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SOL (MSHA) V. CONSOLIDATION 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
PAUL S. SEDGMER, JR.,
EDWARD J. BIEGA, AND
DENNIS R. GORLOCK,
COMPLAINANTS
v.

DISCRIMINATION PROCEEDING
Docket No. LAKE 82-105-D
MSHA Case No. VINC CD 82-16
Reclamation Services No. 60
Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Complainants;
Robert M. Vukas, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Moore

On the first day of the hearing Mr. Gorlock and Mr. Sedgmer completed their testimony. Since their memories differ in some respects from the other witnesses, I will summarize their testimony first. Considering that the events took place in April 1982, that the depositions were taken in November of 1983 (the reporter apparently lost the notes because the depositions were not transcribed until March 1984) and that the trial took place in March of 1984, it is not surprising that memories differ as to details.

Both witnesses testified essentially as follows. They were reinstated as pan (a pan and scraper are the same thing) drivers after a lay-off on April 12, 1982. On April 15, 1982, they were both in a crew operating in a loop or a circle where they would pick up dirt from one area and deposit it in another. Mr. Taylor, the superintendent, stopped them and asked them if they could go a little faster. Both replied that they could not under the conditions and Mr. Gorlock mentioned that he had injured his back earlier and did not intend to do it again. Mr. Sedgmer was told by Mr. Taylor something like "I know you had trouble in the preparation plant and came out here thinking it would be easy . . . well, I'm going to tame you." Mr. Sedgmer considered this a threat. Both witnesses thought it was unusual

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that Mr. Taylor was out on the job so often. Usually a superintendent was somewhere else, not out with the pan crew. Both thought that a tramping or deadheading operation, and they had both engaged in many such operations, was not a valid indication of the pan operator's ability to produce. Pan operators deadheaded only 1% or 2% of the time and such operations were not similar to their normal productive activity.

On April 23, 1982, a deadhead was scheduled to an area known as the 46-C Pit. The deadhead would begin at a place where the various pans or scrapers had been parked, and on the way to the 46-C Pit they would first pass, in either a mile or a half-mile, the Gem Haulroad Bridge, then the Spade Haulroad Bridge, and thereafter the 46-C Pit. On the bus from the 46-C Pit to the place the scrapers were located it was very dusty in the back of the bus. There were times when the witnesses could not see Foreman Busby in his pickup truck ahead of the bus. When the bus stopped, Mr. Busby got on and said that because of the dusty conditions and the traffic of the darts on the road, which was expected to be heavy, a different than normal deadhead system would be used. This time the men would start off individually with 5-minute intervals between them. The men had been assigned various scrapers that had been lined up in a row and Mr. Biega, Mr. Sedgmer, Mr. Hornyak and Mr. Gorlock were at the tailend of the procession. The first nine were waved on over the hill and both witnesses assumed that they would go over the hill and then line up and leave at 5-minute intervals. About twenty minutes later, however, Mr. Busby signaled the last four to start moving and when they got to the brow of the hill they could not see the others lined up for a 5-minute interval start like they expected. Everybody had left. At some point after they had left the Spade Haulroad Bridge, but before they got to the 46-C Pit, a Mr. Lane stopped them all and then pulled Mr. Hornyak off to the side for an alleged brake problem. In getting going again, Mr. Gorlock, who originally started out last, went ahead of Mr. Sedgmer. Both witnesses testified that from the Quonset hut on, about 25% of the total move, the area had been watered. When these two, and Mr. Biega were almost finished with the deadhead, Mr. Davis pulled them off to the side of the road. Mr. Taylor and Mr. Lane were there. They were asked if they had any safety or mechanical problems and they said No. They then were directed to return to their cabs and stay there. They stayed there for about 6 hours. During that time Mr. Davis was asked what was going on and he said he did not know what Mr. Taylor had up his sleeve this time. During the whole time Mr. Davis sat across the haul road from the three pans operated by Mr. Gorlock, Mr. Sedgmer, and Mr. Biega. The three pan operators were not allowed to talk to each other. For most of the deadhead they had operated in second or third gears and both had the new pans which had six gears instead of four and thus operated slower in the middle gears than the older pans. They both testified that they knew of no one who had been

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fired for going too slow in the pans but knew of some who had been disciplined and warned about going too fast.

Both had made many deadheads and said that the normal way was to leave in a convoy with a supervisor and his radio in front and a supervisor and his radio behind the convoy. Normally, the way was clear to them so that there was no problem with the darts (haulage trucks). The foreman had always said that there was plenty of work for them so even though they had recently been laid off they were not concerned about running out of work at this time.

Other witnesses who had participated in the deadhead testified, and while there was some discrepancy as to the manner in which they departed and while one witness testified that the Quonset hut was in a different location from that testified to by the others there was no essential difference. The company stipulated that in all past moves a convoy had been used and that the move on April 23 was the first time they had ever attempted to set the pans off in 5-minute intervals. Mr. Barron, a pan operator who had been involved in at least a hundred deadheads, testified that on a deadhead the pans were not allowed to pass each other.

In addition to the three complainants, five of the other participants in the April 23 deadhead testified. Mr. Bintz, classified as a first-class mechanic, Mr. Carpenter, classified as a 'dozer operator, Mr. McKeen, classified as a 'dozer operator, and Mr. Bonfini, a pan operator, and Mr. Hornyak, a first-class mechanic all gave similar testimony. Pan operators that were not involved with the April 23 deadhead: Scott, Barron, and Boggs also testified. All were of the opinion that only the operator of the equipment can judge the proper speed for that piece of equipment. Only the operator knows the conditions of the road when he is traveling on it, the extent of dust suspended in the air, and the condition of his machine. The government, prosecuting for the three complainants, contends that the operator of the equipment has absolute discretion as to how fast he operates.

All of the participants in the April 23 deadhead heard Mr. Busby describe the new procedure of leaving at 5-minute intervals. Some of them, including complainant Biega, heard him say that plans had been changed and they were no longer intending to use the 5-minute interval system. Some of them, however, went to their scrapers still thinking that they would be leaving at 5-minute intervals.

Unbeknownst to the scraper operators and to most of the foremen, a time and motion study had been secretly set up for the April 23 deadhead. Superintendent Taylor made the decision as to the order in which he wanted the pans to depart the Gem Pit, and he told Mr. Cyrus to set up the study. Mr. Cyrus and

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two assistants stationed themselves at points along the haulroad known as the Gem Haulroad Bridge, the Spade Haulroad Bridge, and the 46-C Pit. As each scraper passed one of these three points, its number and the time of passage to the nearest minute was noted. The results of that time and motion study are set forth in complainants' exhibit 3. From the starting point of the study, the Gem Haulroad Bridge, it was 6.4 miles to the Spade Haulroad Bridge and 3.3 miles thereafter to the 46-C Pit (the actual study ended at the 'dozer pit, which is near the 46-C Pit), a total of 9.7 miles.

The first four scrapers to leave the Gem Haulroad Bridge and the ones that finished the entire trip with an average time of 29.25 minutes were operated by the miners who were not classified as pan operators. Two were first-class mechanics and two were 'dozer operators. There was convincing testimony that non-pan operators generally run faster than regular pan operators. One possible explanation is that since they do not operate pans on a regular basis they enjoy the change of pace and like to run fast. Another possible explanation is that since they do not have to put up with the jarring motion of the pan all day like the pan operators do, they run faster and take more punishment. The pan operator on the other hand, knowing that he is going to be driving that pan for a full shift, tends to take it easy on himself. Regardless of what the reason may be, the time and motion study bears out this evidence. The first four regular pan operators to finish the deadhead did so in an average time of 38.6 minutes. The complainants covered the same distance at an average time of 68.3 minutes.

The secret time and motion study was obviously a set-up or "sting" operation. The suspected malingerers along with the mechanic, Hornyak, who may or may not have been a target, were put at the tailend of the procession and the drivers who could be expected to be the fastest, were put in front. Mr. Taylor also testified that he likes to get his mechanics and 'dozer operators to the scene of a new operation first; but if he had expected the entire group to travel as a convoy, the time difference between the first arrivals and the last arrivals should have been insignificant. There was also the suggestion that the front-runners were driving the older pre-1977 scrapers and that these old scrapers are faster than the newer ones. Inasmuch as nobody ran at full speed, 32 m.p.h., it hardly matters which pans were faster.

There is considerable controversy about how dusty it was on the day in question. Some of the witnesses said that dust was a problem and others said it was not. Mr. Sedgmer, father of one of the complainants, was driving a water wagon that day and he put the first water on the haul road in the vicinity of the Quonset hut and it had not been previously watered. The Quonset

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hut is fairly near the Spade Haulroad Bridge which, from respondent's exhibit 7 would appear to be about 6 miles after the start of the time and motion study. According to the study, the watering of the Quonset hut area would have taken place before any of the thirteen pans involved in the deadhead got to that area and at about the time that the last four pan operators passed the Gem Haulroad Bridge where the study began. Mr. Sedgmer's watering of the Quonset hut area took place at 7:50 A.M.

If, on April 23, the unwatered portions of the haul road had been extremely dusty with no cross wind to carry the dust away, it would be obvious that the last pans in line would have had more dust to contend with than the scrapers near the front of the line. And if the dust was hanging in the air the cumulative effect of the dust being thrown off by the coal haulage trucks would be worse for the last pan operators in line. I can not find, however, that the road was as dusty as the conditions I have just described. The complainants testified that at the speed they were driving dust was not a problem. The front-runners all testified that they were not having a problem with dust but that the road conditions would be worse for those trailing behind. It was speculated that the ones behind would have not only more dust but more truck traffic to contend with.

Some of the witnesses thought that there was dew on the ground and while it is fairly clear that the dust settling effect of the dew would be dissipated as more and more scrapers rolled by, there is no evidence of a traumatic change in the road conditions between 7:38 A.M. when the first scraper passed the Gem Haulroad Bridge and 9:09 A.M. when the last scraper passed the finish line. The superintendent, Mr. Taylor, and the other foreman traversed the deadhead route several times during the move and observed both the leading pans and the last four. They testified that the dust and traffic conditions as well as the road surface conditions were not significantly different for the different operators.

After listening to the testimony of the complainants, Mr. Biega, Mr. Gorlock and Mr. Sedgmer, I can not believe that they were involved in a deliberate slowdown designed to hamper the company's operation and avoid a layoff. Avoiding a layoff by engaging in a slowdown, thus prolonging the available work, has been suggested as the motive for complainant's actions. I do not find that the complainants engaged in such a slowdown.

I believe that Mr. Hornyak and the three complainants took a leisurely trip relying upon the belief that all equipment operators seem to hold to the effect that they are the only ones who can determine the speed at which the equipment will operate. To the extent that the pan operator or any other equipment operator, has his feet on the brake and accelerator and is in charge

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of the gear shifting mechanism the operator is obviously the one who determines the speed at which the equipment is operated. I can not find, however, that he has unlimited discretion in this respect as the government contends. Mr. Biega himself was the cause of a citation being issued against the company because he was following another scraper too close. Drivers have been disciplined for going too fast and a Mr. Scott, who testified for the complainants, was disciplined (a letter of reprimand) for going too slowly. I heard a case in Texas, Secretary of Labor vs. Garrett Construction Company, 4 FMSHRC 2202 (December 13, 1982) in which two scrapers were going in opposite directions at 30 m.p.h. each and collided. One operator was killed and the other was seriously injured. Those drivers undoubtedly thought they had discretion to operate at approximately full speed. I hold that the speed at which a scraper is supposed to be operated is not in the sole discretion of the operator himself.

Both parties devote a portion of their briefs to the question of good faith belief, on the part of complainants, that they were operating at a safe reasonable speed. I do not consider the driver's belief a controlling factor. The question is whether respondent had a good faith belief that the three drivers were engaged in a slowdown. It is the determination of the motivation of the employers that is crucial.

While I have held that I do not believe the complainants were engaged in a slowdown, I also hold that from the results of the time and motion study, respondent had every right to think that they were so engaged and, in fact, did think that. Taking the first 6.4 mile leg of the test, only a small portion of which had been watered at the time of the deadhead, complainants average speed was 8.2 m.p.h. Disregarding the faster speed of the mechanics and 'dozer operators, the five regular pan operators had a speed over that first leg of 14.6 miles per hour. That is 6.4 miles per hour faster than the complainants. It took an average of 26.2 minutes for the five regular pan operators to cover that leg, and it took the complainants an average of 47 minutes to cover that same distance. The last of the regular pan operators passed the Spade Haulage Bridge at 8:12 A.M. It was 19 minutes later before the first of the complainants got to that check point. The time and motion study justifies a belief by respondent that complainants were engaged in a slowdown.

The complainants did make safety complaints from time to time and there is evidence that they were outspoken in regard to safety matters, but there was no evidence that their safety complaints had any connection with the disciplinary action taken. (FOOTNOTE 1)

Complainants were suspected of being malingerers and a trap was set up to provide evidence of that fact. The trap did provide Mr. Taylor with the evidence he wanted and the result was exactly as he expected it to be. If extremely dusty conditions had existed on April 23, 1982, on the haul road, I would have found this time and motion study to be unfair because of the way the scrapers were lined up. I do not find that such extremely dusty conditions existed, and I can not find that the time and motion study was unfair. Considering the fact that Mr. Biega finished the entire run approximately 25 minutes before Messrs. Sedgmer and Gorlock, together with the fact that Mr. Gorlock passed Mr. Sedgmer, I can not find that any of the complainants were being held up by one of the other complainants. Pan operators are allowed to pass each other although some of them (Mr. Barron for example) do not think they are supposed to pass. There was evidence to the effect that a rubber-tired front end loader overtook and went around one or more of the complainants.

I find for the company and the case is DISMISSED.

Charles C. Moore, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

1 Complainants were all given notices of suspension with intent to discharge. The matter went to arbitration and the decision of the arbitrator was that complainants should be suspended for 30 days, but not discharged. The complainants were thus suspended for 30 days and then put back to work.