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LONNIE DARRELL ROSS v. SHAMROCK COAL
HARLES E. GILBERT v. SHAMROCK COAL
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Federal Mine Safety and Health Review Commission
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LONNIE DARRELL ROSS, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 91-76-D BARB CD 90-40
SHAMROCK COAL COMPANY, INC., RESPONDENT	No. 10 Mine

CHARLES E. GILBERT, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 91-77-D BARB CD 90-41
SHAMROCK COAL COMPANY, INC., RESPONDENT	No. 10 Mine

DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, KY, for Complainant;
Neville Smith, Esq., Manchester, KY, for Respondent.

Before: Judge Fauver

These consolidated discrimination proceedings were brought by Lonnie Ross and Charles Gilbert against Shamrock Coal Company, Inc., alleging that they were wrongfully discharged for engaging in protected activity, i.e., making safety complaints, in violation of Section 105(c)(1) of the Federal Mine Safety Act of 1977, 30 U.S.C. 801 et seq.

In September, 1990, Complainants filed their initial complaints with the Mine Safety and Health Administration (MSHA). On November 7, 1990, MSHA advised them that its investigation did not indicate a violation of 105(c). On November 30, 1990, Complainants filed the instant complaints with the Commission.

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 further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates an underground coal mine known as Greasy Creek Mine No. 10, where it mines coal for sale or use in or substantially affecting interstate commerce. Mine No. 10 is part of Respondent's Greasy Creek coal division, which consists of several coal mines.

2. Complainant Lonnie Ross was employed at the mine as a fireboss and crew leader, and Charles Gilbert as a maintenance worker on Ross' crew, when they were discharged by Respondent, on July 31, 1990.

3. Lonnie Ross began work for Respondent on May 28, 1981. He was employed as a fireboss and maintenance employee on the night (third) shift from 1985 until July 31, 1990, when he was discharged. Beginning about 6 months before his discharge, he also became a crew leader of a maintenance crew on the third shift. His principal duties included firebossing, doing preshift examinations of two sections, and being a crew leader in maintenance work to prepare one section to run coal on the day shift. His job was to carry out orders from the third shift foreman.

4. Charles Gilbert was employed by Respondent as a maintenance worker on the third shift from July 3, 1981, until July 31, 1990, when he was discharged. His job was to carry out orders from the third shift foreman or his crew leader in preparing his section to run coal on the day shift. Gilbert was a member of Ross' maintenance crew.

5. The maintenance crew in Section 10-3A, where Complainants were working when they were discharged, consisted of three miners -- Lonnie Ross (fireboss and crew leader) and two general maintenance workers, Charles Gilbert and Mike Europa. Occasionally they had a "greenhorn," a trainee miner, assisting them. Their job was to carry out assigned duties to prepare the section for the production of coal by the day shift. Complainants regularly performed electrical work without the presence or direct supervision of certified electricians. This included splicing high voltage cables, disconnecting and hooking up power centers, electrical boxes and water pumps, locking out and re-energizing power circuits. The electrical work was not isolated or sporadic, but a regular part of their jobs. Complainants were not certified mine electricians. They moved the power center in their section three or four times a week, routinely doing the electrical work that was involved in such a move.

6. It was well known by their supervisors that Complainants were not certified mine electricians, that they were doing electrical work without the direct supervision of a certified electrician, and that this work was prohibited by federal safety standards.

7. In the 1980's, Ross and Gilbert complained to their foreman, Doug Collett, about working on high voltage electricity and not being certified mine electricians. Collett indicated to them that was part of their job and they had the choice of doing it or quitting. In the fall of 1989, they complained to his successor, Foreman Ralph Bowling, but he either ignored their complaints or said he could not spare an electrician to do the electrical work they were doing.

8. Ross and Gilbert continued doing unlawful electrical work to keep their jobs, but they did not want to work on high voltage electricity and did so only because their supervisors expected such job performance of them.

9. In the fall of 1989, the mine changed the work week from five 8-hour days to four 10-hour days. The two production shifts increased daily production from 16 hours to 20 hours, so that the third shift maintenance crew had only 4 hours instead of 8 hours between production shifts. This significantly increased the work load and job pressures on Complainants. As a result, Ross and Gilbert were vocal in making complaints to Foreman Ralph Bowling that they had too much work to do in the 4 hours between production shifts and asked for help by having more personnel assigned. They emphasized that they did not have enough time to do their jobs properly. Bowling did not address these complaints.

10. In January, 1990, the general mine superintendent, Stanley Couch, quit because of his objections to the 10-hour plan. He found that it created unacceptable job pressures and inefficiency.

11. Couch was replaced by Don Smith as mine superintendent. Ross and Gilbert complained to Smith that they needed more men on their crew, and did not have enough time to do their jobs, but he either ignored the complaints or indicated that they were expected to do the job with what they had.

12. In the first part of July, 1990, Foreman Bowling went on vacation for one week. He recommended that Ross be promoted as acting third shift foreman in his absence. Smith approved the recommendation. In recommending Ross, Bowling said Ross was one of his best workers.

13. On July 18, 1990, a federal mine inspector was preparing to go underground for an inspection. Ross had filled out his preshift examination report, as fireboss, and signed it. Smith came up to him and said that the day shift foreman, Charles L. Morgan, had not countersigned the report. Without Morgan's signature, it would be a violation to begin production on the day shift. Smith asked Ross to sign Morgan's name. Ross refused. Smith asked him again, but Ross refused. This made Smith angry, and he signed Morgan's name himself.

14. After this incldent, Ross perceived a clear change in Smith's attitude toward him, which became hostile and harassing. Ross feared, from that incident, that Smith would retaliate against him.

15. The last week of July, 1990, Mike Europa, the third man on Complainants' maintenance crew, went on vacation for one week. Ross and Gilbert asked Foreman Ralph Bowling to replace Europa for that week, but Bowling told them that Ross would have to do Europa's job as well as his own duties for that week. This decision increased the job pressures on Ross and Gilbert for that week, and created a number of safety risks by causing pressures on them to do their jobs faster. These risks included rushing Ross in his preshift examinations and rushing Ross and Gilbert in doing unlawful electrical work. Both Complainants complained to Foreman Bowling that they needed a replacement for Mike Europa that week, and could not do their work properly without a replacement. These complaints were unheeded.

16. Ross was fireboss and crew leader, and also filling in for Mike Europa (on vacation) the last week of July, 1990. Gilbert was doing his regular job, with added pressure because of the absence of Europa. The only other employee with Ross and Gilbert was a greenhorn, who had been in training for several weeks.

17. On July 26, 1990, between production shifts, Ross and Gilbert moved the power center in their section, doing the electrical work involved in the move.

18. By the time they moved the power center and one cable, it was approaching 6:00 a.m., and they still had two cables to move. They were under pressure to move the cables, so they could hook up the power center, connect the cables, and have the section ready for the day shift at 7:00 a.m. Ross looked for pull ropes on the section, but did not find any. These ropes are loops used to attach a cable to a vehicle for pulling. He decided to use a method of pulling the cables that he had often seen used before, and at times had used himself. By bending a cable into a loop, and lowering the scoop batteries onto the loop, a cable could be pulled by the scoop. This method was commonly used to pull a cable out of the mine, or to move a cable out of the way if it was going to be removed from the mine. The advantage of this method was that the grip on a cable loop was more reliable than a grip on a pull rope, which would become loose or disconnected over a long distance. The disadvantage of this method was that a cable loop could be damaged by the heavy batteries (weighing about 7,000 pounds) and this would require cutting off about four feet of cable. Since this amount of cable cost only $20, various supervisors believed it was worth the cost, rather than lose time reconnecting a pull rope during a long haul. This comparison of time and cost was relevant in moving a cable out of the mine, because the replacement of the damaged end of the cable eliminated a safety risk. Also, pulling the cable did

not present a hazard at the time of pulling, because the cable was de-energized. However, a safety risk would be involved if the last four feet of cable were damaged and not replaced. The damage could expose bare wire or it could weaken the outer jacket so that, with further use of the cable in mining, a bare wire might be exposed in the last four feet of the cable and could cause an electric shock. It was therefore not a safe practice to move a cable by placing it under the scoop batteries if the looped end of the cable was not replaced before re-using the cable. Ross knew that it was not a good practice, but he was also aware of cases in which a cable was moved that way with no apparent damage. He had also seen foremen move a cable this way when they were in a hurry.

19. As of July, 1990, moving a cable under scoop batteries was not an accepted practice at this mine if the cable were being advanced with the section. It was an accepted practice if the cable were being moved out of the mine.

20. When Ross told Gilbert to lower the scoop batteries onto the cables, Gilbert knew this was not an accepted practice, and advised Ross several times not to move the cables under the scoop batteries. Ross rejected this advice, and ordered Gilbert to lower the scoop batteries onto the cable loops. Gilbert followed the order of his crew leader.

21. Gilbert drove the scoop, pulling the cables to the power center, where Roger Hoskins saw him. Hoskins, a crew leader on a repair crew, told Gilbert that they were wrong to pull the cables that way.

22. When the day shift tried to use the cables, one had internal damage so that the circuit breaker would keep shutting off the circuit. Hoskins told the day shift foreman, Charles Morgan, that he had seen certain employees pull the cables under scoop batteries. He did not tell Morgan their names.

23. Morgan told Mine Superintendent Don Smith what Hoskins had said. Smith told Foreman Ralph Bowling to find out what happened and that, if employees had pulled the cables under the scoop batteries, to fire "whoever did it."

24. Bowling contacted Ross, who said he did not know anything about it. He then contacted Gilbert, who said he drove the scoop, pulling the cables under the scoop batteries. Bowling told him he was fired. Gilbert said he would not take the blame alone, and that Ross had told him to do it. Gilbert was not actually fired at that time. He was fired later, by Superintendent Smith, not Foreman Bowling.

25. On July 31, 1990, at Smith's request, Bowling called Ross to the office, where Don Smith, Pearl Napier, and Gilbert were also present. Smith confronted Ross with Gilbert's statement that he

had told Gilbert to move the cables under the scoop batteries. Ross said he would take the blame.

26. Bowling did not want to see the men fired. He persuaded Don Smith to step outside the room. Outside, he recommended two weeks' suspension without pay, instead of discharge. Smith agreed.

27. They returned, and Bowling said they were giving Complainants two weeks off without pay. Ross indicated his agreement to accept that punishment. Gilbert was angry, because he had only followed his crew leader's order and did not believe he should be given time off without pay, and because he believed the company had imposed undue job pressures on him. He told management he did not believe he deserved two weeks' suspension and that he was "tired" of "having to work like a dog and not having time to do the job" (Tr. 36). He said that, if he had enough accumulated hours for that year for his profit-sharing fund, they could go ahead and fire him rather than give him two weeks' suspension.

28. Someone called the payroll office, to see whether Gilbert had enough hours for 1990 for his profit-sharing fund, and reported that he did have enough time. At this point, Bowling told Smith that they could not fire one employee and give the other only two weeks' suspension since they were "equally" at fault. Gilbert then reconsidered. He said that he did not want Ross to lose his job, and agreed to take the two weeks' suspension.

29. Superintendent Don Smith, who had a short temper, lost his temper at this point, and said "just go ahead and fire both of them." Tr. 338.

DISCUSSION WITH FURTHER FINDINGS

Scope of Protected Activity

Section 105(c)(1) of the Act (Footnote 1) protects miners from

retaliation for exercising rights under the Act, including the right to complain to supervisors about an alleged danger or safety or health violation.

The basic purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181. 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess. (1978)).

This provision is a key part of remedial legislation, which is to be liberally construed to effectuate its purposes.

Reporting an alleged danger or violation to a mine operator is distinguished from refusing to work because of such a complaint. Refusal-to-work cases generally focus on whether the miner believed that he or she was being subjected to danger. A key issue is whether the belief was held in good faith and was a reasonable one. In such cases, the miner generally has an obligation to express the safety complaint with sufficient clarity and detail to enable the mine operator to address it and take corrective action if necessary. In contrast, if a miner does not refuse to work but complains about a hazard or violation, the voicing of the complaint is protected by 105(c) without examining whether the miner would be justified in refusing to work.

Complaints About Electrical Work

Early in their employment, Complainants were introduced to electrical work as a normal part of their jobs. This included making high voltage splices, disconnecting and hooking up power centers, electrical boxes, water pumps, and locking out and re-energizing circuits. This work was dangerous in the hands of unqualified personnel and forbidden by a mandatory safety standard, 30 C.F.R. 75.511, which provides:

> No electrical work shall be performed on low, medium, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

Complainants were not certified mine electricians ("qualified persons") and were not working under the direct supervision of a certified mine electrician when they performed electrical work. Indeed, they usually did such work without the presence of a certified mine electrician. Respondent regarded this unlawful (Footnote 2) electrical work as a routine and integral part of their jobs.

Complainants complained to an early supervisor, Foreman Doug Collett, about doing electrical work and not being certified mine electricians. Collett did not heed their complaints, and indicated that they had the option of doing such work or quitting.

They complained to Collett's successor, Foreman Ralph Bowling, about doing electrical work and not being certified mine electricians. His usual reaction was to ignore their complaints or say that he could not spare an electrician to do the electrical work Complainants were performing.

The regular practice by Ross and Gilbert, with Respondent's knowledge, was to handle the power moves on their section, doing the electrical work themselves, including disconnecting and hooking up the power center, electrical boxes, disconnecting, hooking up

and splicing cables, and locking out and re-energizing circuits, without the presence or supervision of a certified electrician.

The reliable evidence corroborates Complainants' testimony that they regularly did unlawful electrical work as a routine, integral part of their jobs. Other employees saw them do electrical work and themselves did electrical work although they were not certified electricians. Respondent did not assign an electrician to Complainants' section, but did so a few months after they were discharged. During Complainants' employment, on the third shift electricians were assigned to a "roving" repair crew that covered a number of mines. They were usually not present for power moves in Complainants' section.

Complainants' foreman, Ralph Bowling, knew that Complainants were doing electrical work, and saw them hooking up power boxes and making high voltage splices. His attitude was that in doing such work Complainants were in "No more danger than an electrician or anybody else would have been in" (Tr. 435). Bowling was not a certified mine electrician but did electrical work because he believed in doing "What had to be done" (Tr. 436). In his view, an "electrician's card" does not make an electrician. This apparently was his justification for not seeking electrical training and certification and for employing Complainants to do electrical work without the presence or supervision of a certified electrician. Foreman Bowling showed a serious disregard for mandatory safety standards requiring training, qualification, certification, and job assignments of mine electricians.

Complainants' safety complaints about doing electrical work went unheeded by Respondent. Gilbert testified that his last safety complaint about doing electrical work was about 5 or 6 months before his discharge (Tr. 78). Ross testified that he specifically requested that he not be required to do electrical work "A lot of times" (Tr. 169). Ralph Bowling became their foreman around October, 1989, and remained their foreman until they were discharged. I find that Complainants complained to Foreman Bowling about doing electrical work a number of times and at least as late as the last months of 1989. With Bowling's attitude toward electrical work, such complaints were futile.

Complainants complained, and adequately put Respondent on notice, that they objected to doing electrical work for which they were not certified mine electricians, and that they did not want to work on high voltage. They acquiesced in doing unlawful electrical work, not because they were not afraid of high voltage electricity, but because they needed to keep their jobs. This mine is located in a remote area where jobs are very had to find. One of the Complainants was on a waiting list for a year to get his job with Respondent, and his starting wage was nearly three times larger than the pay he was earning elsewhere. Complainants had families to provide for, and were easy prey to pressures to ignore safety

standards.

I find that Complainants' complaints about doing electrical work were a protected activity under 105(c).

Complaints About the 10-Hour Work Shift

In the fall of 1989, Respondent started a 10-hour work shift, changing from five 8-hour days to four 10-hour days. This meant that coal was produced 20 hours a day instead of 16 hours, and the third shift had only 4 hours between production shifts, instead of 8 hours, to do section preparation work while power and production machinery were turned off. Although, in theory, the third shift maintenance crew had 10 hours (instead of 8 hours) to prepare their section for daytime production, in reality they were under increased and significant job pressures because much of their work required shutting off the power. The mine superintendent, Stanley Couch, quit in January, 1990, because of his objections to the 10-hour plan. His replacement, Don Smith, testified that the 10-hour plan was later dropped because "it wasn't working out. We could not keep our repairing up on our equipment. We just did not have enough time in four hours to keep the repairing on our equipment and stuff. The down time was eating us up. . . . " Tr. 344. Complainants bore a considerable work burden under this plan, and were vocal in their complaints to Foreman Ralph Bowling and at times to the new mine superintendent, Don Smith, that they needed more men to assist them and that they could not do their jobs properly in the squeeze of 4 hours between production shifts. Complainants advanced the power center three or four nights a week. This meant that their power moves and related electrical work that could be done only between production shifts had to be done in 4 hours instead of the 8 hours previously allowed. Complainants' complaints to Bowling and Smith went unheeded.

I find that these complaints were a protected activity under 105(c) of the Act. In light of the dangers inherent in mining a miner's complaints (without refusing to work) that he is overworked and does not have enough time to do his job properly imply a safety complaint that haste and overwork will create hazards and accidents. Whether or not such a complaint merits corrective action by management, depending on an evaluation of the facts, the voicing of the complaint has a sufficient connection to safety or health to be a protected activity under 105(c). In addition, there were clear hazards in rushing these Complainants because Ross was doing critical firebossing duties and both he and Gilbert were performing unlawful electrical work. (Footnote 3) As stated, complaints of

this nature are distinguished from refusal-to-work complaints, which may require more specificity.

Ross' Refusal to Falsify a Preshift Report

On July 18, 1990, two weeks before Complainants' discharge, Ross had a serious incident with Mine Superintendent Don Smith. The day shift production foreman, Charles Morgan, had failed to countersign Ross' preshift report, and it would be a violation to start production without it. A federal inspector was about to begin his inspection. Smith asked Ross to sign Morgan's name. Ross refused. Smith asked him again, and Ross refused. Smith became angry and signed Morgan's name himself. Ross perceived a marked change in Smith's attitude toward him, which became hostile and harassing.

Ross' refusal to falsify a preshift report was a protected activity under 105(c) of the Act. Miners are protected against retaliation for refusing to violate the Act or any safety or health regulation promulgated under it.

Complaints About the Failure to Replace Mike Europa

In the last week of their employment, Mike Europa, the third member of Complainants' maintenance crew, went on vacation. Complainants asked Foreman Bowling to replace Europa for that week, but he said Ross would have to fill in for Europa. This meant another major increase in the already intense work pressures on Complainants. They were vocal in complaining to Bowling several times during that week that they could not do their jobs properly without a replacement for Europa. This condition created safety hazards for Complainants and others. Ross was pressured in his

duties as fireboss and both Ross and Gilbert were under substantial pressure in trying to cope with the 10-hour shift problems, now made more severe by the absence of a critical member of their maintenance crew, and rushing in their performance of unlawful electrical work. Their complaints were unheeded.

I find that these complaints were a protected activity under 105(c), for the reasons stated concerning the 10-hour shifts Gilbert's Complaints on July 31, 1990

In the meeting between management and Complainants on July 31, the day of their discharge, management offered to discipline Complainants with two weeks' suspension without pay. Ross agreed to take this punishment. Gilbert rejected this at first, feeling that he did not deserve punishment because he was only following the order of his crew leader and being upset about management's excessive work pressures. Gilbert stated he was "tired" of "having to work like a dog and not having time to do the job" (Tr. 36).

I find that, in the context of Complainants' prior safety complaints to mine management, this expression of being overworked (worked like a dog and not having enough time to do his job) related sufficiently to prior and recent safety complaints about the excessive work pressures on Complainants to be a protected activity under 105(c).

Was There Discrimination Against Complainants?

Having found that Complainants were engaged in protected activities, I turn to the question whether adverse action against them was motivated by their protected activities.

To establish a prima facie case of discrimination under 105(c) of the Act, a miner has the burden to prove that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981).

"Direct evidence of motivation is rarely encountered, more typically, the only available evidence is indirect. * * * "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence."' Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965). In "analyzing the evidence, circumstantial or direct, the [adjudicator] is free to draw any

reasonable inference" (id.).

After accepting Foreman Bowling's recommendation, Superintendent Don Smith agreed to discipline Complainants by two weeks' suspension without pay. Ross agreed to accept the discipline. Gilbert at first objected to suspension, because he was only following an order of his crew leader and believed he should not be punished, and because he felt so mistreated by being "worked like a dog" and "not having time to do the job" (Tr. 36). He added that, if he had enough accumulated time that year for his profit-sharing fund, they could go ahead and fire him rather than give him two weeks' suspension. Someone called the office, and reported that Gilbert had enough reported hours for vested profit-sharing in 1990. Bowling then said to Smith that they could not fire one employee and give the other only two weeks off because they were "equally" guilty. Gilbert then reconsidered. He said he did not want to see Ross lose his job, so he (Gilbert) would accept the two weeks' suspension also.

At this point, Don Smith, who had a short temper, lost his temper and said, "just go ahead and fire both of them." Tr. 338. Smith testified that he lost his temper (became "aggravated") because "they was a'squalling and hollering. I got aggravated and I told them to just go ahead and fire both of them." Id. I find that an animus toward Complainants was created in Smith by their safety complaints, including the July 18 incident between Ross and Smith over the signature on the preshift report, complaints about the pressures of the 10-hour shift and the failure to replace Mike Europa, and Gilbert's safety-related complaint at the final meeting (being worked like a dog and not having enough time to perform his job), as well as their long background of complaining about unlawful electrical work. Smith also testified that he believed "They weren't sorry for what they did and they would probably do it again anyway." Tr. 338. This appears to me to be an afterthought by Smith, not a motivating factor. However, assuming that this was a factor in his decision to discharge Complainants, I find that it was a "mixed motive" discharge, motivated at least in part by protected activities of the Complainants. Complainants made out a prima facie case of discrimination.

Did Respondent Rebut the Prima Facie Case of Discrimination or Establish an Affirmative Defense?

An operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. In a "mixed motive" case, although the miner must bear the ultimate burden of persuasion, the operator, to

sustain its affirmative defense, must prove by a preponderance of the evidence that the adverse action would have been taken even if the miner had not engaged in the protected activity. Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983).

Foreman Bowling's recommendation for two weeks' suspension does not reflect a discriminatory animus against Complainants. He was trying to reach a reasonable and, he believed, just result (although suspension of Gilbert would appear harsh considering he was following a crew leader's order). (Footnote 4)

However, the discharge decision made by Don Smith was through a loss of temper directed at Complainants, after management had offered two weeks' suspension and Complainants had accepted it. This showed an animus toward them which I find was motivationally connected with their substantial protected activities. Respondent has not proved, by a preponderance of the reliable evidence, that the Complainants would have been discharged even if they had not engaged in protected activities. Instead, Respondent has offered a case generally denying that safety complaints were even made. However, I credit Complainants' evidence of making safety complaints. Respondent did not prove an affirmative defense.

The fact that Don Smith originally ordered discharge for "whoever did it" does not alter this conclusion. The reliable evidence shows that Smith, at that time, knew or had reasonable grounds for believing that Complainants had moved the cables under the scoop batteries. It was clear that the cables were moved on the third shift, in Complainants' section. Complainants' three-man maintenance crew were the only employees who would be moving cables with a scoop in that section on the third shift. Mike Europa was on vacation. Excluding the greenhorn, that left Complainants. I do not credit Smith's testimony that he did not know or have reasonable grounds for believing that Complainants were the ones who moved the cables under the scoop batteries. An angry early order to fire "whoever did it" on facts that pointed to Complainants would have presented a similar problem for Respondent in responding to a prima facie case as did the actual discharge decision made on July 31. However, the early order to Bowling is not the issue here. The issue is the July 31 discharge, which I find was an angry decision taken after Smith knew Complainants had accepted management's offer to take two weeks' suspension. This was a discriminatory discharge, of at least a "mixed motive" kind, and Respondent has not made out an affirmative defense.

Respondent's Limited Offer to Reinstate Gilbert

Respondent introduced evidence that, around October 27, 1990, after Complainants engaged an attorney and filed their complaints with MSHA, Respondent's personnel director made an offer to Gilbert to reinstate him with one month's back pay. This settlement offer was made to Gilbert directly and not to his attorney, and it did not offer to pay Gilbert full back pay, interest, and litigation costs including a reasonable attorney fee. I find that Gilbert was not obligated to accept this limited offer.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent discriminated against Complainants on July 31, 1990, by discharging them in violation of 105(c)(1) of the Act.

3. Complainant Gilbert was not obligated to accept Respondent's limited offer of settlement.

4. Complainants are entitled to reinstatement with back pay, interest, (Footnote 5) and their litigation costs, including a reasonable attorney fee.

ORDER

WHEREFORE, IT IS ORDERED THAT:

1. Respondent shall, within 30 days of this decision, reinstate each Complainant in its employment with the same position, pay, assignment and all other conditions and benefits of employment that would apply had he not been discharged on July 31, 1990, with no break in service for employment or any other purpose; provided: Respondent may in its discretion apply retroactively two weeks' suspension without pay to Ross or to both Ross and Gilbert effective July 31, 1990.

2. Within 15 days of this decision, counsel for the parties shall confer in an effort to stipulate the amount of Complainants' back pay, interest, and litigation costs including a reasonable attorney fee. Such stipulation shall not prejudice Respondent's right to seek review of this decision. If the parties agree on the amount of monetary relief, counsel for Complainants shall file a stipulated proposed order for monetary relief within 30 days of this decision. If they do not agree on such matters, counsel for Complainants shall file a proposed order of monetary relief within

30 days of this decision and Respondent shall have ten days to reply to it. If appropriate, a further hearing shall be held on issues of fact concerning monetary relief.

3. This decision shall not be a final disposition of this proceeding until a supplemental decision is entered on monetary relief.

William Fauver
Administrative Law Judge

Footnotes start here:-

1. Section 105(c)(1) provides:

> 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 rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, 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, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

2. In finding that Complainants' electrical work was unlawful, I address the basis of one of their protected activities under 105(c), which applies to complaints of "an alleged danger or safety or health violation" (emphasis added). Complainants were entitled to complain about safety violations to their employer without fear of retaliation. Their performance of electrical work without the direct supervision of a certified mine electrician was a plain violation of 30 C.F.R. 75.511 (quoted above). This is not an adjudication of a violation for civil penalties under 110(i) of the Act, or for any purpose other than determining the nature of Complainants' protected activities proved in these proceedings.

3. The dangers involved in Complainants' unlawful electrical work were increased in the context of mine management's longstanding risk-taking attitude toward electrical work. On one occasion, their foreman, Collett, said he would have the main power circuit de-energized while Ross made a high voltage splice. Collett failed to do so, and it was only Ross' decision to de-energize the local circuit that prevented an electrical shock to employees. On another occasion, Don Smith sent an employee to de-energize a circuit and assumed he was gone long enough to do

so. Smith started cleaning the bare leads of a high voltage cable with a subordinate. When Smith sprayed a cleaner on the wires, there was a short circuit and a bolt of electricity shot from the cable, hitting Smith and knocking him against the mine rib. He was hospitalized. The surge through his body caused a burn where each of his dental fillings touched his tongue. Smith and his subordinate could have been killed or permanently disabled by this misjudgment. Complainants' last foreman, Bowling, who was not a certified mine electrician, showed a serious disregard for the mandatory safety standards requiring training, qualification, certification, and job assignments of mine electricians.

4. There was no precedent at this mine for suspending or discharging a miner for following the order of a crew leader or other supervisor.

5. Interest is computed at the IRS adjusted prime rate for each quarter. See Arkansas-Carbona Company, 5 FMSHRC 2042, 2050-2052 (1983).