CCASE:
SOL (MSHA) V. ALL AMERICAN ASPHALT
DDATE:
19940103
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

January 3, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO, GREGORY DENNIS, Complainants v. ALL AMERICAN ASPHALT, Respondent	: : : : : : : : : : : : :	TEMPORARY REINSTATEMENT PROCEEDING Docket Nos. WEST 93-194-DM WEST 93-195-DM WEST 93-196-DM WEST 93-197-DM All American Aggregates

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
Naomi Young, Esq., Los Angeles, California, for Respondents.

Before: Judge Cetti

These consolidated temporary reinstatement proceedings arise 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 Min 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 or engaged in other protected activity. If a miner believes that he has been laid off or otherwise discriminated against by any adverse action 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." he 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 Procedural Rule 45(c) provide an opportunity for a hearing upon request of a mine operator, prior to the entry of a reinstatement order. 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).

I

Procedural History

In January 1993 the Secretary of Labor (Secretary) filed an application for an order temporarily reinstating the Complainants James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis to the positions they had, heavy equipment operators, with Respondent All American Asphalt.

The Secretary's application for the reinstatement order stated the Complainants had been discharged in retaliation for engaging in protected safety activity and that the facts and circumstances of the case support a finding that the complaints of discrimination are non-frivolous under Section 105(c) of the Act.

The Secretary attached to his application the affidavit of James E. Belcher, the Chief of the Division of Technical Compliance and Investigation, Metal and Nonmetal Safety and Health. The affidavit states in part that investigation discloses the following facts:

a. At all relevant times, Respondent All American Asphalt engaged in the production of aggregate, and is therefore an operator within the meaning of Section 3(d) of the Mine Act;

b. At all relevant times, Applicants James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis were employed by Respondent as miners within the meaning and scope of Section 3(g) of the Mine Act;

c. All American Aggregates Mine, located near Corona, Riverside County, California, 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 or after July 7, 1992, when Applicants Hyles, Mears, Soto and Dennis were effectively discharged by Respondent's Vice-President Michael Ryan;

e. Applicant James Hyles engaged in protected activity by filing a hazardous condition complaint with MSHA in April 1991 which resulted in 29 citations and orders and closure of the plant and by giving a statement to the MSHA special investigator in the subsequent Section 110(c) investigation in May 1991;

f. Applicants Douglas Mears, Derrick Soto and Gregory Dennis engaged in protected activity by giving statements to the special investigator in the Section 110(c) investigation in May 1991;

g. All four Applicants worked during the weekend in April 1991 when the hazard complaint was filed;

h. Respondents Ryan and Sisemore had knowledge of the Applicants' protected safety activity;

i. Respondents made statements to Applicants and other employees indicating that the person who filed the hazard complaint would be fired or forced to quit, demonstrating open hostility toward Applicants' protected safety activity;

j. Applicant Soto was threatened with lay-off shortly after the Section 110(c) special investigation was completed in May 1991;

k. In October 1991, Applicant Hyles was demoted from leadman on the second shift to loader operator on the first shift and his working conditions deteriorated;

l. Respondents' articulated basis for the demotion is pretextual;

m. On July 7, 1992, Applicants Hyles, Mears, Soto and Dennis were laid off along with 12 other miners, allegedly due to a drop in production;

n. By August 31, 1992, every other laid-off miner was recalled for work except Applicants Hyles, Mears, Soto and Dennis;

o. Other less senior miners were recalled to perform jobs which Applicants were entitled to pursuant to the union contract;

p. Applicants were subject to disparate treatment with respect to the operator's lay-off/recall policy;

q. On July 24, 1992, Respondents received MSHA's Notice of Proposed civil penalties for the 29 orders and citations issued as a result of the hazard complaint against All American Asphalt ($45,000.00) and against Respondent Ryan as a corporate agent ($9,500.00);

r. Respondents' articulated basis for laying-off and refusing to recall Applicants is pretextual.

In view of the foregoing facts, I have determined that Applicants Hyles, Mears, Soto, and Dennis were effectively discharged in retaliation for engaging in protected safety activity and the complaints filed by them are not frivolous.

/s/
James E. Belcher

On January 19, 1993, All American Asphalt filed a timely request for a hearing on the application for temporary reinstatement of the complainants. A hearing on the application was set by agreement of the parties on February 10, 1993, in Riverside, California. At the joint request of the parties this hearing was canceled on February 9, 1993. The parties stated that they had agreed on a voluntary reinstatement of the Complainants at the same wage and to the same or similar positions Complainants held at the time of their July 1992 layoff. It was also agreed that there would be compliance with the collective bargain agreement (Operating Engineers Local 12) with respect to any possible future layoff. The cases were not dismissed pending the filing of a written settlement with specific terms that both parties were willing to sign off on, particularly with respect to seniority.

On March 29, 1993, the Secretary filed a motion to Renew the Application for Temporary Reinstatement. The motion states in part the following:

Respondent has not complied in good faith with the terms of the settlement agreement, effectively voiding the agreement and necessitating a Temporary Reinstatement hearing and Order of Reinstatement by the Commission in order to enforce the Applicants' right to temporary reinstatement under the Mine Act.

From the date of voluntary temporary reinstatement, Respondent refused to assign Applicant Douglas Mears to his former position as a plant operator, assigning him to shovel manually instead of operating crushing equipment.

On March 24, 1993, Respondent laid-off all four Applicants under circumstances demonstrating that Respondent deliberately planned the layoff and manipulated the collective bargaining agreement in order to achieve the layoff of the four Applicants. By its actions, Respondent continues to deny the four Applicants the bona fide temporary reinstatement to which they are entitled.

On April 9, 1993, Respondent filed a timely request for a hearing on the Secretary's motion to renew application for tempo-

rary reinstatement. The matter was therefor set for hearing on the date agreed by the parties April 29 and 30, 1993, in Riverside, California.

This hearing was canceled when on April 23, 1993, the Secretary filed a motion to stay the application for temporary reinstatement, stating that on "April 22, 1993 counsel for All American notified counsel for the Secretary that All American plans to recall the four applicants to return to work on Monday, April 26, 1993."

On April 27, 1993, the Secretary filed a revised Motion to Stay Temporary Reinstatement Proceedings with a cover letter stating "the parties agree that the hearing scheduled for April 29 and 30, 1993, will not be necessary and requesting that the temporary reinstatement proceeding be stayed. Respondents opposed the motion to stay on the grounds that their proposed voluntary reinstatement should be approved.

Pursuant to the request of the parties the April 29-30 hearing was canceled and the parties were ordered to jointly file a written Temporary Reinstatement Agreement.

The parties discussed such an agreement but were never able to reach agreement on some of the necessary terms. In any event a joint written reinstatement settlement agreement was never filed. Reinstatement was apparently continued on a voluntary basis but not without controversy.

On October 5, 1993, the Secretary filed a motion entitled "Secretary of Labor's Motion for Order Requiring Bona Fide Temporary Reinstatement."

In the motion the Secretary alleges in part that Respondents have refused to employ the Complainants on a regular, full-time basis, have limited the regular hours worked and by refusing to recognize the original seniority dates of the four complainants as agreed by the parties.

On receipt of the Secretary's October 5, 1993, motion these reinstatement proceedings were set for hearing along with the hearing on the discrimination complaints WEST 93-336-DM through WEST 93-339-DM and WEST 93-436-DM through WEST 93-439-DM which were set by agreement of the parties on November 16 through November 19, 1993, and when time ran out on Friday November 19th the proceeding was continued for further hearing on December 13 through December 17, 1993.

II

At the conclusion of the hearing on December 17, 1993, the presiding undersigned Judge from the bench made an oral decision finding that the discrimination complaints were not frivolously brought and issuing an Order of Temporary Reinstatement. I ordered Respondent to immediately reinstate Complainants to the same position from which they were laid off at the same rate of pay and with the same or equivalent duties assigned to them prior to their layoff.

I hereby affirm in writing my bench decision and Order.

III

At the hearing on the Application for an Order of Temporary Reinstatement evidence was presented that the Complainants were employed by All American Asphalt primarily as heavy equipment operators, members of the Operating Engineers Union Local 12. In April 1991 All American Asphalt was in process of having work completed on the construction of its new finishing plant, a new addition to its rock crushing operation. The new finishing plant was run during the start-up weekend April 19-21, 1991, before many of the basic safety items were installed. Complainant James Hyles was employed as leadman at the time. Evidence was presented that he complained to Respondent's vice president and plant supervisor that the plant was not safe to run in its unfinished condition due to the fact that guarding on moving equipment, handrails, stop cords and catwalks were not completed. Each of the Complainants also complained to their leadman about running the plant in its unsafe condition.

The leadman, Complainant Hyles, videotaped the unsafe conditions during the start-up weekend and reported the unsafe conditions to the MSHA San Bernardino field office on Monday morning, April 22, 1991. The other Complainants encouraged him to do this. That same day MSHA responded by conducting a hazard complaint investigation which resulted in a closure order and the issuance of approximately 29 unwarrantable failure citations and orders for lack of guarding, handrails, and other safety equipment. MSHA subsequently conducted a Section 110(c) investigation of Vice-President Michael Ryan for authorizing the activity that resulted in the unwarrantable violations cited during the hazard complaint investigation.

In June 1991 each of the four Complainants were interviewed and gave a statement to MSHA Special Investigator Ronald Mesa during the Section 110(c) investigation.

The interviews were conducted in Mr. Mesa's vehicle which was parked in front of the main office at the plant.

Evidence was presented that after the hazard complaint investigation which resulted in closure of the mine, Complainants experienced adverse changes in working conditions. Complainant Soto was threatened with layoff and Complainant Hyles was demoted from his leadman position.

Evidence was also presented that in July 1992 All American Asphalt laid-off the four Complainants along with most of the work force. Complainants were initially told that the layoff would be for approximately one week while the crusher was moved and that only a few employees were needed to move the equipment. When the Complainants called in to inquire when they could return to work, Respondent informed them that no work was available because of a slowdown in production. Respondent had in fact recalled almost the entire work force and worked some employees overtime during July and August 1992 when the Complainants were told no work was available. Complainants assert that the only employees not recalled were the four Complainants and loader operator Martin Hodgeman.

Complainants presented evidence that in late August 1992, two of the Complainants went to the mine and observed that less-senior employees were working at the mine and that employees were working overtime, contrary to repeated statements of Respondent that no work was available.

In July 1992, MSHA issued the Notices of Proposed Civil Penalties totaling $45,000.00 against All American Asphalt for the violations cited during the hazard complaint investigation.

On March 3, 1993, Respondent implemented a third shift for production, assigning four senior plant repairmen to perform production jobs during the third shift. Respondent presented evidence that the third shift was implemented on a temporary basis in order to run wet material through the plant.

After assigning the plant repairmen to perform the production jobs for three weeks, on March 24, 1993, Respondent announced a layoff which resulted in only the four Complainants being laid off.

With respect to the March 1993 layoff, it is the Secretary's position that Respondent deliberately manipulated the assignment of employees to different shifts and working hours in order to terminate the four Complainants. The Complainants had returned to work pursuant to a voluntary temporary reinstatement agreement on February 11, 1993. Respondent changed the production shift to the day shift and changed the maintenance shift to the second shift. The four Complainants were assigned to production jobs on the day shift.

The Secretary asserts that rather than simply discontinuing the temporary third shift and reassigning the four senior plant repairmen to their regular positions on the maintenance shift, Respondent required all of the third shift employees participate in a formal layoff and bid on jobs held by less senior employees. Each of the four Complainants was "bumped" (replaced) by a senior plant repairman, even though plant repair positions were available on the seniority list.

It is the Secretary's position that the facts support a strong inference that Respondents coerced the senior plant repairmen into bidding on the four Complainant's production jobs, in order to ensure the Complainants would be laid off.

The record contains a great deal more relevant evidence. There were eight days of testimony of 20 witnesses and over 100 exhibits. There is more than 2,000 pages of testimony which as yet has not been transcribed. There is a considerable amount of the evidence that tends to rebut or refute portions of the Secretary's evidence. I have not attempted to recite or discuss all the relevant evidence. The only issue to be decided in this reinstatement proceeding is whether the complaints of discrimination are frivolously brought. My ruling in this matter is limited to that single issue, keeping in mind that the Secretary has the burden of proof on that issue. I make no attempt to weigh the evidence or make any findings on the ultimate issues. Upon the basis of the record as a whole I find that the complaints of each of the four miners, James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis, is not frivolous and is not frivolously brought.

ORDER

Respondent, All American Asphalt, is hereby ORDERED to reinstate James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis to the positions from which they were discharged or laid off or to an equivalent position, at the same rate of pay and with equivalent duties.

August F. Cetti
Administrative Law Judge

Distribution:

Gretchen M. Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Facsimile)

J. Mark Ogden, Esq. Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Facsimile)

Naomi Young, Esq., GARTNER & YOUNG, P.C., 1925 Century Park East #2050, Los Angeles, CA 90067-2709 (Facsimile)

Eve Chesbro, Esq., Ontario Airport Center, 337 North Vineyard Avenue #400, Ontario, CA 91764-4453

Mr. James Hyles, 15986 Nancotta Road, Apple Valley, CA 92307

Mr. Douglas Mears, 18212 Brightman Avenue, Lake Elsinore, CA 92503

Mr. Derrick Soto, 15394 Dakota Road, Apple Valley, CA 92307

Mr. Gregory Dennis, 1128 Amarillo Street, Alta Coma, CA 91701

sh