

CCASE:  
SOL (MSHA) v. SANTA FE PACIFIC GOLD  
DDATE:  
19920211  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 Skyline, 10th Floor  
5203 Leesburg Pike  
Falls Church, Virginia 22041

SECRETARY OF LABOR, MSHA,  
ON BEHALF OF  
ROBERT W. BUELKE,  
APPLICANT

DISCRIMINATION PROCEEDING  
Docket No. WEST 92-243-DM  
WE MD 91-15

v.

Rabbit Creek Mine

SANTA FE PACIFIC GOLD  
CORPORATION,  
RESPONDENT

DECISION  
AND  
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Applicant;  
Charles W. Newcomb, Esq., Denver, Colorado,  
for Respondent.

Before: Judge Cetti

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act"). Section 105(c) of the Mine Act, 30 U.S.C. 815(c) (1988), prohibits operators of mines from discharging or otherwise discriminating against a miner who has filed a complaint alleging safety or health violations at a mine. If a miner believes that he has been discharged in violation of this section, he may file a complaint with the Secretary of Labor ("Secretary"), who is required to initiate a prompt investigation of the alleged violation. If the Secretary finds that the miner's complaint was "not frivolously brought," she must apply to the Federal Mine Safety and Health Review Commission ("Commission") for an order temporarily reinstating the miner to his job, pending a final order on the complaint. The Commission is required to grant such an order if it finds that the statutory standard has been met.

Although the Act does not require a hearing on the Secretary's application for temporary reinstatement, the Commission's regulations provide an opportunity for a hearing upon request of a mine operator, prior to the entry of a reinstatement order. See 29 C.F.R. 2700.44(b) (1990). The scope of such a hearing

~474

is limited to a determination by the Administrative Law Judge "as to whether the miner's complaint is frivolously brought," with the Secretary bearing the burden of proof on this standard.

#### Factual and Procedural Background

On February 7, 1992, the Secretary pursuant to Section 105(c)(2) of the Mine Act and Commission Rule 29 C.F.R. 2700.44(a), filed an application for an order requiring Respondent, Santa Fe Pacific Gold Corporation ("Pacific Gold"), to temporarily reinstate Robert W. Buelke to his job as an electrician at Pacific Gold, Rabbit Creek Mine from which he was discharged July 1, 1991.

On August 6, 1991, Mr. Buelke filed his discrimination complaint with MSHA at the Reno field office. His complaint in part reads as follows:

- I. Have worked as a mine electrician approximately 15 years. Resume Attached.
- II. Have had numerous encounters with supervisors in trying to get electrical installations done correctly, or repaired correctly; have tried to get them taken care of "in house", written a couple of letters/reports of concern, and have been put down and fired mainly because of these -- see attached letter.

If you need any additional information, please feel free to contact me.

Thank you for your concern, time and consideration.

Sincerely,  
/s/  
Robert W. Buelke

cc: Perry Tenbrink  
Ray Nicholson

The application for temporary reinstatement states that the Secretary has determined that the Respondent's discharge of Robert W. Buelke was motivated by his protected safety activity and that this constitutes an act of illegal discrimination which

~475

provided the basis for a non-frivolous cause of action under Section 105(c)(2) of the Act. Attached to the application is an affidavit setting forth the factual basis for the Secretary's determination.

The affidavit reads as follows:

AFFIDAVIT

James E. Belcher, being duly sworn, deposes and states:

1. I am the Chief, Office of Technical Compliance and Investigation Division, Metal and Nonmetal Safety and Health.

2. I am responsible for reviewing discrimination complaints filed pursuant to the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). I have reviewed the special investigation file in the above-captioned case.

3. My review of the investigative file disclosed the following facts:

a. At all relevant times, Respondent, Santa Fe Pacific Gold Corporation, engaged in the production of gold and is therefore an operator within the meaning of Section 3(d) of the Mine Act;

b. At all relevant times, Applicant, Robert W. Buelke, was employed by Respondent as an electrician and was a miner as defined by Section 3(g) of the Mine Act;

c. Rabbit Creek Mine, located near Winnemucca, Humboldt County, Nevada, is a mine as defined by Section 3(h) of the Mine Act, the products of which affect interstate commerce;

d. The alleged act of discrimination occurred on July 1, 1991, when Applicant Robert W. Buelke was discharged by Perry Tenbrink, Maintenance Supervisor;

e. Applicant Buelke engaged in protected activity by making numerous safety com-

plaints to management concerning electrical equipment and by submitting letters to Mine Manager Michael Surratt on January 23, and May 13, 1991. The letters detailed safety complaints by Buelke concerning electrical equipment;

f. The letters concerning safety complaints were received with hostility. Buelke was told that he had no business writing letters to mine management. Buelke's supervisors became hostile in tone and work assignments after the letters were submitted;

g. On May 29, 1991, Buelke was given a step one disciplinary notice allegedly for failing to correct an electrical grounding problem in a timely manner.

h. The Respondent's articulated basis for the May 29, 1991, disciplinary action was pretextual.

i. On July 1, 1991, having been absent for one week due to legitimate illness, Buelke received three disciplinary notices for violation of the one hour rule which requires employees to call in sick at least one hour prior to the start of the shift.

j. Buelke suffered disparate treatment, as other employees violated the one hour rule and received no disciplinary action or less severe action.

4. In view of the foregoing facts, I have determined that the Applicant Robert W. Buelke was discharged for engaging in protected safety activity and the complaint filed by him is not frivolous.

/s/  
James E. Belcher

Taken, subscribed and sworn before me this  
3rd day of February, 1992.

Catherine L. Falarko  
Notary Public

### Stipulations

1. Jurisdiction of this action is conferred upon the Federal Mine Safety and Health Review Commission pursuant to Section 113 of the Act, 30 U.S.C. 823.

2. This action is brought by the Secretary of Labor (Secretary) pursuant to authority granted by Section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2).

3. The Administrative Law Judge has jurisdiction to hear and decide this matter.

4. At all relevant times hereinafter mentioned, Respondent Santa Fe Pacific Gold Corporation, a New Jersey corporation, authorized to do business in Nevada operated the Rabbit Creek Mine in the production of gold and is therefore an "operator" as defined by Section 3(d) of the Act, 30 U.S.C. 802(d).

5. Respondent's Rabbit Creek Mine, located in or near Winnemucca, Humboldt County, Nevada, is a surface metal mine, the products of which enter commerce within the meaning of Sections 3(b), 3(h), and 4 of the Act, 30 U.S.C. 802(b), 802(h), and 803.

6. At all relevant times, Complainant Robert W. Buelke, was employed by Respondent as an electrician and was a miner as defined by Section 3(g) of the Act, 30 U.S.C. 802(g).

7. Buelke was employed as an electrician at the Rabbit Creek Mine from June 6, 1990, until his discharge on July 1, 1991.

8. At all relevant times hereinafter mentioned, Perry Tenbrink was maintenance supervisor for the Respondent at the Rabbit Creek Mine and as such supervised miners employed at the mine. Mr. Buelke was discharged by maintenance supervisor Perry Tenbrink on July 1, 1991.

### Applicant's Evidence

Mr. Buelke testified that he was concerned about employee safety; that he made numerous safety complaints to management concerning electrical equipment. He wrote two letters detailing safety complaints, to the mine manager, Mr. Surratt. The first letter dated January 23, 1991, a memorandum with the heading Internal Correspondence, reads as follows:

Whereas I'm the only MSHA Electrician on the Rabbit Creek Mine Site, and not in a position to advise, design, or change many of the electrical installations here, I would appreciate your naming someone who is responsible and liable for all electrical installations, and operations. Under MSHA regulations, and being a carded MSHA electrician, I automatically become totally liable for all electrical installations, and operations should there be any violations of the codes or accidents, unless I have a written notice from you relieving me of this responsibility and specifically naming someone else.

Since this mine has been in operation for 6 months and turned over from the constructor to Rabbit Creek and we are now coming under full MSHA jurisdiction, I'm obligated as a MSHA electrician to shut down and tag out (until corrected) any electrical equipment that is in violation of the code and/or a safety hazard.

I would appreciate a reply before February 1, 1991 thereafter I will be obligated to carry out my duties.

Mr. Buelke's second letter, addressed to David Wolfe, the Head of the Safety Department, dated May 13, 1991 reads as follows:

Whereas it has been a very busy time since our last meeting, around the first of March, with off site schools, new used trucks, a new P&H shovel, and general maintenance on the rest of our fleet, I regret that I have not been able to get a list of electrical (sic) problem areas, to your attention, before this time. I have decided, due to my limited time available to research and verify each problem, that I will try to get a list of three problems to you each month, for you to get corrected or verified.

The following three items are submitted for your verification and corrective action this month:

1. The need for a static ground line on the 34,500 volt pit-shovel supply line for the following reasons:

- a. Common safety practice. (sic)
- b. Required by MSHA in all mines (metal or non-metal) and strictly enforced in the Midwest - even the iron mines.
- c. Falls under the N.E.C. Section 250 on grounding as high-lited on attached copies.

2. The need to correct the Main 375Kw/480v Pit Generator feed for the following reasons:

- a. The generator output leads have been changed and no longer meet code Section 445; high-lited.
- b. A second branch circuit is required to protect the 2/0 pump cable Section 240, high-lited.
- c. Pump must be additionally (separtly) (sic) grounded or cable must be provided with ground check monitor, Section 250.

3. The need to correct the new 4160/480 volt pit-pump transformer/distribution panel (located on the lower hopper level) for the following reasons:

- a. All service panels over 1000 amp must be protected with Ground Fault Interupter breaker, Section 230 and 240, high-lited.
- b. A main disconnect means shall be provided on all service panels over 6 circuits (present 7 - and has additional spaces available), Section 230.

If you need any additional information, please feel free to contact me.

Thank you for your concern, time, and consideration.

Mr. Buelke also testified that his concern for employee safety from electrical hazards due to improper grounding of the substation, led him to tag out the substation on May 14, 1991, and again on May 20, 1991. He stated that the improper grounding could result in serious injury or death.

It is Applicant's position that Pacific Gold took adverse action against Mr. Buelke in the form of disciplinary notices and the July 1, 1991, discharge. On May 29, 1991, Mr. Buelke received a step-one disciplinary notice allegedly for failure to correct a grounding problem on the substation in a timely manner while time permitted. The electrical log book entries, and the testimony of Mr. Buelke and Mr. Brabank indicated that Mr. Buelke's actions were consistent with good practice and that Mr. Buelke acted diligently and responsibly with regard to the substation. The Applicant contends that the May 29, 1991, disciplinary notice was pretextual, and that Mr. Buelke was in fact punished for engaging in protected safety activity, including his previous safety complaints and tagging out the substation to ensure proper grounding on May 20, 1991.

Testimony was presented at the hearing that tended to show that Mr. Buelke has a good work record and has never been disciplined in any way prior to May 29, 1991, concerning performance of his duties. Mr. Buelke has on occasion been called out to perform electrical work that more senior electricians could not perform.

Mr. Buelke received three consecutive disciplinary notices on July 1, 1991, for failure to report off sick prior to one hour before the start of the shift, which allegedly formed the basis for his discharge. Mr. Buelke testified as to matters that appear to be mitigating circumstances. Evidence and arguments were presented to show that other employees violated the one hour rule and received no or less severe disciplinary action. The evidence shows that Mr. Buelke received the three disciplinary notices on the same day without any verbal warning or discussion, after returning from a legitimate illness of which the company was aware. The evidence indicated that Mr. Buelke had no history of lateness or absenteeism and had never been disciplined in any way for attendance problems prior to July 1, 1991, the date of his discharge.

Special Investigator David Brabank, Western District, MSHA, testified concerning the conduct of the 105(c) investigation, including the purpose and scope of the investigation. Mr. Brabank testified as to information he obtained with respect to disparate treatment in the enforcement of the one hour reporting

~481

rule. Mr. Brabank testified as to why in his opinion, based on the special investigation, the complaint is non-frivolous.  
Respondent's Position

Respondent's position broadly stated is that Mr. Buelke did not engage in protected activity and adverse actions taken against him were not motivated by that activity and in any event Mr. Buelke's job-related misconduct warranted the termination of his employment under company policies.

Respondent asserts that Mr. Buelke was properly discharged for receiving two or more disciplinary notices within 12 months in accordance with company policy.

#### Conclusion

At the conclusion of the hearing in this matter on February 27, 1992, after reviewing all the evidence and arguments presented, I ruled from the bench that the Secretary had made a sufficient showing and I granted the application for an Order of Temporary Reinstatement. I hereby affirm in writing the oral ruling made from the bench. The bench order orally issued February 27, 1992, was substantially as follows:

#### ORDER

My ruling in this matter is limited to the single issue of whether Mr. Buelke's application for temporary reinstatement is frivolously brought. I heard the testimony of only two witnesses, both presented by the Solicitor. I see no reason to doubt their credibility. Evaluated against the "not frivolously brought" standard, I conclude that the Secretary has made a sufficient showing of the elements of a complaint under Section 105(c) of the Act. Therefore, the application for an Order of Temporary Reinstatement of Robert W. Buelke is GRANTED.

Respondent is ORDERED to immediately reinstate Mr. Buelke to his position as electrician from which position he was discharged, at the same rate of pay, and with the same or equivalent duties assigned to him immediately prior to his discharge.

As previously stated the scope of this temporary reinstatement hearing is limited to my determination as to whether Mr. Buelke's discrimination complaint is frivolously brought. The Respondent will have a full opportunity to respond, and the parties will be afforded an opportunity to be heard on the merits

~482

of the discrimination complaint filed. The parties will be notified as to the time and place of any hearing requested on the discrimination complaint.

August F. Cetti  
Administrative Law Judge