FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 15, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On behalf of ANDY HOWARD, JR., Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	
BRUCE YOUNG AND YOGO, INC., Respondent	:	Docket No. KENT 96-95-D MSHA Case No. PIKE CD 95-21 Martiki Surface Mine Mine I.D. No. 15-07295 BLH

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee; Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund, Inc., Lexington, Kentucky; for Complainant; Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Pikeville, Kentucky, for Respondent.

Before: Judge Amchan

Facts and Contentions of the Parties

Complainant, Andy Howard, Jr., began working as a haul truck driver for Respondent, Yogo, Inc., in late February or early March, 1995 (Tr. 13-17, 70). Yogo transports coal for Martiki Coal Company at its surface mine in Martin County, Kentucky (Tr. 114-16). Howard's duties entailed the transportation of coal over private dirt roads on Martiki's property (Tr. 18-19, 70-71).

The week prior to working for Yogo, Howard drove a green Mack truck for BNA Trucking, a company owned by the wife of Bruce Young (Tr. 15-17). Mr. Young owns 50 percent of Yogo, Inc. (Tr. 114). This green truck had defective brakes and was the subject of a section 105(c) discrimination complaint filed by William Delong, who drove the truck just before Mr. Howard was hired (Tr. 15-16, 41-45). In July 1995, Howard was interviewed by MSHA special investigator Nancy Bartley. In Mr. Young's presence, he told Ms. Bartley that the brakes on the green Mack truck were defective and would not stop the truck

on a hill. According to Howard, Mr. Young's face turned red during Howard's conversation with the investigator (Tr. 41-46).

In March 1995, when Howard started to work for Yogo, he drove an orange Mack truck. He continued to drive this vehicle for approximately three months when he was transferred to a black Mack truck, model RD-600. The air conditioning unit on this truck did not work (Tr. 17, 23).

Due to the summer heat, Mr. Howard operated this truck with the windows rolled down. The haul roads were often very dusty and the dust coming into his cab made it difficult for Howard to breathe, gave him headaches, and sometimes upset his stomach. Howard complained to Bruce Young, who promised he would have the air conditioning fixed (Tr. 18-25).

Employees of Yogo, Inc. were on vacation from June 24, 1995 to July 10, 1995 (Tr. 118). When Mr. Howard returned to work he discovered that the air conditioning unit of his truck was still non-functional (Tr. 27-28). Mr. Young contends that he arranged to have the air conditioning repaired on Howard's truck and others, but that the person with whom he made these arrangements unexpectedly failed to do the work (Tr. 118-20, 148-49, 175).

On the morning of July 11, 1995, Howard and four other drivers refused to drive their trucks (Tr. 28-29). Two of the other drivers, one who worked for Yogo and the other who worked for another company owned by Larry Goble, the other partner in Yogo, also had non-functioning air conditioners (Tr. 151-52). The five drivers demanded that the air conditioning be repaired on the three trucks. They also demanded that Yogo provide them with medical insurance, and Howard asked or demanded an increase in his salary (Tr. 31).

Mr. Howard contends that Mr. Young's response was that the drivers could go back to work or be fired (Tr. 29). Young says he merely told them that if they refused to work, everybody at Yogo would lose their jobs, and that he would try to get the air conditioners fixed. Young was apparently inferring that if the drivers refused to work that Martiki might replace Yogo with another contractor (Tr. 120-21).

Mr. Young says he contacted Worldwide Equipment Company the day before when he discovered that the air conditioners had not been fixed over the vacation. Worldwide was not able to repair the vehicles until July 14. The repairs performed on that date cost Yogo $1,020 (Tr. 123-24, Exh. R-1).

Mr. Howard claims that Bruce Young never indicated that he

would fix the air conditioners. He states that the five drivers continued their strike against Yogo for 13 hours. Then, on the morning of July 12, Larry Goble promised them he would get the vehicles fixed if they returned to work (Tr. 30-31). Howard also claims that after this incident Bruce Young would not speak to him (Tr. 29-32, 35)[1].

The air conditioner on Complainant's truck worked for about two weeks following the July 14 repairs. Howard drove the truck for a few weeks after it broke again. The dust entering his cab made him feel ill. Howard's headaches got worse. At the beginning of his shift on August 15, 1995, he informed Bruce Young that he would not drive the truck until the air conditioner had been repaired (Tr. 33-35).

Mr. Young assigned Howard to a truck usually used to transport mud and other debris. Howard transported coal in the mud truck while a Yogo mechanic repaired the air conditioner on his truck. On August 16, Howard drove his own truck until about noon when the air conditioner stopped working again (Tr. 36-39, 127-29).

When Howard told Young that his truck's air conditioner was broken, Howard claims that Young became angry and told him that he had stabbed Young in the back ever since he had come to work for him[2]. Then Young told Howard to go home and that he either would call him when he needed him, or when the air conditioner was fixed (Tr. 39-41, 48-49, 64, 85).

Young denies making the "stab in the back" remark. He says he merely sent Howard home because the mud truck was being used by another miner and therefore he had no vehicles for Howard to drive that had operational air conditioning (Tr. 129).

Respondent contends that Mr. Howard called Larry Goble on August 21, 1995. Goble told him that his truck's air conditioner was not fixed yet. Howard asked Goble if he could come in to wash the truck so that he could earn some money. Goble told Howard that he could not use the vehicle until the air conditioner was fixed (Tr. 198-99).

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[1]Other than Howard, the three drivers who worked for Yogo are still employed by Respondent (Tr. 73-74).

[2]It is not clear from Howard's testimony whether he claims these statements were made on August 15 or 16, or on both days (Tr. 39, 64).

The next day Howard, who lives close to the Martiki mine, heard on his CB radio that another miner was driving his truck. He called Goble again and was told he could return to work. Howard claims that Goble said to him that somebody had called the Mine Safety and Health Administration and indicated that this would hurt Yogo (Tr. 49-53).

Respondent claims it intended to recall Howard as soon as the air conditioning was fixed (Tr. 130). Goble states that on August 22 he became tired of waiting for a contractor and repaired the air conditioning compressor himself. He was then able to get the contractor to come to the site simply to add freon, which neither he nor any other Yogo employee was licensed to do (Tr. 199, 211, Exh. R-3).

Respondent further contends that the truck was driven by another miner on the afternoon of August 22, only to make sure that the air conditioner worked before recalling Howard. On August 23, Howard returned to work and his air conditioner functioned properly (Tr. 53, 130).

On or about August 29, 1995, Howard encountered Mr. Young at the scale house where Yogo's trucks were weighed by Martiki. According to Howard, Young begged him to quit, told him again that Howard had stabbed him in the back and hurt him (Tr. 55-56). Young denies having any heated discussions with Howard. He states that he had been told by two people that Howard was planning to quit and merely asked if this was true and told Howard he would appreciate being given notice. Both men agree that Howard told Young that he planned to quit as soon as he found another job (Tr. 92, 133-36, 168).

On August 30, the radiator hose on Howard's truck broke. He took his truck to Respondent's repair shop to fix it. There he encountered Mr. Young again. Howard says Young became very angry. With his face only four or five inches from Mr. Howard's, Young asked Howard if he thought he "owned the place." He then told Howard not to get out of the truck until Young told him to get out (Tr. 56-59).

Young claims that he merely asked Howard to move his truck because it was in the way of Yogo's mechanics. Young also claims that Howard refused to move the truck. He denies that he was four to five inches from Howard and says the distance between them was two to three feet (Tr. 170-72).

The radiator hose was fixed and Howard resumed driving. Later on August 30, Howard returned to the shop area to get oil. He claims Young opened the door to the truck cab and told him he was either going to fire him or force him to quit. Howard believed that Young was trying to provoke him into starting a fist fight (Tr. 60-61, 95-97).

Young says he merely told Howard that he should have called the shop on his CB radio and had the oil brought out to him. This apparently would have taken Howard's truck out of production for significantly less time. Young denies that he slammed the door to Howard's truck, as claimed by Howard (Tr. 173-75).

On August 31, 1995, despite the fact that he had not found another job, Howard did not report for work. He did not call Respondent to inform it that he was quitting. He picked up his last pay check on September 1, and filed a discrimination complaint with MSHA on September 5. On September 13, Respondent sent Howard a letter formally discharging him (Tr. 57, 97-99, 136-38, 142-43, 220).

Howard's complaint was investigated by MSHA and an application for temporary reinstatement was received by the Commission on January 16, 1996. Respondent requested a hearing

on the application. This hearing was held on February 8, 1996, in Prestonsburg, Kentucky.

Evaluation of the Evidence

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.

In a temporary reinstatement proceeding, the Secretary need not establish that it will, or is even likely to, prevail in the discrimination proceeding. 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 miner's complaint was frivolously brought. The Secretary of Labor has the burden

of proving that the complaint was not frivolous.

The legislative history of the Act provides that the Secretary shall seek temporary reinstatement, "[u]pon determining that the complaint appears to have merit." The Eleventh Circuit, in Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990), concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. Further, that court equates "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit" 920 F.2d 738, at 747 and n. 9.

In the instant case the primary question is whether the Secretary and Mr. Howard have established that it is not frivolous to contend that adverse action was taken against Mr. Howard. More specifically, the issue is whether the Secretary's claim that Mr. Howard was constructively discharged in August 1995 is clearly without merit. It is uncontroverted that Howard quit and was not fired by Respondent.

It determining whether the Secretary and Mr. Howard have met this burden, I conclude it would be inappropriate for me to make the ultimate credibility resolutions that I would make in a discrimination proceeding. Commission Rule 45(d) allows the Secretary to limit his presentation to the testimony of the Complainant. Thus, unless I find there is no conceivable way

that I could credit the complainant's version of events in a discrimination proceeding, I believe I must take his testimony at face value in a temporary reinstatement proceeding[3].

For example, there are sharp differences in the accounts of Mr. Howard and Mr. Young regarding their conversations in August, 1995. It is quite conceivable that there may be corroborative evidence presented in a discrimination hearing that would allow a far more reliable resolution of the credibility of these witnesses than I am able to make at the present time.

The Secretary has established that his claim that Mr. Howard was constructively discharged is "not frivolous."

Under Commission law, a constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign, Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2210 (November 1994); Also see, Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988); Yates v. Avco Corp., 819 F. 2d 630, 636-8 (6th Cir. 1987) [a similar test is applied by the 6th Circuit under the Civil Rights Act].

Mr. Howard's testimony indicates that Mr. Young, half-owner of the operator, became upset at him when he insisted that his air conditioner be repaired on July 11 and on August 15 and 16. Howard claims Young approached him in an extremely hostile manner on August 29 and 30, 1995, to the point of provoking a fight.

At this juncture, I conclude that it is not frivolous for the Secretary to argue that Howard's insistence of having his air conditioner repaired and his conversation with MSHA special investigator Nancy Bartley constituted activities protected by section 105(c) of the Act. Further, I find the Secretary's allegations of animus on the part of Mr. Young towards these activities to be not clearly without foundation. This alleged animus may establish a nexus between Howard's protected activities and the termination of his employment with Respondent.

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[3] This is analogous to determinations made in deciding a motion for summary decision under Commission rule 69(b) and (c). Such motions can only be granted if there is no genuine issue as to any material fact and the moving party is entitled to summary decision as a matter of law.

Finally, I conclude that it is at least arguable that Mr. Young's alleged behavior in July and August 1995 with respect to Mr. Howard created conditions so intolerable that a reasonable miner would have felt compelled to quit. Therefore, I conclude that the Secretary's decision to seek the temporary reinstatement of Mr. Howard is not frivolous.

ORDER

Respondent is hereby **ORDERED** to reinstate Andy Howard, Jr., immediately. The purpose of temporary reinstatement is to render Complainant financially secure during the pendency of his discrimination case, Legislative History of the Federal Mine Safety and Health Act of 1977, at page 625. Respondent may satisfy this order through the means of "economic reinstatement." Complainant's position, including financial compensation and benefits, must be no worse than it would have been had he returned to work on August 31, 1995, and continued to work for Respondent up to the present date[4].

Arthur J. Amchan
Administrative Law Judge

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[4]This refers to current payments and working conditions, it does not require Respondent to give Complainant back pay, which he would be entitled to only if he prevailed in a discrimination proceeding.