FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 31, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
DEWAYNE YORK,	:	Docket No. KENT 2001-22-D
Complainant	:	BARB-CD-2000-06
v.	:	
	:	BR&D #3 Mine
BR&D ENTERPRISES, INC,	:	Mine ID 15-18028
Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Associate Regional Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant:
J. P. Cline, III, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Zielinski

This matter is before me on a complaint of discrimination filed by the Secretary on behalf of Dewayne York pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c)(2). The complaint seeks an order declaring that Respondent, BR&D Enterprises, Inc. (BR&D), discriminated against York and other relief including back pay and benefits, as well as a civil penalty in the proposed amount of $7,000.00. A hearing was held in Pineville, Kentucky on April 17, 2001 and the parties submitted briefs following receipt of the transcript. The Secretary had previously filed an Application for Temporary Reinstatement on behalf of York. A hearing was held on the application and on August 29, 2000, an order was issued directing that York be temporarily reinstated pending completion of the investigation of his allegations and final decision on any formal complaint that might be filed.[1] The parties have stipulated that the record of proceedings from the temporary reinstatement hearing be included in the record of this case. For the reasons set forth below, I find that Respondent did not discriminate against York in violation of the Act.

[1] The Order was subsequently amended, at the request of the parties, to provide for York's economic reinstatement. The Temporary Reinstatement Proceeding was conducted under Commission Docket No. KENT 2000-255-D.

Findings of Fact

Dewayne York had been employed by BR&D for approximately seven of his ten years as a miner. He worked at the #3 mine for 12-14 months prior to being terminated on May 25, 2000, and held the position of roof bolter operator on the #1 shift at the time of his discharge. By all accounts, York was a good worker and there were no complaints about his work performance.

The work crew in a section of the mine consisted of twelve men, four of whom operated two roof bolting machines, or "pinners", referred to as the "intake" and "return" pinners. The power cables of the "intake" pinner ran along the right, or intake, side of the mine entries, and those of the "return" pinner ran along the left or "return" side. York and Charlie Price operated the "intake" pinner. John Simpson and George Black operated the "return" pinner. After the continuous mining machine had driven an entry past where a crosscut would be made and the area had been bolted, the miner would then make a 32 foot deep cut at the face, back away from the face into the previously mined area and make another cut by turning right and starting the crosscut. Even though roof bolts had been installed in that area of the entry, the newly created intersection was considered unsupported and BR&D's approved roof control plan specified that no miners were allowed to enter it until temporary supports, or two rows of bolts, had been installed in the newly created crosscut.[2] Under the plan, the intake pinner would proceed up the entry and install the required two rows of bolts. It would then be backed out of the entry and allow the return pinner to proceed up the entry past the crosscut to bolt the new cut at the face. The intake pinner would then return to finish bolting the crosscut. It would take approximately 15 minutes for the intake pinner operators to install the two rows of bolts and back the machine out of the entry to allow the return pinner access to the face.

At least since the beginning of York's most recent employment at the #3 mine, BR&D followed a mining procedure that violated its approved roof control plan. Rather than wait for the intake pinner to install two rows of bolts in the crosscut, the return pinner and its crew would travel through the unsupported intersection to bolt the new cut at the face. York himself also entered the unsupported intersection to help hang the power cable for the return pinner. The intake pinner would then be brought into the entry to bolt the new crosscut. With the possible exception of York, the roof bolter operators preferred this "illegal" procedure. It allowed both roof bolters to finish sooner because the return pinner could immediately begin to bolt the entry and the intake pinner would not have to stop bolting to back out of the entry and allow the return pinner access to the heading. This resulted in more break time for pinner operators, particularly the return pinners, who did not feel that the "illegal" procedure was hazardous, because they did not believe that the stability of the roof in the intersection would be significantly enhanced by the addition of two rows of roof bolts in the crosscut and the additional time required to install the bolts could result in sagging and deterioration of the roof in the newly cut heading.

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[2] The roof control plan provided that: "Openings that create an intersection will be supported by permanent supports or be supported with two rows of temporary supports on 5-foot centers across the opening before any work or travel in the intersection."

This deviation from the roof control plan was not the result of instruction or directives by management. In fact, the miners were aware that they were not permitted to enter the unsupported intersection and had signed acknowledgments to that effect at annual training sessions. Despite this knowledge and training, however, the "illegal" method was the practice preferred by the roof bolter operators and was accepted by Jackie Jaggers, the foreman. Jaggers had a fairly contentious relationship with the miners, particularly York. There was a good deal of give and take and the miners generally felt free to raise issues with Jaggers and inform him of conditions that affected their safety and the mining operation.

The miners typically encountered draw rock. Draw rock, or "draw slate" is "soft slate, shale, or rock approx. 2 in. (5.08 cm) to 2 ft. (0.61 m) in thickness, above the coal, and which falls with the coal or soon after the coal is removed."[3] During a period of several weeks in late March and early April, 2000, however, the draw rock was unusually thick and unstable. Virtually all of the roof bolters called this problem to the attention of Jaggers, who instructed the continuous miner operator to try and cut down some of the draw rock.[4] While the miner operator was able to cut some of it down, he could not get it all and would let the bolter operators know if conditions were particularly bad. The presence and location of draw rock at the mine was highly variable, and it was not always possible, or advisable, to cut it down. Sometimes, the preferred procedure was to allow some draw rock to remain, rather than cut down significant good roof to try and remove it. In such cases, the roof bolters were to pry the loose rock down with a bar, or make sure that it was securely bolted.[5]

Around April 1, 2000, York, who had experienced roof falls attributable to draw rock, decided that he would not continue with the "illegal" bolting procedure. He told Jaggers that he would not do so, which dictated that the procedure called for by the roof control plan be followed. The other pinner operators did not feel strongly about the draw rock conditions but did not object to the change in procedure, feeling that York was within his rights to take the position that he did. Jaggers did not verbally respond to York. He just shrugged and walked away. The roof bolters then proceeded to bolt in conformance with the roof control plan.

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[3] American Geological Institute, *A Dictionary of Mining, Mineral and Related Terms* 168 (2d ed. 1996).

[4] In addition to his complaints about draw rock, which were also voiced by other bolter operators, York had complained on occasion to Jaggers about excessive dust attributable to a failure to install line curtain and excessively wide and deep cuts made by the continuous miner. He did not attempt to bring any of his safety concerns to MSHA officials and did not speak to any other management officials about them.

[5] The roof control plan also provided that when adverse roof conditions were encountered, extended cuts of 32 feet were to be reduced to the standard 20 feet. While there may have been some reduction in the depth of cuts, generally, mining proceeded with the extended 32 foot cuts.

Jaggers, who was somewhat temperamental, sulked for a while after York insisted on bolting in conformance with the plan. However, he did not treat York any differently than any of the other miners. The effect of the change was minimal. By operating the two roof bolting machines, rather than just one, BR&D had ample roof bolting capacity. Consequently, the 15 or so minutes that the return pinner had to wait while the crosscut intersections were bolted did not interfere with production. The return pinner operators were not particularly happy about the procedure, because they were unable to take breaks later in the day.

On May 25, 2000, there was an unusually heavy rainstorm that caused flooding and power outages at the #3 mine and the adjacent #4 mine. York and the other miners arrived about 6:00 a.m., and waited at the mine site. York rode to work in Black's vehicle, along with Wendell Fuson, the continuous miner operator. Stanley Ditty, BR&D's president and owner, was intent on producing coal that day as soon as power was restored because customers were in need of coal at that time. He had informed his superintendent, Randy Phelps, that the miners should remain at the site and they were so instructed. The men were periodically advised that the power would likely be restored in a few minutes, predictions that proved unfounded. By 8:30 or 9:00 a.m., the power had not been restored, and the miners tired of waiting. It was York's and the other miners' understanding from prior experience that they would not be paid until they actually started working. Despite the instructions to stay, some of the miners decided to leave the mine site. Black, York and Fuson left in Black's vehicle. York left because he believed he would not be paid for waiting and because Black and Fuson were leaving. They went to Fuson's home and remained in the driveway, where they could observe the road to the mine and see whether other miners also left. In all, some thirteen miners, including York, left the site.

Ditty arrived at the mine site about 9:30 a.m., after the power had been restored. When he was told that some of the men had left the mine, he determined that he would discipline the absent miners by suspending them for three days, until the following Tuesday. Ditty did not consult with Phelps or Jaggers about his decision to discipline the men, but did inform Phelps what he had decided and began to call the homes of the miners who had left. He spoke to York's wife, Dejuana,[6] and inquired about York's whereabouts. Mrs. York thought her husband was at work. Ditty informed her that he, and other miners, had left the mine. She asked what was going on and Ditty informed her of the flooding and power outage and stated that her husband was being suspended. She remarked that York, who had been aggravated about the draw rock condition, was not happy working at that mine and Ditty responded that York could find another job. Ditty intended only to note the obvious, i.e., that York was free to find a different job if he was unhappy working at BR&D. His comment apparently was misinterpreted by Mrs. York.

Mrs. York called Black's wife, Lori, and Fuson's wife, Jennifer, to see if they knew where the men were. Jennifer Fuson called her neighbor to see if the men were outside of Fuson's home, and the neighbor called Fuson to the phone. She informed him that the miners

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[6] Mrs. York was at work that morning and received a call from her son, who advised that Ditty was looking for York. She then called the mine site and spoke to Ditty.

who had left were being suspended and that York was being fired. Fuson told Black and York what his wife had said and then used his phone to call the mine and talked to Ditty, who informed him that he was being suspended for three days. York called his wife, who repeated what she had told Mrs. Fuson, and told him he needed to talk to Ditty.

York called Ditty, who asked why he had left the mine. York explained that he didn't think he was being paid. Ditty questioned how York could believe that, asked him to cite an example to support his belief. York replied that he couldn't cite a specific example, but there were times when he hadn't been paid. Ditty disagreed and told York that he was suspended. York protested that other miners had left the site and Ditty stated that they were also being suspended. York protested the suspensions as unfair and then cursed Ditty. Ditty told him to find another job and York responded that he would see him in court. Ditty spoke to Phelps around noon that day and told him that he had fired York for insubordination, that York had cursed him. York later called the mine and spoke to Phelps and asked him why he had been fired. Phelps responded that he needed to talk to Ditty.

York filed a complaint of discrimination with MSHA on May 26, 2000, alleging that he had been discharged for making safety complaints. The Secretary filed an Application for Temporary Reinstatement on his behalf, which was granted following a hearing. The Secretary subsequently filed this discrimination action.

Conclusions of Law - Further Factual Findings

A complainant alleging discrimination under the Act typically establishes a prima facie case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n. 20. 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 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

York has clearly established two of the three elements of his prima facie case, i.e., that he engaged in protected activity and suffered adverse action, i.e., he was discharged. His expressions of concern about adverse roof conditions, as well as concerns about dust and deep cuts, all qualify as protected activity. More significantly, his refusal to continue to bolt in a manner violative of the roof control plan, clearly was protected activity under the Act.

Respondent argues that York failed to establish that he engaged in protected activity because he failed to prove that his concerns about safety issues were not properly addressed by Jaggers. The manner in which York's concerns were addressed may be relevant to other issues, but it has no bearing on whether he engaged in protected activity. A complaint made to an operator or its agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act and it is clear that York engaged in protected activity prior to his discharge.

Unlawful Motivation

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.*

Here there is no direct evidence of unlawful motivation for York's discharge. There is also no direct evidence that Ditty was aware of York's protected activity. York confirmed that, in general, communications followed the chain of command and that he voiced his concerns to Jaggers, not to Phelps or to Ditty. York suspected that Ditty had been told of his protected activity and was hostile toward it. His suspicion was based solely on the fact that Jaggers had spoken to Ditty one day when he was at the mine and that Ditty did not come out and speak with the men that day. However, there is nothing to suggest that it would have been unusual for Jaggers to have conversed with Ditty when he visited the mine and Black testified that there were many times when Ditty was at the mine that he didn't speak to the men. Jaggers, Phelps and Ditty all testified that York's concerns were not passed up the chain of command. Because Ditty came into contact with Jaggers on his visits to the mine, it would be permissible to infer that Jaggers told Ditty of York's protected activity. I decline to make such an inference here and find that during the events of May 25, 2000, Ditty was not aware that York had engaged in protected activity and that his decision to discharge York was not motivated in any way by York's protected activity.

York presented a considerably more compelling case at the Temporary Reinstatement Proceeding. He portrayed himself as somewhat of a spokesman for the other miners on a variety of issues, including dust and deep cuts. Most significantly, however, he claimed that his insistence on compliance with the roof control plan resulted in a 10-15% reduction in coal production, which reflected adversely on Jaggers and Phelps and which Ditty was sure to have known about. He claimed that the miners didn't like it because it interfered with their running coal, that Jaggers showed hostility toward him by largely refusing to talk with him and that Phelps, too, no longer initiated conversations with him. Had these facts been proven, they would have easily justified an inference that Ditty was aware of York's protected activity and that it

may have been a motivating factor in his reaction to the events of May 25, 2000.

Unfortunately for claimant, the evidence materialized on the opposite side of those claims. The miners who testified uniformly stated that York was not regarded as a spokesman for them and that they all complained to Jaggers about issues that concerned them, including the troublesome draw rock they were encountering in March and April, 2000. While York was the only one who insisted on bolting in conformance with the roof control plan, that action was less significant than originally claimed in light of the other miners' complaints and the nature of their relationship with Jaggers. The other miners also testified that there was no noticeable change in Jaggers' or Phelps' attitude toward York after he took his stand, and that York was not treated any differently than other miners by Jaggers, Phelps or Ditty, either before or after April 1, 2000.

Most significantly, however, production reports introduced into evidence at the hearing in this case established that there was no fall-off in production on or around April 1, 2000, which was substantiated by virtually every witness. York, forced to abandon his contention that production was adversely affected, testified that roof bolting and other functions, such as scooping, were slowed, but failed to explain, or to introduce evidence to establish, why such developments would have adversely affected mining operations in a manner to be of concern to Jaggers, or to an extent that Ditty would likely have been aware of them. The most significant result of the change in bolting procedure appears to be that the return pinner operators essentially lost some free time they had used for breaks,[7] an issue unlikely to have been of particular import to Jaggers or one that he would have felt compelled to bring to Phelps' or Ditty's attention.

The Secretary argues that unlawful motivation should be found because "[t]here is a reasonable inference that Jaggers discussed the safety complaints by York and his refusal to bolt illegally with Ditty," the discharge was "so close" in time to the protected activity, there was demonstrated hostility toward it and BR&D's justification was pretextual.[8] The facts of the cases relied upon by the Secretary, however, are substantially different than those proven here. As noted above, the facts of this case do not justify an inference that Ditty was made aware of York's protected activity. I found Ditty to be a credible witness, whose position at the Temporary Reinstatement Proceeding hearing was largely substantiated by the evidence

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[7] One of the roof bolters, George Black, testified that they went back to bolting illegally because he and John Simpson "got tired" of the loss of their break time. Others denied that they had returned to the illegal roof bolting practice. York testified that they returned to the illegal practice several weeks before his termination, at his request, because he was concerned about loss of his job. I reject that testimony, which was not consistent with any other miner's. If there was a return to the illegal practice, which likely happened, at least on occasion, it was a result of the bolters' desire to get their additional break time and not at the request or urging of York.

[8] Brief for the Secretary, at pp. 34-36, citing, *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) and *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).

introduced at the hearing of this case and I credit his testimony, which was consistent with other witnesses', that as of May 25, 2000, he had not been advised of and had no knowledge or information of any protected activity by York.[9]

York's discharge was not particularly close in time to his protected activity. Nor is there any evidence of animus toward his protected activity by Phelps or Ditty. Ditty, himself, was properly concerned about safety issues, including roof control. He operated two roof bolting machines, when he likely could have operated one. More significantly, he directed that the bolters install 5 bolts per row, though the roof control requires only 4. As he explained, the extra bolts were installed to provide additional roof support and the cost of installing them came "out of [his] pocket." Ditty also had no personal animosity toward York. He had loaned York money in the past and had accommodated a limited work schedule when York had suffered an injury and gave him a couple of days off to attend to a child's illness. Jaggers did evidence some animosity after the change in bolting procedures, sulking for a few days. However, that animosity was directed toward all of the miners and was not significantly different than his normal demeanor. As Simpson stated: "Jackie is just Jackie."

The Secretary's "pretext" argument is based upon her crediting of testimony to the effect that York did not curse Ditty during the phone conversation. I reached a different conclusion. The evidence as to both the substance and timing of the various phone conversations on May 25, 2000, was conflicting. I have credited Ditty's testimony regarding the conversations because I find them reasonable and because of my overall assessment of his credibility. As to the critical issue, York testified that he did not curse Ditty and Ditty testified that he did, using just one or two common curse words. Black and Fuson, friends of York, both overheard York's end of the conversation and testified that they did not hear him curse or raise his voice. However, Black was on the porch some 25 feet away from York and admitted that it was "possible that [he] missed something," though he did not believe that he had. Fuson also admitted that he was momentarily distracted by a neighbor's yelling, but also did not believe that he missed anything. Accepting the Secretary's argument that a pretextual justification can support an inference of unlawful motivation, I find no pretext in Ditty's explanation of his decision to discharge York.

ORDER

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[9] Jaggers denied that he had ever advised Phelps or Ditty of any of York's protected activity. Phelps testified that he had no knowledge of any complaints made by York and that he had never discussed any complaints by York with Jagger or Ditty. Ditty testified that he had no knowledge or information that York had made safety complaints. As the Secretary points out, Jaggers also testified that York never complained to him and that the roof control plan had always been followed, which was contradicted by virtually every other witness with knowledge of those facts. While Jaggers' credibility is certainly questionable, it does not reflect adversely on Phelps' and Ditty's credibility. Their testimony is consistent with that of other witnesses' on significant issues.

For the reasons stated above, I find that Ditty's decision to discharge York was not motivated in any part by York's protected activity. Accordingly, the complaint of discrimination is hereby **DISMISSED**.[10]

Michael E. Zielinski
Administrative Law Judge

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[10] The Decision and Order of Temporary Reinstatement, as amended, remains in effect until there is a final Commission decision on the complaint. *Sec'y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999).