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SOL (MSHA) V. BOMAN 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 SAMUEL E. GRIFFITH, COMPLAINANT v.	DISCRIMINATION PROCEEDING Docket No. VA 84-25-D MSHA Case No. NORT CD-84-3 No. 2 Mine
BOWMAN COAL COMPANY, INC., RESPONDENT	

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant; Keary R. Williams, Esq., Williams & Gibson, Grundy, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant Griffith contends that he was discharged from his job as belt man and scoop operator on February 21, 1984, because of his refusal to operate mining equipment, which he considered to be unsafe. An Order of Temporary Reinstatement was issued on April 26, 1985, but Complainant declined to return to Respondent's employ. He is seeking back wages from February 22, 1984 to April 26, 1984, with interest. The Secretary also seeks a civil penalty for the alleged violation of section 105(c) of the Act.

Respondent contends that Griffith was not discharged, but voluntarily quit and that the equipment he was operating was not unsafe.

Pursuant to notice, the case was heard in Abingdon, Virginia, on November 29, 1984. Samuel E. Griffith, Michael Reed Moran and Rufus Earl Barton testified on behalf of Complainant. Roby Bowman, Casby Bowman and Tony Viers 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. On February 21, 1984, and prior thereto, Respondent was the owner and operator of an underground coal mine in Buchanan County, Virginia, known as the No. 2 Mine. The mine produced goods which entered interstate commerce and its operations affected interstate commerce.

2. On February 21, 1984, Complainant Samuel E. Griffith was employed by Respondent at the No. 2 Mine and was a miner.

3. Complainant was hired as a belt man and machine operator by Respondent on February 20, 1984.

4. Complainant had previously worked in about 1974 for Island Creek Coal Company as general inside labor. He quit because it was too dangerous. He worked about 6 to 8 months for Bishop Coal Company in about 1976. He quit because of too many strikes and two few hours of work. He worked for 1 year and 2 months at Trammel & Cline Coal Company, beginning in April 1981. He operated a scoop. He quit for no special reason. Thereafter, he worked for Carey Coal Company for about 4 months as a roof bolter. He also operated a scoop. He quit because a fellow miner was killed operating a scoop.

5. Respondent is a corporation. At the time of the hearing, it was operating a coal mine in Kentucky. The subject mine was operated for about 9 months until July 25, 1984. It was shut down because "[we] just couldn't make it; rejects." (Tr. 75). It was the practice at the subject mine if equipment was not operating for even a short time to lay off the affected miners.

6. Although Complainant was hired and began working as a belt man, Respondent's President, Roby Bowman, intended that he take over operating a scoop. Complainant told Bowman that he could operate a scoop and had approximately 7 years experience as a scoop operator.

7. The Kersey scoop operator before Complainant, Rufus Barton, was experiencing difficulty in shearing axle studs and in knocking out the lights on the scoop. For these reasons, Bowman wanted "to make a change and see if I could get better service out of my scoop." (Tr. 78).

8. Complainant worked the entire shift on February 20, 1984, as a belt man. The following day after working 2 or 3 hours on the belt, he was asked to come to the face area to run a scoop. Belt men were paid $40 per shift. Scoop operators were paid $50 per shift.

9. Complainant drove the scoop on a short test run in Bowman's presence. Then Bowman left and Complainant commenced operating the scoop.

10. Complainant had problems getting the scoop to run: "It was cutting off and on. And I had to kick the gas feed to get the thing to go and back up. And the other scoop man was making four or five trips to my one." (Tr. 13).

11. Complainant also had difficulty with the brakes and steering.

12. Because of these difficulties, Complainant parked the scoop and told the section boss Michael Moran that "I parked the scoop because I couldn't run it, and the thing was just too raggedy to run; that I wasn't going to run it...." (Tr. 15). Moran stated that Complainant told him "that he couldn't run it; that he wasn't going to run it; it was unsafe." (Tr. 57).

13. Moran called Bowman who told him to send Complainant outside. Complainant waited outside until the end of the shift. He asked Casby Bowman (part owner of Respondent and brother of Roby Bowman) whether he was fired and Casby said he would have to talk to Roby.

14. When Moran came out at the end of the shift, Complainant asked whether he was fired and Moran said he did not know. Complainant told Moran to ask Roby Bowman and if he was fired, to return his miner's papers. Moran asked Roby if Complainant was fired and Roby handed him Complainant's papers without replying to the question. Complainant said "I guess this means I'm fired." Moran replied "I guess so." (Tr. 19).

15. Complainant left the job site and went to the local MSHA office where he filed his complaint.

16. The following day, February 22, 1984, an MSHA inspector inspected the mine. He issued a citation for

insufficient illumination in the No. 2 entry, an inoperative methane monitor on the S & S Scoop (Complainant operated the other scoopÄa Kersey scoop), permissibility violations on the S & S Scoop, an inoperative de-energizing device on the S & S scoop, and several defective splices in the cutting machine trailing cable. No citations were issued on the Kersey Scoop. There is no evidence, however, to indicate whether the Kersey scoop was inspected. The evidence indicates that it was operated on February 22. The MSHA inspector was not called as a witness in this proceeding.

17. The Kersey scoop in question had the following safety defects at the time Complainant was operating it: The brakes were inadequate and leaked fluid; the steering was dangerously loose; some or all of the lights were out.

18. Complainant declined to continue operating the scoop on February 21, 1984, in part because of his frustration resulting from his inability to keep up with the other scoop operator. This was largely caused by the problems with the ignition and accelerator. His refusal to continue working was also related in part to what he perceived was the unsafe condition of the scoop.

19. Complainant has sought work at other coal companies and mobile home companies after leaving Respondent's employ. He was hired by a mobile home company in Richlands, Virginia, on April 26, 1984.

20. On application of the Secretary, the Commission ordered Respondent to reinstate Complainant. The order was issued April 26, 1984. Complainant declined to accept reinstatement because he had accepted the new job with the mobile home company. Respondent by a clerical error paid Complainant for 8 hours worked on February 22, 1984, although he did not work on that day.

ISSUES

1. Was Complainant Griffith discharged (actually or constructively), or did he quit his employment with Respondent?

2. If Complainant was discharged, was it for activity protected under the Mine Safety Act?

3. If he was discharged for protected activity, to what relief is he entitled?

4. If he was discharged in violation of section 105(c) of the Act, what is the appropriate penalty?

CONCLUSIONS OF LAW

1. Complainant Griffith was a miner as that term is used in section 105(c) of the Act. Complainant and Respondent are subject to the Act, and I have jurisdiction over the parties and subject matter of this proceeding.

2. Respondent discharged Complainant on February 21, 1984, from the position he held as beltmanÄmachine operator with Respondent. At the time of his discharge he was working as a scoop operator and was paid $50 per day.

DISCUSSION

Respondent contends that Complainant was not discharged but voluntarily quit. The records shows a strange reluctance on the part of Complainant and the Bowmans to communicate with each other as to Complainant's status after leaving the scoop. I conclude, however, that (1) Complainant refused to continue operating the scoop (Finding of Fact No. 12) and (2) Respondent discharged him because of this refusal (Finding of Fact No. 14).

3. Complainant's refusal to continue operating the scoop was activity protected under the Act. Refusal to work is protected activity if it results from a reasonable, good faith belief that continuing to work would be hazardous. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981). Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), and that belief is communicated to the mine operator. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982). I conclude that Complainant believed in good faith that continued operation of the scoop would have been hazardous. In view of the safety defects present on the scoop, this belief was a reasonable one. Complainant communicated this belief to his supervisor, Mick Moran; whether it was communicated to the Bowmans is not so clear, but is unnecessary to my conclusion.

4. Therefore, I conclude that the discharge of Complainant on February 21, 1984, was the result of activities protected under the Act. It was therefore in violation of section 105(c) of the Act.

RELIEF

Complainant is entitled to back wages from February 23, 1984 (he was paid for February 22) through April 25, 1984, together with interest thereon in accordance with the Commission approved formula set out in Secretary/Bailey v. ArkansasÔCarbona Company and Michael Walker, 5 FMSHRC 2042 (1983). Complainant shall submit a statement on or before February 15, 1984, of the amount due hereunder, to the date of this decision. Respondent shall have 10 days from the date the statement is submitted to reply.

CIVIL PENALTY

Respondent is a small operator and the subject mine has been closed. It does not have a serious history of prior violations. The violation found herein is serious, however. Based on the criteria in section 110(i) of the Act, I conclude that a civil penalty of $100 is appropriate.

ORDER

1. Respondent IS ORDERED to pay Complainant back wages at the rate of $50 per day from February 23, 1984 through April 25, 1984, with interest thereon, as set out above. This order is not final until the exact amount is determined and ordered paid hereafter.

2. Respondent is ORDERED to pay the sum of $100 as a civil penalty for the violation of section 105(c) of the Act found herein to have been committed.

James A. Broderick
Administrative Law Judge