

CCASE:
JOHN STACK V. ECHO BAY MINERALS
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JOHN J. STACK, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 94-4-DM
: WE MD 93-12
ECHO BAY MINERALS, :
Respondent : McCoy Cove
:

DECISION

Appearances: Mr. John J. Stack, Ms. Terri Lynn Stack,
Winchester, Idaho, pro se;
Stephen M. Long, John F. Van De Beuken, Echo Bay
Minerals Company, Battle Mountain, Nevada for
Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by John J. Stack against Echo Bay Minerals Company under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). For the reasons set forth below, I find that while Mr. Stack may have engaged in activities protected under the Act, the evidence does not support his claim that he was discriminated against by Echo Bay as a result of having engaged in such activities.

Mr. Stack filed a discrimination complaint with the Secretary of Labor pursuant to Section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2). The Secretary concluded that the facts disclosed during its investigation did not constitute a violation of Section 105(c). Mr. Stack then instituted this proceeding before the Commission pursuant to Section 105(c)(3), 30 U.S.C. 815(c)(3)

The case was heard on December 16, 1993, in Winnemucca, Nevada. Ricky Cordova, Lawrence Spring, Nick Chavez and Dan Howard, all employees of Echo Bay, testified on behalf of Mr. Stack, as did the complainant himself. Manuel Barella, John Van De Beuken, Antonio J. Lanzzone, Stephen M. Long and William B. Francom testified on behalf of the company.

FINDINGS OF FACT

Mr. Stack began working for Echo Bay as an underground miner on August 8, 1988. On January 7, 1991, he was promoted to "Miner B." On January 6, 1992, he was demoted retroactively to December 30, 1991, to the job of "Pumpman/Nipper." On April 26, 1993, he was transferred from the Underground Department to Surface Maintenance as a "Mechanic Helper." On April 27, 1993, Mr. Stack submitted his resignation, effective May 7, 1993. His last day of work was May 7.

Echo Bay operates two underground projects in the same area, the Cove mine and the McCoy mine. Both projects are mined with the same people. Depending on the work going on, miners are moved back and forth from one mine to the other. Thus, at times a crew may be in one mine or the other, or split between the two (Tr. 163).

According to Mr. Stack, he did not have any problems at Echo Bay until 1991, when he complained to his supervisors that crews were "drilling and loading at the same time" (Tr. 42-3). After that, he testified that he was sent from Cove to McCoy to "muck," that is, to remove broken rock and ore from the mine and that his foreman, Manny Barella, began "harassing" him by calling him "dirty names" and "threatening to terminate" his employment (Tr. 43-5). The Complainant averred that he took the position as Pumpman/Nipper because it "was the only way I could get out of being harassed practically every day" (Tr. 45).

Mr. Stack testified that when Echo Bay began its reduction in force in 1993, he was offered a utility job on the surface. He considered that he was being "railroaded" out of the underground, so he refused the utility job (Tr. 46-7). Some time later, after thinking it over, he informed management that he would take the utility job, however, he was informed that the job was no longer available (Tr. 47).

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1 That is, drilling holes for charges at the same time previously drilled holes in the same heading were being loaded with charges. The proper method would be to drill all of the holes in the heading, then move the drill to another heading and then load the rounds (Resp. Ex. M, p.2).

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Mr. Stack stated that he was then told that he would be working in the surface shop, but while he was filling out the paperwork for that position, he decided that he could not do it (Tr. 48). He then submitted his resignation (Tr. 48-51).

According to Echo Bay, Mr. Stack was not harassed for complaining about loading and drilling at the same time (Tr. 95, 97, 103). He was not transferred to McCoy for engaging in protected activities (Tr. 96, 166-67). He voluntarily transferred to Pumpman/Nipper because he thought it was a less hazardous job (Tr. 97, 160, 186). Finally, he was not treated any differently than the rest of the miners in being reassigned due to the reduction in force, and after refusing to accept two reassignments, voluntarily resigned (Tr. 181-82).

To sum up, it is Mr. Stack's contention that as a result of his complaining about loading and drilling at the same time he was discriminated against by Echo Bay in that he was harassed into taking a lower paying job as Pumpman/Nipper and then subsequently forced into resigning. On the other hand, Echo Bay asserts that Mr. Stack suffered no discrimination from the company for making safety complaints, that he voluntarily transferred to the position of Pumpman/Nipper as a less hazardous position and that he resigned on his own after they made several attempts to reassign him.

FURTHER FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) 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 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F2d. 1211 (2d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC

2508 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Id. at 2800; Robinette, 3 FMSHRC at 917-18.

It is undisputed that the Complainant engaged in protected activity by complaining about possible loading and drilling at the same time and I so find. However, the evidence does not support Mr. Stack's claim that the adverse actions which he complains about were motivated in any part by Echo Bay as a result of his engaging in protected activity.

There is no doubt that the Complainant and Manny Barella had a personality conflict (Tr. 45, 93-4). Nevertheless, there is no evidence that their animosity toward one another was anything other than that, i. e. a personality conflict rather than an effort by Echo Bay to harass against Mr. Stack because of his complaints. For instance, Mr. Stack received five negative actions, four daily reviews and one six month performance evaluation, from Barella (Resp. Exs. E and L). Three of those negative daily reviews were given before the safety complaints in question had been made. Nor are the negative evaluations limited to Manny Barella, the complainant received three negative reviews for poor work performance and one warning before he began on a Barella's crew, a time when even Mr. Stack does not claim that he was being discriminated against (Resp. Exs. A and L).

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2 Respondent's Exhibit L consists of most of the papers from Mr. Stack's personnel file at Echo Bay. The top three sheets of the exhibit are a chronological listing of the documents in his file. Some of the documents in the file were offered and admitted as separate exhibits. In those instances, I have noted on the listing what exhibit those documents are.

The record also does not support Mr. Stack's claim that he was transferred to the other mine as a form of harassment. In the first place, it is clear that all miners worked back in forth between the mines (Tr.96-7, 163). In the second place, it is obvious that Mr. Stack was frequently used to perform mucking because he was very good at it (Tr. 97, 167). Even he admitted as much:

Q. Oh. Did you believe that's why you were transferred?

A. Well, I don't really know. I know that they needed to get the muck out, but it didn't -- there was times that I wasn't comfortable being over there all by myself. (Tr. 44).

Q. Okay. In your opinion, would your ability to run equipment effectively, very productively, been a reason why you were assigned to work at McCoy when we were mining stope ore out of the stopes there?

A. Probably, yes. (Tr.70).

Mr. Stack also claimed that Manny Barella gave orders in Spanish. Mr. Barella denied that he gave instructions to Stack in Spanish, but admitted he sometimes did give orders in Spanish to Hispanic employees (Tr. 92-3). I have no doubt that Mr. Barella frequently spoke in Spanish with his fellow Hispanics or that this may have irritated some of the non-Hispanics (Tr. 93, 188). I do doubt that Mr. Barella gave direct orders to the complainant only in Spanish, since, as the foreman testified, he generally only gave orders to the lead miners, and because Mr. Stack does not claim that there were times when he did not know what jobs to perform as a result of his orders being given only in Spanish.

Therefore, I conclude that any problems that Mr. Stack had with Mr. Barella resulted from their inability to get along. If Mr. Barella did, in fact, harass Mr. Stack, and there is little in the way of specifics to support this allegation, it was because of this animosity and not because Mr. Stack had complained about safety violations.

The evidence also supports Echo Bay's assertion that Mr. Stack's transfer to Pumpman/Nipper was the result of his actions, not theirs. The best evidence on this issue is the December 26, 1991, request for transfer signed by Mr. Stack. It states that "I voluntarily request to be transferred." It also indicates that the new position has a lower rate of pay. Finally, it states as the reason for the request, "development of skills for an employment alternative which has less risk than underground miner" (Resp. Ex. C). This evidence is consistent with the frequently reported statements by Mr. Stack that Echo Bay did not pay enough money to warrant the hazards to which miners were exposed (Tr. 165).

Lastly, I conclude that Mr. Stack was not forced to resign from Echo Bay. It is uncontested that Echo Bay was, and is, undergoing a reduction in force because the ore reserves were running out in the underground mines (Tr. 63, 178). They had a rational basis for determining what miners would remain underground and they did not treat the Complainant any different from other miners (Tr. 180-82). He was offered a job on the surface and turned it down. It was not unreasonable on Echo Bay's part to have already given the job to someone else when Mr. Stack informed them three weeks later that he had reconsidered and would take the position.

Even then, Echo Bay did not terminate the Complainant but attempted to place him again. It was only after he turned down that job and stated that he wanted to resign that his resignation was accepted. Since this was a voluntary resignation on Mr. Stack's part (Comp. Ex. 1, Resp. Ex. F) it can hardly be considered an adverse action on Echo Bay's part. There is no evidence to support the claim that Mr. Stack was forced to resign. On the contrary, it appears that Echo Bay went out of its way to retain him.

In reaching these conclusions, it is not necessary to decide that Mr. Stack is not credible. Most of the matters that he testified to are corroborated by the company's evidence. It is in the inferences that he draws from the evidence that Mr. Stack is mistaken. To successfully show discrimination under the Act, there must be a connection between the protected activity and the

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