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HARRY L. WADDING v. TUNNELTON MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HARRY L. WADDING, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. PENN 84-186-D
TUNNELTON MINING COMPANY, RESPONDENT	MSHA Case No. PITT CD 84-10 Marion Mine

Appearances: Samuel J. Pasquarelli, Esq., Jubelier, Pass & Intrieri, Pittsburgh, Pennsylvania, for Complainant;
R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, and Joseph T. Kosek, Jr., Esq., Tunnelton Mining Company, Ebensburg, Pennsylvania, for Respondent.

DECISION

Before: Judge Melick

This case is before me upon the complaint of Harry Wadding pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that he was discharged from the Tunnelton Mining Company (Tunnelton) in violation of section 105(c)(1) of the Act.(Footnote.1)

Before his discharge on March 14, 1984, Mr. Wadding was employed at Tunnelton's Marion Mine as one of three mine examiners or firebosses responsible for mine safety inspections. Tunnelton maintains that the Complainant and the other two mine examiners, Michael Solarz and Ben Selapack, were all properly discharged on March 14, 1984, solely because they failed to perform their job duties in neglecting to inspect and place their initials and date at certain locations required to be inspected. (Footnote.2) Additional discharge proceedings were subsequently brought against Mr. Wadding on the basis of an alleged trespass on mine property. (Footnote.3) Wadding argues that the grounds cited by Tunnelton for his discharge were pretexts and that the true motivation for Mr. Wadding on the basis of an alleged trespass on mine property. for his discharge were pretexts and that the true motivation for this action was his safety related activities protected under section 105(c)(1) of the Act.

In order for the Complainant to establish a prima facie violation of section 105(c)(1) he must prove by a preponderance of the evidence that he engaged in an activity (or activities) protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom., Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Wadding alleges a number of protected activities purportedly giving rise to his discharge, namely: (1) that he reported in the fireboss books in February 1983, that notations he had been making on certain dateboards in areas he was required to inspect had been erased, and that there was "garbage" in the walkways (2) that during 1983 and 1984 he complained to mine foreman John Matty and to an inspector from the Federal Mine Safety and Health Administration (MSHA) about his inability to safely inspect various caved-in areas without the installation of tubes, (3) that in June 1983, he reported a safety violation to a Federal inspector, (4) that in October or November 1984 he "dangered off" a portion of the mine because of "bad roof", (5) that on February 24, 1984, he reported in the fireboss books that the mine needed rock dusting and that certain wooden rollers

needed replacing, (6) that on March 12, 1984, he again reported in the fireboss books that those wooden rollers needed replacing, (7) that on March 12, 1984, he complained to state mine inspector Monaghan, to union safety committeeman Jim Gradwell and to foreman Harold Learn that dateboard notations were not being made by Michael Solarz, one of the other mine examiners, and (8) on March 13, 1984, the day before his discharge, he reported in the fireboss books that the mine needed rock dusting. It is not disputed that these reports and activities occurred as alleged and that they constituted complaints of "an alleged danger or safety or health violation" within the meaning of section 105(c)(1).

The second element of a prima facie case is a showing that the adverse action (discharge) was motivated in any part by the protected activity. Complainant alleges herein, as circumstantial evidence of such motivation, that Tunnelton management knew of his protected activities and that such activities elicited hostile responses toward him. See Secretary ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981). rev'd on other grounds, sub nom., Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983). Tunnelton acknowledges that it knew of all but two of the protected activities but denies that it was motivated in any part by those activities. (Footnote.4)

In support of his case Wadding cites an incident in June 1983 after he had reported a safety violation to a Federal inspector. In response to that complaint mine foreman John Matty purportedly warned him that if he continued to talk to Federal inspectors he would be fired. At hearing Matty denied any such threats and testified that after he received notice of the citation he merely asked Wadding why he had not reported the safety problems to him as mine foreman instead of to the Federal inspector. Matty was admittedly unhappy with what Wadding had done because it made him "look like I wasn't aware of what was going on at the mines." Whichever version is accepted, it is apparent that Matty was not pleased with Waddings protected activity. The relationship was further frayed when unfair labor practice charges were filed with the National Labor Relations Board (NLRB) by Wadding and others which included allegations of retaliation for filing safety complaints. The matter was at that time apparently resolved by a settlement agreement in

which Tunnelton agreed inter alia, not to "threaten employees because they have filed safety complaints."

Wadding also reports that in October 1983, he refused to inspect certain caved-in areas which had not been provided with tubes to permit methane testing from what he considered to be a safe area and reported this problem to a Federal inspector and in the fireboss books. Wadding alleges that the inspector in turn told Matty to get the tubes. Matty purportedly told Wadding that he "caused him a lot of trouble" over this. Matty does not deny the events and testified essentially that he did not remember talking to Wadding about the matter. Under the circumstances I accept the undenied allegations.

On February 24, 1984, Wadding reported in the mine examiner's books that certain wooden rollers were defective (Ex. CX-6).(Footnote.5) Wadding claims that Matty told him not to make entries such as that and said that he did not have the men to repair the rollers. Wadding testified that he responded by telling Matty he should find the men to replace the rollers. A written entry also appears in the examiner's book on March 12, 1984, indicating that the rollers had still not been repaired (Ex. CX-7). Wadding's testimony is not disputed on this issue.

In addition Matty does not deny Wadding's testimony that in October or November 1983, after Wadding had dangered-off an area of the mine because of "bad roof", he said to Wadding "what the hell do you mean--you take that danger off or I'll fire you."

While it is not specifically alleged that the entries by Wadding in the mine examiner's books concerning garbage in the walkways and erasures on dateboards in February 1983 and inadequate rock dusting on March 13, and March 14, 1984, evoked any specific hostile response it may reasonably be inferred from the evidence of specific hostile responses already noted that these protected activities were not looked upon with favor by Matty. Wadding's complaint on March 12, 1984, to Foreman Learn in which he alleged that Solarz was not doing his job of performing safety inspections may be placed in the same category.

In rebuttal to this circumstantial evidence suggesting that it was motivated by Wadding's protected activities, Tunnelton cites the unprotected circumstances which it asserts provided the sole basis for its discharge of Wadding. This evidence is also presented in the alternative as the operators affirmative defense that it would have discharged

Wadding in any event for his unprotected activities. Pasula, supra.

The First Discharge

As noted Harry Wadding had been employed as a mine examiner or fireboss at the Marion Mine until March 14, 1984. Wadding and the two other firebosses, Michael Solarz and Ellwood (Ben) Selapack, were primarily responsible for examining areas of the mine where the conveyor belts and track haulage were located. The three examiners were responsible for examining the same areas of the mine and worked on separate, rotating shifts--Mr. Wadding's shift followed Mr. Selapack's and Mr. Solarz's shift followed Mr. Wadding's.

Before his midnight shift on March 14, 1984, Wadding requested that foreman Harold Learn have the Union Safety Committee investigate whether the slope had been properly examined by Solarz, the day shift examiner. Ben Selapack, the night shift examiner, had told Wadding that he had not seen any dates for Mr. Solarz in the area of the slope where a new dateboard had been installed. (Footnote.6)

Foreman Learn relayed this information to Frank Scott, the assistant to the mine foreman, who thereafter conducted an investigation with two members of the Union Safety Committee. They examined the slope area as well as other areas of the belt conveyors near the slope, including the 1 North belt. They found what they called an absence of recent and consistent dates in these areas and apparently felt that all three examiners had not been properly performing their jobs. Their findings were reported to mine foreman John Matty at the end of the midnight shift on March 14 and Matty

in turn reported it to his supervisor, Superintendent William Weimer, and to General Manager Gene Jones. Matty and Weimer then conducted their own investigation of essentially the same areas and in later consultation with Jones and Don Marino (Manager of Labor Relations), purportedly concluded that proper examinations might not have been performed. They decided late on March 14, to suspend all three examiners pending a full investigation. The examiners were notified of the suspension later that day.

On Friday, March 16, 1984, a meeting attended by members of management, the Union, and the suspended mine examiners was held to review the matter. At that meeting each of the mine examiners identified particular locations along the belt conveyor in the 3 North area of the mine where they indicated their dates would be found. It was decided that Matty and the Chairman of the Union Safety Committee, James Gradwell, would reexamine this area beginning at 7:00 the next morning to determine whether the dates were in fact located as identified by the mine examiners.

Matty and Gradwell thereafter inspected the 3 North belt area on March 17, and purportedly found no dates in the areas identified by the mine examiners and purportedly found a pattern of dates and times from which they concluded that the area had not been properly examined by any of the three examiners. On Tuesday, March 20, 1984, each of the mine examiners was accordingly suspended with the intent to discharge. The discharge letters were prepared by Marino and signed by Weimer. The letter to Wadding reads as follows:

> In accordance with Article XXIV--"Discharge Procedure" of the 1981 National Bituminous Coal Wage Agreement you are hereby notified that your suspension on 3/15/84 is converted to a SUSPENSION WITH INTENT TO DISCHARGE for failure to make proper examinations as prescribed by Law and Company directives. You also failed to sign and date examinations for No. 1 North belt and No. 3 North belt, which is required as part of your daily job assignment.
>
> Failure to make proper examinations has resulted in a Federal citation being issued, but more importantly, has placed the well being of the mine and all mine employees in jeopardy.
>
> In accordance with Article XXIV, Section (b) "Procedure", you may request a meeting with Mine Management after 24 hours but within 48 hours of this notice.
>
> During this period you are not to be on or about Tunnelton Mining Company property without prior

> approval by me, or you may be charged with unlawful trespassing.(Footnote.7)

Within the framework of credible evidence presented I find that Mr. Wadding did not in fact properly perform his duties as a mine examiner on March 12, 1984 and that this proffered non-business justification for his discharge was not a pretext. While I find little substance to support Tunnelton's claim that Wadding was required by law or company policy to initial and date specific locations other than dateboards (Footnote.8) I find that the credible evidence supports its claim that two of the dateboards had been notated by Wadding on March 12, 1985, with times too close to have physically permitted the required examination on that date.

It is not disputed that Wadding's examination route on March 12 would have taken him from 3 North drive dateboard to the 3 North tail, from the 3 North tail to the 3 North drive and from the 3 North drive along the track to 1 North. While most of this trip could have been made in a vehicle, there were several derails and a set of air lock doors which required dismounting from the vehicle to throw the derail or open the doors, mounting again to pull the vehicle ahead, dismounting again to rethrow the derail and remounting the vehicle again. 600 feet of the trip would also have been by foot in a low area of the mine. All this was to be done while conducting an examination.

Wadding's notations for March 12, indicate that he was at the 3 North Drive at 11:49 p.m. and at the #35 Dateboard

near 1 North at 11:55 p.m., only six minutes later. The dateboards showed that on the next day Wadding performed the same examination in 15 minutes and the other examiners did it in 18 to 20 minutes. Matty also performed a test run at a "safe speed" over the same route but with another person to throw derails and open the doors and found that without performing any examinations it took 12 minutes. Wadding does not in this case seem to disagree that a proper examination could not be done in six minutes but defends by claiming that the times he noted on the dateboards i.e. 11:47 p.m., 11:49 p.m., and 11:55 p.m. were not the precise times of his examination but were only rough estimates. If the times had been rounded off to the nearest 5 or 10 minutes that argument might carry some weight. When, however, as in this case, the times are reported down to the precise minute, Wadding's proffered explanation does not ring true.(Footnote.9) Mr. Wadding's credibility on this issue is further undermined by his overall loss of credibility in denying the trespass incident, discussed, infra, contrary to the testimony of three disinterested eyewitnesses who knew Wadding.

Tunnelton's rather harsh response to the three mine examiner's apparent deficiencies must also be considered in the context of several events that preceded the discharge action. Shortly before the discharges there had been a fatal explosion at Greenwich Collieries, another mine controlled by the same management as Tunnelton. Federal and state investigations were continuing at the time of the incident at bar and there were allegations that improper mine examinations had caused the explosion. In addition, a citation had been issued to Tunnelton on March 15 (by an inspector involved in the Greenwich investigation) for an inadequate mine examination. Tunnelton officials were apparently also then aware of another fatal explosion that occurred in July 1983 that was also caused by improper examinations. Accordingly, Tunnelton officials were clearly under immediate pressure, if not already obligated, to see that the mine examiners were properly performing their critical duties. Finally, shortly before Wadding's discharge Tunnelton had discharged a foreman for having failed to properly report a mine examination. It is understandable under these circumstances that management may have felt compelled to apply similar harsh treatment to the three mine examiners herein.

Three other factors are also persuasive indicators that the proffered non-business justification was not a pretext.

The first is that while mine foreman John Matty was the person alleged to have been motivated to retaliate against Wadding, the decision to discharge was also made by at least four other mine officials not shown to have had the same knowledge of Wadding's protected activities. The second factor is that the union safety committee, after having participated in the investigation of the incidents, agreed that Wadding had failed to properly perform his examinations. The third factor is that all three mine examiners were given the same punishment and there is insufficient evidence to suggest that there had been retaliation against the other two examiners for any protected activity. In other words there is no evidence that Wadding was singled out for disparate treatment. Under all the circumstances I find that Tunnelton did indeed have a plausible non-protected business justification for Wadding's discharge.

Within this framework of evidence I conclude that Tunnelton was indeed not motivated in any part in its first discharge action by any of Mr. Wadding's protected activities. Pasula, supra. While some evidence does exist that could support an inference of a nexus between Wadding's safety complaints and his discharge, I find that Tunnelton has affirmatively defended by proving that Wadding would have been fired in any event solely on the basis of his deficient mine examination. Pasula, supra.

The Second Discharge

A second discharge action was brought against Wadding on March 22, 1984 based on an alleged trespass on mine property. The alleged trespass occurred on the March 17, midnight shift, the night before Matty and Gradwell were to reinspect the mine to determine whether the examiners had been placing dates of inspection as required. Tunnelton contends that Wadding returned to the mine that night to fill in his initials and dates where he had previously failed to perform these tasks in the areas to be inspected the next day.

Foreman Learn and three union employees, Jerry Kelly, John Lupyan, and Delvin Bartlebaugh, were outside the mine portal during the night of March 17, when they encountered a trespasser. The trespasser was not caught that night but on March 19, officials of the local union approached Weimer on behalf of the three union employees indicating that the employees could identify the trespasser. They identified him as Wadding.

The factual analysis and conclusions of arbitrator Thomas Hewitt in his July 1984 decision (Ex R-18) upholding Wadding's discharge for trespass are entitled to significant weight. Pasula, supra, Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (1984). The same factual issue was specifically

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addressed by the parties therein and was decided by a qualified arbitrator on the bases of an adequate record. Hollis, supra. In any event, based on my own de novo review of the record I find the positive eyewitnesses testimony of those three miners, who knew Wadding and who would clearly have preferred not to have testified against a co-worker and union brother, to be unimpeached. Considering this incident in the context of previous disciplinary action against Wadding, as did arbitrator Hewitt, I find that Tunnelton did indeed have adequate non-protected business justifications for this second discharge action.(Footnote.10) I further find that under the circumstances, Tunnelton was not motivated by Wadding's protected activities in discharging him on this occasion. In any event I find that Tunnelton has affirmatively defended since I am convinced that it would have discharged him for this non-protected reason alone. Pasula, supra.

Accordingly, this complaint of discriminatory discharge is denied and this case is dismissed.

Gary Melick
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 Section 105(c)(1) of the Act provides in part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any coal or other mine subject to this act because such miner ... has filed or made an complaint under or related to this act, including a complaint notifing the operator or the operator's agent, or the representative of the miner at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this act ... or because of the exercise of such miner ... on behalf of himself or others of any statutory right afforded by this act.

~Footnote_two

2 The duties of mine examiners under applicable state law are set forth in 52 PA.CONS.STAT. 701-228.

~Footnote_three

3 At separate arbitration proceedings Selapack's discharge was reversed, Solarz' discharge was modified to a warning and Wadding's first discharge was modified to a 90-day suspension. Wadding's discharge based on the trespass charges was upheld in

subsequent arbitration proceedings.

~Footnote_four

4 Indeed the Complainant produced no evidence to show that his complaint (about the failure of fireboss Solarz to have performed his inspections) on March 12, 1984, to state mine inspector Monaghan and to union safety committeeman Gradwell were known to Tunnelton officials. Without such evidence there is of course no basis to find that Tunnelton was motivated by those specific complaints. It is noted however that essentially the same complaint was also made on that date to Harold Learn, a Tunnelton foreman.

~Footnote_five

5 It was one of the legally required duties of the mine examiners to report health and safety hazards in the mine examiner's (fireboss) books after their inspections.

~Footnote_six

6 Although the parties agree that "dateboards" as such were not required by state or Federal Law, the mine operator in this case had provided such "dateboards" (made from old pieces of conveyor belt) in places required to be inspected by the mine examiners. According to company policy the mine examiners were to sign the dateboards and "any other place also needed". Those "other places" were never specified and although both Federal and state authorites had inspected the mine there is no evidence that they required any areas, other than where dateboards were located, to be initialed. The required information was placed on the dateboards with chalk and unauthorized erasures had been a longstanding problem. Company officials admittedly had been unable to correct this problem. Indeed, acting superintendent John Matty conceded at one point that because of the possibility of erasures he could not prove that an examiner had not placed his initials and date on a particular dateboard. The Federal regulatory standard at 30 C.F.R. 303(a) sets forth the areas to be so inspected and requires the mine examiner "to place his initials and the date and time at all places he examines."

~Footnote_seven

7 After the 24-48 hour meetings the suspensions with intent to discharge were converted to discharges. Grievances were filed in each case and arbitrated separately. As noted, Selapack's discharge was reversed, Solarz's discharge was modified to a warning and Wadding's was modified to a 90-day suspension. Arbitrator Marvin Feldman found that Wadding had not performed his examinations according to law and, based in part on Wadding's prior disciplinary record, warned that further "substandard activity" would result in a discharge.

~Footnote_eight

8 At hearing Tunnelton claimed in this regard that there

were four locations that Wadding had failed to initial and date but none of those locations had dateboards. The evidence does not establish that company policy required that any specific area other than dateboards be initialed and dated by the mine examiners. There was, moreover, a recognized problem of unauthorized erasures and illegibility of the chalk notations made by the examiners and on one occasion Matty had acknolwedged that because of those problems he could not prove the examiners had not done their job. I also observe that the Pennsylvania Bureau of Deep Mine Safety investigated this precise claim and found no violations of state law in connection therewith (Ex CX-12).

~Footnote_nine

9 While the Pennsylvania Bureau of Deep Mine Safety found that no violations of state laws had been committed by the mine examiners it is not apparent from that determination that the Bureau considered the specific issue of the timing of Waddings dateboard notations in relation to the impossibility of performing the examinations within the noted times (Ex CX-12).

~Footnote_ten

10 Tunnelton conceded at hearing that Wadding's alleged theft of a miner's belt and hardhat could not be proven and accordingly is not considered herein as a basis for Wadding's discharge.