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CARL HOLCOMB V. COLONY BAY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CARL HOLCOMB,
COMPLAINANT

v.

COLONY BAY COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. WEVA 86-135-D

DECISION

Appearances: Carl Holcomb, pro se; Thomas L. Woolwine, Coal Labor Inc., for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job with Respondent because of safety complaints. Respondent's position is that Complainant was fired for insubordination. Pursuant to notice, the case was heard in Beckley, West Virginia on May 19, 1986. Carl Holcomb testified on his own behalf, and called as witnesses Richard Wells, Gary Walker, Jr., Edward Kincaid, and Joe C. Rotenberry; James Steven Mink, Robert T. Bolen, and James R. Caldwell testified on behalf of Respondent. Both parties have submitted posthearing written arguments. I have carefully considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

From July 19, 1981 until November 8, 1985, Complainant worked as a bulldozer operator for Respondent's coal company. He moved overburden that had been dislodged by drilling and blasting to uncover the coal seams in a strip mine. Respondent produced coal which entered into interstate commerce, and its operation affected interstate commerce. Complainant had previously worked in the coal mining industry for more than ten years as a truck driver, bulldozer operator, grader operator and loader operator. Complainant is a skilled bulldozer operator. In the opinion of Respondent's superintendent, "he's one of the best dozer men I've ever seen." (Tr. 166)

Complainant contends that as he continued on the job, management put more and more pressure on him, forcing him to work while others were "just playing and carrying on." (Tr. 11) Complainant alleges that he was always required to work in hard rock and in dusty places and that he was given the dangerous assignment on the top of the highwalls. He also stated that he was unfairly denied sick leave rights and "could not get a grievance filed with the Committeeman." (Tr. 12)

Complainant had been placed on probation in 1984 after apparently threatening the General Superintendent. He was suspended with intent to discharge following the incident, but the discipline was reduced to one year probation during the grievance procedure.

In midÄ1984, Complainant's dozer was used in an attempt to clear an area of burning coal in a 5Äblock seam. The heat apparently burned the seals around the air conditioning unit in the cab. This resulted in more dust coming in the cab through the air conditioner, causing Complainant bronchial problems. Complainant asked his foreman and superintendent for a transfer to less dusty conditions. When the transfer was refused, Complainant filed a grievance but the company would not meet with him on the grievance. However, on May 31, 1986, Respondent conducted a dust sample survey of the cab of his dozer. The sample was taken to the MSHA Field Office where it showed 1.0 milligrams of respirable dust. On June 3, 1985, Complainant filed a request under section 103(g) of the Act for an MSHA inspection of the environment in his bulldozer. An MSHA inspector came to the mine and examined the bulldozer. He found two holes in the bottom of the blower compartment which were not sealed. The holes and dust vents were sealed and on June 6, 1985 a dust sample was collected which showed 0.8 milligrams of dust per cubic meter of air (0.8 mg/m3). Complainant continued to complain of dust in his cab, and further work was done on the seals in June and July 1985. Complainant filed a second 103(g) complaint on October 9, 1985 alleging excessive dust in his cab. An outside contractor was called in to clean and reseal the unit and an MSHA inspector inspected the unit on October 11, 15 and 16, 1985. Respirable dust samples were taken on October 11 and October 15 which showed 1.2 mg/m3 and 0.8 mg/m3 respectively.

Complainant states that the dust in his cab resulted in bronchial problems and he was treated for respiratory problems at the Southern West Virginia Clinic beginning in May 1985 by Dr. Norma J. Mullins. Dr. Mullins made a diagonsis of asthma exacerbated to some degree by exposure to dust. Complainant was treated with medication and an inhaler, and was referred to Dr. D.L. Rasmussen on November 14, 1985: X-rays showed no

evidence of coalworkers pneunoconiosis; pulmonary function studies showed no lung impairment.

On November 7, 1985, Complainant, who normally worked from 7:00 a.m. to 5:00 p.m. asked his foreman Tom Bolen to bring his paycheck, because he intended to leave at about 3:00. Bolen went for the check, but did not bring it to Complainant who kept working until about 4:00. At that time Complainant drove to his own vehicle and took off his mining gear as the foreman drove up. Complainant told him he could take the check and stick it. Complainant then drove home. Bolen went to the mine office and reported the incident to the Superintendent and the Union Management Communications Committee. Bolen requested a meeting concerning the incident and one was scheduled for the next morning, November 8.

Bolen approached Complainant after he began work on November 8, and asked him to come to the office for a meeting. Complainant refused. Bolen returned to the office and informed the superintendent James Caldwell. Caldwell returned to the mine site with two union committeemen who urged Complainant to come to the meeting. He again refused. Caldwell called the Union District Representative, at whose direction the committeemen returned to Complainant, but he again refused to come to the office for a meeting. Complainant was then given a written suspension from work subject to discharge. The action was stated to be "based on gross insubordination displayed toward management and for refusing to follow specific directives of management." Complainant filed a grievance which was denied. He took the matter to arbitration and the arbitration upheld the discharge in an award issued December 27, 1985.

ISSUES

1) Did Complainant's discharge on November 8, 1985 result from activities protected under the Act?

2) If it did, what remedies is Complainant entitled to?

CONCLUSIONS OF LAW

I. JURISDICTION

Complainant was a miner; Respondent was a mine operator. Both were subject to the Act, and I have jurisdiction over the parties and subject matter of this proceeding.

II. PROTECTED ACTIVITY

To establish a prima facie case of discrimination, Complainant must show that he was engaged in activity protected under the Act, and that the adverse action was motivated in any part by that activity. Houser v. Northwestern Resources Company, 8 FMSHRC ÄÄÄÄ (June 20, 1986), and cases cited therein.

The evidence before me clearly establishes that Complainant complained to his supervisors on many occasions of excessive dust in his cab. These complaints were related to what Complainant believed was an unhealthy working environment. They constituted activity protected under the Act. The requests Complainant made under section 103(g) of the Act for MSHA investigations of his working environment were also protected activity. Complainant was experiencing excessive dust in his cab, even though the dust samples were within allowable limits. Respondent admitted that Complainant's cab was dustier than the other bulldozers at the mine site. However, the evidence establishes that Respondent was making reasonable efforts to take care of the problem, including calling in an outside contractor. There is no probative evidence that Respondent was deliberately causing excessive dust in Complainant's work environment, nor was any credible motive for such a practice suggested.

The incident involving the alleged threat made by Complainant to the Superintendent was not protected activity, and this is so regardless of fault, since it did not involve any employment health or safety matter. Nor is the incident involving Complainant's check in itself activity protected under the Mine Safety Act.

ADVERSE ACTION

Complainant was discharged. Is there any evidence that the discharge was motivated in any part by the protected activity described above? Complainant testified that on October 11, 1985 after an MSHA inspection, as Complainant was driving home, he met Superintendent Caldwell driving up the road about 50 to 60 miles per hour and "he run me clean out of the road when he came through." (Tr. 17) On the succeeding days, Caldwell began checking Complainant's work area frequently, which he had never done before. Complainant was off work from October 25 to October 29, 1985 and from the latter date until he was discharged the company "didn't let up. They kept pushing me to do more. The more work I done, the more they wanted me to do." (Tr. 21)

Complainant believes that these facts show that Respondent was retaliating against him for his complaints to management and to MSHA about his dusty environment. However, there is no evidence of such a retaliatory intent. I have carefully considered this evidence, and Complainant's other evidence,

written and oral, and conclude that it does not establish that his discharge was motivated in any part by his protected activity. Therefore, he has failed to establish a prima facie case of discrimination.

Even if a prima facie case were established, the evidence clearly establishes that Respondent would have taken the adverse action for unprotected activity alone, viz, for Complainant's verbal abuse of his foreman, and his repeated refusal to attend a company-union meeting to discuss the matter. See Houser v. Northwestern Resources Company, supra; Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982).

For the above reasons, I conclude that the evidence does not establish that Complainant was discharged for activity protected under the Mine Act. No violation of section 105(c) of the Act has been shown.

ORDER

Based on the above findings of fact and conclusions of law, the Complaint of Discrimination and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge