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RONALD MORRIS V. DUNKARD MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RONALD R. MORRIS,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. PENN 87-77-D

v.

PITT CD 86-15

DUNKARD MINING CO.,
RESPONDENT

DECISION

Appearances: Harold Cancelmi, Esq., Thompson and Baily,
Waynesburg, Pennsylvania, for Complainant;
C. Robert McCall, Esq., McCall, Stets &
Hardisty, Waynesburg,
Pennsylvania, for 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. 815(c) (the Act) alleging, in essence, that he was illegally discriminated against in that he made a valid safety complaint which caused "the loss of my employment."

Pursuant to notice, the case was set for hearing in Washington, Pennsylvania on March 17, 1987. On March 17, 1987, the Complainant and Respondent both appeared, and the Complainant was represented by Counsel. The Respondent made a motion to have the case adjourned in order to be represented by Counsel. This motion was granted, and the case was rescheduled for May 27, 1987, in Pittsburgh, Pennsylvania. At the hearing, on May 27 & 28, 1987, Ronald D. Morris, Frank Rutherford, and Ann Kerr testified for the Complainant. Ernest Sauro, Barbara Smith, Barbara Bircher, Harvey Litten, Floyd Jenkins, Karl Hans Rath, Barbara Betchy, and James Earl Mason testified for the Respondent. Subsequent to the hearing, Respondent, on July 7, 1987, requested an extension of time until August 4, 1987, to file Posthearing Findings of Fact. On July 30, 1987, Complainant, on behalf of both Parties, requested a further extension until August 24, 1987. On August 26, 1987, Respondent filed its Posthearing Brief and Requested Findings of Fact. On August 24, 1987, and September 10, 1987, Complainant requested further extensions of time to file its

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brief and Requested Findings of Fact. These requests were granted. Complainant filed his Requested Findings Fact and Memorandum Brief on October 5, 1987.

Issues

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

Findings of Fact

Complainant and Respondent are protected by, and subject to, the provisions of section 105(c) of the Act. I have jurisdiction to decide this case.

The Complainant, commencing in April 1985, and continuing through all dates in question herein, was a truck driver for the RMW Trucking Company which had an agreement to haul coal from Respondent's mine and dump it at Respondent's processing plant. The Complainant, in essence, has alleged that as a consequence of safety complaints that he made to Respondent, the Respondent "barred" him from entering on Respondent's property and as such, according to a complaint filed with the Commission, caused the loss of his employment.

On January 14, 1986, the truck that the Complainant was driving, skidded on the Respondent's haulage road which was snow covered, and had a maximum grade of 20 percent. In this connection I base my finding upon the testimony of Rath as it was predicated upon a detailed topographical map, Exhibit 2, rather than upon the approximations of Morris and Sauro.

The testimony was in conflict between Ronald R. Morris (Complainant) on the one hand, and Carl Hans Rath (Respondent's Vice President) and Ernest Sauro (Respondent's Superintendent), on the other hand, with regard to the following: the time the incident occurred, whether it was witnessed by Rath, whether the Morris' truck skidded down the slope or on a level grade at the end of the slope, the order in which Morris and Harvey Litten, another truck driver employed by RMW Trucking, arrived at the processing plant, and whether, after the incident, Morris drove back up the hill or left by another exit. Although the weight of the evidence tends to support the version testified to by Rath, as it was corroborated by Sauro and Litten, it is not critical to these proceedings to reconcile all these conflicts.

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Morris, on January 14, 1986, after the truck skidding incident occurred, did not register any safety complaints about the condition of the road with either Sauro or Rath.

On January 15, 1986, Rath observed that the truck that Morris was driving, had coal left in its bed after the rest of the load had been dumped. He requested Morris to either clean the truck of the remaining coal or get it light weighed. Morris testified that he complied with this request. According to the testimony of Rath, Morris first responded by telling Rath that he (Rath) was not to tell him (Morris) anything. I find that Morris did respond as testified to by Rath, as Rath's testimony was not rebutted by Morris when he testified in rebuttal.

According to Morris, he then saw Rath in the weighhouse and said that he had done Rath a favor in light weighing the coal and asked Rath to do him a favor in keeping the road clear. He testified that he then told Rath about the incident of the truck skidding on January 14. Morris testified that Rath did not respond.

Morris testified that later on in the day he was asked by the weighmistress to go to the office to see Rath. Morris testified that when he saw Rath in the office there was no one else in the area and Rath said that he was the boss of the company and that he was not going to tell his employees to stay late or to pay them overtime to clean the haulage road of snow. Morris testified that Rath told him that he was not to make complaints about the road condition.

According to Morris, after he spoke with Rath, he received permission from the weighmistress to use the telephone in Respondent's office, and called his union representative, Frank Rutherford, at UMW Headquarters. He testified that he told him he had a safety problem and " started to relate to him what happened " (Tr. 60). Rath, who was in another office, then picked up the phone and told Morris, in essence, not to use the office phone.

Morris further testified that at the end of the day he returned to the RMW Company and James Earl Mason, RMW's owner, told him that Rath had called on the telephone and told him that he (Morris) is no longer to be allowed on the site. Morris testified that when he asked Mason for the reason, Mason said that he understood that Morris had made complaints about the road condition.

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Rath testified, in essence, that after Morris had refused to follow instructions to either clean out the truck or get it light weighed, he asked Barbara Smith (Respondent's payroll clerk), Barbara Bircher (Respondent's bookkeeper and weighmistress), and Barbara Betchy (Respondent's office manager) to identify Morris. Rath testified that he could not recall who said what, but that these employees complained that Morris had dumped coal on Taylortown Road, and had sat around for 2 to 3 hours if anything was wrong with his truck. He also testified that Smith, Bircher, and Betchy had told him that Morris had dumped coal in the wrong places and when reminded responded by saying "don't tell me anything." I adopted Rath's testimony as to what was told to him as it was essentially corroborated by Bircher and Betchy.

Subsequently, Rath asked Morris to come to his office. Rath told Morris that the women in the office had complained about him. Rath testified that Morris said that he (Rath) was not his boss. Rath said that Morris then told him that the road the previous night was not in good condition and he requested that an employee be on the premises all night to clear the road of snow. I adopt Rath's version of this conversation as it was corroborated, in the essential parts, by Betchy and Smith.

After this conversation occurred, Rath testified that he called Mason and asked him to replace Morris as the latter was not following instructions. Rath further said that later on Mason called back to ask him to reconsider and he refused. I accept Rath's version of what he told Mason as it was essentially corroborated by Mason.

Morris testified that subsequent to January 15, 1986, RMW trucking employed him maybe a total of 5 or 6 weeks in 1986 to drive a truck at sites other than Respondent's facilities. He testified that he did not have any other earnings in 1986, aside from unemployment compensation, and that he is presently unemployed.

Discussion

The Commission, in a recent decision, *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 860 (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 follows:

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, 958-59 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test).

Applying the above standards to the case at bar, I find that the evidence is uncontradicted that on January 15, 1986, Morris voiced his concern about the road conditions at Respondent's preparation plant the day before. Further, based on the 20 percent grade of the haulage road, Morris' testimony that it was snow covered, as corroborated by Sauro's comment that it was "slick," along with the fact that Morris' truck did skid, whether on the level or on a grade, established that Morris had good cause in voicing his complaint to Rath about the condition of the roadway. Furthermore, the action of Rath in effect telling Mason on January 15, 1986, to stop using Morris as a truck driver on Respondent's premises, was adverse to Morris, as it, in essence, prevented him from working for RMW Trucking Company on a full time bases. Moreover, inasmuch as Rath took this action right after Morris had voiced complaints about the road condition, and after the latter attempted to contact his union representative, I find that the adverse action was motivated in part by Morris' protected activity. According, I find that Morris has established a prima facie case. (Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, (April 1981)).

In analyzing whether Respondent has rebutted the Complainant's prima facie case, I found Rath's testimony credible as to his motivation in having Morris replaced as a truck driver on Respondent's premises. In this connection, I found that Betchy, Smith, and Bircher told Rath, on January 15, 1986, that Morris has said "don't tell me anything," when reminded that he had dropped coal in the wrong places. In addition, I found that, on January 15, 1986, when Rath requested Morris early in the day to clean the truck bed or light weigh, Morris had told Rath not to tell him anything. Also, I found that subsequently on January 15, 1986, when Rath told Morris that the women in his office had complained about him, Morris had said that Rath was not his boss. I find that Morris' comments and responses were unprotected activities.

Based upon the above, I find that when Rath told Mason on January 15, 1986, to no longer have Morris sent to Respondent's facilities, Rath was motivated by comments made to him by Morris

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as well as information provided to him by Bircher, Betchy, and Smith of Morris' responses to their requests. I therefore conclude that the adverse action taken by Rath would have been taken in any event for the unprotected activities alone. Accordingly, I find that the Complainant has failed to establish a case of prohibited discrimination under the Act. (see, Sedgmer v. Consolidation Coal Co., 8 FMSHRC 303, 306 (March 1986)).

ORDER

Based upon the above findings of fact and conclusions of law it is ORDERED that this proceeding be DISMISSED.

Avram Weisberger
Administrative Law Judge