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SOL (MSHA) V. U.S. STEEL
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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
ROGER NELSON,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 86-407-D

HOPE CD 86-7

v.

Morton Mine

U.S. STEEL MINING CO., INC.,
RESPONDENT

DECISION

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia for the
Complainant Billy M. Tennant, Esq., Pittsburgh,
Pennsylvania for the Respondent

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 185(c) (the Act) alleging that on about January 21, 1986 he was illegally discriminated against when he was intimidated as a result of making a safety complaint to his foreman, and that on or about January 28, 1986 he was discriminated against when he was required to perform additional and strenuous duties as a result of filing a safety complaint with MSHA and speaking with an MSHA inspector.

Pursant to notice the case was heard in Huntington, West Virginia on November 12, 1986. Roger Nelson, Charles Pauley, Danny Meadows, Bernie May, and Samuel Smith testified for Complainant. John Cummings, Bill Wright, Ron Winfrey and David Kirk testified for Respondent. Both Parties filed Post Hearing Briefs and Proposed Findings of Fact. In addition, Parties were granted the right to file Reply Briefs, but none were filed.

Findings of Fact

The Complainant, Roger Nelson, has been employed as a miner by the Respondent, U.S. Steel Corporation, since 1981. On September 9, 1985 Nelson began working as a shuttle car operator under Foreman David Kirk.

During a daily safety meeting on January 21, 1986 Nelson asked Kirk how far ventilation tubing could be legally kept from the mining face. Kirk told Nelson that the law required ventilation tubing to be kept within 10 feet of the face. At the time the tubing was being kept more than 10 feet from the face. Nelson gave his opinion to Kirk that the Respondent was violating the law in its placement of the ventilation tubes. Merle Johnson, a miner operator who was present, stated that keeping the tubing 10 feet from the face was dangerous to the miner operator and the miner helper. Johnson and Nelson argued but there was no physical contact.

After this incident, Nelson said that Kirk ordered him to take the man trip and get some additional ventilation tubing (although Charles Pauley testified that Kirk told him that he did not order Nelson to take the man trip, I have adopted Nelson's version as Kirk did not contradict it in his testimony). As Nelson was leaving the man trip Kirk approached the electrician, Charles Pauley. Pauley testified that Kirk asked who was in the man trip. When Pauley replied that it was Nelson, Kirk stated to Pauley that he did not tell Nelson to take the man trip and that it was against the law for Nelson to take the man trip from the section. When Nelson returned to the section, Kirk informed him that it was illegal to take the man trip off the section and denied that he had told Nelson to take the man trip.

After the argument between Nelson and Johnson, Kirk called Ron Winfrey, the General Mine Foreman, and asked that he come to the section as he (Kirk) had a problem. However, Kirk did not explain to Winfrey the nature of the problem. Winfrey did not have any transportation available but advised Kirk that he told Bill Wright, Shift Foreman, and John Cummings, Assistant to the Mine Foreman, to come to the section. Cummings and Wright asked Kirk what the problem was and they testified that they were told by Kirk that Nelson was the problem. I note that Kirk denied that he told Wright and Cummings that Nelson was the problem. I adopted the version testified to by Wright and Cummings based upon observations of their demeanor and also considering the fact that their testimony corroborates each other.

According to Cummings, Kirk told them that Nelson and Johnson "just about got into a fight" over placement of the tubing (Tr. 177). According to Wright, Kirk told him that Nelson and Johnson had a fist fight. Kirk did not ask Cummings or Wright

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to talk to Nelson. On his own initiative Wright told Kirk to have Nelson to come to the dinner hall to talk to him and Cummings. Wright explained he wanted to talk to Nelson in order to "try to solve the problem before it got out of hand" (Tr. 197).

At the dinner hall Nelson admitted to Wright and Cummings that there had been an argument about placement of the ventilation tube. Wright and Cummings explained to Nelson the hazards involved in maintaining the ventilation tube within 10 feet of the face. Wright and Cummings asked Nelson if he would like to be transferred from the section to another job elsewhere in the mine running a supply motor. Cummings stated that there is a difference in pay between a suttle car operator, (Nelson's job on January 21) and that of a supply motor operator. He said that he was not sure what the difference was but that he "would imagine" that the suttle car operator job pays more (Tr. 183). There is no other evidence in the record regarding the pay of these two jobs. Accordingly, I conclude that Cummings' testimony is insufficient to establish positively that the job that Wright and Cummings asked Nelson if he wanted to transfer to, would have involved a cut in pay.

Nelson testified that Cummings said that if he stayed on the section he "would end up with the short end of the stick." (Tr. 24). Nelson told Wright and Cummings that he would like another job, but that he did not want people to think that Kirk had run him off the section.

Wright and Cummings did not threaten Nelson nor did they take any disciplinary action against him or remove him from the section.

Wright testified that he had decided to speak to Nelson and not Johnson because he felt that the latter was the problem as Kirk had so indicated. Also he said that he could speak to Johnson any time as he operated a miner, whereas Nelson operated a suttle car and thus did not stay in one place.

At about 11:00 a.m. Winfrey arrived at the section. He testified that Kirk had said that there was almost a fight between Johnson and Nelson concerning the distance ventilation tubing is to be kept from the face. Kirk did not ask Winfrey to speak to anyone. Winfrey then went to talk to Johnson who said that he and Nelson "about came to blows" in the dinner hall that morning arguing placement of the ventilation tube (Tr. 220). Johnson asked Winfrey to be transferred from the section. Winfrey did not grant this request. After Winfrey talked to Johnson, Winfrey asked Nelson to leave his suttle car and talk to him. According to Winfrey, he asked Nelson, just as he had asked Johnson, to tell

him what happen earlier in the day. Winfrey and Nelson had a discussion with regard to placement of the ventilation tube, and Winfrey explained why they were placed beyond 10 feet from the face. According to Nelson, Winfrey told him that he thought he (Nelson) had an attitude problem. Winfrey said there seem to be "turmoil" between Nelson and Kirk and he asked Nelson if he wanted to transfer to another section. Winfrey said that Kirk had not asked him to transfer Nelson, and that he was unaware that earlier in the day Wright and Cummings had offered Nelson work in another section. Winfrey said that he asked Nelson if he wanted a transfer but turned down Johnson's request for transfer, as Nelson was calm and Johnson was "belligerent." Winfrey did not take any action to have Nelson transferred.

The following day Danny Meadows, the scoop operator, inspected the face area and noted that it was not rock dusted within 40 feet of the face. He testified that there was no rock dust available to correct the problem. Meadows brought the problem to Kirk's attention and Kirk told Meadows that he would order some rock dust. Nelson asked Kirk if he was going to get some rock dust. Meadows testified that Kirk told that him "(Nelson) was crying about the place not being rock dust(ed)." (Tr. 114). Nelson reported the violation to the Safety Committee and another Section 103(g) complaint was filed.

On January 28, 1986 MSHA Mine Safety and Health Inspectors Martin Copley and Karl Jenkins came to the mine to investigate the Section 103(g) complaints filed by the Union at Nelson's request. Nelson and Danny Meadows told the Inspectors in the presence of Kirk about the failure to properly rock dust the face area. Meadows also told Inspector Jenkins that it had taken 16 bags of rock dust to dust the area that had been in violation. Three citations were issued by Inspector Copley and paid by the Respondent. They were for failure to maintain ventilation tubing within 10 feet of the face, failure to rock dust within 40 feet of the face on January 22, 1986, and for allowing work to continue on the section without ventilation.

According to the testimony of Meadows there was an occasion when a State Mine Inspector looked at a scoop after Meadows said "how about coming over there and looking at it?," as the battery plugs were loose on the scoop. Meadows testified that after the mine inspector looked at the scoop, Kirk said that if the scoop would have been put out of operation then Meadows "would have been shoveling ribs out the rest of the day." (Tr. 123). Kirk, in essence, testified that he did not remember that incident nor in essence did he remember making such a statement to Meadows. I adopt the testimony of Meadows in this regard based upon my observations of the witnesses' demeanor, and in as much as this testimony was corroborated by May (Tr. 153).

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On January 29, 1986, when Meadows arrived on the section the scoop was broken. He testified that Kirk told him to get two shovels and get Nelson as the two of them would be shoveling to clear the face area and remove coal from the ribs. It was the testimony of Nelson that only he and Meadows shoveled. They shoveled for approximately 20 minutes before Kirk told them to stop.

Nelson also testified that, in the section, prior to this incident whenever the scoop broke down the miner would be used to clean up the coal and that there was never any shoveling done before in the section when the scoop broke down. Kirk's testimony was at variance to that testified to by Nelson. I adopt the testimony of Nelson, after having observed and evaluated the demeanor of both witnesses, and also due to the fact that Nelson's testimony was corroborated by May and Meadows.

Issues

1. Whether Complainant has established that he was engaged in activity protected by the Act.
2. If so, whether the Complainant suffered adverse action as a result of the protected activity.
3. If so to what relief is he entitled.

Conclusions of Law

Complainant and Respondent are protected by and subject to the provisions of the Act, the Complainant as a miner, and Respondent as operator of the Morton Mine. I have jurisdiction to hear and decide this matter.

The Commission, in a recent decision, *Goff v. Youghioghney & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, *Goff supra* at 1863, stated as follow:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2797-2800; Secretary on behalf of *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 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. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958 (D.C.Cir.1984); Boich v. MSHRC, 719 F.2d 194, 195 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test). Protected Activity

On January 21, 1986 the Complainant questioned Kirk concerning the placement of ventilation tubing. On January 22, 1986 the Complainant asked Kirk if he was going to get some rock dust. On January 28, 1986 the Complainant told MSHA Inspectors Mark Copley and Carl Jenkins about the failure to properly rock dust the face area. I conclude that all of the these activities were safety related and are protected by the Act.

Adverse Action

In his Post Hearing Brief, Complainant complains of three separate actions by Respondent:

1. After Complainant questioned Kirk about the position of ventilation tubing on January 21 he was "set up" for possible disciplinary action.

I accepted Complainant's testimony that Kirk had told him to take the man trip to get additional ventilation tubing I also accepted Complainant's testimony that when he returned to the section Kirk informed him that it was illegal to take the man trip off the section and denied that he had told Complainant to take the man trip. I also accepted Pauley's testimony that Kirk told that he did not tell Complainant to take the man trip and that it was against the law for Nelson to take the man trip from the section. In this context, I find that Kirk's statement to Complainant and Pauley could reasonably tend to intimidate Complainant and cause fear of reprisal. As such, I find Kirk's statements to constitute an adverse action [See Moses v. Whitley Development Corporation, 4 FMSHRC 1475, 1478 (August 1982)].

2. Cummings, Wright, and Winfrey discussed with the Complainant the possibility of transferring him off the section.

Neither Wright, nor Cummings, nor Winfrey did discipline, demote, or transfer Complainant subsequent to his engaging in protected activities on January 21, 1986. The only overt actions were discussions that Cummings, Wright and Winfrey had with the Complainant at which time they raised the possibility with Complainant of him transferring off the section to another section. These discussions, by management officials, coming soon after Complainant engaged in protected activities, surely tended, in some degree to cause the Complainant to feel intimidated. As such, I conclude that they constitute an adverse action.

3. On July 29 1986 Kirk required Complainant to shovel the face area for approximately 20 minutes.

Ron Winfrey, Respondent's Shift Foreman, testified that shoveling coal is part of coal mining and that the only crew member he would exempt would be an electrician. He further testified, in essence, that shoveling is required when a scoop is down. It was also his testimony that normally a shuttle car operator shovels coal around a feeder on an average of three to five times a shift, and that nine times out of ten the shovel car man normally cleans the spillage around the tail piece. These statements might be true with regard to Winfrey's general experience, but in order to ascertain the specific working conditions in Kirk's crew, I adopted the testimony of Nelson, May and Meadows, as being crew members, they would have personal knowledge of the work conditions in the crew. As such, I found that prior to January 29, 1986 no crew members had been required to shovel coal upon the breakdown of the scoop. Accordingly, I find that an adverse action occurred when Kirk required Complainant to shovel coal.

Motivation

I have concluded, *infra*, that the discussions of Cummings, Wright, and Winfrey with Complainant on January 21, 1986, concerning a transfer out of Kirk's section, constituted an adverse action. In as much as Kirk did not tell them to speak to Nelson in this regard, and they acted solely on their own initiative, the inquiry must focus on their motivation rather than on Kirk's motivation. These discussions took place a short time after Complainant had engaged in protected activities. Also, although Johnson and Nelson had an argument over the placement of the ventilation tubing, Wright, Cummings, and Winfrey initiated a discussion about a transfer only with Nelson. However, Winfrey indicated that Johnson had initiated with him a discussion of a transfer, and he considered talking about a transfer with Nelson and not Johnson, as the latter was still belligerent. Winfrey indicated that he wanted to transfer Complainant as there was "turmoil" between him and Kirk. Kirk had told Wright and Cummings that Complainant was the problem and Wright testified that he wanted to talk to the Complainant in order to try to solve the problem before it got out of hand. After the discussions that Wright, Cummings, and Winfrey had with the Complainant, with regard to a transfer out of the section, no further action was taken by them to transfer Complainant. I thus find that their motivation in offering to transfer Complainant from the section was not related to safety complaints.

The adverse action against the Complainant by Kirk on January 21, 1986 in falsely accusing him of illegally using a man trip was committed almost immediately after Complainant had engaged in a protected activity. It establishes, prima facie, that this adverse action on Kirk's part was motivated by Complainant's protected activity. Respondent has not offered any evidence to rebut this prima facie finding. Accordingly, it is concluded, that this adverse action on Kirk's part was motivated solely by Complainant's protected activity.

On January 29, 1986, one day after Complainant engaged in a protected activity in the presence of Kirk, Kirk had him shovel coal. Further, I adopted the testimony of Meadows that on one other occasion Kirk had told Meadows that he "would have been shoveling ribs all day", if a piece of equipment would have been taken out of service by a State Inspector as a result of comments that Meadows had made. Also, I have adopted the testimony of Meadows that after Complainant asked Kirk if he was going to get some rock dust, that Kirk told Meadows that Nelson was "crying about the place not being rock dust(ed)". Also, I have adopted the version testified to by Nelson, May and Meadows that in Kirk's section miners in the past had not done any shoveling when the scoop had broken, and that only Complainant and Meadows, who also had complained to Kirk about the lack of rock dust on January 28, were singled out by Kirk to shovel coal on January 29.

I thus find, based on the above, that the Complainant established a prima facie case that Kirk's action, in having him shovel coal for 20 minutes on January 29, was motivated by the former's protected activity. I further find that Respondent has not rebutted this finding.

I therefore find that Complainant has met his burden in establishing that his being required to shovel coal for 20 minutes on January 29, 1986 constitutes a violation of Section 105(c) of the Act. I also find that Kirk's action on January 21, 1986, accusing Complainant of illegally using a man trip constitutes a violation of Section 105(c) of the Act. The balance of the allegations in the complaint do not establish a violation of Section 105(c) of the Act.

I have considered the size of Respondent's mining operation and history of violations, as contained in figures submitted by Complainant and stipulated to by the Respondent. It is significant to note that no previous Section 105(c) violations have been assessed. I further find that the adverse actions taken by Kirk against the Complainant to have been intentional. Based on these factors as well as the nature of the adverse actions established, I find that a penalty of \$400 is appropriate.

Order

It is ORDERED that:

1. Respondent shall within 15 days from the date of this decision post a copy of this decision at the Morton Mine where notices to miners are normally placed and shall keep it posted there for a period of 60 days.

2. Respondent shall pay a penalty of \$400 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge