

CCASE:
BUFORD SMITH V. R J F COAL
DDATE:
19891024
TTEXT:

~2050

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

BUFORD SMITH,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 88-201-D

v.

BARB CD 88-45

R.J.F. COAL COMPANY, INC.,
RESPONDENT

DECISION

Appearances: Mr. Buford Smith, Hazard, Kentucky, for Complainant;
Leon Hollon, Esq., Hollon & Hollon, Hazard,
Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

This is before me based upon a Complaint filed by Buford Smith (Complainant) on September 14, 1988, alleging discrimination by R.J.F. Coal Company (Respondent) under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). On April 5, 1989, an Order was issued directing the Respondent, within 30 days of the Order, to file an Answer to the Complaint or show good cause for the failure to do so. On June 27, 1989, Respondent filed a response to the Show Cause Order, and a Motion to Permit Late Filing of the Answer. This response established good cause to permit the late filing of the Answer, and the Answer is considered as being filed as of June 27, 1989. Pursuant to notice, the case was heard in Johnson City, Tennessee, on September 21, 1989. At the hearing Irvin Neace, Claude Branson, Gary Goodson, Shade Neace, and Buford Smith testified for Complainant. Kevin Moore, Braxton Mullins, Boyd Wilson testified for Respondent.

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.

~2051

3. If so, to what relief is he entitled.

Stipulations

1. At all relevant times in this action, including February 11, 1988 (the date of layoff), the Respondent, RJF Coal Company, operated surface mines located at Vicco in Perry and Knott Counties, Kentucky, and at Red Oak in Knott County, Kentucky. The products of these coal mines enter the stream of commerce within the meaning of the Act.

2. Buford Smith, Complainant, first became employed by a company known as River Processing, Inc. on August 6, 1981. River Processing, Inc. was subsequently acquired by and became a subsidiary of Coal Ridge Fuel, Inc. on December 22, 1983. Thereafter, the surface coal mining operations of the companies were conducted by an affiliated general partnership, RJF Coal Company. Buford Smith was hired by Respondent, RJF Coal Company, on December 23, 1983, and was a "miner" within the meaning of the Act. RJF Coal Company was later incorporated and also became a subsidiary of Coal Ridge Fuel, Inc.

3. At the time of the layoff at issue in this case, Respondent, RJF Coal Company, employed approximately 130 persons at its various operations and at its offices. Of these, approximately 70 were employed in the surface mining operations.

4. At the time of the layoff on February 11, 1988, Complainant, Buford Smith, was earning \$10.50 per hour for a 40-hour week. In addition, he earned \$15.75 per hour for any hours worked in addition to 40 hours per week. Employees recalled from the layoff accepted a 10 percent pay reduction upon their return on March 12, 1988.

5. In late November or early December, 1988, the Board of Directors of the Respondent voted to dissolve Respondent, RJF Coal Company, in conjunction with negotiations for the acquisition of approximately 50 percent of the outstanding corporate stock of Respondent's parent corporation, Coal Ridge Fuel, Inc. Articles of Dissolution for Respondent were filed with the Secretary of State on November 26, 1988. After the sale of the stock was consummated on February 1, 1989, the name of RJF's corporate parent was subsequently changed to Diamond May Coal Company.

6. Diamond May Coal Company laid off all remaining surface coal mining employees of the company at the Red Oak and/or Vicco surface mines on July 14, 1989, and has now entered into contract mining arrangements for the operation of both mines. The only remaining company employees are employed in its office as clerical staff or in the field as part of its tipple or reclamation crew.

Findings of Fact and Conclusions of Law

Complainant first became employed by a company known as River Processing, Inc. on August 6, 1981. River Processing, Inc. was subsequently acquired by and became a subsidiary of Coal Ridge Fuel, Inc. on December 22, 1983. Thereafter, the surface coal mining operations of the companies were conducted by an affiliated general partnership, RJF Coal Company. Complainant was hired by Respondent, RJF Coal Company, on December 23, 1983, and was a "miner" within the meaning of the Act. RJF Coal Company was later incorporated and also became a subsidiary of Coal Ridge Fuel, Inc.

Irwin Neace, who worked for Respondent, RJF Coal Company for approximately 1 1/2 years commencing in January 1984, indicated that during that time he replaced the brake chambers on the lowboy that Buford Smith drove for Respondent. Buford Smith indicated that the brakes on his Birmingham Lowboy had been repaired by mechanic Irvin Neace, sometime in 1986, but that after that time the brakes began to deteriorate. He indicated that he was scared to drive the lowboy, but he had to work to support his family and send his children to college. He indicated that in early 1987 and on several occasions thereafter, he told Jimmy Ambergey and Glenn Sharpe, Respondent's mechanics, to work on the brakes, as he knew that the lining was gone and that new brakes were needed. He indicated that Sharpe told him that he did not have time to work on the brakes, and Ambergey told him to see the foreman Bill O'Donnell. He said that O'Donnell or another supervisor would tell him that he needed to do production work first. Specifically, he indicated that when he told O'Donnell in the spring of 1987, that he needed to have the brakes fixed on the lowboy, O'Donnell said that he would do the best that he could. He indicated that whenever he had to move a dangerous piece of equipment, which occurred daily, he "probably" talked to O'Donnell about the brakes (Tr. 78). He said that "several dozen times" he mentioned to O'Donnell about the brakes (Tr. 78). He said that O'Donnell sometimes said he'll fix it and sometimes he said for Smith to see the mechanics. Smith indicated that on the few occasions when he did go to the mechanics, he did not get any "action" from the mechanics (Tr. 79). Smith also indicated that on "several occasions" over a 2-year period prior to his layoff in February 1988, he told Lloyd Harvey, Respondent's purchasing agent, that the lowboy did not have any brakes, but does not recall Harvey's response (Tr. 86). He also indicated that in 1987, he received a total of a half a dozen citations from the Tennessee Department of Transportation for faulty brakes. He said that when this occurred, he called into Respondent's Office

~2053

on a CB Radio, but did not receive any response with regard to the citations. He said that when he arrived in the office he presented the citations to Harvey who did not say anything. Smith also indicated, in essence, that in the summer of 1987, after he had an incident where brakes did not work, he spoke to Chesten Wooton and told him that the brakes were "out" on the lowboy and that it was unsafe (Tr. 95).

Gary Goodson, one of Respondent's foremen, indicated that probably in the fall of 1986, he observed that while Smith was driving the lowboy down a wet hill, the brakes locked up and agreed that the lowboy slid "quite a ways" (Tr. 48). He indicated that he told Smith the same thing he told other persons, i.e., that if he is afraid to operate a piece of equipment he should not do so.1

The Commission, in a recent decision, *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (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 Maine 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).

~2054

I find, based upon the above testimony, that Smith did perceive that there was a problem with brakes on the Birmingham Lowboy, and did communicate this concern to Respondent. As such I find that he did engage in protected activities.

In order for the Complainant to prevail herein, he must establish not only that he engaged in protected activities, but that adverse action taken against him by Respondent was motivated in any part by the protected activities (Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981)). According to Smith, when he spoke with Wooton in the summer of 1987, and informed him that the brakes were out on the lowboy, and that it was unsafe to haul it, the latter told him "you will do it if you stay here" (Tr. 94). He also indicated that in the summer or fall of 1987, when he was hauling a wide load, he was concerned that he might be given a citation by the Tennessee Department of Transportation and so informed Howard Woolum (check spelling) who told him "We'll get you out if it takes us 5 years" (Tr. 98). He also indicated that O'Donnell threatened him four or five times in the summer of 1987 and 1988, and that they argued a few times concerning hauling on the steep grade. He indicated that on one occasion O'Donnell told him that the same road that brought him in will take him out. Smith indicated that approximately 1 1/2 to 2 weeks before he was laid off in February 11, 1988, he turned the Birmingham Lowboy upside down. He indicated that when O'Donnell asked him why he did it, he told him that he was not going to drive it again as it did not have any brakes. He indicated that it had only one good spring out of four. He said that O'Donnell told him "it looked like that was about it for me (you)" (Tr. 81, sic).

Smith indicated that on February 11, 1988, at quitting time, 35 to 40 employees at Respondent's Red Oak location, including himself, received a paper indicating that they were laid off until further notice due to a slowdown of work. Smith indicated that he took it for granted that he was fired, and concluded that O'Donnell's previous comments in response to his turning the Birmingham Lowboy upside down, were to be interpreted as his being fired. However, according to the uncontradicted testimony of Kevin Moore, the assistant secretary/treasure of Diamond May Coal Company, the successor to RJF, the latter was operating at a loss for a number of years, and in the month of January 1988, had lost \$303,000. He indicated that on February 11, 1988, 120 employees were laid off, including 70 at the surface and reclamation locations.

~2055

I thus find that Smith's lay off was motivated by Respondent's economic conditions. The evidence is insufficient to establish that the lay off of Smith was motivated in any part by protected activities.²

Braxton Mullins indicated that he, Boyd Wilson, and Lou Warrix were asked by Edward L. Clemens, in essence, to act as consultants to manage Respondent's above ground operations. Mullins, Wilson, and Warrix decided to rehire various categories of employees who had been laid off on February 11, and to rehire them based upon seniority within the various job categories. Mullins obtained a list from Respondent's personnel office listing all previously laid off employees and their job titles. Mullins had the office staff also indicate the dates that employees were hired by RJF. He then fed this information into a computer and obtained a printout whereby, for each job category, the employees were listed in order of seniority. According to Braxton and Wilson no other persons were involved in this process aside from the two of them and Warrix. In order to reduce mining cost, not all employees were called back. Indeed, 20 employees, including Smith, who had been laid off on February 11, 1988, were not recalled. Those who were recalled were recalled on the basis seniority.³

~2056

Wilson and Mullins indicated with regard to rehiring those who were laid off on February 11, 1988, that they had not discussed their decision with any of Respondent's foreman or supervisors and the decision was made solely by the two of them and Warrix. In contrast, Respondent testified that O'Donnell had threatened him, and that O'Donnell was friendly on a social bases with Clemens, one of the principles of RJF. I find that it is mere speculation, and totally without foundation, that O'Donnell had discussed the firing of Smith with Clemens. Also I did not place much weight on Branson's testimony, that Bowling, a principle in Coal Ridge Fuels, had threatened to dismiss Smith with regard to safety of the brakes, as Branson indicated in crossexamination that he did not hear any conversation between the two in which the issue of the brakes was discussed. Thus, I find, based on the testimony of Mullins and Wilson, that the decision not to rehire Smith was based solely on business reasons, and not motivated in any part by Smith's protected activities. Hence I find that Respondent did not discriminate against Smith in violation of section 105(c) of the Act. (See, Secretary on behalf of Robinette, supra).

ORDER

It is hereby ORDERED that the complaint herein be DISMISSED and this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAA

FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Smith indicated that Goodson told him "if it was me I would not drive." Having observed the demeanor of the witnesses I find Goodson's version more credible.) Shade Neace was asked whether Smith had problems with the brakes on the lowboy and said "you better believe it" (Tr. 53). He indicated that in the latter part of 1986, or early 1987, he was driving with Smith on a real steep incline and indicated that there were no tractor brakes and the tractor was being pushed by the trailer and the drill.

~FOOTNOTE_TWO

2. Claude Branson indicated on direct examination that maybe 5 months prior to Smith's dismissal he (Smith) was threatened by Larry Bowling, over "this safety thing" and about "brakes" (Tr. 35). Bowling was an owner of Coal Ridge Fuels for whom Respondent operated the facility and in which Smith was employed. However, I did not place much weight on Branson's testimony in this regard as on cross-examination he indicated that the incident occurred back in the middle of the summer of 1987, and that he did not over hear any conversation between Smith and Bowling in which brakes were discussed.

~FOOTNOTE_THREE

3. There were only two exceptions. In one situation, Bowling was unable to fill all of the necessary dozer positions. As most of of the previous employees, who were dozer operators, already

had other jobs. Accordingly, Mullins consulted with Foreman Donald Hilton, who indicated that another employee had dozer experience and he was hired. According to the uncontradicted testimony of Mullins, he and Hilton did not discuss Smith in this connection. In addition, a decision was made to rehire two day shift oilers rather than the night shift oiler who was more senior, as there was no need for a night oiler, and the latter (day shift oilers) had better experience.