

CCASE:
SOL (AMOS HICKS) V. COBRA MINING
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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 FOR
AMOS HICKS,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. VA 89-72-D

v.

NORT CD 89-18

COBRA MINING, INC.,
JERRY K. LESTER, AND
CARTER MESSER,
RESPONDENTS

DECISION

Appearances: Glenn M. Loos, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
Kurt J. Pomrenke, Esq., White, Elliott, & Bundy,
Bristol, Virginia, for the Respondents.

Before: Judge Weisberger

Statement of the Case

On August 22, 1989, the Secretary, on behalf of Amos Hicks, alleged that the Operator and three named individuals violated section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2) (the Act). On September 19, 1989, the Secretary filed an Amended Complaint in which it deleted one of the previously named Respondents, Garnett Sutherland, and demanded various relief. Respondents filed an Answer on September 25, 1989.

Pursuant to Notice, the case was scheduled for Hearing for December 27-28, 1989. On December 22, 1989, in a telephone conference call with Counsel for both Parties and the undersigned, Respondents' Counsel advised that he was ill and sought an adjournment. Counsel for the Secretary did not object. The case was rescheduled and subsequently heard in Abington, Virginia, on January 3, 1990. Amos R. Hicks, David Lee Payne, Mary Lou Ray, and Douglas Wayne Lester testified for the Secretary. Opie Steven McKinney, Garnett Sutherland, Danny Osborne, Paul Horn, Carter G. Messer, and Jerry Keith Lester testified for Respondents. Findings of Fact and Memorandum of Law were filed by Petitioner and Respondents on February 28 and March 5, 1990, respectively. Reply Briefs were filed by the Secretary and Respondent on March 15 and 19, 1990, respectively.

Findings of Fact and Discussion

I.

As set forth in *Goff v. Youghioghney & Ohio Coal Company* 8 FMSHRC 1860 (December 1986), in order to establish a prima facie case of discrimination under section 105(c) of the Act, it is incumbent for the Secretary to establish, not only that the Complainant engaged in protected activity, and that adverse action was taken against him, but 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)." Protected Activities and Adverse Action

Amos Hicks was employed by Respondents as a shuttle car helper for approximately 2 1/2 years until until he was discharged May 1989. Prior to his employment by Respondents, he worked for Respondents' predecessor for 6 years,

Hicks indicated that he complained to his shift foreman Garnett Sutherland "fairly often" (Tr. 24) that support jacks were not being set. Mary Lou Ray, a roof bolter on the same section as Hicks, indicated that she heard Hicks "off and on" (Tr. 194) complain about jacks not being set. Sutherland indicated that a "few times" Hicks mentioned that jacks were not set (Tr. 250). Hicks also indicated that, in riding the man trip to the section, he complained to Sutherland about loose rock on the roof.1 Ray testified that she heard Hicks complain to Sutherland about loose rock 2 to 3 times a week. Sutherland indicated that Hicks told him about loose rock once or twice, and he responded by stopping the man trip and pulling down the loose rock. David Lee Payne, who was the mine superintendent until May 12, 1989, indicated that Hicks had complained to him about the roof on several occasions.

Hicks further indicated that in the first part of 1989, he complained to Sutherland that there were two miners in one split of air, and it was so dusty that he could not see. He also testified that he complained to Sutherland that there were pinners working in the return air, and they were not able to see. He told Sutherland that he would not work in those circumstances.

Hicks also indicated that sometimes he complained to Sutherland that a ventilation curtain was hung on the wrong side. Ray corroborated that Hicks had complained about ventilation problems. Douglas Wayne Lester, a shuttle car operator with whom Hicks worked, testified that he and Hicks complained about dust in the air. Sutherland did not rebut Hicks' testimony in this regard, and indicated that Hicks had said that he would not work in the dusty atmosphere like the pinners did. Payne indicated that Hicks did complain to him that he had to run the scoop through return air.

It was Hicks' testimony that approximately 3 to 4 times a week, he, along with the miners in the section, would have to ride a scoop, rather than a man trip from the section to the mine exit. He indicated that the scoop was crowded, there was not enough room to lie down, and on one occasion he was caught up against the roof and thrown out. He also indicated that he complained to Payne about this situation. Ray indicated that she heard Hicks make the complaints in this regard on a "consistent basis" (Tr. 201). Payne indicated that Hicks had voiced these complaints to him and Sutherland in his (Payne's) presence. Sutherland, in essence, indicated that Hicks had made complaints about riding in the scoop.

I conclude, as testified to by Hicks, that he did make statements to Sutherland concerning loose rock, improper ventilation, and improper jack supports. I also find that Hicks complained to Payne about roof conditions, and ventilation problems. The evidence also establishes that Hicks complained to Payne and Sutherland with regard to riding in the scoop in lieu of the man trip. I find that in bringing these matters to the attention of management, Hicks was engaged in protected activities. (See, Secretary on Behalf of Robinette v. United Castle Coal Co., supra. Further, the record before me unequivocally establishes that on May 10, 1989, Hicks was fired, and he thus suffered adverse action.

II.

Motivation

a. When Safety Complaints Were Made

Hicks testified on direct examination that he made a complaint to Sutherland about safety jacks a week before he was fired. Upon cross-examination, it was elicited that on

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October 16, 1989, in answers he gave in response to interrogatories, he had said that he did not know when these complaints occurred. In his testimony, he indicated that, with regard to when he complained of inadequate jacks "it (the instances when he made the complaints) happened at different times all the way through" (Tr. 99). (Explanatory phrase added). However, Sutherland did not specifically rebut Hicks' testimony with regard to having made a complaint about inadequate jacks the week before he was fired. I thus find, on the basis of Hicks' uncontradicted direct testimony, that a week before his discharge, he had complained to Sutherland about the failure to use safety jacks.

The weight of the evidence fails to establish that the balance of Hicks' complaints were made within close proximity to his discharge. Hicks testified that about a month before he was fired, he had made complaints to Sutherland about loose rock on the roof. He indicated that he again made such a complaint on May 8, 2 days before he was fired, and Sutherland told him to have the man trip stopped, and to pull off the rock. However, neither Ray nor Lester, who rode the man trip along with Hicks, corroborated his testimony that he had made a complaint about the loose rock 2 days before he was fired. In this regard, it was Sutherland's testimony, in essence, that the incident, in which the man trap was stopped, and he had Hicks pull down the loose rock, occurred 1 month prior to his firing and not a few days prior thereto. Hicks indicated, on direct examination, that he complained about improper ventilation a week before he was fired. However, upon cross-examination it was elicited that in his response to interrogatories taken on October 16, he did not say that he had made such complaints a week before he was fired.

Hicks indicated that he made complaints with regard to riding the scoop in April or May, but he did not indicate specifically when these complaints were made. However, neither Ray nor Lester provided any testimony with regard to the most recent time Hicks made such a complaint prior to the time he was fired. Sutherland indicated that Hicks had complained several months prior to the firing. b. Reaction of Respondents' Managers to Hicks' Complaints

According to Hicks, when he complained about riding the scoop, inadequate jacks, and loose rock on the roof, Sutherland got mad. Douglas Wayne Lester, a shuttle car operator who worked with Hicks, indicated that "sometimes," Sutherland got angry about the safety complaints (Tr. 227). Sutherland did not specifically rebut this testimony of Hicks and Lester.

c. Complainant's Prima Facie Case

Thus, the record indicates that Hicks made multiple safety complaints and had voiced complaints about inadequate jacks week before he was fired. Also, the weight of the evidence establishes that Hicks' foreman, Sutherland, got mad on occasion, when presented with Hicks' complaints. Thus, I conclude that there is some evidence to support a finding that the firing of Hicks by Sutherland was based, in some part, on the safety complaints that Hicks had made.

d. Affirmative Defense

On May 10, 1989, at approximately 10:00 a.m., Sutherland informed Hicks and Lester that they should take lunch.² According to Hicks, Sutherland returned 20 minutes later and told him and Lester to return to work. Both Hicks and Sutherland indicated that they argued, and that Hicks said to Sutherland "kiss my a--." Sutherland then told Hicks that he was fired. Although there is evidence that the miners and Sutherland regularly cursed back and forth, Sutherland indicated that he fired Hicks after the latter made the above statement, because he felt that Hicks was not joking.³ The following day Hicks met with Payne and Sutherland. According to Payne, who had the authority to hire and fire, Sutherland explained that he had fired Hicks because he "bad mouthed him" (Sutherland) (Tr. 148). In essence, Payne indicated that he told Sutherland to make the decision with regard to the firing of Hicks. Payne indicated that he talked to Jerry Keith Lester, who is a one third owner of Respondent's operation, and the latter said that the matter of the firing would be left up to him (Payne). Lester indicated that prior to the firing, Sutherland had complained about Hicks

getting his buggy late to the face, and that Hicks had made smart remarks in the last few months when he was asked to perform some tasks. Lester indicated that he had said it was time to do something about it, and that he went along with Sutherland's decision to fire Hicks. Lester indicated that he did not talk to Carter G. Messer, who also has a one third ownership in the operation. He said that in his conversations with Payne with regard Hicks, Payne had said that Hicks was always clean even though he worked in a dirty environment. Payne indicated that after the meeting on May 8, 1989, Messer told Hicks that he was fired and that "we've got to take a stand somewhere and we'll just leave it at that" (Tr. 151). According to Payne, after Messer told Hicks he was fired, Messer said that he wanted to get rid of Hicks for a long time, but "couldn't get anything on him" (Tr. 152). Payne indicated that prior to that time, Messer had never said that he wanted to fire Hicks, and indeed indicated that the latter was a good buggy man. Messer denied telling Payne that he wanted to get rid of Hicks for a long time. He indicated that, prior to the firing of Hicks, he did not discuss with Lester either Hicks or his work habits. He indicated that he supported the decision of Sutherland to fire Hicks as he was 100 percent behind his foreman. According to Messer, Sutherland never told him that Hicks had made safety complaints. He was asked whether he talked to Sutherland with regard to Hicks' work habits, and indicated that Sutherland had told him that it takes Hicks a long time to do things.

I find that at least a week elapsed between Hicks' complaint about jacks and loose rock, and his being fired. It is significant that Hicks did not indicate that Sutherland manifested any displeasure or anger at the complaint he (Hicks) had made about loose rock on May 8, 2 days before he was fired. There is no evidence that Payne, who according to his testimony had the responsibility for hiring and firing, ever expressed displeasure at Hicks for his having made safety complaints. Also, there is no evidence that Lester and Messer, who together own two thirds of Respondent's operation, had, prior to the firing of Hicks, any knowledge of the latter's safety complaints. Moreover, due to the nature of the words spoken by Hicks to Sutherland, his foreman, and the manner in which they were spoken, I find that a valid business reason existed for the firing of Hicks.

I find that Sutherland found Hicks deserving of being fired on May 10, for the manner in which he talked to him, and that he would have fired him for this action in any event. I thus conclude, that Respondents have established an affirmative defense that Hicks would have been fired in any event based on his unprotected activities alone. Accordingly, it must be concluded that the Complaint is to be dismissed. (See, Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, at 2799-2800 (October 1980)), rev'd on other grounds sub. non. Consolidation Coal Co., v. Marshall, 663 F 2nd 1211 (3rd Cir. 1981)).

ORDER

It is hereby ORDERED that the Complaint of Discrimination filed on August 23, 1989, be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. Paul Horn, a scoop operator on Hicks' shift, testified that he did not recall Hicks' complaining about loose rock on the top of the ceiling. I find this testimony not sufficient to rebut the testimony of Hicks, Ray, Payne, and Sutherland that Hicks did in fact bring to the attention of management, the existence of loose rock on the ceiling.

2. Apparently, it was not unusual for the shuttle operators, Lester and Hicks, to take lunch other than the noon hour, due to interruptions in the normal mining cycle.

3. It appears to have been common practice in the mine for the miners and Sutherland to curse one another. The only time a miner had been disciplined or threatened for cursing or talking back, was on one instance when Ray, in anger, cursed Sutherland. Sutherland then fired Ray, but rescinded this action upon advice of Payne, and Ray did not miss any work.

Thus, I find that the firing of Hicks by Sutherland for cursing was not a pretext as argued by Complainant, inasmuch as Sutherland threatened Hicks the same way he had previously threatened Ray. Although Payne advised Sutherland not to fire Ray, but supported his decision to fire Hicks, there is no evidence to establish that Payne in any way was motivated by Hicks' safety complaints. Indeed, he concurred in many of these complaints.