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KEEN, HENSLEY etc. V. GARDEN C. POCAHANTAS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DON KEEN, WILLIAM HENSLEY, HUBERT D. ROWE, ARVIL ARWOOD, JERRY BARRETT, KERMIT BARNART, AND JACK COLE,	DISCRIMINATION PROCEEDINGS
COMPLAINANTS	Docket No. VA 86-4-D
	MSHA Case No. NORT CD 85-2
v.	Virginia Pocahontas No. 6 Mine
GARDEN CREEK POCAHONTAS COMPANY,	
RESPONDENT	

DECISION

Appearances: Gerald F. Sharp, Esq., Castlewood, Virginia, for Complainants;
Thornton L. Newlon, Esq., Campbell & Newlon, P.C., Tazewell, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaints by the named individual miners under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," alleging that each was laid-off from the Garden Creek Pocahontas Company (Garden Creek) on October 22, 1984, in violation of section 105(c)(1) of the Act.(FOOTNOTE 1) They are each seeking back-pay from that date until they returned to work on January 2, 1985, with accrued benefits and interest.

In order for the Complainants to establish a prima facie violation of section 105(c)(1) of the Act, they must prove by a preponderance of the evidence that they engaged in an activity protected by that section and that the lay-off or discharge they suffered was motivated in any part by the protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2686 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983) and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

The Complainants specifically allege that officials of Garden Creek threatened to lay them off and in fact subsequently laid them off for the failure of the union local, of which they were members, to waive as a condition of employment the "requirements of [a] safeguard and grievance settlement concerning a "dispatcher' to control traffic on idle days". (FOOTNOTE 2) They claim that their refusal to work without a full-time "dispatcher" was a protected activity and that their lay-off based on that work refusal was therefore in violation of the Act.

It is indeed well established that a miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith and reasonable belief that to work under the conditions presented would be hazardous. Miller v. FMSHRC, 687 F.2d 194, (7th Cir.1982); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). For the reasons set forth in this decision however, I do not find that the miners' work refusal in this case was based on such a belief. Accordingly whether or not their lay-off or discharge was motivated by that work refusal, their complaint herein must fail.

According to Kenneth Lester, vice-president of Local 2421 of the United Mine Workers of America (UMWA) and chairman of the mine committee, he was called into a meeting on October 19, 1984, by mine superintendant Vern Reynolds. Reynolds called the meeting to announce a lay-off and to advise the union of the company's plans for an impending idle period in a non-producing status. Reynolds reportedly stated that the company intended to lay-off everyone except 14 of the union miners and that 7 of the 14 would be assigned to underground work during this period.

Lester says that he then asked Reynolds who would be employed as the "dispatcher". Reynolds said there would be no "dispatcher" and that if they insisted on having a "dispatcher" there would be no undergound work at all. Lester then indicated that he wanted to have a union meeting to discuss the subject and would get back to Reynolds. A union meeting followed on October 21, at which the membership voted to insist upon the employment of a full-time "dispatcher" as a pre-condition for their continued underground work during the contemplated idle period.

On October 22, there was another meeting with Reynolds. According to Lester, Local 2421 president Donny Lowe told Reynolds at this meeting that the union wanted a "dispatcher" to control the underground traffic and Reynolds responded that under the circumstances he would then lay-off the seven underground men. Lester testified that Reynolds then telephoned his superior, Rufus Fox. He overheard Reynolds state on the phone that the union was asking for a "dispatcher". Reynolds then hung-up and said he would lay-off the seven men.

The testimony of Lester is corroborated in essential respects by other witnesses called by the Complainants including the then general mine foreman George King. King testified that sometime during the meeting on October 22, someone said there would be no one working underground without a "dispatcher" and Reynolds responded that there would then be no one working underground. In his post-hearing deposition Reynolds also acknowledged that he told the union representatives that "we would work seven men underground with no dispatcher or we would work no men underground." The Complainants' allegations in this regard are therefore accepted as an accurate accounting of events.

The Complainants argue that their work refusal under the circumstances was based on a "reasonable, good faith belief" that for seven miners to work underground without a full-time dispatcher during the idle period would have been hazardous. This argument is based on their purported reliance upon a safeguard notice that had been issued by Inspector Charlie Wahles of the Federal Mine Safety and Health Administration (MSHA) on April 13, 1982. They maintain that it would have violated that safeguard to have continued working without the additional employment of a full-time dispatcher and that a violation of the safeguard would constitute per se a dangerous condition justifying a work refusal under the Act.

I do not find however that the Complainants could reasonably have believed that the safeguard would have been violated under the circumstances. The safeguard notice,

issued by virtue of the regulatory standard at 30 C.F.R. 75.1403 and directed to the Virginia Pocahontas No. 6 Mine, reads as follows:

> The mine traffic at this mine has been under the direction of a dispatcher in the past, however since the mine has been in a non-producing status, the dispatcher has been eliminated. Several persons are still employed on each shift in different areas of the mine (approximately 35). Man trips and other mine traffic have been operating to and from the sections and other work areas with no assurance that they have a clear road. This is a notice to provide safeguards requiring that man trips or other mine traffic be under the direction of a dispatcher or other competent person designated be the operator and that man trips or other mine traffic shall not be permitted to proceed until the operator of the man trip or other mine traffic is assured by the dispatcher or other competent person that he/she has a clear road.

The safeguard on its face does not limit the mine operator to the use of only a full-time "dispatcher" but allows him to use any "competent person," full-time or part-time, to perform the same function. In addition, in the case of Secretary v. Southern Ohio Coal Company, 7 FMSHRC 509 (1985) this Commission held that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. The Commission further held that in interpreting a safeguard notice a narrow construction of the terms of the safeguard and its intended reach is required. 7 FMSHRC at 512. In this regard, by its own specific terms the safeguard herein was applicable only when 35 miners were employed underground. In this case it is not disputed that no more than seven union miners and perhaps up to three supervisors were to be employed underground. For this additional reason there clearly would not have been any violation of the safeguard to have continued operating the subject mine in a non-producing status with seven union miners and three supervisory personnel as contemplated.

In addition the apparent failure of the Complainants to have consulted with the MSHA inspector who issued the safeguard as to whether the contemplated work conditions would have violated the safeguard demonstrates a lack of good faith on their part. Significantly the Complainants also failed to call that inspector as a witness in these proceedings. It is reasonable to infer from the absence of that key witness that his testimony would not have been supportive of the Complainants position herein and that they knew it.

The Complainants also demonstrated a lack of good faith by exercising their work refusal before determining what alternative safety procedures were planned for the impending idle period in the absence of a full-time "dispatcher". The evidence at hearing showed that other procedures could have been followed for the safe control of rail traffic but there is no evidence that the Complainants even considered these alternatives. It is apparent from this that they were more interested in preserving another job rather than exercising a sincere concern for safety.

I also note from the undisputed evidence that other mines in the region similar to the Virginia Pocahontas No. 6 mine and with a similar single track system do not generally use, and are not required to employ, a "dispatcher". The evidence shows for example that each of the Island Creek Coal Company mines in the area has established its own policy in this regard. For example at its Beatrice Mine no "dispatcher" is used unless a supervisor decides it is necessary in a particular circumstance. At the Virginia Pocahontas No. 1 Mine a "dispatcher" is used only when more than 12 union miners are employed underground. At the Virginia Pocahontas No. 2 Mine a "dispatcher" is used only when at least 25 union employees are working underground. At the Virginia Pocahontas No. 3 Mine a "dispatcher" is employed only if more than two pieces of track equipment are being used on one side of the mine and at the Virginia Pocahontas No. 5 Mine a "dispatcher" is employed only if two or more pieces of equipment are being used. The evidence shows that other Virginia mine operators including Westmoreland Coal Company have also operated without "dispatchers".

In addition former superintendant Reynolds said in his deposition placed in evidence that he checked with federal mine inspector Jack Burnette and a state mine inspector concerning the procedures he intended to use during the idle period at issue and that both agreed that it would not have been unsafe to operate the mine in the proposed manner.(FOOTNOTE 3)

Under the circumstances I find that the Complainants have failed in their burden of proving that they entertained a good faith and reasonable belief that their refusal to work

without a "dispatcher" under the described conditions would have been hazardous. Accordingly, the Complaint herein must be, and is, dismissed.

Gary Melick
Administrative Law Judge

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

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, . . . in any coal or other 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 operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner, . . . on behalf of himself or others of any statutory right afforded by this Act."

2 Although the duties of a "dispatcher" were never precisely defined in this case it appears that a "dispatcher" coordinates rail traffic in the mine.

3 The Complainant's objection to this testimony at the posthearing deposition on the grounds that it was hearsay is denied.