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SOL (MSHA) V. SMOOTH SAILING 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
SIX MINERS,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 89-90-D

Mine No. 4

v.

SMOOTH SAILING COAL COMPANY,
INC., AND JAMES W. RUNYON,
RESPONDENTS

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
ON BEHALF OF
DARRELL MAYNE, LARRY D.
SAYLOR, RICKY G. SAYLOR,
AND TERRY D. SAYLOR,
COMPLAINANTS

DISCRIMINATION PROCEEDING

Docket No. KENT 89-100-D

BARB CD 89-04

BARB CD 89-05

BARB CD 89-06

BARB CD 89-08

v.

Mine No. 4

SMOOTH SAILING COAL CO.,
INC., AND JAMES W. RUNYON,
RESPONDENTS

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
the Complainant;
Guy E. Millward, Jr., Esq., Millward and Jewell,
Barbourville, Kentucky, for the Respondents.

Before: Judge Maurer

STATEMENT OF THE CASE

These proceedings concern a discrimination complaint and an
application for temporary reinstatement filed by the Secretary of
Labor (Secretary) on behalf of the affected miners named herein
pursuant to section 105(c) of the Federal Mine Safety and Health
Act of 1977, 30 U.S.C. 815(c).

On March 15, 1989, an Application for Temporary Reinstatement dated March 1, 1989, was filed with the Commission by the Secretary on behalf of Darrell Mayne, Larry D. Saylor, Terry D. Saylor and Ricky G. Saylor. On that same day, the case was assigned to the undersigned. No response was had from the respondents requesting a hearing on the application and on March 27, 1989, an order was issued by the undersigned directing the respondents to immediately reinstate the aforementioned four miners to the positions they held on August 26, 1988. However, the No. 4 Mine, where they all worked, became non-producing as of March 6, 1989.

On March 2, 1989, a Discrimination Complaint was filed with the Commission on behalf of these four miners plus Carl Croley and Timothy Cox. The complainant alleged that the respondents discriminated against the six miners by laying them off in retaliation for them making safety and health-related complaints to the respondents on several occasions prior to the date of the layoff. Respondents answered with what was essentially a general denial.

Pursuant to notice, a hearing on the merits was held in this matter on August 8 and 9, 1989, in Berea, Kentucky. A post-hearing brief was filed by the Secretary on December 5, 1989, on behalf of the six individual complainants. The respondents did not choose to file a post-hearing submission.

General Law Applicable to the Case

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 on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (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 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (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). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro

v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Findings of Fact

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, substantial and probative evidence establishes the following findings of fact:

1. The six miners named herein as complainants along with their job titles from which they were laid off are: Ricky G. Saylor, roof bolter; Terry D. Saylor, scoop operator; Darrell Mayne, scoop operator; Carl Croley, drill operator; Timothy G. Cox, tailpiece man; and Larry D. Saylor, scoop operator.
2. The individual respondent herein, James Runyon, with Larry Bryant, owned and operated Smooth Sailing Coal Company (Smooth Sailing), and also worked in and around the mine as the foreman.
3. Smooth Sailing and Runyon were contract miners for Davis Branch Coal Company (Davis Branch) meaning that Smooth Sailing actually mined the coal for which Davis Branch held the mineral lease for the No. 4 Mine. Davis Branch also held the permit and provided the bond required by the State of Kentucky and "faced up" the area to be mined by Smooth Sailing.
4. The coal mined by Smooth Sailing at the No. 4 Mine was sold to the Gatliff Coal Company (Gatliff). Smooth Sailing was identified in the records of Gatliff as Davis Branch No. 3. Smooth Sailing had no direct contractual relationship with Gatliff, but Gatliff was aware that Smooth Sailing and Davis Branch No. 3 were one and the same.
5. Payments for the coal mined by Smooth Sailing and trucked to Gatliff, were made directly to Davis Branch from which Davis Branch deducted a fee and then paid the remainder to Smooth Sailing by issuing its own checks to Smooth Sailing.
6. The No. 4 Mine began operations on or about May 15, 1987, and was listed with MSHA as being non-producing as of March 6, 1989.

7. Ricky Saylor, more or less the spokesman for all the complainants by mutual agreement, began working for Runyon in or about 1983 at an earlier coal mine operation called Wax Enterprises. He started working for Smooth Sailing, per se, in or about 1985. He was laid off on August 26, 1988, along with the other five miners named herein as complainants.

8. Terry Saylor, brother of Ricky Saylor, worked for Smooth Sailing for approximately three years before he was laid off on August 26, 1988.

9. Darrell Mayne was hired by the respondents in the summer of 1987 and worked at the No. 4 Mine until being laid off on August 26, 1988.

10. Carl Croley worked for Mr. Runyon from 1984 or 1985, until he was laid off from the No. 4 Mine on August 26, 1988.

11. Tim Cox worked at the No. 4 Mine for the respondents for four or five months prior to the layoff of August 26, 1988.

12. Larry Saylor, another brother of Ricky, worked continuously for Mr. Runyon between approximately 1982 and the August 26, 1988 layoff.

13. Prior to being laid off, all the complainants had engaged in protected activity, that is, they all had complained to Runyon or to their spokesman or representative, Ricky Saylor, about bad roof conditions and the lack of adequate ventilation on the working areas of the mine. On many occasions, the other men would look to Ricky Saylor to speak for them to Mr. Runyon. When the men registered a safety or health-related complaint about the mining operation with him, he would tell Runyon of it on their behalf.

14. Ricky Saylor, on behalf of himself and others, had complained to Runyon on numerous occasions about the lack of ventilation to the working areas which caused an accumulation of what Saylor described as "bad air". He believed this was caused by a lack of ventilation curtains (or line brattices) which would have directed ventilating air into the working places. He also had complained to Runyon on many occasions about "bad top", i.e., unsupported roof, on the "right side" where the ventilation was also extremely poor. More specifically, he complained about the lack of "safeties" which are necessary as temporary support to protect him while he roof bolts. Saylor also testified that Runyon's practice of "double-cutting" caused the other complainants, particularly the drill operator and scoop operators to have to work under unsupported roof while doing their

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respective jobs. "Double-cutting" was described by Saylor as drilling and shooting two rounds in the face of the coal without roof bolting in between.

15. Ricky Saylor had made the safety and health-related complaints enumerated in Finding of Fact No. 14 to Runyon at least on a weekly basis for the six months immediately prior to the August 1988 layoff. He testified that Runyon's response to these complaints was to the effect that if the current miners (the complainants) didn't want to work in these conditions, he had a hundred applications from other men who would be glad to take their place.

16. Terry Saylor had also on occasion complained to Runyon about working in the "smoke" and "dead air" in the mine, as well as having to go out under unsupported roof to get the coal. Typically, he would come out of the mine and tell Runyon it was too smoky in there, that he couldn't stand anymore of it. He would tell Runyon that he needed to hang some curtains to provide some ventilation. Runyon, instead of hanging curtains, however, would just go pull the coal out himself.

17. Darrell Mayne also personally complained to Runyon on many occasions about "bad top" and "bad air" in the mine, primarily during the last six months of his employment because of the worsening conditions at the mine. Runyon would get mad about it and say there was plenty of people looking for a job.

18. Carl Croley was the drillman for Smooth Sailing. Croley's job was to drill into the face of the coal, load these holes with explosives (assisted by the tamp man) and shoot down the coal. Croley corroborated the fact that there were roof and ventilation problems at the No. 4 Mine and that he had been required by Runyon to double-cut the coal faces. Croley had complained to Ricky Saylor who he knew would take his complaints to Runyon, as well as to Runyon himself about this. Furthermore, he had on at least one occasion shortly before he was laid off, refused to work in an area that had not been roof-bolted.

19. Ricky Saylor also testified and I find it credible that two to three months prior to the layoff, he and Carl Croley had refused to work on the "right side" of the mine because of becoming sick on "dead air". He testified that this "right side" had been advanced four to five hundred feet and that there had never been any ventilating air directed into this area.

20. Timothy Cox was the tailpiece man for Smooth Sailing and had also worked as the tamp man, assisting Carl Croley.

21. Cox had complained to Runyon about bad ventilation in the mine whenever he was in the smoke while greasing the belt. Moreover, on the few occasions he had worked with Croley as tamp man, he complained to Ricky Saylor, whom he considered his spokesman or representative with Runyon, about the bad ventilation and unsupported roof at the face.

22. Cox had also been present when the other complainants herein had made safety complaints to Runyon. He observed that Runyon's response to such complaints was to threaten to hire new miners.

23. Larry Saylor also testified concerning problems in the No. 4 Mine with working out under unsupported roof, and ventilation. He had also voiced complaints to Runyon about the lack of ventilation and roof support. He likewise observed that Runyon would respond angrily to complaints about safety from the men. Two to three weeks before the layoff Larry Saylor had refused to work on the "right side" of the No. 4 Mine where there was absolutely no ventilation. He made this refusal to Runyon who responded that "he'd find people to run the mine for him."

24. When Runyon initially announced the layoff, he told Larry Saylor that he wanted him to stay on after the layoff to keep the water pumped out of the mine and to produce approximately 52 tons of coal per day. Larry Saylor was the longest tenured miner at the time of the layoff and was also a qualified foreman. However, within two days, Runyon changed his mind and told Larry Saylor that he too was laid off.

25. Between November 12, 1985, and August 5, 1986, MSHA Inspector Earl Lankford issued seventeen (17) section 104(a) citations, and a section 104(d)(1) citation to Runyon for violations of Smooth Sailing's roof control plan at the No. 3 Mine.

26. On May 22, 1986, and August 5, 1986, Lankford found that no line brattice or curtains had been installed to direct air to the working section at the No. 3 Mine and therefore issued section 104(a) citations to Runyon.

27. The No. 3 Mine and the No. 4 Mine were similar operations which were mined in consecutive order by Smooth Sailing. The No. 3 Mine was abandoned prior to the start of operations at the No. 4 Mine on or about May 15, 1987.

28. MSHA Inspector James Langley issued a citation on August 12, 1988, at the No. 4 Mine, when he found that a cut had not been bolted as required by the roof control plan.

29. MSHA Inspector Richard Gibson inspected the No. 4 Mine in December, 1987 and November, 1988. During both inspections he issued citations for the failure of Smooth Sailing to have properly installed line brattices.

30. MSHA Inspector Charles Blume issued a citation at the No. 4 Mine on June 1, 1988, for the failure of Smooth Sailing to provide a line brattice to the No. 3 heading. Inspector Blume testified that there was no line brattice at all in this heading. The face was approximately 30 feet from the last open crosscut.

31. At the time of the August 26, 1988 layoff, there were ten miners, including the six complainants, working at the Smooth Sailing No. 4 Mine. After the layoff, Runyon and the Gray brothers worked the mine until Runyon left for college in the fall. After this, Ricky and Ronnie Gray worked the mine themselves until the first new miner was hired on September 19, 1988. Another new miner was hired on or about October 10, 1988 and another on or about October 31, 1988. After the layoff, it is noteworthy that Runyon never offered any of the complainants their jobs back at an hourly rate or on any other basis.

32. The claimed basis (although never proven) for the layoff by respondents was a notification by Gatliff that Smooth Sailing's output that they would accept had been cut to 52 tons per day. Prior to that time, Gatliff would take all the coal that Smooth Sailing could produce.

33. Purportedly, a truck driver named "Spider" had notified Smooth Sailing that they were cut back to 52 tons per day. Runyon was not personally present at the time and to confirm this information, he states he called Sam Carr, a Gatliff employee, who told him that they were cut back until December. Carr, however, doesn't believe he told him that. Also casting doubt on Mr. Runyon's version of the cut-back is the fact that after August 26, 1988, and up to the time the No. 4 Mine was shut down on March 6, 1989, Smooth Sailing never shipped as little as 52 tons a day (on a weekly basis) except the weeks of September 1, 1988, September 15, 1988, October 6, 1988 and March 10, 1989 (four days after it shut down). The actual coal production and sales for Smooth Sailing between August 26, 1988 and March 1989 when Runyon shut the mine down show that Smooth Sailing continuously and consistently produced more than 52 tons per day.

34. Runyon also testified that he believed the complainants wouldn't work if limited to producing 52 tons per day. However, the six complainants had never told Runyon that they would not work producing 52 tons per day and had, prior to August 26, 1988,

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continued to work for Runyon even when the production tonnage was below 52 tons per day (on a weekly basis) or even zero.

DISCUSSION WITH FURTHER FINDINGS

The Secretary has demonstrated to my satisfaction that the six complainants named herein engaged in activity protected under section 105(c) of the Mine Act by making repeated complaints about unsafe and/or unhealthful conditions at the respondent's No. 4 Mine. After these complaints had gone on for some period of time, the six were laid off and have never been offered a chance to return to work.

Respondents claim that the layoff was motivated only by a cut-back in the purchase of coal instituted by Gatliff on the date of the layoff. However, the Secretary has amply demonstrated the pretextual nature of this "justification". Documents prepared in the ordinary course of business by Gatliff employees show that within one week of the layoff Smooth Sailing was scheduled to produce 1600 tons of high quality stoker coal for September 1988 and as of November 3, 1988, Smooth Sailing was scheduled to produce 400 tons per week or 80 tons per day of coal. Furthermore, the fact that Runyon hired three new employees shortly thereafter is further evidence that the layoff was motivated by the complainants' protected activity. I therefore find that the respondents have failed to show that there was a valid economic reason for the layoff or that the layoff was not motivated by the complainants' protected activities.

In summary, I find and conclude that the complainants engaged in repeated and justifiable protected activity over a protracted period of time prior to the layoff and that the layoff was motivated exclusively by those protected activities. Although there is no direct evidence of this latter point, I find the circumstantial evidence to be strongly supportive of this conclusion. The operator has failed to rebut this prima facie case of discrimination under the Act and therefore I find a violation of section 105(c) of the Mine Act to be proven as alleged in this instance.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. That the respondents shall reinstate the herein named six miners to the positions from which they were terminated at the No. 4 Mine, on August 26, 1988, at the same rates of pay, on

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the same shift and with the same or equivalent duties, including seniority rights and all employee benefits to which they were entitled to immediately prior to their discharge, at such time as the No. 4 Mine should again become a producing mine.

2. That the respondents shall pay back wages with interest thereon computed in accordance with the Commission decision in *UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (1988) and provide all other employment benefits to the six miners which were lost because of their unlawful layoff. The back wages to which the six complainants are due shall be computed as follows:

a. The four miners who prior to the unlawful layoff were paid \$.90 per ton (Larry, Ricky, and Terry Saylor, and Carl Croley) shall be paid for each ton produced by Smooth Sailing from August 26, 1988, until March 10, 1989, the date of the last payment from Davis Branch to Smooth Sailing; and

b. Darrell Mayne and Timothy Cox shall be paid at their regular rates of pay, for forty hours per week from the date they were laid off on August 26, 1988, until March 6, 1989, the date the No. 4 Mine was listed with MSHA as non-producing.

3. That the respondents shall within 30 days of the date of this decision, pay to the Secretary a civil penalty in the amount of \$2000 for the violation found herein.

Roy J. Maurer
Administrative Law Judge