

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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SEP 07 2017

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of RICKEY SIMMONS,	:	Docket No. LAKE 2017-392
Complainant	:	MORG-CD-2017-16
	:	
v.	:	
	:	
B&N COAL, INCORPORATED,	:	Orange Strip Mine
Respondent	:	Mine ID: 33-01925

**ORDER GRANTING TEMPORARY REINSTATEMENT**

Before: Judge Bulluck

This matter is before me upon Application for Temporary Reinstatement filed by the Secretary of Labor (“Secretary”) on August 11, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(c)(2), requesting an order requiring B&N Coal, Incorporated (“B&N Coal”) to temporarily reinstate Rickey Simmons to his former position as a heavy equipment operator at B&N Coal’s Orange Strip Mine, or to a similar position within the same commuting area, at the same rate of pay and benefits. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The Application is supported by Declaration of MSHA Special Investigator William Wilson, and a copy of the Discrimination Complaint filed by Simmons with MSHA on July 6, 2017. The Application alleges that Simmons was terminated by B&N Coal because he refused to operate the rock truck that he believed to be unsafe.

B&N Coal elected to waive its right to a hearing, and by agreement of the parties, on August 25, 2017, simultaneous briefs were filed. B&N Coal’s Opposition denies that Simmons had been terminated for any discriminatory reason, and is supported by Affidavits of Roger Lee Newberry, B&N Coal truck driver; Douglas Smith, B&N Coal equipment operator; Bradley Bettinger, B&N Coal equipment operator; Paul Gill, B&N Coal foreman; Kevin Marshall Burns, Jr., B&N Coal mechanic/welder; Brian Warner, B&N Coal equipment operator; Jim Yeagle, B&N Coal equipment operator; and Brian Cunningham, B&N Coal Chief Financial Officer.

## Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), which limits the inquiry to a “not frivolously brought” standard by providing that “[i]f no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary’s application and, if based on the contents thereof the Judge determines that the miner’s complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement.” 29 C.F.R. § 2700.45(c).

It is well settled that the “not frivolously brought” standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources, Inc. v. FMSHRC*, the 11th Circuit Court of Appeals explained the standard as follows:

The legislative history of the Act defines the ‘not frivolously brought’ standard as indicating whether a miner’s ‘complaint appears to have merit’ -- an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency actions seeking temporary relief, the former fifth circuit construed the ‘reasonable cause to believe’ standard as meaning whether an agency’s ‘theories of law and fact are *not insubstantial or frivolous*.’

...

Congress, in enacting the ‘not frivolously brought’ standard, clearly intended that employers should bear a disproportionately 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 the employer’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.

920 F.2d 738, 747-48 n.11 (11th Cir. 1990) (citations omitted) (footnotes omitted).

## Ruling

The Mine Act accords to miners and miners’ representatives protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. § 815(c). The Commission has consistently held a miner seeking to establish a prima facie case of discrimination to proving that he engaged in activity protected by the Act, and that he suffered adverse action as a result of the protected activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

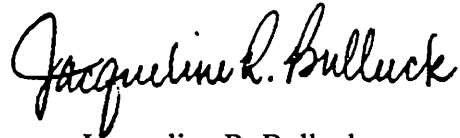
The Secretary's allegations are based on the findings of Special Investigator William Wilson. Wilson found that on June 29, 2017, B&N Coal foreman Paul Gill instructed Rickey Simmons to operate rock truck no. 670, that Simmons discovered that the truck's CB radio and rearview camera were not functional, that these unsafe conditions almost resulted in two collisions with another truck, and that Simmons reported these conditions to the mechanic at the end of his shift. On the following day, June 30, Gill assigned Simmons to operate rock truck no. 670, and Simmons refused to operate it because it had not been repaired. Gill became angry at Simmons' refusal, they agreed to meet off-site to fight, and Gill then left the area. A few hours later, Gill found Simmons where he was working and discharged him. Wilson concluded that Simmons' complaint, asserting that he was discharged for engaging in protected activity, was not frivolously brought.

B&N Coal's Opposition to the Application, supported by Affidavits, seeks to establish that the complaint was frivolously brought by asserting that Simmons did not engage in protected activity when he refused to operate rock truck no. 670, and that B&N Coal was not motivated by his refusal when it terminated him on June 30. In their Affidavits, Newberry, Smith, Bettinger, Gill, Burns, Warner, and Yeagle asserted that rock truck no. 670 was not unsafe to operate on June 29 or 30. Newberry and Bettinger averred that there was no near-collision between Simmons and another truck driver on June 29, and Burns asserted that Simmons never reported to him that rock truck no. 670 was unsafe. According to Newberry, Smith, Bettinger, Gill, and Warner, Simmons threatened Gill with physical harm on June 30. Smith, Burns, Bettinger, and Gill assert that Gill reassigned Simmons to work with Burns in the capacity of mechanic and, by Gill's and Burns' account, Gill fired Simmons later that morning. B&N Coal contends that Simmons' refusal to drive the truck was not protected, and that he was fired for threatening Gill with physical violence.

While I have carefully considered B&N Coal's Opposition, the differing accounts of events precipitating the discrimination complaint are not appropriately resolved at this stage of the proceedings. *Sec'y of Labor on behalf of Nickoson v. Mammoth Coal Co.*, 34 FMSHRC 1252 (June 2012); *see Sec'y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085 (Oct. 2009). The Secretary has set forth allegations of adverse treatment, close in proximity to the protected activity, so as to create a nexus sufficient to raise an inference of discrimination. I also note that B&N Coal has not challenged the Secretary's allegation that responsible management officials had knowledge of Simmons' work refusal. At best, B&N Coal has shown intent to defend its actions at hearing on the basis of legitimate business-related, non-discriminatory reasons. At this juncture it is emphasized that the Secretary ultimately bears the burden of proving discrimination by a preponderance of the evidence, in order to sustain a violation under section 105(c). Accordingly, since the allegations of discrimination, as set forth in the Secretary's Application, have not been shown to be clearly lacking in merit, it must be concluded that they are not frivolous and, therefore, satisfy the lesser threshold in this proceeding.

**WHEREFORE**, the Application for Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that B&N Coal, Incorporated **TEMPORARILY REINSTATE** Rickey Simmons to the position of heavy equipment operator at B&N Coal's Orange Strip Mine, or to a similar

position within the same commuting area, at the same rate of pay and benefits, effective this date, September 7, 2017.



Jacqueline R. Bulluck  
Administrative Law Judge

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