CCASE:
SOL (MSHA) v. A. & M TRUCKING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DOUGLAS B. TUTTLE, APPLICANT v. A & M TRUCKING COMPANY, RESPONDENT	DISCRIMINATION PROCEEDING Docket No. WEVA 91-621-D HOPE CD 91-08 Huffman Surface Mine

DECISION

Appearances: Tina Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Applicant;
Edward Dooley, Esq., Middlesboro, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the request for hearing filed by A & M Trucking Company (A & M) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq., the "Act," and under Commission Rule 44(b), 29 C.F.R. | 2700.44(b), to contest the Secretary of Labor's Application for Temporary Reinstatement on behalf of miner Douglas B. Tuttle:

These proceedings are governed by Commission Rule 44(c). That rule provides as follows:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine

> any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

This scheme of procedural protections, including the statutory standard of proof provided by section 105(c)(2) of the Act, to an employer in temporary reinstatement proceedings far exceeds the minimum requirements of due process as articulated by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) . See JWR v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

Within this framework of law it is clear that the determination of whether the Secretary's application on behalf of a miner was frivolously brought (the functional equivalent of a "reasonable cause to believe" standard) is to be made on the basis of evidence adduced at, and as of the time of, the hearing before the Commission Administrative Law Judge under Rule 44(c).

The complaint of discrimination accompanying the Secretary's application herein alleges that the discriminatory firing of Mr. Tuttle took place on December 17, 1990. The accompanying affidavit required by Commission Rule 44(a), certifies, however, that the act of discrimination took place on January 31, 1991, and the credible evidence adduced at hearing shows that Mr. Tuttle performed no work for A & M after December 11, 1990. Footnote 1) It is clear, in particular from the last computer-printed "weigh ticket" corresponding to the No. 120 haulage truck Tuttle had been operating on the evening shift that Tuttle last worked for A & M on December 11, 1990 (Exhibit R-5). Further, it is not disputed that the truck drivers working for A & M received their pay twice a month with the first paycheck (covering the first of the month through the 15th of the month) due on the 25th of the month. From the undisputed testimony of A & M foreman Ronnie Williams, it is clear that after Tuttle had terminated his work relationship with A & M, he came to the mine site sometime before December 25, 1990, requesting his final paycheck. Since the check due on December 25th would correspond to work performed between December 1 through December 15, and admittedly this was his last paycheck, it is clear that Tuttle did not work for A & M after December 15, 1990. As Williams explained at hearing, if Tuttle had hauled coal after December 15th, he would not have been paid until January 10, 1991. Indeed Tuttle himself acknowledges that he went to the mine site on December 21st to pick up this final paycheck and that December 25th would have been the normal corresponding payday.

Given these serious conflicts, I am compelled to conclude that there is no reasonable cause to believe that any discharge or any other discriminatory event occurred as alleged in either the complaint or the affidavit. (Footnote 2) Accordingly, I cannot find that ,the complaint was not "frivolously brought. " Commission Rule 44(c), supra; JWR v. FMSHRC, 920 F.d 738 at p. 747 (11th Cir. 1990).

However, even assuming, arguendo, that the Secretary had properly charged that the discriminatory event occurred on December 11, 1990, the individual complainant's allegations in his own testimony at hearing fail to state a claim cognizable under the Act. Since the allegations of discrimination are facially insufficient, it cannot be said that the complaint herein was not frivolously brought.

A miner's refusal to perform work is protected under section 105(c)(1) of the Act, if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), reversed 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). According to the complainant, on what turned out to be his last day of work, he first pre-tripped (pre-shifted) the No. 120 haulage truck he was to operate that evening. He observed that it had been "down" the day before and new brakes had been installed. After driving his first load to the dumping location, he noted that the brakes would not hold on an incline and accordingly reported that the brakes needed adjustment.

A & M representative Anthony Mayes stated that he overheard Tuttle complain on his radio that he had to use his hand brake to stay on the slope so Mayes directed Tuttle to return to the truck lot and have the brakes adjusted. Mayes then followed Tuttle to the lot. According to Tuttle, Mayes first told him to exchange his truck for truck No. 129 then changed his mind and told him to take truck No. 127. Tuttle testified that as he began "pre-tripping" truck No. 127 he heard the air leaking out. According to Tuttle, the air was leaking so badly that when he released the parking brake, the release button would not remain in the released position but would kick back out because of insufficient air pressure. Indeed, according to Tuttle, the

brakes were locked to such an extent that the truck could not be moved.

While denying that there was any leak in the air brake system of truck No. 127 and that Tuttle had ever pre-shifted the truck that night, Mayes corroborated Tuttle's testimony that when the air pressure is inadequate the parking brake will set itself and completely lock the brakes. Indeed, according to Mayes, once the brakes lock up you must repair the air leak before you can ever move the truck again.

According to Tuttle, after he pre-tripped the truck he told Mayes that the truck was unsafe. Mayes purportedly then told Tuttle to drive it or go home. Finally, after Tuttle allegedly refused to drive it he asked Mayes if he should return for his regular shift the next day. Mayes purportedly responded that if he did not drive the truck that shift he was not to return. Tuttle testified that he thereafter went home, believing that he had been fired.

While Mayes generally denies this version of events, and indeed the allegations are not completely rational, it is not necessary to resolve these conflicts since I find Tuttle's allegations to be facially insufficient in any event to state a claim under the "work refusal" analysis. Indeed, according to the credible evidence of record it would have been mechanically impossible for the truck to have been driven in its alleged condition. The parking brakes would have been locked and the truck could not have been moved until the air leak was repaired. The truck could not have been operated without repairs and Tuttle therefore faced no hazard. Accordingly, Tuttle could not have entertained a good faith, reasonable belief in a hazard and there is no basis on this record for a violation under section 105(c)(1) of the Act. Therefore, it must be concluded that the complaint was indeed frivolously brought.

ORDER

The Application for Temporary Reinstatement herein is denied.

Gary Melick
Administrative Law Judge

Footnotes start here:-

1. The Secretary's counsel represented at hearing that the affidavit was incorrect, but she has not submitted any corrective affidavit.

2. The Respondent also disputes the Secretary's assertion that Tuttle was an employee rather than an independent contractor and maintains that independent contract miners are not entitled to the section 105(c) protections. In light of the decision herein, it is not necessary to reach these questions.