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SOL (MSHA) V. CONSOLIDATION COAL
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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
WILLIAM J. KELLER
PETITIONER

DISCRIMINATION PROCEEDING

Docket No. WEVA 88-202-D
MORG CD 87-22

Ireland Mine

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA,
for Complainant;
Michael R. Peelish, Esq., Pittsburgh, PA, for
Respondent

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor under 105(c) of the Federal Mine Safety and Health Act of 1977, 3 U.S.C. 801 et seq. The Secretary contends that Respondent violated 105(c)(1) by reprimanding and threatening William J. Keller for engaging in protected activities and by applying a company policy requiring employees to report safety complaints first to a foreman or mine management before reporting them to a government inspector or a mine safety committee member. The Secretary seeks injunctive relief and a civil penalty.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the discussion that follows.

FINDINGS OF FACT

1. On July 3, 1987, William J. Keller was working as a precision mason in the Three North Section of Respondent's Ireland Mine. The mine produces coal for sale or use in or affecting interstate commerce.

2. Keller and Harry Gallagher were building an overcast, a job that required about eight bags of block bond. Only one bag of block bond was at the construction site.

3. Following a common practice at the mine, after they applied the bag of block bond they searched for block bond in other parts of the mine. Keller looked in the belt entry and Gallagher searched the supply track. Both miners considered the places in which they were searching to be part of their work area for the purposes of the construction job.

4. The two miners had previously searched areas of the mine to look for work materials, without asking permission of a foreman and without being reprimanded for such practice. Local union president Jerald Stephens could not recall any case in which a miner was disciplined (before the instant case) for leaving his work area to search for materials. Witnesses Keller, Gallagher, Stephens, and Wise testified that it was a common practice for miners to look for work materials in the mine. Keller's foreman had instructed him on previous occasions that if he needed supplies, he should look for them. Gallagher had never been instructed that he should first contact a foreman before looking for supplies.

5. While looking for block bond, Keller came upon an inspection party in the belt entry: state mine inspector Colin Simmons, company mine safety representative Chris Alloway, and union safety committeeman Billy Wise. Inspector Simmons cautioned Keller by telling him that he (Keller) had just walked under an unguarded trolley wire. After walking a bit farther, Keller stopped, turned, and told Billy Wise that there was tight clearance and an upguarded high line in the supply track. This statement was audible to Inspector Simmons as well as to Wise and others present. It was, in effect, a complaint of two alleged safety violations or dangers.

6. The inspection party went to the supply track area mentioned by Keller, and there Inspector Simmons issued two state citations for the conditions Keller had mentioned. After the issuance of the citations, the company mine safety representative, Alloway, asked Wise, "Does Mr. Keller always cause trouble like this?" (Tr. 77.)

7. After Keller finished his shift (on Friday, July 3, 1987), the shift foreman met him outside and told him that the mine superintendent, John Snyder, wanted to see him the following Monday.

8. Over the weekend, Keller told the local union president, Stephens, that Snyder wanted to see him on Monday. Stephens said he would accompany Keller to the meeting with Snyder.

9. That Monday, at a meeting in Snyder's office, Snyder reprimanded Keller for reporting safety violations to a state inspector and a safety committee member, and threatened him with discharge if he reported safety complaints to a federal or state mine inspector or to a union safety committeeman in the future. Keller testified that Snyder stated, "I cost him a lot of money on July 3rd by turning in those violations and he told me if I ever talked to a safety committeeman or a state or federal mine safety inspector that he would discharge me." (Tr. 12.) Stephens confirmed that Snyder reprimanded and threatened Keller, and that the threat was serious. (Tr. 136, 139.) I credit Keller's and Stephens' testimony on this matter.

10. Harry Gallaher was not reprimanded or threatened for walking up the supply track to look for block bond.

11. Respondent has a policy that mine employees must first report safety hazards or violations to a supervisor or mine management before they report them to a government inspector or safety committee member.

DISCUSSION WITH FURTHER FINDINGS

In order to establish a prima facie case of discrimination under 105(c) of the Act, a miner must prove that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. In order to rebut a prima facie case, an operator must show that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone and would have taken the adverse action in any event for the unprotected activity. Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC 803 (1981).

Keller was engaged in a protected activity when he reported alleged safety hazards or violations to his safety committeeman, Billy D. Wise, in the presence of a state mine inspector, on July 3, 1987.

Respondent has demonstrated a hostile attitude towards its miners' exercise of complaint rights protected by 105(c)(1) of the Act. Billy Wise, who has served as a member of the mine safety committee and grievance committee and as vice president of the local union, testified that Respondent did not like to have employees turn in violations to federal or state inspectors and that many employees did not report violations because they were afraid of reprisal. (Tr. 101-102.) Harry Gallagher testified that an assistant mine superintendent had told him not to tell government inspectors or safety committee members about violations. (Tr. 124-127, 132.) Jerald Stephens, president of

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the local union, testified that some miners were hesitant to report conditions to inspectors "because they don't want to put their jobs in jeopardy." (Tr. 139.) I credit the testimony of the above witnesses.

I do not accept Respondent's contention that it was motivated to reprimand Keller because he left his work area without permission. Gallagher was not reprimanded for searching for bond block at the same time Keller searched a different entry for bond block. The evidence showed that Keller and Gallagher were simply following a mine custom and practice in looking for bond block away from the immediate construction site. Employees in the past had followed this practice and there was no evidence of any other employee being reprimanded for searching for work materials without permission of a foreman. I find that Respondent's contention that Keller was reprimanded because he left the work area without permission was a mere pretext.

Respondent, through its mine superintendent, John Snyder, reprimanded Keller because he had reported safety violations to a safety committeeman and to a state inspector, and threatened Keller with discharge if he ever reported safety violations to a federal or state inspector or to a safety committee member in the future. This reprimand and threat interfered with Keller's right to engage in protected activities under 105(c) of the Act and therefore violated that section. Considering all of the criteria for a civil penalty in 110(i) of the Act, a civil penalty of \$1,200 is assessed against Respondent for this violation.

Respondent has a policy that mine employees must first report safety hazards or violations to a supervisor or mine management before they report them to a government mine inspector or a safety committee member. The local union president, Jerald J. Stephens, who has been employed at this mine for 19 years, described the policy as follows: "the practice is report things to your immediate foreman first and then if you get no satisfaction, then you are to go on to your steps, which you see your safety committeeman or the state or federal agency" (Tr. 147). This same policy is illustrated by the mine superintendent's answers to the following questions (Tr. 183-184):

JUDGE FAUVER: When you talked to Keller and Stephens, the thrust of what you were saying to Keller seems to have been that he was causing unnecessary citations for this mine.

THE WITNESS: I think the thrust of the conversation was that he needlessly got us two citations because he left his immediate work area to go out there and tell Simmons. He could have very well got on the phone and called his immediate supervisor and had them corrected the same way.

JUDGE FAUVER: This is something that could have been done kind of in the family without involving the state inspector?

THE WITNESS: Correct.

JUDGE FAUVER: Had the inspector gone down the belt entry and had Keller been mixing the block bond and working on the overcast and if he had told the inspector about these two violations at that point, would you have reprimanded or cautioned him?

THE WITNESS: I don't know if I would have personally said anything but I would have maybe had his front-line supervisor again go over the important step they should bring their problems to mine management and then we don't have to receive a citation to get every little thing that they think is wrong corrected.

JUDGE FAUVER: Do you believe that that kind of communication to Keller would be a discouragement of his exercise of a right to talk to an inspector who is in his work place?

THE WITNESS: No, sir.

Respondent's policy inhibits miners from reporting alleged violations or dangers to inspectors or safety committee members; it is an unjustified interference with their exercise of rights under 105(c)(1) of the Act, and therefore violates that section.

In Local Union No. 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979), the Commission held that a reprimand of a safety committee member for leaving his assigned duties to report an alleged safety violation or danger to MESA, the predecessor to MSHA, violated 110(b) (the anti-discrimination section) of the 1969 Mine Safety Act, which is the predecessor to 105(c)(1) of the 1977 Act. It also held that the company's "permission policy" -- requiring the company's permission before a member of the safety committee could leave his assigned duties to report safety complaints to federal inspectors or their agency -- violated the 1969 Act's anti-discrimination provision. The Commission affirmed Judge Broderick's order to Consolidation Coal Company to "cease and desist from enforcing a policy requiring [the Company's] permission before a member of the Mine Health and Safety Committee can leave his assigned duties to bring safety complaints to the Secretary" (id., at 340).

In the instant case, the Secretary is similarly entitled to a cease and desist order regarding Respondent's violative policy of requiring employees to report alleged violations or dangers

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first to a supervisor before reporting them to a government inspector or a safety committee member. This ruling does not relieve or affect a miner's obligation to report a violation or hazard to his supervisor where special circumstances, e.g., a work refusal, create such a duty. For example, in a work refusal case, the following legal principles apply (quoted from the Commission's decision in S & M Coal Company, Inc., et al (Slip Op. p. 6; Sept 26, 1988)):

A miner has the right under section 105(c) of the Mine Act to refuse to work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. Where reasonably possible, a miner refusing to work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Reco, supra, 9 FMSHRC at 955; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also Miller v. Consolidation Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated 105(c)(1) of the Act on July 6, 1987, by reprimanding and threatening William J. Keller for engaging in activities protected by that section.
3. Respondent's policy of requiring employees to report alleged mine safety or health violations or dangers first to a supervisor or mine management before reporting them to a government inspector or a mine safety committee member violates 105(c)(1) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay a civil penalty of \$1,200 within 30 days of this Decision.
2. Respondent shall cease and desist from reprimanding threatening, or otherwise discriminating against employees for engaging in protected activities under 105(c)(1) of the Act.
3. Respondent shall cease and desist from enforcing a policy of requiring employees to report alleged mine safety or health violations or dangers first to a supervisor or mine

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management before reporting them to a federal or state inspector or a mine safety committee member.

William Fauver
Administrative Law Judge