FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 2000

SECRETARY OF LABOR, MSHA, on behalf of VERNON DANIELS, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	Docket No. KENT 2000-44-D
	:	BARB CD 99-21
MANALAPAN MINING COMPANY, Respondent	:	R.B. No. 7 Mine
	:	Mine ID 15-17701

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon application, filed by the Secretary on November 29, 1999, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring Manalapan Mining Company, Incorporated ("Manalapan"), to temporarily reinstate Vernon Daniels to his former position as a mobile bridge carrier operator, day shift, at Manalapan's RB No. 7 mine, or to a similar position at the same rate of pay. 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 Gary Harris, and a copy of the discrimination complaint filed by Daniels with MSHA on September 17, 1999. The application alleges that Daniels was laid-off by Manalapan, because he made himself available to testify at a temporary reinstatement hearing, and because, subsequently, he testified at the related discrimination hearing.

Manalapan elected to waive its right to a hearing and on December 9, 1999, filed its response, therein denying that Daniels had been laid-off for any discriminatory reason, and asserting that Daniels refused three offers to return to work. The Secretary filed a reply to Manalapan's response on December 27, 1999, noting that any post lay-off offers made by Manalapan to Daniels were for a different position, with less pay, or for a different shift at another mine.

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), 29 C.F.R. § 2700.45(c), which limits the inquiry to a "not frivolously brought" standard, by providing that "If no hearing is requested, the Judge assigned 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."

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 v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court 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. [*Citation omitted*]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous.*' 920 F.2d at 747 (*emphasis in original) (citations omitted).*
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> . . . Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately 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 work force 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. *Id.* at 748, n. 11 (*emphasis in original*).

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. *Secretary on behalf of Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981);

Secretary on behalf of Robinette v. United Coal Company, 3 FMSHRC 803, 817-18 (April 1981).

The Secretary's allegations are based, in part, on Inspector Harris's investigation of Daniels' discrimination claims. Based on his investigation, Harris found: 1) that Daniels had been employed at the RB No. 7 mine (J&C Mining prior to May 1999) from February 1997, until July 29, 1999; 2) that on January 19, 1999, day shift miners Vernon Daniels, William Daniels, Jeff Craig, Dwayne Hubbard, Grant Noe and Carl Runyon engaged in protected activity, when they testified in the wrongful discharge proceeding of *Middleton v. J&C Mining, L.L.C.*, 21 FMSHRC 217 (February 1999) (ALJ); 3) that on March 2, 1999, Manalapan discharged Noe; 4) that in May 1999, Manalapan took over J&C Mining, renamed the mine RB No. 7, and continued to employ all J&C Mining employees on one maintenance and two production shifts; 5) that during a day shift in June 1999, the foreman sent Daniels and Hubbard home early; 6) that on July 29, 1999, due to the depressed coal market, Manalapan laid-off 14 miners at the RB No. 7 mine, including Daniels, Hubbard and Donnie Adkinson, and transferred Runyon, Craig and William Daniels to another mine; 7) that Manalapan retained seven day shift miners at the RB No. 7 mine, who did not participate in the *Middleton* hearing; 8) that Manalapan replaced Daniels, Craig, Hubbard, and William Daniels with second shift miners, who have less seniority and mining experience; 9) that mine superintendent Earl Hensley, upon the advice of day shift foreman George Saylor, decided which miners to lay-off; 10) that foreman Saylor had knowledge of the miners' protected activity; and 11) that all day shift miners who testified in the *Middleton* hearing have suffered adverse action within six months of the protected activity. Based on these findings, Harris concluded that Daniels' allegation that he was laid-off because of his participation in the January 1999, *Middleton* hearing was not frivolous.

Manalapan's response seeks to establish that the discrimination complaint was frivolously brought by asserting, in part: 1) that on June 29, 1999, Manalapan shut down operations, by placing the miners on one week without pay, in addition to their paid vacation week; 2) that, due to the depressed coal market, Manalapan owner Duane Bennett decided to eliminate the second shift, and delegated the decision-making authority to mine superintendent Hensley; 3) that Hensley received recommendations from foreman Saylor, as to the best qualified and most reliable miners; 4) that, for reasons concerning production, Hensley determined that other miners were more dependable than Daniels, and Hensley also believed that the lay-off would only last for a couple of months; 5) that Jessie Saylor, foreman Saylor's son, was also involved in the *Middleton* proceeding, as well as the pending *Noe* wrongful discharge proceeding; 6) that Daniels was absent nine days, and left work early two days, between January and May 1999; 7) that Daniels refused three opportunities to return to work, one at his previous position; and 8) that, of 38 miners laid-off, 11 of which were bridge operators, only 8 bridge operators had been called back to work, as of December 9, 1999. Manalapan concludes, therefore, that the decision to downsize was motivated by a depressed coal market, that decisions on retention and placement of miners were based solely on job qualifications and work records, and that Daniels was not laid-off because he gave testimony in the *Middleton* wrongful discharge hearing.

While I have carefully considered Manalapan's response, because it has waived its right to a hearing on the Secretary's application, I must accept as true, the events, as alleged. The Secretary has set forth allegations of adverse treatment, close in proximity to protected activity so as to create a nexus, sufficient to raise an inference of discrimination. Manalapan has conceded the protected activity and has not challenged the Secretary's position that, at the time Daniels was laid-off, company officials responsible for the action had knowledge of Daniels' participation in the *Middleton* discrimination proceeding. At best, Manalapan has shown an intent to defend its actions at hearing, on the basis of legitimate business-related, non-discriminatory reasons. At this juncture, it is emphasized that, at hearing, 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.

ORDER

For the reasons set forth above, it is **ORDERED** that Manalapan Mining Company, Incorporated, reinstate Vernon Daniels, retroactive to December 29, 1999, by agreement of the parties, to the position he held prior to his lay-off on July 29, 1999, at the same rate of pay and benefits for that position, or to a similar position with the same or equivalent duties, at the same rate of pay and benefits.

Jacqueline R. Bulluck
Administrative Law Judge

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