with the National Labor Relations Board, and Respondent agreed to reinstate Rife effective April 25, 1983, at the same rate of pay he was earning when discharged. Based on the settlement agreement, this proceeding will be dismissed insofar as it involves the complaint of David Rife.

Jimmy Sizemore, Roscoe Collett, Donnie Mosley, David Rife, Ricky Napier, Cecil Harris, and Glenn Caldwell testified on behalf of Complainant Sizemore; John Chaney, Ronnie Napier and Daryl Napier 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

Complainant Sizemore was employed on the third shift at Respondent's mine as a roof bolter. The third shift was a maintenance shift. The hours of work for this shift were changed in approximately October, 1982, from 11:00 p.m. - 7:00 a.m., to 2:00 a.m. - 10:00 a.m. The third shift foreman was Ronnie Napier. Employees on the shift were Jimmy Sizemore, David Rife, Delbert Couch (also known as "Lightning"), and Ricky Napier. Donnie Mosley also worked on the third shift as outside man, but his hours continued to be 11:00 p.m. to 7:00 a.m. All of the third shift miners were unhappy about the change in hours of work. The first shift worked from 6:00 a.m. to 2:00 p.m. and the second shift from 4:00 p.m. to 2:00 a.m. Thus, there was an overlap of 4 hours in the working time of the third and first shifts. Sizemore complained that he was required to install bolts in 4 hours in the cuts made by the second shift and it was not possible to accomplish this in the allotted time. When the third shift arrived, Sizemore discontinued bolting and did general cleanup work.

During the afternoon of November 8, 1982, Ronnie Napier, Delbert Couch and David Rife were out drinking beer and playing pool. They were travelling in Ronnie Napier's jeep. Sometime in the evening, Rife fell asleep in the back of the jeep. Napier and Couch decided to stage a protest at the mine because of the change in the hours of the shift. They drove to the mine site, arriving some time between 10:00 p.m. and midnight. Napier and Couch had consumed approximately 10 bottles of beer each and Rife had drunk six. Couch continued to drink after arriving at the mine. Napier had a rifle in his possession and Couch had a pistol.

The second shift was underground mining coal when they arrived. Napier called the second shift foreman, Terry Ward, from the mine office and directed him to bring his crew out of the mine. When they didn't respond quickly enough, he directed the second shift outside man to cut off the power to the mine, which resulted in shutting off the mine fan. The second shift then came out of the mine. Couch called Glenn Caldwell, the mine superintendent, and Ronnie Napier told him to come out to the mine. Caldwell called the police but they refused to come out to the mine, after being told on calling the mine office that there was no trouble there. After further telephone conversations between Caldwell and Ronnie Napier, Caldwell agreed to come out to the mine at 5:00 a.m., believing that this would allow time for Napier to sober up.

Napier, who was armed told the second shift crew that they were going on strike because of the change in working hours, The second shift crew remained outside the mine and were instructed to remain on the mine property. Napier then gave his rifle to Terry Ward who placed it in Napier's jeep. Couch kept his pistol. Both Couch and Napier were intoxicated.

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Complainant Sizemore arrived at the mine at approximately 1:45 a.m. prepared to begin work at 2:00 a.m. When he saw the second shift outside, he went to the mine office. Ronnie Napier was there and was complaining about the change in hours and a problem he was having with insurance. Since the power had been shut off, none of the third shift went into the mine. Napier told them no one could go to work until Caldwell came, and said or implied that no one should go home either. The third shift workers therefore remained in or around the mine office. Between 2:00 a.m. and 5:00 a.m., Napier and Couch refused to permit the loading of coal trucks which were at the mine waiting to be loaded. Napier shot a hole in the door of the mine office and both Napier and Couch shot at insulators on light poles or power lines. A hole or holes had been kicked through the wall of the mine office. Beer cans were scattered over the parking lot. Tires had apparently been cut.

Caldwell arrived at the mine about 5:00 a.m. and met with the third shift miners all of whom had remained at the mine site. Ronnie Napier and Delbert Couch did most of the talking, and voiced complaints of the change in hours of the shift, an insurance problem Napier had, and Couch's demand for a raise in pay. When he was asked what his complaint was, Sizemore told Caldwell he would like to see the hours changed back to the old schedule.

Sizemore had not been drinking or taking drugs. He did not carry a gun. He was not involved in calling the second shift from the mine or in shutting down the mine. He was ready and willing to work his shift. He was not involved in cutting off the power to the mine or in damaging mine property.

Following his meeting with the third shift miners, Caldwell discussed the matter with John Chaney, the owner of the mine, and Daryl Napier, the mine superintendent. Chaney was told, or at least understood, that the entire third shift was involved in drinking and property destruction. Based on that understanding, he told Caldwell to fire all the miners on the third shift. "I told Glenn to fire everybody, that way we would for sure have the right people." (Tr. 136). Later Ricky Napier was rehired when Chaney found out he did not participate in the drinking and destruction of mine property.

ISSUE

Whether Complainant Sizemore was discharged for activity protected under the Mine Safety Act.

CONCLUSIONS OF LAW

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act and that his discharge was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC _____ (1983).

Complainant contends that he was fired in part for failing to work on November 9, 1982, and that his failure to enter the mine and work his shift was protected activity. He asserts that it was protected activity because to enter the mine when the power (including the fan) was shut off and the preshift examination had not been performed would be (1) dangerous and (2) in violation of sections 303(d)(1) and 303(t) of the Act.

It certainly is true that it would have been dangerous for Complainant to enter the mine when his shift was scheduled to begin on November 9. The danger, however, arose not so much from the fact that the fan was shut off and the mine had not been preshifted as from the fact that an intoxicated man with a gun made it clear that no one should enter the mine. Complainant recognizes that this is not a case of a refusal of a miner to enter a dangerous area or perform dangerous work. The mine was shut down in part because of a labor dispute concerning hours of employment, and in part because two employees, including a supervisor, were drunk. It is stretching the notion of protected activity under the Mine Act to hold that it includes not going to work under these circumstances.

Assuming, however, that the "activity" was protected, was Complainant's discharge motivated in any part by such activity?

It is true that Caldwell testified before the Kentucky Unemployment Commission that Sizemore was fired because he didn't go to work or go home. I think it distorts the real situation, however, to conclude that Sizemore (or any of the third shift miners) was fired for failing to enter an unsafe mine. The reality is that they were all fired because management believed that the entire third shift was involved in shutting down the mine, drinking on the mine site, and wantonly destroying mine property. So far as the record before me shows, management was in error about Sizemore's participation in any of these activities (as it was, and admitted it was, in error concerning the participation of Ricky Napier).

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Because his discharge was based on false information, it seems grossly unfair. However, the Commission has no responsibility to assure fairness in employment relations or to determine whether an employee was discharged for cause, but only to protect miners exercising their rights under the Act. Complainant was unfortunately caught by a collective - guilt dragnet and discharged though, according to this record, he was entirely innocent of the charges properly levelled at some of his fellow miners (including his foreman).

I conclude that the discharge of Complainant Sizemore was not motivated in any part by activity protected under the Act. Therefore, no violation of section 105(c) has been established.

ORDER

Based upon the above findings of fact and conclusions of law, (1) the complaint of David Rife is WITHDRAWN and the proceeding is DISMISSED pursuant to a settlement agreement between Rife and Respondent; (2) the Complaint of Jimmy Sizemore and this proceeding is DISMISSED for failure to establish a violation of section 105(c) of the Act.

James A. Broderick
Administrative Law Judge