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J.W. MACKEY JR v. CONSOLIDATION COAL

J.L. CLEGG v. CONSOLIDATION COAL

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JAMES W. MACKEY, JR.,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEVA 85-84-D
MSHA Case No. MORG CD 85-6

CONSOLIDATION COAL COMPANY,
RESPONDENT

Ireland Mine

JEFFREY L. CLEGG,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEVA 85-86-D
MSHA Case No. MORG CD 85-8

CONSOLIDATION COAL COMPANY,
RESPONDENT

Ireland Mine

DECISION

Appearances: Thomas Myers, Esq., Shadyside, Ohio, for
Complainants; Brann Altmeyer, Esq., Wheeling,
West Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Each of the Complainants filed a complaint with the Commission alleging that he was discharged by Respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). Respondent filed answers and motions to dismiss on the ground that the Respondent was not served with copies of the complaints. The motions were denied. On motion of Respondent, the two cases were consolidated by order issued April 4, 1985, because they grew out of the same facts, and involved the same witnesses and the same legal issues. Pursuant to notice, the case was heard in Wheeling, West Virginia on April 22 and 23, 1985. James W. Mackey, Sr., James W. Mackey, Jr., Jeffrey L. Clegg, Gerald L. Stevens and Paul Haines testified on behalf of complainants; Glen Curfmon, Richard W. Fleming, John H. Snyder and George Carter testified on behalf of Respondent. Complainants and Respondent have filed posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

MOTION TO DISMISS

At the commencement of the hearing, Respondent moved to dismiss on the ground that neither of the complaints stated a cause of action under section 105(c) of the Act. For the purposes of my ruling on the motions, the parties agreed that complainants are alleging that they were discharged in retaliation for a disagreement between Federal Inspector James Mackey, Sr., father of one of the complainants, and Respondent's management, over a proposed noise reduction program. The issue therefore is whether a miner is protected under 105(c) from retaliation by a mine operator because a Federal Inspector was carrying out his duties. Respondent argues that the miners here were not engaged in any "protected activity," nor were they exercising any "statutory right afforded by the Act." But surely one of the most basic rights a miner has under the Act is the right to have federal mine inspectors conduct their inspections free from any threat or fear of retaliation or coercion. This is a case of first impression, and the unique facts alleged are unlikely to be duplicated in other cases: a mine operator attempts to show his displeasure over the official actions of an inspector by discharging the inspector's son, a miner at the subject facility. I conclude that this states a cause of action under section 105(c), which protects the rights of miners to have federal inspections free from fear or concern that the mine operator may retaliate against miners for actions of inspectors. The motion to dismiss is DENIED.

FINDINGS OF FACT

1. On October 1, 1984, and prior thereto, Respondent was the owner and operator of an underground coal mine in Marshall County, West Virginia, known as the Ireland Mine.

2. On October 1, 1984, and prior thereto complainants James W. Mackey, Jr. and Jeffrey L. Clegg were employed as miners at the Ireland Mine.

3. On July 31, 1984, and prior and subsequent thereto, James W. Mackey, Sr. was employed by the Mine Safety and Health Administration (MSHA) as a Federal Mine Inspector. He is the father of complainant James W. Mackey, Jr. During the year 1984, Mr. Mackey, Sr. was assigned to perform a health inspection, including a consideration of a noise Reduction Plan at the subject mine.

~979

4. On July 31, 1984, Inspector Mackey met with John Snyder, Superintendent of the Ireland Mine, to go over a proposed Noise Conservation Plan drawn up by the company for the longwall section of the mine.

5. The Plan proposed that a noise barrier be erected on top of the longwall to reduce the noise to 90 decibels or less. The plan further stated that if the mine noise barrier became damaged, or if the coal height was so low that it could not be used, it would be removed.

6. Inspector Mackey told Mr. Snyder that he could not recommend approval of the plan unless it stipulated that the longwall operator stay 3 or 4 "chocks" above the longwall plow when cutting. This would keep the noise level down to about 90 decibels even if the barrier was damaged or destroyed.

7. Snyder objected to the suggested revision and said: "Well, I spent \$6000 dollars and six months work, working on that27 I am not going to do it." (Tr. 23) The inspector believed that Snyder was very upset.

8. Inspector Mackey recommended that the Plan be disapproved, and it was disapproved by the MSHA District Manager.

9. A new plan was proposed reflecting the changes suggested by Inspector Mackey. This plan was presented to Inspector Mackey by Respondent's General Superintendent Becker. Snyder was not present at the meeting. The plan was approved, and has remained in effect at the mine.

10. On October 1, 1984, James W. Mackey, Jr. was employed at the mine as a bolter helper, on the midnight shift. He had worked at the Ireland Mine for 16 years and 8 months. He was a member of Local 1110, United Mine Workers of America.

11. On October 1, 1984, Jeffrey L. Clegg was employed at the mine as a roof bolter, on the midnight shift. He had worked for Respondent 14 years and 8 months. He was a member of Local 1110, United Mine Workers of America. Clegg was a certified electrician, and had worked for Respondent as a mechanic before he was laid off. He was called back as an unskilled laborer some time prior to October 1, 1984.

12. On October 1, 1984, Mackey and Clegg worked under section foreman Glenn Curfmon and were assigned to shovel a walkway, build a crib in front of the No. 2 air shaft, and

~980

perform pumping duties. The first two tasks were performed in the area of the No. 2 air shaft and were completed at about 2:30 or 2:45 a.m. The two men then proceeded in a jeep driven by Clegg to check and make minor repairs to the pumps along the main line. Curfmon went to a different area of the mine on other duties.

13. Mackey and Clegg split up at about 2:55 a.m., Mackey to do pumping in the 1 South area, and Clegg to do pumping in the dump area.

14. The area where Mackey proceeded on foot was substantially flooded. He set and primed the pumps while standing in water to his knees. He was not wearing rubber boots and his trousers became very wet. After he pumped out the area, he proceeded toward the portal at about 5:30 a.m. and met Clegg who was on the jeep at the pumphouse.

15. Clegg had gone to the Dump area and had substantial difficulty in priming the pump there. After priming it, he proceeded to two other pumps, got them pumping, checked some others, and proceeded to the portal switch. At about 5:55 he called the dispatcher and told hm he was "in the clear" at the portal switch. He met Mackey and they checked the pumps in the portal area. They decided to wait for Curfmon there because they heard on the jeep radio that he was going to the head of 3 North on his fire boss run.

16. Mackey sat in the portal bus which had a heater in an attempt to dry his clothes. Clegg sat in the jeep, and ate a sandwich and drank coffee.

17. Richard Fleming was the day shift foreman at the River Portal of the subject mine on October 1, 1984. He had held that portion for almost nine years. He arrived at the mine on October 1, 1984 at about 5:00 a.m. in order to make a preshift examination in the 2 South Seals area where his crew was expected to work that morning.

18. Fleming entered the mine and arrived at the top of the supply slope at 5:35 a.m. He preshifted the area along the slope as he proceeded toward 2 South Seals. He decided to get a jeep and walked to the portal switch. At about 6:07 a.m. he arrived at the area where Mackey and Clegg were in the parked vehicles.

19. As he approached the jeep, Fleming said he heard the occupant snoring. He found Clegg lying on the jeep with his feet crossed. He tapped the bottom of Clegg's foot, but there was no response. Fleming said he then heard a noise

~981

coming from the portal bus. He walked to the bus and found Mackey asleep inside the bus. He returned to the jeep, tapped Clegg's foot and Clegg woke up and began talking about a defective pump. Mackey emerged from the bus and said he was not asleep.

DISCUSSION

Both Mackey and Clegg denied that they were sleeping. Both assert that they saw Fleming approaching their vehicles shortly after 6:00 a.m. and that Fleming was startled when Clegg spoke to him. Complainants also argue that it would not have been possible for them to be sleeping when Fleming arrived, since Clegg was seen by Foreman Curfmon at 5:39 a.m. and called the dispatcher at about 5:55 a.m. Were the complainants sleeping at work? An answer to this question depends in large part on an assessment of the witnesses' credibility. The testimony of Mackey and Clegg was not inherently incredible, but they have an obvious motive to deny that they were sleeping. I reject the argument that it would have been impossible, given the time factor, for Clegg and Mackey to have been asleep when Fleming came upon them. Between 5 and 10 minutes elapsed between the time complainants completed their pumping duties and sat in the vehicles, and the time that Fleming came upon them. In view of the clear and detailed testimony of Fleming, I conclude that he could not have been mistaken, nor could his testimony be explained by the fact that his senses were dulled by medication. The only remaining explanations for his testimony are (1) complainants were asleep as he testified, or, (2) Fleming was lying. No reasonable motive has been suggested for Fleming to have fabricated his testimony. The testimony of Paul Haines on rebuttal that Fleming told him in a conversation following the arbitration hearing that "he [Fleming] never caught Jim Mackey sleeping. He said that he went up and he said something to Clegg and Clegg yelled real loud at Jim and Jim Mackey came scurrying out of the portal bus in front of them" (Tr. 574), reflects on the credibility of Fleming's testimony to some extent, but I am convinced that he was basically telling the truth. I conclude on the basis of all the testimony that in fact Fleming saw both Clegg and Mackey asleep in or on the vehicles at about 6:05 a.m. October 1, 1984.

20. Fleming told Mackey and Clegg that they were relieved of their duties for sleeping on company time. He led them from the mine at 6:18 a.m. and told them they would have to report to the superintendent before returning to work.

~982

21. At about 8:30 or 9:00 a.m. on October 1, 1984, Superintendent Snyder talked to Mackey and Clegg. He later talked to Fleming and George Carter of the Industrial Relations Department. Carter and Snyder went underground and walked the area Fleming had travelled on the morning of October 1. At 9:00 a.m. on October 2, 1984, Snyder gave each of the complainants a letter notifying them that they were relieved of their duties and that the company intended to discharge them.

22. Complainants filed grievances under the collective bargaining contract. The grievances went to arbitration and the arbitrator denied the grievances and upheld the discharges in a written decision issued October 23, 1984.

23. Fleming was not aware of the dispute between Snyder and Inspector Mackey at the time he relieved complainants of their duties for sleeping.

24. A notice was posted on the mine Bulletin Board on January 7, 1980, following an arbitrator's decision regarding company rules. The notice reads as follows:

Employees are hereby placed on notice that neglect in performance of assigned duties or sleeping on company time are dischargeable offenses. Any employee found neglecting to perform assigned duties or sleeping on company time will be subject to suspension with intent to discharge.

25. There had been incidents prior to the posting of the above notice in which Respondent's employees were charged with sleeping on company time and were not discharged.

26. Clegg and Mackey had generally good work records prior to the October 1, 1984 incident.

ISSUE

Whether complainants were discharged in violation of rights protected under the Act?

CONCLUSIONS OF LAW

I. Complainants and Respondent are protected by and subject to the provisions of the Act, complainants as miners, and Respondent as the operator of the Ireland Mine.

II. PROTECTED ACTIVITY

I have already concluded, in denying the motion to dismiss, that Complainants are protected under the Act from retaliation against them for actions of Federal Mine Inspectors in carrying out their inspection duties.

III. ADVERSE ACTION-RESPONDENT'S MOTIVATION

Complainants were discharged ostensibly for sleeping in the mine during working hours. They claim that the discharge was in fact related to the disagreement between Respondent's Superintendent and an MSHA Inspector, who happened to be the father of one of the claimants. If the adverse action was motivated in any party by the protected activity, a prima facie case of discrimination is made out. *Secretary/Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir.1981); *Secretary/Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981). Here, there is no direct evidence that Respondent's discharge of complainants was motivated in any part by the disagreement between Superintendent Snyder and Inspector Mackey. The two incidents are relatively remote in time (more than 2 months apart), and the alleged motivation seems to me inherently unlikely under the circumstances disclosed in this record. I accept the testimony of Mr. Fleming that he was completely unaware of the dispute between Snyder and Mackey, Sr. which took place two months previously, when he took complainants from the mine and accused them of sleeping on company time. Although the actual decision to discharge was made by Snyder, it was based on Fleming's statements. I conclude that complainants have failed to establish that their discharges were motivated in any part by the activity protected under the Act. Therefore, they have failed to establish a prima facie case of discrimination under section 105(c).

IV. UNPROTECTED ACTIVITY

An operator may rebut a prima facie case of discrimination if it proves that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action for the unprotected activities alone. The operator bears the burden of proof with respect to these matters which are affirmative defenses. See *NLRB v. Transportation Management Corp.*, 76 L.Ed.2d 667 (1983); *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir.1983). Since I have found (Finding of Fact No. 19) that complainants were found

~984

sleeping on company time, I would conclude that even if complainants had established a prima facie case of discrimination, Respondent has rebutted it by showing that it would have discharged them for the unprotected activity of sleeping at work.

Whether the penalty exacted by the company (discharge) was justified under the collective bargaining contract, or whether it was too harsh, are matters which were decided by the arbitrator adversely to the complainants, and are not matters for Commission review. I conclude on the basis of the entire record that Complainants have failed to establish that they were discharged in violation of section 105(c) of the Act.

ORDER

Based upon the above findings of fact and conclusions of law, the complaints of James W. Mackey, Jr. and of Jeffrey L. Clegg and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge