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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
ROBERT RIBEL,
COMPLAINANT
v.

DISCRIMINATION PROCEEDING
Docket No. WEVA 84-33-D
MSHA Case No. MORG CD 83-18
Federal No. 2 Mine

EASTERN ASSOCIATED COAL
CORPORATION,
RESPONDENT

SUPPLEMENTAL DECISION ON THE MERITS

Before: Judge Koutras

On June 18, 1985, the Commission remanded this matter to me for consideration, and its remand order states in pertinent part as follows:

[T]he merits portion of this case is remanded to the judge for the limited purpose of making specific findings of fact, along with any credibility determinations necessary to resolve key, conflicting testimony, and for an analysis of those findings consistent with established Commission precedent. 30 U.S.C. 823(d)(2)(C). On remand, the judge is directed to analyze in detail whether a prima facie case of discrimination was established. In particular, the judge is to determine what actually occurred at the August 5, 1983 meeting between longwall coordinator Michael Toth and the miners of the midnight shift, and that meeting's relationship, if any, to the allegation that the decision to suspend Ribel with intent to discharge was a violation of section 105(c).

Supplemental Findings and Conclusions

The record in this case establishes that Mr. Ribel, along with several of his co-workers, was the focal point for an on-going dispute with mine management with regard to

~1060

the issue of "double cutting" coal on the longwall section. Mr. Ribel took the position that such a practice was inherently unsafe, and mine management took the position that it was safe. Mine safety committeeman James Merchant confirmed that Mr. Ribel and the other complaining miners spoke to him about the double cutting in May, 1983, and that meetings were held with Michael Toth, the longwall coordinator, and representatives of the UMWA, at which the issue was discussed. Mr. Merchant also alluded to discussions with MSHA several years earlier over the issue of double cutting.

As a result of the dispute concerning the issue of double cutting, Mr. Ribel and two of his co-workers (Kanosky and Wells), informed their supervisor and foreman, Jack Hawkins, that they would not double cut anymore. As a result of this, a meeting was held with the safety committee and mine management, and the decision was made by Mr. Hawkins' supervisors that the complaining miners did not have to double cut. Subsequently, in early May, 1983, Mr. Hawkins met with the recalcitrant miners, including Mr. Ribel, and in an effort to convince them to change their minds about double cutting, he purportedly discussed several "options" with them. Subsequent allegations by the employees that these "options" included threats by Mr. Hawkins to take away certain work-related privileges, i.e., overtime, favorable work assignments, led to a May 31, 1983, discrimination complaint to MSHA by Mr. Ribel and the other miners. Although Mr. Hawkins denied giving the employees any "options," and denied threatening them, he conceded that the issue of "double cutting" was frequently discussed with his crew as early as March and April, 1983, and that he had spoken with Mr. Ribel and the other miners on at least 10 or 15 occasions about the matter.

Mr. Hawkins candidly admitted that he spoke with Mr. Ribel and the other miners on many occasions about their initial refusal to perform double cutting, and that he did so out of concern that production on his shift was suffering and that his shift was far below the production of other shifts where double cutting was taking place. Although Mr. Hawkins denied that he ever threatened Mr. Ribel, or gave him "options" in connection with his refusal to double cut, Mr. Hawkins' continuous contacts and conversations with his crew over this subject supports a conclusion that coal production was uppermost in Mr. Hawkins' mind. Since Mr. Ribel was instrumental in curtailing production on his shift by his refusal to double cut, and since Mr. Ribel obviously influenced Mr. Wells and Mr. Kanosky to join him in his protests, as well as the discrimination complaint filed against Mr. Hawkins, one can reasonably conclude that

~1061

Mr. Ribel did not ingratiate himself to Mr. Hawkins, and that Mr. Hawkins was not too enchanted with Mr. Ribel. As a matter of fact, Mr. Hawkins testified that his goal of 300 carloads of coal production was not being met, and that everyone else on his crew except for Mr. Ribel, Mr. Wells, and Mr. Kanosky were "willing to go along with me" (Tr. 484).

Mr. Hawkins testified that he had discussed the fact that his crew was the only crew which did not engage in double cutting with both his supervisor and the mine safety department (Tr. 553). He conceded that production was "number one in my book" (Tr. 556), and that mine management expected him to "motivate" his crew to get them to double cut coal so as to increase production (Tr. 601). Mr. Hawkins also confirmed that he discussed the double cutting issue with MSHA Inspector Cross, the individual who conducted the discrimination investigation (Tr. 621).

In addition to the complaints over the question of double cutting, Mr. Hawkins alluded to a complaint and a request for an investigation by the safety committee concerning two face shields being pulled down at the same time, and while he was not certain whether Mr. Toth spoke to an inspector about the incident, Mr. Toth made a decision to discontinue the practice (Tr. 622). Mr. Hawkins also stated that the union's complaints to a state mine inspector, including complaints about the manner in which he was firebossing the section, resulted in the inspector visiting the mine on August 4, 1983, and interviewing Mr. Hawkins, members of his crew, and Mr. Toth. Although Mr. Hawkins testified that the state inspector found no wrong-doing on the part of mine management, he confirmed that the inspector "didn't like being drug in on it" because the complaints were "just a management-union conflict" (Tr. 624). The inspector suggested that a meeting be held to resolve their differences, and the meeting held on the midnight shift on August 5, 1983, was for that purpose (Tr. 625).

As the longwall coordinator, Mr. Michael Toth was responsible for all production and safety on the longwall section (Tr. 633), and he would also have occasion to review production delays and loss of production during any particular shift (Tr. 640).

Mr. Toth admitted that he was aware of the problems between Mr. Hawkins and his crew, and that he had "a definite interest" in these problems. He confirmed that he met "many times" with the crew and with the safety committeemen

~1062

about complaints which were made over alleged unsafe practices (Tr. 697-698). Although Mr. Toth denied that he was aware of any discussions between Mr. Hawkins and his crew concerning the issue of double cutting, and could not recall any specific complaints by the safety committee over that issue, he conceded that the subject had been "talked about several times" (Tr. 638). He also confirmed that he was aware of the fact that Mr. Ribel had filed a discrimination complaint with MSHA on May 31, 1983 (Tr. 665), and that everyone at the mine was aware of the problems between Mr. Hawkins and his crew (Tr. 665).

Mr. Toth testified that the August 5, 1983, meeting was the result of a request made by a state mine inspector that Mr. Toth meet with Mr. Hawkins and his crew to resolve the "bickering" or "personal grudge" which existed between Mr. Hawkins and members of his crew (Tr. 646). Although Mr. Toth denied threatening anyone at the meeting with the loss of their jobs, he conceded that it was possible that a miner could be disciplined or lose his job if he made groundless safety complaints against his foreman, and that taken in this context, he admitted that he may have said something about job losses (Tr. 672). Mr. Toth also admitted that he was somewhat chagrined at Mr. Wells for laughing or smirking while he was speaking, and that he remarked to Mr. Wells "Danny, don't think for one minute that you can't be on the shit end of the stick" (Tr. 650). After making this remark, Mr. Toth abruptly left the meeting in charge of Mr. Hawkins, with a remark to Mr. Hawkins that maybe "he could do some good with them" (Tr. 650).

Four of the miners who were at the August 5th meeting testified that Mr. Toth made the remarks attributed to him. Mr. Wells testified that Mr. Toth mentioned the fact that he was getting tired of all of the safety complaints and that if they did not stop, miners could end up losing their jobs (Tr. 221-222). Mr. Kanosky believed that Mr. Toth was directing his remarks to him, as well as to Mr. Ribel and Mr. Wells (Tr. 289).

Mr. Reeseman testified that Mr. Toth became upset at Mr. Wells during the meeting and remarked to Mr. Wells that "all of this petty stuff that has been going out to the safety department, every day, and every day, is going to stop, or you will be next" (Tr. 406). Mr. Hayes testified that Mr. Toth remarked to Mr. Wells that "he would be next" and would "come out on the shitty end of the stick" over the safety grievances which had been filed on the section (Tr. 420).

Given all of the aforementioned facts and circumstances, I conclude and find that it is abundantly clear from this record that both Mr. Toth and Mr. Hawkins were hostile towards Mr. Ribel because of his prior safety and discrimination complaints over the issue of double cutting. I also believe that it is clear from the record that the animosity which was displayed by mine management (Toth and Hawkins), was the direct result of Mr. Ribel's resistance to the double cutting of coal, his leadership role in convincing at least two other members of his crew to join in on his protests, and his filing of a discrimination complaint against Mr. Hawkins. It also seems obvious to me that Mr. Ribel's activities in this regard impacted on mine production, placed Mr. Hawkins in the position of being the only section foreman whose crew did not produce adequately, and caused Mr. Toth daily operational problems, all of which adversely impacted on an otherwise smooth mining operation.

Although I ultimately held in Docket No. WEVA 84-4-D, that Mr. Ribel and the other complaining miners had failed to establish a prima facie case with respect to their discrimination complaint in connection with the double cutting of coal issue, Mr. Ribel's right to complain about that practice, including his right to file safety or discrimination complaints, remains intact and protected, and mine management may not retaliate or otherwise discriminate against him for exercising his rights in this regard.

Mr. Toth discovered that the telephone wire had been cut after he instructed a mechanic to check the telephone because it had not been paging. Upon opening the phone, the mechanic discovered that the wire appeared to have been cut, and he so informed Mr. Toth. Mr. Toth immediately went to the head gate to summon Mr. Ribel, and he brought him to the telephone station and asked him to look at the telephone. In the presence of at least two mechanics (Toothman and Foley), Mr. Toth asked Mr. Ribel--"Rob, what's that look like to you" (Tr. 661). Mr. Ribel responded that it appeared that the phone wire had been cut, and Mr. Toth agreed with him (Tr. 661). Mr. Toth then concluded that Mr. Ribel had cut the wire, and his conclusion was based on his belief that Mr. Ribel was the only person who had an opportunity to do so.

Given the background of animosity and acrimony which obviously existed between Mr. Ribel and mine management, I find it doubtful that Mr. Ribel would openly make himself vulnerable to discharge by cutting a telephone wire while his adversaries Mr. Toth and Mr. Hawkins were present on the

~1064

section. Further, given the fact that Mr. Toth was personally checking on the telephone system, and in view of management's suspicions that miners were deliberately sabotaging the telephones, I find it doubtful that Mr. Ribel would place himself in the position of being "fingered" as the responsible party. Assuming that Mr. Ribel was a party to the prior acts of alleged telephone sabotage, since the culpable party or parties had not as yet been discovered, I find it rather unlikely that Mr. Ribel would do anything to cast suspicion on him. Since Mr. Ribel had an otherwise clear employment record, and there is no indication that he did not perform his job properly, or had ever been in any trouble on the job, I find it doubtful that he would risk his livelihood by sabotaging a telephone while his bosses were on the section.

Mr. Toth has conceded that his conclusion that Mr. Ribel was the person who cut the wire was based on "circumstantial evidence." Mr. Toth's rationale for pointing the finger at Mr. Ribel was his belief that Mr. Ribel was the only person who had access to the phone and the opportunity to cut the wire. My previous finding was that this was not so, and that other individuals who were present on the section had ready access to the telephone and also had an opportunity to cut the wire in question.

Although it may be true that at the time Mr. Toth confronted Mr. Ribel about the damaged telephone wire, Mr. Toth believed that he had the "right man," I believe that Mr. Toth's conclusion that Mr. Ribel was the guilty party was influenced in part by Mr. Toth's hostility and animosity towards Mr. Ribel and certain members of his crew. I believe that this hostility was the result of the disruptive and protracted safety confrontations between Mr. Hawkins and his crew, and the fact that Mr. Ribel and several of his co-workers chose to make safety and discrimination complaints over the practice of double cutting and other mining practices.

I believe that one can reasonably conclude that Mr. Toth considered Mr. Ribel to be a disruptive force among his crew, particularly in light of the decreased production which resulted from Mr. Ribel's leadership role in refusing to double cut. Further, shortly before the discovery of the cut wire, Mr. Toth had abruptly left a meeting with Mr. Ribel's crew after being provoked by Mr. Wells. The remarks attributed to Mr. Toth against Mr. Wells, which I believe were made, were construed by several members of the crew as

~1065

threats to their jobs. Although Mr. Toth denied that he made direct threats, he admitted making some remarks about possible disciplinary action against miners who made unfounded safety complaints. Given the background of conflict and hostility which existed, I can understand why some of the crew members may have viewed Mr. Toth's comments as job threatening. I can also understand Mr. Toth's frustration over Mr. Hawkins' inability to control his crew or to get more production out of them, and the frustration and anger that he obviously felt over his confrontation and words with Mr. Wells. Given all of this turmoil, I believe that Mr. Toth seized upon the opportunity to blame the wire cutting on Mr. Ribel, and rather than conducting a thorough investigation into the matter, he made a rather cursory decision that Mr. Ribel was the guilty party. In making that decision, I believe that Mr. Toth was motivated in part by his hostility and animosity towards Mr. Ribel, and that by singling him out for suspension and discharge, Mr. Toth somehow hoped to end all of the conflict which had directly affected his operation.

George A. Koutras
Administrative Law Judge