FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 26, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On behalf of RONALD A. MARKOVICH, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. LAKE 96-139-DM
	:	NC-MD 96-02
v.	:	
	:	Minntac Plant
MINNESOTA ORE OPERATIONS, USX CORPORATION, Respondent	:	

ORDER DENYING COMPLAINANT'S APPLICATION FOR TEMPORARY REINSTATEMENT

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for Complainant;
Gary R. Kelly, Esq., U. S. Steel Law Department, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Amchan

Uncontroverted Facts

Complainant, Ronald Markovich, worked for Respondent's Minnesota Ore Operations from 1969 until September 26, 1995. At about 1:30 p.m. on September 26, 1995, Complainant was summoned to the office of Thomas Hakala, the Area Manager for the Concentrator where he worked. He was given a discipline notice informing him that he was being suspended for five days subject to discharge and was escorted off company property (Exh. R-17, Markovich affidavit filed with the National Labor Relations Board). The notice stated that he was being suspended for "Removal or destruction of Company property (including notices) (Exh. G-6)."

The next morning a hearing was conducted pursuant to section 12(b) of Respondent's Collective Bargaining Agreement with the United Steelworkers of America. On September 28, Respondent informed Complainant that it had decided to convert the suspension into a discharge (Exh. R-11, R-17).

A week prior to the suspension/discharge Respondent installed a surveillance camera in the Concentrator Step I passenger elevator in order to secretly monitor employee activity. Respondent contends that it did so to address complaints of violations of its no smoking rules, the prevalence of obscene personalized graffiti and harassment of some employees by other employees (Tr. 25).

In addition to installing the video camera, USX affixed No Smoking stickers on three walls of this elevator. These stickers were repeatedly removed or damaged by employees on the elevator and replaced by management. On Monday, September 18 and 19, the signs in the elevator were white stickers saying simply "No Smoking" (Exh. G-1). During the day on Tuesday, September 19, management began affixing a yellow sign which read as follows:

Removal or Destruction of any Company
Property (Including Notices) is a Violation
of USS General Rules & Regulations
NO SMOKING IN ELEVATOR

These signs were also repeatedly removed and damaged. On Thursday, September 21, management began affixing a red sticker with the same message (Tr. 30-33).

The camera recorded employees in the elevator continuously between the morning of Monday, September 18, 1995 and Monday, September 25, 1995. When the tapes from the camera were reviewed by USX management they identified seven employees out of the 250 who worked in the concentrator, as having removed or damaged No Smoking stickers placed in the elevator.

One of the seven employees was a supervisor named Kenneth Koski, who was discharged for destroying three No Smoking stickers (Tr. 75-76). With regard to the six bargaining unit (non-supervisory) employees, Respondent concluded as follows:

Complainant Ronald Markovich removed or tampered with 28 No Smoking stickers on 16 separate occasions;

William Barfknect removed or tampered with one sticker on one occasion;

Anthony Leoni removed 3 stickers on one occasion;

Roger Manninen removed or tampered with one sticker on one occasion;

Steven Lindborg removed or tampered with 3 stickers on 3 separate occasions;

Ronald Johnson removed or tampered with 2 stickers on 2 occasions.

(Tr. 90).

William Smith, Respondent's manager of Employee Relations, contends that in deciding whether to suspend or terminate these employees he made a distinction between those who only tampered or removed stickers once and those who did it more than once. Those who removed or damaged No Smoking stickers more than once were discharged. Those who were recorded doing so only once were suspended (Tr. 54-55).

Mr. Smith concedes that Respondent was not entirely consistent in making these distinctions. Thus, it decided to suspend rather than discharge Mr. Lindborg. Smith's rationale was that it was hard to distinguish Lindborg, who tampered with 3 stickers on 3 occasions, from Leoni, who tampered with 3 stickers on one occasion. Moreover, Smith believed that Lindborg should be given a break for telling the truth at the 12(b) hearing (Tr. 61-2, 65, 72, 91-93). Thus, the end result was that Markovich and Johnson were discharged while the other four miners received suspensions. Johnson apparently won his job back in arbitration. Thus, Complainant is the only rank-and-file miner who was discharged for removing and tampering with No Smoking stickers.

Complainant's Activities Protected Under the Federal Mine Safety and Health Act

Ronald Markovich had been a miners' representative under the Federal Mine Safety and Health Act for 19 years. At about 7:15 a.m. on the morning of September 26, 1995, another miner handed Markovich a written safety complaint (Exh. R-2, p. 93). Markovich took the complaint to safety director's office where Timothy Kangas, an assistant to the director, was waiting for MSHA Inspector Allen Brandt. Brandt was already on site to inspect another area of Respondent's plant.

After Complainant presented the written safety complaint, he accompanied Inspector Brandt and Mr. Kangas to the Second floor of the concentrator, where Brandt investigated the complaint. Before the inspection started, Markovich told Brandt, apparently within earshot of Kangas, that if they saw any MSHA violations and Brandt didn't issue a citation, the union would "conference" these conditions (Exh R-17). This "conference" is essentially an appeal to Brandt's supervisors.

During the inspection Brandt issued Respondent 22 citations, 12 of which were "significant and substantial (S & S)" (Exh. R-2, p. 95). Kangas' reaction to the inspection was recounted by Complainant at his arbitration hearing and in an affidavit filed

with the National Labor Relations Board. At page 2 of the affidavit he relates that:

> The inspection went for half a day until noon and I would guess that the MSHA inspector and myself both pointed out about the same number of violations. During the inspection Tim Kangas said that this really pisses him off. Although this is the only comment he made I think he was mad about the fact that we were pointing out such a large number of citations.

(Exhibit R-17, page 2 of Markovich affidavit).

At his arbitration hearing in December 1995, Markovich testified:

> Tim Kangas during the inspection said, "This really pisses me off." I said, "It pisses me off, too, Timmy." I says, "If we are talking about the same thing here that nothing is done and here we are on another inspection."...

(Exhibit R-2, p. 95).

Procedural History

Complainant filed a grievance concerning his suspension/discharge which was heard by an arbitrator in December, 1995 and denied in March, 1996 (Exhibit R-1 and R-2). In October, 1995, he filed a charge with the National Labor Relations Board (Exhibit R-15). The Board's Regional Director declined to issue a complaint on his behalf (Exhibit R-16).

On October 11, 1995, Markovich filed a discrimination complaint with MSHA. He asserted that he believed he was discharged because of "enthusiastic performance" of his duties as a Union Safety Representative. He also asserted that other employees committed the same and/or similar violations (of company rules) and were not discharged. This referred to the fact that Respondent fired only two of the six union members identified as tampering or destroying No Smoking stickers in the company's video.

On June 24, 1996, the Secretary of Labor filed an Application for the Temporary Reinstatement of Mr. Markovich with the Review Commission. An affidavit attached to that application

alleges that Respondent's articulated reason for the discharge of Complainant (removing and tampering with No Smoking stickers) is pretextual. On July 3, 1996, Respondent requested a hearing on the application. Pursuant to an agreement with the parties the hearing was held in Duluth, Minnesota on July 18, 1996.

The Issue Presented

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.

The Secretary has not met his burden of proving that Mr. Markovich's complaint was "not frivolous" or that his decision to seek temporary reinstatement was "not frivolous".

It is uncontroverted that Complainant engaged in protected activity over a period of 19 years as miners' representative. It is also uncontroverted that he engaged in protected activity the morning of his suspension when he transmitted another miner's complaint to Respondent and accompanied the MSHA inspector and management representative. For purposes of this proceeding, I take it as given that he pointed out to the inspector many of the conditions for which citations were issued. Nevertheless, I conclude that the Secretary has not established a nexus between Complainant's protected activity and his discharge. Moreover, the Secretary has not established that it is reasonable or "not frivolous" to contend that such a nexus exists.

As the Commission and Federal Courts have repeatedly noted, it is rare that a link between an adverse action and protected activity will be supplied exclusively by direct evidence. Usually discrimination can be proven only by circumstantial evidence upon which the trier of fact draws an inference regarding the employer's motivation, Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2510 (November 1981).

The most common circumstances upon which such an inference may be based are the employer's knowledge of the protected activity, hostility towards the protected activity (animus), coincidence in time between the protected activity and the discharge or other adverse action, and disparate treatment of the complainant and similarly situated employees, Ibid., at 2510.

With regard to these factors, I assume for purposes of this

proceeding that Respondent was aware of Markovich's role in the September 26 MSHA inspection when it decided to discharge him[1]. While the timing of a discharge may be evidence of a nexus with the protected activity, or evidence of animus towards the protected activity, that is not always the case. Where, as in the instant case, an employer at the same time becomes aware of a legitimate unprotected reason to discharge an employee, an inference linking the protected activity and the adverse action may not necessarily be drawn.

The evidence in this record is overwhelming in indicating that Respondent's stated reason for the discharge, Markovich's removal and tampering with No Smoking signs, was not pretextual. It is clear that Respondent considered destruction of these notices to be a very serious matter. This is established to my satisfaction by the discharge of foreman Koski.

It is not unheard of for an employer to discharge other employees to cover up its motives for discharging a union or safety activist. However, I place very great weight on the fact that Respondent fired one of its foreman for the same reasons that it fired Markovich. It is not reasonable to contend that it would have done so simply to conceal its motives in discharging Complainant.

I also place very great weight of the lack of evidence regarding animus towards Complainant's protected activity. The only such evidence are the statements made by Mr. Kangas which are quoted earlier in this decision. I consider these statements to be very ambiguous. It is not at all clear whether Kangas was angry at Mr. Markovich or considered him to be responsible for the number of citations received. I also consider it important that Markovich was merely transmitting the complaint that gave rise to the inspection. There is virtually nothing to indicate that he caused Respondent to get citations it would otherwise have not received[2].

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[1]Respondent's employee relations manager, William Smith, testified that he was unaware of the inspection when he reviewed the video and decided to suspend Markovich and the other miners observed tampering with the stickers. However, the final decision to discharge Markovich, which is what is really at issue in this case, was made the next day and I assume Respondent's management was aware of his participation in the inspection by September 27.

[2]The Secretary argues that retaliation was taken for Markovich's activities as miners' representative for the past 19 years. There is nothing in this record to support such a contention other than the assertions of Complainant and his wife. To conclude that the Application is "not frivolous" on such a

It is possible that Respondent was irritated enough by the September 26 citations that it decided to fire Markovich rather than merely suspend him. However, I deem the evidence supporting this theory to be so speculative that it falls short of establishing that Markovich's complaint and the Secretary's decision to seek temporary reinstatement are "non-frivolous."

Complainant's claim of disparate treatment vis-a-vis other rank and file employees is simply without merit. Disparate treatment which allows for an inference of retaliatory discharge is different treatment of individuals **who are similarly situated,** see, Hayes v. Invesco, Inc., 907 F. 2d 853 (8th Cir. 1990). Mr. Markovich's offenses of Respondent's rules were of a totally different order than that of the other rank-and-file miners (including Mr. Johnson, who Respondent also tried to fire[3]). The distinction Respondent drew between Complainant and other employees is a rational one.

The Secretary in cross-examining Mr. Smith raised legitimate questions as to whether Markovich actually removed or tampered with 28 signs on 16 occasions. However, it is absolutely clear that he tampered or tried to remove many signs on a number of occasions--far more than any other employee. While, it may also be possible that some of these signs were removed because they contained offensive graffiti (Markovich's excuse for his actions), it is clear that many of these signs had no graffiti on them.

One may question the justice of discharging an employee with 26 years of service for tampering with No Smoking signs in an elevator. The Secretary may also be correct in arguing that Respondent could have made its point with its employees without discharging Markovich. However, there is no reason on the record before me to conclude that Respondent did not discharge Mr. Markovich for reasons other than those it articulated. The Secretary's assertions to the contrary I consider to be nothing more than speculative and without any reasonable basis. I therefore conclude that he has not established the Application

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theory would require the reinstatement of any miners' representative regardless of his or her unprotected conduct. Congress could not have intended such cavalier application of the temporary reinstatement feature of the Act.

[3]I reject the Secretary's argument that Respondent's reconsideration of its initial decision to fire Mr. Lindborg raises a non-frivolous issue of disparate treatment. Lindborg's transgressions were not comparable to those of Complainant.

for Temporary Reinstatement to be "not frivolous" and dismiss the application[4].

ORDER

The Secretary of Labor's application for the temporary reinstatement of Ronald Markovich is hereby **DISMISSED**.

Arthur J. Amchan
Administrative Law Judge

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[4]Two other issues are raised by the Secretary. One is Respondent's refusal to hold a fact-finding meeting prior to the 12(b) hearing on September 27, 1995. I see no significance in this fact because none of the six employees had such a meeting and Markovich had an equivalent opportunity to present facts on his behalf at the 12(b) hearing.

A second issue is whether the company may have been wrong in concluding that Markovich fabricated evidence at the 12(b) hearing when he produced two red stickers with obscene graffiti. Even if some of the stickers he removed or tampered with had such graffiti many of them did not. If Respondent was wrong about the two stickers I fail to see how this evidence would be material.