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ROY D. LUCAS V. EASTERN ASSOCIATED COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| ROY D. LUCAS, COMPLAINANT | DISCRIMINATION PROCEEDING |
| v. | Docket No. WEVA 83-48-D |
| EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT | MSHA Case No. HOPE CD 82-47 |

FINAL ORDER

Appearances: Joseph A. Colosi, Esq., Camper & Seay, Welch, West Virginia, for Complainant; R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, and Sally S. Rock, Esq., Eastern Associated Coal Corp., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Kennedy

This matter is before me on complainant's challenge to the tentative decision of August 9, 1984, denying his claim and dismissing his complaint. Based on a de novo evaluation and review of the record, I find complainant failed to sustain his ultimate burden of showing that protected activity played a substantial or motivating part in the decision to discharge Roy Lucas from his job as a service foreman on August 13, 1982. I further find the operator carried its burden of showing that even if protected activity was arguably involved in the decision to discharge Mr. Lucas he would in any event have been discharged for his unprotected activities alone. I also find that complainant failed to show by a preponderance of the reliable, probative and substantial evidence that (1) he was wrongly accused of perpetrating the serious safety violation for which he was discharged, or (2) that the unprotected activities for which he was discharged were a mere pretext. NLRB v. Transportation Management Corp., 462 U.S. 392 (1983); Bioch v. FMSHRC, 719 F.2d 194 (6th Cir.1983); Donovan v. Stafford Const. Co., 732 F.2d 954 (D.C.Cir.1984); Dickey v. FMSHRC, 3 MSHC 1233 (3d Cir.1984); Hecla-Day Mines Corporation, 3 MSHC 1527 (1984); Haro v. Magma Copper Co., 2 MSHC 1897 (1982); Robinette v. United Castle Coal Co., 2 MSHC 1213 (1981); Pasula v. Consolidation Coal Co., 2 MSHC 1001 (1981), rev'd on other grounds, sub. mon., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981).

I

Complainant misconceived his burden of proof. This is not surprising as the shifting burdens of production and persuasion that govern discrimination cases have long been confusing to the Courts, the Commission and counsel.

As complainant asserts he carried his burden of showing, at least arguably, that protected activity may have played a part in the decision to discharge. But this satisfied only the burden of establishing a prima facie motive and not, as he suggests, his ultimate burden of persuasion as to the true motive. As I read the precedents it would be clear error to substitute a prima facie showing of unlawful intent for complainant's ultimate burden of persuasion as to the existence of a retaliatory motive for an adverse action.

In attempting to carry his ultimate burden complainant encountered evidence which showed (1) that it was doubtful that protected activity played any part in the decision to discharge, and (2) that serious unprotected activity intervened between the claimed protected activity and the decision to discharge. Indeed, the operator's affirmative defense showed that it was the safety violation plus complainant's disingenuous attempt to alibi as well as his unsatisfactory work record that were uppermost in Mr. Meadow's mind at the time he made the decision to discharge Lucas. Walter A. Schulte v. Lizza Industries, 3 MSHC 1176, 1182 (1984).

The question then is what was the operator's burden. Whether the operator's burden is one merely of production or production and persuasion has for some time been a matter of dispute among the circuits and before the Supreme Court. As I read Transportation Management, Robinette, Pasula and their progeny, the operator's first option is to show that it was at least as probable as not that no protected activity occurred or that protected activity played "no part" or "no substantial or motivating part" in the decision to take adverse action. If the operator succeeds in placing the evidence in equipose or in negating by a preponderance of the credible evidence the prima facie case he will prevail.(Footnote.1)

If, on the other hand, the operator is not content to rest on his rebuttal case he may proceed to attempt to show

that, at worst, his motives were mixed and that he would in any event have taken the adverse action for complainant's unprotected activity alone. This, the so-called affirmative defense route, requires under the Court's and the Commission's precedents assumption of a burden of both production and persuasion.(Footnote.2)

The operator suggests the way may still be open to apply the Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), test, as the court did in the first Boich case, 704 F.2d 275. (Footnote.3) Under this test first devised for Title VII cases the operator has only a burden of production sufficient to raise a question of fact as to the true motive for the adverse action. Complainant then has the burden of showing that "but for" the protected activity he would not have been discharged. Williams v. Boorstein, 663 F.2d 107, 117 (D.C.Cir.1980). This is not, however, the prevailing view under the NLRB Act or the Mine Act.

Under the prevailing view, it is necessary that the operator show that assuming without conceding he entertained an unlawful motive he nevertheless had a lawful or legitimate motive and this motive was standing alone sufficient cause for the adverse action. This showing he must make by a preponderance of the evidence. If the operator does not make a persuasive showing as to this or if the complainant shows the dual motive was a mere pretext the employer or operator does not carry his intermediate burden of persuasion and complainant prevails. Thus, the burden in the case of the dual or mixed motive defense is on the operator to disentable his motives and make a persuasive showing, i.e. a showing by a preponderance of the evidence that despite his illegal motive the adverse action would have been taken for the permissible motive alone.

Once the operator meets his burden of production and at least arguably his burden of persuasion, the complainant in

order to ensure that he carries his ultimate burden of persuasion may also "attempt to refute [the] affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have been taken in any event for such unprotected activities alone." Robinette, supra, n. 20. This reformulation of the ultimate burden of production and persuasion adopts "both the "in any way' and "but for' tests" and underscores the fact that the ultimate burden always rests with complainant. Pasula, supra at 1010. The difference between the Court's tacit rejection of the "but for" test in NLRB cases and the Commission's melding of the two tests for the Mine Act is, as this case demonstrates, of little practical consequence as under either test the ultimate burden of persuasion rests with complainant.(Footnote.4)

It was in this sense that I found that the evidence did not refute and therefore did not support a finding that "but for" the claimed protected activity Mr. Lucas would not have been discharged but to the contrary that the preponderant evidence showed Mr. Lucas would in any event has been discharged for his unprotected activities alone. Bench Decision Findings 9, 10.

II

With respect to the claim of disparate treatment, I note that, as I found, the two contract miners present when the violation occurred shared responsibility for the hazard created.(Footnote.5) As the Commission has noted, however, neither

it nor its trial judges "sit as a super grievance or arbitration board meting out industry equity. Once a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." Secretary ex rel Chacon v. Phelps Dodge, 2 MSHC 1505, 1511 91981), rev'd on other grounds, sub. nom. Donovan v. Phelps Dodge, 709 F.2d 86 (P.C.Cir.1983); Haro v. Magma Copper, 2 MSHC 1897, 1898-99 (1982).

Further, as Mr. Lucas acknowledged, it is permissible for management to hold supervisory employees to a higher standard of responsibility and accountability than hourly employees. Compare, Dickey v. United States Steel, 2 MSHC 2168, aff'd., sub. nom. Dickey v. FMSHRC, 3 MSHC 1233 (1984). I took into account the claim of disparate treatment in weighing the bona fides of the operator's claim that Lucas would have been discharged whether or not his protected activity played a part in the decision. Upon further analysis I am persuaded that Mr. Meadows, the mine superintendent who made the final decision, did so because he had a good faith, reasonable belief that Lucas was the foreman responsible for the nipping cable hazard, that it was a life threatening hazard, and that, rightly or wrongly, Lucas in his panic over the matter, tried to fabricate an alibi. I am also persuaded by the contemporaneous, corroborating physical circumstances that it would have been impossible to operate the dust buggy without using the nipping cable. Mr. Meadows chose to believe, and I submit on the basis of what he knew, quite rightly, that Mr. Lucas was on the track entry after 2:00 a.m.; that he was, in fact, the last miner to leave the track entry that morning; and that in doing so he so concentrated on helping the two contract miners get the derailed dust buggy back on the tracks he forgot to remove the unfused nipping cable from the trolley wire.

III

There is no gainsaying the fact that Mr. Lucas' immediate supervisor, Harry Stover, the third shift mine foreman, was a harsh taskmaster who rode Lucas unmercifully and unfairly. Despite the fact that he was responsible for hiring Lucas, Stover immediately took a strong personal and job-related dislike to Lucas for the latter's more relaxed style of workforce management.

Stover was a hard driver who looked upon Lucas as a soft touch for his work crews--inclined to give them too many work breaks and disinclined to drive them to the point of exhaustion over hard physical tasks. Lucas was truly the ham in the sandwich and in a no-win position

between Stover's unceasing demands for productivity and the contract miners' pleas for some consideration in the performance of the hard physical labor demanded.

As the record shows, between the time Lucas was hired to work in February 1982 until he was fired in August the two men engaged in several verbal altercations over how various tasks should be performed and how long it should take to accomplish them. Only one of these, the crib block incident on April 20, 1982, involved arguably protected activity that resulted in an unsatisfactory work warning. However, as I have found, and now confirm, the safety related activity occurred before the cribs arrived and did not, at least in my judgment, play a part in Stover's decision to issue the warning for failure to set enough cribs after they arrived on the section and before the shift ended.

The other incidents that resulted in the issuance of unsatisfactory work warnings occurred on March 16 and July 16, 1982.(Footnote.6) These incidents did not involve any safety related activity. Nevertheless, they did show that Stover had a strong anti-Lucas animus.

The incidents of April 8, May 8, May 21 and June 3 arguably involved safety related activity but did not result in any overt adverse actions by Mr. Stover. Mr. Lucas admitted he made no protest to Stover or anyone else in management with respect to the unsafe mining practices he allegedly participated in on May 8 and May 21, 1982. The April 8 incident involving Stover's refusal to furnish communications or transportation to Lucas and his crew may have stirred Stover's personal resentment toward Lucas but did not demonstrate a pervasive or even transitory anti-safety animus. The claim that Stover harbored resentment over the April 8 incident until he could find an excuse, as he allegedly did so April 20, to issue an unsatisfactory work warning is, I find, speculative and unsupported by a preponderance of the credible evidence.

Taken as a whole complainant's evidence shows a pattern of conduct on the part of Stover that boded ill for Lucas' job security, but, as I find, this did not stem from Lucas' claimed concerns for safety. These concerns, while

real, were, in my opinion, exaggerated to meet the needs of advocacy and the exigencies of a hard case. Many activities in an underground coal mine involve the weighing of risks, the exercise of judgment, and sometimes heated disagreements over what risks are or are not acceptable. Often the law or the collective bargaining agreement will, when viewed in hindsight, provide a bright line between acceptable and unacceptable risks. Just as often, however, in the heat of the moment and with the pressure to act the line is blurred if not entirely illusory.

Honest, even if heated, disagreements between two foremen over what risks are or are not acceptable is not probative of an anti-safety animus on the part of management. Nor is every dispute over productivity versus safety, without more, evidence that a discharge for unprotected activity was ineradicably tainted with an anti-safety animus.

When supervisory personnel lose respect and confidence in one another someone has to go. Unfortunately, as in other spheres of life, it is usually the subordinate who is, rightly or wrongly, made the scapegoat. I find it a matter of regret that Lucas did not have self-confidence enough to break the iron vice by going over Stover's head. Only two months after he was hired he knew he had two strikes against him and that unless he succeeded in calling Stover's hand before Meadows his job security was in jeopardy. Lucas passed up his chances on May 8, May 21 and June 3 to make, if he could, a clear and convincing record of Stover's and management's claimed anti-safety animus. The breaker post incident of June 3 demonstrated, of course, that Lucas could be wrong and Stover right over a disputed safety issue with no attempt by Stover to retaliate. Further, Lucas was just plain wrong in attributing the August 10 rail runner incident to Stover. The contemporaneous record showed that Stover was on vacation at that time and at the time of Lucas' discharge on August 13, 1982.

Consequently, even if I impute to top management all of Stover's anti-Lucas animus I cannot find that this was the functional equivalent of an anti-safety animus. Rightly or wrongly, management including the mine superintendent, Mr. Meadows, was convinced that Lucas was a poor supervisor and that his work history and Stover's evaluations, as reflected in his progressive discipline file, made him a candidate for early removal. Bradley v. Belva, 2 MSHC 1729, 1736 (1982).

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This is the background against which one must weigh Meadows' statement that Lucas would not have been discharged for the nipping cable violation alone. Meadows, I find, was being perfectly candid. Few, if any, miners are ever discharged for committing safety or health violations. The tradition among both management and labor, with the acquiescence of MSHA, is that by and large miners are not to be disciplined for even serious safety violations.

I have no doubt that if Lucas had been a highly regarded member of the management team, such as Stover, he would not have been discharged for the nipping cable violation.(Footnote.7) But, as Meadows testified, Lucas' record was against him, and, worst of all, Meadows believed he tried to fabricate an alibi that was so transparently false that Meadows would have put his own reputation in jeopardy if he had accepted it. I believed Mr. Meadows when he testified that Lucas was not discharged for the safety violation alone, but for that plus his poor performance record and, most importantly, for his attempt to dissemble over the nipping cable incident. On the record considered as a whole therefore, I am compelled to conclude and affirm that Lucas was discharged for unprotected activity alone and that retaliation for protected activity played no substantial part in the decision to effect the adverse action.

Accordingly, it is ORDERED that the tentative decision of August 9, 1984, a copy of which is attached hereto and incorporated herein, as supplemented by this Order be, and hereby is, ADOPTED and CONFIRMED as the final disposition of this matter.

Joseph B. Kennedy
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 I found, and I hereby confirm, that the operator succeeded in showing that protected activity played "no substantial part" in the decision to discharge. Bench Decision, Finding 6.

~Footnote_two

2 This accords with the NLRB's Wright Line test as approved by the Supreme Court in Transportation Management.

~Footnote_three

3 It is important to recognize that in Transportation Management the Supreme Court did not establish a rule of its own for the allocation of the burden of proof in NLRB cases. It merely accorded "deference" to the rule established by the Board.

It is likely that it would accord the same deference to the Commission's rule which differs somewhat from that of the NLRB. In Burdine, on the other hand, the Court established a rule to be followed by the Article III courts in deciding Title VII cases.

~Footnote_four

4 While Pasula and Robinette outline the order and allocation of proof as a three-stage process, it is clear that the actual presentation of evidence does not contemplate a trifurcated trial, but simply sets forth the proper method of analysis after the relevant evidence is before the trial judge. Evidence relating not only to the complainant's prima facie case, but also the operator's articulated nondiscriminatory reason and the complainant's demonstration of pretext, is, as it was in this case, frequently presented during the course of the complainant's case in chief. Similarly, the evidence presented by the operator in its case in chief will almost always, as it did in this case, contain evidence directed at refuting the complainant's assertions of pretext, as well as evidence to support the claim of unprotected activities and again as in this case, evidence to attack the prima facie case.

~Footnote_five

5 Evidence of disparate treatment may be used either to support a prima facie case or to refute a dual motive defense. Walter A. Schulte, supra.

~Footnote_six

6 The March 16 incident involved a verbal warning for letting the work crew quit early. The July 16 incident involved a written warning for failure to accomplish the timely installation of a car spotter.

~Footnote_seven

7 I note in passing that among Stover's less endearing qualities was his stubborn refusal to admit, in the face of overwhelming evidence, that the use of unfused nipping cables was a common practice in the Harris No. 1 Mine.

# APPENDIX

## TENTATIVE DECISION

I find a preponderance of the credible evidence shows:

1. That Roy Lucas, James Taylor, and Jennings Harrison were jointly and severally responsible for leaving the nip cable energized between shifts on August 12, 1982.

2. That the condition created a serious hazard of shock, burn, or electrocution to other miners.

3. That under Eastern's progressive disciplinary policy, the creation of this hazard was just cause for the discharge of one or all of those responsible.

4. That the discharge of Roy Lucas on August 13, 1982, for the role he played in creating the nip cable hazard did not violate any rights guaranteed him under Section 105(c) of the Mine Safety Law.

5. That the activity for which Roy Lucas was discharged was not protected by the Mine Safety Law.

6. That none of Mr. Lucas' claims of protected activity motivated the decision to terminate his employment.

7. That Mr. Lucas would have been discharged for the nip cable incident, despite any previous protected activity because the nip cable incident was, standing alone, just cause for his discharge.

8. That the motive for Mr. Lucas' discharge was not tainted or rendered unlawful by any intent to retaliate for any of his protected activity.

9. That the evidence does not support a finding that but for the claimed protected activity Mr. Lucas would not have been discharged.

10. That on the contrary, the preponderant evidence shows that Mr. Lucas would, in any event, have been discharged for his failure to prevent the hazard occasioned by the energized nipping cable.

11. That while the unsatisfactory work warning of April 20, 1982, involved protected activity, that activity did not play a part in management's decision to issue the warning. I agree that in issuing the warning management failed to take into account the roof hazard that Mr. Lucas addressed prior to the time the cribs arrived. I also agree that Mr. Lucas' reluctance to short circuit the ventilation system was justified, even if the diversion of the air, as it turned out, did not adversely affect ventilation at the face. I am not in a position to second guess management's finding that Mr. Lucas failed to accomplish enough work on the cribs. I am inclined to the view that management's decision was on balance unjustified. Even so, this warning was not the deciding factor in the decision of August 13, 1982, to terminate Mr. Lucas.

12. The single predominate motive for the termination was the nip cable incident. Thus while there was management animus toward Mr. Lucas, it stemmed, rightly or wrongly, from his perceived performance deficiencies and not from safety complaints.

13. Accordingly, it is ordered that the complaint be, and hereby is, dismissed.