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SOL (MSHA) V. WEST VIRGINIA
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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 LARRY DUTY,	DISCRIMINATION PROCEEDINGS
COMPLAINANT	Docket No. KENT 83-161-D
v.	MSHA Case No. PIKE CD-82-15
WEST VIRGINIA REBEL COAL COMPANY, INC.,	Docket No. KENT 83-232-D
RESPONDENT	MSHA Case No. PIKE CD-83-06
	No. 1 Surface Mine

DECISION

Appearances: Thomas A. Grooms, Esq., and Ralph D. York, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant;
George V. Gardner, Esq., and J. Edgar Bailey, Esq., Gardner, Moss, Brown and Rocovich, Roanoke, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

On March 1, 1983, the Secretary filed a complaint with the Commission on behalf of Larry Duty alleging that he was discharged on February 8, 1982, from his job with Respondent West Virginia Rebel Coal Company, Inc. (Rebel), for activity protected under the Mine Safety Act (Act). Duty was returned to work after this discharge, and was again discharged on March 3, 1983. The Secretary instituted a separate proceeding on May 24, 1983, by filing an Application for Temporary Reinstatement. A complaint was filed August 22, 1983, alleging that the discharge of Duty on March 3, 1983, was also for activity protected under the Act. The cases were assigned to Judge Joseph B. Kennedy who presided over certain pretrial activity including an on-the-record pretrial hearing on May 3, 1984. Judge Kennedy recused himself on May 29, 1984, and the cases were assigned to me on May 30, 1984.

Pursuant to notice, the cases were heard on the merits in Paintsville, Kentucky, on July 9 through July 13, 1984, and on September 11 through September 13, 1984. Larry Duty, Robert B. Goodman, John Franklin Meade, Hobert Meade, Tommy R. Ryan, Johnny Pennington, Delmer Green, John Patrick McCoart, Kenneth Borders, Roger Dean Fannin, Donald Litton, James Robert Collins, Philip Wells, Jerry Lee Meade, Barry Wilson Lawson, R.C. Hatter, William Creech, Gary Ousley, John H. Gamble and John South testified on behalf of Complainant; Lambertus Boerboom, Ezra Martin, Milton Preston, Clarence Inscore, Pete Webb, O'Dell Rogers, Malcolm Van Dyke, Jake Taylor Watts, Nina Sneed Tackett, Paul Greiner, Wendell Knight and Dale Mosely testified on behalf of Respondent.

Both parties have filed extensive posthearing briefs. Based on the entire record and carefully considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT COMMON TO BOTH PROCEEDINGS

1. At all times pertinent to these proceedings, Respondent West Virginia Rebel Coal Company, Inc., was the owner and operator of a surface coal mine in Martin County, Kentucky, known as the No. 1 Surface Mine, the products of which entered interstate commerce.

2. At all times pertinent to these proceedings, Complainant Larry Duty was employed by Respondent Rebel as a miner. He began his employment with Rebel in April 1977.

3. Duty was a member of the United Mine Workers of America (UMWA) and, in December 1979, was appointed member and Chairman of the Mine Health and Safety Committee at the subject mine. He also acted as head of the Mine Committee which dealt with contract grievance matters under the collective contract between the UMWA and the Bituminous Coal Operators Association (BCOA). This contract governed the employment relations between Rebel and its miner-employees.

4. In May, 1980, Duty was elected President of Local 1827 UMWA. He continued as President until April 1983, when he became ineligible for the position because he was no longer actively employed as a miner at Rebel.

5. The evidence concerning the size of Rebel's business at the times it is alleged in these proceedings to have violated 105(c) of the Act, shows that in 1983,

Respondent had 131 employees at the subject mine (Secretary's Exhibit C-12). In 1981, approximately 1,292,568 tons of coal was produced by Respondent (Secretary's Exhibit C-65); apparently 980,172 tons were produced at the subject mine (Secretary's Exhibit C-63); in 1982, 1,353,829 tons were produced by Respondent, 1,050,408 tons at the subject mine (id); in 1983, 919,118 tons were produced at the subject mine (C-63) and from January to March 1984, 185,288 tons were produced (id). On the basis of this evidence, I conclude that Respondent is of moderate size.

6. Between March 3, 1981 and March 2, 1983, 354 violations were assessed against the "controller" of Respondent (the owner of Respondent, O'Dell Rogers, also owned other companies), 35 of which were paid. (Secretary's Exhibit C-27). Between the same dates, 51 violations were assessed against Respondent, 32 of which were paid. (Secretary's Exhibit C-1). I do not consider this history to be such that penalties otherwise appropriate should be increased because of it.

7. Respondent is presently in bankruptcy before the Bankruptcy Court for the Eastern District of Kentucky in Lexington, Kentucky (transferred from the Western District of Virginia). The Statement of Financial Affairs filed by Rebel shows an inventory of the property on April 30, 1983, of $421,976 (at cost). An attached schedule shows pending suits against the company seeking more the 2 million dollars in damages. Included in these suits are cases brought by MSHA to collect civil penalties. The same documents show that Respondent has sold and had repossessed substantial quantities of mining equipment. It shows further in a list of notes and accounts payable that it owes creditors in excess of 3 million dollars. Based on this information, it is apparent, and I find that the imposition of substantial penalties in these cases would affect Respondent's ability to continue in business.

8. On a number of occasions prior to the incidents involved herein, Complainant was disciplined for matters he considered related to miners' safety. (1) In about February 1980, he asked management to have the miners withdrawn because of what he thought was an imminent danger (loaders working within 100 feet of charged holes). He asked MSHA for an inspection under section 103(g) of the Act. The foreman J.D. Ellison threatened to fire him thereafter. (2) At an unrelated grievance meeting in March 1980, Superintendent Clarence Inscore asked Complainant if he had called MSHA concerning Respondent's failure

to have a supervisor in a remote area. Inscore made what Complainant considered an oblique threat when Complainant told him he had called MSHA. (3) On about September 12, 1980, Complainant complained that the coal trucks were not properly trimmed. He was criticized for this by Inscore and later discharged. He filed a grievance which went to arbitration before being settled by the imposition of a 3-day suspension. (4) On October 17, 1980, Complainant received a written warning because he stopped his time to inform miners of the status their grievance proceedings. Complainant filed a grievance and the warning was removed from his records. (5) On October 21, 1980, Complainant filed a health and safety grievance because the coal trucks were not properly trimmed. In step 2, the company agreed to make a reasonable effort to keep the trucks reasonably trimmed and the grievance was dropped. (6) On December 11, 1980, Complainant was relieved of his duties subject to discharge for conducting union business during working hours and interferring with management. (7) On December 19, 1980, he was suspended with intent to discharge when he filed a 103(g) inspection request on behalf of employees at the L & M Coal Company (members of the same union local) while on suspension. He filed a 105(c) case which came to the Commission and was settled. The settlement provided that Complainant receive pay for the 10-day suspension and that all references to the suspensions be removed from his personnel file. (8) In February 1981, Respondent discharged Complainant for using the bath house after Respondent had declared it "off limits" to truck drivers during production hours. He filed a grievance which went to arbitration. The arbitrator modified the discipline to a 14 day suspension without pay.

FINDINGS OF FACT IN DOCKET NO. KENT 83-161-D

On February 8, 1982, Duty was working as a laborer with the blasting crew on the day shift. At the beginning of the shift, he met with an MSHA inspector who was preparing an accident survey at the mine. After the meeting, Duty went to a blasting area called the shovel pit. The blasting foreman, Lambertus Boerboom, ("Dutch") then sent him to the magazine to obtain explosives and take them to another blasting area called the binder pit. There two end loaders were removing overburden and loading it into rock trucks at each end of the binder. The trucks then carried it to a nearby spoil area and dumped it. Holes had been drilled in the binder to be loaded with explosives. Duty and the pit foreman, Ezra Martin, had a discussion concerning whether the loaders would be too close to the holes

after they were charged. Duty said they would be, and Martin said the equipment would be pulled out when they started loading the holes. One of the loaders broke down and was moved to a point about 50 to 75 feet from the binder shot holes where repairs were performed on it. The other loader was being operated about 75 to 100 feet from the holes. The two rock trucks passed to within 15 to 25 feet of the holes when dumping the overburden.

Duty then returned to the shovel pit and resumed his work loading the holes. He could see the binder pit area from the shovel pit and noticed that the trucks were still being operated there although the prell (ammonium nitrate, a explosive) and primers had been placed in the holes. On two occasions, he told Dutch who said he would call Martin. The work continued, however, and Duty requested that his time be stopped so that he could go on union time to inspect the area, because he believed the situation created an imminent danger. I find as a fact that his belief was in good faith. Dutch told him to go ahead and inspect the area. Duty asked whether a management official would accompany him, and whether transportation would be supplied. Dutch then took him in a company vehicle to the office where he received a notice of discharge for insubordination and interference with management. Duty filed a grievance which went to arbitration. On March 29, 1982, the arbitrator issued an opinion and award sustaining the grievance and ordering Duty reinstated with back pay. The company did reinstate him, and paid him for his lost time from work except for one day. Duty claims that he is entitled to pay for that one day with interest.

There are conflicts in the testimony concerning the binder pit incident. I have largely accepted Complainant's version which is corroborated by other witnesses, particularly by Robert Goodman, a State licensed blaster, who drove the prell truck and loaded the holes on the day in question. My findings are consistent with those made by the arbitrator in the grievance proceeding.

FINDINGS OF FACT IN DOCKET NO. KENT 83-232-D

As President of the Local Union and Chairman of the Mine Safety and Health Committee, Duty received $280 per month from the Union. As part of this case, he claims reimbursement for 5 months during which he failed to receive this amount which he alleges resulted from the discrimination complained of herein.

Duty returned to work following the arbitrator's decision referred to above, and continued as a laborer on the shooting crew until March 27, 1982, when he was assigned to cleaning equipment. At some time thereafter, he became a coal truck driver and worked as a driver for about 1 year. On about March 3, 1983, he was assigned to operate a loader at the coal stockpile, loading coal trucks. The coal was taken by Rebel's trucks to the tipple operated by Island Creek Coal Company. After he loaded "a few trucks," the coal inspector from the Island Creek tipple, Kenneth Borders, came to where Duty was loading and told him to lower his load a little and to load the trucks "graveyard style, and just have the hump in the center" (Tr. III, 106). Borders repeated the instruction to the foreman, William Runyon (also known as "Preacher"). Borders testified that he gave the instruction because coal was spilling on the tipple road from overloaded trucks.

On at least four occasions prior to March 3, 1983, Duty had filed grievances or complaints alleging that Respondent was not properly "trimming" its coal trucks. The issue was raised at one union meeting in February 1983.

A short time after Borders left the stockpile area on March 3, 1983, Mr. O'Dell Rogers, President of Respondent Rebel, arrived with J.T. Watts, Superintendent. Rogers told Duty to load additional coal on a truck which was "fixing to pull out and it was half loaded too." (Tr. VII, 91). Duty loaded additional coal on the truck and it pulled out "with lumps hanging over the side." (Tr. III, 149). The truck driver, Philip Wells, testified that the truck "was real heavy," and coal fell off as he was driving to the tipple (Tr. VI, 17-18). Rogers followed the truck to the tipple and testified that "there might have been a peck or something" of coal that fell from the truck going around a curve (Tr. VII, 94).

Rogers returned to the stockpile and he and Duty had a heated discussion concerning the loading of trucks. Duty then requested that his time be stopped so that he could go to MSHA. Runyon drove him to the portal where Duty's private vehicle was located. Duty drove to the Paintsville MSHA office and made a written request for an inspection under section 103(g) of the Act. When he returned to the mine site, he was told to go home and was discharged for "interfering with management. Refusing to work as directed by management. Leaving job site without permission or stated good cause." (Secretary's Exh. C-11).

Duty filed a grievance which went to arbitration. The arbitrator denied the grievance and the discharge was upheld. The 103(g) inspection resulted in a citation for improperly trimmed coal trucks (Secretary's Exh. C-5). Duty filed a 105(c) complaint with MSHA and Judge Kennedy issued an Order of Temporary Reinstatement on May 25, 1983, on application of the Secretary. Duty did not return to work, however, but was placed on "economic reinstatement" effective May 31, 1983. In May 1983, Duty was reelected President of his local union for a 3-year term. The election was challenged and a new election was ordered by the International Union because Duty was not then actively employed as a miner. He returned to work on July 27, 1983. A new election was held in August and Duty was defeated. He went back on economic reinstatement on September 1, 1983. Duty did not receive the $280 per month as union President and Committeeman in April, May, June or July 1983. He continued on economic reinstatement until he was laid off pursuant to the contract on March 16, 1984. Subsequent to that date, Rebel has recalled miners with less seniority than Duty but has refused to recall Duty. On September 11, 1984, I issued a bench order on the record that Respondent reinstate Duty with back pay to the date he was entitled to be rehired under the terms of the contract. Ths order was issued in written form on September 18, 1984, and corrected on October 3, 1984.

ISSUES

1. Did the discharge of Duty on February 8, 1982, result from activities protected under the Act?

2. Did the discharge of Duty on March 3, 1983, result from activities protected under the Act?

3. If either or both of the above issues are answered affirmatively, to what relief is Duty entitled?

(a) May he be reimbursed for loss of income received as local union President and Committeeman?

4. If either or both of the first two issues are answered affirmatively, what are the appropriate civil penalties for the violations?

EVIDENTIARY RULINGS

Respondent objected to the admission into evidence of Secretary's Exhibits 2 through 6 and renewed its objections in its posthearing brief. The objection was to the relevance of the documents. Exhibits 2, 3 and 4 were notes prepared by Duty as Safety Committeeman with reference to certain alleged safety problems at the mine site. Exhibit No. 4 also contains a grievance filed by Duty resulting from his discharge and an agreed arbitration award wherein the discharge was modified to a 3-day suspension. Exhibit Nos. 5 and 6 are grievances filed by Duty both in October 1980, one because he was given a written warning for allegedly conducting union business on company time, the other a safety grievance filed by Duty because of alleged improper trimming of coal trucks.

Exhibit No. 2 contains notes of a protest Duty made on February 19, 1980, because of loaders working within 30 feet of charged holes. Duty asked that the men be removed which ultimately was done. MSHA was called, and a closure order was issued. Exhibit No. 3 contains notes of a "3rd step safety meeting" with management March 27, 1980, apparently over the absence of a foreman in certain areas. Exhibit No. 4 relates to alleged improper trimming of trucks on September 12, 1980, and the grievance proceedings in connection therewith.

Although none of these documents or the incidents they refer to is directly concerned with either of the alleged discriminatory discharges involved herein, they tend to show a pattern of hostility between Duty and Rebel over conduct similar to that involved herein. The documents are relevant to these proceedings.

Milton Preston, Rebel's Safety Director, testified that he had a conversation with Duty in which Preston asked Duty what he thought about reports of charges by Judge Kennedy "that inspectors had been on the take." (Tr. III, 10). The conversation took place about in June 1984. Preston testified that the discussion had nothing to do with the instant case. I sustained an objection to the testimony and counsel for Respondent made an offer of proof "that Mr. Duty had a conversation with Judge Kennedy while his very own case was pending before this court . . . the relevance is it would be prejudicial to this case, and the mere fact that a judge of this court has talked with this defendant (sic) without notifying counsel is prejudicial in and of itself." Judge Kennedy recused himself by an order

issued May 29, 1984. The case was reassigned to me on May 30, 1984, and has been entirely my responsibility since that date. The testimony, assuming as true the facts in the offer of proof (that Judge Kennedy had a conversation with Duty) has no relevance to these proceedings and would be of no assistance in the just resolution of the issues. The objection was properly sustained.

CONCLUSIONS OF LAW DOCKET NO. KENT 83-161-D

Duty was discharged on February 8, 1982, ostensibly for "insubordination and interference with management." In fact, he was discharged, as my findings show, for requesting that his time be stopped so that he could inspect an area which he believed to be dangerous. Duty was acting as Chairman of the Mine Safety Committee. His action is protected by the Act if it was reasonable and in good faith. See Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds, Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). "Good faith," the Commission held in Robinette, "simply means honest belief that a hazard exists." Id, at 810. With respect to the requirement that affirmative self help be reasonable, the Commission said that "a miner need only demonstrate that his affirmative action was a reasonable approach under the circumstances to eliminating or protecting against the perceived hazard." Id at 812. I have found that Duty had a good faith belief that the situation at the binder pit was dangerous. Unlike Robinette, Duty was a representative of the miners as local union president and safety committee chairman. He had a special responsibility for the safety of the miners. Compare Local 1110, UMWA and Carney v. Consolidation Coal Co., 1 FMSHRC 338 (1979). The reasonableness of his action is supported by the testimony of miners working in the binder pit that the equipment was being operated within 100 feet of the charged holes. There may be a legitimate dispute as to whether this is dangerous, but I conclude that one who believes it to be dangerous is acting reasonably. Therefore, I conclude that the discharge of Duty on February 8, 1982, was the result of activities protected under the Act. It therefore was in violation of section 105(c) of the Act.

CONCLUSIONS OF LAW DOCKET NO. KENT 83-232-D

Duty was discharged on March 3, 1983, ostensibly for interfering with management, refusing to work as directed, and leaving the work site without permission. In fact, he

was discharged because of a dispute over the proper loading and trimming of coal trucks. The testimony is conflicting as to whether Rogers' direction that Duty increase the load on the truck driven by Philip Wells on March 3, 1983, resulted in a dangerously overloaded truck. Wells testified that the truck "weaved" because of the load and coal fell off as he drove to the dump (Tr. VI, 17, 18). Rogers testified that he had observed "half loaded trucks" (Tr. VII, 90) going to the dump and that he saw the truck loaded by Duty "fixing to pull out and it was half loaded too." (Tr. VII, 91). He directed that more coal be added and that the load be trimmed. When the truck pulled out, he followed it to the tipple, did not notice it weaving and only "a peck or something" of coal fell off going around a curve. His testimony was generally supported by that of Malcolm Van Dyke, foreman and J.T. Watts, Superintendent of Rebel. Watts testified that Wells stated when questioned at the tipple that the load was safe and that he had "no problems" (Tr. VII, 146).

I conclude (1) the question of overloading trucks and improperly trimming trucks is a matter involving safety to miners; (2) Duty in good faith believed that he was directed by Rogers on March 3, 1983, to overload coal trucks and that this caused a safety hazard to miners, (3) this belief was reasonable under the circumstances, since injury to miners could result from the practice; (4) Duty's action in requesting that his time be stopped so that he could request an MSHA inspection was reasonable, particularly because he was a representative of the miners in safety matters. See Local 1110 UMWA and Carney v. Consolidation Coal Co., supra.

Therefore, I conclude that the discharge of Duty on March 3, 1983, was the result of activities protected under the Act. It therefore was in violation of section 105(c) of the Act.

RELIEF

1. The statement of back wages filed by the Solicitor indicates that Duty "should have been recalled from layoff" (pursuant to my order of October 3, 1984) during "the period from July 17, 1984 to October 26, 1984." From that statement, I assume that his continued absence from work beyond October 26, 1984 results from a layoff proper under the contract. Therefore, I do not order his reinstatement. However, because Commission orders have been flouted by Respondent in the past, I ORDER Respondent to reinstate

Complainant Duty when by reason of his seniority (which shall not be affected by the discharges involved herein), he is entitled to be recalled under the contract.

2. IT IS FURTHER ORDERED that within 30 days of the date of this decision, Respondent pay back wages which Complainant Duty lost as a result of his wrongful discharge on February 8, 1982, with interest thereon in accordance with the Commission approved formula in Secretary/Milton Bailey v. Arkansas-Carbona Company and Michael Walker, 5 FMSHRC 2042 (1983).

a. The parties have stipulated that the gross amount due as back wages is $66.90. Interest on this amount to December 10, 1984, is $26.05.

b. Respondent is ORDERED to pay Complainant the sum of $92.95 as back wages and interest for the wrongful discharge of Complainant on February 8, 1982. Docket No. KENT 83-161-D.

3. IT IS FURTHER ORDERED that within 30 days of the date of this decision, Respondent pay back wages which Complainant Duty lost as a result of his wrongful discharge on March 3, 1983, with interest thereon in accordance with the Commission approved formula in Arkansas-Carbona, supra.

a. The parties have stipulated that the gross amount due as back wages is $20,602.29. Interest on this amount to December 10, 1984, is $1,898.44.

b. Respondent IS ORDERED to pay Complainant the sum of $22,500.73 as back wages and interest for the wrongful discharge of Complainant on March 3, 1983 Docket No. KENT 83-232-D.

4. IT IS FURTHER ORDERED that Respondent shall expunge references to these discharges from Duty's employment records and shall post a copy of this decision at a conspicuous place at the mine office.

5. The uncontradicted testimony shows that Duty lost income he had previously received as local union president and safety committee chairman as a result of his discharge. The claim submitted indicates that this income was lost for

a 5-month period. However, the evidence shows that he lost this income in April, May, June and July 1983, and was defeated in an election held at some unknown date in August 1983. Therefore, I find that he is entitled to reimbursement of $280 for 4 months ($1,120) with interest thereon in accordance with the above formula.

a. Within 30 days of the date of this decision, Respondent IS ORDERED to pay Complainant the sum of $1,290.70 as reimbursement for loss of 4 months income (with interest) from the union resulting from his wrongful discharge by Respondent.

CIVIL PENALTIES

The two violations found to have occurred herein were serious. They were attempts to undermine a basic purpose of the Mine Act "to consciously involv[e] the employees in the enforcement of safety regulations and protect that involvement." Broderick and Minahan, Employment Discrimination Under the Federal Mine Safety and Health Act, 84 West Va.L.Rev. 1023, 1066 (1982). See S.Rep. No. 181, 95th Cong., 1st Sess. at 35 (1977), reprinted in 1977 U.S.Code Cong. & Ad. News at 3435. The violations were deliberate. Respondent is a moderate sized operator and does not have a serious history of prior violations. Respondent is in bankruptcy attempting a reorganization. High penalties might affect its ability to continue in business. Based on the criteria in section 110(i) of the Act, I find the following civil penalties to be appropriate.

Docket No. KENT 83-161-D	$100
Docket No. KENT 83-232-D	$400

Respondent is therefore ORDERED to pay within 30 days of the date of this decision the sum of $500 as civil penalties for the violations found herein to have occurred.

James A. Broderick
Administrative Law Judge