FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 7 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF GEORGE ROY LOGAN, Complainant	COMPLAINT OF DISCRIMINATION Docket No: KENT 81-162-D PIKE CD 81-10 Mine No. 2
v.	
BRIGHT COAL COMPANY, INC., & JACK COLLINS, Respondents	

DECISION ON REMAND

Before: Judge Moore

On July 23, 1982, I issued a Decision in this matter which was favorable to Bright Coal Company and Jack Collins. In that proceeding I had ordered the government, both by subpoena and discovery order to produce any exculpatory material in its files. In doing so, I relied upon Brady v. Maryland, 373 U.S. 83 (1963). 1/ Counsel for the government refused to either produce such-material or deny that it existed.

As a result, I stated that I was drawing inferences adverse to the government. After discussing complainant's statements in his deposition which were not included in his testimony, I drew the inference that the files might

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1/ In its brief to the Commission the Solicitor's appellate staff stated that this case was applicable only in criminal cases. See Page 24. Back in 1974 Administrative Law Judge Merritt Ruhlen prepared a "Manual for Administrative Law Judges" for the Administrative Law Conference of the United States. At page 14 of that Manual Judge Ruhlen citing Brady v. Maryland said:

> In Jencks v. United States it was held the defendant in a criminal prosecution has the right to examine all reports in the possession of the prosecution that bear upon the events and 'activities to which a prosecution witness

contain other statements made by Mr. Logan which could not be substantiated by others. In issuing the order that resulted in these inferences, I denied that the exculpatory information was subject to any privilege.

On November 8, 1984, the Commission reversed my decision and held that the informer's privilege is applicable to any "person who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law . . ." All of the people who gave statements to MSHA, including Jack Collins, were thus informants. The Commission remanded the case to me with instructions that I require the government to furnish the material for my in camera inspection. After examining the material, I was to decide whether fairness would require that the qualified informer privilege yield. Pursuant to my order, the Secretary did produce the previously excluded material and upon examining it I found that it did not contain exculpatory evidence other than what had already been discussed in my previous decision. I also found no reason to disregard the informers privilege.

The material submitted for my in camera inspection is divided into two distinct sections.-Exhibit A is the original investigation file compiled by Inspector Finney and referred to the Solicitor's office. It is not the work product of an attorney. Exhibit B consists of interview reports and notes collected by Inspector Finney after Attorney Taylor had taken control of the case. Inspector Finney received instructions from Mr. Taylor both by telephone and in a memorandum as to who to interview, what questions to ask, and what facts to try to develop.

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fn (continued)

testifies at trial. In modified form, this principle has been extended to administrative proceedings in which the agency is adversary and some agencies have adopted procedural rules specifically directed to the "Jencks" situation. The attorney representing the agency in such cases has the responsibility of providing any information in the agency's files that is favorable to the respondent, and the Judge should be sure that the attorney is aware of such responsibility.
[Footnote omitted].

This portion of the file is the work product of an attorney and not discoverable except under special circumstances which have not been shown here. 2/.

I did not at the time of my original ruling, and do not now, interpret the amended motion to compel production of documents as involving "Jencks" statements. The Jencks Act, 18 U.S.C. § 3500 requires that in a criminal proceeding, after a witness has testified for the government, the government must, on request, produce any verbatim statement or written statement taken from that witness. As applied in administrative law cases the disclosure of such statements can be required prior to the testimony of the witness. Section (a) of the amended motion calls for documents to be introduced and witnesses (presumably the names) expected to testify. It clearly does not request'any documents such as interview reports of witnesses expected to testify except such documents as the government intended to offer in evidence. Obviously the government did not intend to offer interview reports in evidence. Request (b) refers only to witnesses the government did not intend to call and documents which tended to disprove the allegations of the application. Statements of witnesses who are not expected to testify are not subject to the "Jencks" rule and I have already dealt with the matter of exculpatory information

As stated, all of the people who gave information to MSHA were informers. Once they became witnesses however,

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2/ In its brief before the Commission the Solicitor's appellate staff took what I think is an incredible position regarding the attorney's work product privilege. It argued in effect, that if an attorney had to do any work compiling material in response to a discovery production order, the fact that he worked on it would convert it i.e. the material, into an attorney's work product and thus make it not discoverable except under special circumstances. (See page 19 of the Secretary's brief). If the Commission had adopted that argument it would have seriously hampered discovery in Commission proceedings.

the informer privilege was lost and their prior confidential statements became Jencks Act statements. The government says that it did produce such statements. I have resealed the files submitted for in camera inspection and suggest that they be returned to the Solicitor.

After the remand, the parties agreed that no new evidence was necessary, but counsel for the government wanted to file a brief. He filed an exhaustive brief on March 13, 1985. Respondents had announced that they did not think further briefing was necessary but I nevertheless gave them 15 days to respond to the government brief. They did so on March 29.

In Secretary of Labor ex Rel. Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1841, 1846 (August 1984) the Commission summarized the case law in discrimination cases as follows:

> In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, a complaining miner bears. the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., v. Marshall, 663 F. 2d. 1211 3rd. Cit. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was.in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co.; 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F. 2d. 194, 195-96 (6th Cir. 1983) and Donovan v. Stafford Constr. Co;, 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually

identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., U.S. , 76 L. Ed. 2d. 667 (1983).

The key issue in this case is whether or not Mr. Logan was *engaged in* a protected activity. Was he told to go under unsafe roof and did he refuse to do so? Mr. Logan says yes and Mr. Collins says no, and no one else was present. In order to decide in favor of the government and Mr. 'Logan I have to find that Mr. Collins gave perjured testimony when he denied that he ordered Mr. Logan to go under unsafe roof. The Solicitor devoted a substantial part of its brief attempting to show that the testimony of Mr. Collins is unbelievable. 3/ The Solicitor gives a number of examples of inconsistencies and some are genuine but in my opinion he overstates his case. At page 19 of the brief the Solicitor says:

> After Collins learned of the 'threat' on January 15 directed toward Johnson he (Collins) discussed same with Logan at work the next day (Tr. 407). Logan, however, was absent from work on January 16 (Tr. 458; Applicant's Exhibit No. 1).

What Mr. Collins actually said when asked when he had talked to Mr. Logan about the threat was "probably the next day." On the same page of the government brief "Collins also stated Logan threaten [sic] Johnson on January 18 while he (Logan) was at the tail piece (response to second interrogatories, No. 6; Tr. 469). January 18 was a Sunday and the mine did not operate on Sunday (Tr. 470)." What actually appears at page 469 of the transcript is:

> Q. Mr. Collins, do you ever remember saying or telling anybody that Eugene Lewis told you on the 18th that Mr. Logan threatened Mr. Johnson?
>
> A. It could possibly have been the 18th.

On page 470 of the transcript Mr. Taylor read an answer that Mr. Collins had given in response to an interrogatory

3/ It also attacked the credibility of State Inspector Lewis.

fn (continued)

In footnote 4 on page 16 of the government brief, the following appears:

> Lewis also testified to their conversation (Tr. 237). However, 'Lewis' account lacks any indicia of inherent credibility. Lewis testified that Logan approached him while he was on his way to the entry where the- pull-test was to occur, accompanied by both Collins and Celtite representative, Paul Reid (Tr. 235). Neither Collins nor Reid testified that they had seen any conversation between Lewis and Logan. Indeed, it appears highly unlikely that a miner would voluntarily tell a State inspector, whom he did not know well, that he was going to attack his foreman. . .

While I have not previously encountered the phrase "indicia of inherent credibility" I can not imagine why the government would doubt the honesty of a State mine inspector when its own client, Mr. Logan, corroborated Mr. Lewis' testimony: At Tr. 176, the following appears:

Q. Did you tell Gene Lewis in December or January, 1981 that you were going to whip Scott Johnson?

A. I don't know. I don't know whether I said I'm going to 'whip him' or said, 'somebody ought to whip him before they leave.'

Q. How many times did you tell him that?

A. I told'him once.

Q. Where were you when you told him that?

A. It was somewhere around the tailpiece.

as follows: "Probably on January 18, 1981, Lewis was at the tail piece of the No. 3 entry when George Roy Logan threatened Scott Johnson to Eugene Lewis."

Again, beginning on page 19 of the brief, counsel states that Collins testified that he fired Logan on January 15 the day of the pull-test, and cites page 471 of the transcript Mr. Collins had been asked how many times he had reprimanded Mr. Logan for not doing his job properly.

A. I talked to him twice.

Q. Two times?

A. Yeah..

Q. When did that occur?

A. I first - - when we was making the pull-test and up at the tail-piece when - I - - that is the day I fired him.

To me, that means that he talked to Logan on the day of the pull-test and on the day that he fired him. Mr. Collins did not say that he fired Logan on the day of the pull-test.

At page 20 of the brief the government says:

> Collins claims that Jimmy Cornett told him (Collins) that Logan was asleep in the mine and Cornett almost ran over him (response to interrogatory No. 45). Cornett denied he ever told Collins that Logan was asleep. (Tr. 40-41).

Interrogatory No. 45 is "please provide the name, address, telephone number and job title of the person or persons who told Jack Collins that Jimmy Cornett (scoop operator) almost ran over George Roy Logan because George Roy Logan was asleep in the underground runway No. 2 Mine?" The answer to interrogatory 45 was "Jimmy Cornett, Skyline, Kentucky, Scoop Driver." The answer was half right and half wrong but hardly perjury.

At page 18 of the brief, the government states:

> Collins also claimed that Logan had refused to return to work when he was ordered to, following the January 15 pull-test. (Tr. 401). However, both Logan and Johnson agree that Logan did return to work, albeit reluctantly (Tr. 61-62, 146).

What actually appears at page 402 of the transcript referring to the tune when Mr. Logan was told to go back to work is:

> **Q.** Did he ever go back to work?
>
> A. [Collins] Not that I know of.
>
> * * *
>
> **Q.** What did he do, just sit there for 45 minutes?
>
> A. Evidently, but me and Gene and that Celtite man went around and was going to make a pull-test on another bolt and we broke that 'pulley.

Again on page 18 of the brief "in contrast to Collins' assertion that Logan was found asleep underground, both Jimmy Cornett and Willard Blair confirmed that Logan was never found asleep underground (Tr. 40,. 137." All that Mr. Blair and Mr. Cornett actually said was that neither of them had found Logan asleep underground.

These inaccuracies in citations are unfortunate. They were also contained in the material that was filed with the Commission. 4/ When an attorney makes a statement of fact in a brief and cites the record, the record cited should support the statement fully. The citations should show that Mr. Collins lied. The ones referred to above do not.

Failing to remember who said exactly what, the dates events occurred, etc., does not constitute perjury. Mr. Collins was not a good witness. He failed to understand questions at times and gave some confusing answers and he changed his story on occasion. But the only evidence that he was lying when. he denied that he had told

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4/ An example of the Solicitor's appellate staff's misstatement of the record appears on page 33 of its brief to the Commission. The appellate staff states: "further, the judge's statement that Logan's denial of 'both allegations' does not constitute rebuttal evidence makes no sense". What I actually said at page 5 of my decision was "At his deposition Logan denied both allegations although he did not present any rebuttal testimony at the trial".

Roy Logan to go under unsafe roof and fired him when he refused is the testimony of Logan himself.

In his deposition taken on September 8, 1981, Mr. Logan said the preshift examinations were not being made at the mine. See pages 11, 12, 13, 14, 15, 16, 17, 36 and 55 of that deposition. As I mentioned in my earlier decision failure to make preshift examinations is a serious charge and supportive evidence would have been beneficial to the government's case. No such evidence was forthcoming. If the preshift examinations were not in fact being made, the government should have been able to locate and put on the stand a corroborating witness. The fact that it did not is significant.

When Mr. Logan testified that he had been fired because he refused to go under unsafe roof he made out a prima facie case. When Mr. Collins testified that he did not tell Logan to go under unsafe roof and that Logan did not refuse an order to do so, it brought into question the very existence of any protected activity on Mr. Logan's part. If the government has the ultimate burden of persuasion, as the Commission says, then in order to find for the government I have to be persuaded that Mr. Logan was telling the truth as to the existence of the protected activity and that Mr. Collins was not telling the truth with respect to that issue. I am not persuaded of that and must.therefore find in favor of Bright Coal Company and Jack Collins.

The case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore', Jr.
Administrative Law Judge

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