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D.C. BEATTY JR v. HELVETIA COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DONALD C. BEATTY, JR.,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. PENN 84-205-D

v.

Lucerne No. 8 Mine

HELVETIA COAL COMPANY,
RESPONDENT

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

CORRECTED DECISION

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves issues similar to those in the case of Rocco Curcio v. Keystone Coal Mining Corporation, decided by me on September 27, 1985. The two mine operators are related companies, and counsel for Complainant and Respondent are the same. The cases were briefed together.

Complainant in this case contends that he was discriminated against in violation of the Act when he was charged with an unexcused absence from work for attending an MSHA manager's conference on April 6, 1984. The case was heard in Indiana, Pennsylvania on May 15, 1985. Donald C. Beatty, Jr., Thomas Grove, and Robert J. Schork testified on behalf of Complainant. Robert G. Smith, Kenneth J. Levits and Edward J. Onuscheck on behalf of Respondent. Both parties have filed post-hearing briefs.

FINDINGS OF FACT

There is no important dispute as to the facts in this case. Respondent was the owner and operator of the Lucerne No. 8 Mine, an underground mine, in Pennsylvania. Complainant was a miner at the subject mine, and a member of the health and safety committee at the mine beginning in May 1983.

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The MSHA District Manager called a conference for April 6, 1984 to review eight citations which had been issued to Helvetia. A day or two prior to the conference, Complainant told Robert Smith, Mine Superintendent, that he was going to attend the conference. Smith told him that if he missed work he would be given an unexcused absence. The other two members of the committee intended to attend the conference, but, because of their schedules, were not required to miss time from work.

Respondent was concerned beginning in 1983 about the problem of employee absenteeism caused by union business. On February 27, 1984, Respondent's Vice President of Operations wrote to the President of UMWA District 2, complaining that the "time lost from work for Union business has come from almost no time in the past to a point of now where it is ridiculous at some Locals." The subject was also raised at company-union communication committee meetings.

The District conference was attended by all three safety committee members and lasted from about 9:00 a.m. until noon. Complainant was scheduled to work from 8:01 a.m. and did not report at all. One other committeeman was off, and the third was scheduled to and did work from 12:01 a.m. to 8:00 a.m. Six of the eight citations discussed at the conference were issued by inspectors accompanied by Complainant. Complainant received an unexcused absence for missing work on April 6, 1984.

Article XXII of the National Bituminous Coal Wage Agreement of 1981 provides in part that if an employee accumulates 6 single days of unexcused absence in a 180-day period or 3 single days in a 30-day period, he shall be designated an "irregular worker" and will be subject to discipline. If an employee is absent for 2 consecutive days without consent, other than for illness, he may be discharged. Article IX provides that an employee is entitled to 5 days absence 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 service (Art. XIV).

During 1983, the safety committee members attended four MSHA District Manager Conferences. None of them was charged with an unexcused absence for any of these days. Charging Complainant with an unexcused absence in this case was either "an about face" (Complainant's brief) or "a reinvocation of [a previous] policy" (Respondent's brief).

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MSHA District Manager's Conferences are called pursuant to 30 C.F.R. 100.6, and representatives of the miners are notified of the conferences and permitted to participate. The 3 safety committee members here work in different sections of the mine and have different mining backgrounds.

ISSUES

1. Did Complainant's attendance at the MSHA Manager's Conference and his absence from work constitute protected activity under the Mine Act?

2. If so, did Respondent's act in charging him with an unexcused absence, constitute adverse action for such protected activity?

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

I conclude, following the principles enunciated in *Curcio v. Keystone Mining Co.*, --- FMSHRC ---- (issued September 27, 1985), that Complainant's attendance at the MSHA District Manager's conference was protected activity under the Act. The Act contemplates that miners and especially their representatives take an active role in the effort to make the nation's mines safer places to work. The Act provides (Section 103) that a representative of the miners shall be given the opportunity to accompany the inspector during his inspection and to participate in pre- or post-inspection conferences at the mine. The representative is protected from loss of pay during his participation in the inspection. A miners' representative may request inspections of the mine if he has reasonable grounds to believe that a violation or imminent danger exists. I conclude that it is important for safety reasons that the representatives participate in manager's conferences and that such participation, subject to the limitations that it be reasonable and undertaken in good faith, may not be penalized by the mine operator. See *Secretary/Truex v. Consolidation Coal Company*, --- FMSHRC ---- (issued September 20, 1985), Judge Gary Melick.

ADVERSE ACTION

For the reasons given in my decision in *Curcio*, supra, I conclude that the penalty imposed by Respondent herein--the

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assessing of an unexcused absence day--is adverse action. The activity found to be protected resulted in the action 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 April 6, 1984 shall be removed from his employment record, and his absence 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 reasonable participation in MSHA District Manager conferences concerning citations issued at the mine.
3. Respondent shall pay the costs and expenses (including attorney's fees) reasonably incurred by Complainant in connection 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 20 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