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SOL (MSHA) & J.F. HALE V. BILL BRANCH COAL CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
DONALD J. ROBINETTE,
COMPLAINANT

v.

DISCRIMINATION PROCEEDING

Docket No. VA 87-21-D

NORT CD 87-5

Mine No. 8

BILL BRANCH COAL COMPANY,
INC.,

RESPONDENT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF JOEY F. HALE,
COMPLAINANT

v.

DISCRIMINATION PROCEEDING

Docket No. VA 87-22-D

NORT CD 87-7

Mine No. 8

BILL BRANCH COAL COMPANY,
INC.,

RESPONDENT

DECISION

Appearances: Patricia L. Larkin, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Secretary;
Robert J. Breimann, Esq., Street, Street, Street,
Scott & Bowman, Grundy, Virginia, for the
Complainants.

Before: Judge Weisberger

Statement of the Case

On May 20, 1987, the Secretary, on behalf Donald J. Robinette and Joey F. Hale, filed a Complaint alleging violations of 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1). Respondent filed its Answer on August 20, 1987. On August 28, 1987, an Order was issued consolidating Docket Nos. VA 87-21-D and VA 87-22-D and setting these cases for hearing in Kingsport, Tennessee, on December 1, 1987. On October 28, 1987, Complainants requested a continuance of the

~1319

scheduled Hearing as one of their perspective witnesses had recently undergone surgery, and the request for continuance was not opposed. On September 2, 1987, Complainants filed a Motion for Leave to file an Amended Complaint and this Motion was not opposed. An Order was entered on September 10, 1987, granting this Motion.

A Hearing was subsequently rescheduled for January 26 & 27, 1988, in Kingsport, Tennessee. Due to the unavailability of a MSHA Inspector for deposition, the Hearing scheduled for January 26 & 27, was rescheduled for February 29, and March 1, 1988, in Kingsport, Tennessee. On February 24, 1988, Respondent, in a telephone call to the undersigned, made a request to compel Petitioner to produce names of certain witnesses pursuant to a written interrogatory. In response to this request on February 24, 1988, a telephone conference call was arranged by the undersigned with the attorneys for both Parties. In this conference call the hearing previously set for February 29 and March 1 was adjourned, and the Parties were requested to file Memoranda setting forth their position on the issues raised by Respondent's request. Memoranda were filed on March 7, 1988. On March 10, 1988, an Order was entered requiring Petitioner to serve upon Respondent the names, addresses, and telephone numbers of all witnesses who are not miners, and to file with the undersigned a statement to be examined in camera containing names of witnesses who are alleged to be informers, and a statement setting forth any facts relied upon to establish the informer's privilege for each of the witnesses alleged to be informers. On May 2, 1988, an Order was issued, that having examined the statements in camera, the witnesses listed therein were declared to be informers within the preview of 29 C.F.R. 2700.59.

Pursuant to notice, the case was rescheduled and heard in Johnson City, Tennessee, on May 10 & 12. At the hearing, Donald Joe Robinette, Gary Compton, Fred L. Howery, Franklin Dallas Perkins, Donald James Morris, Junior Vidis Price, Joey Fred Hale, Donald Cook, John Kyle Griffith, and Russell Wayne Reynolds testified for the Complainants. Rexley Ray, Ivan Leon Vandyke, Charles Lee Boyd, and Doris Allen Nickels testified for the Respondent. At the conclusion of the Complainant's case, Respondent made a Motion to strike the Secretary's case and dismiss the Complaints. After oral argument, this Motion was denied.

At the conclusion of testimony on May 12, Respondent requested that the Hearing be adjourned and be rescheduled to allow it to present two additional witnesses. The case was subsequently rescheduled for July 13, 1988, in Johnson City, Tennessee. At the commencement of the rescheduled hearing on July 13, 1988, Respondent indicated that it had not been able to locate one of its witnesses, Gary Compton, and it had decided not to call any other witnesses.

~1320

Proposed Findings of Fact and Memorandum of Law were filed on August 12, 1988, by Complainants, and by Respondent on August 15, 1988. A Reply Brief was filed on September 12, 1988, by Respondent; none was filed by Complainants.

Issues

1. Whether the Complainants have established that they were engaged in an activity protected by the Act.
2. If so, whether the Complainants suffered adverse action as the result of the protected activity.
3. If so, to what relief are they entitled.

DONALD JOE ROBINETTE

In evaluating the evidence presented herein, I have been guided by the Commission's recent decision. The Commission, in a recent decision, *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986), which 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).

Protected Activity

Donald Joe Robinette, a coal miner with 23 years experience, worked for Respondent in 1984, until he was laid off in that year, and then was rehired in July or August 1986. Robinette testified that, at various times, he spoke with his foreman at the time, Russell Wayne Reynolds, about "improving the ventilation" and asked him to speak to the Superintendent, C.L. Boyd,

~1321

about this matter. (Tr. Vol 1, P. 91). He also said that, on one occasion, between a few days and 3 weeks prior to the time he was fired, November 21, 1986, he asked Boyd for a curtain to get more air on the section. In contrast, Boyd indicated that Robinette never registered a complaint with him with regard to air or ventilation, nor did Robinette communicate the same through any other person. Boyd, in general, indicated that he did not receive complaints from any miners with regard to insufficient air. He also said that in February 1986, the brattice was repaired and the air in the section was then measured at 12,000 cubic feet, which exceeded the federally mandated minimum of 9000 cubic feet. Boyd also said that a larger fan was installed in March 1986, and that subsequent air readings indicated air movement of 26,000 cubic feet.

In reconciling the conflict between Robinette and Boyd, I have concluded, based upon my observations of the witnesses' demeanor, that Robinette was truthful and that he did indeed ask Boyd on one occasion for a curtain to get more air on the section. Also, Reynolds corroborated Robinette's testimony that Robinette and other men complained to him about the air on the section. I therefore conclude that Robinette did voice complaints to Reynolds about the air on the section, and did request a curtain from Boyd to get more air on the section. I further find these activities of Robinette to be protected within the purview of the Federal Mine Safety and Health Act of 1977.

Motivation

Gary Compton, who was the foreman of the section on which Robinette worked on November 21, 1986, testified that on that date he worked overtime along with two roof bolters. He said that while traveling on the scoop he hit a drill which was parked inby behind a curtain and that the drill did not have its lights on. Compton, in essence, said that it was not proper for Robinette to have left the drill behind the curtain with its lights off, and it was also contrary to Respondent's policy. Compton said that after he hit the drill he called Respondent's Superintendent, Boyd, and told him that he had "...no further use for Mr. Robinette on the coal drill." (Tr. Vol 1, P. 161). Boyd indicated that Compton told him (Boyd) that as far as he (Compton) was concerned, Robinette was fired if Boyd "did not have any thing else for Donald Robinette to do at the mine." (Tr. Vol III, P. 43). Boyd further said, in essence, that Compton told him that Robinette was fired because Robinette had parked his drill behind the fly curtain and Compton ran into it. Boyd also said that Robinette was caught sleeping 2 to 3 days prior to November 21.

Boyd, who had the authority to fire, indicated that when Robinette came outside, he told Robinette that he did not have

~1322

any thing else for him to do and that he would have to fire him. Boyd said that Robinette got angry, and he (Boyd) asked Robinette to wait outside and he said to Robinette "we'll work it out." (Tr. Vol III, P. 44). Boyd said that Robinette waited approximately 10 minutes and then left. When questioned by Respondent's attorney, Boyd agreed that there were no other reasons for Robinette's termination other than what he previously stated, and that it was not motivated by any other external factor. Boyd also testified that he never discussed with Compton the need to fire Robinette.

In contrast, it was the testimony of Robinette that, when he left the section at the end of his regular shift, and prior to the commencement of the overtime shift, his drill was parked halfway under the curtain and the lights were on. Although the testimony of Rexley Ray appears to corroborate that of Compton, in that the former indicated that the Robinette's drill was pretty close to the curtain and there were no lights on, it is significant to note that Ray observed the drill only after the accident. In contrast, Robinette's testimony finds corroboration in the testimony of Joey Hale that the drill was parked in the middle of the curtain. I observed Hale and found, based upon his demeanor, that his testimony was truthful on this point. Also, Robinette's version finds some corroboration in the testimony of Donald J. Morris, a roof bolter, who worked overtime along with Compton on November 21, that prior to the accident, he saw light coming down the hallway one break back "...from something parked down there." (Tr. Vol I, P. 227). Accordingly, I adopt Robinette's version and find that at the end of his shift he had left the drill halfway through the curtain with its lights on.

Russell Wayne Reynolds, who was Robinette's section boss when Robinette commenced working for Respondent in 1986, testified that 2 weeks prior to November 17, 1986, Boyd told him that Robinette had told Boyd that, in essence, if the section did not get more air that he, Robinette, "...would call somebody that could get it." (Tr. Vol II, P. 159). I find this testimony truthful, as it was not contradicted by Boyd who subsequently testified. (Footnote 1)

On November 17, 1986, a spot inspection was performed at Respondent's mine by MSHA Inspectors Franklin Dallas Perkins and Fred L. Howery. According to Howery, (it was stipulated that if Perkins were to testify, the answers that he would give to questions on direct and cross-examination would be the same as Howery), he indicated, in essence, that upon serving a citation on Boyd, the latter asked if the MSHA Inspectors had been called to make the inspection. Howery, in essence, further testified that Boyd said that if the identity of the person who called the inspectors would be ascertained then that person would be fired. Reynolds said that a few days after the inspection on November 17, Boyd said he'd fire the one who called the inspectors. Boyd, however, said that no one ever told him that Robinette had called the inspectors and that he never threatened to fire an employee for calling the inspectors and never made such a statement. However, I find, based on observations of their demeanor, that Howery and Reynolds were truthful in testifying that Boyd had told them on separate occasions that the one who called the inspectors would be fired. Also, I note that Boyd did not specifically deny making those specific statements to Howery and Reynolds. Further, it was Robinette's uncontradicted testimony that Boyd asked him prior to November 21, 1986, if he had called the inspectors. (Tr. 82). Robinette also testified that Boyd said that he would find the one who called the inspectors and fire him.

In addition, Griffith testified that sometime prior to November 17, 1986, Compton initiated a conversation and indicated that Robinette had called the MSHA Inspectors and that he (Compton) "...was going to get rid of him." (Tr. Vol II, P. 131). In this regard Reynolds also testified that on November 17, the day of the inspection, Compton said that he would fire the one who called the inspector. I find the testimony of Griffith and Reynolds to be truthful based upon observations of their demeanor, as well as the fact that their testimony in this regard has not been contradicted. It is further significant to note that Robinette's uncontradicted testimony was to the effect that Compton had asked him if he had called the inspectors.

In addition, it was Robinette's testimony that on the Monday after he was fired, he asked Eugene Altizer (one of Respondent's owners at the time) if he (Robinette) was fired because of anything he had done, and Altizer said that he did not know why Robinette was fired as Boyd had taken that action but "...if it was because the inspectors had been called, that he would find out who called them if he had to fire every man on that section." (Tr. Vol I, P. 81). I find Robinette's testimony truthful in this regard based upon observations of his demeanor, the fact that his testimony was uncontradicted, and the fact it was corroborated by Hale, who was present when this conversation took place.

~1324

The record contains further evidence bearing on Respondent's motivation. In this connection, I note the testimony of Reynolds that in January 1987, Boyd accused him of having previously called the inspectors to Respondent's mine. Boyd disputed the details of this conversation, denied making such a statement and denied indicating that an employee would not be rehired if he called an inspector. I have resolved this conflict in testimony in favor of Reynolds based upon observations of the witnesses' demeanor. In the same fashion, it was Reynolds' testimony that Leon Vandyke, his present employer, told him that Dors McLaughlin, Respondent's owner, and Boyd told him that he (Reynolds) had called the inspector to Respondent's mine.

Based upon a combination of the above testimony, I conclude that the firing of Robinette was motivated in "any part," by Respondent's perception that Robinette had called mine inspectors to the mine. Further, I find, based upon an analysis of the above outlined evidence, that Respondent has neither shown that the adverse activity was not motivated in any part by the protected activity, nor has it established an affirmative defense.

Hence, I conclude that Respondent did violate 105(c) of the Act as it did commit an act of discrimination against Robinette within the purview of 105(c) of the Act.

JOEY HALE

Protected Activity

Joey Hale, a miner employed by Respondent from October 1981 to November 22, 1986, testified that he told Reynolds on one occasion that if proper ventilation was not provided, he would call the inspector. Hale also said that several times, 2 or 3 weeks before he was fired, he complained to Boyd, in essence, that additional air was needed on the section. In contrast, Boyd essentially testified that he did not receive complaints from other employees about the air in the section, and that the section boss did not tell him that he received any complaints. However, based upon observations of their demeanor, I find Hale's testimony more credible. I thus find that Hale engaged in protected activities in making complaints to Reynolds and Boyd with regard to proper ventilation.

Motivation

According to Hale, on November 17, 1986, the date of the MSHA spot inspection, while he and Robinette were in the section, he thought he saw Compton approaching. He then approached Robinette and asked him if they would have time "to shoot the place." (Tr. Vol II, P. 15). He said that he did not think that

~1325

Robinette was asleep and he did not wake him. Robinette indicated that he was not asleep and stated that Compton asked him if he was going to wake up. Griffith testified that approximately during Compton's first or second week on the section, Compton initiated a conversation and indicated that he was trying to catch Robinette asleep.

Doris Allen Nickels, another miner on the section on November 17, indicated that he was approximately 5 feet away from Robinette during the above incident. He said that Hale did not try to wake Robinette before Compton arrived. It was his testimony, in essence, that when he observed a light approaching the section, Hale asked whether that was Compton and Nickels indicated in the affirmative. Nickels said that Hale then hollered at Robinette 2 or 3 times and said "Don, I believe there comes the boss," (Tr. Vol III, P. 201), but that Robinette did not answer. Nickels said that Hale then picked up some lumps of coal and threw them at Robinette who then raised himself up and put his light on. I find the version testified to by Nickels to be more credible. In reaching this conclusion, I note that neither Hale nor Robinette were recalled to offer testimony in rebuttal to the specifics testified to by Nickels. According to Nickels, later the same evening, Compton asked him whether Robinette was asleep and whether he (Nickels) woke him up. Nickels said that he then proceeded to tell Compton that Hale had hollered at Robinette saying "there comes the boss," (Tr. Vol III, P. 204), and threw rocks at him. The only significant evidence having any tendency to impeach the creditability of Nickels, was Hale's statement that on November 22, Nickels told him that Compton had told Nickels on the morning of November 22, "he had better keep his mouth shut if he wants to keep his job ... " (Tr. Vol II, P. 24). Nickels, however, indicated that Compton had not made such a statement to him and he also denied having himself made such a statement to Hale. Even if Nickels was coerced into not stating certain facts, I can not infer that he was in any fashion coerced to fabricate what transpired on November 21.

According to Hale on November 22, he was summoned to the mine office where Compton and Boyd were present. He said that Compton accused him of waking Robinette up and said that if Hale did not admit that he woke up Robinette he was fired. Hale said that he denied waking up Robinette, and Compton asked Boyd if he had any thing else that he wanted Hale to do and Boyd told Hale that he could go home.

According to Boyd, Compton initially asked Hale why he woke Robinette up and Hale denied waking him up. However, according to Boyd, when Compton indicated that he had a witness, Hale said he did not mean to wake Robinette up and Compton told him "... that he no longer needed him or he was fired for interfering with his work." (Tr. Vol III, P. 50). Compton was, according to

~1326

Respondent, unavailable for testimony on its behalf, and thus was unable to explain his specific reasons for firing Hale. In this connection, I find that Boyd is not competent to testify as to what Compton meant when he said he fired Hale "for interfering with his work." (Tr. Vol III, P. 50). I accordingly did not give any weight to his testimony in this regard.

I find, as analyzed in the portion in this Decision dealing with the complaint of Donald Robinette, *infra*, that Boyd and Compton, Respondent's supervisors at the time, both indicated that the persons who called the inspectors would be fired. I also find, as analyzed above, *infra*, that a statement to the same effect was made by Altizer, one of Respondent's owners at the time. In this connection, I note that Hale testified that approximately 2 to 3 months prior to his discharge, he told Reynolds that if proper ventilation was not provided for he was going to call the inspectors. Also, approximately 2 to 3 months before his discharge, Hale was present in the house of Donald Cook, an employee miner of Respondent from April to July 1986, when a telephone call was made to a Lacey Horton, a State Mine Inspector. According to Cook, he (Cook) spoke with Horton regarding ventilation problems at Respondent's mine. According to Hale, he (Hale) spoke to Horton with regard to his rights working in smoke and dust. It is not necessary to reconcile this conflict in the testimony as it is clear, from the testimony of both Cook and Hale, that in the conversation with Horton, neither one either identified himself or the mine involved. However, significantly, Hale indicated that he discussed this conversation with several other miners.

Also I note, that although Hale's actions on November 17, in waking up Robinette might have been part of the reason for his being fired, Respondent did not discipline him or talk to him about this incident until 5 days later, on November 22, which is 1 day after Robinette had been fired. In this connection, I note that I concluded, *infra*, that Robinette's firing was motivated in part by Respondent's perception that he had called the inspectors.

I conclude, based on the combination of all the above factors, that Hale established his *prima facie* case in establishing that his discharge was motivated "in any" part by management's retaliation against those suspected of having called the inspector, and that Respondent has neither rebutted this *prima facie* case, nor has it established any affirmative defense. (See, Goff, *supra*.)

ORDER

It is ORDERED that:

1. Respondent shall, within 15 days of the date of this Decision, post a copy of this Decision at its Mine No. 8 where notices to miners are normally placed, and shall keep it posted there for a period of 60 days.

