CCASE:
WILFRED BRYANT v. DINGESS MINE
DDATE:
19870224
TTEXT:

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

WILFRED BRYANT, COMPLAINANT
v.

DISCRIMINATION PROCEEDING

Docket No. WEVA 85-43-D

DINGESS MINE SERVICE,

WINCHESTER COALS, INC.,

MULLINS COAL COMPANY,

JOE DINGESS AND

JOHNNY DINGESS,
RESPONDENTS

Dingess Mine No. 2

DECISION

Appearances: Barbara Jo Fleischauer, Esq., Morgantown, West Virginia, and Paul R. Sheridan, Esq., Logan, West Virginia, for Complainant; Robert Q. Sayre, Esq. and Jeffrey Hall, Esq., Goodwin & Goodwin, Charleston, West Virginia, for Respondents, Winchester Coals, Inc., and Mullins Coal Company.

No one appeared for Respondents Dingess Mine Service, Joe Dingess or Johnny Dingess.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as shuttle car operator on April 27, 1984, for activities protected under the Federal Mine Safety and Health Act (the Act). He filed a discrimination complaint on May 1, 1984 with the Mine Safety and Health Administration (MSHA). On October 19, 1984, MSHA notified him of its finding that a violation of section 105(c) of the Act had not occurred.

A complaint was filed with the Commission on November 26, 1984, naming Dingess Mine Service, Joe Dingess, Johnny Dingess and Winchester Coals, Inc., as Respondents. The complaint was not served upon Winchester until May 3, 1985, but Winchester had been notified by the Commission on November 27, 1984, that a complaint was filed. On January 17, 1986, Complainant filed a motion to add Mullins Coal Company as a party Respondent. The motion was granted by order of Judge Joseph B. Kennedy on January 27, 1986.

No appearance or answer to the complaint was filed by or on behalf of Dingess Mine Service, Joe Dingess or Johnny Dingess. On October 24, 1985 and October 3, 1986 I issued an order to show cause to Dingess Mine Service, Joe Dingess and Johnny Dingess why they should not be found in default for failure to answer the complaint. Cause was not shown, and I entered an order finding Dingess Mine Service, Joe Dingess and Johnny Dingess in default. I further found that the default was not conclusive on the issue of discrimination as against Winchester, Mullins or any successor employer.

Pursuant to notice, a hearing was held in Charleston, West Virginia on November 12 and 13, 1986. Wilfred Bryant, Reed Peyton, Roger Cook, Donnie Adams, Stanley Wells, Oscar Davis, and Donald Cooper testified on behalf of Complainant; Aaron Browning testified on behalf of Respondents Winchester and Mullins. Both parties have filed post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

OPERATION OF THE SUBJECT MINE

Winchester Coals, Inc. (Winchester) and Mullins Coal Company (Mullins) are both wholly owned subsidiary corporations of Imperial Pacific Investments. Donald Cooper is President of both Winchester and Mullins and Vice-President of Imperial Pacific. In 1981 and 1982, Winchester had contracted with Dingess Mine Service for the latter to construct certain electrical installations and to relocate high voltage power lines. Based in part on Winchester's satisfaction with the work performed under that contract, Mullins contracted with Dingess Mine Service on July 20, 1982 for the latter to mine coal from the subject mine (called Mullins No. 2 Mine in the contract) and deliver it to Mullins for a certain amount per ton. Dingess Mine Service had never operated an underground coal mine previously. The contract made Dingess responsible for hiring, employment, and working conditions. Dingess agreed that the work force should be under the jurisdiction of the United Mine Workers of America (UMWA) and governed by the current wage agreement with UMWA. Dingess is described as an independent contractor and is responsible for construction and maintenance of all facilities. Dingess agreed to diligently mine the coal with modern and approved mining methods and to employ only competent, skilled personnel. Dingess agreed to comply with applicable laws and regulations. On July 20, 1982 (the date of the Mullins-Dingess Mining Contract) Winchester and Dingess entered into a written equipment lease, in which Winchester leased to Dingess certain mining equipment,

including a coal drill, a cutting machine, an underground Power Center, a loading machine and 2 Joy 21-SC shuttle cars. Dingess agreed to pay as rent a certain amount per ton of coal mined under the Mullins-Dingess Mining Contract. Dingess agreed to keep the leased property in good repair.

The mining contract was for one year, and unless terminated in accordance with its terms, provided that it should continue for successive periods of one year until all the mineable coal is mined and delivered. The equipment lease was for four years subject to Winchester's right to terminate on any anniversary date by 30 days written notice.

Mullins participated in the development of the mining plans by Dingess. It hired an engineering firm to prepare maps and perform some of the ventilation calculations.

During 1982 and early 1983 Mullins was satisfied that Dingess was doing "a pretty good job of operating that coal mine." (Tr. 204). In late 1983 and in 1984 problems developed: a number of citations were issued by the State Department of Natural Resources (DNR), and Dingess fell behind in its payments of UMWA royalties, taxes and worker's compensation fund payments. Mullins, which was the permit holder under the DNR, itself corrected certain problems which endangered its permit. In late 1983 or early 1984, Mullins became aware that Joe Dingess had a drinking problem and was drinking on the job. Mullins could have terminated the contract without cause in July 1984, but because of the high demand for coal decided to continue it. During 1984, rental payments due Winchester were regularly deducted from amounts due Dingess from Mullins. Winchester and Mullins also made payments owed to suppliers, trucking companies, and repair companies by Dingess and treated the payments as advances due under the mining contract. On at least one occasion, Winchester made a payment to Aaron Browning, Dingess' mine foreman, apparently for his salary.

In 1984, Mullins had discussions with Dingess concerning the purchase of coal from the Panna Mine, which Dingess contemplated opening. Winchester advanced $25,000 to Joe and Johnny Dingess to open the Panna Mine.

On October 22, 1984, Mullins terminated the mining contract with Dingess on six grounds: (1) the failure of Dingess to comply with P & R regulations; (2) the failure of Dingess to pay its employees; (3) the failure of Dingess to pay money due a trucking company; (4) the failure of Dingess to comply with the UMWA contract; (5) the making by Dingess of unauthorized subcontracts with Aaron Browning; (6) the failure of Dingess to comply with the Mine Health and Safety law and regulations.

Dingess filed suit for breach of contract which is pending in the State Court.

Winchester formally terminated the equipment lease in February 1985.

The license to operate the subject mine was recovered from Dingess in a court proceeding by Mullins or Winchester. It was subsequently transferred to New River Fuels, which is currently operating the mine, apparently under a mining contract with Mullins.

Roger Cook, General Superintendent of Winchester and previously its Manager of Mines, had the responsibility of monitoring the subject mine to insure that Dingess lived up to its contract with Mullins. This indicates the interchangeable nature of Winchester and Mullins. Cook was at the mine site regularly, and went underground to make sure Dingess was following the proper projections and producing coal. On occasion he had problems corrected, including excessive dust and surface drainage. In discussions with Dingess, he suggested the opening of a continuous miner section to increase production. Cook testified that Winchester/Mullins had to "put in overcasts and everything else, and they [Dingess] really didn't understand how to do it." (Tr. 106). Later, he seemed to indicate that Aaron Browning put in the overcasts. (Tr. 110). Production did not increase, and it was decided to cancel the contract. Neither Cook nor anyone at Winchester/Mullins was involved in the hiring or firing of Dingess' miners. No miner complained to Cook about unsafe equipment.

COMPLAINANT'S EMPLOYMENT

Complainant was hired as a shuttle car operator at the subject mine on April 23, 1984. He was paid $110 per day. He was hired by mine foreman Aaron Browning, who told complainant that he worked for Winchester Coal Company. Complainant had previously worked for Amherst Coal Company as a general inside laborer, roof bolter helper, miner helper and shuttle car operator. He left Amherst more than 2 years before he was hired at the subject mine. Complainant was hired with his brother-in-law, Donnie Adams, both to operate shuttle cars. The shuttle car to which complainant was assigned had defective brakes, no lights, a defective tram operation and defective steering. The car to which Adams was assigned had no brakes and no lights. Complainant pointed out the defects to Kevin Atkins, the section foreman and to Browning and was told to do the best he could.

After three days, Complainant told Kevin Atkins, that he refused to continue operating the shuttle car because his arms ached trying to steer the machine. The next day he was assigned by Browning to "shooting coal". The following day Browning called Complainant and told him the mine was flooded, and the second shift was laid off. Complainant went to the mine site to get a layoff slip so that he could go back on welfare, and found that the mine was not flooded, and that employees who had been hired subsequent to Complainant were working. Browning refused to give him a lay off slip and told Complainant he did not have a job anymore. Complainant filed a grievance through his union representative and after 5 days, Browning agreed to rehire Adams and put Complainant on the panel for recall. He "guaranteed" that he would call Complainant back to work within two or three days. Complainant refused the proposed settlement because "he felt he was done wrong" and because he believed there was no panel. Adams refused to return to work unless Complainant was rehired. Neither returned to the mine. Since leaving Dingess, Complainant has sought work without success. He has worked in a State Park in return for his family welfare payments.

Aaron Browning testified that the loading machine operator filed a safety complaint concerning Complainant's operation of his shuttle car. The loader operator refused to run his machine if Complainant continued on the shuttle car. Browning stated that was the reason he laid off Complainant. He intended to call Complainant back in some other position. Complainant refused the offer and on May 9, 1984, formally terminated his employment. (Rx3)

ISSUES

1. Is Complainant's complaint barred by time limitations?

2. Was Complainant discharged or otherwise discriminated against because of activity protected under the Act?

3. If so, is either Mullins or Winchester liable for the discrimination?

4. If so, to what is Complainant entitled, and who is responsible for providing the remedy?

CONCLUSIONS OF LAW

TIME LIMITATIONS

The complaint with MSHA was filed May 1, 1984, naming Dingess Mine Service, Inc. as the person committing the discrimination, and April 25, 1984 as the date of the

discriminatory action. After an investigation, the Secretary determined on October 19, 1984 that a violation had not occurred and notified Complainant by letter received by Complainant on October 24, 1984. On November 26, 1984, the complaint was filed with the Commission, naming Dingess Mine Service, Winchester Coals, Inc., Joe Dingess and Johnny Dingess as Respondents. The certificate of service states that copies of the complaint were mailed to all Respondents on November 23, 1984. Winchester has stated that it was served with a copy of the complaint on May 3, 1985, and a certificate of service with certified mail receipts was filed by Complainant showing service on Winchester May 3, 1985 and on the Dingesses May 8, 1985. However, the Commission by letter of November 27, 1984 notified Dingess and Winchester that a complaint had been filed. By order issued September 24, 1985, Judge Kennedy denied Winchester's defense based on the statute of limitations. By order issued January 27, 1986, Judge Kennedy granted Complainant's motion to add Mullins as a party Respondent.

Thus, the complaint filed with the Secretary was timely filed even though it failed to name Mullins or Winchester. Complainant could not be expected to know the relationship of Mullins or Winchester to the operation of the mine: he worked for Dingess. MSHA's records apparently showed Dingess as the mine operator, and it had no reason to bring Mullins or Winchester into the investigation. Mullins and Winchester assert that they were prejudiced because they were not involved in the investigation. They have not shown, and it is not evident to me, what the prejudice consisted of. I conclude that their claim of prejudice is not well-founded, and I reject it.

The complaint with the Commission was filed 31 days after the Secretary notified Complainant of his finding that discrimination had not occurred. Thus it was filed one day beyond the statutory period. The record does not disclose why service on Respondents took place so long after filing, but it is clear that Winchester, at least, knew of the filing of the complaint within a few days after it was filed.

At any rate, the time limitations contained in section 105(c) of the Act were not intended to be jurisdictional, and dismissal of a complaint for late filing is justified only if the Respondent shows material, legal prejudice attributable to the delay. Cf. Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986). No such showing has been made here. In view of the close relationship (virtual identity for our purposes) between Mullins and Winchester, Mullins cannot claim additional prejudice because it was added as a Respondent by an order issued later.

Therefore, I conclude that the claim is not barred because of time limitations, and that Winchester and Mullins are properly before the Commission as Respondents.

PROTECTED ACTIVITY

Complainant contends that the shuttle car to which he was assigned was unsafe: it had no lights, defective brakes, a defective tram mechanism and defective steering. Browning denies that it was unsafe, but the clear weight of the evidence supports Complainant's contention, and I conclude that it was in fact unsafe. Complainant testified that he told Browning and Atkins that it was unsafe, which Browning denied. I conclude that Complainant did tell his supervisors that the vehicle was defective and unsafe. This was protected activity under the Act. On April 26, 1984, Complainant told Atkins that he refused to operate the shuttle car anymore, and at least one of the reasons for his refusal was the unsafe condition of the machine. I conclude that this refusal was therefore protected activity, and that the reason for his refusal was made known to the operator in the person of section foreman Atkins.

ADVERSE ACTION

Complainant was "laid off" on April 27, 1984, following his refusal to continue operating the defective shuttle car. This was adverse action. He filed a grievance, and in the course of the grievance procedure, Browning offered to settle the grievance by placing him on a recall panel and calling him back to work in "a couple of days at the most." (Tr. 278) Complainant refused the offer and formally resigned on May 9, 1984. I conclude that he was not discharged and that the adverse action terminated when he refused the offer to be called back and resigned his job.

MOTIVATION

Under the Act, a miner can establish a prima facie of discrimination by showing that he engaged in protected activity and that the adverse action complained of was motivated in any party by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it may affirmatively defend by showing that it was motivated also by the miner's unprotected activities and would have taken the adverse action for the unprotected activities

alone. Pasula, supra; Simpson v. Kenta Energy, Inc., 7 FMSHRC 1034 (1986).

Direct evidence of a discriminatory motive is, as the Commission has said, "rare." Illegal motive may be established, however, if the facts support a reasonable inference of discriminatory intent. Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (1986). Here the evidence shows serious safety defects on mine equipment and Complainant's refusal to operate the equipment followed almost immediately by his lay off. These facts clearly support an inference that one of the mine operator's motives in laying Complainant off was his protected activities. Browning testified that he laid off Complainant because of a safety complaint from the loader operator who was afraid of the way Complainant was operating the shuttle car. I conclude, however, that this complaint was related to the condition of the shuttle car rather than to Complainant's inability to operate it. The operator has not established that Complainant would have been laid off for unprotected activity alone. Therefore, I conclude that a violation of section 105(c) has been established.

LIABILITY OF MULLINS/WINCHESTER

Section 105(c)(1) of the Act provides that "no person shall . . . discriminate against or otherwise interfere with the statutory rights of any miner%y(4)27" Liability is thus not restricted to a mine operator or an employer.

The record in this case establishes that Complainant worked for Dingess Mine Service which was the "operator" of the subject mine: Dingess hired him, directed his work activity and laid him off. Mullins/Winchester was not involved in hiring Complainant. The evidence does not show that it directed his work activity, nor does it show that Mullins/Winchester was in any way involved in his lay-off, the adverse action complained of here.

On the other hand, the record shows that Mullins/Winchester had a continuing presence at the mine. Mullins/Winchester knew or should have known that Dingess showed increasing evidence of its incompetence, technically and financially, to operate the mine, and this evidence was very strong at the time of Complainant's employment. Mullins profited from the coal production, and pressured Dingess to increase its output. Winchester owned most of the mining equipment, including the shuttle car operated by Complainant. There is no direct evidence that Mullins/Winchester knew of the defective condition of the car, but I infer from the regular presence of Roger Cook at the mine that it was aware of the shuttle car's condition. The lease agreement, however, required Dingess to keep the leased property

in good repair (RX-6). The difficult question is whether Mullins/Winchester's relationship to the mine was such that it could be deemed "a person" which "discriminated against" Complainant.

Complainant cites a number of courts of Appeals decisions which held that citations for safety violations were properly issued to mine owner-operators even though the violations were committed by independent contractors. Harmon Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir.1981); Cyprus Industrial Minerals v. FMSHRC, 664 F.2d 1116 (9th Cir.1981); BCOA v. Secretary, 547 F.2d 240 (4th Cir.1977); Brock v. Cathedral Bluffs Shale Co., 796 F.2d 533 (D.C.Cir.1986). These cases differ substantially from the present case in that they involve holding the production-operator liable for safety violations committed by a contractor performing certain discrete construction activities. In the present case Dingess is the production-operator under a contract with the owner of the coal. It is true that Mullins/Winchester was involved in overseeing Dingess' work, and that it actually performed some of the work involved in the production of coal (engineering projections, installation of overcasts). However, it was not involved in the discriminatory act complained of here. This fact distinguishes the present case from the case of UMWA v. Pine Tree Coal Co., 7 FMSHRC 236 (1985), where the owner of the coal directly supervised and directed the contract operator's activity which led to an imminent danger withdrawal order.

The issue considered here was addressed by Judge Richard C. Steffey in UMWA v. Algonquin Coal Co., 7 FMSHRC 906 (1985). In Algonquin, Judge Steffey held that where the owner of the mine did not "take any kind of action to hire, discipline, or discharge any of the miners employed by" the contract mine operator, it could not be held liable for discrimination under section 105(c) of the Act. I agree with the rationale of the Algonquin decision, and conclude that Mullins/Winchester is not liable under section 105(c) of the Act for the discrimination against Complainant.

REMEDY

Complainant was laid off by Dingess for activity protected under the Act. He is entitled to back pay from April 27, 1984 to May 9, 1984 with interest thereon in accordance with the formula in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1984). He is further entitled to be reimbursed for reasonable attorneys' fees and costs of litigation. Because of my conclusion that the adverse action terminated on Complainant's resignation, the motion to add New River Fuels as a party (successor employer) is DENIED.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. That Dingess Mine Service shall pay Complainant back pay from April 27, 1984 to May 9, 1984 with interest thereon in accordance with the Arkansas-Carbona formula.

2. This proceeding is DISMISSED as to Winchester Coals, Inc. and Mullins Coal Company.

3. Complainant shall file a statement within 20 days of the date of this decision, showing the amount he claims as back pay and interest under No. 1 above, and the amount he requests for attorneys' fees and necessary legal expenses. The statement shall be served on Respondents who shall have 20 days from the date service is attempted to reply thereto.

4. The decision is not final until a further order is issued with respect to the amount of Complainant's entitlement to back pay and attorneys' fees.

James A. Broderick
Administrative Law Judge