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SOL (MSHA) V. SANTA FE PACIFIC GOLD
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT W. BUELKE, COMPLAINANT	TEMPORARY REINSTATEMENT Docket No. WEST 92-544-DM WE MD 92-28 Rabbit Creek Mine

v.

SANTA FE PACIFIC GOLD
CORPORATION,
RESPONDENT

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Charles W. Newcomb, Esq., Stephen E. Hosford, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Cetti

I

This temporary reinstatement 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 (not frivolously brought) 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 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. Jim Walter Resources v. Federal Mine Safety and Health Review Commission, 920 F.2d 738 (11th Cir. 1990), see also the Commission's decision Secretary of Labor on behalf of Yale E. Hennessee v. Alamo Cement Company, 8 FMSHRC 1857-1858 (December 8, 1986).

II

Findings and Conclusions

1. Jurisdiction of this action is conferred upon the Federal Mine Safety and Health Review Commission (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 Commission and its Administrative Law Judge has jurisdiction in 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. Mr. Buelke was employed as an electrician at the Rabbit Creek Mine from June 6, 1990, until his discharge on July 1, 1991, and after temporary reinstatement by the Order in Docket No. WEST 92-243-DM was again employed from March 9, 1992 to April 13, 1992, when he was again discharged.

8. Following Mr. Buelke's second discharge by Santa Fe Pacific Gold Corp. on April 13, 1992, Mr. Buelke filed his second complaint with the Secretary of Labor pursuant to Section 105(c) of the Mine Act, 30 U.S.C. 815(c)(2) alleging he was fired in retaliation for his protected activity.

9. After commencing the required investigation of the complaint and determining that it was not brought frivolously, the Secretary filed an application with the Commission for temporary reinstatement of Mr. Buelke.

10. Santa Fe Pacific Gold Corp. filed a request for hearing on the application pursuant to 29 C.F.R. 2700.44(b). The hearing was held on the date agreed by the parties, August 6, 1992 at Reno, Nevada. The parties agreed that irrespective of whether or not the presiding Administrative Law Judge issued a bench order that the close of the hearing would be the date the transcript of the hearing was filed.

11. At the hearing, the Secretary presented the testimony of Robert W. Buelke, the applicant, and David J. Brabank, the MSHA Special Investigator. The Respondent presented the testimony of David Wolfe, Safety Supervisor at the mine, and Debra Thompson, Human Resources Supervisor.

12. The evidence presented, particularly the credible evidence presented by Mr. Buelke and MSHA Special Investigator David Brabank established that there was a viable non-frivolous issue as to whether or not there was illegal discrimination under the provisions of Section 105(c) of the Act.

13. The evidence presented at the hearing of February 27, 1992, in Docket No. WEST 92-243-DM and the August 6, 1992, hearing clearly established that Mr. Buelke's present application for temporary reinstatement was not frivolously brought.

14. Evaluated against the "not frivolously brought" standard, the Secretary has made a sufficient showing of the elements of a complaint under Section 105(c) of the Act to grant the application for an Order of Temporary Reinstatement of Robert W. Buelke.

III

Mr. Buelke while employed as an electrician by Santa Fe Pacific Gold Corp. was discharged on two occasions. After his first discharge on July 1, 1991, he was reinstated pursuant to an Order of Temporary Reinstatement issued by this Administrative Law Judge in Docket No. WEST 92-243-DM which the parties agree is

part of the present record. To avoid unnecessarily prolonging the August 6, 1992 hearing on Mr. Buelke's current Application for Temporary Reinstatement following his second discharge of April 13, 1992, the parties agreed that the evidence presented and the record made in Docket No. WEST 92-243-DM need not be repeated and that the Judge would take judicial or official knowledge of everything in that record.

The Order of Reinstatement after the February 27, 1992 hearing reads 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 of the discrimination complaint filed. The parties will be notified as to the time and place of any hearing requested on the discrimination complaint.

Pursuant to this Order Mr. Buelke returned to work for Respondent on March 9, 1992 and continued to work as an electrician until his second discharge on April 13, 1992. I am satis

fied from the present record which includes both Docket Nos. WEST 92-243-DM and WEST 92-544-DM that the evidence presented on behalf of Mr. Buelke made a strong showing and established for purpose of the present proceeding for temporary reinstatement only that Buelke engaged in protected activity and that a viable non-frivolous issue exists as to whether or not either or both discharges were motivated by Respondent's desire to retaliate against him for his protected activity. There is a viable non-frivolous issue as to whether or not Respondent would have discharged Mr. Buelke for his non-protected conduct or activities alone and whether or not Respondent's proffered reasons for disciplinary action and discharge of Mr. Buelke were pretextual. Some evidence was also presented to support Mr. Buelke's claim of disparate treatment. These are viable non-frivolous issues on which both parties will have a full opportunity to present evidence and be heard on the merits in the issues involved in the two discrimination complaints filed and now pending before the Commission in Docket Nos. WEST 92-545 and WEST 92-243-A-DM. Both of these dockets were assigned to the undersigned Administrative Law Judge on July 23, 1992 for hearing and decision.

III

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 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 filed 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 complaints 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. Falatko
Notary Public

Evidence Presented At The Feb. 27, 1992 Hearing

Mr. Buelke at the February 27, 1992 hearing 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, one to the mine manager, Mr. Surratt and the other to the Safety Supervisor, David Wolfe. 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 contractor 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 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, dated May 13, 1991, addressed to David Wolfe, the Head of the Safety Department, 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 electricial (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 practive. (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 2800 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 have resulted in a miner sustaining 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 in retaliation for his protected activity. 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 protect

ed 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 an excellent work record and had 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 the same day 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 rule. Mr. Brabank testified as to why in his opinion, based on the special investigation, the complaint is non-frivolous. See also Special Investigator Brabank's "Final Report" received as Respondents Exhibit 13 at the February 27, 1992, hearing in Docket No. WEST 92-243-DM.

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.

At the conclusion of the February 27, 1992, hearing after reviewing all the evidence and arguments presented, I ruled from the bench that the Secretary had made a sufficient showing of the elements of a complaint under Section 105(c) of the Act. I granted the application for an Order of Temporary Reinstatement in Docket No. WEST 92-243-DM. I affirm in writing the oral ruling made from the bench.

I stated to the parties that my ruling in this matter was limited to the single issue of whether Mr. Buelke's complaint of discrimination was frivolously brought. I credited the testimony of the two witnesses who testified, Mr. Buelke and Mr. Brabank. I saw 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 and granted the application for an Order of Temporary Reinstatement of Robert W. Buelke.

IV

The August 6, 1992 Hearing

On March 29, 1992, 20 days after his return to work under the first Reinstatement Order, Buelke was assigned to repair an electrical malfunction by Lead Electrician Nathan Allen. Buelke testified that Allen instructed him to perform the task in either of two ways, depending on the results of his trouble shooting. Allen instructed Buelke to correct the problem either at the junction box or at the switch house.

Mr. Buelke testified he changed the wiring at the junction box, in accordance with sound electrical principles and the common practice at the mine. Mr. Brabank, MSHA Special Investigator, testified that Mr. Allen told him that he had also performed the task in the same manner as Buelke in the previous two months, and that there was no policy at the mine contrary to this practice. This was confirmed by the testimony of David Wolfe, the Safety Supervisor.

Mr. Buelke injured his back while performing the repair at the junction box. He reported the injury and was treated by Dr. Bernard McQuillan on March 30, 1992, who was authorized to treat him. Dr. McQuillan diagnosed the condition as an acute dorsal strain. Dr. McQuillan prescribed pain medication and issued a light duty work release for Mr. Buelke. He also referred Mr. Buelke to a specialist, Dr. Herz, and arranged an appointment for April 30, 1992.

Mr. Buelke returned to light duty work on March 30, 1992, and performed light duty work as assigned. Mr. Buelke's assigned work routine at the mine was four days work, followed by four days off work. During his four days off beginning March 31, 1992, Mr. Buelke had an opportunity to drive to Tacoma, Washington with a friend to visit family. When he arrived in Tacoma, Mr. Buelke experienced more severe pain in his back and sought treatment from a chiropractor, Dr. Nyren, to relieve the pain and allow him to return to Nevada.

Dr. Nyren contacted Dr. McQuillan and obtained approval to x-ray Mr. Buelke and provide treatment to relieve the pain. Dr. Nyren also diagnosed Mr. Buelke as having a strain of the thoracic spine, and recommended that Mr. Buelke visit Dr. McQuillan for a re-evaluation upon returning to Winnemucca, Nevada.

Mr. Buelke had been scheduled to work on April 4, 5, 6, and 7, 1992. On these days he was under treatment by Dr. Nyren in Tacoma. On each day he was scheduled to work, Mr. Buelke called in from Tacoma and reported off sick to his supervisors, explaining that he was under the care of Dr. Nyren for severe back pain. Mr. Buelke testified that Santa Fe Pacific Gold Corporation management did not advise Mr. Buelke that he was in violation of company policy or that he needed a work release from Dr. Nyren or a doctor's excuse indicating that he was unable to work for the four shifts he missed because of back pain and needed treatment to relieve the pain so he could return from Tacoma.

Dr. Nyren has indicated that Mr. Buelke needed the treatment he received in Tacoma to relieve his back pain to the point where he was capable of driving back to Winnemucca. In his report to Mr. Brabank dated May 31, 1992, Dr. Nyren states "had Mr. Buelke returned immediately to Winnemucca he would have experienced moderate to severe back pain . . . . "

Mr. Buelke returned to Winnemucca and was re-evaluated by Dr. McQuillan on April 10, 1992. Dr. McQuillan continued the light duty release. Safety Director David Wolfe instructed Mr. Buelke not to come in for his scheduled shift over the weekend, but to come in on Monday, April 13, 1992. When Mr. Buelke came to work on that day, Respondent gave him two disciplinary notices and discharged him.

The first disciplinary notice states that he failed to comply with an assigned duty and failed to recognize a safe working practice in performing the electrical repair on March 29, 1992. The second disciplinary notice states that Mr. Buelke was absent

without leave on April 4, 5, 6, and 7, 1992, because he was off work without a doctor's permission for a back injury and that the doctor's release was for light duty.

The Secretary asserts that the disciplinary notice and discharge is a pretext for illegal discrimination in retaliation of Mr. Buelke's protected activity.

V

Respondent presented evidence tending to rebut or refute portions of the evidence presented on behalf of Mr. Buelke. This evidence tended to give some support to Respondent's claim that it would have discharged Mr. Buelke based upon his unprotected activity alone. Considering the record as a whole, I am not persuaded that Respondent in this proceeding has established it would have discharged Mr. Buelke for his unprotected activity alone.

It has been held that in a temporary reinstatement proceeding, applicant does not have to prove likelihood of ultimate success on the merits of his case; applicant must only make the minimal showing that his discrimination complaint is not frivolous. Sec. of Labor on behalf of Haynes v. DeCondor Coal Co., Docket No. WEVA 89-31-D, 10 FMSHRC 1810 (Dec. 27, 1988). It has also been held that although the record contained some evidence tending to rebut or refute portions of the Secretary's evidence, temporary reinstatement pending a decision on the merits is proper where miner's discrimination complaint was not clearly without merit, fraudulent, or pretextual. (Sec. of Labor on behalf of Joseph A. Smith v. Helen Mining Co., Docket No. PENN 92-15-D, 13 FMSHRC 1808 (Nov. 5, 1991).

In this case the record as a whole establishes that Mr. Buelke's complaint of discrimination was not frivolously brought.

VI

Respondent points to its Employees Handbook disciplinary policy which states:

"Two Disciplinary Notices within any 12 month period regardless of the reason issued, will be cause for discharge."

The Employee Handbook disciplinary policy also states, "It is the intent and purpose of the company to administer company rules in a consistent and reasonable manner and this is accom

plished through the company's disciplinary procedures described below. The seriousness and/or frequency of violations will determine which of the four (4) disciplinary actions that will be taken. These actions include:

1) oral reprimand which may include supervisor's personal contact

2) Disciplinary Notice

3) Disciplinary Notice and suspension from work without pay, and

4) discharge"

"The level of discipline for any violation will depend on all of the circumstances involved including the severity of the misconduct, willfulness, history of discipline, and any mitigating considerations." (emphasis added)

It is well established and has been stated many times that direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp. 709 F2d 86 (D.C. Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence. circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

VII

In Jim Walter Resources supra, the court in footnotes 10 and 11 stated:

10. Because of our prior conclusion that the "not frivolously brought" standard is the functional equivalent to the "reasonable cause to believe" standard implicitly upheld in Roadway Express we find it unnecessary to consider further whether the probable value of a stricter standard of proof in reducing the risk of erroneous deprivations outweighs the additional fiscal or administrative burdens that would be imposed. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct 893,903, 47 L.Ed.2d 18 (1976).

11. Even assuming that the "not frivolously brought" is a less stringent standard [than reasonable cause to believe] we find that it accurately reflects a "societal judgment about how risk of error should be distributed between [mine operators and mine employees]." Santosky, 455 U.S. at 755, 102 S.Ct. at 1395; see also Addington v. Texas, 441 U.S. 418, 423-25, 99 S.Ct. 1804, 1807-09, 60 L.Ed.2d 323 (1979). In placing an antidiscrimination provision in the Act, Congress clearly expressed its intent that individual miners would be an integral part of this nation's attempt to ensure the safety of mining facilities and that they should be protected from unjust discharges in such activities. See Brock ex rel. Parker v. Metric Constructors, Inc., 766 F2d 469, 472 (11th Cir. 1985). In furtherance of this expressed policy, Congress, in enacting the "not frivolous brought" standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employers's right to control the makeup of his workforce under Section 105(c) is only a temporary one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. In light of these considerations, we are unable to accept JWR's contention

that the "reasonable cause to believe" standard is better calibrated than the "not frivolously brought" standard in reflecting society's judgment about how the risk of error should be borne as between miners and operators.

Conclusion

At the conclusion of the hearing in this matter on August 6, 1992, after reviewing all the evidence and arguments presented, I ruled from the bench that the Secretary had made a sufficient showing and found that the discrimination complaint was not frivolously brought. I granted the application for an Order of Temporary Reinstatement. I hereby affirm in writing the substance of the oral ruling made from the bench.

ORDER

My ruling in this matter is limited to the single issue of whether Mr. Buelke's application for temporary reinstatement is frivolously brought. 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.

August F. Cetti
Administrative Law Judge