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SOL (MSHA) V. VIRGINIA CARBON
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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 JOHN L. JONES, JR., COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. WEVA 89-167-D HOPE CD 89-07 Mine No. 4

v.

VIRGNIA CARBON, INC.,
RESPONDENT

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary;

Lawrence E. Morhous, Esq., Bluefield, WV, for Respondent.

Before: Judge Fauver

The Secretary of Labor filed an application for temporary reinstatement of John L. Jones, Jr., as a scoop operator at Respondent's Mine No. 4 in McDowell County, West Virginia. The application, brought under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, is supported by an affidavit of Dennis M. Ryan of the Mine Safety and Health Administration and a copy of the complaint.

Respondent opposed the application and requested a hearing, which was held on May 15, 1989, at Big Stone Gap, Virginia. The date was selected for the convenience of the parties, and it was agreed that if an order of temporary reinstatement is granted, it will be retroactive to May 1, 1989.

Due to a mix-up in communication, the reporter did not appear at the hearing. The parties stipulated that they would waive a transcribed hearing with the understanding that the judge would summarize the evidence relied upon for his decision. The hearing included the testimony of the Complainant and documentary evidence.

At the close of the evidence, oral arguments were heard and a decision was entered from the bench. This Decision confirms the bench decision.

Complainant's testimony, in relevant part, may be summarized as follows:

1. Complainant, John L. Jones, Jr., was first employed by Respondent as a scoop operator in February 1988, on the evening shift, at $90 a shift plus time and a half his hourly rate for over eight hours a day. After five days, he was included in a layoff which lasted about three weeks. He was reemployed on the day shift, to perform several functions: to conduct preshift and onshift examinations and sign the examination book, to operate a scoop, and to perform any other duties assigned to him. Because of the additional responsibility of conducting preshift and onshift examinations and signing the examination book, he was paid $110 a shift (plus overtime for hours over eight a day) instead of $90 a shift.

2. In October, 1988, Complainant was transfered to the evening shift. He was relieved of the responsibility of preshift examinations, but continued making onshift examinations, signing the examination book, operating a scoop, and performing other assigned duties.

3. In November, 1988, Complainant had a dispute with his section foreman, Marshall Keen, who accused him of claiming one-half hour more than he actually worked on a certain day. Complainant insisted that he worked 9 1/2 hours as reported, instead of nine hours as contended by Mr. Keen. The foreman was very angry and verbally abusive of Complainant, to the point that Complainant quit on the spot.

4. About three weeks later, after making a number of calls seeking reemployment, Complainant was reemployed on the evening shift, with the same responsibilities and pay he had before he quit. He was so employed until he was discharged on February 17, 1989.

5. It was a common or frequent practice for the section foreman, Marshall Keen, to order men (sometimes including Complainant) to clean coal beyond supported roof. The roof was dangerous, soft and dribbly.

6. Complainant's strong safety concern about this practice reached a peak on February 16, 1989, when the section foreman, Marshall Keen, ordered Complainant to bring a scoop up to the working section and clean coal "up to the face," meaning that he should scoop coal beyond the last row of roof supports. Complainant told the foreman that he was too busy with another job and the foreman then ordered two other employees (Jerry Stump

and Gary Cook) to do the clean up work beyond supported roof. When Complainant discovered that Stump and Cook had cleaned coal beyond supported roof, he tried to reprimand them for this unsafe practice, but they "made a joke about it," telling Complainant they took orders from Marshall Keen and not from Complainant. Complainant then decided that he could not continue to sign the onshift examination book because of this unsafe practice and his belief (from past experience with mine management) that Respondent would fire him if he made truthful reports of safety hazards or violations in the examination book. He therefore wrote a note to the mine superintendent, Carlos Keen, and stuck it between pages in the examination book where he expected Carlos Keen to find it.

7. Complainant does not have a copy of the note. His best recollection of its contents is as follows (written by Complainant at the hearing at the judge's request and marked as Judge's Exhibit No. 1):

> Carlos:
>
> I cannot sign the onshift Report any more because Marshall is ordering men to go out from [sic] under unsupported roof to clean places up. I am afraid someone is going to be killed or hurt, and that my papers will be taken away from me. I will continue my job as a scoop operator.

8. Carlos Keen read the note. On February 17, 1989, he fired Complainant because he had refused to sign the examination book and because he had left a note which a government mine inspector might have found and could use "to bankrupt" Respondent.

After Complainant testified, the Secretary rested. Respondent introduced no evidence.

Section 105(c)(2) of the Act provides that if a miner believes he has been discharged or otherwise discriminated against, he may file a complaint with the Secretary of Labor. The Secretary may apply for temporary reinstatement. If it is found, after an opportunity for a hearing before the Commission, that "the complaint was not frivolously brought the Commission shall order the immediate reinstatement of the miner pending final order on the complaint."

The scope of a temporary reinstatement hearing is narrow, being limited to a determination as to whether a miner's discrimination complaint was frivolously brought. 30 U.S.C. 815(c)(2); 29 C.F.R. 2700.44(c).

The hearing evidence indicates that Complainant was discharged because he complained to his mine superintendent of a hazardous and violative practice of having miners work under unsupported roof. If unanswered, this evidence would support a finding of a discriminatory discharge in violation of 105(c) of the Act.

I hold that the testimony of the Complainant, the documentary evidence, pleadings, and the record as a whole establish that the complaint was not frivolously brought.

Complainant is therefore entitled to temporary reinstatement.

I make no determination at this point as to the ultimate merits of the complaint.

Other matters were raised in Complainant's testimony that may be explored in the full evidentiary hearing on the merits of the case, but are not necessary to consider here. These include the accuracy of Complainant's entries in the examination book, a question whether various tests for ventilation and methane were actually made, the extent of management's participation in any inaccuracies or failures to take tests, and the practice of other examiners concerning similar tests and the accuracy of their book entries. These matters do not affect my conclusion that the evidence and record as a whole show a substantial, nonfrivolous basis for the complaint.

ORDER

WHEREFORE IT IS ORDERED that, pending a final order on the complaint, Respondent shall immediately reinstate John L. Jones, Jr., to the position of scoop operator at its Mine No. 4 at the same rate of pay and shift assignment that he would now have as scoop operator if he had not been discharged on February 17, 1989. Inasmuch as Complainant does not seek reinstatement as a shift examiner, and Respondent has assigned another employee to make and record shift examinations, Respondent may reinstate Complainant at the pay rate of a scoop operator. Respondent is FURTHER ORDERED to pay back wages of $1,184.16 to John L. Jones, Jr., covering the period from May 1-15, 1989.

William Fauver
Administrative Law Judge