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WARREN CLYDE TEETS V. METTIKI COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

WARREN CLYDE TEETS,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. YORK 89-15-D

v.

MORG-CD-88-16

METTIKI COAL COMPANY,
RESPONDENT

Prep Plant

DECISION

Appearances: Thomas W. Rodd, Esq., for the Complainant;
Ann R. Klee, Esq., for the Respondent.

Before: Judge Fauver

This proceeding was brought by Complainant under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. 801 et seq., alleging a discriminatory discharge.

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 below:

FINDINGS OF FACT

1. The Mettiki Preparation Plant is owned and operated by Mettiki Coal Corporation.
2. Complainant was a miner and an employee of Mettiki Coal Corporation from October 2, 1978, until his discharge on June 21, 1988, when he was working at the Preparation Plant.
3. On June 21, 1988, about 9:00 p.m., Complainant was observed by his supervisor at the time, Harold Upole, carrying a case of sealant from the Preparation Plant Warehouse.
4. Mr. Upole watched Complainant walk from the Preparation Plant Warehouse to the Upper Road where he turned in a westerly direction towards Table Rock Road.

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5. At about 11:20 p.m., at the end of the shift, Mr. Upole observed Complainant walking from the direction of Table Rock Road carrying a case of sealant to his personal vehicle. When questioned by Mr. Upole, Complainant stated that he had received permission from the Preparation Plant Superintendent, John Laughton, to take the sealant home for his personal use.

6. When Mr. Upole telephoned Mr. Laughton to verify Complainant's claim, Mr. Laughton stated that he had not given Complainant authorization to take sealant home. Mr. Laughton then spoke with Complainant on the telephone. Complainant again claimed that he had received permission from Mr. Laughton at some time previously to take the sealant home. Complainant told Mr. Laughton that he was going to use the sealant to seal his steps at home. Mr. Laughton then spoke to Mr. Upole again, and told him to discharge Complainant for stealing company property.

7. The Mettiki Employee Manual states that employees will be discharged for theft of company property. All Mettiki employees, including Complainant, were given copies of this Manual.

8. Mettiki officials held a meeting with Complainant and others on June 22, 1988, to discuss further the incident leading to Complainant's discharge. At that meeting, Complainant stated again that he had received permission to take sealant home for his personal use. Alternatively, he suggested that someone else might have placed the case of sealant in his personal vehicle. Neither Complainant nor anyone else observed any person place a case of sealant in Complainant's vehicle. Complainant did not suggest at that time that he had been discharged for raising safety complaints with his supervisors.

9. After consideration of Complainant's explanation on June 22, 1988, as well as the statements of Mr. Upole and others, Mr. Laughton affirmed the discharge of Complainant for theft of company property.

10. Complainant subsequently filed a discrimination claim with the Mine Safety and Health Administration against Mettiki. Complainant alleged, among other things, that he had been discharged for making safety complaints. The MSHA Office of Technical Compliance and Investigation conducted an investigation of the incident leading to Complainant's discharge. MSHA concluded that Complainant had not been discharged for engaging in protected activity under section 105(c) of the Act.

11. After a state evidentiary hearing on the events leading to Complainant's discharge, the Maryland Unemployment Insurance Benefits Office found that Complainant had been discharged for theft of company property and was guilty of gross misconduct. As a result, he was disqualified from receiving unemployment insurance benefits.

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12. Complainant did not notify either Mr. Upole or Mr. Laughton of any alleged hazards or health or safety violations at the Preparation Plant at any time prior to his discharge on June 21, 1988.

13. If Complainant notified other Mettiki supervisors of alleged dangers or safety or health violations, neither Mr. Upole nor Mr. Laughton - - the Mettiki officials who directed and implemented his discharge - - was aware of it. Nor did Mr. Upole or Mr. Laughton have knowledge that Complainant may have spoken with an MSHA inspector regarding an alleged ice hazard in the Preparation Plant nine months before his discharge.

14. Mr. Laughton decided to discharge Complainant for theft of company policy, and for no other reason.

DISCUSSION WITH FURTHER FINDINGS

Section 105(c) of the Mine Act provides in relevant part that:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory right of any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because such miner has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

In order to establish a violation of 105(c), a complainant must prove that he engaged in protected activity within the scope of 105 and that the action taken against him was motivated at least in part by that activity.

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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 may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense; the ultimate burden of persuasion that discrimination has in fact occurred does not shift from the miner. Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC 803 (1981).

Complainant has not proved by a preponderance of credible evidence that he was engaged in protected activity that had any temporal or causal nexus with his discharge.

On the contrary, the credible evidence shows that Complainant was considerably less active than other employees in expressing safety concerns or complaints and other employees, who were active in safety complaints, were not disciplined or given adverse treatment because of their safety activities.

Complainant has not made a prima facie case of discrimination.

On the other hand, Respondent has proved by a preponderance of the credible evidence that Complainant was discharged because of theft of company property and for no other reason.

Respondent's written policy provided for the discharge of any employee caught stealing company property. This policy was given effect at Mettiki. The testimony revealed, for example, that Rodney Bird, another Mettiki employee caught stealing company property, was promptly discharged by his supervisor, Tom Shrout, and the Vice-President of Operations, Fred Polce. Complainant's discharge followed company policy and precedent.

Mr. Upole testified clearly and consistently as to the events that led to Complainant's discharge. He stated that he first observed Complainant leaving the Preparation Plant Warehouse and walking toward a path to the Northwest of the Warehouse on the evening of June 21, 1988, about 9:00 p.m. (See Ex. R-1 (Map)). At the time, Mr. Upole was driving up the Warehouse Road towards the Maintenance Shop. When Complainant saw Mr. Upole, he stopped at a pipe rack located 60-70 feet to the Northwest of the Warehouse. Tr. 593-601. Mr. Upole's suspicions were aroused because Complainant was carrying a case of sealant, a product not generally used by production shift employees because of its extended setting time (Tr. 188; 265,

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401; 561-565) and because Complainant had no business at the pipe rack which was located in the opposite direction from the Preparation Plant.

Mr. Upole then parked his truck and, from the Maintenance Shop door, observed Complainant walk down the Warehouse Road toward the Preparation Plant. Tr. 595-597. Complainant did not go back to the Preparation Plant with the case of sealant. Instead, he turned to the right when he reached the Upper Road and walked toward Table Rock Road and the Storage Area, away from the Preparation Plant. (FOOTNOTE 1)

After Complainant was out of sight, Mr. Upole went to the Warehouse to verify that Complainant had checked out a case of sealant (which he had done) and then attempted unsuccessfully to search for the sealant on the property. Complainant, in the interim, returned to the Preparation Plant and was working there at about 9:30 p.m. when Mr. Upole arrived to pick up the production reports for Mr. Laughton. When Mr. Upole telephoned Mr. Laughton to report the production numbers, he also told him about his observations and his suspicion that Complainant was stealing. Mr. Laughton directed Mr. Upole to investigate the incident and report any developments. Tr. 612-613; Tr. 846-848; Ex. R-5; Ex. R-9.

In accordance with these directions, at about 10:55 p.m., Mr. Upole positioned himself in the woods to the north of the Storage Area. From there he observed Complainant leave the bathhouse at about 11:20 p.m., cross Table Rock Road and walk along the path toward the Storage Area. When Complainant was out of sight, Mr. Upole walked across Table Rock Road to the laboratory from which he could see Complainant's vehicle in the parking lot. In about five minutes, Mr. Upole observed Complainant walking toward his vehicle carrying a case of sealant on his shoulder. The parking lot was well lighted and Mr. Upole had a clear view of Complainant walking towards his vehicle.

Before Complainant reached the driver's door of his vehicle, Mr. Upole stepped out and greeted Complainant from a distance. Complainant immediately tried to conceal the case of sealant by putting it under his truck behind the wheel on the driver's side. When Mr. Upole questioned him about the package, Complainant stated that it was sealant and that Mr. Laughton had given him permission to take it home. Based upon his previous conversation with Mr. Laughton, Mr Upole suggested that he and Complainant go inside and call Mr. Laughton together to verify Complainant's claim. Complainant was visibly nervous, but agreed.

Mr. Laughton confirmed over the phone to both Mr. Uphole and Complainant that he had not given Complainant authority to take home a case of sealant. During the conversation, Complainant stated that he was taking the sealant home to seal his steps. In concluding the phone conversation, Mr. Laughton directed Mr. Upole to discharge Complainant for theft, and Mr. Upole did so. The decision to discharge Complainant was solely Mr. Laughton's.

Members of Mettiki Management, including Mr. Laughton and Mr. Upole, met with Mr. Upole and two of his co-workers the next day to discuss the circumstances of Complainant's discharge. At that meeting, Complainant admitted again that he had planned to take the sealant home to seal his front steps and claimed he had received permission to do so. Mr. Laughton affirmed his decision to discharge Complainant for theft.

I credit management's evidence summarized above and find that Complainant was discharged for theft of company property and for no other reason. This is not a case of a miner who actively pursued concerns about the safety of his workplace and was discharged for expressing those concerns. Complainant was caught stealing by his supervisor, and was fired for that reason.

The record and the law do not permit, in these circumstances, a finding of a violation under 105(c) of the Mine Act.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Complainant failed to prove a violation of 105(c) of the Act

ORDER

The Complaint is DISMISSED.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

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1. At the direction of the judge, a site visit was conducted by counsel for both parties with Complainant and Mr. Upole, on

June 29, 1989. The observations there confirmed Mr. Upole's physical description of the area and the relative locations of the Warehouse, Maintenance Shop, pipe rack and Storage Area. The site visit and careful tests and photographs at the site confirmed that Mr. Upole could -- despite Complainant's contrary allegations at trial -- have seen Complainant turn onto the Upper Road from the Maintenance Shop. Supp. Ex. I at 4; Joint Statement Regarding June 29, 1989 Site Visit; Supp. Ex. II Annotated Map.