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ALVIN RITCHIE V. KODAK MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALVIN RITCHIE, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 86-138-D BARB CD 86-43
KODAK MINING COMPANY, INC., RESPONDENT	Emmons Plant No. 1

DECISION

Appearances: Alvin Ritchie, Happy, Kentucky, pro se;
Leslie Sr. Clair, Esq., and John W. Fischer,
Esq., Denlinger, Rosenthal & Greenberg, Cincinnati,
Ohio, for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Alvin Ritchie 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 Kodak Mining Company, Inc. (Kodak) laid him off and offered him a lower paying job on May 7, 1986, in violation of Section 105(c)(1) of the Act because he had been injured in a truck accident and had reported health and safety complaints to agents of the mine operator. (FOOTNOTE 1)

In order for the complainant to establish a prima facie violation of Section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that the discriminatory action taken against him was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981). The respondent may rebut the prima facie

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case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

If the respondent cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The respondent bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C.Cir1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Alvin Ritchie was laid off by Kodak from his position as the Emmons Preparation Plant operator on May 7, 1986, and offered a lower paying job as night watchman. Ritchie declined that job and thereafter filed this complaint of discrimination. There is no dispute that Mr. Ritchie engaged in protected activity by repeatedly complaining orally and in writing to his foreman, Oman Sandlin, about what he reasonably believed were unhealthful and unsafe conditions at the Emmons Preparation Plant. It is undisputed that Ritchie made periodic complaints about excessive coal dust at the plant from the time he was first employed as the plant operator in 1983 and that he more recently complained of broken boards on the second level walkway at the plant. (FOOTNOTE 2) Accordingly, Mr. Ritchie has established the first element of a prima facie case.

Mr. Ritchie has failed, however, to establish the second element of a prima facie case, i.e., he has not shown that the adverse action by the operator was motivated in any part by those health and safety complaints. The undisputed evidence is that Mr. Ritchie had made periodic complaints about dust for his entire period of employment as plant operator with Kodak, yet was not laid off for almost 3 years. The evidence also shows that other employees made similar complaints over

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the years, some of whom were laid off at the same time as Ritchie, and others were not. Coworker David Spencer had also complained to Sandlin about the loose floorboards at the plant. While Spencer was also laid off with Ritchie, he was subsequently rehired. In addition, it was one of Mr. Ritchie's duties as preparation plant operator to report to his supervisor, and/or to maintenance personnel, these and other problems in the operation of the plant.

There is also credible evidence of valid business reasons for the layoff of Ritchie and 7 other employees on May 7, 1986. Thomas W. Kemp, Vice President for Finance and Processing for Kodak testified that the layoffs were dictated by the depressed coal market. According to Kemp there was significant overcapacity in production in the coal market over the previous 2 years, resulting in lowered prices and tremendous cost pressure to stay in business. As a result there had been a series of layoffs at Kodak beginning in May 1985 followed by layoffs in December 1985, February 1986, April 1986, May 1986 (the layoff in issue), and in February 1987.

Kemp testified that the May 7, 1986, layoff was dictated by loss of the night shift at the Chester Preparation Plant which in turn was dictated by their forecast for lowered coal production. The decision was made by the Executive Committee consisting of Kemp, President Bowling, Vice President Cauley, and Charlene Walker. Processing Superintendent Estell Adams determined which particular miners were to be laid off in the processing sector after consulting with his foremen, Oman Sandlin and Jack Hall.

Estell Adams testified that the selection of miners to be laid off was made in accordance with the company personnel handbook (Exhibit RA1). The handbook provides as here relevant as follows:

Employees are selected for layoff and recall primarily on the basis of their ability to perform the work needed together with their depend ability. If these factors are equal, then preference is given to the employee with longer service.

According to Adams, using that criteria he and his foremen prepared an analysis of the processing plant employee job skills similar to that found in Exhibit RA5.

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The skills noted in Exhibit RÅ5 are not disputed and clearly demonstrate that those employees laid off in May 1986, including Complainant Ritchie, were those with the fewer critical skills. It is clear from this evidence that the May 7, 1986, layoff of Ritchie and seven other processing plant employees had a legitimate business-related and non-protected basis. Thus even had Mr. Ritchie established a prima facie case herein, that case was clearly rebutted by the operator's evidence. Under the circumstances, the Complaint herein must be dismissed.

ORDER

The complaint of discrimination herein is dismissed.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

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 the operator's agent . . . 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."

~FOOTNOTE_TWO

2 Mr. Ritchie also alleged in his initial complaint that arm injuries he sustained after falling out of a company pickup truck constituted protected activity. He has failed to show, however, how those injuries come within the scope of the activities protected by Section 105(c)(1), and, accordingly, the allegation is rejected.