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RAY WARD V. VOLUNTEER MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RAY WARD, COMPLAINANT — DISCRIMINATION PROCEEDING

Docket No. SE 82-55-D

v.

VOLUNTEER MINING CORPORATION, RESPONDENT — BARB CD 81-38

DECISION

This proceeding was brought by the Complainant under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., seeking relief for alleged acts of discrimination. The case was heard at Knoxville, Tennessee.

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 that produced coal for sale or use in or substantially affecting interstate commerce.

2. Complainant was hired at Respondent's mine on October 30, 1978, as an operator of a continuous miner, a machine used to extract coal, and operated such equipment until April 10, 1981. On that date, Complainant was temporarily assigned to relieve a roof-bolter

operator, Paul McKamey, who left on sick leave. Complainant had severe stomach pains at that time, because of an ulcerous condition, and was also upset by being assigned to run the roof bolter without instruction as to the roof control plan. He told his immediate supervisor that he was leaving the mine to talk to the mine superintendent, Everett Davidson, because Complainant needed to see a doctor about his pain.

3. He told Davidson that he needed to see a doctor because of stomach pains and that he was upset about being assigned to the roof bolter without training. Davidson denied him sick leave and told him that, as far as Davidson was concerned, Complainant had quit his job. Complainant saw a doctor for examination and treatment and later that day, April 10, reported the job incident to the local office of the Mine Safety and Health Administration, United States Department of Labor (MSHA).

4. When Complainant reported for work the following Monday, April 13, and was denied employment, Complainant filed a discrimination complaint with MSHA under section 105(c)(1) of the Act. This complaint was settled by an agreement to reinstate Complainant with back wages for 108 hours. Complainant interpreted the agreement as a right to be reinstated in his regular position, continuous miner operator, but the written agreement did not specify a position in which he was to be reinstated.

5. Complainant was reinstated on April 29, 1981. His supervisor told him that, since McKamey was still on sick leave, Complainant would be assigned to roof bolter until McKamey returned, and the supervisor estimated that McKamey would be back in a few days.

McKamey returned to work in two or three days, but management kept Complainant on the roof-bolter job.

6. On July 10, 1981, Respondent laid off a number of miners, including Complainant, for the stated reason that the section where they were working was being closed and some time would be needed before a new section would open.

7. All of the miners on Complainant's shift who were laid off were later rehired except Complainant, and an additional employee was hired after the layoff. The miners on Complainant's shift who were rehired were: Paul McKamey, rehired on August 3, 1981, Herman Carroll, rehired on August 3, 1981, Joe Ward, rehired on August 10, 1981, and Hoyle West, rehired on August 17, 1981. Bayless Phillips, (a prior employee), who was not employed at the time of the layoff, was hired on August 17, 1981. During the layoff, Complainant asked Davidson for reinstatement but was not rehired; instead, Davidson told him that he could not tell when or if he would be rehired and recommended that Complainant seek employment elsewhere.

8. The layoff on July 10, 1981, was the only layoff at the mine in the time Complainant was employed there. The record does not indicate whether or not there had been a layoff at the mine before Complainant's employment.

9. At all pertinent times, Respondent's employees did not have a collective bargaining agreement. Respondent paid all non-supervisory miners the same rate, regardless of position or length of employment with Respondent.

10. During the period of Complainant's employment by Respondent,

until July 10, 1981, Respondent operated two coal-producing sections on the day shift and one section on the night shift.

DISCUSSION WITH FURTHER FINDINGS

Section 105(c)(1) of the Act provides:

> (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 such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, 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.

This section protects a miner from discrimination because of safety complaints or his exercise of other rights under the statute.

Complainant's complaint to Respondent's mine management on April 10, 1981, and to MSHA later that day, because of his assignment to run the roofbolter without adequate training, was a protected activity under section 105(c)(1) of the Act. His discrimination complaint on April 13, 1981, filed with MSHA under section 105(c)(1) of the Act, was also a protected activity under that section.

Complainant's regular job with Respondent, for over 2 1/2 years, was a continuous miner operator. He was hired for that position on October 30, 1978, and performed this skilled position without incident or any problem until April 10, 1981.

His first discrimination complaint was settled by

Respondent's agreement to reinstate him with back pay for 108 hours and Complainant's agreement to drop the charges.

Pursuant to this settlement, he was reinstated on April 29, 1981. He was not reinstated in his regular position but was given a temporary assignment to relieve Paul McKamey as roof bolter until McKamey returned from sick leave. Complainant's supervisor, Otis Cross, stated that this assignment would be only a few days, since McKamey was expected to return to work in a few days.

The circumstances of the temporary assignment on April 29 raise a suspicion of a discriminatory intent to penalize Complainant because of his prior safety and discrimination complaints. Respondent did not show a legitimate business reason for this temporary assignment, to explain why Complainant could not have reasonably been reinstated as a continuous miner operator and another employee assigned to the job of roof bolter until McKamey's return.

However, without resolving whether the April 29 temporary assignment was discriminatory, I conclude that the permanent assignment of Complainant as a roof bolter helper, on or about May 4, 1981, was discriminatory.

When McKamey returned in a few days, on or about May 4, 1981, Respondent did not return Complainant to his regular position of continuous miner operator but, instead, made him a permanent roof bolter helper. I find that this assignment was discriminatory, and motivated by an intention to retaliate against Complainant because of his exercise of his rights under the statute on April 10 and April 13, 1981. Respondent offered no credible business explantion for its assignment of Complainant as a roof bolter helper after McKamey

returned, or its transfer of Dolphus Carroll from roof bolter to continuous miner operator helper, in order to make Complainant a roof bolter helper. Carroll was not trained as a continuous miner operator, but was an experienced roof bolter. The assignment of him as a continuous miner operator helper was contrary to Respondent's practice of assigning two qualified continuous miner operators on the same shift, so that they could take turns as miner operator and helper in order to achieve the best production. Complainant was a qualified miner operator, and had worked effectively with Joe Ward, another qualified miner operator, as a team for over two years and nine months - rotating with him as operator and helper. The disturbance of this assignment of the two miner operators, by moving Carroll to miner operator helper, displaced Complainant from his regular position with no showing of a legitimate business reason for this job change. I find that the permanent assignment of Complainant as a roof bolter operator or helper was discriminatory. In addition, I find that Davidson demonstrated a discriminatory intent toward Complainant by his hostility in not talking to Complainant at various times when Complainant greeted him after Complainant's reinstatement. This hostility is consistent with, and is further evidence of, an intention by Davidson to discriminate against Complainant because of his prior discrimination complaint and safety complaint.

The layoff on June 10, 1981, was for the purported reason that the section where complainant's shift was mining was being closed and some time was needed before a new section would be opened. This decision by Respondent was different from past practices, in that

Davidson testified that he usually kept a crew on when a section was being closed and gave them duties in order to keep their jobs while the next section was being prepared for mining. The decision to layoff Complainant's shift on July 10 raises a suspicion of a discriminatory intent to use the layoff as a means of discharging Complainant. However, without resolving whether the layoff was discriminatory, I conclude that the decision not to rehire Complainant after the layoff was motivated by an intention to discriminiate against him because of his prior discrimination complaint and safety complaint. Everyone on Complainant's shift who was laid off was later rehired except Complainant, an additional employee was hired in preference to Complainant, Complainant requested but was denied reemployment during the layoff, and Respondent provided no credible, legitimate business reason for its failure to rehire Complainant. In addition, as discussed above, there was discriminatory treatment of Complainant before the layoff.

Complainant has not met his burden of proof on the charge that Respondent violated section 105(c)(1) by denying him the opportunity to work overtime after April 29, 1981. His proof raises a suspicion of a discriminatory intent to deny him overtime opportunities after April 29, 1981(FOOTNOTE 1), but Complainant did not prove sufficient facts to

make a prima facie case on this charge. He did not prove either Respondent's practice with respect to how overtime asignments were made or any specific incidents in which Complainant requested but was denied overtime assignments.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated section 105(c)(1) of the Act by failing to assign Complainant to his regular position of continuous miner operator on or about May 4, 1981, when Paul McKamey returned from sick leave.

3. Respondent violated section 105(c)(1) of the Act by failing to reemploy Complainant on and after August 3, 1981, when the other employees on layoff were reemployed, and on August 17, 1981, when Bayless Phillips was employed.

4. Complainant has not met his burden of proof on the charge that Respondent violated section 105(c)(1) of the Act by denying Complainant the opportunity to work overtime after April 29, 1981.

5. Complainant is entitled to reinstatement, back pay with interest, a reasonable attorney's fee and costs, and such other relief as may be deemed equitable and just.

Proposed findings of fact and conclusions of law inconsistent with the above are rejected.

PENDING A FINAL ORDER

Jurisdiction of this proceeding is retained by the judge pending a final order for relief. Counsel for the parties should confer in an effort to stipulate the amounts and other relief due under this Decision. Such stipulation will be without prejudice of Respondent's

right to seek review of this Decision. Complainant shall have 10 days to file a proposed order, and Respondent shall have 10 days to reply to Complainant's proposed order. If necessary, a further hearing will be held on issues relevant to relief.

William Fauver
Administrative Law Judge

FOOTNOTE START HERE-

1 The employment records show that, prior to April 29, 1981, Complainant worked overtime an average of about one week a month but he worked no overtime from the time of his reinstatement on April 29, 1981, until his layoff on July 10, 1981; a number of employees worked overtime both before April 29, 1981, and in the period from April 29, 1981, until July 10, 1981.