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BOBBY R. LUTTRELL V. JERICOL MINING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

BOBBY R. LUTTRELL,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 87-214-D

v.

BARB CD 87-36

JERICOL MINING, INC.,
RESPONDENT

No. 1 Creech Mine

DECISION

Appearances: Sidney B. Douglass, Esq., Harlan, KY, for
Complainant;
William D. Kirkland, Esq., and Christopher M. Hill, Esq.,
McBrayer, McGinnis, Leslie and Kirkland, Frankfort, KY;
for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as a roof bolter on April 27, 1987, for complaining of safety conditions, activities which are protected under the Federal Mine Safety and Health Act of 1977, (hereinafter the Act). He filed a discrimination complaint on May 14, 1987, with the Mine Safety and Health Administration (MSHA). On July 15, 1987, MSHA notified him of its finding that a violation of section 105(c) of the Act had not occurred.

Mr. Luttrell thereafter filed a pro se complaint with this Commission on July 29, 1987, naming Jericol Mining, Inc., (Jericol) as respondent. The complaint was not served upon Jericol until September 1, 1987, but Jericol had been notified by the Commission on August 4, 1987 that an incomplete complaint had been filed. The complainant thereafter completed his filing and on October 2, 1987, Jericol filed its answer. Respondent contends that Luttrell was discharged for insubordination and engaging in threatening behavior against his superiors and not because of any protected activity.

Pursuant to notice, an evidentiary hearing was held in Lexington, Kentucky on May 25, 1988. Both parties elicited oral testimony and submitted documentary evidence into the record. Additionally, the post-hearing deposition of Mr. Harold Brewer,

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which was taken on June 17, 1988, has been offered and received into the record of trial.

By motion, complainant also seeks to file his own post-hearing deposition wherein he alleges that on May 26, 1988, the day after the hearing, he and one of the men who had testified on his behalf, were terminated from their employment with General Testing of Harlan, Kentucky, a construction firm, because of this case against Jericol Mining, Inc. The complainant asserts that his deposition testimony is relevant to show bias and malice against him on the part of Jericol. Respondent objects to the admission of this deposition into the record on several grounds, including relevancy. The relevancy objection is well taken. I am concerned in this proceeding with an April of 1987 discharge which is allegedly unlawful. What may have occurred in May of 1988 between the complainant and some other third party with or without the complicity of the respondent is too remote to have any bearing on the case before me. Accordingly, complainant's motion to file the deposition of the complainant or in the alternative to reopen the hearing is denied.

Both parties have filed post-hearing briefs which I have considered along with the entire record and considering the contentions of the parties, make this decision.

ISSUES

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

STIPULATIONS

The complainant and respondent stipulated to the following by Joint Exhibit No. 1:

1. The complainant's last day of work was April 21, 1987.
2. Prior to his discharge, the complainant was employed by the respondent as a "miner" within the meaning of 30 USC 802(g).
3. The respondent is an "operator" within the meaning of 30 USC 802(d).

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4. The complainant was first employed by the respondent on January 15, 1979.

5. The complainant resigned on March 26, 1982.

6. The complainant was reemployed on October 8, 1983.

7. The complainant resigned again on April 6, 1984.

8. The complainant was rehired on July 11, 1984.

9. The complainant quit his job with the operator on September 9, 1985 and filed a MSHA complaint.

10. The complainant withdrew the above MSHA complaint on September 30, 1985, and was allowed to come back to work.

11. On April 21, 1987, Millard Perry held the position of section foreman with respondent and was the complainant's supervisor.

12. Robert McConnell, Wayne Sizemore, Larry Blanton, Mike Smith, Don Pittman and Doug Brewer were witnesses to the confrontation on April 21, 1987 between complainant and Millard Perry.

13. The Kentucky Division of Unemployment Insurance has determined that the complainant was not entitled to collect unemployment compensation because he was discharged for insubordination.

14. The Mine Safety and Health Administration has determined that the respondent has not violated 105(c) of the Federal Mine Safety and Health Act of 1977 with regard to the complainant's discharge.

DISCUSSION

Mr. Luttrell first went to work for Jericol in January of 1979, while the company was in the midst of a strike with the United Mine Workers. He endured hardships during his first seven to nine months of employment due to the strike. The miners were escorted back and forth to work by the State Police in armored busses and there were shootings. One man was killed on the same bus with Luttrell and two others were wounded, but Luttrell continued to cross the picket line and go to work.

Mr. Luttrell has been a roof bolter for most of his career with Jericol and over the years has made safety-related complaints to the company on numerous occasions.

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For instance, in 1982 or 1983, when he worked at the Wallins Mine, he had complained of the roof bolts he was furnished being too short to hold the top. He also complained that the "boss" and the continuous miner operator were using LSD, Valium, "speed" and other drugs while on the job and were consequently making cuts forty and fifty feet deep. He also testified that the mine foremen were giving the miners all sorts of drugs such as THC, animal tranquilizers, Valium, "speed" and Percodan right on the job. Allegedly as a result of these complaints, they moved him to the Creech No. 2 Mine. On cross-examination, however, he testified that he, too, smoked marijuana underground while operating the roof bolter.

In 1985, he filed a prior discrimination complaint with MSHA, but it was dropped after the company gave him his job back, and moved him to the Creech No. 1 Mine.

In 1986, at the annual retraining meeting for the Jericol employees at Keokee, Virginia, Luttrell spoke out and complained about safety conditions—the roof bolters being under too much pressure and having to work too many hours. This was in front of all the company employees, including Mr. Baker, the Vice-president of Operations.

In June of 1987, Luttrell testified on behalf of Mr. Roger Hall, who had also filed a discrimination case against Jericol, but he (Luttrell) had already been fired for two months at this point. Therefore, absent proof of some connection between giving this testimony on behalf of Hall and his own discharge, I cannot find that this was protected activity relevant to his April 1987 discharge. Baker's testimony is that he had no knowledge that Luttrell would testify in the Roger Hall case at the time he fired Mr. Luttrell. In fact, Luttrell himself testified that he told Baker that he would not testify two weeks before he was terminated. In any event, it defies common sense that Baker would fire Luttrell before the Hall case went to trial, if his purpose was to prevent Luttrell from testifying for Hall.

There was also some testimony concerning the issue of whether or not Luttrell had called the federal mine inspectors in to inspect the mine. However, Luttrell maintains he did not and there is nothing in the record otherwise to suggest that he did, or that Mr. Baker thought he did.

Mr. Luttrell had also on occasion made safety complaints to Millard "Red" Perry, his section foreman and supervisor. Specifically, he had complained about his "pinner" cable being "blocked in". That means it was wired straight in from the power cable, around the circuit breaker, so that the

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breaker wouldn't trip in the event of a short in the circuit, and shut the equipment off.

The most significant safety complaint Bobby Luttrell seems to have made was that he had to work under deep cuts. Several witnesses for the complaint testified to this effect and I find it to be a credible claim.

On the last day Mr. Luttrell actually worked for Jericol, April 21, 1987, the circuit breaker tripped on the roof bolter, shutting the machine down, until the maintenance foreman, Doug Brewer, "blocked it in". This is a practice Mr. Luttrell believes to be very dangerous. He had complained of this practice in the past, but there was no testimony that he made any mention of it on this day.

In any case, foreman Perry was of the opinion that Luttrell was bolting slower than usual that day and he also believed that Luttrell was attempting to get the bolting machine stuck in loose coal, ostensibly so he could take a break from bolting. Mr. Luttrell, on the other hand, states that he could not have bolted any faster that day because the top was bad and he denies that he was trying to get the bolter stuck, although he admits it did get stuck and he was done bolting for the rest of the shift.

After what turned out to be his final shift, Luttrell and his partner on the "pinner," Mike Smith, were called into the mine superintendent's office. Their foreman, Millard Perry, was waiting there for them, along with Wayne Sizemore, and he confronted them both about their work. Smith testified that Perry said they were both too slow and that they could bolt better. He (Smith) acknowledged that they could have probably bolted more top, but I note that this whole issue of productivity is largely irrelevant to this case. Whether or not Mr. Luttrell is a slow bolter or a fast bolter is relatively insignificant compared to his violent reaction to this criticism coming from his supervisor.

With the four men gathered in the superintendent's office, Perry asked Luttrell and Smith if they had a problem working for him. Smith replied in the negative. Luttrell responded by asking if Perry had a problem with them, to which Perry replied that he did have a problem with that day's bolting. According to Perry's testimony, which is corroborated in the main by Smith's and Sizemore's, it was at this point that Luttrell started cussing him, calling him names and invited him out to his truck to take care of him there. Perry testified that he understood that Luttrell meant to kill him. He quoted Luttrell as saying to him: "Come out to my truck; I've got something to take care of you with."

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Robert McConnell, another Jericol foreman happened to be in the same building, but in a different room while all this was going on. He testified that he heard a lot of screaming through the door and then the door was flung open, Mr. Luttrell came out and then turned and called foreman Perry a "motherfucker," and that he would meet him at Slope Hollow and take care of him there; and he said that he had something in his truck to take care of him with. Luttrell did in fact wait for Perry at Slope Hollow, but Perry didn't stop.

Foreman McConnell had also had an earlier episode with Mr. Luttrell. On January 15, 1987, McConnell was acting section foreman on the section Bobby Luttrell was running a bolting machine on. When the bolter broke down, he told Luttrell to go and shovel around the coal feeder and tailpiece. Instead of performing this task, Luttrell began operating one of the shuttle cars until McConnell saw him. At that time he told him he didn't want him operating the car and to go back to the dump and shovel the loose coal alongside the batwings on the feeder. When he went back a short time later to check on Luttrell, he wasn't there. He found him back at the bolting machine watching the repairman work on the drill. McConnell again told him to go to the dump and finish shoveling the loose coal. According to Respondent's Exhibit No. 5, which is a Jericol Mining, Inc., Incident Report and the testimony of McConnell at the hearing, Luttrell said words to the effect that he was tired of the foreman "fucking" with him, called him a "motherfucker" and threatened to take a piece of drill steel and "knock his goddamned head off". He purportedly added that if that wasn't enough, he had a gun in his truck to take care of the situation. McConnell fired him on the spot. He later rescinded this action after Luttrell had calmed down, but warned him that if it happened again, he would be discharged.

Mr. Baker, the Vice-president of Operations at Jericol, was advised the next day of the incident with Millard Perry in Sizemore's office. At that time, he reviewed Luttrell's personnel file which included the report of the McConnell incident of January 15. Based on the fact that Luttrell had in the very recent past threatened and verbally abused two foremen who were his immediate supervisors, Baker felt he had no alternative but to discharge him for the safety of the other employees at the mine. He ordered that be done the next time Luttrell reported to work, which was the following Monday.

The complainant maintains that he was discharged for activity protected by the Mine Act. More specifically, he testified that he believed he was terminated because he had complained about safety conditions over the years and that he had

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been provoked into cursing Perry on April 21, 1987, so the company would have an excuse to fire him.

I believe and find credible that on occasion over the years he had made safety-related complaints to his immediate supervisor concerning matters which he believed to be unsafe mining practices. This is obviously protected activity. However, in order to make a prima facie case, more is required. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981); Secretary on behalf of Jenkins v. Hecla Day Mines Corporation, 6 FMSHRC 1842 (August 1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983).

Of particular importance in this case is the second part of the complainant's burden of proof. He must make an initial showing that his discharge was motivated at least in some part by his protected activity. If he fails to establish a causal connection between his protected activity, i.e., the safety complaints he made and the adverse action taken against him, he has failed to prove an essential element of his case and his Complaint is subject to dismissal.

It seems clear to me from the record in this case that Mr. Luttrell was discharged from his job solely for aggravated insubordination on not just one, but two separate occasions, approximately three months apart.

Complainant has most definitely not shown by a preponderance of the reliable and probative evidence that his discharge was motivated in any part by protected activity. He has therefore failed to meet his burden of proof in this regard.

The respondent, however, has shown by an overwhelming preponderance of the evidence that Mr. Luttrell was discharged solely for threatening and verbally assaulting his foreman on two different occasions in January and April of 1987, as more fully set-out earlier in this decision. Furthermore, there was no showing that Mr. Baker, who was the individual responsible for Luttrell's discharge, was even aware of Luttrell's prior safety complaints to his various foremen over the years. To the

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contrary, it is un rebutted in this record that Baker was not aware of any safety complaints made by Luttrell to anybody.

An additional point is noteworthy in that regard. Mr. Luttrell claims to have made safety complaints to his foremen over the entire span of his years with Jericol. As established in the stipulations, supra, between 1979 and 1987, Mr. Luttrell left voluntarily and was subsequently re-hired by the company on several occasions. If company management was aware of Luttrells' safety complaints and was bothered by them to any degree, they could have simply not re-hired him on any one of those occasions.

I must concur with the respondent that repeated threats and verbal abuse by an employee directed towards his supervisor need not be tolerated by any company, and is certainly not protected activity under 105(c) of the Mine Act.

ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, the Complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge