

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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1985

ROCCO CURCIO, : DISCRIMINATION PROCEEDING
Complainant :
: Docket No. PENN **84-208-D**
v. :
: Emilie No. 1 Mine
KEYSTONE COAL MINING :
CORPORATION, :
Respondent :

DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C., for
Complainant; William M. Darr, Esq., Indiana,
Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discriminated against in violation of section **105(c)** of the Federal Mine Safety and Health Act of 1977 (the Act) when he was charged with an unexcused absence from work for the time he spent in discussing a safety problem at the subject mine with international union officials. He does not seek monetary relief, but requests that the unexcused absence be removed from his employment record, and that he be reimbursed for the costs and expenses, including attorney's fees, incurred in connection with this proceeding. Respondent contends that **it** was merely enforcing its absentee policy in a nondiscriminatory fashion in assessing an unexcused absence against Complainant.

The case was heard in Pittsburgh, Pennsylvania on December 14, 1984. **Rocco Curcio** and Jerry Duncan testified on behalf of Complainant. Anthony Poloff, James E. Clinger and Edward J. Onuscheck testified on behalf of Respondent. Counsel for both parties requested that post hearing briefs be delayed so that they could be filed in conjunction with briefs due in a subsequent case (Donald C. Beatty, Jr. v. Helvetia Coal Company), involving the same counsel, and the same or similar issues. Since back pay is not an issue, I granted the request. Post hearing briefs were filed by both parties on August 2, 1985.

FINDINGS OF FACT

The important facts in this case are not in dispute. Respondent was at all times pertinent to this proceeding the owner and operator of the Emilie No. 1 Mine, an underground mine in Pennsylvania. Complainant was a miner at the subject mine, a member of the United Mine Workers of America local at the mine, and an elected member of the Safety Committee.

On February 9, 1984, Complainant and fellow-safety committee member Jerry Duncan talked to Mine Foreman Tony Poloff about dusty conditions on the jeep road at 11 butt, first left section in the subject mine. The road was used to transport miners in a jeep and a skid from the track to the working section. Complainant and Duncan suggested that calcium should be put on the road to reduce the dust. Poloff said he would take care of it. The condition was not corrected, and Complainant and Duncan again told Poloff about the problem, but as of February 24, 1984, it had not been taken care of.

On April 9, 1982, Mine Superintendent J. E. Clinger issued what has been termed in this proceeding Respondent's absence control program. The document stated that an employee's absence would not be excused when it "is in the power of the employee to overcome, change, prevent, or arrange otherwise . . .". The document does not specifically refer to absences on union business, or absences due to safety complaints.

On February 22, 1984, a mine communication committee meeting was held **at the** subject mine. This was one of regularly scheduled meetings between management and labor designed to discuss changes in company policy, employee complaints, accidents, employee illness and absences, and other matters. The February 22 meeting was attended by Mine Foreman Anthony Poloff, Superintendent James Clinger, Cleaning Plant Foreman Dan Shafer and the three committeemen of the Emilie Mine, Jerry Duncan, **Rocco Curcio** and James Bonelli, and the committeeman at the cleaning plant, Guy Bonelli. The employee representatives inquired about two employees with claims for excused absences to which management representatives replied. The Superintendent told the committee "on trips to Ebensburg, I wouldn't except [sic] anymore slips for excused absents [sic] -- they would have to take a 'contract **day**'." "**Trips** to Ebensburg" referred to trips to Union headquarters on union business. The committee men were told that if they lost time from work they would have to take contract days (personal days, graduated vacation .

days or sick days under the Union contract), or, with the prior permission of the Superintendent, they could change shifts. The union committee personnel told management that they did not agree with what they construed as a change in policy. Complainant had been a **commiteeman** (both mine committee and safety committee) since February 7, 1983. He missed days from work on April 3, 1983, June 8, 1983, June 22, 1983, August 4, 1983 and August 9, 1983 because of meetings at Union headquarters in Ebensburg, Pennsylvania discussing safety issues. In each instance he received an excused absence. In each instance, Complainant had been told in advance that he would be charged with an unexcused absence (an **"A"** day), but in fact he was excused (received a **"B"** day).

On February 24, 1984, Complainant arrived at the mine at about **7:35** a.m. He was scheduled to work the daylight shift (**8:01** a.m. to 4:00 p.m.) as a **beltman**. Jerry Duncan came out of the mine a short time later and was angry because Respondent had not corrected the dust problem on the jeep road. Complainant and Duncan discussed the matter and decided it would be best to seek the advice of the union district officials since talking with management had proved fruitless. Complainant told his shift boss, Joe **Eckman** that he was going to Ebensburg on Union business. Then he and Duncan told Tony Poloff the same thing. Poloff replied that he would have to take an **"A"** day. Complainant did not specifically tell Poloff the nature of the union business he intended to take up at Ebensburg.

At Ebensburg, Complainant and the other committee members met with District UMWA President Paul Gormish, and Vice President Nick Molnar. After a discussion it was agreed that the safety committee should request a **103(g)** inspection by MSHA of the dusty area. On February 24, 1984 a written request for an MSHA inspection of the travel road, first left section, 1 butt, 11 South section and 11 butt was prepared and signed by James Bonelli, Chairman of the Safety Committee. It was delivered to the MSHA office by Bonelli and Complainant. As a result of the request, an inspection was conducted on February 28, 1984. A citation was issued on that date charging a violation of the approved ventilation, methane and dust control plan because of excessively dry and dusty haulage roads -- the haulage road from the end of the track in 1 left, in 1 butt, 11 South section, a distance of about 2500 feet; and from the end of the track at 1 left in 11 butt off 1 **left**, a distance of about 2000 feet. The citation was extended following an inspection on February 20, 1984 and was terminated on March 7, 1984 after a wetting

agent to allay the dust was applied to the affected haulage roads.

When Complainant returned to the mine after the Ebensburg meeting, he took a letter from the UMWA District Vice President asking that Complainant be excused from work on February 24, 1984 because he was in the District office on union business. Respondent, however, charged Complainant with an unexcused absence.

Article XXII of the National Bituminous Coal Wage Agreement of 1981, in effect at Respondent's mine **during the** time relevant to this case, provides in part that if an employee accumulates 6 single days of unexcused absence in a **180-day** period or 3 single days of absence in 30-day period, he shall be designated an "irregular worker" and will be subject to discipline. When an employee absents himself from work for 2 consecutive days without the consent of the employer, other than because of proven **sickenss**, he may be discharged. Article IX of the contract provides that an employee is entitled to **5** days absence per year for sickness, accident, emergency or personal business. Each employee is also entitled to a graduated vacation of up to 13 days per year depending on his or her length of continuous employment (**Art. XIV**).

Bonelli took a graduated vacation day on February 24, 1984 and Duncan did not miss time from work since he was on the midnight shift. Only Complainant received an unexcused absence for the day.'

ISSUES

1. Did Complainant's trip to Ebensburg, and his absence from work constitute activity protected under the Mine Act?
2. If so, was the action of Respondent charging Complainant with an unexcused absence, adverse action for such protected activity?
3. If so, to what relief is Complainant entitled?

CONCLUSIONS OF LAW

Complainant and Respondent are subject to and protected by section 105 of the Act, the former as a miner and a representative of miners, the latter as a mine operator.

PROTECTED ACTIVITY

In a case under the 1969 Coal Act, the Commission recognized the special status of a union safety committee member in bringing safety complaints to the Secretary. Local 1110 UMWA and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979). The Commission found that the **committee** member's leaving work to call a Federal Mine inspector without the employer's permission was protected activity, and that the resulting discipline imposed by the company violated the Act. The 1977 Mine Act was intended to broaden and strengthen the protection against discrimination afforded miners and their representatives. See S. Rep. No. 95-181, 95th Cong., 1st Sess. 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 (1978). Cases under the Mine Act involving safety committee members include Secretary/Mataleska v. Shannopin Mining Company, 4 FMSHRC 2114 (1982) (ALJ) and Secretary/Duty v. Rebel Coal Company, 7 FMSHRC 125 (1985) (ALJ). Both of these cases involved safety committee members who left the job site to investigate or discuss safety problems. In both cases such action was held to be protected activity.

The members of the mine safety Committee are given a special status and added **responsibilities** under the Union Contract (Article III(d)) and under the Act. They are the spokesmen for the miners in safety matters and are responsible for bringing safety concerns to management and to MSHA. Subject to the requirements that their actions be taken in good faith and be reasonable, I conclude that the actions of safety committeemen in bringing safety complaints to MSHA or to the mine operator, or in discussing them with union officials is protected activity. The evidence in the case establishes that the trip to Union Headquarters was taken in good faith to discuss a perceived safety hazard, and that it was a reasonable reaction to that perceived hazard. It was related directly to the filing of a section **103(g)** complaint and a citation. I further conclude that these activities may not be penalized even if they result in time lost from work by the committeemen.

ADVERSE ACTION

Respondent contends that the adverse action complained of here is de **minimis**. I disagree. The policy followed by Respondent could result in discharge, and certainly tends to inhibit or discourage the committeeman from bringing safety

complaints to the union or to MSHA. The penalty -- one day's unexcused absence -- is not great, but it *is* real. I conclude that it is adverse action under the Mine Act. See Lund v. Anamax Mining Company, 4 FMSHRC 249 (1982) (ALJ).

There is no dispute that the activity which I have found to be protected resulted in the action which I have found to be adverse. Therefore, I conclude that Respondent violated section **105(c)** of the Act.

RELIEF

THEREFORE, IT IS ORDERED:


1. The unexcused absence assessed against claimant on February 24, 1984 shall be removed from his employment record, and his absence from work on that day shall **be deemed** excused.

2. Respondent shall cease and desist from enforcing its absentee program against safety committee members in a manner that limits their reasonably bringing safety complaints to management, union or government officials in good faith.

3. Respondent shall pay the costs and expenses (including attorney's fees) reasonably incurred by Complainant in **conection** with the institution and prosecution of this proceeding.

4. Counsel are directed to confer and attempt to agree on the amount due under paragraph 3 above, and if they can agree, to submit a statement thereof to me within 30 days of the date of this decision. If they cannot agree, Complainant shall within 30 days of **the** date of this decision, file a detailed statement of the amount claimed, and Respondent shall submit a reply thereto within 20 days thereafter. This decision shall not be final until I have issued a supplemental decision on the amount due under paragraph 3.

5. Respondent shall post a copy of this decision on a bulletin board at the subject mine which is available to all employees, and it shall remain there for a period of at least 60 days.


James A. Broderick
Administrative Law Judge

Distribution:

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