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SOL (MSHA) V. SUGARTREE, TERCO & LAWSON
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APPENDIX A

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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
JAMES CORBIN, ROBERT CORBIN,
AND A.C. TAYLOR,
COMPLAINANTS

DISCRIMINATION PROCEEDING

Docket No. KENT 84-255-D
MSHA Case No. BARB 84-35

Sugartree No. 1 Mine

v.

SUGARTREE CORPORATION,
TERCO, INCORPORATED, AND
RANDAL LAWSON,
RESPONDENTS

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the
Solicitor, U.S. Department of Labor, Nashville,
Tennessee, for Complainants;
Guy E. Millward, Jr., Esq., Barbourville,
Kentucky, for Sugartree Corporation, Hubbs Creek
Morris, Esq., Barbourville, Kentucky for Sadd
Coal Company, Inc., and Terco Incorporated.

DECISION

Before: Judge Melick

This case is before me upon the Complaint by the
Secretary of Labor on behalf of James Corbin, Robert Corbin,
and A.C. Taylor under section 105(c)(2) of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the
"Act," alleging that these miners were discharged from the
Sugartree Corporation (Sugartree) on July 6, 1984, in viola-
tion of section 105 (c)(1) of the Act. (FOOTNOTE 1)

On April 30, 1985, the Secretary sought to amend his Complaint by alleging that Randal Lawson was also a "person" responsible for the claimed unlawful discharge of the three miners and that Terco Incorporated (Terco), Sadd Coal Company, Inc., and Hubbs Creek Corporation were "alter egos" and/or successor corporations to Sugartree and as such were jointly and severally liable for damages suffered by the individual complainants. The Secretary also asserts in his amended complaint that the named business organizations, as successors or "alter-egos" to Sugartree, must reinstate the individual complainants to positions equivalent to the positions they formerly held with Sugartree since Sugartree was no longer in business. Joinder was initially permitted for purposes of consolidated proceedings on the merits and to receive evidence on the Motion to Amend. For the reasons set forth in this decision the Secretary's Motion to Amend is granted so as to allow retroactive joinder of Terco and Randal Lawson as party respondents in this proceeding but is denied as to Sadd Coal Company, Inc. and Hubbs Creek Corporation. Rule 19, Fed.Rules Civ.Proc. applicable by virtue of Commission Rule 1(b), 29 C.F.R. 2700.1(b).

In order for the Secretary to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that the individual complainants engaged in an activity protected by that section and that their discharge or removal from Sugartree was motivated in any part by the 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. Marshall, 663 F.2d 1211, (3d 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 those in the Pasula Case.

The undisputed evidence shows that on the Friday before the 1984 4th-of-July vacation at the Sugartree No. 1 underground mine, James Corbin, the day shift continuous miner operator, reported a problem with the water sprays on the continuous miner to Joe Watkins, the general mine foreman. Upon returning to work on July 5, Corbin found that the water sprays had still not been repaired and, as a result, dust created by the operation of the continuous miner was "hitting the face" and enveloping Corbin and other miners working in the entry. Corbin explained that the miner was of necessity also cutting 2 to 4 inches of rock in the process thereby mixing large quantities rock dust with the coal dust. In addition, the ventilation was insufficient to remove the dust from the work area. The dust was particularly severe to the

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right of the continuous miner where A.C. Taylor and James' bother, Robert Corbin, were working.

Corbin and the others complained about the dust to face boss James Proffit. It is not disputed that the dust was so thick and the visibility so limited that the miners were unable to properly test roof conditions as they progressed and were unable to see the continuous miner as it moved in close proximity to the men. In particular James Corbin was unable to see the other miners working near the continuous miner he was operating thereby making it difficult to avoid hitting them.

Proffit reported these initial complaints by the mine telephone to the outside to Mine Foreman Watkins. Watkins reportedly told the men to correct the problem by clamping off the spray bar. The bar was then clamped but the sprays even then did not work. Corbin testified that he was able to make about nine cuts with the continuous miner before the dust got so bad that he got sick and started "throwing-up." His eyes were extremely irritated and he could see nothing. Corbin again complained to Proffit who again telephoned the complaint to Watkins. Watkins then told Proffit to tell the men to "cut coal or go home". The entire work crew of 7 decided to go home than rather than work under these conditions.

Robert Corbin was working as a jack setter adjacent to the rib on the right side of the continuous miner and only 4 feet from the face. He too complained because of the dust conditions. According to him it was so bad you could not see your out-stretched hand. Even though he wore a painters dust mask his lungs were "burning" from the dust. A.C. Taylor was also working on the right side of the continuous miner that day but as a timberman. According to Taylor the dust was so thick that it filled his eyes, lungs, and nose. He could "neither breathe nor see."

Jerry Bray, then a floating foreman for Sugartree, acknowledged that the conditions were extremely dusty and were therefore hazardous. In particular he found that the right side of the entry was not ventilating properly. Everybody working in the entry was complaining about the dust but the three miners working on the right side were exposed to more dust and were complaining more.

The sprays on the continuous miner were thereafter fixed and the three complainants worked the next day. At the end of the day however, Mine Foreman Joe Watkins issued each a lay-off slip indicating thereon that the men were being "laid-off because of a sharp decline in production".

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According to James Corbin, however, Terry McCreary, then vice president of Sugartree, said they were discharged because they had not run coal the day before. James Proffit the face boss told James Corbin that management wanted to know who was doing the "crying" in the mine and Proffit reportedly told Watkins that it was the "right side" meaning Taylor and the Corbin brothers. James Corbin explained that the right side of the continuous miner was the most seriously affected by the dust because the dust was drawn that way by the ventilation. Robert Corbin also asked Joe Watkins why they were laid-off and Watkins reportedly said that it was because they "wouldn't work in the dust". McCreary also reportedly said they were laid-off because they would not work in the dust.

Mine Foreman Joe Watkins recalled getting calls from the face boss, James Proffit, on the day in question concerning the broken spray bar and the reluctance of the three complainants to work in the dust. He told Proffit to send the men home. Watkins claims that when he handed out the lay-off slips the next day he told the Corbins that he could not tell them why they were laid-off, and that they should see "Cotton" (the nickname for Sugartree president Randal Lawson) for an explanation. Watkins admits however that he told Lawson that it was the men on the right side and specifically James Corbin, Robert Corbin and A.C. Taylor, who were complaining about the dust and refusing to work in it. It was only a short time later that Lawson came back with the lay-off slips for these same three miners. Watkins admits that he and Lawson then also discussed hiring three new men to replace the Complainants. Lawson told Watkins that he would replace them by the next Monday. Indeed a new miner operator and jack setter were immediately hired and several days later another jack setter was hired.

Randal Lawson, president and sole owner of Sugartree at the time of the "lay-offs" admittedly discussed the "lay-offs" with both Joe Watkins, the mine foreman and Mathew Logan, superintendent of operations. Lawson admitted that before he "laid-off" the complainants Watkins told him that those were the three who had been complaining about the excessive dust and that indeed his decision to "lay-off" the complainants was made "because they were the ones that complained". He also admits that he then told Watkins that he would obtain replacements for the three.

Within this framework of evidence it is clear beyond all doubt that Randal Lawson "laid-off" the three complainants on July 6, 1984, based solely on their protected safety complaints and/or their protected refusal to work in the face

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of clearly hazardous conditions.(footnote 2) There is no dispute that the complainants refusal to work under the circumstances was based upon a good faith reasonable believe that the continuance of the work under the conditions presented would have been hazardous. See *Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981). Accordingly both Randal Lawson as an individual and the Sugartree Corporation, for which Randal Lawson was agent, are "persons" who unlawfully discharged the complainants under section 105(c)(1) of the Act. See footnote 1, supra. For the above reasons Randal Lawson was also properly joined as a party respondent by the amended complaint filed by the Secretary. Rule 19, Fed.Rules Civ.Proc.

Fashioning a remedy in this case through the award of damages and reinstatement has been complicated by what must be construed as evasive efforts by Mr. Lawson and his associates. Indeed it appears that on the same day that two of the complainants presented an order of temporary reinstatement issued by the Commission's Chief Judge to representatives of Sugartree, Sugartree ceased mining operations and many of the same principals, supervisors and employees continued mining operations in essentially the same mine under the same MSHA identity number but under the name of Terco. At the time of hearings Sugartree apparently had no assets and was not engaged in any mining activity. The Secretary accordingly has alleged in his Amended Complaint that an appropriate remedy of damages and particularly of reinstatement cannot be fully obtained without the joinder of Terco as a successor to Sugartree. Rule 19, Fed.Rules Civ.Proc.

In resolving the question of successorship in *Munsey v. Smitty Baker Coal Company, Inc., et al*, 2 FMSHRC 3463 (1980), the Commission applied the factors used by the Federal Courts in *EEOC v. McMillan Bloedel Containers Inc.*, 503 F.2d 1086, 1094 (6th Cir.1974). These factors are: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4)

whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same work conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same product.

There is no dispute that when mining operations shifted from Sugartree to Terco in July 1984, Randal Lawson was president and Carol McCreary was secretary/treasurer of both Sugartree and Terco. Thus whatever notice these agents of Sugartree had they also had that notice as agents of Terco. Since the initial complaints were filed by the individual miners with MSHA on July 12, 1984, and an investigation was thereafter conducted by MSHA it may reasonably be inferred that Terco had notice that charges of unlawful discrimination had been made. Indeed since Mr. Lawson was the perpetrator of what he should have known was a violation of the Act he should not now be heard to complain that he, as president and agent of both Sugartree and Terco, did not have notice of the corresponding liability under the Act of both Sugartree and Terco. Under the circumstances I find that Terco in fact did have notice of the charges.

Since Sugartree admittedly has no assets and is apparently no longer engaged in any business activity it is clear that it could not provide relief either through monetary damages or reinstatement. I also find that a substantial continuity of business operations was maintained from Sugartree to Terco. Indeed the mine foreman for both Sugartree and Terco, Joe Watkins, testified that he only learned of the changeover when the former vice president of Sugartree and subsequent president of Terco, Terry McCreary, told him. Watkins testified that he saw no other noticeable change except the method of mining changed around that time to "shooting from solid". Watkins testified that six or seven or about one-half of the employees of Sugartree also continued working for Terco.

Watkins also observed that under Terco they continued to use the same mine entrance although they began closing off the left side of the mine and prepared to mine the right side. There was apparently only a brief delay necessitated by preparatory matters relating to ventilation before coal production continued. It is observed that the original ventilation plan submitted by Sugartree includes both the right side and the left side of what has been identified as the Sugartree No. 1 Mine. The evidence also shows that Terco began operating on the right side under the same mine identity that

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had been filed with MSHA by Sugartree. Within this framework it is clear that Terco continued to mine coal from essentially the same mine as Sugartree using substantially the same workforce and supervisory personnel.

While the evidence shows that the method of mining followed by Terco, known as "shooting from the solid" differed from the method followed by Sugartree, i.e., continuous mining, this change was not significant. While Terco would not have needed a continuous miner operator under this method of mining it is clear that the same personnel could have been used in other capacities for which they had been trained. Within the above framework of evidence it is clear that Terco was a successor business entity and accordingly is jointly and severally liable for the illegal acts of discrimination in this case. Accordingly the Secretary's Motion to Amend by also including Terco, Incorporated as a party respondent is also granted. Rule 19, Fed. Rules Civ.Proc. The Motion to Amend to join Sadd Coal Company, Inc. and Hubbs Creek Corporation is denied since the Secretary has not shown that with the joinder of Terco and Randal Lawson complete relief could not now be accorded to the complainants. Rule 19, supra.

ORDER

Terco Incorporated is hereby ordered to immediately reinstate James Corbin, Robert Corbin, and A.C. Taylor to the same (or comparable) positions they held at the time of their "lay-off" on July 6, 1984, at the Sugartree Corporation. It is further ordered that the Secretary of Labor immediately confer with the Sugartree Corporation, Terco, Incorporated, and Randal Lawson, through their representatives if applicable, to determine the amount of costs, damages, and interest due as a result of the unlawful discharges found in this case. The Secretary shall thereafter file with the undersigned a written report of such consultations on or before December 31, 1985. This decision is not a final disposition of this case and no final disposition will be made until such time as the issues of costs, damages and interest are resolved.

CIVIL PENALTY

In light of my findings herein that Randal Lawson discharged James Corbin, Robert Corbin, and A.C. Taylor in clear violation of section 105(c)(1) of the Act and that he knew or should have known that when he discharged those individuals he was doing so in violation of the Act, I find that a high degree of negligence was involved. The violation was quite serious in that the individual miners asserting

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their rights under the Act unlawfully lost their source of work and income. The violation not only had an immediate economic and social impact upon the individual miners but also had the effect of deterring others from asserting their rights under the Act. The violation was accordingly quite serious. I consider that the responsible parties were of small size and had no history of prior violations of section 105(c). Wherefore Sugartree Corporation, Terco Incorporated and Randal Lawson will be, upon final disposition of these proceedings, jointly and severally ordered to pay civil penalties in the amount of \$1,000.

Gary Melick
Administrative Law Judge

footnotes start here-

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

"No person shall discharge ... or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner ... in any ... mine subject to this Act because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or operators agent ... of an alleged danger or health violation in a ... mine ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act."

2 MSHA roof and ventilation specialist Roger Dingess also inspected the Sugartree mine on July 10, 1984, and found that the ventilation continued to be seriously inadequate and was in violation of the ventilation plan. He also found that the sprays on the continuous miner were not then working properly and that excessive dust was in suspension. In addition to the long term health hazard associated with miners breathing respirable dust Dingess observed the immediate hazards caused by lack of visibility and the effects of coughing and vomiting caused by inhaling and ingesting the rock dust.