CCASE:
SOL (MSHA) V. MUTUAL MINING
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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 CLETIS R. WAMSLEY, AND ROBERT A. LEWIS,	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEVA 93-375-D
	:	Docket No. WEVA 93-376-D
Applicant	:	HOPE CD 93-01
	:	HOPE CD 93-05
v.	:	HOPE CD 93-02
	:	
MUTUAL MINING, INC., Respondent	:	Mutual Mine I

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Applicant;

W. Jeffrey Scott, Esq., Grayson, Kentucky, for the Respondent.

Before: Judge Amchan

On December 22, 1992, Cletis R. Wamsley and Robert A. Lewis filed discrimination complaints with the Mine Safety and Health Administration (MSHA) alleging that they were discharged from their employment in retaliation for safety activity in violation of section 105(c) of the Act. On July 6, 1993, MSHA filed an Application for Temporary Reinstatement on behalf of the two employees, which was received by the Commission on July 7. On July 19, Respondent requested a hearing on the MSHA application, which was conducted in Charleston, West Virginia, on August 5, 1993.(Footnote 1)

Pursuant to the procedural rules of the Commission, 29 C.F.R. 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miners' complaints were frivolously brought. The Secretary of Labor has the burden of proving that the complaints were not frivolous. In the instant case it is clear that the Applicant has established a prima facie case of discrimination. I also find that despite some evidence

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1 Commission rules specify that a hearing on a temporary reinstatement application should be held within ten days of the request for a hearing. However, due to scheduling conflicts, August 5 was the first day on which it was feasible to conduct

the hearing in this matter.

rebutting the prima facie case, the record as a whole establishes that the complaints were not frivolous.

On Thursday, December 17, 1992, the United Mine Workers safety committeemen, Cletis Wamsley and John Taylor, conducted an inspection, or "safety run" of Respondent's surface mine in Holden, Logan County, West Virginia (Tr.14-15). At the end of their inspection Mr. Wamsley and Mr. Taylor presented a list of safety defects to Respondent (Tr. 15). The next day, Friday, December 18, 1992, the committee submitted the same list to the Mine Safety and Health Administration and requested an inspection of their employer's facility, pursuant to section 103(g) of the Act (Tr. 15, Exh. G-1).

On Monday morning, December 21, 1993, MSHA began its inspection of Mutual Mining's worksite (Tr. 18, Exh. G-3). That afternoon twelve of Respondent's twenty-four employees were laid off (Tr. 20). Among those laid-off were all three members of the Union Safety Committee, Cletis Wamsley, Robert Lewis, and John Taylor(Footnote 2) (Exh. G-2).

The Applicant has established a prima facie case of discrimination with regard to the discharge of Mr. Wamsley and Mr. Lewis. There is no question that complainants engaged in protected activity. Both men were members of the Union safety committee. Mr. Lewis informed his foreman on December 16, that he was going to participate in the Union safety inspection on December 17 (Tr. 66). Although he did not participate in the physical inspection due to illness, he did assist in planning for the inspection and was obviously identified with the inspection by Respondent (Tr. 61-66). Moreover, as a member of the committee, he participated in the decision to present the union request for a section 103(g) inspection to MSHA (Tr. 63). Mr. Wamsley participated in the union inspection as well as the request for inspection to MSHA (Tr. 14-15). He, as well as a management representative, also accompanied the government inspector during the course of the MSHA inspection on December 21, 1992 (Tr. 18-19, 95-97).(Footnote 3)

Respondent was aware of the safety activity. When MSHA began its inspection on December 21, it provided company officials with the list of alleged safety defects prepared by the Union. Allan Roe, the job superintendent for Respondent commented that the list was the same one presented to him by the

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Mr. Taylor has been reinstated by Respondent (Tr. 37-38).

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The management representative, Foreman Wayne Thornbury, maintained radio contact with Superintendent Allan Roe, advising him constantly as to which pieces of equipment MSHA regarded as violative of the Act and its regulations (Tr. 99).

Union safety committee a few days earlier (Tr. 25). It was, therefore, obvious to Respondent that Wamsley and Lewis were participants in asking for MSHA inspection.

Mr. Lewis and Mr. Wamsley suffered an adverse action. They were both discharged on the day of the MSHA inspection, hours after the company became aware of the section 103(g) complaint (Tr. 20). The timing of the discharges creates an inference that the lay-offs were related to their protected activities.

The miners' prima facie case is weak with regard to evidence of anti-safety animus, often a factor in finding a retaliatory discharge. Mr. Roe, Respondent's job superintendent, allegedly told Mr. Lewis and Mr. Wamsley that he regarded union safety complaints as "suggestions" (Tr. 17). A foreman, Wayne Thornbury, apparently once warned that Union safety complaints would result in all of Respondent's employees losing their jobs (Tr. 58). I find neither remark to be an indication of animus that would indicate a desire to retaliate against the complainants. On the other hand, Respondent, which was having a degree of financial problems at the time of the inspection, clearly was less than happy to experience the section 103(g) inspection by MSHA. I draw an inference of animus from the timing of the discharge--despite the fact that Respondent had experienced section 103(g) inspections in the past and had not retaliated against any of its employees in those instances. The fact that an employer has not retaliated in the past for protected safety activity does not preclude the possibility of retaliation in the present--particularly given the financial situation of the Respondent at the time of the instant inspection.

There is considerable evidence which supports Respondent's contention that the December 21, 1992 discharge of Mr. Wamsley and Mr. Lewis was not motivated by a desire to retaliate for their initiation of the MSHA inspection. The company has established that it anticipated reduced demand for its coal from Island Creek Coal Company for whom it is a contract miner (Tr. 128, 171-173, 193).(Footnote 4) Respondent had also learned on November 30, 1992, that a $486,250 judgment in favor of the United Mine Workers' Pension Fund had been rendered against it (Tr. 183-187, Exh. R-1). That month Mutual Mining also received a $240,000 judgment against it in favor of Eastern Kentucky Explosives Company (Tr. 187-188). However, possibly the most persuasive

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4Respondent, however, has not established that its expectations for a reduction in coal purchased by Island Creek was realized. The record indicates that Respondent is producing and selling the same amount of coal since the lay-offs as it did before the lay-offs (Tr. 213). Under the terms of its contract with Island Creek, which has since been purchased by Consolidation Coal Company, Respondent could sell coal to other customers only with permission from Island Creek (Tr. 173).

evidence supporting the company's position is the fact that when Wamsley and Lewis were laid-off, ten other employees were also laid-off, nine of whom apparently did not engage in safety activity (Exh. G-2).(Footnote 5)

If one considers only the facts known to Mr. Wamsley and Mr. Lewis when they filed their discrimination complaints, the complaints are obviously "not frivolous". The two miners had no reason to believe that any lay-offs were being planned (Tr. 24,67) and knew only that as soon as the MSHA inspectors finished their walkaround inspection on December 21, that they were discharged. For Wamsley and Lewis to conclude that there was a relationship between the discharges and their safety activity was reasonable.

If one considers in addition the evidence adduced at hearing and asks whether the Secretary has a reasonable basis for proceeding further with the complaints filed by Wamsley and Lewis, the issue is a closer one. As Respondent contends, it is not that easy to conclude that a company would discharge half its workforce, including nine employees who did not engage in protected activity to get rid of Wamsley and Lewis. Nevertheless, the Respondent's evidence does not exclude such a possibility.

"Red" Hatton, Respondent's manager, testified that the decision to lay-off employees at Mutual's Holden worksite was made the day of the inspection (Tr. 202-203). Thus, this is not a case in which the employer has convincingly shown that the lay-offs were planned far in advance of the protected activity and couldn't possibly be related to that activity. Similarly, Superintendent Allan Roe testified that on December 21, 1992, he

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5Respondent has also raised two other reasons for the lay-off which the undersigned finds totally unpersuasive. First is the fact that part of Mutual Mining's activities at the worksite, designated as "Job #2" had almost been completed. Respondent's manager, Astor "Red" Hatton conceded that this had very little, if anything to do with the December 21, 1992 lay-off (Tr. 209). Superintendent Roe also mentioned the possibility of a strike occurring at the expiration of the wage agreement between the United Mine Workers and the Bituminous Coal Operators in February, 1993. Respondent has provided no persuasive rationale as to why it would be economically advantageous for it to lay-off employees in anticipation of a strike. Indeed, it would seem that it would be more advantageous to mine the maximum amount of coal before the strike took place, in anticipation of shortages that might occur during the strike.

made some changes to original list of employees to be laid off (Tr. 149-150).(Footnote 6) What stands out in Mr. Roe's testimony is that while the original list went just far enough to capture Mr. Lewis and Mr. Wamsley in the lay-offs, he added the names of five employees with greater seniority because he was advised by Respondent's labor consultant that the original list "wouldn't work" (Tr. 136-137). Since these five employees were subsequently recalled (Tr. 150-151), there is a possibility that the change was made so that the dismissal of Mr. Lewis and Mr. Wamsley would not stand out in light of their protected activity.

Moreover, the fact that Respondent may have had legitimate motives for laying off some employees, does not rule out the possibility that it laid off Mr. Lewis and Mr. Wamsley for retaliatory reasons, or a combination of legitimate and illegitimate reasons. The undersigned believes that the Secretary should be allowed to probe further into Respondent's motivation, if he proceeds further with the discrimination complaints. Given the fact that Lewis and Wamsley are the two most senior employees who were not recalled, it is conceivable that the lay-off and recall was structured to capture these two employees and that, but for their safety activity, only those employees hired in 1991 would have been discharged for economic reasons (See exhibit G-2). Indeed, Mr. Wamsley testified that this is precisely what he believes occurred. (Tr. 28-29).

Another factor that casts some doubt on Respondent's position is the fact that its employees have continued to work ten hour days, Saturdays and through vacations since the lay-offs (Tr. 47-52, 195). The undersigned believes that the Secretary should be allowed further opportunity to probe the legitimacy of the lay-off of Mr. Wamsley and Mr. Lewis in light of the overtime being worked by those employees who were retained.

In conclusion, I find that the Applicant has established a prima facie case of a retaliatory discharge in violation of section 105(c) of the Act. In a hearing on the merits of this discrimination case, the burden of proof would thus shift to Respondent to rebut that prima facie case or affirmatively establish that Mr. Wamsley and Mr. Lewis would have been laid off even if they had not engaged in protected activity. Secretary on behalf of Robinette v. United Castle Coal Co. 3 FMSHRC 803 (April 1981). Although Respondent has introduced some evidence tending to rebut the prima facie case, it has not

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The testimony of Mr. Roe is not totally consistent with that of Mr. Hatton with regard to the planning of the lay-offs. Whereas Roe indicated that lay-offs had been contemplated by Respondent for several months prior to December 21, Hatton testified that no decision to lay-off any employee was made until the morning of December 21, 1992 (Tr. 122-3, 203)

done so in a manner so convincing as to persuade the undersigned that it would necessarily prevail on the merits in a hearing on the discrimination complaint. Thus, its evidence in this proceeding falls far short of persuading me that the Secretary's case is a frivolous one.

ORDER

Respondent is hereby ordered to reinstate Cletis Wamsley and Robert Lewis to the positions from which they were discharged on December 21, 1992, or to an equivalent position, at the same rate of pay and with equivalent duties.

Arthur J. Amchan
Administrative Law Judge
703-756-4572

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