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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
DENNIS C. JONES,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 85-299-D
MSHA Case No. MORG CD 85-4

Martinka No. 1 Mine

v.

SOUTHERN OHIO COAL CO.,
RESPONDENT

DECISION

Appearances: Howard Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Robert M. Steptoe, Jr., Esq., Steptoe and Johnson, Clarksburg, West Virginia, for the Respondent.

Before: Judge Kennedy

This discrimination case was brought on behalf of an employed miner to redress a loss of overtime pay for an alleged act of retaliation in reporting a roof control violation. The Secretary claims the transfer of Dennis Jones from the mine's super section to an equivalent job on another section without a loss of pay, seniority, or benefits other than eligibility for optional overtime pay violated section 105(c)(1) of the Mine Act. The operator defended on the ground the challenged transfer was justified because Jones and his partner on the twin-headed roof bolter engaged in a work slowdown that resulted in serious disharmony and dissension among the workforce assigned to the 2 East A Section (the super section) during August and September 1984.

Findings

Dennis Jones was and is an unregenerate safety activist when it comes to roof control violations. And with good reason. He is a roof bolter--and a very good one--when he wants to be. But because he is so good at his speciality he resented being assigned to do scut work or what is known in the mines as "dead work." These are the physically demanding but demeaning housekeeping chores so essential to the safe and efficient operation of a working section.

The Protected Activity.

For years Dennis Jones had been among the most "vocal" of the miners employed at the Martinka No. 1 Mine about safety hazards, and particularly violations of the roof-control plan. For approximately a year and a half prior to the incident that triggered this complaint Mr. Jones regularly complained to his foreman, the mine safety committee, various members of top management and MSHA about a violation of the roof-control plan that he considered especially egregious. The provision his complaint centered on read as follows:

Where resin bolts are used as primary roof support, the place shall not be left on temporary supports for more than 8 hours. Bolting the roof with resin as soon as practicable is critical for successful results. The only deviation from this procedure will be where there is a mechanical/electrical failure on the roof bolting machine or when a work stoppage occurs. (GÄ1, p. 17, para. 6).

There was no dispute about the fact that working faces (places) were being left totally unsupported for periods of up to 48 hours, especially on the weekends, i.e., from midnight Friday night to midnight Sunday night. Since Mr. Jones worked the midnight to 8:00 a.m. shift, the first shift, it often fell his lot to be directed to bolt cuts at the working faces that had hung unsupported over Saturday and Sunday. He complained about this on his own behalf and on behalf of his fellow workers. Initially his complaints were supported by the mine safety committee. MSHA, however, refused to investigate or cite the condition, management refused to take any corrective action and the mine safety committee, while sympathetic, did not consider the practice sufficiently hazardous to justify a work stoppage for a hazardous or imminently dangerous practice. Nor did Mr. Jones or his coworkers ever invoke the individual safety rights provision of the collective bargain agreement to withdraw their services individually or collectively because of an abnormally hazardous practice or condition.

MSHA and management took the position that tests of the overlying roof strata showed the deflection in the roof over a 48-hour period was insufficient to warrant enforcement of an 8 hour limitation or 30 C.F.R. 75.200. They felt that the roof deflection tests when coupled with the provision for the use of Automated Temporary Roof Supports provided adequate protection for miners such as Jones who were called upon to bolt such faces or entries. In other words, MSHA and management agreed that, in effect, the provision of the roof-control plan cited by Mr. Jones had been rendered obsolete and unenforceable by a technological

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innovation, namely the introduction and use of ATRS Systems on the operator's roof bolting machines.

Mr. Jones as well as the mine safety committee knew that, after introduction of the ATRS, neither management, MSHA nor the West Virginia Department of Mines considered the 48 hour practice unsafe.

Automated Temporary Roof Support (ATRS) Systems on roof bolters eliminate the need for temporary support posts and protect roof bolters from unintentional roof falls through hydraulically activated and supported steel canopies. 50 F.R. 41784, 41792-41794 (1985). Thus, the reference in the plan to "temporary supports" was rendered obsolete by the new technology. Indeed, the steel canopies provided greater protection for Mr. Jones and his partner than that provided under the temporary support procedure. Even so, Mr. Jones felt that the requirement that resin bolts be installed "as soon as practicable" and that only a "work stoppage" or machine failure justified a "deviation" from the 8 hour limitation mandated enforcement of that limitation. He believed the deflection or sag in the roof that would occur over a 48-hour period would, in the long run, seriously detract from the effectiveness of the resin bolt bond in the overlying roof structure. As noted, because test hole observations indicated the contrary, management, the state agency and MSHA did not agree that the amount of separation and deflection that could be expected to occur created any hazard to the long run stability of the resin bolt bond, once installed.

For these reasons, management paid little attention to Mr. Jones' complaints and, it seems clear, hardly looked upon them as a basis for disciplinary action.

The solicitor's suggestion that Jones' threat to carry his complaint to the resin bolt manufacturer created a fear that triggered his transfer is illogical, speculative and without persuasive support in the record. There is no evidence that the bolt manufacturer would have agreed with Jones or that MSHA or the West Virginia Department of Mines would have changed their positions in view of the testing that had been done and the request for modification of the 8 hour limitation that had been under discussion since January. This change was formally submitted to MSHA on July 24, 1984, approximately 2 weeks before Inspector Bowers declined to take action on Mr. Jones' complaint of August 8, 1984.

II

The question then is whether in view of the fact that the two mine safety enforcement agencies and the operator had concluded that compliance with the 8 hour limitation was unnecessary Mr. Jones had a good faith reasonable belief on August 8, September 13, and October 1, 1984 (the dates of the alleged

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actionable complaints) that the practice was hazardous and therefore protected. I think not.

I find that while Mr. Jones had an honest belief that a hazard existed his belief was not reasonable because the evidence, even when evaluated from his standpoint, shows that the practice--later sanctioned by a change in the approved roof-control plan--was not unsafe. Indeed, the record shows that on August 24, 1984, some 6 weeks prior to the complaint of October 1, 1984, the union safety committee had agreed to an extension of the 8 hour limitation to 24 hours. And shortly thereafter, on February 5, 1985, the provision in the roof-control plan relied on by Jones was changed to read as follows:

Where resin bolts are used as primary roof support, the place shall be bolted on the next production shift, or within 48 hours. The only deviation from this procedure will be where there is a mechanical and/or electrical failure on the roof bolting machine or when a work stoppage occurs. (GXÄ10).

While I have given Mr. Jones the benefit of the doubt in finding he had a good faith belief in a hazard, I also find the circumstantial evidence shows that Mr. Jones did not take his complaint to grievance; did not view the hazard as serious enough to justify an individual refusal to work; and that neither his coworkers, nor the safety committee considered it sufficiently dangerous to justify a legally sanctioned work stoppage. Because Mr. Jones knew or should have known that the ATRS System protected him from any immediate hazard and that the weight of the expert judgment was against him on the question of a long run hazard, I conclude Mr. Jones' belief that the practice in question was unsafe was not reasonable. His complaints were not therefore a protected activity. Having failed to make a prima facie case of discrimination for a protected activity, it follows that the complaint must be dismissed.

III

The Unprotected Activity

At the time of the hearing complainant Jones had been employed by SOCCO for approximately 6 years. He had been classified as a roof bolter for the last 3 years. Sometime prior to July, 1984, Martinka Mine management decided to operate an experimental, continuous mining section designed to increase production and reduce labor costs. That section was officially denominated 2 East A but was referred to colloquially as the "super section." Operations commenced on July 23, 1984. The section consisted of eight 16 foot entries or headings mined by two Joy Continuous miners. Roof control was provided by two Fletcher dual-head ATRS roof bolters bolting on 4 foot centers. One continuous miner and roof bolter would normally work on the left side of the section,

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headings one through four, and the other miner and roof bolter would operate on the right side of the section, headings five through eight. The continuous miners were not operated simultaneously. Instead, after one CM drove its four headings, the machine would be parked for servicing and the operator and helper would immediately go to the other continuous miner to cut coal in the other four headings. Management's concept was to operate two continuous miners with 10 classified or contract (UMWA) miners instead of the normal complement of 14. Thus, on the super section, management eliminated the need for one continuous miner operator, one continuous miner helper and two shuttle car operators. The one-third reduction in the workforce when coupled with the demand for a significant increase in production (the "do more with less" concept) created a working environment rife with a potential for labor discontent.

Unlike the two continuous mining machines, which were operated by the same miner, the roof bolting machines each had a separate crew of two miners. One machine and crew (Tom Cunningham and Frank Renick) was assigned to the left side of the section, headings one through four, and the other crew (Dennis Jones and Ed Hill) to the right side of the section, headings five through eight. When bolting operations were completed bolters were expected to work out of their classification and do needed "dead work." This somewhat derisive term was used to describe the housekeeping tasks so necessary to the safe and efficient operation of a section including the moving and servicing of the continuous mining machines, scooping, rock dusting, obtaining and delivering supplies to the face area, installing belt and trolley hangers, moving the ventilation and other chores routine to the maintenance and operation of a conventional continuous mining section.

The midnight shift foreman, James Kincell, working with the general mine foreman, John Metz, selected Jones and Hill as the pair of roof bolters to work the right side of the section. They were specifically told that they were part of an experimental operation, were expected to be self-motivated, and were to act with initiative at all times to make the operation a success. They knew that if they did not produce they could be replaced at any time. It was emphasized that the roof bolters would be expected to do work outside their classification as face men and to perform dead work on their own initiative.

The other bosses on the midnight shift were James Layman who was the section foreman generally responsible for production and James Huffman who was the section foreman generally responsible for construction. Both had responsibility, however, for the safe, efficient and productive operation of the super section as a whole. Kincell, Huffman, and Layman were well acquainted with Jones and Hill, knew them to be highly competent at their craft and also knew that they along with other members of the crew were

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not hesitant about making safety complaints, especially on conditions affecting the roof. Jones, however, was the more insistent and "vocal" of the two. Jones kept up a stream of plausible safety complaints while Hill contributed a somewhat intimidating personal and physical presence that, at least in the case of Layman, allowed the pair to escape any direct confrontation over their work performance.

Jones admitted that while he had for years been making complaints similar if not identical to the ones claimed actionable in this case no adverse action had ever been taken against him either before or after this incident. And certainly this incident did not have a chilling effect on Jones' complaints which continued even after his transfer.

During the first 3 or 4 weeks all went well on the super section although production was not as high as targeted. Around the middle of August, however, things took a turn for the worse when Layman and Huffman began to receive complaints of friction between the left side bolters (Cunningham and Renick) and the right side bolters (Jones and Hill). The problem arose over the failure of Jones and Hill to complete roof bolting assignments on the right side of the section as quickly as everyone knew they could. This meant that an unfair portion of the dead work on both the left and right side of the section fell on Cunningham and Renick. Based on their own observations Layman and Huffman went to Kincell in late August or early September and accused Jones and Hill of "slowing down" on the roof bolting process in order to avoid doing the "dead work" after bolting was complete.

Jones and Hill contested this. They were supported by the continuous miner operator Morris and the two face men. Morris testified he was never delayed by Jones and Hill. This testimony, however, was not germane to management's complaint of a claimed stretchout of bolting assignments to avoid dead work. Neither of the face men, of course, were in a position to observe the claimed slowdown on the bolting assignments or to evaluate the two right side bolters' performance as well as their supervisors and the two left side bolters.

Five highly credible eyeball witnesses (Kincell, Huffman, Layman, Cunningham, and Renick) testified that from the middle of August to October 1, 1984, Jones and his partner Hill regularly, repeatedly and continuously, i.e., on 4 out of 5 days engaged in a planned common course of action to avoid the performance of dead work. This caused friction, conflict, disharmony, and dissension among the members of the super section crew.

For example, Cunningham and Renick early on complained that they would quit the section if Jones and Hill were not replaced or the situation corrected. Kincell tried at first to correct the situation through indirect methods such as letting Jones and Hill know he was timing their performance. Huffman the more

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assertive of the three supervisors on several occasions let Jones and Hill know they were in jeopardy. Layman was inexperienced as a boss and somewhat fearful of provoking a fight or a feud among the crew members. Jones, apparently because of his safety complaints, and Hill, because of his truculence, felt secure. After all Kincell had personally selected them over Metz's misgivings. He naturally was reluctant to admit he had seriously misjudged them.

Jones and Hill as wiley, mine-wise contract miners also knew that management was trying to achieve a production breakthrough and thus could be expected to take a little dissension so long as the bolting assignments were done and the dead work did not fall intolerably far behind. Where they miscalculated was with their union brothers, Cunningham and Renick. They just would not take it and went so far as to make a scene and complaint over Jones and Hill's blatant work slowdown in front of the general mine supervisor, Mr. Metz. Things also turned against them when Kincell on more than one occasion observed them in what appeared to him to be a loafing or sleeping posture and after he made time studies that showed they could work twice as fast when they were being watched as they did when unsupervised. Cunningham and Renick kept up their stream of complaints and openly "ribbed" Jones and Hill for not helping out with the dead work.

Huffman testified he had confrontations with Jones and Hill on several occasions over their delay in installing trolley hangers in the track entry on Sundays. Another example of their obstructionist attitude he cited was their consistent refusal to tram the continuous miner from the five to the seven entry for servicing so that they could bolt the five entry. They repeatedly tried to outwait him in the expectation that he would send the mechanics to move the miner while they just stood or sat around and waited. Jones and Hill knew or should have known they were being watched and of the scene Cunningham and Renick created in front of Metz and Kincell. They also knew or should have known of the animosity they had engendered on the part of their brothers.

Layman was especially bitter over the way they treated him. They knew he was new at the supervisor's job. Yet they seemed to want to take advantage of him. They knew he and Huffman were reprimanded for the complaints Cunningham and Renick made to Metz. They also knew or should have known that when they took an hour to an hour and a half to do a job that Layman knew should have been done in 35 to 45 minutes they were treading on thin ice. Layman testified further that it was embarrassing to him to know that Jones and Hill would spend a whole shift doing three or four places that with their skill and speed should have been done in less than half that time. Vigorous cross-examination did not shake the sincerity of his conviction that Jones and Hill were "dogging" it. Time after time he unequivocally asserted that based on his personal observations of the amount of time Jones

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and Hill were spending on bolting he was convinced they were stretching out the bolting assignments to avoid doing dead work. When counsel demanded he be more specific, Layman testified that his observation was that the slowdown occurred on 4 out of 5 days and he watched them every day.

Layman and Huffman as well as Cunningham and Renick complained loud and long to Kincell who finally, on the basis of his own observations, decided during the last week in September to transfer Jones off the section on October 1 and to put Layman on the day shift for further training as a supervisor. The excuse for not transferring Hill--namely that he was needed to fire boss--I find unpersuasive. Nevertheless, whatever disparate treatment was involved did not stem from any protected activity. By this time management was unimpressed with Jones' complaint over the 8 hour limitation. It was also not interested in disciplining or punishing him. It merely wanted to improve morale on the super section and quiet the complaints from Cunningham and Renick. This was accomplished by transferring Jones to a section where he was not expected to do dead work but also would not enjoy the option of the overtime he was regularly paid on the super section.

The actual transfer of Jones did not occur until Tuesday, October 2, 1984, due to a mistake or misunderstanding on the part of the assistant shift foreman. I find no persuasive basis for reading into this one day delay any sinister motive on the part of management. As I have found, Jones' complaint of Monday, October 1 was of a piece with those he voiced on most Mondays, namely the failure to bolt places on Saturday that left the roof unsupported over the weekend.

V

Based on a preponderance of the credible, fact specific evidence and the reasonable inferences to be drawn therefrom, I am constrained to find that the true motive or cause for Jones' transfer from the super section on October 2, 1984, was his participation with Hill in a stretchout or slowdown of classified work to avoid dead work during August and September 1984. There was therefore, no nexus between the claimed protected activity and the reason for Jones' transfer. The operator having carried its burden of showing Jones was transferred for engaging in an unprotected activity and that he would have been transferred for engaging in that activity alone, it follows that the complaint must be dismissed.

VI

Conclusion and Order

The premises considered, I conclude that as a matter of fact and law the transfer of Dennis Jones off the super section at

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Martinka No. 1 Mine on October 2, 1984, did not constitute a violation of section 105(c)(1) of the Mine Act because the transfer was not based in whole or in part on any protected activity, was motivated solely by the miner's unprotected activity and would have been effected in any event for his unprotected activity alone. Accordingly, it is ORDERED that the complaint be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge