CCASE:
SOL (MSHA) V. MUTUAL MINING
DDATE:
19940624
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, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF	:	DISCRIMINATION PROCEEDINGS
CLETIS R. WAMSLEY,	:	Docket No. WEVA 93-394-D
ROBERT A. LEWIS,	:	Hope CD 93-01, 93-05
JOHN B. TAYLOR,	:	
CLARK D. WILLIAMSON, and	:	Docket No. WEVA 93-395-D
SAMUEL COYLE,	:	Hope CD 93-02
Complainants	:	
v.	:	Docket No. WEVA 93-396-D
	:	Hope CD 93-04
MUTUAL MINING, INC.,	:	
Respondent	:	Docket No. WEVA 93-397-D
	:	Hope CD 93-07
	:	
	:	Docket No. WEVA 93-398-D
	:	Hope CD 93-11
	:	
	:	Mutual Mine I

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Complainants;
W. Jeffrey Scott, Esq., Grayson, Kentucky for the Respondent.

Before: Judge Amchan

Overview of the Case

This case arises under section 105(c) of the Federal Mine Safety and Health Act. Complainants allege that they were laid-off by Respondent on the afternoon of December 21, 1992, in retaliation for a "safety run" conducted by the United Mine Workers safety committee on December 17, and for initiation by the safety committee of an MSHA inspection that began the morning of the lay-off. For the reasons set forth below, I find that complainants have made a prima facie case of retaliatory discharge which has not been adequately rebutted by Respondent. I, therefore, conclude that the lay-off of complainants on December 21, 1992, violated the Act.

Factual Background

On Thursday, December 17, 1992, United Mine Workers (UMWA) local safety committeemen Cletis Wamsley and John Taylor, and a safety representative of the international union conducted an inspection, or "safety run," of Respondent's surface mine in Holden, Logan County, West Virginia (Tr. I: 14, IV: 17). (Footnote 1) At the end of their inspection Mr. Wamsley and Mr. Taylor presented a list of safety defects to Joe Potter, Respondent's mine clerk (Tr. IV: 9-10). (Footnote 2) Mr. Potter copied the list and gave it to Mine Superintendent Allan Roe (Tr. IV: 9-11). The next day, Friday, December 18, 1992, the union safety committee, which included Complainants Wamsley, Taylor, and Robert Lewis, submitted the same list to the Mine Safety and Health Administration through UMWA field representative Bill Hall. The committee requested an inspection of their employer's facility, pursuant to section 103(g) of the Act (Tr. I: 15-16, III: 65, Exh. G-1).

On Monday morning, December 21, 1992, between 8:00 a.m. and 9:00 a.m., MSHA began its inspection of Mutual Mining's worksite (Tr. I: 59, V: 73). (Footnote 3) The MSHA inspectors met with Mr. Potter and Mr. Roe at the beginning of the inspection and gave them a copy of the section 103(g) complaint filed with MSHA. Either Mr. Potter, Mr. Roe, or both, commented that the list attached to the section 103(g) complaint was identical to that presented by the union safety committee (Tr. I: 18, III: 189). In any event, both Mr. Potter and Mr. Roe were aware that the lists were identical (Tr. IV: 11). There is no question that Potter and Roe realized that the inspection was initiated by the union safety committee (Tr. I: 140-41, V: 73).

Mr. Roe, the mine superintendent, reports to Astor "Red" Hatton, Respondent's mine manager. While Mr. Roe is the senior Mutual Mining official who is on site on a daily basis, Mr. Hatton, who otherwise works in Sandy Hook, Kentucky, comes to the Holden, West Virginia worksite two to three times a week (Tr. I: 227). On December 21, 1992, Mr. Roe was not expecting Mr. Hatton at the mine (Tr. V: 73). Hatton arrived at the site

_____

1The record in the temporary reinstatement proceeding involving Mr. Wamsley and Mr. Lewis, Dockets WEVA 93-375-D and WEVA 93-376-D, has been incorporated into the record of this case. There are five paginated volumes of transcript, 8/5/93, 2/1/94, 2/2/94, 2/3/94 a.m., and 2/3/94 p.m. In this decision the transcript volumes will be referred to as volumes I through V, starting with the transcript of August 5, 1993, although they are not numbered that way on their face.

_____

2Joe Potter should not be confused with Johnny Porter, Respondent's president.

_____

3The inspection of Respondent's equipment began no later than 9:05 a.m. (Exh. G-3, Citation No. 4000561, Tr. I: 84).

around 11:00 a.m. (Tr. V: 71-73). It is unclear whether Hatton learned of the MSHA inspection when he arrived at the site or before that (Tr. I: 193, V: 171).

Mr. Hatton and Mr. Roe had some discussions about Mutual Mining's workforce and then about noon drove to the office of Ron May, the human resources director of Island Creek Coal Corporation (Tr. I: 174-81, IV: 64, V: 71-78). Respondent mined the Holden site pursuant to a contract with Island Creek. Its employee relations were governed by Island Creek's collective bargaining agreement with the UMWA. Roe and Hatton sought May's advice regarding a proposed "realignment" of Mutual Mining's workforce (Tr. I: 178-179, IV: 56-57, 60-65). This realignment would have resulted in the shift of some employees from the day shift to the night shift (Tr. I: 178, IV: 56-57, 60-65). Roe and Hatton had discussed such a plan with May previously on several occasions, starting possibly as much as 6 months previously (Tr. IV: 70-71). They had also discussed such plans on a number of occasions over a period of several months with David Vidovich, a labor relations consultant (Tr. III: 44-46).

May advised Roe and Hatton that they could not realign their workforce as planned without violating the terms of Island Creek's collective bargaining agreement with the UMWA (Tr: IV: 61). May also told them that the only way they could shift employees from the day shift to night shift was to have a lay-off and a recall (Tr. IV: 62-63). On December 21, 1992, after the commencement of the MSHA inspection, Roe and Hatton decided to lay-off 12 of their 24 non-supervisory employees (Footnote 4). They effectuated the lay-off on the afternoon of December 21 (Tr. I: 20-23, 66). Among those laid-off were the complainants, three of whom (Taylor, Wamsley, and Lewis) constituted the membership of the safety committee which had initiated the inspection that day (Tr. I: 27, 61-63, Exh. G-2) (Footnote 5).

_____

4The inference I draw from this record is that Respondent decided to lay-off the Complainants after the commencement of the MSHA inspection, but before Roe and Hatton spoke to Ron May.

_____

5 There is a great deal of contradictory and confusing testimony in this record as to whether Respondent had planned to lay-off anyone prior to
December 21, 1992. I find that Respondent has not established that it had decided to lay-off anyone, and certainly none of the complainants, until after the commencement of the MSHA inspection. In August 1993, Roe testified that part of the lay-off list was compiled prior to December 21, 1992 (Tr. I: 124-25, 149-150). However, in February 1994, he stated that "as far as discussing the
layoff, it was a realignment, is what had been discussed, and that probably took place two to three, or maybe four months before . . . "(Tr. V: 47). His testimony continues:

Q. Did any discussions take place in the week before the lay-off?

A. Yes, discussions went continuously for a long time.

Q. And did those discussions include consideration of a layoff?

On January 20, 1993, Complainant Clark Williamson and Willis Hill, the two most senior employees laid off except for Complainant Taylor, were recalled to work (Tr. II: 142, 157). Other employees were recalled in April 1993, including Complainants Samuel Coyle and John Taylor (Tr. II: 59-60, 174).(Footnote 6) By August 1993 all 12 employees had been recalled except for Complainant Wamsley and one other. Both of these miners declined reinstatement (Tr. II: 60).

A. If they did, they would have been in a small scale, on a small scale.

* * *

A. Well, like I said, you know, we had discussed a realignment and there may have been one or two people got laid off in those discussions. But the actual lay-off wasn't the same discussion that we had on a continuous run.

(Tr. V: 47-48)

At the August 1993 temporary reinstatement hearing, Red Hatton testified as follows:

A. The layoff--I hadn't planned a layoff . . . The layoff, as such, was not planned the way it came down until I realized that my realignment wasn't going to work.

Q. When was that?

A. The Twenty-First.

(Tr. I: 202-203)

Hatton's February testimony on this point was the following:

A. . . . At the time I went up there [to the worksite on December 21, 1992], it was primarily a realignment with very few people to be laid off . . . .

(Tr. V: 182)

Given the imprecise nature of the evidence tending to indicate that any lay-off was planned prior to December 21, 1992, and Ron May's testimony that when Roe and Hatton appeared at his office on that date, they initially discussed only a realignment (Tr. I: 178-79, IV: 56-57, 70-71), I conclude that the preponderance of the evidence is that no decision to lay-off any employee was made until December 21, 1992. Other testimony that I have considered on this point includes that of David Vidovich (Tr. I: 104-17, III: 46-53), which is somewhat confusing and inconsistent. However, Vidovich's testimony that he advised Respondent that it had to pay the laid-off employees for December 22, because the company had not provided 24 hours notice, indicates that no lay-off decision was made until December 21 (Tr. I: 112-115). Johnny Porter's testimony regarding discussions of a lay-off prior to December 21, 1992, (Tr. V: 151-52, 162), is so inconsistent with the testimony of Hatton, Roe, May, and Vidovich that I accord it no weight on this issue.

6Taylor filed a grievance over his discharge alleging that Respondent had violated the collective bargaining agreement in laying him off and retaining a less senior employee as a coal loader. Although the retained employee was Respondent's regular coal loader, Mr. Taylor had performed the coal loader job when the other employee was absent and in past employment. His

grievance was sustained (Exh. G-5).

The Issues

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a Complainant establishes a prima facie case of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in part by the protected activity.

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. If the operator cannot, thus, rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Complainants' Protected Activity

In the instant case, there is no controversy regarding the fact that three of the complainants, Wamsley, Taylor, and Lewis, engaged in protected activity. Wamsley and Taylor engaged in such activity when they participated in the safety run of December 17, 1992. Although Lewis did not actually participate in this inspection due to illness, he had advised his supervisor that he planned to do so 24 hours beforehand (Tr. I: 62). Additionally, Lewis provided Wamsley and Taylor information about some equipment with which he was familiar and participated in the decision to refer the safety committee list to MSHA (Tr. I: 62).

Wamsley and Taylor also participated in the union inspection as well as the request for an inspection by MSHA. Wamsley, as well as a management representative, accompanied the government inspectors during the course of the MSHA inspection on December 21, 1992. (Footnote 7)

Neither Mr. Coyle nor Mr. Williamson engaged in protected activity that is relevant to this case (Footnote 8). It is the Secretary's contention that they were laid off so that Respondent could lay-off Mr. Taylor without obviously violating the seniority provisions of Mutual Mining's collective bargaining agreement. If the lay-offs of Coyle and Williamson were motivated by a desire to retaliate against the union safety committee, their lack of protected activity creates no impediment to finding a violation of section 105(c) of the Act.

While I am aware of no cases on point under the Federal Mine Safety and Health Act, it is black letter law under the National Labor Relations Act that proof of an individual employee's protected activity is not necessary to prove a violative discharge if it is part of a retaliatory lay-off. The relevant inquiry is the motivation for the single decision to conduct the layoff. M.S.P. Industries v. N.L.R.B., 568 F.2d 166, 176 (10th Cir. 1977); Dillingham Marine and Manufacturing Co. v. N.L.R.B., 610 F.2d 319, 321 (5th Cir. 1980); N.L.R.B. v. Rich's Precision Foundry, Inc., 667 F.2d 613, 628 (7th Cir. 1981); Hyatt Corp. v. N.L.R.B, 939 F.2d 361, 375 (6th Cir. 1991). This principle was best stated by Judge Henry Friendly:

> A power display in the form of a mass lay-off, where it is demonstrated that a significant motive and a desired effect were to "discourage membership in any labor organization," satisfies the requirements of 8(a)(3) to the letter even if some white sheep suffer along with the black.

Majestic Molded Products, Inc. v. N.L.R.B., 330 F.2d 603, 606 (2d Cir. 1964).

_____

7The management representative, foreman Wayne Thornbury, maintained radio contact with superintendent Allan Roe, advising him constantly as to which pieces of equipment were taken out of service due to MSHA citations (Tr I: 97-99).

_____

8Coyle was a member of the union safety committee until September 1992
(Tr. II: 174). Williamson apparently made safety complaints to his foreman at some unspecified time (Tr. II: 132). However, there is nothing in this record that leads me to conclude that these activities contributed to the lay-off of Coyle and Williamson on December 21, 1992. Indeed, Williamson believes he was discharged so that Respondent could terminate Taylor (Tr. II: 156-57).

Respondent's Awareness of Complainants' Protected Activity

Respondent was aware of the safety activity. When MSHA began its inspection of December 21, it provided company officials with the list of alleged safety defects prepared by the union. Allan Roe, the job superintendent for Respondent, recognized that the list was the same one presented to the company by the union safety committee a few days earlier. It was, therefore, obvious to Respondent that the union safety committee had initiated the MSHA inspection.

Adverse Action

Each of the complainants suffered an adverse action. All were discharged on the day of the MSHA inspection, hours after the company became aware of the section 103(g) complaint. The proximate timing of the discharges creates an inference that the lay-offs were related to the protected activities of the union safety committee. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984); Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2511 (November 1981). Indeed, close timing alone may suggest that employer animus regarding the protected activity was a motivating factor for the adverse action. N.L.R.B. v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984). Thus, the Secretary has clearly made out a prima facie case that Respondent violated section 105(c) in laying-off the complainants on December 21, 1992.

Evidence of Animus

Another factor contributing to the inference that there is a relationship between complainants' discharge and their protected activities is the animus of Respondent. This case is somewhat unusual in that there is strong evidence of animus towards Cletis Wamsley and much less evidence of animus towards any of the other complainants. Respondent's job superintendent Allan Roe readily admits to a strong aversion towards Mr. Wamsley (Tr. V: 57-58). The record establishes that this animus may not have originated with Wamsley's safety-related activities. Nevertheless, Roe's belief that Wamsley was unreasonable in his safety-related demands was a factor in the strong animus towards this Complainant.

Mr. Wamsley was prominent in the prosecution of an unfair labor practice charge against Respondent, which alleged that Mutual Mining had violated the terms of its collective bargaining agreement in retaining certain employees of the Elm Coal Company, which had previously mined the Holden site. One of these employees was Complainant Taylor. Respondent argues that its successful defense to the unfair labor practice charge saved Mr. Taylor's job, and, thus, indicates that it bears no animus towards him.

Mr. Roe also believed that Complainant Wamsley purposely damaged a rock truck (Tr. V: 85). On another occasion, Roe had Wamsley suspended for leading a work stoppage because his paycheck bounced (Tr. V: 93-95).

Nevertheless, some of Roe's hostility towards Wamsley resulted from differences of opinion over safety matters. For example, on one occasion they had a heated discussion regarding the safety of the tires on a rock truck (Tr. V: 92-93). On another after an October 15, 1992, safety run, the two men cursed each other in front of an MSHA inspector. At an MSHA closing conference the same month, Roe called Wamsley a liar and referred to him as a "fat slob." (Tr. III: 191-93). That Mr. Roe considered Complainant Wamsley's safety activities in an unfavorable light is best evidenced by his explanation of his refusal to meet with him instead of the president of the union local in October 1992:

> Every time me and Cletis got together . . . there was a list this long . . . of things he wanted and there was never a list of anything we were going to discuss and try to work out. It was just a list of demands.
>
> So I didn't want to hear any more of the list of demands. I wanted the proper people to be at the meeting and maybe we could have actually ironed out some things.

(Tr. V: 106).

Although there is little direct evidence of animus towards any of the other complainants individually, there is a basis for inferring that Respondent may have equated Mr. Lewis, who was Mr. Wamsley's roommate, with Mr. Wamsley (Tr. II: 208-09, V: 102). Complainant Williamson testified that shortly before the lay-off, Superintendent Roe told him that the safety committee and "the Island Creek boys"--meaning Wamsley and Lewis--were giving him a hard time on safety matters (Tr. II: 132-33). There is also a basis for inferring animus towards Lewis as a result of his collaboration with Wamsley as part of the union safety committee at the mine. (Footnote 9)

As to Complainant Taylor, one can infer animus from Respondent's failure to comply with the collective bargaining agreement in laying him off in December 1992. At no point did

---

9Roe refused to allow Lewis to participate in the safety run of October 15, 1992. The superintendent testified that he had been given no notice that Lewis was going to participate and that Lewis' absence from work that evening would therefore have shut down production on the night shift. I have no basis for finding that Roe's conduct in this incident was not justifiable.

Respondent ever take issue with Taylor's assertion that he had performed the duties of a coal loader during his employment with Mutual Mining and at previous jobs (Exh. G-5, pp. 6-7, Tr. V: 98-99). Further, Respondent did not contend that Taylor performed the job of coal loader inadequately (Exh. G-5, p. 7, Tr. V: 98-100). Given the fact that Respondent had conferred with Ron May and David Vidovich at length on matters regarding the collective bargaining agreement, I infer that it was readily discernible that the lay-off of Taylor violated that agreement. Indeed, May had specifically explained to Roe and Hatton "how they must reduce; one, by seniority and ability to perform the jobs that they would have remaining after the layoff" (Tr. I: 179).

The arbitrator in Mr. Taylor's grievance noted:

> The many arbitration awards submitted by the parties disagreed on many matters. However, all arbitrators agreed when a panel laid-off employee is recalled, he must evidence minimal ability to do what the job calls for. He competes against the minimal requirements of the job. His ability must be minimally sufficient. He is not competing against other employees. Ability does not have to be equal or better to benefit from his seniority.

(Exh. G-5, p. 6).

Given what appears to me to be the facially obvious violation of the collective bargaining agreement in laying-off Mr. Taylor, I infer that his lay-off was the result of animus on behalf of Respondent and that it was related to his activities as chairman of the union safety committee. In addition to the inference drawn from the violation of the collective bargaining agreement, there is some indication of hostility on the part of Roe towards Taylor as the result of his safety committee activities. Complainant Wamsley testified that, after the October 1992 MSHA inspection, Roe was angry at Taylor and Wamsley, and called them both liars (Tr. III: 7). Taylor's account of the incident doesn't mention any remarks specifically directed to him, only that there was a "heated discussion" (Tr. II: 39).

As an indication of Respondent's animus towards the safety committee generally, complainants point particularly to Superintendent Roe's comments regarding a list of safety problems presented to him by the committee in October 1992. Roe told an MSHA inspector that he regarded the union safety list as no more than "suggestions." I am not inclined to impute anti-safety animus to Mr. Roe on the basis on this comment alone. The remark can be viewed as simply a statement that he is not under a legal

obligation to correct a condition simply because the union believes it violates the Act.

One can, however, infer animus towards the United Mine Workers and its safety committee at the Holden mine from other factors. Until 1988 when it became a contract mine operator for Island Creek Coal Company, Respondent had been a non-union employer. It has apparently experienced cash flow difficulties throughout its existence. On a recurring basis over a period of years, paychecks have bounced and Respondent has failed to pay employee health insurance premiums. It also failed for several years to contribute as required to the UMWA pension fund.

On November 30, 1992, a judgment in the amount of $486,250.23 was entered against Respondent in favor of the United Mine Workers pension fund (Exh. R-1). One can assume that this judgment may have created some degree of animus towards the UMWA on the part of Mutual Mining.

Additionally, one can infer that Mutual Mining was not happy about the aggressive activity of its union safety committee. Mr. Roe's reaction to the October 1992 safety run and deep-seated dislike of Mr. Wamsley support such an inference. Moreover, one can infer that the company was somewhat upset that its union safety committee filed a formal complaint with MSHA pursuant to section 103(g) of the Act on December 18, 1992. Almost all of the alleged violations about which the committee complained were equipment defects (Exh. G-1). Respondent's two mechanics were absent on December 17, 18, and 21, 1992, which would have made it impossible for Mutual Mining to quickly repair the defects (Tr. IV: 20-21).

Prima Facie Case Established

I conclude that the Secretary has made out a prima facie case of discrimination. This conclusion is based on the fact that the discharge occurred only hours after the start of the MSHA inspection and that Respondent knew the union safety committee was responsible for the inspection. Mr. Roe's strong dislike of Complainant Wamsley, which was due in part to Wamsley's activities on the union safety committee, and the likely identification of Mr. Lewis and Mr. Taylor with Wamsley, as fellow members of the union safety committee, are also factors leading me to conclude that a prima facie case has been established. Finally, the lack of any apparent basis to lay-off Mr. Taylor under the terms of the collective bargaining agreement indicates that his discharge was retaliatory.

The fact that nine of the 12 employees laid-off did not engage in protected activity does not dissuade me from drawing the inferences necessary to conclude that a prima facie case has been established. Under the National Labor Relations Act there

are numerous cases in which employers have been found guilty of committing unfair labor practices when many employees who have not engaged in protected activity have been discharged in addition to some who have engaged in such activity. See, e.g., N.L.R.B. v. Lakepark Industries, 919 F.2d 42 (6th Cir. 1990); Sonicraft, Inc., 295 NLRB No. 78, 766, 779-783 (1989), 133 BNA LRRM 1139, enforced, 905 F.2d 146 (7th Cir. 1990), cert. denied, 498 U.S 1024 (1991). The discharge of the nine "innocent" employees is a factor to be weighed with other factors in determining whether Respondent has rebutted the Secretary's prima facie case.

Respondent contends that it is preposterous to think that it would lay-off the nine to get at Taylor, Wamsley, and Lewis, and that the mass lay-off virtually proves that it had a legitimate economic motive for the lay-off. Mutual Mining notes that the lay-off left its equipment idle at night and this would make no sense if the lay-off was not economically justifiable. The answer to this contention was probably best stated by Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit:

> The company argues that it would not have been rational for it to shoot itself in the foot by curtailing the work week in the sewing department while it had orders to fill. But the long-term benefits of getting rid of the union might compensate for a short-term loss in filling orders more slowly . . . That is the logic of retaliation; a present cost is traded off against a future benefit from deterring behavior injurious to the retaliator.

N.L.R.B. v. Advertisers Manufacturing Co., 823 F.2d 1086, 1089-90 (7th Cir. 1987).

Rebutting the Prima Facie Case

Mutual Mining contends that the timing of the lay-off in relation to the section 103(g) complaint and ensuing inspection is pure coincidence. Respondent has the burden of overcoming the inference created by the proximate timing of the lay-off, its awareness of the protected activities, and its animus towards the union safety committee and its members, individually.

Mutual Mining must establish that the timing of the lay-off was entirely coincidental. If protected activities had anything at all to do with the lay-off, or the selection of the complainants for the lay-off, I would conclude that "but for" their protected activities, complainants would not have been discharged and that Respondent violated section 105(c) in terminating their employment on December 21, 1992.

Evidence Tending to Rebut the Prima Facie Case

There is a good deal of evidence in this record supporting Respondent's contention that the lay-off was made for legitimate business reasons and that the selection of the complainants for lay-off was nonretaliatory. Mutual Mining has been in precarious financial shape throughout its operations at the Holden site. It has bounced employee paychecks and failed to pay health insurance on a number of occasions over a period of years. Its financial situation became more complicated at the end of November 1992 by virtue of the judgment against it for failure to contribute to the UMWA pension fund (Tr. I: 184-185). (Footnote 10) On the other hand, there are some indications that the company's financial situation was better than usual in December 1992. Its corrected 1992 Federal Income Tax Return apparently shows a $300,000 profit for 1992 (Tr. III: 172, V: 30-32, 180).

Nevertheless, the core of Respondent's case rests on two somewhat contradictory themes. Most important of these is a contention that shortly before the December 21, 1992, lay-off, Mutual Mining was informed by Island Creek Coal Company that it might be buying less coal from Mutual Mining in the next several months. The second theme is a contention that for several months prior to December 21, Mutual Mining had been considering realigning its workforce by shifting employees between the day shift and night shift in order to increase productivity. (Footnote 11)

According to Mutual Mining it had decided to institute the realignment on December 21 for reasons totally unrelated to the union safety committee or MSHA. On that date Red Hatton and Allan Roe went to discuss the realignment with Ron May, the human resources supervisor of Island Creek Coal, and discovered that they could not effectuate this realignment without violating the collective bargaining agreement with the UMWA. Upon close analysis, neither of these explanations is sufficiently persuasive to overcome the strong inference created by the timing of the lay-off, as well as the evidence of animus towards the union safety committee and its members.

Anticipated Reduced Demand from Island Creek

The most important evidence in this record regarding Mutual Mining's anticipation of reduced demand for its coal is the

_____

10This judgment is being satisfied by a $25,000 initial payment and $16,000 monthly installments (Tr. I: 189-90, V: 187-88). Mutual Mining has also been paying $5,000 a month on a judgment in favor of East Kentucky Explosives Company since the Fall of 1992 (Tr. I: 187-88, V: 187-88).

_____

11Although there is some evidence that Respondent had planned to lay-off a few employees prior to December 21, 1992, I have not credited that evidence for the reasons stated in footnote 5.

testimony of Mike Jones, the superintendent of Island Creek's subsidiary, Laurel Run Mining, who confirms that sometime in 1992 he did tell either Allan Roe or Respondent's president, Johnny Porter, that his company would be buying less coal from Mutual Mining for the next 2 months (Tr. IV: 40). However, Mr. Jones believes this conversation took place in early 1992, not at the end of the year proximate to Mutual Mining's lay-off (Tr. IV: 40). When pressed on the timing of the conversation, Jones responded "I can't recall exactly when it was in 1992. I know there was a slack in sales." (Tr. IV: 43).

Charles Leonard, Laurel Run's manager for contract coal at the time in question, testified that he told Mutual Mining that Island Creek would be accepting less coal "probably around in the last of '92, maybe a little bit before" (Tr. IV: 49). This testimony is not as helpful to Respondent as it first appears. In September and October 1992, Mutual Mining produced unusually large amounts of coal (Exh. G-4). The tonnage for those months, 38,374 and 40,954, was almost 33 percent higher than the normal amount of coal demanded by Island Creek (Tr. I: 212-213, Exh. G-4). Thus, the testimony of Jones and Leonard could show nothing more than demand would revert to its normal level. Since Mutual Mining had not hired any new employees since November 1991, this decrease in demand does not explain the lay-off.

Moreover, Mutual Mining's financial statement (Exh. G-8) prepared only 9 days after the lay-off does not comport with Respondent's contention that it anticipated sharply reduced demand for its coal at the time of the lay-off. Page two of that document shows an average tonnage of 32,000 per month for 1992 and an anticipated 30,000 tons per month for 1993. Finally, the testimony of Respondent's president, Johnny Porter, regarding his conversations with Jones and Leonard are just as consistent with a return to the normal levels of demand from Island Creek, as with an anticipated reduction in demand that would explain the lay-off.

Porter testified:

> He [Mike Jones] come up to me -- now, the date, I got so many things going, I can't remember a lot of dates. I think it was in November. He said, "Johnny, I got some news today." He said, "We might have to cut you back on production for November, December and maybe January."
>
> He said, "We might have a time where the stockpiles are full. We might even have to cut you off."

(Tr. V: 151).

As it is unlikely that Jones would have been telling Porter of an anticipated reduction in demand for November in November, it is likely that by Porter's account the conversation occurred earlier. It would, thus, be equally consistent with a return to normal production levels from the peak levels of September and October, as it would be with a reduction necessitating a lay-off.

Equally important is the fact that no sharp reduction in the demand for Respondent's coal ever occurred. Indeed, the retained employees continued to work 10-hour days and some vacation days (Tr. I: 195). Mutual Mining's failure to produce any documentary evidence supporting its proffered reason for the lay-off detracts greatly from its credibility. J. Huizinga Cartage Co., Inc. v. N.L.R.B., 941 F.2d 616, 621-22 (7th Cir. 1991).

Demand for Respondent's coal remained essentially constant from November 1992 until the company was hit by the UMWA's selective strike in September 1993. Given this constant demand, the recall of those laid-off in December detracts substantially from the credibility of the company's asserted legitimate business motive. Indeed, Allan Roe's explanation for the recalls is more consistent with Judge Posner's exposition of the economic logic of a retaliatory discharge.

Roe explained the decision to recall everyone still on lay-off status in August 1993 as due to "low tonnage" and the undersigned's order of temporary reinstatement for Complainants Wamsley and Lewis (Tr. V: 63-64). Since Respondent's production was fairly constant between the lay-off and August 1993, this indicates that the lay-off made no sense economically in the long-run. Roe's testimony also indicates that the lay-off affected production little initially but began to have an adverse effect afterwards (Tr. V: 67-68).

Moreover, only 1 month after the lay-off Respondent recalled Complainant Williamson and Willis Hill, the two bulldozer operators for the night shift. This recall accounted for 50 percent of the production on the night shift (Tr. V: 80). The extremely brief lay-off of the two bulldozer operators makes Mutual Mining's claim that it feared a sharp cutback in coal demand from Island Creek implausible. There is no evidence that Island Creek informed Respondent in January to disregard any prior warnings regarding reduced purchases. The January recall also gives credence to the Secretary's contention that Williamson and Hill were laid-off so that Respondent could lay-off Taylor, who had more seniority, without obviously violating the collective bargaining agreement.

The Nexus with the Realignment

A major component of Respondent's defense to charges of retaliatory motive is that there was an intervening event that

negates whatever inference could be otherwise drawn from the timing of the lay-off. The event is the meeting at mid-day on December 21, 1992, between Allan Roe, "Red" Hatton, and Ron May, the human resources director of Island Creek Coal Company. According to Hatton, there were no plans for a lay-off of the magnitude of the one that occurred until May informed Roe and Hatton that they could not effectuate their proposed realignment of the workforce without violating the collective bargaining agreement (Tr. V: 182). (Footnote 12)

The difficulty with this explanation is that the objective of the realignment that Mutual Mining had been contemplating for several months was to increase production. There is an obvious inconsistency with the two primary nonretaliatory explanations for the lay-off. The concern regarding decreased coal purchases by Island Creek, if credited, does not explain why Mutual Mining would desire to increase productivity by shifting employees from the day shift to the night shift. (Footnote 13) Mr. Hatton testified that when he got into his truck the morning of December 21, 1992--before he had learned of the MSHA inspection--he had decided to implement the realignment that day (Tr. V: 171). This testimony is extremely implausible if Respondent was expecting sharp cutbacks in its sales to Island Creek.

If the lay-off had nothing to do with the realignment, the question becomes why did it take place on December 21? There is little in this record that would indicate the need to effectuate the lay-off on such short notice absent the desire to retaliate for the MSHA inspection that morning. Sonicraft, Inc., supra. Roe testified that Respondent decided to implement the realignment on December 21, because Mutual Mining wanted to avoid paying holiday pay for the Christmas vacation (Tr. V: 73-75). However, a realignment would not have saved the company holiday pay--only a lay-off would do so. If the company wished to lay-off employees due to the warnings of reduced purchases from Island Creek, there is no reason why it waited until December 21, 1992, to do so--given the fact that these warnings were given some time prior to that date.

Respondent has attempted to tie the realignment to the lay-off by suggesting that it was undertaken only after Roe and Hatton were informed by May that to achieve the goals of the realignment, i.e., shifting employees from day to night, it would

_____

12As discussed in footnote 5, I conclude that the evidence fails to establish that Respondent had planned to lay-off any of its employees prior to December 21, 1992.

_____

13The lack of logic in having the realignment if Mutual Mining expected that Island Creek would be sharply cutting back on its coal purchases was recognized by Respondent's labor consultant David Vidovich (Tr. III: 51).

have to institute a lay-off and recall. Indeed, Mr. May's testimony indicates that the idea for the lay-off originated with him.

One difficulty with this theory is that it is inconsistent with Respondent's other proffered explanation and its behavior immediately following the lay-off. If the lay-off was simply a means of achieving the realignment, Respondent's alleged anticipation of sharply reduced coal demand as a motive for the lay-off is obviously fallacious. Moreover, Roe's testimony regarding holiday pay indicates that Roe and Hatton had decided to implement a lay-off on December 21, 1992, prior to their trip to May's office (Tr. V: 73-75). The presentation of shifting, inconsistent, and/or implausible explanations for the lay-off itself suggests discriminatory motive. N.L.R.B. v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984); Hall v. N.L.R.B., 941 F.2d 684, 688 (8th Cir. 1991).

Secondly, if the lay-off was to accomplish the same purposes as the realignment, the recall of most or all the employees should have followed the lay-off quickly. Within a short time Mutual Mining's workforce should have resembled the "realignment with very few people to be laid-off," allegedly contemplated by Hatton on the morning of December 21 (Tr. V: 182). The pace of the recall is more consistent with retaliation in that the January 1993 recall involved only Complainant Williamson and Willis Hill, and the April 1993 recalls stopped just short of the point where Respondent would have had to recall Complainants Lewis and Wamsley (Exh. G-2, Tr. I: 151-52).

The third reason why it is hard to believe that the December 21, 1992, meeting with May induced a bona fide nonretaliatory lay-off is that nothing May told them at that meeting should have been a revelation to Roe and Hatton. They had been discussing shifting employees from the day shift to night shift with both May and Vidovich for some time prior to that date (Tr. I, 105-07, III: 45-53, IV: 64, 70-71). Vidovich had already told them that, under the collective bargaining agreement, such a realignment had to be performed according to the employees' seniority and job title (Tr. I: 106-07, III: 45-53).

Prior to December 21, 1992, possibly on several occasions, Respondent had also discussed with Mr. May, the shifting of employees from day shift to the night shift under the terms of the collective bargaining agreement (Tr. I: 168-69, 177-80, III: 64-65). Given the number of discussions Mutual Mining management had with Vidovich and May concerning the realignment, I do not believe that on December 21, 1992, that they gained surprising new information which caused them to institute a lay-off instead.

Indeed, I find the account of this implausible intervening event itself evidence that the lay-offs were pretextual. (Footnote 14)

Conclusion

I find that the timing of the lay-off of the complainants establishes a prima facie case that their termination on December 21, 1992, was in retaliation for the safety run of December 17, 1992, and the filing of a section 103(g) request for the MSHA inspection that commenced the morning of December 21. I discredit the alternative nonretaliatory explanations for the lay-off proffered by Respondent and find that the lay-off of each of the complainants violated section 105(c) of the Act.

ORDER

1. The parties are to confer and advise the undersigned within 30 days of this decision as to whether they are able to stipulate to the amount of back pay due the complainants. The parties are also ordered to advise the undersigned as to whether they are able to stipulate to an appropriate civil penalty, or facts that will allow the undersigned to calculate a civil penalty pursuant to the criteria set forth in section 110(i) of the Act. If the parties are unable to stipulate to the amount of back-pay due and an appropriate penalty, they may either submit written arguments on these issues or request a supplemental hearing. The Secretary is ordered to offer Respondent documentary evidence, such as W-2 statements, for all employment of Mr. Wamsley between the date of his lay-off and the date he declined reinstatement.

2. Respondent IS ORDERED to inform all its employees by posting a legible notice in a prominent place at all its properties, which are subject to the Federal Mine Safety and Health Act, that the lay-off of December 21, 1992, at its Holden, West Virginia, mine has been found to violate section 105(c), the anti-retaliation provision of the Act. Said notice shall also inform Respondent's employees that they have a right under the Act to bring to the attention of management, the Mine Safety and

_____

14Given the fact that Roe and Hatton readily admit that the decision to conduct a mass lay-off was made on December 21, after they were aware of the MSHA inspection, it is somewhat anomalous to believe that they had the sophistication to cover their tracks by arranging a meeting with May to make it appear that the lay-off was precipitated by an event other than the inspection. However, I find this to be the most likely explanation for what transpired. First of all, Roe's testimony (Tr. V: 73-75), indicating that he and Hatton discussed saving holiday pay prior to meeting May on December 21, provides evidentiary support for this conclusion. As mentioned before, only a lay-off, not the realignment, would have saved the company the holiday pay. Secondly, the alternative explanation, that what May had to tell Roe and Hatton was a complete surprise and led to a mass lay-off that they had not previously contemplated, is even more implausible.

Health Administration, and state and local officials, any concerns they have with regard to safety and health conditions in their employment. Said notice shall also inform employees that such activities are protected by section 105(c) of the Federal Mine Safety and Health Act and they may file a complaint with the Mine Safety and Health Administration (MSHA) if they believe such rights have been violated. Said notice shall also inform employees that they may be entitled to reinstatement, back pay, and other remedies if a complaint filed under section 105(c) is found to be meritorious.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Patrick L. DePace, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203 (Certified Mail)

W. Jeffrey Scott, Esq., 311 Main Street, P.O. Box 608, Grayson, KY 41143 (Certified Mail)

/jf