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RAYMOND L. COPELAND V. AGRICO MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RAYMOND L. COPELAND,
COMPLAINANT

v.

AGRICO MINING COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. SE 84-48-DM
MD 83-53

Appearances: Raymond L. Copeland, Lakeland, Florida, pro se;
Mary A. Lau, Esq., Holland & Knight, P.A., Tampa, Florida, for Respondent.

DECISION

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by Raymond L. Copeland (herein "Complainant") on April 12, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (1976 & Supp. V 1981), hereinafter "the Act."

Complainant was previously notified by letter dated March 6, 1984, from the Mine Safety and Health Administration (MSHA) that his complaint of discrimination with it had been investigated and the determination made that a violation of section 105(c) of the Act had not occurred.

The matter came on for hearing in Lakeland, Florida, on November 7, 1984, at which Respondent was represented by counsel and Complainant appeared pro se.

PRELIMINARY FINDINGS

The Complainant was discharged on June 3, 1983, pursuant to a "Notice of Disciplinary Action" (Exhibit R-4) which specified:

> "Insubordination: Refuse to do flagperson work, instructed by the shift supervisor."

Complainant is a 44-year-old flagman who had been employed by Respondent for approximately 13 years prior to his discharge. The duties of a flagman who is part of a train crew comprised of a locomotive engineer and two flagmen consist of flagging locomotives in and out, loading and unloading cars, switching cars, checking car doors to determine if they are open or closed, observing the track and the train when the train is in transit, and bleeding air off cars by pulling levers (Tr. 41-42, 160, 176-177, 182, Ex. C-1). At all times material herein, Complainant's immediate supervisor was Robert B. Durden, a foreman in the transportation department (sometimes referred to as a "dispatcher") (Tr. 41, 173-175).

Article XV, Section 9, of the Agreement between Respondent and the International Chemical Workers Union (herein "Union"), of which Complainant is a member provides:

> "Except where to do so would place them or others in a real and present danger of serious bodily harm or cause them to violate the criminal laws of the State or Nation, the employees will obey the directives and orders of their supervisors. If the directives or orders cause a violation of the terms of this agreement, the employee can subsequently, after carrying out the directive, resort to the grievance procedure for redress. Subject to the foregoing, refusal to obey such orders or directives of a supervisor will result in discharge or other disciplinary action." (Ex. R-1).

In 1976, Complainant was terminated from employment by Respondent because of insubordination (Tr. 148). In the course of processing a grievance filed by the Union protesting his discharge, the Union and Respondent reached a settlement reducing the penalty from discharge to a six-month suspension (Tr. 148). That settlement was expressly conditioned upon Complainant's execution of a letter agreeing that he would be subject to immediate and permanent discharge if he was "ever again insubordinate or threatening" to his supervisors (R-3). This settlement was in effect at the time of Complainant's termination for insubordination on June 3, 1983 (Tr. 149).

On May 31, 1983, Complainant was to work as a flagman on the third shift, from 11:00 p.m. to 7:00 a.m. (on June 1), and on a train crew comprised of himself, locomotive engineer, Edward Francis and flagman William Cheeseman (Tr. 186) under the direct supervision of foreman Durden. (Footnote.1) At the beginning of the shift, the crew received instructions from Durden which included moving a train of cars to the dumping area to unload, moving the empty

cars to the South Pierce Chemical Plant and returning to the yard at Pierce (Tr. 72, 187-189). The crew completed these assignments and returned to the yard at Pierce at approximately 4:00 a.m. At that time Durden radioed instructions from the dispatcher's office in the yard to Francis, the engineer, to move some cars to a repair area to be repaired (Tr. 73, 188-189). While Francis and Complainant were completing that assignment, Cheeseman returned to the dispatcher's office (Tr. 190, 258). Durden informed Cheeseman that he wanted Cheesman and Complainant Copeland to ride in a truck to an area called the "two-mile post", located approximately 400 yards from the office to check the bottom of the rail car doors and to bleed the air off the rotary dump cars on Track 4 (Tr. 76, 191-258). Complainant had performed both these functions previously at night (Tr. 177-178; Ex. R-6 at pg. 14).

Durden and Cheeseman then left the dispatcher's office and met Complainant at the bottom of the stairs outside the office on his way back from the train area (Tr. 192). Durden repeated to Copeland, "Raymond, I want you and Cheeseman to go to the two-mile post to check the bottom doors and bleed the air off the rotary dumps." Complainant replied that he was not going to the two-mile post to check the bottom doors and bleed the air and he told Durden that if that was all Durden had for him to do, to pay him for his time up to that point and he would "go in" (Tr. 70, 192-196, 256). Durden repeated the instruction and asked Complainant if he was refusing to do the assigned work (Tr. 193, 256). At that point Complainant stated for the first time that he wouldn't do the assigned work because it was unsafe unless he could use a radar light rather than the customary flagman's lantern (Tr. 70, 193, 224, 256; Ex. R-6, pg. 9). Durden advised Complainant that he did not have an available radar light and could not get one because the storeroom was closed (Tr. 109, 195). Durden asked Cheeseman if the work was unsafe to perform without a radar light and Cheeseman stated that it was not unsafe (Tr. 197, 256, Ex. R-6, pg. 9). Both Cheeseman and Complainant had flagman's lanterns which were in working order at the time Durden gave the assignment to go to the two-mile post (Tr. 76, 133, 197).

Complainant then suggested that the crew move the train into a different well-lighted area of the yard (Tr. 84), a procedure which had never been used for checking doors and bleeding air off cars at the two-mile post (Tr. 196). When Durden rejected Copeland's suggestion, Copeland said that he would not go to the two-mile post (Tr. 196). At that point, Durden suspended Copeland for insubordination pending further investigation to determine appropriate discipline, including possible discharge (Tr. 85, 200).

On the basis of its own subsequent investigation Respondent terminated Complainant's employment for insubordination (Tr. 87-88, 242; R-3, R-4), and issued its formal notice of Complainant's termination on June 3, 1983 (R-4).

Tests of the two lanterns in question by the undersigned both in the darkened hearing room and at the "two-mile post" site itself revealed that the flagman's lantern, which Complainant refused to use, is at least equal in lighting capacity and suitability for the tasks to have been performed, and in some respects, superior to the radar light Complainant insisted on using but which was not available (Tr. 135-140, 287, 283-296, 297, 298).

Respondent has promulgated a manual containing general rules for engineers and flagpersons in its transportation department (Ex. C-2). A list of safety equipment required to be worn and cared for by flagpersons in the performance of their duties appears at page 12 thereof, and includes--in addition to such items as safety hat and safety glasses--a "flagman's lantern."

On October 14, 1983, Complainant filed charges with the Equal Employment Opportunity Commission and the Florida Commission on Human Rights alleging that his discharge was due to race (Exs. R-6, R-7. and R-8).

Complainant also filed a grievance pursuant to Article X of the Agreement between the Respondent and the Union (Ex. R-1) on June 3, 1983. The Report of Arbitrator George V. Eyraud, Jr., was issued on March 26, 1984, determining that the Union failed to show that Complainant's discharge was due to safety reasons (Ex. R-6).

Had Complainant been given a radar light he would not have refused to perform the work assigned him by Durden at approximately 4:30 a.m. on June 1, 1983 (Tr. 110).

Complainant testified that he had never previously used a radar light or flagman's lantern to close car doors at night but felt that "it's (the radar light) indicating more lighting than a flagman's lantern" (Tr. 100, 125).(Footnote.2) He also felt that the flagman's lantern was "unsafe for that type of job" (Tr. 103).

The motivation behind Complainant's work refusal was (1) resentment--possibly of a racial nature--because Durden had informed Cheeseman what the duties of the third shift were to be on two occasions several hours earlier but did not so inform Complainant and Francis until the time arrived for the duties to be performed (Tr. 68, 69, 84, 96, 97, 112, 113, 114, 115), and (2) dissatisfaction with Durden's actions which made it seem as though Cheeseman was in charge even though Cheeseman, according to Complainant, "had just come there" and "had just started working in the department" (Tr. 115, 116). Complainant's reaction to this and possibly other wrongs perceived by him was to test Durden to see how much Durden "cared about safety" by raising the issue of lighting (Tr. 115, 116, 133).

The jobs of checking doors and bleeding the air off rotary dumps, when done after dark, typically were done by flagmen using flagman's lanterns (Tr. 177-178, Ex. R-6). No complaints that these two jobs were unsafe to perform at night had been received prior to the night of Copeland's suspension (Tr. 178, 232-236). There was no evidence that Copeland or anyone else ever complained about the safety of those two jobs using a flagman's lantern instead of a radar light, prior to the night of May 31-June 1, 1983 (Tr. 236).

ULTIMATE FINDINGS AND CONCLUSIONS

The Complainant has established no justification whatsoever for his contention that the flagman's lantern (a) was inferior to the radar light, or (b) was insufficient for the job he had been instructed to perform. Indeed, the record in this case in fact actually establishes that the flagman's lantern is somewhat superior to the radar light which Complainant insisted on using as a condition of performing his assigned tasks. It was therefore clearly unreasonable for Complainant to engage in a work refusal since he has admitted that he would not have refused to work had he been given a radar light. This conclusion is further supported by the fact that the Complainant's real complaint was not safety-related but resulted from a perceived slight--justified or not.

In view of the foregoing, and since it is also clear that Complainant did not raise a safety issue until after his foreman had asked him if he was refusing a direct order, it is also concluded that Complainant did not entertain a good faith belief that a hazardous condition existed. His sudden assertion on the night of May 31, June 1, 1983, after ten year's experience as a flagman, that a hazardous condition existed because of the inadequacy of the flagman's lantern was not a genuine safety complaint.

Under the analytical guidelines established in Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980),

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rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall 663 F.2d 1211 (3d Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity.

A miner's work refusal is a protected activity under the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. Secretary on behalf of Pasula v. Consolidation Coal Co., supra; Secretary on behalf of Robinette v. United Castle Coal Co., supra. See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir.1982).

Here, the Complainant's work refusal, being based on neither a good faith belief, or a reasonable belief, in the existence of a hazardous condition, was not a protected activity under the 1977 Mine Act. Accordingly, there is no remedy for his discharge under this Act.

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, his complaint herein is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 Complainant and Francis are black and Cheeseman and Durden are white.

~Footnote_two

2 Complainant failed to establish any persuasive basis on the record why he thought the radar light put out more light than his flagman's lantern. Also, Arbitrator Eyraud found that "Grievant himself established he had indeed previously performed the very duties assigned by Durden on June 1, and without a radar light."